

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 28 2014

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

S.C. Supreme Court

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

Appellate Case No.: 2012-207489

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

v.

Ford Motor Company,.....Respondent.

BRIEF OF PETITIONER

Ronnie L. Crosby
PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.
101 Mulberry Street, East
Post Office Box 457
Hampton, South Carolina 29924
(803) 943-2111

Daniel E. Henderson
Matthew V. Creech
PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.
690 N. Green Street
Post Office Box 2500
Ridgeland, South Carolina 29936
(843) 726-6131

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	3
ARGUMENT.....	6
I. The Court of Appeals Breaks with Binding Precedent Concerning New Trial <i>Nisi Additur</i> and Instead Creates an Inappropriate Bright Line Test without Precedential Support Though the Trial Court’s Underlying Order Granting New Trial <i>Nisi Additur</i> Comports with Existing Law and Was Within the Trial Court’s Discretion.....	6
A. The Trial Court’s Order Granting New Trial <i>Nisi Additur</i> and Tripling the Jury’s Award Was Proper Under the Court’s Discretion and Was Supported by Compelling Reasons.	9
i. The Trial Judge, Familiar with and Informed by the Evidence at Trial, Provided Compelling Reasons for Tripling the Jury’s Grossly Inadequate Award and the Exercise of Discretion Should Not Be Disturbed on Appeal.....	10
ii. The Trial Court’s Order Granting <i>Nisi Additur</i> is Appropriate and Correct Under Existing Standards.....	15
iii. South Carolina Precedent Addressing <i>Additur</i> Supports the Grant of <i>Additur</i> in this Case.....	18
B. The Wide Discretion of the Trial Court to Grant <i>Additur</i> and the Evolution of, and Lack of Guidance as to, the “Compelling Reasons” Analysis.....	22
II. The Court of Appeals Erred in Creating a New Standard of Review for Setoff and Equitable Reallocation that Conflicts with Controlling Case Law Regarding the Appropriate Standard of Review.....	27
A. Though the Court Correctly Found Evidence to Support the Allocation of Settlement Proceeds to a Survival Cause of Action, the Court of Appeals Erroneously Altered the Existing Scope of Review by Conducting a <i>De Novo</i> Review and Reallocating a Non-Fraudulent, Non-Sham Settlement Allocation.....	32

CONCLUSION..... 37

TABLE OF AUTHORITIES

CASES

<i>Albertini v. Veal</i> , 292 S.C. 561, 357 S.E.2d 716 (Ct. App. 1987).....	26
<i>Bailey v. Peacock</i> , 318 S.C. 13, 455 S.E.2d 690 (1995).....	23
<i>Chapman v. Upstate RV & Marine</i> , 610 S.E.2d 852 (Ct. App. 2005).....	23
<i>Chiappetta v. Orr</i> , 293 S.C. 250, 359 S.E.2d 530 (Ct. App. 1987).....	25
<i>Croft v. Hall</i> , 208 S.C. 187, 37 S.E.2d 537 (1946).....	30,31
<i>Estes v. Gray</i> , 319 S.C. 551, 462 S.E.2d 561 (Ct. App. 1995).....	25
<i>Folkens v. Hunt</i> , 300 S.C. 251, 387 S.E.2d 265 (1990).....	10
<i>Garner v. Houck</i> , 312 S.C. 481, 435 S.E.2d 847 (1993).....	17
<i>Graham v. Whitaker</i> , 282 S.C. 393, 321 S.E.2d 40 (1984).....	25
<i>Green v. Fritz</i> , 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003).....	18,19,20
<i>Hancock v. Mid-South Management Co., Inc.</i> , 381 S.C. 326, 673 S.E.2d 801 (2008).....	30
<i>Hoskins v. Fairfield Elec. Co-op.</i> , 321 S.E.2d 185 (Ct. App. 1984).....	24,25
<i>Howard v. Roberson</i> , 376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007).....	23
<i>Kalchthaler v. Workman</i> , 316 S.C. 499, 450 S.E.2d 621 (Ct. App. 1994).....	25
<i>Krepps v. Ausen</i> ,	

324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996).....	23,25
<i>Luchok v. Vena,</i> 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010).....	18,19,20,23
<i>Mack v. South Bound R. Co.,</i> 52 S.C. 323, 29 S.E. 905 (1898).....	34
<i>McCourt by & Through McCourt v. Abernathy,</i> 318 S.C. 31, 457 S.E.2d 603 (1995).....	23
<i>Mishoe v. Atlantic C.L.R. Co.,</i> 186 S.C. 402, 197 S.E. 97 (1973).....	17
<i>Norton v. Norfolk S. Ry. Co.,</i> 350 S.C. 473, 567 S.E.2d 851 (2002).....	10
<i>O'Neal v. Bowles,</i> 314 S.C. 525, 431 S.E.2d 555 (1993).....	20,21
<i>Patterson v. Reid,</i> 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995).....	21,22,23,25
<i>Proctor v. Dep't of Health & Envtl. Control,</i> 368 S.C. 279, 628 S.E.2d 496 (Ct. App.2006).....	26,36
<i>Rush v. Blanchard,</i> 310 S.C. 375, 426 S.E.2d 802 (1993).....	23
<i>Scott v. Porter,</i> 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000).....	34
<i>Smalls v. S.C. Department of Education,</i> 339 S.C. 208, 528 S.E.2d 628 (Ct. App. 2000).....	28,30
<i>Stroud v. Stroud,</i> 299 S.C. 394, 385 S.E.2d 205 (Ct. App. 1989).....	25
<i>Thomas v. Seay</i> 249 S.C. 455, 369 S.E.2d 660 (1988).....	25,26
<i>Toole v. Toole,</i> 260 S.C. 235, 195 S.E.2d 389 (1973).....	8,22,27
<i>Vaughn v. City of Anderson,</i> 300 S.C. 55, 386 S.E.2d 287 (Ct. App. 1989).....	28

Vereen v. Liberty Life Ins. Co.,
306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991).....30,31

Vinson v. Hartley,
324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996).....25

Ward v. Epting,
290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986).....28,29

Waring v. Johnson,
341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000).....24

Welch v. Epstein,
342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).....28,29,30

OTHER AUTHORITIES

11 S.C. Jur. Damages § 24.....17

STATEMENT OF THE ISSUES ON APPEAL

1. WHETHER THE COURT OF APPEALS ERRED BY EQUITABLY REALLOCATING THE ESTATE'S SETTLEMENT WITH CARTER WHEN EVIDENCE EXISTED THAT WAS SUFFICIENT TO SUPPORT A SURVIVAL CAUSE OF ACTION UNDERLYING THE ALLOCATION?
2. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S GRANT OF NEW TRIAL *NISI ADDITUR* WHEN THE TRIAL COURT, IN ITS DISCRETION, PROVIDED SATISFACTORY COMPELLING REASONS FOR THE GRANT OF *ADDITUR*?

STATEMENT OF THE CASE

On November 26, 2008, Laura Riley, as Personal Representative of the Estate of Benjamin Riley, (hereafter, the "Estate"), brought wrongful death and survival actions sounding in products liability in Bamberg County against Ford Motor Company and for negligence against Andrew Marshall Carter, II ("Carter"). Carter was the at-fault driver of the vehicle that collided with Riley's truck. (R. p. 11). As against Ford, the Estate claimed Riley's injuries were enhanced and death caused by a defectively designed door-latch system in his Ford F-150. (Id). In April of 2010, Carter was dismissed from the suit after settling with the Estate for \$25,000.00, of which \$20,000.00 was allocated to the survival claim and \$5,000.00 to the wrongful death claim. (R. p. 29; R. p. 1; R. p. 4).

A jury trial in Bamberg County began on September 19, 2011. Prior to the directed verdict stage, the Estate withdrew its survival action. (R. p. 342, l. 23 - p. 343, l. 2). The Estate's wrongful death claim was submitted to the jury and on September 29, 2011, the jury returned a verdict in favor of the Estate for \$300,000.00 in actual damages. The jury also found that Ford's actions "were willful, wanton, or reckless," but awarded "zero" dollars in punitive damages. (R. p. 378; R. p. 374, l. 9-p. 375, line 5).

On October 10, 2011, Ford timely moved, *inter alia*, 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 of January 25, 2012, the trial court denied Ford's request for set off. (R. p. 5). The Estate also filed post-trial motions on October 10, 2011, seeking either a new trial absolute, a new trial under the

"thirteenth juror" doctrine, or a new trial *nisi additur* based upon the mere inadequacy of the verdict. (R. p. 52). The trial court held arguments on November 21, 2011 and then requested additional briefing on the limited issue of new trial *nisi additur*. 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 the total verdict to \$900,000.00, or a new trial will be granted."

Both parties timely filed Notices of Appeal. On February 5, 2014, the Court of Appeals issued Opinion Number 5195, affirming in part and reversing in part as to the parties various issues. The Estate timely filed its Petition for Rehearing and Suggestion for Rehearing *En Banc* on March 7, 2014. Ford too timely filed its Petition for Rehearing on the directed verdict/liability issues, *inter alia*. The Court of Appeals denied the parties' respective Petitions for Rehearing by Order of April 3, 2014; however, the Estate's Suggestion for Rehearing *En Banc* was not acted on and denied until May 2, 2014. While Ford has not petitioned for review by this Court, the Estate timely filed its Petition for Certiorari, which was granted on September 24, 2014.

STATEMENT OF FACTS

Benjamin "Ben" Riley died on August 29, 2007 when he was ejected from a 1988 Ford F-150 "PN96" that was involved in a collision in Bamberg County, South Carolina. The F-150 pickup was owned and maintained by Jasper County and as Sheriff of Jasper County for ten years, Riley had access and permission to use the F-150 pickup truck. (R. p. 486, ll. 2-14). Riley frequently used the truck, and on the day of the wreck he had travelled to Bamberg County to pick up grain and feed for the farm animals he kept at his home. (R. p. 1230, l. 8 – p. 1231, l. 3; R. p. 491, ll. 3-12; p. 193, l. 11 – p. 194, l. 5).

Riley purchased the feed and then drove towards home on Erhardt Road. At Erhardt Road's intersection with Pocketville Road, sixteen year old Carter failed to yield the right of way, pulled into the intersection, and into Riley's lane of travel. (R. p. 241, ll. 20 – p. 242, l. 8; p. 243, l.17 – p.244, l. 18 – p. 249, ll. 10-13). Riley saw the Carter vehicle before initial impact and he took evasive action, veering right trying to avoid a direct impact with Carter. (R. p. 283, ll.15-25; p. 388, l.21 – p. 339, l. 5). Despite Riley's evasive maneuver, the vehicles struck one another, causing Riley's F-150 to leave the roadway, roll over, and then strike a tree. (R. p. 760, l. 20 – p. 761, l. 4; p. 1072, ll. 3-9; p. 1086, ll. 5-24).

At initial impact between the vehicles, the left front of the Riley F-150 struck the right front of the Carter vehicle. (R. p. 339, ll. 2-15; p. 340, l. 7 – p. 341, l. 8). During this impact the forces translated rearward into Riley's left driver's door, compressing the door opening a few millimeters. (R. p. 837, l. 2 – p. 841, l. 13). The resulting compression of the door caused the door latch to activate and unlatch. (R. p. 848, l.20 – p. 852, l.15). The latch itself, although deformed, was not damaged. The door became unlatched due to a type of failure mode termed "foreshortening" by automotive engineers, where the space between the inside door handle and latch shorten. The decrease at issue was approximately 11.85 millimeters. (R. p. 855, l.7 – p. 866, l.7).

After the initial impact with the Carter vehicle, the truck rolled and Riley was ejected fully from the vehicle. (R. p. 761, ll.5-8; p. 999, ll.3-6). Riley's body was found 85 feet from the point of ejection off of the right shoulder of the roadway (R. p. 391, ll. 10-21; p. 391, ll. 10-21).

Brian Bishop, the first eyewitness to arrive on the scene, came immediately after the wreck and testified that he “heard something in the bushes” and then saw Ben Riley face down. Bishop also heard a “gasping sound” but did not approach Riley. (R. p. 111, l. 10 – p. 112, l. 20). Ben Riley died from injuries sustained from the ejection. (R. p. 305, ll. 5-13). Witnesses confirmed the driver side door was open when the truck came to rest. (R. p. 108, l. 15 – p. 109, l. 22; R. p. 113, ll. 7-18; R. pp. 476-477).

Insofar as damages, the Estate presented testimony from various members of Ben Riley’s direct family, his Sheriff’s Department, and his community. The Estate also designated many other members of Ben Riley’s community to testify as to the damages and loss sustained by the Riley family. During the trial, the trial judge actually stopped the Estate from calling further damage witnesses. During the testimony of Dale R. Terry, upon objection by Ford to a question to the witness about Ben Riley as a person, the court stated: “I am going to rule under 403 that it’s now becoming cumulative. Let’s move on to another area, Mr. Henderson.” (R. p. 495, ll. 19-21). Outside of the presence of the jury, the trial judge admonished the Estate about the number of damage witnesses it intended to call. In passing on the importance and credibility of the witnesses that had been called by the Estate, the trial judge 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. 637, II. 16-24). The trial court then excluded proposed Estate witnesses involving Ben's activities as a lodge member, his crusades as a cancer survivor, as well as the testimony of his best friend. (R. p. 636, ll. 9 - p. 647, l. 17).

Finally, the purely pecuniary losses sustained by Riley's family were testified to by Oliver G. Wood, Ph.D., an expert economist, who was admitted without objection. (R. p. 1206, ll. 1.7). Dr. Wood's economic loss testimony concluded that the pecuniary loss to the Riley family totaled \$228,605.00, of which \$145,050.00 was the post-death/pre-trial loss and \$81,555.00 post-trial loss. (R. p. 1209, l.2 - p. 1210, l.17). These figures did not account for the private security income earned by Riley, (R. p. 1211, ll. 6-10) or costs of the funeral. (R. p. 1211, ll. 12-14; Exhibit 139A). No economic consideration was given by Dr. Wood to the loss of love, affection, guidance, companionship, or wounded feelings. (R. p. 1211, ll. 15 - p. 1212, l. 1).

ARGUMENTS

The Court of Appeals erroneously reversed the trial court's grant of *nisi additur* and also conducted a *de novo* review of a non-fraudulent settlement which was supported by the evidence. The Court of Appeals' Opinion conflicts with existing precedent on both issues and in the analyses undertaken, creates novel issues for which no precedent exists. On each issue, the Court of Appeals' analysis is deeply flawed, and this Court after review of the issues should reverse.

- I. **The Court of Appeals Breaks with Binding Precedent Concerning New Trial *Nisi Additur* and Instead Creates an Inappropriate Bright Line Test without Precedential Support When the Trial Court's Underlying Order Granting New Trial *Nisi Additur* Comports with Existing Law and Was Within the Trial Court's Discretion.**

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 \$300,000.00.¹ In granting *additur*, the trial court satisfied all requirements of existing case law in its order by giving numerous compelling reasons for its decision.

Despite the trial court's compliance with existing standards and ruling within its sound discretion, the Court of Appeals reversed, by applying the nebulous and undefined "compelling reasons" requirement, while also stating concerns that the trial court invaded the jury's province in an impermissible manner. 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. The case law defining *nisi additur* as a discretionary power shows our Courts grappled with those same concerns many years ago, yet allowed the trial court wide discretionary latitude in dealing with the issue. The trial court's order here did not offend those notions and the trial court struck a careful balance in its detailed order granting *additur*. All applicable standards, including numerous compelling reasons, were rigorously adhered to by the trial court, yet the Court of Appeals erroneously reversed the trial court. That reversal by the Court of Appeals is inconsistent with existing case law and this Court should reverse.

¹ Reference is craved to the trial court's Order granting *additur*. The court correctly set out the elements of damages in wrongful death cases and went on to state that the testimony and evidence regarding each and every element was proven by "... uncontroverted, emotionally compelling testimony..." The testimony and exhibits "left no question as to the grief, emotional turmoil, and loss suffered" by the Riley family.

As it now stands, the Opinion below sets a new precedent which binds the hands of the trial court on post-trial review. If not reversed, the Opinion will be interpreted and will be presented to the trial courts of this state on post-trial review as standing 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 grant *additur* through the exercise of historic discretion. Ford would have the Opinion below read as if it does not set a bright line standard for *additur*. This is intentionally near sighted for the sake of advancing an argument. Based on the language of the Opinion, there are two certainties if the Opinion is not reversed. One, no trial court will consider an *additur* if the verdict exceeds the economic damages. Or, two, should a trial court be so bold as to exercise its longstanding discretionary function and grant an *additur*, on appeal the Opinion below will be cited as precedent against that ruling. This is an absolute certainty without reversal by this Court.² A bright line test of this nature has never existed, nor should it. The holding below flies in the face of the precedent of *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973), as addressed below.

² The Opinion below presumes to read the mind of the jury. “By subtracting \$238,801- the maximum amount of economic loss suffered by the Estate – from the jury’s verdict of \$300,000.00, we can determine the jury awarded at least \$61,999 in non-economic damages.” The Opinion goes on to say that the trial court “disagreed” with the amount of non-economic damages awarded and this was not a compelling reason to “invade the province” of the jury. Accepting the leap of faith taken by the Court of Appeals that their reading of the jury’s mind is accurate, the Opinion below totally and without question skirts the issues by saying that “simple disagreement” with the amount of damages awarded by a jury is not a compelling reason to grant *additur*. The Opinion totally ignores that fact that to ever consider a grant of *additur*, the trial court must, in the first instance, disagree with the amount of damages awarded by the jury. Rather, the Opinion below gives is lip service to – but then totally ignores –the trial court’s analysis of the testimony and damages so aptly stated in the Order granting the *additur*. These well founded, well-reasoned, compelling reasons are simply brushed away by the Opinion below by saying that the trial court exercised its long standing discretion and after hearing all the evidence and reviewing the exhibits, it simply chose to “disagree” with the jury. That is a gross misreading of the trial court’s Order granting *additur*.

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 and all other compelling reasons given and simply states that the trial court's disagreement with the jury verdict is not a "compelling reason." The Opinion completely ignores the point that the through the exercise of the long vested discretion, a trial court, in the first instance – for any *additur* that has ever been granted – must have 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 summarily in the Opinion. The Court of Appeals' holding on this issue is in error and should be reversed to bring it in conformity with existing law.

A. The Trial Court's Order Granting New Trial *Nisi Additur* and Tripling the Jury's Award Was Proper Under the Court's Discretion and Was Supported by Compelling Reasons.

To the Court below, Ford contended that the trial court erred in granting a New Trial *Nisi Additur* in three respects: (1) in failing to enumerate compelling reasons to

support the decision; (2) in relying on evidence that was not relevant to recoverable damages; and, (3) in failing to afford substantial deference to the jury's determination of intangible damages. The Court of Appeals erroneously ruled in favor of Ford on issues one and three, as addressed below.

From a review standpoint, clearly the trial judge's decision on a motion for new trial *nisi additur* is entitled to great deference because the trial judge heard the evidence and testimony, is more familiar with the evidence at trial, and therefore possesses a better informed view of the damages than does an appellate court. An appellate Court's "review is limited to consideration of whether evidence exists to support the trial court's order." *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). "As long as there is conflicting evidence the appellant court should not disturb the trial court's decision." *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002).

i. The Trial Judge, Familiar with and Informed by the Evidence at Trial, Provided Compelling Reasons for Tripling the Jury's Grossly Inadequate Award and the Exercise of Discretion Should Not be Disturbed on Appeal.

In the order granting new trial *nisi additur*, the trial judge found that it was "abundantly clear that the verdict in this case was inadequate, in light of the evidence presented at trial..." (R. p. 9).

During the trial of this case, Defendant Ford never – not once – challenged the evidence of the damages sustained by the wife and children of Ben Riley. Counsel for Ford stated in opening:

We're not here to – You're not going to hear anybody from Ford say that Sheriff Riley wasn't a good husband, a good sheriff, a good father to his family, and a good provider because he was... (R. p. 90, ll. 18-21).

It's a very very sad day whenever a wife loses her husband, grown children lose their father, or a valued member of a department, a sheriff's department, loses their leader. And no matter how it happens and whose fault it is it's a tragedy when it happens. Now none of us in this courtroom here today personally experienced with the exception of the Riley family their tragedy but as husbands, as wives, as children we are sorry for their loss. We're sorry for the loss of a man who by all accounts – all accounts was a wonderful husband, a wonderful father, and a wonderful sheriff... (R. p. 88, l. 18 – p. 89, l. 3)

The evidence presented at trial did not change Ford's position on damages. In closing counsel for Ford stated:

You may remember at the beginning of this case I told you one of the first things I said to you all was that this case involved a tragedy – a tragedy because a very good and honorable man of the community on August 27, 2007 passed away. He was killed. And you have seen clearly that Mr. Sheriff Riley was a great man and we've seen the family – a wonderful family and how his death has affected them. If we were here, members of the jury, to decide whether or not Sheriff Riley was a wonderful man, a valued member of the community, we would have no reason to be here because he was. If we were here simply and solely to decide whether or not the loss of a husband, a grandfather, a father, and a sheriff would be incredibly hurtful, we wouldn't need to be here because it was...

(R. p. 368, ll. 6-19).

The trial judge saw and heard from the widow of Ben Riley as well as three (3) of his five (5) children. In addition to the family, witnesses from the Riley's community who knew the Riley family on an intimate, personal basis testified. A brief review of the damages testimony and evidence of the Riley family's loss heard by the trial judge, and which compelled him to exercise his discretion to grant *additur*, is warranted:

a. Laura Riley, widow

Laura Riley called her husband "Ben" and he called her "Laura Ann." (R. p. 351, ll. 10-16). They were married December 21, 1968 and stayed married for 38 years. Their

marriage was the first for both. (R. p. 318, ll. 15-25). Laura and Ben lived in a home they built. (R. p. 317, ll. 14-16). At the time Ben died, their youngest daughter Adrian and two grandchildren lived with them. (R. p. 319, ll. 9-11). The other children live very close to the family home and saw their parents frequently. (R. p. 336, ll. 9-14; R. p. 348, ll. 5-10).

Laura Riley did not want to know any details of the wreck. She only knew that "he was gone." (R. p. 322, ll. 1-10). She cherishes the flag that draped his coffin (R. p. 323, ll. 1-6; R. p. 490) and keeps his law enforcement badges (R. p. 329, l. 19 - p. 1246, l. 6; R. p. 483). The family still keeps and cares for the farm animals that Ben loved so much. (R. p. 324, ll. 4-15).

As a father, Ben Riley was "not harsh but strict." (R. p. 325, ll. 9-10). He could, and did, address misbehavior when necessary as when daughter Lasonya played hooky from school. (R. p. 325, l. 4 - p. 326, l. 11; R. p. 1286, ll. 19-22). Ben helped his adult daughters financially, and Laura testified that although she did not know the extent of the help, "it was alright." (R. p. 333, ll. 12-22). As husband and wife, Ben and Laura shared their love of and devotion to their church. (R. p. 331, l. 4 - p. 332, l. 7; R. p. 489). They loved to travel (so long as not by airplane). Jacksonville, Florida was their special place they visited frequently because they "just loved it." (R. p. 332, ll. 8-23). Daughter Tonya testified she had never seen her mother in the emotional state she was in after her father's death. (R. p. 337, ll. 5-9). Laura tries to be strong for her daughters. (R. p. 340, ll. 13-15). Ben's death has nonetheless been "rough," "very rough." (R. p. 335, ll. 9-12). Laura misses her husband's companionship the most. (R. p. 335, ll. 13-14).

Besides the emotional turmoil and loss, Ben Riley's death caused a financial strain on Laura Riley. Although she was working at the time of his death most of the

household expenses were paid out of Ben's salary. His funeral cost Laura \$10,196.00. (R. p. 334, ll. 13-21; R. pp. 1101-1102).

b. Tonya Armstead, daughter

The oldest of Ben and Laura Riley's three daughters is disabled and on dialysis. She lives near her parents' home. (R. p. 336, ll. 9-17). After the death and continuing at the time of trial the daughter and their mother Laura have propped each other up for support. (R. p. 338, ll. 5-7). Tonya described her parents as "very close" and "best friends." (R. p. 339, ll. 1-5). His death has taken a "big toll" on the family. (R. p. 341, l. 1).

c. Lasonya Riley Major, daughter

Lasonya, known as "Sonya" to the family, is the middle of Ben and Laura Riley's daughters. Sonya lives a two minute walk from her parent's home. (R. p. 348, ll. 8-10). She freely admits that she was the "bad one" and was justifiably exposed to a lot of "hard work" coming up. Her parents raised their children by teaching them "the right way to do things." (R. p. 349, ll. 10-22). They were taught to "walk the straight and narrow." (R. p. 350, ll. 17-25). She too described her parents as "best friends." Laura won most of the fusses. (R. p. 351, l. 17 – p. 352, l. 1). God was first in Ben and Laura's lives and family was second. (R. p. 352, ll. 13-25). She describes her father as her "friend," "her father," and her "whole lot (life)." (R. p. 353, ll. 20-22). Sonya misses her father's "smile," "laugh," "smell," and "talks." (R. p. 355, ll. 13-15).

d. Adrian Riley, daughter

Adrian, the baby girl of the family, lived with her parents along with her daughter and niece. Adrian cannot talk about her father without crying. (R. p. 357, ll. 22-23). She

described her parents as “wonderful,” “loving,” “caring,” and “disciplined.” (R. p. 357, ll. 1-4). Adrian and her sisters were raised “to do the right thing” and “never lacked for anything.” (R. p. 357, ll. 1-4). Her father doted on Adrian’s young daughter Kayla. In describing the loss suffered by her mother Laura, she describes her mother as strong but “hurt,” “very hurt,” by her father’s death. Adrian misses “everything” about her father. (R. p. 357, ll. 5-16).

e. Roy G. Hughes

As Chief Deputy of the Jasper County Sheriff’s Office, Roy G. Hughes had known Sheriff Riley since their early days at the Ridgeland Police Department. (R. p. 93, ll. 3-6). Over many years he got to know the Riley family. (R. p. 93, ll. 3-10).

On the day of Ben Riley’s death, Hughes went to the scene of the crash. (R. p. 94, ll. 4-17). After leaving, he and another deputy went to the Riley home. They joined Lt. Gregg Jenkins and Det. Donald Hipp who had already informed the family of the death. (R. p. 94, ll. 4-17). In describing the atmosphere at the Riley home, Chief Deputy Hughes found it almost impossible to describe. “It was very devastating.” (R. p. 95, ll. 8-15). The support for the Sheriff’s family shown by the community and other law enforcement agencies at the Sheriff’s funeral was “amazing.” Having attended other funerals he had “never taken part in it such as one as this.” (R. p. 96, ll. 23-25).

Hughes described Sheriff Riley as a “good family man, a good Christian man...” who was always there for his family. God was first in Ben’s life and then his family. (R. p. 99, ll. 16-19). According to Hughes, after surviving cancer, Ben Riley thanked God for life. He continued his past efforts as a good law enforcement officer who helped people

in addition to enforcing the laws. As a good family man, the sheriff was a good provider who worked part time jobs “to do special things.” (R. p. 101, ll. 12-25).

f. Donald L. Hipp

As both a detective with the Sheriff’s office and as a member of the Riley family, Lt. Donald Hipp had the unpleasant duty of informing the family of Ben’s death. (R. p. 136, ll. 1-5; R. p. 135, ll. 9-25). He had grown up with Ben’s family and knew them his entire life. (R. p. 136, ll. 13-15). Hipp described the scene at the Riley home as “horrible,” and “one of the worst days” of his life. (R. p. 137, ll. 3-9).

He described Ben Riley as a “respectful” and as a “God fearing person.” (R. p. 138, l. 20). Based on his relationship with the family Hipp observed that there was a “very close relationship” between Laura and Ben Riley. Ben did “everything” for his family. As for his children, Ben “loved them to death.” (R. p. 139, ll. 1-22). If Ben Riley were alive Det. Hipp believes he would “still be providing for them as if they were living in his home.” (R. p. 140, ll. 1-2).

The Estate designated many other members of Ben Riley’s community to testify about Ben Riley and the damages and loss sustained by his family. The trial court actually stopped the Estate from calling further damage witnesses.

ii. The Trial Court’s Order Granting *Nisi Additur* Is Appropriate and Correct Under Existing Standards.

The trial court correctly found in its Order that there was “neither dispute nor argument about damages... .” (R. p. 6). In noting that Ford’s counsel referred to Sheriff Riley as a “wonderful man,” the trial court went on to note that “not a single damage introduced was questioned by Ford in an effort to contest damages.” (R. p. 8). The Order cites the “emotionally compelling” testimony of the family as well as the exhibits

supporting damages. In certainly what must be considered as compelling reasons the trial court stated:

It is uncontested that these witnesses suffered grief and sorrow, wounded feelings, and loss of companionship of the decedent and that in fact, through the time of trial, each continued to suffer the same. This court is compelled to grant *nisi additur* because every element of wrongful death damages was proven by the Plaintiff and the \$300,000 verdict does not reflect the evidence on these issues.

In this case, the award of \$300,000 in damages seems woefully inadequate in light of the evidence and testimony that was elicited during the trial.

(Id.).

Having heard the evidence at trial, viewed the demeanor and affect of the allowed damages witnesses, and experienced the general atmosphere of the trial, it was well within the trial court's power to declare the jury verdict of \$300,000.00 inadequate. The trial court was compelled to do so because each and every element of wrongful death damages was proved by the Plaintiff and the \$300,000.00 verdict did not, in the opinion of the trial court who heard the testimony and saw the evidence, reflect the damages sustained by the heirs of Ben Riley.

The elements of damages generally recoverable in a wrongful death action are:

- (1) Pecuniary loss;
- (2) mental shock and suffering;
- (3) wounded feelings;
- (4) grief and sorrow,
- (5) loss of companionship,
- (6) deprivation of the use and comfort of the intestate's society, the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries, in addition to the loss of his ability to earn money for the support, maintenance, care and protection of his wife and children, and for the education and training of the latter.

11 S.C. Jur. Damages § 24; *Mishoe v. Atlantic C.L.R. Co.*, 186 S.C. 402, 416, 197 S.E. 97, 104-105 (1973); *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993). The evidence at trial showed – and it was uncontested – that the beneficiaries of Ben Riley’s estate suffered each of the compensable elements of loss.

The intangible elements of damages of wrongful death of (2) through (5) were not only established, but shown to be significant through uncontested, emotionally compelling testimony of Laura Riley and her three children, as well as the other damages witnesses and exhibits supporting damages. It is uncontested that these witnesses suffered grief and sorrow, wounded feelings, and the loss of companionship of the decedent and that in fact, through the time of trial, each continued to suffer the same. Testimony concerning the non-monetary part of element six (6), above, was substantial in the trial of this case. Beneficiaries of a wrongful death suit may receive damages for the “loss of [the decedent’s] experience, knowledge, and judgment in managing the affairs of [the decedent] and of his beneficiaries.” Multiple witnesses testified as to Riley’s experience, knowledge, and judgment in his profession, church, and greater community, all of which was reflected on the type of husband and father he was. The testimony showed that this family of beneficiaries, perhaps more than most wrongful death beneficiaries, suffered great loss under this element of wrongful death damages.

The trial court heard the testimony, saw the witnesses, and presided over ten days of trial. The trial court reasonably concluded that \$300,000.00 is an inadequate verdict and gave compelling reasons for granting the Estate’s motion for *nisi additur*. Because the Court of Appeals found that some amount of damages for intangibles was awarded, the Court erroneously broke with precedent and stripped the trial court of its discretion.

The trial court's discretion is paramount and its decision comports with the testimony and evidence which was substantial, uncontroverted, and compelling.

iii. South Carolina Precedent Addressing *Additur* Supports the Grant of *Additur* in this Case.

The lack of contest regarding damages has been a central point in South Carolina cases addressing the propriety of the court's discretionary powers to grant or deny post-trial motions for *additur* or *remittitur*. Reference to those South Carolina cases addressing the compelling reasons for the grant of *additur* highlights how the Court of Appeals erroneously infringed upon the trial court's broad discretion.

Two recent cases appear to boast a more formal rigidity to the "compelling reasons" language, and then only making findings concerning what was deemed NOT to be compelling reasons. Also, 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 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. The Court of Appeals 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. The Court of Appeals' 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*, the Court of Appeals 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 v. Vena* and in the case at bar is stark. *Luchok* was a case tried not on liability but solely on the basis of the contest and dispute as to the damages claimed by the plaintiff. In the case at bar, while liability was hotly contested there was literally no contest of damages. In the words of *Luchok* and *Green*, there was no “sharply conflicting evidence” and in fact *no* conflicting evidence as to damages. Unlike *Luchok* and *Green*, based upon the lack of dispute as to the evidence here, the grant of *additur* was proper.

Review of other cases addressing the grant or denial of *additur* again supports the grant of *additur* here. In *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) this Court upheld the trial court's denial of the plaintiff's request for *additur*. O'Neal was involved in a motorcycle accident which caused certain injuries and for which Bowles was the treating doctor. Plaintiff asserted a medical malpractice claim against Bowles. In that case “Dr. Bowles [did] not dispute that he severed O'Neal's peroneal nerve during the surgery requiring a second surgery to repair the nerve. The dispute [was] over the amount of damages.” *Id.* at 527. At trial there was contested testimony as to the extent of impairment, the relation of lost wages as a result, and the amount of lost earning capacity as a result of the surgery. The plaintiff claimed more than \$43,000.00 in actual damages and the jury awarded only \$12,500.00. In support of the trial court's discretionary

decision to deny the request for *additur*, this Court relied on the disputed nature of the damages in the case:

The jury in this case could have determined that O'Neal would have lost his job because of the time necessary to heal the fracture and any lost or diminished wages would not have been caused by Dr. Bowles' actions. Furthermore, the jury could have determined that any impairment was the result of the fracture and not the severed nerve. A \$12,500 verdict is not grossly inadequate considering the evidence before the jury. Accordingly, the denial of O'Neal's motion for a new trial *nisi additur* is not an abuse of discretion.

Id. at 557. Again, in this appellate analysis, the damages evidence was *the* central issue in dispute in the litigation.

Unlike the decisions above, the case of *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) provides an example of a case where the trial court was affirmed as acting within its broad discretion in granting *additur* despite the fact that damages were contested. In that car accident case defendant Reid admitted liability and the case proceeded to trial on the issue of damages only. The jury awarded the plaintiff actual damages of \$500.54. The trial judge granted a new trial *nisi additur* and awarded damages of \$7,639.40. In addressing post-trial motions “the trial judge found the verdict to be merely insufficient based on the evidence.” *Id.* The evidence consisted “of conflicting medical testimony as to the origin and extent of Patterson's injuries.” *Id.* at 186. On appeal the defendant argued that the judge’s conclusion amounts to an error of law in the granting of the new trial *nisi additur*. The defendant based these arguments on the trial judge's following comments:

The verdict was inadequate. There's no doubt. That was a verdict where the doctors who had made the prior things never did get the opportunity to say [“]I was wrong, I misjudged it.[”] Of course it’s hard to get them to say that. Just by putting their reports in, them

not there to testify, I don't know what a jury might get out of it. If they're not going to believe one expert, they're not going to believe any of them, and I think it is unfairly too low.

Id. at 186-187. In affirming the trial court's discretionary decision to grant *additur* this very Court concluded that the trial judge's remarks "were appropriate during the analysis of the evidence, since the consideration of a motion for a new trial *nisi additur* required the trial judge to consider the adequacy of the verdict in light of the evidence presented. Therefore, no error of law was committed." *Id.* Furthermore, the Court of Appeals found: "ample evidence to support the trial court's finding of an insufficient verdict. Therefore, the grant of *nisi additur* was not an abuse of discretion." *Id.*

The cases above underscore the broad discretionary power of the trial court to order *additur* in the circumstance at hand, where based on the uncontested evidence at trial the award given by the jury was inadequate. However, the Court of Appeals failed to follow the analyses of these cases and reversal is warranted.

B. The Wide Discretion of the Trial Court to Grant *Additur* and the Evolution of, and Lack of Guidance as to, the "Compelling Reasons" Analysis.³

"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*, 260

³ The Court of Appeals' Order Denying Rehearing notes that the Estate's discussion that the compelling reasons analysis is borne of *dicta* has been raised for the first time on motion for rehearing. The Estate does not point to the history of that concept to argue that it does not apply here; since post-trial motions at the trial level, all parties have acknowledged the applicability of the "compelling reasons" analysis. This is not a preservation issue and if not the law of this state, the parties have certainly made it the law of this case. Nevertheless, based upon the Opinion below, the Estate points to the history to highlight the lack of guidance or definition provided to the bench and bar, and to ask that this Court consider clarifying the analysis.

S.C. 235, 195 S.E.2d 389 (1973). 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, 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). As shown by these cases, the Opinion below completely strips the trial court of its longstanding ability to disagree with the jury on damages based on the evidence and testimony. To sustain the Opinion will be the end to the trial court's exercise of discretion if the verdict is higher than the economic damages claimed.

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. The Opinion below completely abandons or ignores the abuse of discretion standard. It simply says that disagreement with the jury verdict is not a compelling reason. The Opinion in this regard is unsound, as there is no finding of abuse of discretion amounting to an error of law. In 1984 the 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, *Hoskins v. Fairfield Elec. Co-op.*, 321 S.E.2d 185 (Ct. App. 1984). This issue has been exhaustively briefed in the Petition for Certiorari below and repeating it here is unnecessary. If the "compelling reasons" standard is to be used by the trial courts, then both the trial bench and bar need guidance, as it is difficult to imagine what a compelling reason would be if those contained in the trial court's order here are not compelling.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

⁴ The Estate's arguments on this point included in its Petition for Certiorari are incorporated by reference herein.

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).

The requirement of the "compelling reasons" is now so entrenched as not to be questioned. However, 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.⁵ The Opinion below never addresses whether or not there has been an abuse of discretion.

The extended line of cases on *additur* adheres to recognition of the trial court's wide discretion stated succinctly, post-*Hoskins*, 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

⁵ See e.g., *Graham v. Whitaker, supra* (where judge stated "appropriate reasons" in his order, trial court did not abuse its discretion in granting patient, an *additur* of \$67,500.00 in actuals where jury awarded \$10,000 in actuals and \$10,000 in punitives); *Estes v. Gray*, 319 S.C. 551, 462 S.E.2d 561 (Ct. App. 1995) (affirming grant of 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 from jury's \$500.54 (well less than claimed medical costs) to \$7,639.40 did not abuse its discretion, even where treating doctor's testimony of the extent of injuries was hotly disputed); *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'"); *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 \$8,765.17, 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).

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*. *Hoskins 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.

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 Court of Appeals 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.⁶

In support of this notion, the Court of Appeals cited 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

⁶ “The consideration for a motion for a new trial *nisi* [*additur* or] *remitter* 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 & Env'tl. Control*, 368 S.C. 279, 319-21, 628 S.E.2d 496, 518 (Ct. App.2006) (internal citations and quotation marks omitted).

“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.⁷ 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, this very Court refused to acknowledge that the award of some amount over economic damages provided a prohibition of the trial court’s use of discretion.

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

The trial court exhaustively set out compelling reasons for the *additur* in its order. It is hard to imagine what it would take to be compelling reasons if the trial court’s order here does not pass muster. For these reasons, the Estate respectfully requests that this Court review and reverse the Court of Appeals.

⁷ 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.

II. The Court of Appeals Erred in Creating a New Standard of Review for Setoff and Equitable Reallocation that Conflicts with Controlling Case Law Regarding the Appropriate Standard of Review.

While it is true that the trial court has the equitable power to set-off amounts paid by other defendants prior to the verdict, the reduction must be from a settlement of the same cause of action. (Emphasis added). *Smalls v. S.C. Department of Education*, 339 S.C. 208, 528 S.E.2d 628 (Ct. App. 2000); *Vaught v. City of Anderson*, 300 S.C. 55, 386 S.E.2d 287 (Ct. App. 1989). Our Appellate Courts' analysis of setoff and equitable 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 stopped there. 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, reallocation should be available to the party claiming the right to setoff, as a matter of fairness and equity.

In this case, however, the Court of Appeals correctly found that evidence existed to support a survival cause of action. Having made that determination, by definition the settlement allocation between the Estate and Carter could not be fraudulent, or a sham, thereby requiring equitable reallocation. If existing precedent were followed, the analysis should end there. It did not, however, and the Opinion should be reversed.

There are two foundational cases addressing setoff and equitable reallocation: *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) and *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986). 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*, 536 S.E.2d at 425. “The allocation between the survival and wrongful death claims must yield to fairness and justice.” *Id.* at 426. Such judicial discretion has been exercised when a settlement or judgment is based on a fraud or a sham. *Ward v. Epting*, 290 S.C. at 560.⁸

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, in *Welch v. Epstein*, a settlement was successfully collaterally attacked and overturned. *Welch* was a medical malpractice suit dealing with substandard

⁸ In its Order denying the Estate’s rehearing, the Court of Appeals correctly pointed to a quote attributed by the Estate to *Welch* that was not accurate. *Welch* was cited as standing for the proposition that an appellate court could not review a previous trial court’s allocation of settlement unless the allocation was based on a fraud or a sham. *Welch* does not contain the quote. Rather, *Ward* stands for that proposition as cited here and discussed in the following paragraph.

post-operative care, and 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. 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. In that instance, the Court of Appeals found that the settlement should be reallocated and the apportionment "yield to fairness and justice." *Id.*

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 v. Hall*, 208 S.C. 187, 37 S.E.2d 537 (1946). 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 case 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. This Court held the 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, even circumstantial and weak evidence may support a settlement allocation and that allocation will not be determined to be sham. The law as it existed before the Opinion below is that fraudulent or sham allocations would be attacked, because to allow such settlements was unfair and unjust. However, if some evidence existed to support the allocation, then the settlement would not be equitably reallocated. The Court of Appeals has now diverged from that body of law.

A. Though the Court Correctly Found Evidence to Support the Allocation of Settlement Proceeds to a Survival Cause of Action, the Court of Appeals Erroneously Altered the Existing Scope of Review by Conducting a *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 by the Court of Appeals: "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 Court of Appeals, though, did not employ the "any evidence" standard. Instead, the Court of Appeals chose 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 Estate's review of precedent.

The Court of Appeals attacked 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, 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.

Because the Estate withdrew the survival cause of action after presenting its case in chief and prior to the case being submitted to the jury, (R. p. 342, ll. 23-25) Ford will likely continue to argue that the Riley's withdrawal of the survival action means that Ben Riley could not have suffered conscious pain and suffering, and the withdrawal of the claim from the jury's view invalidates the prior settlement. This is not true.

In this crashworthiness case, there were two discrete phases of the wreck. First, there was the initial collision with Carter, caused by Carter alone. Carter was liable to the Plaintiff for injuries caused by his negligence and his insurance carrier paid for causing damages in the initial phase of the wreck. The second phase of the crashworthiness analysis involved the design defect that led to the enhanced injuries (death) which would not have occurred but for Ford's defective product.

As for the first phase, there is ample evidence that Ben Riley sustained injuries in the initial collision with Carter, but that those injuries alone would not have been fatal. (R. p. 305, ll. 3-13). In fact, Ford's biomechanical expert Thomas McNish testified that

during the initial phase of the wreck, the impact between the Riley and Carter vehicles, and prior to the door opening, the left side of Ben Riley's body slammed the driver's door with sufficient force to fracture the door panel itself. (R. p. 358, ll. 4-19). McNish also opined that before the door came open Riley's head struck the interior of the truck with sufficient force to tear ligaments in Riley's neck. (R. p. 359, ll. 1-15). Moreover, prior to and during the initial phase of the wreck, the evidence is clear that Ben Riley saw and perceived the impending wreck. Both the Estate's and Ford's accident reconstruction experts agree that prior to the point of impact within the roadway, Ben Riley swerved to the right shoulder in an attempt to avoid the collision. Ben Riley's conscious realization and perception of the impending wreck and the emotional response caused by Carter's negligence is a compensable element of survival damages. As noted in this Court's decision of *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981):

Recovery for mental or emotional disturbance based upon violation of a legal right for which other damages are recoverable has long been accepted in this state. Perhaps the most common example occurs when damages for mental suffering are allowed in a personal physical injury suit. *Mack v. South Bound R. Co.*, 52 S.C. 323, 29 S.E. 905 (1898).

Ford v. Hutson, 276 S.C. at 159, 276 S.E.2d at 777. In a survival action, the "mental distress of the deceased" is an appropriate element of damages, amongst others. *Scott v. Porter*, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000). "Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." *Id.*

Ample evidence was presented to allow the Estate to go to the jury on the issue of conscious pain and suffering. Even considering the time frame of after Riley's ejection from the truck, sufficient evidence to support the pain and suffering allocation exists. The

first eyewitness on the scene, Brian Bishop, arrived immediately after the wreck. Bishop testified that he “heard something in the bushes” and then saw Ben Riley face down. He also heard a “gasping sound” but did not approach Ben Riley. (R. p. 111, l. 10 – p. 112, l. 20). Despite this evidence, Ford previously argued that the cause of action for conscious pain and suffering was dismissed “due to an undisputed lack of evidence.” (Appellant’s Brief, p. 37), a gross misstatement to the Court.⁹

The Estate’s earlier settlement with Andrew Carter and his insurance carrier was fair, reasonably apportioned, and approved by the trial court. Ford’s arguments on appeal thus far completely ignore their arguments concerning Ben Riley’s injuries in the wreck. At trial, Ford contended that there was an initial frontal impact, a “side slap” between the Carter vehicle. Based on physical evidence to the door panel as well as autopsy evidence, Ford contended that Ben Riley’s body was “slammed” into the door panel during the initial sequence of the wreck. This physical insult, as well as his conscious awareness of the impending accident (it is uncontested that Riley attempted to swerve to miss the Carter vehicle) are compensable elements of damages.

The Plaintiff strategically withdrew the survival action from jury consideration not because she would have been disallowed from going to the jury on the cause of action, but because of trial tactics. Under South Carolina precedent, Ford is entitled to a Five Thousand (\$5,000.00) Dollar setoff and no more.

Finally, and perhaps most precariously, 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 below greatly detracts from the

⁹ Ford cite to pages 1274 and 1276 of the transcript to support this statement. A reading of these portions of the transcript finds no reference to any lack of evidence. It simply recites Plaintiff’s withdrawal of that cause of action. (R. p. 342, l. 23 – p. 343, l. 2).

inherent discretionary powers of the trial court. Historically, great deference has been due 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 Court of Appeals' decision to conduct *de novo* appellate review flies in the face of the historical "any evidence/ abuse of discretion" standard.

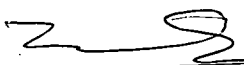
The Opinion also raises significant policy concerns for litigants, lawyers, and the trial bench. First and foremost, the possibility of appellate *de novo* review of non-fraudulent settlements between settling parties will chill settlements to the detriment of plaintiffs and settling co-defendants. If 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, faced with the number of appeals at hand, equipped for, willing, and desiring of *de novo* review of records where there has been no sham or fraudulent settlement?

The Court of Appeals' Opinion in this matter should be reversed so that there is continuity and agreement based on adherence to existing precedent. Here, evidence existed to support the allocation. No unfairness or inequity resulted and there was no reason to equitably reallocate. The Opinion's misapprehension of the existing standards of review creates far reaching problems for litigants, lawyers, and the trial bench. The

Opinion also weakens the historic, inherent discretionary powers of the trial bench to make equitable determinations concerning the propriety of setoff and allocation.

CONCLUSION

The findings and conclusions by the Court of Appeals should be reviewed by this Court. On both issues presented, the Court of Appeals deviated from binding precedent and created novel issues and analyses. The Estate therefore respectfully requests that this Court grant the relief sought herein, inquire further into these matters, and reverse the Court of Appeals.



Ronnie L. Crosby
Daniel E. Henderson
Matthew V. Creech
PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.
690 N. Green Street
Post Office Box 2500
Ridgeland, South Carolina 29936
(843) 726-6131

ATTORNEYS FOR PETITIONER/
RESPONDENT

October 24, 2014
Ridgeland, S.C.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 28 2014

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

S.C. Supreme Court

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

Appellate Case No.: 2014-001192

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

v.

Ford Motor Company,.....Respondent.

PROOF OF SERVICE

I, the undersigned, of the law firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., attorneys for the Petitioner, do hereby certify that I have served all counsel in this action with the copy of the Petitioner's Reply To The Return in the above matter by mailing a copy of the same by United States Mail, postage prepaid, to the following:

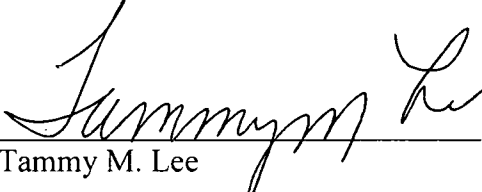
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

C. Mitchell Brown, Esquire
A. Mattison Bogan Esquire
Michael J. Anzelmo, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, SC 29211-1070

J. Kenneth Carter, Esquire
David C. Marshall, Esquire
Carmelo B. Sammataro, Esquire
Turner Padgett Graham & Laney, PA

Post Office Box 1473
Columbia SC 29202

Curtis L. Ott, Esquire
Laura W. Jordan, Esquire
Gallivan White & Boyd, P.A.
Post Office Box 7368
Columbia SC 29202



Tammy M. Lee

October 24, 2014
Ridgeland, S.C.

LAW OFFICES
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK

JOHN E. PARKER
J. PAUL DETRICK
DANIEL E. HENDERSON
MARK D. BALL
RANDOLPH MURDAUGH, IV
RONNIE L. CROSBY
R. ALEXANDER MURDAUGH
BERT G. UTSEY, III
RANDOLPH MURDAUGH, III
GRAHAME E. HOLMES
LEE D. COPE
MATHEW V. CREECH
LEAGUE B. CREECH
STEVEN D. MURDAUGH
WILLIAM F. BARNES, III
AUSTIN H. CROSBY

PROFESSIONAL ASSOCIATION
690 NORTH GREEN STREET
P.O. BOX 2500
RIDGELAND, SOUTH CAROLINA
29936-2500

RANDOLPH MURDAUGH, SR.
(1887-1940)
RANDOLPH MURDAUGH, JR.
(1915-1998)
J. ROBERT PETERS, JR.
(1927-2008)
CLYDE A. ELTZROTH, JR.
(Retired)

TELEPHONE
(843) 726-6131
TOLL FREE
(866) 943-2113
FACSIMILE
(843) 726-6057
www.pmped.com

October 24, 2014

VIA U.S. MAIL

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

OCT 28 2014

S.C. Supreme Court

RE: Laura Riley as PR of the Estate of Benjamin Riley v. Ford Motor Company;
Appellate Case No.: 2012-207489

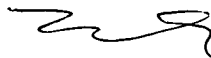
Dear Mr. Shearouse:

Enclosed please find one original, unbound copy and fifteen (15) bound copies of Petitioner's Brief in the above-referenced matter. Please file the original and return a clocked copy of the extra copy in the self-addressed stamped envelope I have provided. I am also enclosing 13 copies of the Appendix in addition to the two copies previously served. Finally, I have enclosed our Proof of Service.

By copy of this letter to counsel of record, we are serving the same upon them.

With kind regards, I remain

Sincerely,



Matthew V. Creech

Enclosures: as stated

cc: C. Mitchell Brown, Esq.
A. Mattison Bogan, Esq.
Michael J. Anzelmo, Esq.
Curtis L. Ott, Esq.
Laura W. Jordan, Esq.
J. Kenneth Carter, Jr., Esq.
David C. Marshall, Esq.
Carmelo B. Sammataro, Esq.