

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

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JUN - 5 2014

Appellate Case No.: 2012-207489

S.C. Supreme Court

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

v.

Ford Motor Company,.....Respondent

APPENDIX

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Court Of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case No: 2008-CP-05-235

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

v.

Ford Motor Company Appellant.

FINAL BRIEF OF APPELLANT

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SC COURT OF APPEALS

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN SUBMITTING THE CASE TO THE JURY AND DENYING FORD'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHEN, AS A MATTER OF LAW, FORD'S DESIGN WAS NOT DEFECTIVE OR UNREASONABLY DANGEROUS BECAUSE THE ESTATE FAILED TO PRESENT EXPERT TESTIMONY OF EITHER A DESIGN FLAW BEYOND MERE FAILURE OR AN ALTERNATIVE FEASIBLE DESIGN THAT WAS CRASHWORTHY?
- II. DID THE TRIAL COURT IMPROPERLY INVADE THE PROVINCE OF THE JURY WITHOUT COMPELLING REASON BY GRANTING A NEW TRIAL *NISI ADDITUR* AND ARBITRARILY TRIPLING THE JURY'S DAMAGES AWARD?
- III. DID THE TRIAL COURT ERR BY DENYING FORD'S REQUEST FOR AN OFFSET FROM THE JURY'S VERDICT IN THE AMOUNT OF THE ESTATE'S SETTLEMENT WITH A CO-DEFENDANT?

INTRODUCTION

This wrongful death case arises from a fatal collision when a teenage driver failed to yield the right-of-way and struck Jasper County Sheriff Benjamin Riley's 1998 Ford F-150 truck. The impact caused Riley's truck to leave the roadway, roll over, and strike a tree. Riley died from injuries sustained when he was ejected from the vehicle. The Personal Representative of his estate ("the Estate") filed this action against Appellant Ford Motor Company ("Ford") alleging negligent design of the truck's door-latch system.

The trial court erred in allowing this case to reach a jury and erred in denying Ford's motions for judgment as a matter of law. The Estate presented no evidence of a design flaw in the door-latch system, no evidence that a design flaw caused the truck to be defective and unreasonably dangerous, and no evidence of a feasible alternative design. The door-latch system in Riley's truck was the same system used in 90% of vehicles on the road at the time, and the Estate presented no evidence that the Ford F-150's doors were more likely to come open in collisions than doors on any other vehicle. The Estate failed to present evidence supporting a viable negligent design claim as a matter of law.

After erring by allowing the claim to reach the jury, the trial court further erred by deciding post-verdict to *triple* the jury's damages award. The trial court impermissibly discounted the jury's damages evaluation as unacceptable based on Riley's stature in the community, and the court substituted its own calculation of non-economic damages for that of the jury without a compelling reason. The trial court erred in ordering a new trial *nisi additur* and arbitrarily increasing the jury's damages award from \$300,000 to \$900,000.

Finally, the trial court erred by denying Ford's motion for a set off of \$25,000.00 from the verdict. Because the Estate settled its claims with the at-fault driver of the other vehicle involved in the collision, South Carolina law entitles Ford to a set off equivalent to the full amount of that settlement.

STATEMENT OF THE CASE

On November 26, 2008, Respondent Laura Riley, the Personal Representative of the Estate, brought wrongful death and survival claims pursuant to S.C. Code Ann. § 15-51-10, *et seq.* (1976), and S.C. Code Ann. § 15-5-90, *et seq.* (1976), respectively, against Ford and Andrew Marshall Carter, II ("Carter"), the at-fault driver of the vehicle that collided with Riley's truck. (R. p. 11).¹ The Estate's claims against Ford were based on a products liability negligence theory that Riley's injuries were enhanced by a defectively designed door-latch system in his Ford truck. (R. p. 11). The Estate dismissed Carter from the case in April 2010 after settling with him for \$25,000.00, with \$20,000.00 allocated to the survival claim and \$5,000.00 to the wrongful death claim.² (R. p. 29; R. p. 1; R. p. 4).

In September 2011, the Estate filed an Amended Complaint against Ford, again alleging wrongful death and survival claims premised on a negligent design defect theory regarding the door-latch system. (R. p. 14). Ford's Answer denied liability and, among other things, averred that it was entitled to a set off or credit for any amounts paid to the Estate by any third-parties for the injuries and damages sought against Ford. (R. p. 17).

A jury trial commenced on September 19, 2011. Immediately prior to the directed verdict stage, the Estate withdrew its survival action. (R. p. 342, line 23-p. 343, line 2). At the close of the Estate's evidence regarding liability,³ Ford moved for directed

¹ The Estate's initial complaint also alleged claims against other insurance company defendants who were dismissed upon settlement early in this litigation.

² The Estate also received \$50,000.00 from an underinsured motorist carrier.

³ The trial court sought Ford's agreement to allow testimony from two of the Estate's damages witnesses after consideration of Ford's directed verdict motion, and Ford

verdict on the Estate's claim of negligent design and its request for punitive damages.⁴ (R. p. 343, line 9; p. 344, line 4-p. 346, line 7; R. p. 34). The trial court denied Ford's directed verdict motions. (R. p. 346, line 8-p. 347, line 1).

At the close of all evidence, Ford renewed its directed verdict motions as to the Estate's design defect claim and its claim for punitive damages. (R. p. 365, line 5-p. 367, line 4). The motion was denied as follows: "I just think it's, obviously, a factual dispute and factual issues. You got --- as typical in these types of cases, you got the battle of the experts --- one saying one thing and one saying the other and it's obviously a question for the jury on both issues of actual and punitive damages. So, I respectfully deny the motion." (R. p. 344, lines 7-13).

The sole claim submitted to the jury was the Estate's wrongful death claim alleging that Riley's injuries were enhanced by a design defect in the door-latch system. During its deliberations, the jury submitted a question inquiring whether actual damages were to be awarded as a "lump sum or per year" figure. (R. p. 1530). With the agreement of the parties, the trial court instructed the jury that actual damages were to be calculated as a lump sum.

On September 29, 2011, the jury returned a verdict in favor of the Estate for \$300,000.00 in actual damages. Although the jury also found that Ford's actions "were

expressed no objection "subject to the understanding that [the witnesses would] not add[] anything substantive other than information on damages." (R. p. 342, lines 3-17).

⁴ Ford also moved for directed verdict to the extent that the Estate had asserted a claim based upon failure to warn. (R. p. 343, lines 9, 17-19). The Estate conceded that no testimony regarding warnings had been presented at trial, (R. p. 343, lines 20-24), and the trial court "grant[ed] directed verdict . . . if there were any claims as to the design defect being as a result of failure to warn, that's no longer a part of the case." (R. p. 343, line 25-p. 344, line 3).

willful, wanton, or reckless," the jury awarded "zero" dollars in punitive damages. (R. p. 378; R. p. 374, line 9-p. 375, line 5).

On October 10, 2011, Ford timely moved for judgment notwithstanding the verdict ("JNOV") and/or a set off. (R. p. 42). Ford's JNOV motion renewed its previous request for judgment as a matter of law on several grounds, two of which are relevant to this appeal: (1) the Estate failed to prove that the truck was defective and unreasonably dangerous; and (2) the Estate failed to satisfy all of the required elements of a crashworthiness claim. (R. pp. 44-46). Ford also moved for a set off from the jury's verdict in the amount of \$25,000.00 to account for the full amount of the Estate's settlement with Carter. (R. pp. 49-51). By form order entered on January 25, 2012, the trial court denied both Ford's JNOV motion and Ford's request for set off. (R. p. 5). Ford received written notice of entry of the Order on January 27, 2012.

Also on October 10, 2011, the Estate filed a motion seeking: (1) a new trial absolute because the verdict purportedly was grossly inadequate; (2) a new trial under the "thirteenth juror" doctrine because the verdict was contrary to the fair preponderance of the evidence; or (3) a new trial *nisi additur* because the verdict was merely inadequate. (R. p. 52). The trial court heard the motion on November 21, 2011. The trial court focused at the hearing on the Estate's request for new trial *nisi additur*. (R. p. 376, line 5-p. 377, line 16). Thereafter, the trial court requested additional briefing on the limited issue of new trial *nisi additur*, and both parties submitted supplemental memoranda. (R. p. 67; R. p. 80).

On January 10, 2012, the trial court granted the Estate's motion for new trial *nisi additur* and ordered Ford to pay "an additional \$600,000 in actual damages . . . bringing

It is undisputed that, during the relevant time period when the subject truck was designed, rod linkages were the predominant latching systems used by all car manufacturers. (R. p. 269, line 23-p. 270, line 1). Even the Estate's expert, Gilberg, conceded that "in the mid 90s, nearly 90% of the cars on the road had rod linkages" in their latch systems. (R. p. 269, lines 9-11). Although Ford utilized both rods and cables in the vehicles it designed and manufactured during the relevant time period, (R. p. 268, lines 1-4), many other truck manufacturers, including Chevrolet and Dodge, relied exclusively on the rod-linkage system in the design of their pickup trucks, (R. p. 268, line 9-p. 269, line 3). Ford's use of compression rods was an undisputed improvement over the tension rods used by other manufacturers during the same time period. (R. p. 269, lines 15-22; p. 285, line 25-p. 286, line 7).

The subject truck was part of a new F-series truck platform designated as the PN96, a successor model to the 1992-1995 F-150 F-series. (R. p. 162, lines 20-25). The PN96 model was produced with the rod-linkage system, not the cable system. (R. p. 207, lines 16-19). Although the PN96's predecessor platform did employ a cable linkage in its door-latch system, (R. p. 204, lines 20-22), the 1992 predecessor F-150 series model was recalled in November 1991 due to a potential defect in the cable system. The recall coincided with the initial design phase of the PN96, (R. p. 287, line 8-p. 288, line 14), and was prompted by Ford's findings that water could invade the cable linkage system and freeze the cable, preventing the door from opening, (R. p. 287, line 16-p. 288, line 6). Thus, although the cable system was used in the PN96's predecessor F-150 series platform, it was not used in the PN96. It is undisputed that Ford tested the PN96 to the level of standards specified both internally by Ford and externally by the federal

government. (R. p. 209, lines 11-13).

Riley's PN96 truck, which was conceptualized in 1991, was not produced until October 1997. (R. p. 299, lines 20-22). It was sold as the 1998 F-150 to the Sheriff's Department in July 1998. (R. p. 162, lines 5-6; p. 97, line 8-p. 98, line 6).⁶

C. The Potential for Rod Foreshortening

The Estate presented evidence that frontal collisions can potentially cause "foreshortening" – a decrease in the distance between the remote control and latch due to the rod being compressed, bent, or shortened. (R. p. 191, lines 6-21). When foreshortening causes the remote control to move too close to the latch "for some reason like a crash, the latch releases" and may cause the door to open without pulling the handle. (R. p. 191, lines 18-21).

Ford's design team found that the risk of foreshortening could be minimized by implementing "intrusion beams and reinforcements" in vehicles with the rod-linkage system. (R. p. 148, line 20-p. 149, line 4). During the relevant time period, Ford found "that all truck data available to date would indicate that foreshortening can be managed in the latch design." (R. p. 289, line 4-p. 290, line 2). Indeed, Gilberg admitted that the use of a rod in the subject vehicle does not render it defective. (R. p. 275, lines 3-15). It is undisputed that during the design of the PN96 door-latch system, Ford conducted a failure mode effects analysis and continued to test the design to internally- and externally-set standards. (R. p. 291, lines 10-18). The subject PN96 truck contained a

⁶ Ford never sold a 1996 PN96 model. (R. p. 206, lines 8-15). The 1997 PN96 model was sold side-by-side with the previous F-150 Series 1996 model, which was a carryover model denominated as the "Heritage." (R. 206, line 8-p. 207, line 15). The Heritage contained the cable linkage system, (R. p. 207, lines 7-24), while the PN96 model had the rod-linkage system, (R. p. 207, lines 16-19).

rod system supplemented with a "214 intrusion beam," (R. p. 276, line 25-p. 277, line 15), a design tactic intended to protect the rod from foreshortening, (R. p. 149, lines 1-4). The intrusion beam was spot-welded to the door structure at the ends, (R. p. 277, lines 12-20), providing a "robustness in the door . . . and [giving] the door very, very strong strength from front to rear of those two pillars [forming the frame of the door on either side]," (R. p. 364, lines 4-14). The National Highway Traffic Safety Administration ("NHTSA") has recognized that intrusion beams can reduce the risk of a door opening during a collision. (R. p. 279, lines 20-25).

D. Testimony from the Estate's Design Expert

Gilberg was the Estate's only design expert. (R. p. 180, lines 21-25). His theory was that Ford should have used a cable system rather than a rod-linkage system in Riley's truck. Gilberg admitted, however, that the use of a rod, rather than a cable, does *not* render the design defective. (R. p. 275, lines 3-15). Gilberg further admitted that the predominant linkage used by 1990s-era truck manufacturers was the rod system, not the cable system. (R. p. 269, line 23-p. 270, line 1).

Gilberg nonetheless testified that he believed the cable-linkage system would have been a superior alternative design in preventing the door from opening *in this particular crash*. (R. p. 273, lines 13-25). Gilberg based that belief solely on the fact that the door in this crash allegedly opened. Gilberg's ultimate conclusion was "I believe that the door in Riley's truck was defective. I believe it came open without damage to the latch. That shouldn't have happened." (R. p. 181, lines 6-14). He testified that "had [a cable] latch system been in Sheriff Riley's door it wouldn't have come open in this collision." (R. p. 273, lines 13-25).

Gilberg was "unwilling to say," however, that a cable system was a better alternative design than rod-linkage systems in foreseeable crash scenarios in general:

Q. But you're unwilling to say that the design as a whole is a good design for all reasonably foreseeable crashes?

A. *I am unwilling to say that. That's correct, yea.*

(R. p. 273, lines 13-25) (emphasis added). As with the rod linkage, Gilberg also recognized that cable-actuated systems are not impervious to failure either, as "every engineering component has failure modes." (R. p. 274, lines 7-16).

E. Testimony Regarding Damages

The sole claim that proceeded to trial was a negligence claim brought pursuant to the Wrongful Death statute. The parties stipulated that Riley's life expectancy under S.C. Code Ann. § 19-1-150 (1976) was 19 years. The Estate presented testimony from Dr. Oliver Wood, who conducted a "study on the economic loss to [Riley's] family." (R. p. 309, lines 2-10). Wood opined that the statutory beneficiaries suffered a total pecuniary loss of \$226,605.00, which was comprised of lost earning capacity and alleged replacement cost for family services that Riley provided. (R. p. 314, lines 15-17; R. p. 478).

Wood's \$169,017.00 estimate of net loss in earning capacity assumed that Riley, who was sixty-seven years old at the time of his death, would have been reelected to another four-year term as Sheriff. (R. p. 311, lines 8-11 (explaining that his future earning calculations were based upon representations by "Mrs. Riley [that] Riley intended to work until approximately December 31, 2012"); p. 313, lines 13-15 (calculating Riley's net loss in earning capacity before trial to be \$128,980.00); p. 314, lines 8-13 (estimating Riley's net loss in earning capacity after trial to be \$40,037,

assuming that "he had been reelected")). Wood also calculated a total loss of family services of \$57,588.00 based upon "Mrs. Riley['s] indicat[i]ons] that he performed an average of 10 hours a week of these activities before he passed . . . includ[ing] such things as cooking, washing dishes, laundry, vacuum, general household cleaning, grocery shopping, and lawn and yard care," which Wood valued at "eight dollars per hour." (R. p. 311, line 20-p. 312, line 1). All of Riley's children were adults, and two of the five children did not attend trial or testify. (R. p. 318, lines 7-20).

ARGUMENT

I. The Trial Court Erred In Submitting the Case to the Jury and Denying Ford's JNOV Motion Because The Estate Failed, As A Matter Of Law, To Show That Ford's Design Was Defective Or Unreasonably Dangerous When The Estate Presented No Expert Testimony Of Either A Design Flaw Beyond Mere Failure Or An Alternative Feasible Design That Was Crashworthy

A. Standard of Review

This Court reverses a trial court's denial of a directed verdict or JNOV "when there is no evidence to support the ruling or when the ruling is governed by an error of law." *Watson v. Ford Motor Co.*, 389 S.C. 434, 455, 699 S.E.2d 169, 180 (2010) (quoting *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010)). "[W]here the only reasonable inference from the evidence is that there has been a failure of proof as to a material element of the plaintiff's cause of action, it becomes the duty of the court to resolve the issue against the party having the burden of proof by directing a verdict." *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 534-35, 462 S.E.2d 321, 323-24 (Ct. App. 1995).

B. Required Elements of a Design Defect Claim

No evidence supports the trial court's denial of Ford's motions for a directed verdict and for JNOV. The Estate failed to offer proof of two essential elements of a design-defect claim: (1) a design defect that made the product unreasonably dangerous; and (2) an alternative design that would have prevented the product from being unreasonably dangerous.

"It is well-established that one cannot draw an inference of a defect from the mere fact a product failed." *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 80, 735 S.E.2d 650, 658 (2012) (citing *Sunvillas Homeowners Ass'n v. Square D Co.*, 301 S.C. 330, 333, 391 S.E.2d 868, 870 (Ct. App. 1990)). "South Carolina does not follow the doctrine of

res ipsa loquitur,” and the fact that an accident occurred is not enough to establish a negligence products liability claim. *Watson*, 389 S.C. at 452-53, 699 S.E.2d at 179. “Accordingly, the plaintiff must offer some evidence beyond the product’s failure itself to prove that it is unreasonably dangerous.” *Graves*, 401 S.C. at 80, 735 S.E.2d at 658-59 (emphasis added). Even if considered a malfunction, “the mere fact that a product malfunctions does not demonstrate the manufacturer’s negligence or the product’s defectiveness.” *Bragg*, 319 S.C. at 543, 462 S.E.2d at 328.

Instead, in a products liability action, the plaintiff must establish three things, regardless of the theory of recovery: (1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user. *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 8-9 (2010). The South Carolina Supreme Court recently reiterated that in a negligent design defect case like this one, “the only way to meet the [required showing that the product was in a defective condition unreasonably dangerous to the user] . . . is by ‘point[ing] to a design flaw in the product and show[ing] how his alternative design would have prevented the product from being unreasonably dangerous.’” *Graves*, 401 S.C. at 79, 735 S.E.2d at 658 (quoting *Branham*, 390 S.C. at 225, 701 S.E.2d at 16); see also J. Rhoades White, Jr., *Products Liability Law for Design Defects in South Carolina: The Aftermath of Branham v. Ford Motor Co.*, 62 S.C. L. Rev. 781, 790 (Summer 2011)(“Under the new rule, a plaintiff in a products liability design defect action must: 1) ‘point to a design flaw’ in the allegedly defective product; 2) ‘present evidence of a reasonable alternative design’; and 3) ‘show how his alternative

design would have prevented the [allegedly defective] product from being unreasonably dangerous.”).⁷

“Academically, it may be argued that all products are defective because they can be made more safe. However, it does not automatically follow that the products are deemed ‘unreasonably dangerous.’” *Claytor v. General Motors Corp.*, 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982). As the South Carolina Supreme Court observed more than thirty years ago:

Most any product can be made more safe. Automobiles would be more safe with disc brakes and steel-belted radial tires than with ordinary brakes and ordinary tires, but this does not mean that an automobile dealer would be held to have sold a defective product merely because the most safe equipment is not installed. By a like token, a bicycle is more safe if equipped with lights and a bell, but the fact that one is not so equipped does not create the inference that the bicycle is defective and unreasonably dangerous. . . . There is, of course, some danger incident to the use of any product.

Marchant v. Mitchell Distributing Co., 270 S.C. 29, 35-36, 240 S.E.2d 511, 513-14 (1977). This principle has the “longstanding approval” of the South Carolina Supreme Court:

In every design defect case the central recurring fact will be a product that failed causing damage to a person or his property. Consequently, the focus will be whether the product was made safe enough. This inquiry is the core of a risk-utility balancing test in design defect cases, *yet we do not suggest a jury question is created merely because a product can be made safer.*

Branham, 390 S.C. at 224, 701 S.E.2d at 16 (emphasis added).

⁷ Because the Estate’s claim against Ford sounds in negligence, it bore the additional burden, above and beyond the three elements required in all products liability cases, “of demonstrating . . . [that Ford] failed to exercise due care in some respect . . . , and liability is determined according to fault.” *Bragg*, 319 S.C. at 539-40, 462 S.E.2d at 326. Nevertheless, “[t]he fault-based element is of no moment where, as here, there is no showing in the first instance of a product in a defective condition unreasonably dangerous to the user.” *Branham*, 390 S.C. at 210, 701 S.E.2d at 9.

In a crashworthiness case like this one, liability is premised on the theory that Ford "designed and sold a defective product that did not . . . cause the accident, but rather caused an enhanced injury when the car was involved in an accident" *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 452-53 (4th Cir. 2001)(applying South Carolina law). The South Carolina Supreme Court has imposed a duty on automobile manufacturers to use due care in car design so as not to create an unreasonable risk of enhanced injury to passengers in a collision situation. *Mickle v. Blackmon*, 252 S.C. 202, 242, 166 S.E.2d 173, 191-92 (1969). Nevertheless "[t]his duty is not absolute. No liability will attach unless the negligent design was unreasonably dangerous." *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 154 (4th Cir. 1978)(applying South Carolina crashworthiness law and considering numerous factors including "[t]he intended use of the vehicle, styling, cost to change design, the obviousness of the defect, and the circumstances of the accident itself"). Notably, "[i]n assessing crashworthiness, rather than focus on the allegedly defective part of the automobile, the jury must consider whether the vehicle was unreasonably dangerous *as a whole*." *Jimenez*, 269 F.3d at 459 (emphasis in original).

In a case like this one where the alleged product defect is "too complex to be within the ken of the ordinary lay juror," that evidence must be in the form of expert testimony. *Graves*, 401 S.C. at 80, 735 S.E.2d at 659. The South Carolina Supreme Court has held that the field of automobile design is, as a matter of law, one of those complex domains where expert testimony explaining the alleged design flaw is required. *Watson*, 389 S.C. at 445, 699 S.E.2d at 175 ("[E]xpert testimony is required where a factual issue must be resolved with scientific, technical, or any other specialized

knowledge.”). Thus, when a plaintiff has failed to produce expert testimony beyond the product’s failure to prove that a product is unreasonably dangerous, its “claims are subject to dismissal.” *Graves*, 401 S.C. at 81, 735 S.E.2d at 659.

C. The Estate Failed to Establish a Design Flaw Beyond Mere Failure of the Latch System

The Estate utterly failed to present expert testimony identifying a design flaw in the door-latch system of the 1998 F-150 truck. Instead, the Estate relied exclusively – and impermissibly – on the fact that the door opened in the accident as evidence of defect. Under South Carolina law, the Estate’s lack of expert testimony is fatal to its claim that the system was defective and unreasonably dangerous. *Watson*, 389 S.C. at 445, 699 S.E.2d at 175; *Graves*, 401 S.C. at 81, 735 S.E.2d at 659.

In the final analysis, Gilberg provided only one reason for his conclusion that the PN96 rod-linkage system was defective: The door opened in this accident. Gilberg’s testimony is replete with references to the alleged failure of the latch system on the subject truck. When pressed to identify a defect in the PN96 door-latch design, Gilberg opined that it “fails without even stressing the latch,” (R. p. 275, lines 7-8), and “came open without damage to the latch. That shouldn’t have happened,” (R. p. 181, lines 9-11). He repeatedly insisted that a non-defective latch system is simply one that protects the door from opening when subjected to longitudinal crush. (R. p. 251, lines 6-11 (“[T]here are a lot of rod doors out there that don’t come open in similar circumstances, but they have various ways of protecting the rods.”); p. 284, lines 8-9 (“A rod system could be made safe if it were protected against crush.”); p. 276, lines 5-9 (“It is the whole system that makes it unreasonably dangerous. The rod linkage – you could build it with or without the rod linkage. As long as the rod linkage were protected in a longitudinal crash

situation it wouldn't matter, *but in this door it doesn't.*" (emphasis added))). Gilberg's allegations of a design defect are nothing more than a tautological loop; his theory is that because the door opened in this accident, the rod linkage must not have been protected and therefore a flaw must exist in the design.⁸

Although Gilberg made a conclusory statement that the door-latch system of Riley's truck was defectively designed, (R. p. 181, lines 9-11; p. 249, line 10-p. 250, line 6; p. 272, lines 11-12), he failed to specify the facet of Ford's rod-linkage system that was, in his opinion, a design flaw. Indeed, Gilberg was only particularly clear about what was *not* a design defect: he emphasized that the use of a rod rather than a cable is not, in itself, a design flaw. (R. p. 275, lines 3-15; p. 276, line 14 ("[T]here is nothing inherently wrong with rods . . .")) The undisputed evidence showed that rod linkages were the predominant latching systems used in approximately 90% of cars on the road when the subject truck was designed, (R. p. 269, line 9-p. 270, line 1), and Gilberg was not aware of any published data discouraging the auto industry from using rod linkages during the relevant time period, (R. p. 284, lines 3-9).

Gilberg himself therefore admitted that opting for a rod over a cable is not a design flaw, and that 90% of the vehicles at that time were equipped with rods. Gilberg provided no evidence to set Ford's rod-linkage design apart from the 90% of other cars utilizing rods at the time. Gilberg admitted that he knew of no statistical studies showing

⁸ Gilberg's assertion that foreshortening of the rod caused the door to open in this collision is just another version of this same conclusion that the rod-linkage system was defective because a failure occurred. Even assuming that foreshortening occurred in this accident, Gilberg identified no design flaw that caused the alleged foreshortening, other than the decision to use a rod-linkage system which he admitted was not "inherently wrong." (R. p. 276, line 14).

that Ford PN96 doors are more likely to come open in collisions than doors on any other vehicle, (R. p. 283, lines 20-25), and no evidence was presented to show that the PN96 model had an unreasonably higher rate of collision door openings or injuries when compared with other vehicles.

Instead, Gilberg suggested generally that the use of a rod linkage is appropriate so long as it is properly implemented. (R. p. 276, lines 7-16). He did not, however, offer any testimony regarding the manner in which Ford implemented the rod system on the PN96 model, nor did he offer any testimony regarding alternative means to implement a rod system. He noted that the thickness of the intrusion beam in the F-150 may have been changed, (R. p. 297, line 7-p. 301, line 5), but he did not offer any testimony as to how this would change the characteristics of the system or if it even applied to the subject truck.⁹ There was no evidence regarding improper implementation of the rod linkage in this design.

That Gilberg relies solely on the alleged failure as evidence of a design flaw is further evidenced by his utter inability to identify a well-implemented rod system. Although he believes that a non-defective "design . . . [should] account for [rods'] weaknesses, and their vulnerabilities," (R. p. 276, lines 1-16), he cannot point to even one American-made car or truck manufactured prior to 1998 that had a well-designed, non-defective door-latch system, despite having examined "hundreds, if not thousands of different model doors," (R. p. 271, line 23-p. 273, line 6). Indeed, Gilberg could not

⁹ Nor did Gilberg conduct any testing on the intrusion beam used in the door. Gilberg admitted that he did not test how much compression force it would take to "squish" an intrusion beam, (R. p. 277, line 23-p. 278, line 10), and the foreshortening demonstration he conducted for the jury bypassed the intrusion beam on his modified demonstrative exhibit, (R. p. 294, line 2-p. 296, line 5).

identify any such vehicle worldwide. (R. p. 272, line 21-p. 273, line 2). According to Gilberg, "I wouldn't be able to do that because that's not what I do." (R. p. 272, lines 5-6).

But as the Estate's sole design expert in this case, that is exactly what Gilberg was *required* to do to warrant submission of the design defect claim to the jury. As recently reiterated in *Graves*, proof that the latch design may have failed in this accident is legally insufficient standing alone to establish a design defect claim under South Carolina law.¹⁰ Gilberg's failure to specify the design flaw is fatal to the Estate's design defect claim.

D. The Estate Failed to Present Evidence of an Alternative Design that Would Prevent the Subject Truck from Being Unreasonably Dangerous

Moreover, Ford was due judgment as a matter of law on the Estate's design defect claim for a second, independently sufficient reason: The Estate failed to propose a feasible crashworthy alternative design that "would have prevented the product from being unreasonably dangerous." *Graves*, 401 S.C. at 79, 735 S.E.2d at 658; *Branham*, 390 S.C. at 225, 701 S.E.2d at 16. A cognizable design defect theory under South Carolina law must include a showing that "omission of the alternative design renders the product not reasonably safe." *Branham*, 390 S.C. at 224, 701 S.E.2d at 16 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998)). Gilberg's admission that he could not identify a single well-designed, non-defective door-latch system using a design other than the one in the subject vehicle, (R. p. 271, line 23-p. 273,

¹⁰ When pressed, Gilberg even conceded that the mere fact that a door opens during a crash does not mean that door was defectively designed. (R. p. 293, lines 8-14). Ford's design expert echoed that conclusion, noting that numerous factors could cause the opening of a door during a crash and "certain types of crashes . . . make every door come open." (R. p. 362, line 19-p. 363, line 11).

line 12), entitles Ford to judgment as a matter of law.

Branham clarified the contours of what is required to meet the plaintiff's burden, holding that "the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design." 390 S.C. at 220, 701 S.E.2d at 14. The risk-utility test analyzes whether "the danger associated with the use of the product outweighs the utility of the product." 390 S.C. at 218, 701 S.E.2d at 13 (quoting *Bragg*, 319 S.C. at 543, 462 S.E.2d at 328). Consistent with its prior holdings that the ability to make a product safer does not alone make a product defective or unreasonably dangerous, the South Carolina Supreme Court specified that "numerous factors must be considered [when determining whether a product is unreasonably dangerous], including the usefulness and desirability of the product, the cost for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger." *Branham*, 390 S.C. at 218-19, 701 S.E.2d at 13 (quoting *Claytor*, 277 S.C. at 265, 286 S.E.2d at 132). *Branham* leaves no doubt, however, that evidence of a feasible design alternative is a necessary component of the risk-utility analysis:

In sum, in a products liability design defect action, the plaintiff *must* present evidence of a reasonable alternative design. The plaintiff will be *required* to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design *must* include consideration of the costs, safety and functionality associated with the alternative design.

390 S.C. at 225, 701 S.E.2d at 16 (emphasis added).

In this case, the crashworthiness doctrine, with its underlying rationale to require design of a product that is reasonably safe for reasonably foreseeable crash scenarios, also bears on the risk-utility analysis. See Ralph King Anderson, Jr., ANDERSON'S SOUTH

CAROLINA REQUESTS TO CHARGE - CIVIL, § 32-22 (2009) ("A manufacturer has a duty to exercise ordinary care to design a vehicle that is reasonably safe . . . for its intended and reasonably foreseeable use . . . includ[ing] the potential of a collision. Accordingly, an automobile manufacturer has a duty to design reasonably crashworthy vehicles, so that the effects of accidents are minimized."). Evidence of an alternative feasible design in a crashworthiness case must demonstrate not only prevention of the harm in the particular crash at issue, but also general crashworthiness in other reasonably foreseeable crash scenarios. *See* Anderson, *supra*, § 32-22.¹¹ To permit a plaintiff to rely on an alternative design that may have prevented the crash at issue yet poses a high risk of harm in other foreseeable crash scenarios would defeat the rationale behind the doctrine. If that were the law, the same design could be defective in one case and non-defective in a different case, creating inconsistency in judicial proceedings and uncertainty for manufacturers.

Nevertheless, that is precisely the theory the Estate advances. While it points to the cable system as a "reasonable alternative design," (R. p. 250, lines 11-14), its only design expert admitted that he does not stand behind the cable system as a reasonable design for *any* foreseeable crash other than the one involving Riley:

¹¹ Indeed, that is the perspective adopted by the trial court, as reflected in its jury charges:

A manufacturer has a duty to exercise ordinary care to design a vehicle that is reasonably safe in the event of an accident . . . therefore, an automobile manufacturer has a duty to design reasonably crashworthy vehicles so that the effects of accidents are minimized.

...

A manufacturer must use reasonable and due care in the adoption of plan or design for its products. It must design a vehicle so that during a collision the vehicle will secure its occupants from harm.

(R. p. 370, lines 1-9; p. 371, lines 2-4).

Q. Alright, sir. We have talked about this 1996 door from Ford with the [cable linkage] door latch system. Do you have an opinion that that door latch system and door is well designed and non-defective?

A. No. No, I don't do that, but I will say that had that latch system been in Sheriff Riley's door it wouldn't have come open in this collision.

Q. In this one collision?

A. Yes.

Q. But you're unwilling to say that the design as a whole is a good design for all reasonably foreseeable crashes?

A. I am unwilling to say that. That's correct, yea.

(R. p. 273, lines 13-25). As noted above, throughout his testimony, Gilberg continued to emphasize his opinion that the cable system would have prevented the door from opening "in this crash." (*E.g.*, R. p. 266, line 25-p. 267, line 3). Gilberg even recognized that cable-actuated systems are not impervious to failure either, as "every engineering component has failure modes." (R. p. 274, lines 7-16).

Instead of addressing the required elements of a design defect claim, the Estate engaged in an abstract comparison of rods versus cables. That Gilberg preferred a cable over a rod is not probative of a design defect under South Carolina law. The salient inquiry is whether there is a specific flaw in a rod system that can be remedied by the use of a different design. Gilberg utterly failed to make that showing. He admitted he has "no beef" with rods, (R. p. 276, lines 10-12), and could not identify even one well-designed, non-defective door-latch system using cables or any other design for that matter, (R. p. 271, line 23-p. 273, line 12).

Gilberg's admission that his analysis of the cable design's crashworthiness was limited to this particular accident, coupled with his refusal to speculate how the alternative design would perform in any other reasonably foreseeable accident, can only yield one result: the Estate presented no evidence of a crashworthy design alternative to the rod-linkage system used in the PN96. Although Gilberg made a conclusory statement that the cable system was "clearly more crashworthy" than the rod-linkage system, (R. p. 205, lines 15-22), he undermined his own conclusion, not only by refusing to bank on the cable system's crashworthiness in any crash other than this one, but also by conceding that a true assessment of "the safest latch system out there" would require a comprehensive comparison in a number of different areas that he did not consider, (R. p. 302, line 15-p. 303, line 3). Gilberg failed to consider the most essential part of a crashworthiness case, namely, how crashworthy the proffered design alternative would be in other reasonably foreseeable crashes.

The factors outlined in *Branham* support the conclusion that the proper risk-utility analysis was not conducted in this case. It is well-settled that the "presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design." *Branham*, 390 S.C. at 225, 701 S.E.2d at 16. "The analysis asks the trier of fact to determine whether the potential increased price of the product (if any), the potential decrease in the functioning (or utility) of the product (if any), and the potential increase in other safety concerns (if any) associated with the proffered alternative design are worth the benefits that will inhere in the proposed alternative design." *Branham*, 390 S.C. at 225 n.16, 701 S.E.2d at 16 n.16 (emphasis added)(citing *Claytor*, 277 S.C. at 265, 286 S.E.2d at 132 (recognizing that any product

“can be made more safe” and that “numerous factors must be considered, including the usefulness and desirability of the product [and] the cost involved for added safety”). In other words, there can be no comparison of the risk and utility of a proposed design if there is no evidence regarding the potential risk reduction by the use of that design in other accidents.

This Court has made clear that adequate proof of an alternative design requires a plaintiff's expert to “conduct[] a risk-utility analysis regarding their proposed design alternative” and a risk-utility analysis “weigh[ing] the benefits of [the proposed design] against the costs and potentially adverse consequences.” *Holst v. KCI Konecranes Int'l Corp.*, 390 S.C. 29, 37, 699 S.E.2d 715, 719 (Ct. App. 2010). The Estate “cannot establish [that the subject truck] was defective and unreasonably dangerous as a matter of law” because it has “failed to produce evidence of a feasible design alternative or that a risk-utility analysis was conducted.” *Holst*, 390 S.C. at 37, 699 S.E.2d at 719-20. Nor has the Estate shown that ““omission of the alternative design renders the product not reasonably safe.”” *Branham*, 390 S.C. at 224, 701 S.E.2d at 16 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998)).

The only reasonable inference that can be drawn from the evidence presented at trial is that the Estate failed, as a matter of law, to show that Ford's design was defective or unreasonably dangerous both because the Estate presented no expert testimony of a design flaw beyond the mere occurrence of the accident and because it failed to prove an alternative feasible design with respect to the door's latching system. Thus, the trial court erred by failing to enter judgment in favor of Ford, and reversal of the ruling denying Ford's motion for JNOV is warranted.

II. The Trial Court Erroneously Invaded the Province of the Jury By Granting the Estate's Motion for New Trial *Nisi Additur* and Arbitrarily Tripling the Jury's Damages Award

The trial court further erred by granting the Estate's motion for a new trial *nisi additur* and then arbitrarily *tripling* the jury's damages award. The order granting a new trial *nisi additur* amounts to an error of law for multiple reasons: (1) it fails to enumerate compelling reasons for the decision; (2) it relies on evidence that was not relevant to the recoverable damages; and (3) it fails to afford substantial deference to the jury's determination of intangible damages and instead substitutes the trial court's personal calculation. Any one of these errors of law standing alone is sufficient to warrant reversal and reinstatement of the jury's verdict.

A. Standards of Review for New Trial *Nisi Additur*

A new trial *nisi additur* is not a vehicle for simply increasing a plaintiff's recovery via judicial fiat. A trial judge may grant a new trial *nisi additur* only if the jury's damages award was so "grossly . . . inadequate" that "it must be deemed the result of the jury's disregard of the facts and the court's instructions." *Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 18-19, 419 S.E.2d 795, 798-99 (Ct. App. 1992). A trial court must afford substantial deference to the jury's determination of damages, and the trial judge must give "compelling reasons" for invading the jury's province. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995); *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993); *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003); *Waring v. Johnson*, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). "[T]he trial court may not impose its will on a party by substituting its judgment for that of the jury." *Krepps v. Ausen*, 324 S.C. 597,

608, 479 S.E.2d 290, 295 (Ct. App. 1996).

A court granting a new trial *nisi additur* cannot replace the jury's interpretation of the evidence with its own, particularly when the jury could have discredited the testimony. *See Pelican*, 311 S.C. at 61, 427 S.E.2d at 676 (reversing the trial judge's grant of a new trial *nisi additur* because, although the trial judge properly charged the jury members that they could believe as much or as little of each witness' testimony they deemed proper, the grant of additur ignored the possibility that the jury could have disbelieved testimony which would account for the jury verdict).

This Court reviews a trial court's grant of a new trial *nisi additur* for an abuse of discretion amounting to an error of law. *Bailey*, 318 S.C. at 14, 455 S.E.2d at 691; *Pelican*, 311 S.C. at 61, 427 S.E.2d at 676; *Green*, 356 S.C. at 570, 590 S.E.2d at 41; *Waring*, 341 S.C. at 257, 533 S.E.2d at 911. The Court reverses an additur order when either compelling reasons are not given or "inapplicable grounds are given." *Green*, 356 S.C. at 570, 590 S.E.2d at 41 (citing *Bailey*, 318 S.C. at 14-15, 455 S.E.2d at 692)).

B. The Jury's Damages Award Was Not Grossly Inadequate, and the Trial Court Failed to Give Compelling Reasons for Tripling the Award

The trial court here failed to afford substantial deference to the jury's determination of damages and failed to give "compelling reasons" for its decision to triple the jury's damages award. Despite having correctly charged the jury with the "duty as judges to evaluate the evidence and determine which evidence convinces you of its truth," (R. p. 369, lines 11-15); and the responsibility for determining "[w]hat is reasonable compensation for monetary damages . . . [in] your sound discretion, and your judgment," (R. p. 373, lines 11-13), the trial court injudiciously substituted its own

assessment of the damages for the jury's discretion.

The trial court's order does not demonstrate "compelling reasons" showing that the jury's damages award was "grossly" inadequate and "resulted from the jury's disregard of the facts and the court's instructions." Indeed, the trial court believed that mere recitation of the damages testimony, which it deemed to be "emotionally compelling," satisfied the requirement. (R. pp. 8-9). On this matter, the South Carolina Supreme Court is clear: the mere listing of the plaintiff's claimed damages by the trial judge does not constitute a compelling reason for invading the jury's province when damages are debatable. *Green*, 356 S.C. at 571, 590 S.E.2d at 41.

Nor were the claimed damages necessarily the actual damages awarded in this case, despite speculation by the trial court about how the jury arrived at its total verdict of \$300,000.00. It is clear that the trial court presumed that the jury awarded \$226,605.00 in pecuniary damages – the exact amount advocated by the Estate's expert which the trial court characterized as "undisputed, uncontroverted." (R. pp. 7-8).¹² In reality, *no one* knows how much the verdict awarded for pecuniary loss because the general verdict form asked only for the jury's total actual damage award without division into separate amounts of economic and non-economic damages. (R. p. 378). The court's analysis thus consisted of: (1) guessing how the jury might have calculated damages;¹³ and (2)

¹² The trial court apparently adopted the Estate's contention that "[w]ith \$226,605.00 of a \$300,000 verdict being uncontested economic damages, the jury at best only awarded \$74,000.00 in non-economic damages." (R. p. 74).

¹³ Here the jury had options – it could have configured the ratio between economic and non-economic damages in any number of ways (particularly given that \$73,395.00 is an unusual number for noneconomic damages if the jury intended to award the full pecuniary damages sought). For example, there is simply no way to divine whether the jury was persuaded that reelection was sufficiently certain to include the additional post-

evaluating whether that hypothetical award was sufficient in this case. Such rank speculation is not a compelling reason to invade the jury's province.

That is especially true in a wrongful death case like this one. Most of the elements of wrongful death damages are decidedly intangible in nature. *See* 11 S.C. Jur. Damages §24; *Mishoe v. Atlantic Coast Line R. Co.*, 186 S.C. 402, 416, 197 S.E. 97, 104-05 (1973); *Garner v. Houck*, 312 S.C. 481, 487-88, 435 S.E.2d 847, 850 (1993). "There is no yardstick" by which suffering, wounded feelings, grief, loss, and other intangible elements can be measured in dollars and cents – those elements "must be estimated by the jury in the exercise of their sound judgment under all the facts and circumstances." *Kapuschinsky v. U.S.*, 259 F. Supp. 1, 6 (D.S.C. 1966); *Lucht v. Youngblood*, 266 S.C. 127, 137, 221 S.E.2d 854, 859 (1976).

That is precisely how the jury was charged in this case: with the responsibility to determine "actual damages [which] would be the actual losses and expenses which the plaintiff has suffered because of the defendant's negligence," (R. p. 372, lines 4-16); with the right to believe or disbelieve witness testimony, (R. p. 369, lines 9-25); and with the discretion to set "[w]hat is reasonable compensation for monetary damages . . . [by] consider[ing] a number of things in determining the amount of monetary damages," (R. p. 373, lines 11-17). It is undisputed both that the verdict exceeded the amount of pecuniary damages the Estate presented and that the jury awarded at least \$73,795.00 for intangible losses. *See Hyload, Inc. v. Pre-Engineered Products, Inc.*, 308 S.C. 277, 281, 417 S.E.2d 622, 625 (Ct. App. 1992) (upholding the denial of a motion for new trial *nisi remittitur* because "the damages awarded were within the range of the evidence, therefor,

election earnings in its calculation.

we cannot hold the verdict was excessive as a matter of law"). However, instead of deferring to the value the jury assigned to these intangible losses incapable of numeric measurement,¹⁴ the trial court substituted its own amount that was at least \$600,000.00 more than the jury's.

C. The Trial Court's Reliance on Inapplicable Grounds to Increase the Jury's Verdict Constitutes an Error of Law

Just as the failure to enumerate compelling reasons warrants reversal, so does a trial court's reliance on "inapplicable grounds . . . for granting additur." *Green*, 356 S.C. at 570, 590 S.E.2d at 41. The trial court's order cites to not one – but two – inapplicable grounds in its additur decision: (1) testimony regarding the loss sustained by non-statutory beneficiaries; and (2) the jury's punitive damage verdict finding "willful, wanton, or reckless conduct" but awarding "zero" damages. (R. pp. 3-4, 6).

First, the trial court's order is replete with references to the losses sustained by Riley's community, church, peers, colleagues, and even his fellow citizens, none of which are recoverable as damages under the South Carolina Wrongful Death statute. This Court has made clear that a wrongful death claim "is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death." *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 114, 498 S.E.2d 395, 407 (Ct. App. 1998); *Self v. Goodrich*, 300 S.C. 349, 351 387 S.E.2d 713, 714 (Ct. App. 1993). See also *Zorn v. Crawford*, 252 S.C. 127, 136-37, 165 S.E.2d 640, 645 (1969).

¹⁴ There can be no doubt that the jury was attentive when evaluating the matter of damages – the only question submitted by the jury during its deliberations was a question about whether the figure should be expressed as a lump sum or annual allotment. (R. p. 1530).

Nevertheless, the trial court in this case devoted a significant portion of its additur order to the recitation of evidence of that very type – testimony regarding the value of Riley's life to non-beneficiaries:

"The evidence at trial showed that Benjamin Riley was . . . a central figure not only in the lives of his family, but also . . . within his church and community." (R. p. 8-9);

"[The Estate] presented numerous witnesses who were peers, colleagues, and fellow citizens These witnesses established Riley's role as a husband father and community leader, dedicated law enforcement official, and general pillar of his community." (R. p. 9);

"While presiding over this two week trial, it became readily apparent that Riley was a pivotal member of both the Ridgeland community as well as his family. He was not merely a member of his community, but rather he was an integral part of the community." (R. p. 9).

Not insignificantly, the recitation of the inapplicable evidence above immediately preceded the trial court's statement that "[f]or all of the compelling reasons listed above, it is abundantly clear that the verdict in this case was inadequate" (R. p. 9). There can be no other reasonable conclusion but that the trial court considered that inapplicable testimony to be a "compelling reason" (if not *the* compelling reason) for its decision.

Second, the trial court's order impermissibly cites to the jury's finding that "Ford's conduct rose to the level of willful, wanton, and reckless conduct," noting that the jury "nonetheless awarded Zero (\$0.00) Dollars in punitive damages." (R. p. 6). While the trial court's order did not expressly rely on the punitive damage verdict in its additur analysis, it is clear that the Estate tried to use this finding to its benefit by arguing that "the jury found conduct warranting [an award of punitive damages]," which "should be significant in the consideration of a new trial additur." (R. p. 73).

The jury's finding of willful, wanton, or reckless conduct as a precursor to a

punitive damages award is completely inapplicable to the analysis of whether the jury's *actual damages* award was adequate. Any attempt by the trial court to compensate for the jury's lack of a punitive damage award by adding to the actual damages award would offend numerous constitutional safeguards, warranting reversal.

For either – or both – of these reasons, reversal is warranted because the trial court's additur order cited inapplicable grounds for its decision.

D. Permitting the Jury to Evaluate Credibility of the Damages Evidence Does Not Mean that Damages Were Undisputed

Finally, the trial court erred by basing its additur decision in part on its conclusion that the damages were “undisputed.” The jury was permitted to exercise its discretion to discredit portions of the damages testimony that it determined were overstated or inaccurate. While Ford did not attack the alleged damages, the jury very well could have doubted Wood's estimate of pecuniary loss.

Wood made several assumptions that the jury could have reasonably chosen to reject, including that:

- (1) Riley, who was sixty-seven years old at the time of his death, would not only run for reelection instead of retiring but *would actually be reelected*, (R. p. 311, lines 8-11 (explaining that his future earning calculations were based upon representations by “Mrs. Riley [that] Riley intended to work until approximately December 31, 2012”); p. 314, lines 9-10 (stating that in computing estimates he presumed “Riley had been reelected”)); and
- (2) the family suffered a loss of over \$57,000 in family services despite any evidence that the family had ever hired someone to perform those tasks, (R. p. 311, line 20-p. 312, line 1 (explaining that his family services calculations were premised on “Mrs. Riley[’s] indicat[i]ons” that he performed an average of 10 hours a week of these activities before he passed . . . includ[ing] such things as cooking, washing dishes, laundry, vacuum, general household cleaning, grocery shopping, and lawn and yard care” which Wood valued at “eight dollars per hour” to replace); p. 313,

lines 16-21 (estimating the total before-trial loss to replace family services was \$16,070); p. 314, lines 5-7 (calculating the post-trial “[d]iscounted present value of the chores that he would have done and replacing the[m] - \$41,518”).

Furthermore, the jury’s valuation could also have considered that all of Riley’s children were adults, (R. p. 318, lines 7-20), who may not have relied exclusively on him for financial support. Indeed, two of the five children did not attend trial or testify about their loss, if any, (R. p. 318, lines 17-20), and thus the jury was free to assume that these beneficiaries suffered minimal or no loss.

Against that backdrop of variable damages, it was entirely inappropriate for the trial court to additur the verdict on the basis that damages were “undisputed.” (R. p. 6 (concluding that in the absence of direct dispute of the evidence, Ford “did not contest damages”); p. 7 (finding that the Estate “presented undisputed, uncontroverted evidence of pecuniary loss in the amount of \$226,605.00”); p. 8 (“On the issue of damages, there was no dispute The intangible elements of wrongful death . . . were . . . shown to be significant through uncontested, emotionally compelling testimony”). The South Carolina Supreme Court has made clear, “[t]he fact that evidence is not contradicted by direct evidence does not render it undisputed, as there still remains the question of its inherent probability and the credibility of the witness or his interest in the result.” *Terwilliger v. Marion*, 222 S.C. 185, 188, 72 S.E.2d 165, 166 (1952). “If there is anything tending to create distrust in his [or her] untruthfulness, the question must be left to the jury.” *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) (quoting *Terwilliger*, 222 S.C. at 188, 72 S.E.2d at 166). There was no stipulation of damages in this case, and the jury was free to award all of the claimed damages or only a portion thereof.

Additur is not appropriate in a case like this when the jury awarded damages that were both intangible and debatable. In *Steele v. Dillard*, 327 S.C. 340, 486 S.E.2d 278 (Ct. App. 1997), this Court affirmed the denial of a plaintiff's motion for new trial *nisi additur*, reiterating the jury's right to disbelieve even uncontradicted evidence when evaluating damages to award:

We disagree with Steele's final contention that the trial court erred in denying his post-trial motions. Steele moved for a judgment notwithstanding the verdict, new trial *nisi additur* or a new trial absolute on the grounds that the jury's verdict was grossly inadequate.

Although the evidence indicates the jury could have awarded a verdict larger than \$6,662.88, there is evidence in the record, as mentioned above, that supports the amount that the jury did award, irrespective of the manner in which it may have calculated its award.

Steele, 327 S.C. at 345, 486 S.E.2d at 281.

The amount of damages to which the Estate was entitled – whether tangible or intangible – was a question of fact for the jury, and the jury was free to weigh the evidence and reach its own conclusion on that issue. As this Court has observed when examining the propriety of additur: “the trial court may not impose its will on a party by substituting its judgment for that of the jury.” *Krepps*, 324 S.C. at 608, 479 S.E.2d at 295.¹⁵ Otherwise, the result would be a *de facto* bench trial, and the purpose for having a

¹⁵ The trial court's reliance on its own assessment of the evidence effectively, and inappropriately, adopts the “thirteenth juror” stance. Although the South Carolina Supreme Court has reaffirmed the trial court's “thirteenth juror” prerogative to grant a new trial absolute upon a finding that the balance of the evidence does not justify the verdict, *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990), the Court has specifically prohibited the use of that standard in the context of a new trial *nisi additur*, *Bailey*, 318 S.C. at 15, 455 S.E.2d at 692 (requiring a finding that the verdict was inadequate for additur). A proper additur inquiry focuses on whether the verdict was merely insufficient given the evidence and does not involve a complete substitution of the court's interpretation of the evidence. Although not expressly premised on the thirteenth juror doctrine, the trial court's additur analysis in this case is certainly reminiscent of it.

jury in the first instance would be lost.

That is precisely what occurred in this case. After outlining the testimony at trial regarding "the intangible elements of wrongful death," the trial court credited that testimony as "significant," "emotionally compelling," and indicative that "this family . . . suffered great loss." (R. p. 8). In so doing, the trial court weighed the evidence in the same manner prohibited in *Pelican* – it "ignored the possibility that the jury could have disbelieved testimony which would account for the jury verdict" and substituted its own evaluation of the evidence. *Pelican*, 311 S.C. at 61, 427 S.E.2d at 676. A trial judge is not permitted to usurp the jury's duty and power to determine the facts based on the evidence, and the grant of additur in this case was an error of law that amounts to an abuse of discretion.

For all of these reasons, if the Court does not grant judgment to Ford as a matter of law, Ford respectfully requests that the Court reverse the trial court's grant of a new trial *nisi additur* as an abuse of discretion and reinstate the jury's original verdict of \$300,000.00.

III. The Trial Court Erred By Denying Ford's Request For An Offset From The Jury's Verdict in the Full Amount of the Estate's Settlement With a Co-Defendant

Regardless of whether this Court ultimately decides to reinstate the jury's original verdict or affirm the trial court's grant of a new trial *nisi additur*, Ford is entitled to a set off of \$25,000.00 from the final verdict amount, and the trial court erred in denying Ford's motion. (R. p. 5).

"The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties."

Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 219, 528 S.E.2d 682, 688 (Ct. App. 2000). It is well-established that a non-settling defendant is entitled to credit for the amount paid by another defendant who settles. *Hawkins*, 330 S.C. at 92, 498 S.E.2d at 395; *Powers v. Temple*, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967); *Vaughn v. City of Anderson*, 300 S.C. 55, 61, 386 S.E.2d 297, 301 (Ct. App. 1989). As the South Carolina Supreme Court has explained, "the reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong." *Smalls*, 339 S.C. at 219-20, 528 S.E.2d at 688. South Carolina Code § 15-38-15(E) also codifies a defendant's right to set off. See S.C. Code Ann. § 15-38-15(E) (Supp. 2005) ("[S]et off from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant's percentage of liability.").

It is undisputed that the Estate received \$25,000.00 upon settlement of its claims, split between the survival claim (\$20,000.00) and the wrongful death claim (\$5,000.00). Because the Estate withdrew its survival claim against Ford during trial due to an undisputed lack of evidence, (R. p. 342, line 23-p. 343, line 2), Ford is entitled to a set off on the wrongful death claim for the full \$25,000.00 received from Carter's liability insurance.

That the Estate's settlement with Carter was apportioned between the two claims does not reduce or inhibit Ford's entitlement to a set off. Where a settlement with one defendant is allocated between survival and wrongful death claims, South Carolina law permits the trial court, post-verdict, to reallocate that settlement for purposes of set off.

See, e.g., *Welch v. Epstein*, 342 S.C. 279, 312-14, 536 S.E.2d 408, 425-26 (Ct. App. 2000) (affirming reallocation of settlement proceeds between survival and wrongful death claims because “the allocation between the survival and wrongful death claims must yield to fairness and justice”). The reasoning employed by this Court in *Welch* applies with equal force to the circumstances of this case, which are indistinguishable. See also *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 209-10, 662 S.E.2d 444, 451 (Ct. App. 2008) (upholding application of a set off even though the plaintiff asserted different causes of action against the defendants, because the term injury “is broad enough to include all damages”).

Because Ford was entitled to a full set off from the jury’s verdict in the amount of the Estate’s \$25,000 settlement with Carter, reversal of the trial court’s denial of Ford’s motion for set off is warranted.

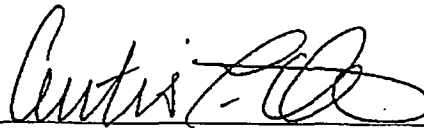
CONCLUSION

Ford’s design of its F-150 truck was not to blame for this accident. The only reasonable inference to be drawn from the evidence is that Ford’s latch system was not defective or unreasonably dangerous because the Estate presented no expert testimony of a specific design flaw or a non-defective alternative design. The Court should reverse the trial court’s denial of Ford’s motions for judgment as a matter of law.

Alternatively, the Court should vacate the trial court’s additur and grant Ford a set off from the damages award.

April 18, 2013

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THE STATE OF SOUTH CAROLINA
In the 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

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

v.

Ford Motor Company Appellant.

APPELLANT'S FINAL REPLY BRIEF

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SC COURT of Appeals

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Despite having used every one of its allotted fifty pages, the Estate has yet to identify: (1) expert testimony of a specific design flaw and a crashworthy alternative design; (2) any compelling reason articulated by the trial court for rejecting the jury's assessment of non-economic damages and substituting its own; or (3) any justification for the trial court's complete denial of a settlement offset. Instead, like a ship passing in the night, the Estate's brief primarily focuses on matters not raised by Ford on appeal. Without unnecessarily restating the arguments in Ford's initial brief, Ford reexamines the salient issues that require reversal of the trial court's decisions.

I. THE ESTATE'S INABILITY TO PRODUCE EXPERT TESTIMONY OF A SPECIFIC DESIGN FLAW AND A CRASHWORTHY ALTERNATIVE DESIGN WARRANTS JUDGMENT AS A MATTER OF LAW FOR FORD ON THE ESTATE'S DESIGN DEFECT CLAIM.

A design defect claim in a complex case regarding vehicle crashworthiness cannot succeed without: (1) expert testimony pointing to a particular design flaw; and (2) an alternative design that would have prevented the product from being unreasonably dangerous. *See Graves v. CAS Medical Sys., Inc.*, 401 S.C. 63, 79, 735 S.E.2d 650, 658 (2012); *Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010). The Estate's arguments on appeal establish neither.

A. The Estate Still Cannot Identify A Design Flaw In The Latch System.

The "Evidence of Design Defect" section of the Estate's brief epitomizes the circular logic that the Estate has employed throughout this case:

Mr. Gilberg . . . opined that the latch on the driver's door . . . had been activated due to foreshortening . . . [which] caused the door to unlatch . . . This was due to a design defect . . . of the particular door and rod latch mechanism that would allow the door to unlatch in the foreseeable crash due to a "very small amount of longitudinal crush—end wise crush . . .," such design disadvantage and risk which had been known to Ford for

years before the subject truck was manufactured This design defect rendered the subject vehicle defective and unreasonably dangerous.

(Respondent Initial Brief, 13-14). Not once does the Estate actually name the specific defect which allegedly caused foreshortening and latch activation. Instead, the Estate perpetuates the legally insufficient argument that product failure and/or knowledge of foreshortening evidences a design defect.

The Estate cannot articulate a design flaw because its expert did not identify one. Gilberg never designated a particular flaw in the material, placement, size, or any other feature of the latch that allegedly caused activation, nor did he believe that the use of a rod linkage was, in itself, a design flaw. (R. p. 276, line 14 (“[T]here is nothing inherently wrong with rods”)). Gilberg’s result-oriented explanation that a “small amount of longitudinal crush endwise in the door caused it to come open . . . ,” (R. p. 250, line 22-p. 251, line 5), is merely product failure by another name. As in *Graves*, the absence of expert testimony identifying a “specific design flaw” is fatal to the Estate’s claim and warrants judgment in Ford’s favor.

The Estate attempts to fill this void of expert testimony by recounting virtually every piece of circumstantial evidence that it presented at trial, which it believes to be “ample evidence” that Ford’s design was unreasonably dangerous. (Respondent Initial Brief, 15-26). This barrage of evidence is unrelated to the threshold inquiry of whether a design flaw exists in the first instance, which is the issue that Ford raises on appeal. Moreover, the Estate’s “all but the kitchen sink” approach has already been rejected by the South Carolina Supreme Court in *Graves*. No amount of circumstantial evidence can substitute for expert testimony of a specific design flaw in a case like this beyond the ordinary ken of the jury. *Graves v. CAS Medical Sys., Inc.*, 401 S.C. at 80, 735 S.E.2d at

658 (“In this case, however, we need not determine what quantum of circumstantial evidence of a design defect is necessary to withstand summary judgment because the lack of expert testimony [establishing a defect beyond the product’s failure] is nevertheless dispositive of the Graves’ claim.”); *see also Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010)(holding that complexities in the field of automobile design require expert testimony explaining the alleged design flaw). No matter how strong the Estate believes its evidence of Ford’s “own design criteria, testing standards, and internal documentation” to be, it simply is not enough under *Graves*.¹

B. The Estate’s Own Expert Undermines The Existence Of A Crashworthy Alternative Design.

Ford is due judgment as a matter of law for a second, independently sufficient reason: Gilberg could not identify a single well-designed, non-defective, door-latch system using a design other than the one in Riley’s vehicle. (R. p. 271, line 23-p. 273, line 12). Even Gilberg admitted that he could only support the use of a cable system to prevent this one collision. (R. p. 273, lines 13-25).

Rather than directly address Gilberg’s refusal to endorse the cable system as a reasonable design for any other foreseeable crash scenario, (R. p. 273, lines 13-25), the Estate argues without any supporting citation that an alternative design need not be “impervious to failure,” (Respondent Initial Brief, 19). Pursuant to the Estate’s logic,

¹ Despite Gilberg’s admission that opting for a rod over a cable is not a design flaw and his acknowledgment that 90% of vehicles at that time were equipped with rods, (R. p. 269, line 9-p. 270, line 1; p. 275, lines 3-15), the Estate devotes several pages of argument to its contention that Ford had “fundamental knowledge of foreshortening within the automotive industry,” (Respondent Brief, 23-26). As outlined above, evidence regarding Ford’s purported knowledge is of no moment given the absence of an identified design flaw about which Ford could be knowledgeable.

each and every instance of a door latch failure would require Ford to implement a new system designed to prevent only that failure, without any regard for how that new design would perform in other crash scenarios. If that were the case, Ford would be left with no meaningful criteria to select a design that is truly "crashworthy," because the definition of what constitutes a "reasonable" latch design would be different for each crash scenario. While it may be true that no design is fail-proof, neither is a "reasonable alternative design" one that prevents failure in only one crash scenario.²

II. THE ADDITUR DECISION WAS AN ABUSE OF DISCRETION.

Just as the Estate cannot correct deficiencies in Gilberg's testimony with its arguments on appeal, neither can it manufacture compelling reasons for additur when the trial court provided none. Ford's initial brief presented three main reasons why the trial court's new trial *nisi additur* decision was improper: (1) it failed to provide compelling reasons; (2) it relied on irrelevant evidence; and (3) it usurped the jury's province to evaluate non-economic damages. The Estate attempts an end run around those reversible errors by suggesting that unless a defendant puts forth affirmative evidence "hotly" contesting a plaintiff's claimed damages, additur is warranted. (Respondent Initial Brief, 39-43).

The Estate's reliance on *Luchok*, *Green*, and *O'Neal* for this proposition is misplaced. Those decisions collectively confirm the impropriety of additur when damages are fervidly contested at trial; not one of those decisions, however, *authorizes*

² The Estate also suggests that Ford's decision to later change the latch design to a cable linkage somehow proves that the rod linkage was defective. (Respondent Brief, 24-25). Numerous factors influence the decision to alter a design, and a change does not signal that one design is safer or even more desirable than the other. If that were the case, every design change would render the previous generation defective and unreasonably dangerous.

additur simply because a defendant permitted the jury to evaluate damages without presenting evidence of its own. Such a leap in logic erodes the jury's province to disbelieve even uncontradicted evidence when evaluating damages, *see Steele v. Dillard*, 327 S.C. 340, 345, 486 S.E.2d 278, 281 (Ct. App. 1997), and grossly overstates the significance of "contested damages" to the additur analysis.

Undergirding each of the *Luchok*, *Green*, and *O'Neal* decisions is a reluctance to permit additur if the jury "could have determined" the amount of damages in more than one way. *See, e.g., O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 557 (1993). That is exactly the case when the damages sought are intangible and incapable of precise calculation. *See, e.g., Kalchthaler v. Workman*, 316 S.C. 499, 504, 450 S.E.2d 621, 623 (Ct. App. 1994) ("We particularly note her claim for pain and suffering was one that peculiarly fell within the province of the jury to weigh and determine."). The Estate's brief avoids any discussion of this critical distinction between pecuniary loss, such as the medical expenses sought in *Luchok*, *Green*, and *O'Neal*, and the non-economic wrongful death damages in this case. It would be inappropriate to characterize evidence regarding grief, sorrow, and wounded feelings as "disputed" or "undisputed" because there is no amount to dispute until after the jury assigns a value thereto. Requiring intangible damages to meet the "hotly contested" benchmark is like trying to fit a square peg in a round hole.

It is not surprising that the Estate never identified a compelling reason for the trial court's decision — the trial court failed to provide one. The Estate's brief reads much like the trial court's emotional rendition of the evidence in its additur decision, (Respondent Initial Brief, 30-36), confirming that the trial judge substituted his own beliefs about the

value of the case in place of the jury's assessment. The trial court's determination that the grief, sorrow, and wounded feelings of the statutory beneficiaries were worth far more than what the jury assessed presents the very scenario that the "compelling reasons" requirement aims to prevent. Emotion is not a compelling reason, and a trial court may not substitute its judgment for that of the jury.

Even assuming, *arguendo*, that the trial judge properly replaced the jury's evaluation with his own, reversal nevertheless is warranted because the trial court relied on losses suffered by non-statutory beneficiaries that have no relevance to the additur analysis. The Estate's contention that the extraneous evidence served only to explain "who Ben Riley was," (Respondent Initial Brief, 44), blurs a line that this Court already has clearly defined – a wrongful death claim "is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death." *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 114, 498 S.E.2d 395, 407 (Ct. App. 1998).

Excluding inapplicable grounds from the additur analysis safeguards the jury verdict from a *de facto* bench trial of irrelevant facts. Contrary to the Estate's assertions, there is no such thing as a trial judge's "harmless" reliance on inapplicable grounds when replacing the jury's verdict with his own. (Respondent Initial Brief, 46 (citing to a non-additur case)). In the additur context, the inclusion of irrelevant grounds warrants reversal even if the trial judge provided compelling reasons for the decision:

A trial judge may grant a new trial *nisi additur* when a jury's verdict is inadequate. However, to grant such relief, the trial judge must state compelling reasons for invading the province of the jury. Similarly, if inapplicable grounds are given for granting additur, the order fails by error of law.

Green v. Fritz, 356 S.C. 566, 570-71, 590 S.E.2d 39, 41 (Ct. App. 2003)(internal citations omitted). Here, the trial court either failed to provide compelling reasons altogether or it provided inapplicable reasons; either way, the grant of additur must be reversed.

III. THE RECENT CASE OF *RUTLAND V. SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION* SUPPORTS OFFSET OF THE VERDICT BY THE FULL SETTLEMENT AMOUNT.

After acknowledging that the trial court erred because Ford was entitled to a \$5,000.00 offset for the wrongful death settlement,³ the Estate claims that Ford was not entitled to reallocation of the \$20,000.00 survival claim settlement because Riley could have suffered conscious pain and suffering. (Respondent Initial Brief, 46-47). Despite having had the opportunity and incentive to present evidence supporting its survival claim at trial, the Estate's "evidence" of conscious pain and suffering consists only of: (1) speculation that swerving to avoid a collision indicates a "conscious realization" of impending death, (Respondent Initial Brief, 47-48); and (2) testimony from an eyewitness ten feet away from Riley's body who heard a "gasping" noise that admittedly could not have come from Riley because he was not breathing, (Respondent Initial Brief, 48; R. p. 112, lines 11-22; R. Appx. p. 1531, lines 11-22).

The South Carolina Supreme Court's November 7, 2012 decision in *Rutland v. South Carolina Department of Transportation*, 400 S.C. 209, 734 S.E.2d 142 (2012), reaffirms that settlement of a survival claim for which no evidence exists should be

³ The Estate's admission on appeal that Ford is entitled to a \$5,000.00 setoff is a distinct departure from its argument to the trial court that Ford was "clearly not entitled to any kind of setoff." (R. Appx. p. 1533, lines 9-13). This is not the first time that the Estate has changed course on this issue. At the hearing before the trial court, the Estate initially conceded that Ford was entitled to a partial setoff, (R. Appx. p. 1532, lines 18-21), but later decided to "take issue that [Ford was] entitled even . . . to the \$5,000 . . .," (R. Appx. p. 1534, lines 6-12). The trial court apparently accepted the latter position over the former, as it denied Ford's request for a setoff altogether. (R. p. 5).

reallocated and offset from the verdict on a wrongful death claim. In *Rutland*, the Court assessed the viability of a hypothetical survival claim and found that no evidence would have supported such a claim if it had been asserted because “the accident ... occurred quickly and the evidence suggests [that the decedent] died instantaneously.” *Rutland*, 400 S.C. at 215; 734 S.E.2d at 145. As the Court observed, “even assuming [the decedent] had a pulse, that fact alone is not evidence of conscious pain and suffering.” *Id.* Without any evidence of conscious pain and suffering, the settlement proceeds were all allocated to wrongful death and offset from the jury’s verdict. *Id.*

This case presents an even stronger scenario for reallocation than *Rutland*. In *Rutland*, the plaintiff never had the opportunity to present evidence directed toward conscious pain and suffering because a survival claim was never filed. *Rutland*, 400 S.C. at 212-13; 734 S.E.2d at 143. Here, the Estate had every opportunity to set forth its best evidence of conscious pain and suffering because the survival claim was *presented* to the jury before it was withdrawn. (R. p. 342, line 23-p. 343, line 2). Even still, the Estate offers only conjecture and unconstructive testimony – insufficient evidence to support allocation of \$20,000.00 in settlement proceeds to a survival claim. Accordingly, Ford is entitled to a setoff of the full \$25,000.00 that the Estate received from liability insurance.

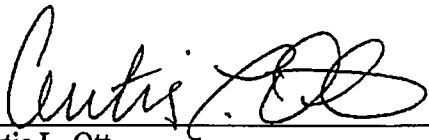
CONCLUSION

Ford’s design of its F-150 truck was not to blame for this accident. The only reasonable inference to be drawn from the evidence is that Ford’s latch system was not defective or unreasonably dangerous because the Estate presented no expert testimony of a specific design flaw or a non-defective alternative design. The Court should reverse the trial court’s denial of Ford’s motions for judgment as a matter of law. Alternatively, the

Court should vacate the trial court's additur and grant Ford an offset from the damages award.

April 18, 2013

By: _____


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ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The 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

Appeal From Bamberg County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5195
Heard September 11, 2013 – Filed February 5, 2014

AFFIRMED IN PART AND REVERSED IN PART

Curtis Lyman Ott and Laura Watkins Jordan, both of
Gallivan, White & Boyd, PA, of Columbia; Joseph
Kenneth Carter, Jr., Carmelo Barone Sammataro, and
David Christopher Marshall, all of Turner Padgett
Graham & Laney, PA, of Columbia, for Appellant.

Ronnie Lanier Crosby, of Hampton, and Daniel E.
Henderson and Matthew Vernon Creech, of Ridgeland,
all of Peters Murdaugh Parker Eltzroth & Detrick, PA,
for Respondent.

FEW, C.J.: Jasper County Sheriff Benjamin Riley's estate ("the Estate") brought this products liability lawsuit against Ford Motor Company after Riley was ejected from his 1998 Ford F-150 pickup truck in an accident and killed. The Estate

settled with the at-fault driver before trial, and the jury awarded \$300,000 against Ford. We affirm the trial court's denial of Ford's motion for judgment notwithstanding the verdict (JNOV). However, we reverse the denial of Ford's motion for setoff and the granting of the Estate's motion for new trial *nisi additur*.

I. Facts and Procedural History

On August 29, 2007, Riley was driving his Ford F-150 pickup truck near Ehrhardt in Bamberg County when a vehicle driven by Andrew Marshall Carter II pulled from a side road into Riley's lane of travel. The resulting impact caused Riley's truck to leave the road and roll over. The driver's door of the truck opened in the initial collision with Carter, and Riley was ejected through the open door. First responders found Riley's body eighty-five feet from where he was ejected.

Riley's wife Laura, serving as personal representative of the Estate, brought wrongful death and survival claims against Ford and Carter. The claims against Ford were based on a products liability negligence theory. Specifically, the Estate alleged Ford's negligent design of the door-latch system in Riley's truck allowed the door to come open, and Riley would not have died if he had not been ejected. The Estate settled with Carter for \$25,000, with the Estate and Carter agreeing to allocate \$20,000 to the survival claim and \$5,000 to the wrongful death claim. The trial court approved the settlement.

At trial, the Estate withdrew its survival claim, and the court submitted the wrongful death claim against Ford to the jury. The jury returned a verdict in favor of the Estate for \$300,000 in actual damages.

Ford moved for JNOV, arguing the Estate failed to prove both the existence of a defect in the door-latch system and a reasonable alternative design. Ford also requested a setoff from the verdict in the amount of \$25,000 to account for the Estate's settlement with Carter. The trial court denied both motions in a form order without explanation.

The Estate filed a motion seeking a new trial *nisi additur*. At the hearing on the motion, the trial court stated that a "\$300,000 [verdict] for this type of case could very well be found to be shockingly inadequate" "because of the stature of [Riley] and what he's done in life, what he's contributed to his family." The trial court granted the motion and ordered Ford to pay "an additional \$600,000 in actual damages . . . , bringing the total verdict to \$900,000." Ford appeals each of these three rulings.

II. Ford's JNOV Motion

Ford raises in its brief three arguments as to why the trial court erred in not granting Ford's motion for JNOV: (1) the Estate did not present sufficient evidence of a design defect, but relied on the "mere failure" of the door latch; (2) the Estate did not prove the existence of a reasonable alternative design as required by *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010); and (3) the Estate did not present adequate expert testimony to prove a design flaw or a reasonable alternative design.¹ At oral argument, Ford presented more detail for its argument that the Estate did not satisfy the requirements of *Branham*. We hold the trial court correctly denied Ford's motion for JNOV.

A. Reasonable Alternative Design

We begin by addressing Ford's argument that the Estate did not satisfy the requirements of *Branham*. In *Branham*, the supreme court noted that "South Carolina . . . [has] traditionally employed two tests to determine whether a product was unreasonably dangerous as a result of a design defect: (1) the consumer expectations test and (2) the risk-utility test." 390 S.C. at 218, 701 S.E.2d at 13. The court held, however, that "the consumer expectations test . . . is ill-suited in design defect cases," 390 S.C. at 220, 701 S.E.2d at 14, and adopted the risk-utility test as "the exclusive test in a products liability design case." *Id.* The court held that to satisfy the risk-utility test, a plaintiff must meet the "requirement of showing a feasible alternative design." *Id.* The court explained the requirement: "The very nature of feasible alternative design evidence entails the manufacturer's decision to employ one design over another. This weighing of costs and benefits attendant to that decision is the essence of the risk-utility test." 390 S.C. at 223, 701 S.E.2d at 16. Summarizing its holding, the court stated:

¹ Each of these arguments is stated within one of Ford's issues on appeal:

Did the trial court err in submitting the case to the jury and denying Ford's motion for judgment notwithstanding the verdict when, as a matter of law, Ford's design was not defective or unreasonably dangerous because the Estate failed to present expert testimony of either a design flaw beyond mere failure or an alternative feasible design that was crashworthy?

[I]n a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design.

390 S.C. at 225, 701 S.E.2d at 16.

We find the Estate met the requirements of *Branham* by presenting evidence of Ford's own alternative design for a door-latch system, which Ford used in F-150 trucks manufactured before Riley's 1998 model, and which Ford originally incorporated into the design of the 1998 model.

To explain our finding that the Estate met the requirements of *Branham*, we first describe the mechanics of two door-latch systems—the rod-linkage system and the cable-linkage system. Riley's 1998 F-150—which Ford internally called the PN96—contained a rod-linkage door-latch system. According to the evidence presented in this case, a rod-linkage system contains a metal rod that connects the door handle to a latch. When a person pulls the door handle, the rod activates the latch, which causes the door to open. The type of rod-linkage system in Riley's PN96 is a compression rod system, in which the action of pulling the door handle pushes the rod, or "compresses" it, to activate the latch and cause the truck door to open. The Estate presented evidence that when a vehicle containing a compression rod system is involved in a frontal collision such as this one, the force of the collision may cause "foreshortening"—a decrease in the distance between the handle and the latch,² which in turn compresses the rod as though a person pulled the handle. When a certain amount of foreshortening occurs, the rod may activate the latch and allow the door to open without the handle being pulled.

The Estate presented evidence that at the time Ford manufactured the PN96, Ford was also using a different door-latch system in other models—the cable-linkage system. As the Estate's mechanical engineering expert, Andrew Gilberg, explained, "you can't push on a cable and cause the latch to release." For this

² Reading from a Ford document on how to design door-latch systems, a Ford engineer defined foreshortening as "the relative movement between the release handles and the latch due to vehicle crash deformation."

reason, the cable-linkage system prevents the effects of foreshortening during collisions—doors opening without a person pulling the handle. According to Ford witnesses and internal documents, Ford originally designed the PN96 to contain a cable-linkage system.

Gilberg testified the door latch on Riley's PN96 activated during the collision due to foreshortening, which allowed the door to open. According to Ford's own internal documents, the compression rod system in a PN96 allowed the door latch to activate with only 12 millimeters of foreshortening. Gilberg testified he was "100 percent confident that the latch reached the trigger point" and allowed the door to open during the crash. Although Gilberg measured the post-crash foreshortening in Riley's PN96 to be 11.58 millimeters, he explained that the elasticity of the "all steel structure[]" of the truck caused "spring-back" after the collision, which made the post-crash measurement less than what it actually was when the crash occurred.

According to Gilberg's testimony, the cable-linkage system was a safer design and had "[n]o safety risks associated with [it]." Gilberg testified the cable system "was clearly more crashworthy" and prevented "unwanted door opening due to foreshortening" in frontal collisions. Ford's own internal documents established that it knew compression rod systems "have a tendency to unlatch during crash if doors are crushed beyond a certain limit," and cable systems "provide a solution to this problem." In 1989, Ford conducted two frontal crash tests on F-150s that had rod-linkage systems, and the test results indicated that doors opened upon impact. Gilberg testified this occurred due to "compression of the door—the same thing that opened the door in Sheriff Riley's vehicle." Based on these crash test results, the Estate asserted Ford installed a cable system in the 1992-1995 F-series instead of the rod system because the cable system prevented the effects of foreshortening and the resulting "unwanted door opening" in frontal collisions. Ford continued to crash test the F-series trucks once the cable systems were installed, and the results showed no doors opened due to foreshortening.

Despite the safety advantages associated with cable systems, Ford changed its original design for a cable-linkage system in the PN96 and incorporated the compression rod system. Ford asserts it made the change because it discovered water could invade the cable-linkage system and freeze the cable, preventing the door from opening. Ford produced evidence that it recalled the 1992 F-150 series trucks for this reason. Thus, Ford argues that although it used the cable system in the PN96's predecessor models, it was not "feasible" in the PN96 due to the cable freezing issue.

The record does not support Ford's assertion. One of Ford's engineers testified that by 1993, Ford corrected the freezing cable concerns. This is corroborated by a study conducted by Ford in 1994, which sought to determine whether cable systems were "a viable alternative to rod systems." The report generated from the study stated that "freezing cable concerns [have been] corrected." In fact, Ford's engineers advocated for the use of cables once the problem was fixed.

The Estate's primary evidence establishing the reasonableness and feasibility of the cable-linkage system was the fact that Ford designed, manufactured, and sold F-150 trucks with the cable-linkage door-latch system only three model years before Riley's PN96. In addition, the Estate presented extensive evidence concerning Ford's cable-linkage design. According to the report of the 1994 study, the advantages of cables, when compared to rods, included: (1) packaging—"cable systems require less package space"; (2) safety—"cable systems are more robust to crash"; (3) performance—"cable systems provide better performance to the customer"; and (4) manufacturing—"cable systems are easier for assembly plants to handle," "are tolerant to build variations between latch and handle," "reduc[e] cost and reduc[e] operator dependence," and "reduce[] complexity in service." The only disadvantage indicated by the report was that "cable systems are from two to three times as expensive as rods," costing \$9.00 per door instead of \$4.25 per door if Ford used a rod system. A second report Ford produced sometime after 1993, which compared rod and cable systems, concluded cable systems "improved quality," were "easier to install," and were more "robust to door foreshortening." The only disadvantage listed was "higher cost"—"\$0.85/door more than rods."

These reports demonstrate Ford conducted its own risk-utility analysis. Specifically, Ford "consider[ed] . . . the costs, safety and functionality associated with the alternative design," *Branham*, 390 S.C. at 225, 701 S.E.2d at 16, and concluded the cable-linkage system was a feasible, if not superior, alternative design to the compression rod system.

We find the Estate presented ample evidence of a reasonable alternative design. This evidence supports a finding that "the increased costs . . . of altering the design [to incorporate a cable-linkage system] would have been worth the resulting safety benefits," and thus satisfies the risk-utility test. See 390 S.C. at 224, 701 S.E.2d at 16 (explaining the central inquiry of the risk-utility test, quoting David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 Tex. L. Rev. 1661, 1687 (1997))). We find the Estate met the requirements of *Branham*.

However, Ford makes other arguments based on *Branham*, which we address in turn.

First, Ford argues the Estate did not meet the requirements of *Branham* because it failed to prove a specific design flaw in the compression rod system of the PN96. Relying on the *Branham* court's statement that a plaintiff must "point to a design flaw in the product," 390 S.C. at 225, 701 S.E.2d at 16, Ford argues the Estate never identified a defective feature of *this* particular rod system. In support of this argument, Ford asserts it is not enough for the Estate to present evidence showing the compression rod system in the PN96 allowed the door to open with only 12 millimeters of foreshortening and that a different system would have prevented this from occurring. Rather, Ford argues, *Branham* required the Estate to prove how a specific feature of this rod-linkage system allowed the door to open, and then offer a design alternative to that feature.³ Ford argues the Estate cannot meet the requirements of *Branham* by simply proving another door latch system would have prevented the product from being unreasonably dangerous and that Ford could have prevented Riley's death by using the other system.

We find Ford has misinterpreted the statement from *Branham*—that the plaintiff must "point to a design flaw in the product." *Id.* This statement relates to the plaintiff's burden of proving a reasonable alternative design, not the requirement of proving the existence of a design defect,⁴ which the *Branham* court addressed in detail in another section of the opinion. See 390 S.C. at 212-18, 701 S.E.2d at 10-12. The statement merely sets up the requirement of a reasonable alternative

³ Ford argued in its brief that Gilberg "failed to specify the facet of Ford's rod-linkage system that was, in his opinion, a design flaw." At oral argument, Ford stated Gilberg "doesn't explain how we improperly implemented" a rod design, and suggested the Estate could have met the requirement Ford reads into *Branham* by proving "this rod was . . . defectively designed because it was . . . in the wrong place, . . . not the right size," or "manufactured [with] the wrong material."

⁴ A plaintiff must, of course, prove the existence of a design defect. See *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 79, 735 S.E.2d 650, 658 (2012) (reciting the elements of a design-defect products liability claim, including "the injury occurred because the product 'was in a defective condition . . .'" (quoting *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985))). The Estate's evidence proving the door latch system of the PN96 was in a defective condition is addressed in section II.B.

design by noting that a plaintiff must identify the design feature for which an alternative is offered. We find the Estate met the requirements of *Branham* because the Estate (1) "point[ed] to a design flaw in the product"—the vulnerability of the PN96's compression rod system to foreshortening, which allowed the door to open during the collision without the handle being pulled—and (2) "show[ed] how [the cable-linkage system] would have prevented the [PN96] from being unreasonably dangerous." 390 S.C. at 225, 701 S.E.2d at 16.

Second, Ford argues the Estate failed to meet the requirements of *Branham* because it did not offer an expert who would "champion" the cable-linkage system. This argument by Ford is based on Gilberg's testimony that "there is nothing inherently wrong with rods." We find no basis in *Branham*, or in any other authority, for Ford's argument that an expert must "champion" an alternative design.

Finally, Ford claims the Estate did not propose an alternative design that would have prevented the product from being unreasonably dangerous in all foreseeable collisions. It argues Gilberg's analysis of the crashworthiness of the cable system was limited to this particular accident involving Riley because he was "unwilling to say that the [cable-linkage system] as a whole [wa]s a good design for all reasonably foreseeable crashes." However, the law of crashworthiness does not require the Estate to prove its alternative design would have prevented the door from opening in every foreseeable collision. Instead, the law required the Estate to prove (1) the design of the rod system in Riley's PN96 "created an unreasonable risk of injury" that was "readily foreseeable as an incident to the normal and expected use of [the] automobile," *Mickle v. Blackmon*, 252 S.C. 202, 228, 232, 166 S.E.2d, 173, 184, 186 (1969), and (2) the cable system "would have prevented the product from being unreasonably dangerous." *Branham*, 390 S.C. at 225, 701 S.E.2d at 16. We find the Estate met these requirements.

B. Design Defect

Ford argues the Estate did not present sufficient evidence that the door-latch system in Riley's PN96 was defective because the Estate relied on the mere fact that the door opened in the accident as evidence of a defect. See *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 80, 735 S.E.2d 650, 658-59 (2012) (holding a plaintiff cannot rely on "the mere fact [that] a product failed," but "must offer some evidence beyond the product's failure itself"); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1995) (stating "the mere fact that a

product malfunctions does not demonstrate the manufacturer's negligence nor does it establish that the product was defective"). We disagree.

In addition to the evidence discussed in section II.A., Gilberg testified extensively about what constitutes a safe door-latch design and, specifically, the safety of the door-latch design in the PN96. He stated the PN96 "did have a design defect" that caused the door to unlatch in this accident. He went on to testify "why it is that [he] believe[d] Sheriff Riley's F-150 had a design defect." He testified the door of Riley's truck "came open without damage to the latch," which "shouldn't have happened." He explained this was the basis for the design defect because the particular rod-linkage system in Riley's truck allowed the door to unlatch due to a "very small amount of longitudinal crush . . . [of] the door." When asked on cross-examination whether the mere use of the rod-linkage system itself rendered the truck defective, he responded, "No sir. What renders it defective is that it fails without even stressing the latch." Gilberg explained this is because a compression rod-linkage system is "sensitive to longitudinal crush" in that "[i]f the door is crushed longitudinally as little as one inch," the door will open.

Ford relies heavily on *Graves*, but we find that reliance to be misplaced. In *Graves*, the supreme court affirmed the circuit court's exclusion of all the plaintiff's computer experts, 401 S.C. at 78, 735 S.E.2d at 657, leaving the plaintiff with no evidence whatsoever as to how, or even whether, the product malfunctioned. 401 S.C. at 79, 735 S.E.2d at 658. Thus, the plaintiff in *Graves* did not prove a failure, and also did not prove any defect that could have caused a failure. In this case, the failure was that the door opened when no person pulled the handle. The defect that caused the failure was a door-latch system that did not protect against foreshortening, and allowed the door to open when it should not have—with only "a very small amount of longitudinal crush." Through its expert and through Ford's witnesses and documents, the Estate presented extensive evidence of how and why the design of the door-latch system in the PN96 was defective. This case is readily distinguishable from *Graves*.

C. Expert Testimony

Finally, Ford argues "the Estate failed to present expert testimony of either a design flaw beyond mere failure or an alternative feasible design that was crashworthy." Much of the evidence we discussed in sections II.A. and B. came directly from the testimony of the Estate's mechanical engineering expert, Gilberg. We find Gilberg's testimony on the existence of a design defect and a reasonable alternative design required the denial of Ford's motion for JNOV.

III. Ford's Motion for Setoff

Ford also argues the trial court erred in refusing to grant a setoff to account for the \$25,000 Carter paid the Estate to settle the claims against him. *See Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) ("A non-settling defendant is entitled to credit for the amount paid by another defendant who settle[d] for the same cause of action."). The Estate in its brief "acknowledges that Ford is entitled to a \$5,000 setoff representing that portion of the prior settlement allocated to wrongful death," and thus concedes the trial court erred in part by refusing to grant any setoff. The Estate argues, however, that Ford is not entitled to any of the \$20,000 the Estate and Carter allocated to the survival claim because there was "ample evidence" showing Riley suffered conscious pain and suffering. *See Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct. App. 1991) (stating a survival action exists when "there is any evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering"). The Estate essentially argues the trial court should have accepted the allocation of settlement funds it agreed upon with Carter, despite the fact Ford did not participate in those negotiations. Ford argues, on the other hand, it is entitled to a credit for the entire \$25,000 because of "an undisputed lack of evidence" of conscious pain and suffering.

We disagree with both the Estate and Ford. We find there is some evidence that Riley suffered consciously, and hold both parties were entitled to have the trial court analyze the proper allocation of the settlement and make findings of fact on the record as to whether, and if so how, the remedy of setoff should be applied to the facts of this case. Because the trial court's form order denying setoff reflects no analysis, and because the Estate concedes Ford is entitled to at least \$5,000, we reverse the trial court's decision to deny any setoff. Because we find the record is sufficient to allow this court to engage in the required analysis, we decide the question without remand. *See 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).

In this crashworthiness action, the Estate has no claim against Ford for Riley's injuries resulting solely from the initial impact with Carter. Rather, the Estate's claim against Ford is limited to the enhanced injuries—in this case, Riley's death—that resulted from the alleged negligent design of the door-latch system that allowed Riley to be ejected. *See Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439,

452 (4th Cir. 2001) (applying South Carolina law) ("Under the crashworthiness doctrine, liability is imposed not for defects that cause collisions but for defects that cause injuries after collisions occur."). Thus, the Estate's theory against Ford necessarily depends on Riley being alive after the initial collision because if Riley died before he was ejected, Ford's negligent design of the door-latch system could not have proximately caused his death. The jury's verdict against Ford, therefore, requires a finding that Riley was alive after the collision with Carter. Additionally, the first witness to arrive at the scene of the accident testified that when he looked for the ejected driver of the pickup, he "heard something in the bushes," saw Riley on the ground, and heard "a gasping sound." Though it is minimal, we find the existence of some evidence to support a survival action against Carter.⁵

It makes sense, therefore, that the Estate and Carter allocated some portion of the settlement to the Estate's survival claim, particularly when Carter alone is liable for any pain and suffering Riley endured consciously before he was ejected from the truck. However, the minimal evidence of survival damages in this record does not support an allocation of eighty-percent of the settlement to the survival claim. This is particularly true because Carter is jointly liable for all of the wrongful death damages. Moreover, Ford was not a party to the settlement negotiations between the Estate and Carter, and thus is not bound by their agreement. *See Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 426 (Ct. App. 2000) (holding a defendant who is "not a party to the settlement . . . is not bound by its terms" when requesting setoff).

The Estate would have us focus only on the amount of money Carter paid to settle the survival claim, and not on the percentage of the settlement allocated to one claim or the other. Doing so, the Estate argues, requires the conclusion that the \$20,000 allocated to the survival action in its settlement with Carter was reasonable. We concede that \$20,000 is not an unreasonable amount for Carter to pay to settle the survival claim on the facts of this case. We disagree, however, with the premise of the Estate's argument because allocating eighty-percent of the settlement to survival is not reasonable. We hold that in the context of a non-settling defendant's claim for setoff, the court should examine whether the percentages allocated to one claim or the other by the settling parties are reasonable. *See id.* If the allocation is not reasonable, the court may reallocate the funds.

⁵ Funeral expenses are also recoverable in a survival action. *See* S.C. Code Ann. § 15-5-100 (2005) ("Damages recoverable under . . . [the survival statute] . . . may include reasonable funeral expenses . . .").

Rutland supports a fair reallocation of the settlement by this court. In *Rutland*, the decedent died in a car accident, and the personal representative settled with the at-fault driver's insurance company and the automobile manufacturer for a total settlement of \$305,000. 400 S.C. at 212, 734 S.E.2d at 143. The settling parties agreed to allocate \$138,000 to a survival claim and \$167,000 to wrongful death. *Id.* The plaintiff proceeded to trial against a third defendant only on the wrongful death claim. 400 S.C. at 213, 734 S.E.2d at 143. After the jury awarded the plaintiff \$300,000 in actual damages, the trial court reallocated the entire amount of the settlement exclusively to wrongful death. *Id.* The supreme court found "no evidence of conscious pain or suffering," 400 S.C. at 214, 734 S.E.2d at 144, and affirmed the trial court's reallocation of the settlement. 400 S.C. at 217, 734 S.E.2d at 146. The court's finding of "no evidence" of pain and suffering meant there was no factual support for the agreed-upon allocation.

Although our finding of some evidence of conscious pain and suffering makes this case different from *Rutland*, we believe the reasoning of *Rutland* permits a reallocation of the settlement proceeds in this case. *Rutland* is based in part on the policy that "[c]ompensatory damages are intended to make the plaintiff whole." 400 S.C. at 217, 734 S.E.2d at 146. When an agreed-upon allocation of settlement proceeds is not reasonable under the evidence, that policy is not advanced because of the possibility of double recovery. *See id.*; *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 406 (Ct. App. 1998) (stating "[t]he reason for allowing [setoff] is to prevent an injured person from obtaining a second recovery" (citation omitted)). Thus, when an agreed-upon allocation of settlement proceeds is not reasonably based on the evidence and does not fairly advance the policy of preventing double-recovery, a non-settling defendant who is entitled to a setoff but was not involved in the settlement negotiation is entitled to have the court consider reallocating the proceeds.⁶

The minimal evidence of conscious pain and suffering in this case weighs in favor of allocating the majority of the proceeds to the wrongful death claim. However,

⁶ We use permissive language such as "may," "permit," and "consider reallocating" because setoff is an equitable remedy a court is not required to grant. *See Church*, 391 S.C. at 342, 705 S.E.2d at 485 (stating setoff is equitable in nature); *Siau v. Kassel*, 369 S.C. 631, 640, 632 S.E.2d 888, 893 (Ct. App. 2006), *overruled on other grounds by Buffington v. T.O.E. Enters.*, 383 S.C. 388, 680 S.E.2d 289 (2009) (providing that all equitable remedies are "granted as a matter of sound judicial discretion, and not as a matter of legal right" (citation omitted)).

the fact that Carter alone is liable for the pain and suffering Riley endured before being ejected weighs in favor of some portion being allocated to the survival claim. Further, settling parties must support the settlement agreement with consideration for the release of both claims. *See Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) (stating "settlement agreements are viewed as contracts"); *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) ("The necessary elements of a contract are an offer, acceptance, and valuable *consideration*." (citation omitted) (emphasis added)). This also weighs in favor of some portion being allocated to the survival claim. Considering the entire record before us, we find that a fair allocation of the Estate's settlement with Carter is eighty-percent to the wrongful death claim and twenty-percent to the survival action. Thus, we find Ford is entitled to a \$20,000 setoff from the jury's verdict.

IV. The Estate's Motion for New Trial *Nisi Additur*

Finally, Ford argues the trial court erred by increasing the jury verdict from \$300,000 to \$900,000. We agree.

We begin our analysis of this issue by focusing on both parties' right to a trial by jury. Article I, section 14 of the South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate." The right to trial by jury is "guaranteed in every case,"⁷ and includes the right to have the jury determine the amount of damages. *See Hatchell v. McCracken*, 243 S.C. 45, 51, 132 S.E.2d 7, 10 (1963) (stating "[t]here [is] no question as to the legal right . . . to have the amount of damages . . . determined by a jury").

In potential conflict with this constitutional right, a trial court has the power to grant a motion for new trial *nisi additur* when the court determines the jury's verdict is inadequate in light of the evidence presented. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). To balance "the wide discretion given to a trial judge in ruling on a new trial [*nisi additur*] motion," *Luchok v. Vena*, 391 S.C. 262, 264, 705 S.E.2d 71, 72 (Ct. App. 2010), against a litigant's constitutional right to a trial by jury as to the amount of damages, our courts give "substantial deference . . . to a jury's determination of damages," *id.*, and we require trial courts

⁷ *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868.").

to "offer compelling reasons for invading the jury's province." *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003) (citing *Bailey*, 318 S.C. at 14, 455 S.E.2d at 691).⁸

Thus, our analysis of the decision to grant *additur* must be made in deference to the jury's verdict, and turns on whether the trial court gave compelling reasons for invading the province of the jury. We agree with Ford that the court did not offer compelling reasons.

The trial court found it was "compelled to grant [*additur*] because every element of wrongful death damages was proven by the [Estate] and the \$300,000 verdict d[id] not reflect the evidence on these issues." The court found the Estate presented "undisputed, uncontroverted evidence" of economic loss in the amount of \$228,605. The Estate also presented evidence of a funeral bill for \$10,196, which amounts to a total claim of economic loss of \$238,801. As to noneconomic damages, the court found the Estate's "uncontested" evidence showed "the beneficiaries . . . suffered each of the compensable elements of [noneconomic] loss," and noted that these damages "were not only established, but shown to be significant through uncontested, emotionally compelling testimony." See *Scott v. Porter*, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (listing the same elements of recoverable damages as are listed in the court's order). The court went on to summarize the testimony of Riley's family and friends, which the court found "showed that this family of beneficiaries, perhaps more than most wrongful death beneficiaries, suffered great loss" and "left no question as to the grief, emotional turmoil, and loss suffered." The court then concluded, "For all of the compelling reasons listed above, it is abundantly clear that the verdict in this case was inadequate, in light of the evidence present[ed] at trial, and a granting of *nisi additur* is appropriate."

By subtracting \$238,801—the maximum amount of economic loss suffered by the Estate⁹—from the jury's verdict of \$300,000, we can determine the jury awarded at

⁸ See also *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); *Jones v. Ingles Supermarkets, Inc.*, 293 S.C. 490, 493, 361 S.E.2d 775, 777 (Ct. App. 1987), *overruled on other grounds by O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

⁹ Ford does not concede these damages. However, Ford did not actively contest any element of the Estate's claim of economic loss, choosing instead to focus its efforts on the issue of liability. Many of the elements of the Estate's economic loss

least \$61,199 in noneconomic damages. In essence, the trial court ruled that \$61,199 in noneconomic damages was not enough. In other words, the jury awarded noneconomic damages, but the trial court disagreed as to whether the amount was sufficient. We find this is not a compelling reason to invade the province of the jury.¹⁰ See *Krepps v. Ausen*, 324 S.C. 597, 608, 479 S.E.2d 290, 295 (Ct. App. 1996) (stating "the trial court may not impose its will on a party by substituting its judgment for that of the jury").

As a general rule, the "determination of reasonable compensation for non[economic] damages . . . is . . . left to the jury's discretion." *Scott*, 340 S.C. at 169, 530 S.E.2d at 395. The assessment of noneconomic damages "turns on the facts of each case," *id.*, and the value of these damages "cannot be determined by any fixed yardstick." *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 310, 578 S.E.2d 16, 26 (Ct. App. 2002) (citation omitted). Our civil justice system is built on the foundation that such determinations are to be made by juries, not judges. See generally 2 J. Kendall Few, *In Defense of Trial by Jury* 277-87 (1993) (stating,

are in fact uncontested, such as Sheriff Riley's lost salary for the remainder of his existing term of office, and the funeral bill. However, the jury could have discounted other elements even though Ford did not actively challenge their values. For example, the Estate's claim for economic loss included lost salary after the Sheriff's reelection, and its expert economist testified the Estate lost household services in the approximate amount of \$57,000. As Ford pointed out at oral argument, no elected official's reelection is certain, and no witness testified the expenses for lost household services were actually incurred. For these reasons, the jury could have awarded less than the amounts claimed for those items.

¹⁰ This case is different from those in which our court has affirmed the granting of *additur* when the jury altogether failed to award noneconomic damages. See, e.g., *Waring v. Johnson*, 341 S.C. 248, 255, 261, 533 S.E.2d 906, 910, 913 (Ct. App. 2000) (finding "[t]he jury failed to make any award for other damages such as pain and suffering," which amounted to "compelling reasons . . . justifying the grant of the *nisi additur*"); *Williams v. Robertson Gilchrist Constr. Co.*, 301 S.C. 153, 155-56, 390 S.E.2d 483, 484-85 (Ct. App. 1990), *overruled on other grounds by O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) (finding the trial court's reason for granting *additur*—the jury disregarded the testimony about the funeral bill and noneconomic losses—was compelling); *Jones*, 293 S.C. at 493-94, 361 S.E.2d at 777 (affirming the granting of *additur* where the jury's award of actual damages equaled the exact amount of the plaintiff's economic loss, but no damages for proven noneconomic loss).

for example, "the judgment of twelve impartial [jurors] of the average of the community, applying their separate experiences of life to the solution of such doubts as may arise, is more likely to be wise and safe than the conclusion of any single judge" (quoting U.S. District Judge William H. Brawley of South Carolina in *Travelers' Ins. Co. v. Selden*, 78 F. 285, 287 (4th Cir. 1897)) and "what individual can so well assess the amount of damages which a plaintiff ought to recover for any injury he has received [than] . . . an intelligent jury?" (quoting Henry Peter Brougham's address to the English House of Commons (Feb. 7, 1828))).

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*. Therefore, we reverse the award of *additur* and reinstate the jury's verdict of \$300,000.

V. Conclusion

For the reasons explained above, we **AFFIRM** the trial court's decision to deny Ford's motion for JNOV, **REVERSE** the decision to deny setoff, and **REVERSE** the decision to grant a new trial *nisi additur*. We reinstate the jury's verdict of \$300,000 and award a setoff against the verdict in the amount of \$20,000.

PIEPER and KONDUROS, JJ., concur.

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.

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 reasonably 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. at 432, 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 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.

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.

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 remittitur*. 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.

...

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*.

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

requirement³, 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

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*

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.

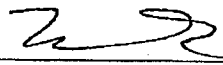
Likewise, as to the equitable setoff ruling, the Opinion improperly diminishes the inherent power of the trial court. The Opinion charts new territory of equitably reallocating a settlement that by definition under our precedent is NOT a sham.

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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ATTORNEYS FOR THE RESPONDENT

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.

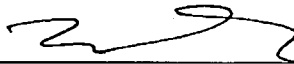
Ford Motor Company,..... Appellant.

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.

**PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P. A.**

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March 7, 2014
Ridgeland, South Carolina

ATTORNEYS FOR RESPONDENT

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.

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:

The Honorable Jenny Abbott Kitchings
Clerk of Court
P.O. Box 11629
Columbia, SC 29211

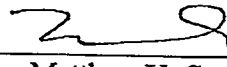
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March 7, 2014
Ridgeland, South Carolina

ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the 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 PETITION FOR REHEARING AND
SUPPORTING MEMORANDUM

Appellant Ford Motor Company ("Ford") hereby petitions the Court for rehearing, pursuant to South Carolina Appellate Court Rule 221. The opinion of the Court (Opinion 5195) was filed February 5, 2014. That opinion: (1) affirmed the trial court's denial of Ford's motion for judgment notwithstanding the verdict (JNOV); (2) reversed the grant of the Estate's motion for new trial *nisi additur* and reinstated the jury's verdict of \$300,000; and (3) reversed the denial of Ford's motion for setoff and awarded a setoff against the verdict in the amount of \$20,000. Ford petitions this Court for rehearing on the affirmance of the trial court's denial of Ford's JNOV motion and the award of a \$20,000 setoff against the verdict.

ARGUMENT

Ford seeks rehearing because this Court overlooked and misconstrued both the record and controlling law.

I. The Court's Opinion Misapprehends That the Estate Offered "Some Evidence Beyond the Product's Failure Itself" as Evidence of a Defect.

First, the Court's opinion misapprehends that the Estate offered "some evidence beyond the product's failure itself" as evidence of a defect. (Op. pp. 8-9). The Court's analysis gives credence to the circular logic of Estate expert Andrew Gilberg, who concluded that Ford's rod linkage system was defective because "it fails without even stressing the latch." (Op. p. 9). This opinion amounts to pointing to the failure, and then stating that the design was bad because it should not allow the failure. The opinion was not that Ford's design used an improper material, incorporated a rod of the wrong size, or placed the rod in the wrong position. No identifiable reason was provided that would render Ford's design defective and differentiate it from the nine out of every ten vehicles on the road at that time that also employed rod-linkage systems, including vehicles manufactured by Ford's competitors.¹ Gilberg admitted that he knew of no statistical studies showing that Ford PN96 doors are more likely to come open in collisions than doors on any other vehicle, (R. p. 283, lines 20-25), and no evidence was presented to show that the PN96 model had an unreasonably higher rate of collision door openings or injuries when compared with other vehicles.

Instead, Gilberg relied on failure: Ford's design was defective because the latch activated in Riley's truck and the latch system did not protect against that failure. (R. p.

¹ In fact, Gilberg *endorsed* Ford's use of a compression rod rather than the tension rod used by most other manufacturers at the time, which he thought was an improvement, not a defect. (R. p. 269, lines 15-22; p. 285, line 25-p. 286, line 7).

181, lines 6-14 (“I believe that the door in Riley’s truck was defective. I believe it came open without damage to the latch. That shouldn’t have happened.”); R. p. 275, lines 7-8 (It “fail[ed] without even stressing [it].”). The Court’s opinion echoes Gilberg’s error: “The defect that caused the failure was a door-latch system *that did not protect* against foreshortening, and *allowed the door to open* when it should not have” (Op. p. 9) (emphasis added). What is missing is evidence of how this particular rod system was not adequately protected from foreshortening.

Whether couched as the “capacity to fail,” a “sensitivity to crush,” or the “failure to protect,” it is just failure by another name. “[T]he mere fact that a product malfunctions does not . . . establish that the product was defective.” *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1995). “South Carolina does not follow the doctrine of *res ipsa loquitur*,” and the fact that an accident occurred is not enough to establish a negligence products liability claim. *Watson v. Ford Motor Co.*, 389 S.C. 434, 452-53, 699 S.E.2d 169, 179 (2010). The danger of equivocating failure with a defect is clear: no identifiable design flaw sets apart Ford’s rod-linkage design from the rod-linkage design used in 90% of cars on the road at that time.

The Estate’s own expert admitted that there is “nothing inherently wrong with rods,” and he refused to vilify the rod-linkage design. (R. p. 276, line 14). Yet, the Court’s opinion does exactly that: “[t]he defect . . . was a door-latch system that . . . allowed the door to open when it should not have” (Op. p. 9). This is the same tautological loop in which Gilberg engaged: the door opened because of a defective latch design, and the defective design is the latch’s ability to fail. (R. p. 250, line 22-p. 251, line 5) (“[A] small amount of longitudinal crush endwise in the door caused it to come open.”). The resulting inconsistency of this approach is apparent in the Court’s opinion.

The Court held that the use of “a compression rod-linkage system . . . ‘sensitive to longitudinal crush’” is a design defect *immediately after acknowledging* Gilberg’s concession that “the mere use of the rod-linkage system itself” is not a design defect. (Op. p. 9).

The Court also misapprehends the impact of *Graves* in this case. Contrary to the Court’s suggestion, *Graves* is not “readily distinguishable.” (Op. p. 9). In *Graves*, exclusion of the plaintiffs’ experts left them with only lay testimony of the product’s failure, while in this case the Estate has offered expert testimony of the product’s failure. This is a distinction without a difference because under *no circumstances* is evidence of failure – whether from a lay witness or an expert – enough to satisfy the required showing that the product is defective:

It is well-established that one cannot draw an inference of a defect from the mere fact a product failed. *Survillas Homeowners Ass’n v. Square D Co.*, 301 S.C. 330, 333, 391 S.E.2d 868, 870 (Ct.App.1990). Accordingly, the plaintiff must offer some evidence beyond the product’s failure itself to prove that it is unreasonably dangerous. *Thus, while the Graves do have witnesses who testified that the alarm did not sound, that alone is not sufficient.*

...

[T]he Graves are still left with no expert opinions regarding any defects in the monitor.

Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 80-81, 735 S.E.2d 650, 658-59 (2012), *reh’g denied* (Dec. 12, 2012) (emphasis added). The Court’s opinion in this case overlooks this language by suggesting that exclusion of the computer experts in *Graves* “[le]ft the plaintiff with no evidence whatsoever as to how, or even whether, the product malfunctioned” and thus no proof of “failure.” (Op. p. 9). *Graves* makes clear that the

issue was not that plaintiffs lacked proof of failure, but rather that *mere* proof of failure was insufficient to meet their burden.

For these reasons, and for the reasons set forth in Ford's appellate briefs on this point, rehearing is warranted. The Court's conclusion that the defect is a "door-latch system that did not protect against foreshortening" runs afoul of well-established South Carolina law requiring a plaintiff to "offer some evidence beyond the product's failure itself to prove that it is unreasonably dangerous." *Graves*, 401 S.C. at 80, 735 S.E.2d at 659. The Court's opinion only perpetuates the Estate's legally insufficient argument that susceptibility to failure evidences a design defect.

II. The Court's Opinion Overlooks the Estate's Inability to Show How the Cable Linkage Design Would Have Prevented the Product from Being Unreasonably Dangerous.

The Court's parsing out of the Estate's burden to identify a design "flaw" (also referred to as a design "feature") as distinct from the Estate's ultimate burden to show a design "defect" is a semantic exercise that distorts the analysis outlined in *Branham* and echoed in *Graves*. (See Op. pp. 7-8) ("[The requirement] that the plaintiff must 'point to a design flaw in the product' . . . relates to the plaintiff's burden of proving a reasonable alternative design, not the requirement of proving the existence of a design defect."). The South Carolina Supreme Court has pronounced that the "only way" for the Estate to prove that injury resulted from an unreasonably dangerous, defective product is to "point to a design flaw" and then "show how [its] alternative design would have prevented the product from being unreasonably dangerous." *Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010). The defect and the flaw are inextricably intertwined, as the Estate always bears the burden to show that Ford's product was "in a defective condition unreasonably dangerous to the user." *Graves*, 401 S.C. at 79, 735 S.E.2d at

658. "Academically, it may be argued that all products are defective because they can be made more safe. However, it does not automatically follow that the products are deemed 'unreasonably dangerous.'" *Claytor v. General Motors Corp.*, 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982).

The analysis centers on whether "omission of the alternative design renders the product not reasonably safe." *Branham*, 390 S.C. at 224, 701 S.E.2d at 16 (quoting Restatement (Third) of Torts: Products Liability § 2(b) (1998)). Whether referred to as a flaw, a feature, or a defect, the law is clear: it is not enough for the Estate to point to a failure in Riley's vehicle and then point to an alternative design that would have prevented that particular failure. Such a myopic view overlooks *Branham's* mandate that the omission of the alternative design must not only prevent the failure, but also render the product *not reasonably safe*. Indeed, in *Graves*, the Court noted that the plaintiff presented evidence of an alternative reasonable design, 401 S.C. at 79 n.11, 735 S.E.2d at 658 n. 11, but still found that: "Without the testimony of their experts . . . the Graves have no direct evidence of whether the [product] was unreasonably dangerous because there is no identification of a specific design flaw." *Graves*, 401 S.C. at 79, 735 S.E.2d at 658. When a specific design flaw is not identified first and the plaintiff is permitted to point only to a product's susceptibility to failure, then the requirement of an alternative design exists in a vacuum.

That is exactly what occurred here. The Estate pointed to Ford's use of the cable linkage system as an "alternative design" even though its own expert refused to agree that the cable system would have prevented the product from being unreasonably dangerous. Gilbert's attention was fixed on the failure, and he would only opine that the cable system would have prevented the failure *in this crash*:

Q. Alright, sir. We have talked about this 1996 door from Ford with the [cable linkage] door latch system. Do you have an opinion that that door latch system and door is well designed and non-defective?

A. No. No, I don't do that, but I will say that had that latch system been in Sheriff Riley's door it wouldn't have come open in this collision.

Q. In this one collision?

A. Yes.

Q. But you're unwilling to say that the design as a whole is a good design for all reasonably foreseeable crashes?

A. I am unwilling to say that. That's correct, yea.

(R. p. 273, lines 13-25). Gilberg continued throughout his testimony to emphasize that the cable system would have prevented the door from opening "in this crash," (e.g., R. p. 266, line 25-p. 267, line 3), and he recognized that cable-actuated systems are not impervious to failure either, as "every engineering component has failure modes." (R. p. 274, lines 7-16). The Court's rendition of Gilberg's testimony as an overwhelming endorsement of the "safer" and "clearly more crashworthy" cable system (Op. p. 5) overlooks Gilberg's refusal to endorse the cable system, or any other system for that matter, as an alternative feasible design for the door latch system employed. Gilberg's refusal to testify the cable system was reasonably safe for all foreseeable crashes means the vehicle would remain unreasonably dangerous, even with the cable-linkage design. Thus, the Court incorrectly concluded the evidence was sufficient by holding "the law of crashworthiness does not require the Estate to prove its alternative design would have prevented the door from opening in *every* foreseeable collision." (*Id.* p. 8) (emphasis in original).

The sharp contrast between Gilberg's testimony and the fastidious testimony of the plaintiff's expert in *Branham* illustrates the point. In *Branham*, the plaintiff's design expert presented the MacPherson suspension system as the design that Ford should have implemented over the (allegedly defective) Twin I-Beam; he believed that the MacPherson system addressed identified design flaws in the Twin I-Beam by lowering the center of gravity and raising the stability index, resulting in a lower rollover propensity. *Branham*, 390 S.C. at 213-17, 701 S.E.2d at 10-12. Gilberg, on the other hand, neither criticized the selection of the rod system nor recommended the cable system as an alternative feasible design. Gilberg never used the characteristics of the cable system to pinpoint the defect in this rod system nor did he use the cable system to explain why this rod system was defective. Instead, Gilberg relied on his conclusion for his analysis: the cable system would not have allowed the latch to open in this particular accident and therefore the rod system was defective because the latch failed.

Despite testimony from the Estate's own expert that there was nothing "inherently wrong" with Ford's decision to use rods, the Court permitted the Estate to "m[e]et the requirements of *Branham* by presenting evidence of Ford's own alternative design for a door-latch system." (Op. p. 4). This decision impermissibly relieved the Estate of its burden to show not only that it was possible to use the cable-linkage system, but also that its use addressed a design flaw and prevented the product from being unreasonably dangerous. Numerous factors influence a manufacturer's decision to alter a design, and a change does not signal that one design is safer or even more desirable than the other. If that were the case, every design change would render the previous generation defective and unreasonably dangerous. Gilberg found nothing inherently wrong with the use of rods in a latch system, and it was error for the Court to allow the Estate to rely on Ford's

own use of the cable-linkage system to meet its burdens under *Branham*. For this additional reason, and for the reasons set forth in Ford's appellate briefs on this point, rehearing is warranted.

III. The Court's Opinion Misapprehends That the Record Contains Evidence of Conscious Pain and Suffering under the Threshold Required by South Carolina Law.

Finally, the Court's opinion misapprehends the threshold for sufficient 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 preceding case law. Although the facts of this case parallel the facts in *Rutland*, they inexplicably yielded a different result.

It is clear that the quality of the proffered "evidence" of conscious pain and suffering in this case was comparable to the evidence in *Rutland*—a disputed eyewitness account of a "gasping sound" in the vicinity of Riley's body in this case, (R. p. 112, lines 11-22; R. Appx. p. 1531, lines 11-22), and a disputed bystander account in *Rutland* that the decedent had a pulse, *Rutland*, 400 S.C. at 215, 734 S.E.2d at 145. After considering this evidence in *Rutland*, the Supreme Court pronounced that "even assuming [the decedent] had a pulse, that fact alone is not evidence of conscious pain and suffering." *Id.* Similarly, in *Camp v. Petroleum Carrier Corporation*, 204 S.C. 133, 28 S.E.2d 683 (1944), the Supreme Court held that "no evidence from which a reasonable inference can be drawn that [the decedent] was conscious of any pain and suffering in the interval between his injury and death" even though "[a] witness . . . testified that while standing on the outside of the wrecked automobile helping [another passenger] out of the car, he heard a man groaning on the inside of the car" *Camp*, 204 S.C. 133, 28 S.E.2d at

685. Despite the parameters set by *Rutland* and *Camp*, the Court held in this case that “a gasping sound . . . [is] some evidence to support a survival action.” (Op. p. 11).²

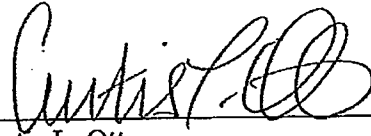
That finding misapprehended the threshold required and cannot be reconciled with *Rutland* and *Camp*. The incongruity of this result is even more apparent because the Estate had the chance in this case to present its best evidence of conscious pain and suffering to the jury before the survival claim was withdrawn, (R. p. 342, line 23-p. 343, line 2), unlike in *Rutland* where a survival claim was never filed. *Rutland*, 400 S.C. at 212-13, 734 S.E.2d at 143. Despite every opportunity to set forth its best evidence, the Estate’s proffer of conscious pain and suffering still fell short of the threshold required by South Carolina law.

The Court’s misapplication of law to fact resulted in an erroneous finding that the Estate presented any evidence of conscious pain and suffering. Because the evidence was insufficient under South Carolina law to support a survival claim, the Court erred by allocating settlement proceeds *in any amount* to that claim.

CONCLUSION

For all of the reasons set forth herein, and for the reasons set forth in its appellate briefs, Appellant Ford Motor Company respectfully submits that it is entitled to rehearing and reconsideration of the Court’s opinion and so moves.

² The circumstances of the accident in *Rutland*—the decedent “was killed when the car in which she was riding rolled over and fell on top of her after she was partially ejected,” *Rutland*, 400 S.C. at 211, 734 S.E.2d at 143—are also analogous to the rollover and ejection in this case. Although the Court in *Rutland* determined that the decedent “would have had little if any time to contemplate her demise” under these circumstances, *Rutland*, 400 S.C. at 211, 215, 734 S.E.2d at 143, 145, the Court presumed in this case that Riley had sufficient time because “the Estate’s theory against Ford necessarily depends on Riley being alive after the initial collision . . .” (Op. p. 11).



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February 20, 2014



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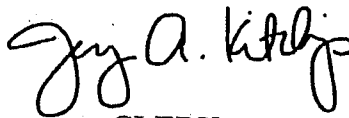
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Re: Riley, Laura v. Ford Motor Company
Appellate Case No. 2012-207489

Dear Counsel:

Enclosed is the decision of the Court. Pursuant to Rule 219(b), SCACR, the suggestion for rehearing en banc has been transmitted to all judges of the court. The court will advise the parties if the suggestion is rejected, or if a vote is taken, the result of the vote.

Very truly yours,


CLERK

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).

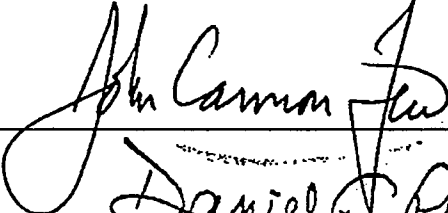
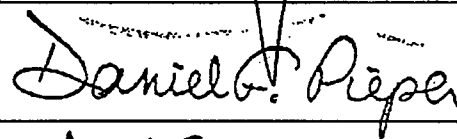
Furthermore, we find no basis for the Estate's suggestion that "de novo review of settlements between agreeing parties" creates a disincentive for parties to reach

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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The South Carolina Court of Appeals

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Re: Riley, Laura v. Ford Motor Company
Appellate Case No. 2012-207489

Dear Counsel:

Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen

DEPUTY CLERK