THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

The Honorable Doyet A. Early III, Circuit Court Judge

Civil Action No. 2008-CP-05-235
Appellate Case No. 2014-001192

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

v.

Ford Motor Company, ... Respondent.

BRIEF OF RESPONDENT

C. Mitchell Brown
A. Mattison Bogan
Michael J. Anzelmo
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia, SC 29211-1070
(803) 799-2000

Curtis L. Ott
Laura W. Jordan
Gallivan White & Boyd, PA
Post Office Box 7368
Columbia, SC 29202
(803) 779-1833

Attorneys for Ford Motor Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Did the Court of Appeals correctly apply the well-established requirement that a trial court may grant a new trial *nisi additur* only when the trial court both disagrees with the jury's evaluation of damages based on probative evidence and sets forth compelling reasons to invade the jury's province?

2. Did the Court of Appeals adhere to this Court's precedent in analyzing the allocation of funds derived from a pre-trial settlement with a third party and by reallocating those funds in accord with the evidence?

INTRODUCTION

This Court should affirm the holdings of the Court of Appeals. The Court of Appeals properly reversed the trial court's grant of a new trial *nisi additur*. This ruling was in accord with this Court's long-standing precedent that before granting *additur*, a trial court must determine that the award was inadequate *and* that there are compelling reasons to disagree with the award, before the trial court may invade the jury's province and increase the award. Dissatisfied with this ruling, Petitioner argues that the "compelling reasons" requirement is undefined judicial surplusage and that trial courts should have unfettered discretion to award *additur* based on their subjective evaluation of the weight of the testimony. As explained below, Petitioner's arguments and conclusions are incorrect.

The Court of Appeals also analyzed the reasonableness of the allocation of funds from Petitioner's pre-trial settlement with the at-fault driver, and the Court of Appeals reallocated those funds to reflect the evidence. This ruling was also in accord with this Court's well-established precedent. Petitioner, however, argues that such a reallocation is permissible only if the pre-trial settlement was fraudulent or a sham. As explained below, this is incorrect. Accordingly, this Court should affirm the Court of Appeals' reallocation of the settlement funds.

COUNTER-STATEMENT OF THE CASE[1]

The Estate of Benjamin Riley ("the Estate") filed this products liability lawsuit against Ford Motor Company ("Ford") after Riley was ejected from an F-150 pickup

[1] Respondent does not consent to be bound by the Statement of the Case and the Statement of Facts contained in Petitioner's brief, and, pursuant to Rule 208(b)(2), SCACR, submits its own Counter-Statement of the Case and Facts.

truck in an accident and died. (App. 11.) Prior to trial, the Estate settled with the at-fault driver for $25,000. (App. 29–32.) The settlement funds, pursuant to Petitioner's agreement with the at-fault driver, were allocated $20,000 to the Estate's survival claim and $5,000 to the wrongful death claim. (*Id.*) The Estate subsequently proceeded to verdict against Ford solely on the wrongful death claim.

At trial, the Estate presented evidence of economic damages totaling $238,801.[2] The Estate also presented testimony from Riley's family and friends in support of noneconomic damages. The jury returned a verdict of $300,000 in actual damages and declined to award any punitive damages. (App. 378.)

Ford moved for JNOV and also requested a set-off of $25,000 to account for the Estate's settlement with the at-fault driver. (App. 42–51.) The trial court denied the motions. (App. 5.) The Estate moved for a new trial absolute or, alternatively, new trial *nisi additur* based on the supposed inadequacy of the verdict. (App. 52–53.) After hearing arguments on the Estate's motion, the trial court granted the motion for a new trial *nisi additur* and ordered Ford to pay an additional $600,000, bringing the total verdict to $900,000. (App. 6–10.)

In the order granting *additur*, the trial court first held that of the $300,000 amount awarded by the jury, $226,605 was for economic damages and the remainder was for

---

[2] This figure comprised $10,196 for a funeral bill (App. 334:14–15) and $228,605 of pecuniary losses (App. 314:15–17). The pecuniary losses were estimated based on the assumption that Riley, who was 67 when he died, would run for reelection as Sheriff of Jasper County instead of retiring, and would be reelected for a fourth term. (App. 311:8–11, 313:13–314:13.) Such speculation is not entitled to probative value. *Baughman v. AT&T Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991) ("Neither the existence, causation, nor amount of damages can be left to conjecture, guess, or speculation."). The pecuniary losses also included an amount designed to replace the household tasks performed by Riley. (App. 311:20–312:1.)

noneconomic damages.[3] (App. 7–8.) The trial court also noted in its order that the Estate had introduced "emotionally compelling testimony" in support of noneconomic damages. (App. 8.) Based on the trial court's view of that evidence—a view that differed from the jury's—an additional $600,000 was needed to compensate the Estate for noneconomic damages. (App. 9.)

Both parties appealed. On February 5, 2014, the Court of Appeals affirmed in part and reversed in part. *See Ford v. Riley*, 408 S.C. 1, 757 S.E.2d 422 (Ct. App. 2014). The Court of Appeals reversed the trial court's *additur*, noting that the trial court had failed to comply with the well-established requirement of offering "compelling reasons" for invading the jury's province. *Id.* The Court of Appeals also reversed the trial court's refusal to evaluate the reasonableness of the way in which the Estate allocated its pre-trial settlement proceeds with the at-fault driver, concluding that under a reasonable allocation in accord with the evidence, Ford was entitled to a $20,000 set-off. *Id.*

Both parties filed petitions for rehearing, and the Estate also sought rehearing *en banc*. The panel of the Court of Appeals denied the petitions on April 3, 2014, and the Court of Appeals denied the Estate's request for rehearing *en banc* on May 2, 2014. The Estate filed a Petition for Certiorari with this Court on June 2, 2014, and this Court granted the petition on September 24, 2014.

STANDARD OF REVIEW

"Motions for a 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,

[3] Only the jury knows how much of the $300,000 verdict was awarded for economic loss because the general verdict form asked only for the jury's actual damage award without division into separate amounts of economic and noneconomic damages.

however, is not absolute and it is the duty of this Court in a proper case to review and determine whether there has been an abuse of discretion amounting to error of law." *Toole v. Toole,* 260 S.C. 235, 239, 195 S.E.2d 389, 390 (1973). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *Kiriakides v. Sch. Dist. of Greenville Cnty.,* 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009).[4]

"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." *Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (citing *Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct. App. 2000)); *Smalls v. South Carolina Dept. of Educ.*, 339 S.C. 208, 219, 528 S.E.2d 682, 688 (Ct. App. 2000) ("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. [] A set-off is not necessarily founded upon 'any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction' of the court; therefore, such motions are 'addressed to the discretion of the court—a discretion which [should not be] arbitrarily or capriciously exercised.'") (quoting *Rookard v. Atlanta & Charlotte Air Line Ry.*, 89 S.C. 371, 376, 71 S.E. 992, 995 (1911)).

ARGUMENT

The Court of Appeals' opinion applies well-settled precedent that a trial judge is permitted to invade the province of the jury and award additur only when the award is inadequate and compelling reasons justify an adjustment. In addition, the Court of

[4] The Estate incorrectly states that the standard of review is whether there is any evidence to support the trial court's order. *See* Pet. Brief at 10.

Appeals followed established precedent by analyzing and reallocating the pre-trial settlement proceeds to accord with the evidence. *Id.* at 28–37. The Court of Appeals should be affirmed.

I. The Court of Appeals' decision is consistent with well-settled law regarding *additur.*

The Court of Appeals' opinion applies the time-tested rule established by this Court and repeated by our appellate courts for nearly three decades: that a trial judge is permitted to invade the province of the jury and award *additur* only when there is a finding of inadequacy and the determination that this invasion is justified by compelling reasons. Here, the Court of Appeals correctly applied that rule, concluding that the trial judge erred by effectively trebling the jury's verdict based on his view of how "emotionally compelling" the testimony was.

The Estate insists that the trial court had compelling reasons to second-guess the jury's award of damages (namely the court's evaluation of the emotional weight of the testimony), *id.* at 9–15; that the compelling reasons requirement does not apply if (or alternatively is satisfied where) damages are uncontested, *id.* at 15–22; that South Carolina precedent supports the grant of *additur* in this case, *id.* at 18–22; and that because a grant of *additur* involves an exercise of discretion, the grant should be left undisturbed unless it is without any evidentiary support, *id.* at 22–27.[5] Each of the Estate's arguments is without merit.

[5] Petitioner complains that the compelling reasons requirement is both a "bright line test" and is "nebulous and undefined." *See* Pet. Brief at 6–7. As explained below, it is neither. Rather, it permits the trial courts to exercise their discretion within certain defined parameters.

A. The Court of Appeals' opinion discussing *additur* is consistent with South Carolina precedent.

This Court has long stated that a motion for new trial *nisi additur* may be granted only where the verdict is inadequate and compelling reasons justify the trial court's invasion of the province of the jury. *See Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("If an award is merely inadequate or unduly liberal, the trial judge alone has the discretion to grant a new trial *nisi additur*. [] Compelling reasons, however, must be given to justify invading the jury's province in this manner."); *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993) (same). Likewise, the Court of Appeals has long repeated and applied this well-established rule in numerous cases. *See, e.g., Luchok v. Vena*, 391 S.C. 262, 264, 705 S.E.2d 71, 72 (Ct. App. 2010); *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008); *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003); *Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 18, 419 S.E.2d 795, 799 (Ct. App. 1992).

The Estate, however, argues that the Court of Appeals' ruling here goes beyond this rule. *See* Pet. Brief at 7. The Estate predicts (allegedly with "absolute certainty") that the Court of Appeals' holding means that "no trial court will consider an *additur* if the verdict exceeds the economic damages." *Id.* The Estate misinterprets the Court of Appeals' holding and analysis. The Court of Appeals did not hold that a trial court can *never* increase a jury's award of noneconomic damages as long as some such damages are awarded. Rather, it simply held that such an increase must be justified by compelling

reasons and that, under the facts of this case, there were none provided.[6] *See Riley*, 408 S.C. at 18–20, 757 S.E.2d at 432–33 ("[O]ur analysis of the decision to grant *additur* . . . turns on whether the trial court gave compelling reasons for invading the province of the jury. . . . [W]e 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*.").

This holding is entirely consistent with precedent regarding *additur*. This Court has held that *additur* is justified where a grossly inadequate verdict indicates the jury's disregard of the facts and the court's instructions. *Craven v. Cunningham*, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("Inadequacy of a jury's verdict will not, per se, entitle litigants to a new trial or a new trial *additur*. [] A reviewing court will not interfere with the amount of a verdict unless the verdict is either so grossly excessive or inadequate that it must be deemed the result of the jury's disregard of the facts and the court's instructions.") (citations omitted). Conversely, a trial judge's mere belief that the jury's award of noneconomic damages is inadequate is an insufficient basis upon which to grant a new trial absolute. *See Kalchthaler v. Workman*, 316 S.C. 499, 503, 450 S.E.2d 621, 623 (Ct. App. 1994) (affirming trial court's denial of motion for new trial and noting that "a claim for pain and suffering was one that peculiarly fell within the province of the jury to weigh and determine") (citations omitted).

Under the precedents cited above, before granting *additur*, a trial court must determine (1) that the award was "inadequate," *and* (2) that there are "compelling

---

[6] Specifically, the Court of Appeals concluded that the trial judge's disagreement with the jury's evaluation of the emotional impact of the testimony was not a compelling reason to invade their province and thus the *additur* was impermissible.

reasons" to disagree with the jury's award, such as an inescapable indication that the jury ignored the facts or the court's instructions. *Craven*, 292 S.C. at 443, 357 S.E.2d at 25; *see also Bailey*, 318 S.C. at 14, 455 S.E.2d at 691.

The Estate argues that the trial court's disagreement with the jury's evaluation of the emotional weight of the testimony justified *additur*. *See* Pet. Brief at 9–15 (summarizing the testimony of the decedent's family and friends and arguing that because the trial court's view of the emotional impact of this testimony differed from the jury's, that difference of opinion constituted a compelling reason to substitute the court's opinion for the jury's). This argument is incorrect. *See Green v. Fritz*, 356 S.C. 566, 571, 590 S.E.2d 39, 41 (Ct. App. 2003) ("[T]he 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.").[7] Here, the trial court's *additur* order simply reiterated the reasons the Estate claimed entitlement to noneconomic damages. (*See* App. 8–9.) Applying prior case law, the Court of Appeals correctly held this did not constitute a compelling reason, and thus amounted to an error of law. A trial court's ruling that is based on an error of law constitutes an abuse of discretion. *See Kiriakides*, 382 S.C. at 20, 675 S.E.2d at 445. The Court of Appeals also correctly held that a trial court may not grant *additur* simply

[7] The Estate has attempted to distinguish *Green* by arguing that the damages in *Green* were disputed while the noneconomic damages here were uncontested. The placement of a monetary value on friendship, reputation, or familial ties is an inherently inexact process, and testimony that someone's friendship or services were meaningful does not establish an uncontested monetary value on the loss of that friendship or service. Accordingly, because the noneconomic damages here are not undisputed, fixed amounts, the *Green* court's holding applies with equal force, and a trial court's "mere listing" of a plaintiff's claimed damages "does not constitute compelling reasons for invading the jury's province." *Green*, 356 S.C. at 571, 590 S.E.2d at 41.

because he believes that testimony of noneconomic damages should be given greater emotional weight than the jury gave it.

B. The "compelling reasons" requirement applies regardless of whether damages were contested, particularly where the evaluation of damages is susceptible to differences of opinion.

The Estate argues that the damages asserted in this case were uncontested and that this "certainly . . . must be considered as compelling reasons" to grant *additur*. *See* Pet. Brief at 15–16. The Estate also argues that the question of whether damages are contested is a "central point" in determining whether a trial court properly granted or denied *additur*. *Id.* at 18. Both of these arguments are incorrect.

First, the fact that Ford did not dispute the trial testimony regarding the decedent's future earnings does not mean that the estimated amount was a conceded and guaranteed damages amount. The future earnings estimate was based on the assumption that Riley, who was 67 when he died, would not only run for reelection as Sheriff of Jasper County instead of retiring but also would actually *be* reelected for a fourth term—a speculative assumption.

Other courts have rejected claims for damages predicated on winning an election as speculative. For example, in *Chrysler Corp. v. Todorovich*, 580 P.2d 1123 (Wyo. 1978), Mr. Todorovich—who was the sheriff of Hot Springs County, Wyoming—was involved in an automobile collision while driving a Chrysler vehicle. An alleged failure in the seat bracket of his car caused a herniated disk. At trial, one of Mr. Todorovich's witnesses was qualified as an expert in the politics of Hot Springs County. The expert opined that the reason Mr. Todorovich was not re-elected as sheriff was because of the injuries he sustained in the accident. The jury awarded him $450,000. On appeal, the

Wyoming Supreme Court held in part that the allowance of the expert testimony that Mr. Todorovich would have won the election (and thus had wages as sheriff) was reversible error, noting that "remote, uncertain and speculative damages are not allowed." *Id.* at 1134 (citation omitted). The court noted that, in a prior case, it had held "that the fact of a future election prevented a candidate for office from claiming as damages the loss of the salary for the four-year term." *Id.* (citing *State ex rel. Willis v. Larson*, 539 P.2d 352 (Wyo. 1975)). It also noted that other jurisdictions—namely the Ninth Circuit and Louisiana—have applied a similar rule. *Id.* Accordingly, the court concluded it was "plain and prejudicial error" to permit the supposed expert's testimony that the plaintiff lost the election as a result of his injuries. *Id.* The lost wages claim here was similarly speculative to the extent that it was predicated on the decedent winning another election. This component of the economic damages was the lion's share of such damages. App. 310-14. The trial court's reliance on speculation as evidence of pecuniary loss is itself an abuse of discretion. *See Kiriakides,* 382 S.C. at 20, 675 S.E.2d at 445 ("An abuse of discretion occurs when the conclusions of the circuit court . . . are based on unsupported factual conclusions.").[8]

Similarly, the jury may have disagreed with the estimate that the loss of the decedent's household services was worth approximately $57,000. *See Black v. Hodge,* 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) (noting a trier of fact must not always believe uncontradicted testimony because "[t]here remains the question of the

[8] Further, the trial court in part based his *additur* on his view that the decedent was "a general pillar of the community" and "not merely a member of the community, but rather he was an integral part of the community." App. 8–9. The decedent's role as a community leader does not support damages to the Petitioners.

inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation").

The fact that Ford did not dispute the trial testimony that the decedent was a loving husband and father, a loyal friend, and a community servant does not mean that the monetary figure placed on the family's grief and suffering was uncontested or conceded. South Carolina's courts have repeatedly recognized that intangible damages such as grief and loss are inherently imprecise and incapable of exact measurement and thus should be determined by a jury:

> A determination of reasonable compensation for nonpecuniary damages turns on the facts of each case and is usually left to the jury's discretion. [] We must bear in mind this case involves a young, loving mother who lost her infant child. There is no mathematical formula which can easily establish the value of this kind of loss, and it is not this court's place to do so.

Scott v. Porter, 340 S.C. 158, 169, 530 S.E.2d 389, 395 (Ct. App. 2000) (citations omitted); *see also Mims v. Florence Cnty. Ambulance Serv. Commn.*, 296 S.C. 4, 7, 370 S.E.2d 96, 98 (Ct. App. 1988) ("The amount of damages a jury may award for . . . mental pain and suffering is incapable of exact measurement and is therefore left for determination by the jury.") (citations omitted); *Lucht v. Youngblood*, 266 S.C. 127, 137, 221 S.E.2d 854, 859 (1976) (noting that parents' losses from the untimely death of a child "are intangibles, the value of which cannot be determined by any fixed yardstick. Their loss to the beneficiaries must be estimated by the jury in the exercise of their sound judgment under all the facts and circumstances of the case."). In contrast to these authorities, the Estate believes the trial court may substitute its opinion of the monetary value of these intangible losses for the opinion of the jury. The law does not permit this.

Furthermore, contrary to the Estate's argument, the question of whether the amount or causation of damages is disputed has never been a critical component in the *additur* analysis. Rather, of the cases discussing *additur*, only a small number mention whether damages were contested. *See, e.g., Luchok v. Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010); *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003); *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995). In each of these cases, damages (or the proximate causation of damages) were disputed, and in each of them the award of *additur* was reversed. This correlation, however, does not support the Estate's argument. In *Bailey*, for example, the reversal of the trial court's award of *additur* was based not on the existence of a dispute regarding damages but on the fact that the trial court had applied the wrong legal test for *additur*. No South Carolina cases have held that a defendant's failure to rebut noneconomic damages evidence submitted by a plaintiff authorizes the trial court to invade the jury's province at will, unconstrained by the applicable legal test justifying *additur*. This Court should not create such a rule now.

C. The "compelling reasons" requirement is neither ambiguous nor a meaningless redundancy.

The Estate repeatedly complains that the "compelling reasons" requirement is undefined dicta and is mere judicial surplusage that simply means "abuse of discretion." *See, e.g.,* Pet. Brief at 7, 24 (asserting the phrase is "nebulous and undefined," and is "as yet undefined"). Contrary to the Estate's argument, however, the well-established rule requiring compelling reasons is neither ambiguous nor mere redundant verbiage.

The Estate's argument implies that either (1) this Court can and should set out a firm, fixed definition of a "compelling reason" to invade the jury's province or (2) this Court should sweep aside 30 years of precedent and eliminate the "compelling reasons"

requirement. Both suggestions should be rejected. As to the first, a firm, fixed definition is impracticable and unnecessary in light of the purpose of the compelling reasons requirement and this Court's prior guidance on what constitutes a compelling reason. Such a definition of the phrase "compelling reasons" is impracticable because that phrase is intended to strike a balance—both deferring to juries' findings and also giving trial courts some, though not unfettered, discretion—and thus may not be capable of a precise, fixed definition. *See Luchok*, 391 S.C. at 264, 705 S.E.2d at 72 ("The requirement [to offer compelling reasons for invading the jury's province] is imposed to balance the wide discretion given to a trial judge in ruling on a new trial motion with the substantial deference courts must give to a jury's determination of damages."). Such balancing tests, like other legal tests containing comparative descriptive terms, are not susceptible to exact definitions. *See, e.g., In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 147, 568 S.E.2d 338, 350 (2002) ("The concept of equal protection is 'difficult to define and not susceptible of exact delimitation.'") (citation omitted); *Ellis v. Taylor*, 311 S.C. 66, 70, 427 S.E.2d 678, 681 (Ct. App. 1992) (noting that the word "reasonable" is "'a relative, generic term difficult of adequate definition'") (citing 75 C.J.S. Reasonable § 634).

In addition, the Estate's argument ignores the fact that, by way of example, this Court *has* defined what constitute compelling reasons to invade the jury's province. In *Craven*, this Court explained that the invasion of the jury's province via *additur* is permissible when justified by the jury's apparent disregard of the facts or law. *Craven*, 292 S.C. at 443, 357 S.E.2d at 25 ("Inadequacy of a jury's verdict will not, per se, entitle litigants to a new trial or a new trial *additur*. [] A reviewing court will not interfere with

the amount of a verdict unless the verdict is either so grossly excessive or inadequate that it must be deemed the result of the jury's disregard of the facts and the court's instructions.") (citations omitted). Here, the Court of Appeals' opinion aligns with *Craven's* definition. Because the jury awarded noneconomic damages—even if in a lesser amount than the trial judge wished—they cannot be said to have disregarded the facts, evidence, or the court's instructions. Further, as pointed out above, the Court of Appeals here also followed precedent and guidance from prior case decisions in setting forth what would *not* constitute a compelling reason set forth by a trial court, namely, merely reciting the damages claims and evidence of the plaintiff and then noting disagreement with the jury's damages verdict. *See e.g.*, *Green v. Fritz*, 356 S.C. 566, 571, 590 S.E.2d 39, 41 (Ct. App. 2003).

The alternative suggestion implied by the Estate's argument—that this Court should cast aside 30 years of jurisprudence and jettison the compelling reasons requirement entirely—is singularly inadvisable. In support of this position, the Estate notes that an award of *additur* is a matter of the trial court's discretion and is entitled to deference. *See* Pet. Brief at 22–27.[9] This discretion, however, is subject to an abuse of discretion review. Trial courts should not be permitted to usurp the jury's role by noting disagreement with the jury's verdict and describing certain evidence regarding damages to be compelling. Such a result would be a dramatic departure from this Court's and the Court of Appeals' precedent.

[9] Most of the cases the Estate cites in support of this argument also contain the requirement that the exercise of this discretion be grounded on compelling reasons. The Estate, however, fails to quote that requirement in its parenthetical quotations of these cases.

Finally, even if there were no requirement for articulating compelling reasons to invade the province of the jury, a trial court may not use *additur* to simply substitute his judgment for that of the jury. That is what the trial court attempted to do here. *Graham v. Whitaker*, 282 S.C. 393, 402, 321 S.E.2d 40, 45 (1984) ("Certainly, [the trial judge] has no right to substitute his judgment for that of the jury.") The Court of Appeals should thus be affirmed.

D. The Court of Appeals' ruling does not deprive trial courts of the ability to award *additur* in appropriate cases.

The Estate erroneously predicts that the Court of Appeals' ruling will lead to dire results. For example, it predicts (allegedly with "absolute certainty") that "no court will consider an *additur* if the verdict exceeds the economic damages" and that "where *some*, *any*, or *even a nominal* award of noneconomic damages can be discerned from the verdict, the trial judge . . . [will be] stripped of long-held discretionary power" to award *additur*. *See* Pet. Brief at 8, 26 (emphasis in original). These predictions are baseless.

Contrary to the Estate's assertions, the compelling reasons requirement (both on its face and as applied by the Court of Appeals) permits a trial court to award *additur* where some amount of noneconomic damages has been awarded, so long as there are compelling reasons to do so, and there is not otherwise an abuse of discretion. Specifically, an award of *additur* would be warranted where there is a significant and inescapable indication that the jury's verdict is inadequate and not consistent with the evidence presented and law instructed. A special verdict in which a jury found liability but provided no requested damages of a particular category in the face of uncontested and probative evidence of such proximately caused damages, and despite their instructions from the court, is an easy example.

Accordingly, the Court of Appeals' ruling and the application of the long-standing compelling reasons requirement do not limit or remove a trial court's ability to award *additur* where appropriate. The Estate's ominous predictions to the contrary provide no basis upon which to reverse the Court of Appeals.

II. The Court of Appeals correctly analyzed the reasonableness of the allocation of the pre-trial settlement.

The Estate also argues that the Court of Appeals erred and deviated from controlling case law by analyzing the reasonableness of the way in which the Estate allocated the funds derived from the pre-trial settlement with the at-fault driver and by reallocating those funds more reasonably to reflect the evidence. *See* Pet. Brief at 28–37. The Court of Appeals' analysis was consistent with this Court's precedent and reflects the same analysis and solution employed by other jurisdictions to consider this scenario.

A. The Court of Appeals' reallocation of settlement proceeds to reflect the evidence is consistent with South Carolina precedent.

As noted in the Counter-Statement of the Case, *supra*, prior to trial, the estate settled with the at-fault driver for $25,000. The settling parties agreed to allocate $20,000 to the survival claim and $5,000 to the wrongful death claim. Immediately prior to the directed verdict stage, the Estate withdrew its survival action and proceeded to trial against Ford solely on the wrongful death claim. After the verdict, Ford moved for a setoff of $25,000 to account for the Estate's settlement with the at-fault driver. Although Ford was at least entitled to a $5,000 setoff for the wrongful death claim, the trial court denied the motion outright.

The Court of Appeals concluded that neither the Estate's allocation nor Ford's requested set-off were proper. Rather, it held that Ford was entitled to an assessment of the proper allocation of the settlement in light of the evidence and, if necessary, a

reallocation of the settlement amount to comport with the evidence. The Court of Appeals conducted this analysis and determined that 80% of the settlement (*i.e.*, $20,000) should have been allocated to the wrongful death claim, and 20% of the settlement (*i.e.*, $5,000) should have been allocated to the survival claim. *Ford v. Riley*, 408 S.C. 1, 17, 757 S.E.2d 422, 432 (Ct. App. 2014). The Court of Appeals determined that this allocation was reasonable based on the "minimal" evidence that Riley briefly survived the collision. *Id.* at 15, 757 S.E.2d at 430.

The Court of Appeals' analysis and reallocation of the settlement is strikingly similar to the analysis and reallocation of a settlement recently affirmed by this Court in *Rutland v. S.C. Dept. of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012). In *Rutland*, prior to trial the plaintiff had settled with one party, allocating part of the settlement to the wrongful death claim and part to the survival claim. After trial, the trial court reallocated the entire settlement amount to the wrongful death claim, noting there was "no evidence of conscious pain or suffering" to support the survival claim. *Rutland*, 400 S.C. at 214, 734 S.E.2d at 144.

Here, the Court of Appeals held that the settlement allocation differed from that in *Rutland* because in *Rutland* there was "no evidence" to support a survival claim whereas here there was "minimal" evidence to support such a claim.[10] *Riley*, 408 S.C. at 16, 757 S.E.2d at 430. The Court of Appeals properly determined, however, that this distinction only affected the *amount* in which the settlement should be reallocated, not *whether* the

[10] Ford argued the evidence here was substantively indistinguishable from that in *Camp v. Petroleum Carrier Corporation*, 204 S.C. 133, 28 S.E.2d 683, 685 (1944), and in *Rutland*, 400 S.C. at 215, 734 S.E.2d at 145 and that thus, there was no evidence of conscious pain and suffering.

settlement was susceptible to reallocation.[11] This was a proper application of the *Rutland* Court's analysis, which was premised on the question of whether the allocation reasonably reflected the evidence. That analysis is not limited to a zero-sum allocation, and a court is not foreclosed from applying that analysis to change an improper allocation where the bulk of the total settlement amount is allocated to a cause of action supported by minimal evidence.

The Estate's argument all but ignores *Rutland* and instead relies primarily on two older cases from the Court of Appeals: *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).[12] Based on these cases, the Estate argues that a reallocation of a settlement for set-off purposes is permissible only if the reallocation can be done on an all-or-nothing basis. Specifically, the Estate argues that reallocation is allowed only if there is evidence that the pre-trial settlement was fraudulent or a sham because there was *no* evidence at all to support the cause of action to which the settlement proceeds were allocated. *See* Pet. Brief at 28–30. This argument is incorrect.

First, the Estate's argument ignores the fact that the most recent law on point—*Rutland*—contains no mention or implication that a court's analysis and reallocation of a pre-trial settlement must be triggered by evidence of fraud or a sham settlement or allocation. Second, contrary to the Estate's argument, the reallocation of the settlement

[11] In *Rutland*, for instance, where there was no evidence of survival, none of the settlement should be allocated to that cause of action. Here, in contrast, where there was minimal evidence of survival, a relatively minimal amount of the settlement—twenty percent, in the Court of Appeals' view—was allocated to that cause of action.

[12] In addition, the Estate relies on a few other cases that do not involve settlements or the reallocations thereof, and offer little or no guidance on the issue here. *See* Pet. Brief at 30–32 (discussing *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991) and *Croft v. Hall*, 208 S.C. 187, 194, 37 S.E.2d 537, 539 (1946)).

in *Welch v. Epstein* was *not* premised on a finding that the allocation was a sham. Rather, like in *Rutland*, the court there merely held there was no evidence of pain and suffering and thus no settlement funds should be allocated to that claim. Third, the Estate's reliance on *Ward v. Epting* is misplaced. The question in *Ward* was not how the settlement funds should be allocated between two colorable claims, but whether one of the causes of action was itself a sham and thus not entitled to any allocation.[13] The *Ward* court held that because there was evidence from multiple witnesses that the patient was conscious and responsive after her surgery, there was sufficient basis for the claim of pain and suffering and thus the court would not disturb the allocation of the settlement. Taken together, these cases indicate at most that a fraudulent or sham settlement allocation can lead to a court's analysis and potential reallocation of settlement funds. The cases do not stand for the proposition that a fraud or sham allocation is *required* for any reallocation of settlement funds.

B. The Court of Appeals' reallocation analysis promotes justice and addresses potential concerns about reallocation.

The dissent in *Rutland* noted several potential concerns posed by a court's ability to reallocate pre-trial settlement proceeds agreed to by settling parties. *See Rutland*, 400 S.C. at 218-20, 734 S.E.2d at 146-48 (Pleicones, J. dissenting in part). Specifically, the *Rutland* dissent opined that where a plaintiff settles two causes of action (*e.g.*, survival and wrongful death) but proceeds to trial only on one (*e.g.*, wrongful death), "it is hardly surprising that the record contains little evidence," of the other issue. *Id.* at 218, 734

[13] *Ward* is the only case cited by the Estate that—at first glance—offers any support for the Estate's argument. *See* Ward, 290 S.C. at 559–60, 351 S.E.2d at 874 ("The judge found in a post-trial order . . . that Dr. Epting could not attack the covenant absent a showing of fraud or lack of jurisdiction."). *Ward*, taken as a whole, does not stand for this legal proposition, however.

S.E.2d at 146. Accordingly, in the *Rutland* dissent's view, this "essentially requires a plaintiff to defend to the court the viability of a claim she has not made" and "may also inequitably reduce a plaintiff's recovery against at-fault defendants." *Id.* at 219, 734 S.E.2d at 147. Finally, the *Rutland* dissent noted concern that permitting reallocation would discourage plaintiffs from settling and encourage joint tortfeasors to litigate. *Id.* at 220, 734 S.E.2d at 147.[14]

The concerns expressed by the dissent are alleviated in this case for several reasons. First, the Estate was not required "to defend to the court the viability of a claim [it] has not made." Unlike in *Rutland*, where 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, a survival claim was filed and litigated by the Estate in this case. 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. (App. 342:23-343:2.) Moreover, each of the dissent's concerns is addressed by protecting both parties, balancing their competing equitable interests, and exercising discretion in pursuit of fairness and equity.[15] *See generally id.* at 216, 734 S.E.2d at 145 ("The trial court's jurisdiction to set off one

[14] Additionally, in *Rutland*, the effect of the reallocation meant that the defendant found liable at trial was not required to pay any amount to the plaintiff. *See Rutland*, 400 S.C. at 220, 734 S.E.2d at 147 (Pleicones, J. dissenting in part) ("Further, the result of reallocation in this case is that SCDOT, an at-fault defendant, is exempted from any payment to the decedent's statutory heirs. I see no equity in this result."). This result is not present here, where Ford—despite the reallocation—was liable to pay damages to the Estate. In any event, this concern, like the *Rutland* dissent's other concerns, would be adequately safeguarded against by an equitable analysis as performed by the Court of Appeals.

[15] In contrast, the rule urged by the Estate would not permit judicial scrutiny of a settlement allocation and thus permit, in certain circumstances, an improper double recovery.

judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties.") (citing *Welch*, 342 S.C. at 313, 536 S.E.2d at 425); *Smalls v. South Carolina Dept. of Educ.*, 339 S.C. 208, 219, 528 S.E.2d 682, 688 (Ct. App. 2000) ("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. [] A set-off is not necessarily founded upon 'any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction' of the court; therefore, such motions are 'addressed to the discretion of the court—a discretion which [should not be] arbitrarily or capriciously exercised.'") (quoting *Rookard v. Atlanta & Charlotte Air Line Ry.*, 89 S.C. 371, 376, 71 S.E. 992, 995 (1911)).

Reallocation is only available where: (1) the plaintiff enters a pre-trial settlement with less than all defendants, (2) the settlement allocates the proceeds among various causes of action, (3) the case proceeds to trial against the remaining defendant(s), (4) the jury returns a verdict for the plaintiff, and (5) the evidence or surrounding circumstances involved in the case show that the settlement has not been reasonably or fairly allocated.[16]

---

[16] In addition, the *Rutland* dissent overestimates the likelihood that a plaintiff would be unable to defend the viability of a cause of action she chose not to assert. In each of the four lawsuits in which the issue of reallocation has arisen—*Rutland*, *Welch*, *Ward*, and the case at bar—there was sufficient evidence adduced at trial to permit the courts to make a reasonable evaluation of the claims' viability, including claims not asserted at trial. *See, e.g.*, *Rutland*, 400 S.C. at 217, 734 S.E.2d at 146 (affirming trial court's reallocation of pre-trial settlement proceeds and noting that, even though the survival claim was not asserted at trial, the record evidence nevertheless indicated the decedent did *not* survive the accident and experience conscious pain and suffering); *Welch*, 342 S.C. at 313, 536 S.E.2d at 426 (affirming trial court's reallocation of pre-trial settlement on the basis of record evidence); *Ward*, 290 S.C. at 560, 351 S.E.2d at 875 (analyzing viability of a claim not asserted at trial and noting that "[t]he record contains evidence from testimony of Dr. Epting and a recovery room nurse that Mrs. Ward was responding

The application of this equitable review of settlement allocations does not discourage plaintiffs from settling. Rather, it simply encourages them to allocate settlement proceeds in a way that is consistent with the evidence and reasonable under the surrounding circumstances.

C. The Court of Appeals' reallocation of settlement proceeds reflects the same analysis and solution employed by other jurisdictions.

The Court of Appeals' ruling comports with the approach of other states in similar circumstances. Other jurisdictions have recognized a plaintiff may have ulterior motives in allocating pre-trial settlement amounts and thus a court can and should scrutinize such allocations:

> [Our precedent has] warned of the collusive forces at play in these situations. The settling defendant only cares about the total amount of the settlement, but the plaintiff greatly prefers that the settlement be allocated to non-joint liabilities so as to allow the plaintiff to recover more from other defendants. Because of the lack of truly adverse interests, the court said, the parties' allocation is virtually meaningless and may not reasonably reflect the parties' relative liabilities.
>
> "Far from deferring to allocations such as these, we view them with considerable suspicion because of the risk that liability may have been allocated for strategic reasons . . . . We can't blame the [settling parties] for trying to structure the settlement in a manner that best served their interests; but we can't let their allocation bind [the non-settling obligor]."

Sims v. DeArmond, 42 F.3d 1181, 1184 (9th Cir. 1994) (quoting *Slottow v. American Casualty Co.*, 10 F.3d 1355, 1359 (9th Cir. 1993)) (alterations in original); *see also McDermott, Inc. v. AmClyde*, 511 U.S. 202, 214 (1994) (explaining that allowing the

---

to directions given to her following surgery and in the recovery room. . . . We find there was sufficient evidence to present a jury question on conscious pain and suffering").

dollar figure of a settlement to determine a co-defendant's liability, "is likely to lead to inequitable apportionments of liability").

In response to this concern, courts of other jurisdictions have adopted the same approach taken by the Court of Appeals here. *See Readel v. Towne*, 706 N.E.2d 99, 102–03 (Ill. Ct. App. 1999) (holding that trial court was required to analyze the allocation of settlement proceeds, and "should evaluate the fairness and reasonableness of the allocation in view of the survival and wrongful death claims involved," and if necessary "reapportion it accordingly"); *Casey v. State*, 507 N.Y.S.2d 159 (N.Y. App. Div. 1986) (holding that for purposes of set-off, the trial court—not the plaintiff—should determine the reasonable allocation of the settlement proceeds between the wrongful death and survival claims and "that the self-created apportionment proffered by the claimants is not binding on the trial court"); *see also Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, No. 4:09-cv-1379, 2013 U.S. Dist. Lexis 138941, *73–85 (D.S.C. Sept. 27, 2013) (analyzing a lump-sum settlement and concluding that the recipient's allocation of those proceeds toward certain claims and not others did not prevent the court from analyzing and reallocating those proceeds); *El Escorial Owners' Assn. v. DLC Plastering, Inc.*, 154 Cal. App. 4th 1337, 1350-52 (Cal. Ct. App. 2007) (affirming trial court's reallocation after trial of pre-trial settlement and noting that a "trial court must therefore have the latitude to adjust offsets in response to evidence educed in trial").

Because the Court of Appeals' analysis and reallocation is consistent with this Court's reasoning and holding in *Rutland*, is not barred by any South Carolina precedent, and is consistent with the approach taken by other jurisdictions in such situations, there is no basis upon which this Court should reverse the Court of Appeals.

CONCLUSION

For the foregoing reasons, Ford respectfully submits that the Court of Appeals' decision should be affirmed.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown, SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan, SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Michael J. Anzelmo, SC Bar No. 72933
E-Mail: michael.anzelmo@nelsonmullins.com
Post Office Box 11070
Columbia, SC 29211-1070
(803) 799-2000

Curtis L. Ott
E-Mail: cott@gblawfirm.com
Laura W. Jordan
E-Mail: ljordan@gwblawfirm.com
Gallivan White & Boyd, PA
Post Office Box 7368
Columbia, SC 29202
(803) 779-1833

Attorneys for Ford Motor Company

December 3rd, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 3 2014
S.C. Supreme Court

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

The Honorable Doyet A. Early III, Circuit Court Judge

Appellate Case No. 2014-001192

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

v.

Ford Motor Company,..... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Ford Motor Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Brief of Respondent

Counsel Served:

Ronnie L. Crosby, Esquire
Peters Murdaugh Parker Eltzroth & Detrick, P.A.
Post Office Box 457
Hampton SC 29924

Daniel E. Henderson, Esquire
Matthew V. Creech, Esquire
Peters Murdaugh Parker Eltzroth & Detrick, P.A.
Post Office Box 2500
Ridgeland SC 29936

J. Kenneth Carter, Esquire
David C. Marshall, Esquire
Carmelo B. Sammataro, Esquire
Turner Padget 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

Lisa P. Whitehurst
Lisa P. Whitehurst
Administrative Assistant

December 3, 2014

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9025
www.nelsonmullins.com

C. Mitchell Brown
Tel: 803.255.9595
Fax: 803.255.9025
mitch.brown@nelsonmullins.com

December 3, 2014

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

RE: Laura Riley as the Personal Representative of the Estate of Benjamin Riley v. Ford Motor Company
Civil Action No. 2008-CP-05-235
Appellate Case No. 2014-001192
Our File No. 12745/01682

Dear Mr. Shearouse:

Enclosed please find the original and sixteen copies of the Brief of Respondent in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this brief.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

CMB:lpw
Enclosure
cc: Ronnie L. Crosby, Esquire
Daniel E. Henderson, Esquire
Matthew V. Creech, Esquire
Curtis L. Ott, Esquire

Laura W. Jordan, Esquire
J. Kenneth Carter, Jr., Esquire
David C. Marshall, Esquire
Carmelo B. Sammataro, Esquire