**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**APPEAL FROM BAMBERG COUNTY**
**Court of Common Pleas**

**Doyet A. Early, II, Circuit Court Judge**

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**Case No.: 2008-CP-05-00235**

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

**v.**

**Ford Motor Company .....Appellant.**

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# FINAL BRIEF OF RESPONDENT

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## STATEMENT OF THE ISSUES ON APPEAL

1. DID THE ESTATE PRESENT SOME EVIDENCE THAT THE DOOR LATCH SYSTEM OF THE FORD F-150 PN96 TRUCK WAS UNREASONABLY DANGEROUS AND DEFECTIVE AS DESIGNED AND OF AN ALTERNATIVE FEASIBLE DESIGN?

2. WAS THE TRIAL COURT'S GRANT OF NEW TRIAL *NISI ADDITUR* WITHIN THE COURT'S DISCRETION, SUPPORTED BY THE EVIDENCE, AND CONTROLLED BY COMPELLING REASONS?

3. DID THE TRIAL COURT PROPERLY DENY FORD'S REQUEST FOR EQUITABLE REALLOCATION OF SETTLEMENT PROCEEDS?

## STATEMENT OF THE CASE

For the sake of brevity, the Estate agrees with and incorporates by reference the Statement of the Case contained in Appellant Ford Motor Company's Initial Brief. The only point of contention or addition that the Estate wishes to address is regarding Ford's recitation of the trial court's ruling on the denial of the directed verdict. The trial court's ruling was not as limited as that portion quoted by Ford. The trial court did not reduce his denial of Ford's directed verdict motion to a determination that that there was a mere "battle of the experts." Instead, the trial court stated that the evidence presented, including the Estate's door expert's testimony, the accident reconstruction, and biomedical expert's testimony, created questions of fact "for the jury to determine whether or not Ford, in fact, did nor did not or was or was not negligent in the design of the system and whether or not it was designed so the door would not come open; i.e., whether or not it was crashworthy and if, in fact, is the proximate cause of the Sheriff Riley's death." (R. p. 346, lines 8-21).

## STATEMENT OF FACTS

Benjamin "Ben" Riley died in Bamberg County, South Carolina on August 29, 2007 when he was ejected from a 1998 Ford F-150 "PN96" pickup truck that was involved in a collision. However, the relevant facts regarding issues of liability and Ford Motor Company's culpability begin years before Ben Riley died.

Automobile manufacturers long have acknowledged the principle of "crashworthiness" as it relates to the design and manufacture of vehicles. In a Ford promotional pamphlet from 1956, Ford acknowledged the father of crash injury research, Hugh Dehaven, a pioneer in the field of crashworthiness. (R. p. 182, lines 1-11; R. p. 1000). The principles espoused by Dehaven still underpin the automotive industry's design and manufacture goals for the foreseeable event of its products being involved in crashes. With regard to automobile doors, crashworthiness principals require that a passage into the occupant compartment – such as a door – should not come open and allow people out of the passenger compartment in a crash. (R. p. 182, lines 14-21). Since 1969, Ford engineers' reports have acknowledged that in rollover crash events the risk of ejection from the vehicle is substantially greater and that upon ejection, the risk of injury is substantially greater than without ejection. (R. p. 183, line 12 – p. 185, line 13; (R. p. 452). One Ford safety engineering report from November 6, 1980 concludes that a passenger car occupant is approximately twenty (20) times more likely to be ejected in a crash if a door opens. (R. p. 379). The risk of ejection is increased by door openings for both belted and unbelted occupants. (R. p. 186, lines 18-25).

Ford's "Worldwide Product Acceptance Specifications" of June 15, 1990, applicable to door latch integrity, states that "the components and assemblies covered by

this Subsystem shall retain their respective doors in the closed position under all vehicle operating conditions." (R p. 396-399).

**A. The Concept of Foreshortening**

The concept of "foreshortening" is central to the analysis of unwanted door latch activations or door opening in this case. Foreshortening occurs when the distance between the actuator or remote control and the latch shortens, causing the door latch to release. (R. p. 189, lines 4-14). In a crash, the distance between the actuator and latch should be maintained. (R. p. 191, lines 18-23). The concern and concept of foreshortening has been well known within the automobile industry, and patented components to prevent unintended latch release go back as far as General Motors' patent of June, 1965. (R. pp. 449-451). General Motors' 1965 patent states:

> In the event of a collision or otherwise, it is possible that deformation of the body may change the normal distance between the operating means of the door latch and force the actuating rod to release the door latch. It is also possible that the actuating rod may become deformed in a manner shortening the end-to-end distance thereof so that the door latch will be released. Accordingly, it is the primary object of this invention to provide latch-actuating means which will accommodate changes in the normal distance between the door latch and operating means therefore, or deformation in the latch actuating means, without release of the door latch.

(Id.). Ford's own Engineering Department, in a report of March of 1990 states that "rod type connections may cause the door to unlatch during a high speed frontal impact crash test...[and] [t]his unlatching is caused by the compression loading of the rod during excessive door deformation." (R. p. 401). Similarly, before Ford's manufacture of the PN96 at issue, a Ford patent addressed the concerns of foreshortening. This June of 1994 patent states: "During operation a vehicle may be subjected to fore, aft, or side forces

which may cause the latch to operate. Accordingly it would be appreciated that it would be highly desirable to have a vehicle door-latching mechanism that can withstand fore, aft, or side forces without operating." (R. p. 492; R. p. 193, line 15– p. 195, line 4). Ford Motor Company and the automotive industry in general have long known of the concerns and concepts of latch activation in accidents where sheet metal crushing is involved. (R. p. 196, lines 7-12).

**B. The PN96 Model, Latch Configuration, and Testing**

Ford's first production model F-150 PN96 was manufactured on November 6, 1995. (R. p. 206, lines 4-15). Designated as the "PN96," the subject truck was part of a new F-series truck platform and was a successor model to the 1992-1995 F-150 F-series. (R. p. 162, lines 20-25). The PN96 model was produced with the rod-linkage system to control door opening. A cable system, an alternative design to the rod system, was used in the 1992-1995 predecessor model F-150's. (R. p. 207, lines 16-19). The 1998 Ford F-150 PN96 which Ben Riley drove was manufactured in October of 1997. (R. p. 264, line 21 – p. 265, line 8).

The door-latch system in the 1998 F-150 PN96 that Riley drove utilized a "rod linkage" system, as opposed to a "cable" system. The Ford rod linkage system at issue contains a compression rod[1] that connects the door handle inside the vehicle to an actuator mechanism inside the door that operates the door latch. In contrast, a cable system employs a cable to link the door handle to the actuator.

Prior to the production of the PN96, all Ford F-150 truck model years 1992 through 1996 used a cable system in its doors. (R. p. 203, line 4–p. 204, line 22). The

[1] Rods may either be compression or tension rods. If a rod pushes, then it is a compression rod and if it pulls, then it is a tension rod. Cables are actually in compression and tension. (R. p. 188, line 25 – p. 189, line 14).

change from rod to cable was triggered by Ford's crash tests which showed door opening during impact testing when the rod system was employed. (R. p. 204, lines 6-13). On September 13, 1989, Ford performed two crash tests where rod system door latches failed. Crash Test 7290 used an offset frontal crash with an angled barrier on a 1992 Ford F-150. At 31 miles per hour, the right side door opened upon impact. (R. pp. 1103 (Exhibits 157 and 157A); R. p. 208, lines 3-12; R. p. 197, line 5–p. 199, line 2). The same day, another frontal impact crash test was performed at 35 miles per hour. In this Crash Test 7277 "the right front door unlatched at impact." (R. pp. 1327-1328).

Based on these two crash tests with failed rod linkage systems, Ford discontinued the rod system and changed to a cable system in the 1992 F-Series pickups. The use of a cable in the latch system corrected the problem of the doors coming open in frontal crashes. (R. p. 201, line 23–p. 202, line 3; R. p. 204, lines 1-22). Ford continued to crash test the F-Series pickups with the cable design and no doors opened in crash testing. (Id.). Ford's cable assembly design was "clearly more crashworthy than the [rod assemblage] it replaced." (R. p. 205, lines 15-22).

Prior to the manufacture of the PN96, Ford acknowledged a key requirement for its design practices was to keep doors closed during a crash event. (R. pp. 415-418). Ford's documents acknowledge that factors that may affect the latching system during the crash include the "relative movement between the release handles and the latch due to vehicle crash deformation," or foreshortening. (R. p. 156, line 23 – p. 157, line 4).

Ford's Engineering Department, prior to the decision to return to the rod linkage system in the F-150, favored the use of cable systems. Ford engineers concluded that the cable system "can be designed to compensate for side intrusion, angular, frontal, and

rearward impacts... [and] [c]able systems provide confidence in meeting FMVSS206 and FMVSS 214 inertia and impact advantage." (R. p. 147, line 5–p. 148, line 13; R. pp. 426-428). These engineering statements specifically address the issue of foreshortening with frontal impact of the vehicle door. (R. p. 148, line 19–p. 149, line 11). Ford's engineers concluded that "[c]able systems are more robust to crash" and the cable system was recommended in all "higher series" models. (R. p. 148, line 14 -p. 151, line 1; R. pp. 407-409). The VN127 Econoline van, which went into production at the same time (1993) of the F-150 pickup, employed the cable front door latching system after Ford's hardware engineers recommended that the 1997 program retain a cable latch, even though Ford's body engineering management preferred the use of rods. (R. p. 151, line 8 – p. 153, line 9; R. p. 438).

During development of the PN96, Ford engineers continued to favor the cable design. In a Ford report entitled "PN96 Tension Vs. Compression Rod Study Recommendations," Ford's engineers indicated that a cable design latch system "has inherent advantages which would lessen the effects of both deformation and inertia." (R. p. 442). Despite these advantages, Ford engineering recommended revising the PN96 "program from cable to compression [rods]." At the time the PN96 was produced, however, Ford management wished to revert to rods. (R. p. 152, line 2– p. 153, line 9; R. p. 151, lines 14-21; R. p. 442). Cable actuated latches were retained in the Mustang, Ranger, and Econoline series. (R. p. 153, line 13 – p. 154, line 9; R. pp. 407-409; R. pp. 426-437; R. pp. 438-441). The only disadvantage of the use of cables documented by Ford was higher cost. (R. p. 159, line 7–p. 161, line 16; R. pp. 407-409; R. pp. 426-437).

At trial though, Ford argued that the reversion to rod was based upon a freezing problem/recall with the cable system. The only Ford employee to testify at trial, Mr. James L. Loschiavo, directly contradicted Ford's "freezing" claims. Loschiavo verified that in by the time of the decision to revert to rods, the freezing issue had been fixed. Moreover, after the fix, Ford engineers continued to advocate the use us cables. (R. p. 149, lines 14-18). Loschiavo was aware of no Ford engineering or management report, nor any document, which tied Ford's decision to revert to the rod linkage to the previous issue of cable freezing which had been corrected five years before the Riley vehicle was manufactured. (R. p. 164, line 1 - 167, line 6).

Prior to the manufacture of the Riley vehicle, and after the decision to utilize the rod system, there are other crash tests performed by Ford relevant to this case. In March of 1997 Ford Crash Test 10631, performed on an F-150 with the rod linkage design, resulted in door opening. (R. pp. 551-554). On September 10, 1997, Ford performed Crash Test 10826, using the alternative cable design. The doors remained closed and secure. (R. pp. 847-850). Then, Crash Test 10828 was performed on a production level 1997 F-150 PN96 on September 11, 1997.[2] (R. pp. 474-475). This was approximately one month before the Riley vehicle was manufactured. The crash test involved a frontal impact at a test speed of 37.5 miles per hour. Ford stipulates that the driver side door is open in one still photograph taken during or after the crash test, Exhibit 54A.07. (R. p. 217, lines 3-5).

Interestingly, Ford's post-crash reporting of this crash test differs greatly from the procedure used by Ford to document crash tests. Ford's protocol requires the following

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[2] This production level model means that this was a vehicle which had already been released for sale. (R. p. 163, lines 6-24; R. p. 214, lines 4-11).

documentation: 1) test summary; 2) test report; 3) detailed photographs; and, 4) videos from several angles. (R. p. 475). The required documentation for a given crash test is set forth on the "Test Authorization" that is filled out by the engineering entity requesting the test. Rather than create a "crash test report," the manager of Ford's Safety Laboratories Department, in a letter of December 8, 1997, directed Ford's Operations Testing Section Supervisor and a Test Development Engineer as follows:

> This letter confirms the procedure to be followed regarding documents relating to the subject crash test.
>
> - A crash test report will not be written.
> - The test will be listed in the Corporate Crash Test Log with its Special Purpose identified as an "Experimental Crash".
> - This letter and the Test Authorization will be the only documents appearing in the crash file system maintained by the Safety Laboratories Department.

(R. p. 474; R. p. 215, line 1–p. 219, line 3). Thus, prior to the manufacture of the Riley PN96, but after the public release of production level PN96 trucks, Ford conducted a crash test with the rod assembly where a door opened. According to Ford's employee, Mr. Loschiavo, in the event of any latch failure in a crash test, Ford's procedure to be followed was described as follows:

> Q: Is it fair for me to draw from you that you can as an engineer if you're going to make an effort to verify that if you are installing a door latch system in the vehicle that uses a rod as a connection between the handle and the latch that you as an engineer in order to verify that decision would want to see it testing in the frontal offset condition?
>
> A: Absolutely.
>
> Q: And that would be a prerequisite to releasing that system?
>
> A: Yes. Like I said, every crash test that Ford Motor Company runs is monitored for latch performance. If there is an anomaly or an issue it gets back to the design or release engineer

and say this happened. We would dispatch engineers over and come up with a root cause and fix it.

Q: And at Ford Motor Company it would be improper for you to release a vehicle with the new design where you developed it with a new system such as a rod system where you had attempted to protect it in some manner without conducting frontal offset crashes?

A: You're saying would we put a vehicle in the field before we crash-tested it?

Q: Yes, sir.

A: Not possible. I don't think it's possible. The system would not allow that to happen.

Q: And if in that crash testing you did if you had a crash test where a door opened should the folks – whoever it be in charge of the latch and hardware system – should they examine that if it did occur?

A: That's the procedure. The procedure is if – like I said, if they had an issue or anomaly and the door comes open in a crash – any crash test – the crash test engineer in their department gets ahold of the designer or release engineers that are responsible for putting it into production and they go over and as a team they would investigate what caused it. It could simply be that they didn't have the right hardware in it or they had something that wasn't right or they didn't have a spot-weld or they didn't do this or they didn't have that. They would determine what the root cause was. They would fix the root cause and they would rerun the test and verify the fact that it performed to expectations before the customer ever got it.

Q: And that's an absolute rule as to how things should be done?

A: That's an absolute rule from 1987 to 2007 when I retired, yes. That was the expectations of myself and I believe the corporation.

(R. pp. 157-158; R. pp. 474-475; R. p. 215, line 1–p. 219, line 3). No such "investigation" was documented, but rather the jury was presented with evidence of the "experimental crash" designation and order not to report the crash test.

With regard to these testing requirements within Ford, since 1991, the Product Planning Committee, including the highest levels of Ford, and per the Chairman of the Board, indicated "it would be desirable to reduce costs related to items designed to achieve or exceed compliance with regulatory requirement to as low a level as possible to maximize our future pricing flexibility vis-à-vis competition." (R. p. 210, line 23 - p.211, line 3; R. pp. 419-424). Later in addressing these standards, Ford's Chief Technical Officer Richard Perry Jones indicated in a trade magazine, "Testing and Technology International," that testing standards were insufficient. Jones noted a demand for "more stringent acceptance criteria and test protocols from his development engineers in the future. We want to make sure they stress-test the part not until it cracks, but until it fails. This is a paradigm shift for our engineers – testing not to standard, but to failure – a failure that includes filed failure data and conditions. If all of our tests were correct we wouldn't have any failures in the field; so the test must be changed to reflect more accurately what is happening in the field." (R. p. 212, lines 3-19; R. p. 213, lines 13-23; R. pp. 470-473).

**C. The Collision**

Before the wreck Riley, who loved and kept farm animals at his home, had travelled to Bamberg County to pick up grain and feed for his animals. (R. p. 320, line 8 – p. 321, line 3). He drove a 1998 Ford F-150 pickup truck that was owned and maintained by Jasper County. (R. p. 143, lines 2-14). As Sheriff of Jasper County for ten

years, Riley had access to and permission to use the truck. He frequently did so. (R. p. 144, lines 3-12; R. p. 91, line 11 – p. 92, line 5).

After purchasing the feed Riley drove on Ehrhardt Road. At the road's intersection with Pocketville Road, sixteen year old Andrew Carter failed to yield the right of way, pulled out into the intersection, and into Riley's lane of travel. (R. p. 102, line 20 – p. 103, line 8; R. p. 104, line 17 - p. 105, line 18; R. p. 110, lines 10-13). Before impact, Riley obviously saw the Carter vehicle because he took evasive action, veering to the right in an attempt to avoid a direct impact. (R. p. 114, lines 15-25; R. p. 339, lines 1-5). Nevertheless, the vehicles made contact, causing Riley's truck to leave the roadway, roll over, and then strike a tree. (R. p. 220, line 20 - p. 221, line 4; R. p. 305, lines 3-9; R. p. 308, lines 5-24).

The impact with the Carter vehicle involved the left front of the Riley F-150 striking the right front of the Carter vehicle. (R. p. 127, lines 2-15; R. p. 128, line 7 – p. 129, line 8). During this impact the forces translated rearward into the left driver's door, compressing the door opening a few millimeters. (R. p. 228, line 2 – p. 232, line 13). The resulting compression of the door caused the door latch to activate and unlatch. (R. p. 233, line 20 – p. 237, line 15). The latch was not damaged, but simply unlatched due to foreshortening of the space between the inside door handle and the latch. This decrease in distance was about 11.85 millimeters. (R. p. 238, line 7 – p. 249, line 7). This type of failure mode is called foreshortening by automotive engineers.

As the Riley truck rolled, Riley was ejected fully from the vehicle (R. p. 221, lines 5-8; p. 292, lines 3-6). Riley's body was found 85 feet from the point of ejection. His body was off of the right shoulder of the roadway. (R. p. 133, lines 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, line 10 – p. 112, line 20). Ben Riley died from injuries sustained from the ejection. (R. p. 305, lines 5-13). Andrew Carter and Brian Bishop saw the Riley vehicle after the wreck and before any person had touched the vehicle. (R. p. 108, line 15 – p. 109, line 22; R. p. 113, lines 7-18; R. pp. 476-477). Both witnesses confirmed the driver side door was open when the truck was at rest. (Id).

At trial, there was conflicting evidence presented by the parties as to whether or not Riley was wearing his seatbelt. Ford presented some evidence that Riley was not wearing his seatbelt. (R. p. 116, line 12- p. 117, line 2; R. p. 146, lines 10-18). The Estate conceded that it could not affirmatively show that Riley was belted thorough physical evidence, but did present testimony from Riley's family and co-workers that Riley habitually wore his seatbelt. (R. p. 100, lines 10-20; R. p. 141, line 23 - p. 142, line 2).

**D. Evidence of Design Defect**

The Estate's door expert, Andrew Gilberg, testified that the latch on the subject F-150 unlatched at the time of the initial collision with the Carter vehicle as a result of a design defect. (R. p. 249, lines 9-24). Latch activation through sheet metal crush in collisions was known to Ford for many years before the Riley crash. (R. p. 191, line 11 – p. 196, line 12). Failure mode in the door system occurs when the door is unlatched, regardless of whether the door opens. (R. p. 200, lines 11-17). Mr. Gilberg analyzed the evidence, measured the door and door latch mechanisms of the Riley vehicle, and opined

that the latch on the driver's door of the Riley truck had been activated due to foreshortening. This caused the door to unlatch. (R. p. 242, line 8–p. 246, line 9; R. p. 460; R. pp. 461-469). This was due to a design defect. (R. p. 249, lines 10-24). The design defect of the particular door and rod latch mechanism that would allow the door to unlatch in the foreseeable crash due to a "very small amount of longitudinal crush – end wise crush...," such design disadvantage and risk which had been known to Ford for years before the subject truck was manufactured. (R. p. 251, lines 1-5). This design defect rendered the subject vehicle defective and unreasonably dangerous. (R. p. 249, line 25– p. 250, line 6).

**E. Evidence of Alternative Feasible Design**

The Estate proved the existence of an alternative design to the rod linkage system used in the Ford F-150 PN96. Plaintiff's engineering expert Andrew Gilberg testified "that there were many alternative designs but Ford was already using one... [t]hat was the cable release system." (R. p. 250, lines 7-14). The cable system is superior because unlike the rod system that is subject to compression under foreseeable forces in a wreck, a cable system cannot be pushed and cause a latch to unlock. (R. p. 252, lines 4-8). Ford's own documents recognize the safety advantages of the cable system over the rod system, although the cable system was more expensive by Forty Cents ($.40) per door. (R. pp. 410-414; R. pp. 461-469; R. p. 252, line 9–p. 255, line 1). Furthermore, Ford documents introduced by the Estate stated that the 1998 F-150 Ben Riley drove actually was supposed to be equipped with a cable as opposed to rod door latch system. (R. p. 255, l. 21–p. 263, line 19; R. p. 500-550, R. p. 497; R. pp. 442-447; R. pp. 498-499). It was therefore feasible to use the cable system in the PN96 model driven by Ben Riley.

(R. p. 266, lines 3-24). Had the cable system been used on the subject vehicle, the door on the subject vehicle would not have opened in this crash. (R. p. 266, line 25–p. 267, line 3). The cable system was not only feasible, but also cost effective and posed no safety risk. The utility of the vehicle would not have been compromised by the cable system. (R. p. 267, lines 4-18).

## ARGUMENT

### I. Because the Estate Presented Ample Evidence Showing Ford's Design to be Defective and Unreasonably Dangerous, as Well as Ample Evidence of an Alternative Feasible Design, the Trial Court Properly Denied Ford's Motions for Directed Verdict and Judgment Notwithstanding the Verdict.

The Estate of Benjamin Riley's claims against Ford Motor Company sound in products liability, specifically under a design defect theory. The Estate's claim attacks the "crashworthiness" of the Ford PN96 truck and does not allege that the defectively designed product caused the initial accident with the Carter vehicle. Rather, Ford's defectively designed PN96 truck caused enhanced injuries and damages – Ben Riley's death – when the truck was involved in the wreck and subsequently rolled over.

On appeal Ford argues that the appellant presented *no* evidence to support the trial court's denial of Ford's motions for a directed verdict and for JNOV. Ford argues that the Estate's proof failed two particular elements of a design-defect claim: (1) that a design defect existed that made the product unreasonably dangerous; and (2) that an alternative design that would have prevented the product from being unreasonably dangerous. To the contrary, the Estate presented compelling evidence of all required elements under a design defect theory. The evidence proving the PN96's door latch design to be unreasonably dangerous is based not only upon expert testimony, but Ford Motor Company's own design criteria, testing standards, and internal documentation. As for the

alternative feasible design element, the Estate offered proof of this requirement through expert testimony and by use of Ford's very own available, viable design alternative.

On appeal, the trial court's denial of a directed verdict and JNOV motions may only be reversed if "there is *no evidence* to support the ruling or when the ruling is governed by an error of law." (Emphasis added). *Watson v. Ford Motor Co.,* 389 S.C. 434, 455, 699 S.E.2d 169, 180 (2010) (quoting *Austin v. Stokes-Craven Holding Corp.,* 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010)). As to all essential elements of a cause of action, if there is any evidence or reasonable inference drawn therefrom to support the plaintiff's claims, then the denial of directed verdict and/or JNOV must be affirmed. *Bragg v. Hi-Ranger, Inc.,* 319 S.C. 531, 534-35, 462 S.E.2d 321, 323-24 (Ct. App. 1995).

**A. South Carolina's Crashworthiness Doctrine**

Since 1969, the South Carolina Supreme Court has imposed a duty on automobile manufacturers to use due care in vehicle design so as not to create an unreasonable risk of enhanced injury to passengers in a collision situation. *Mickle v. Blackmon,* 252 S.C. 202, 242, 166 S.E.2d 173, 191-92 (1969). This foundational case involved a gear shift knob which the Plaintiff claimed was defective and which enhanced the injuries to the plaintiff when an automobile collision occurred. In *Mickle*, our Supreme Court applied "ordinary negligence principles," including the principle of reasonable foreseeability, to determine that a product manufacturer owed "a duty of care to reasonably minimize the risk of death or serious injury to collision victims who, quite predictably, will upon impact be forcefully thrown against the interior" of the vehicle. *Id.,* 166 S.E.2d at 185. Thus, the critical question in crashworthiness cases is whether the defendant's product is designed or manufactured so as to minimize the risk of harm or injury in the event of a collision,

such collisions being, as a matter of law, foreseeable to the manufacturer of an automobile.

Nevertheless, a manufacturer's "duty is not absolute... [and] [n]o liability will attach unless the negligent design was unreasonably dangerous." *Stonehocker v. General Motors Corp.,* 587 F.2d 151, 154 (4th Cir. 1978). In assessing crashworthiness, rather than focus on the allegedly defective part of the automobile, the jury must consider whether the vehicle was unreasonably dangerous *as a whole."* *Jimenez, v. DaimlerChrysler Corp.,* 269 F.3d 439, 459 (4th Cir. 2001) (applying South Carolina law) (emphasis in original).

South Carolina's adoption of the crashworthiness doctrine and its "enhanced injury" reasoning is in accord with many cases tracing the evolution of the doctrine. For example, in *Ford Motor Co. v. Zahn,* 265 F.2d 729, 731-734 (8th Cir. 1959), the defendant was held to have a duty to design a reasonably safe dashboard, into which the heads of vehicle occupants could foreseeably be thrown. The *Zahn* Court stated:

> Here again, *the test is foreseeability.* If the acts of third persons, although contributing to the ultimate injury and damage, might reasonably have been anticipated, then such acts do not interrupt the connection between the original negligence and the injury.

(emphasis in original). *Ford Motor Co. v. Zahn,* 265 F.2d at 733-734. Later, in *Larsen v. General Motors,* 391 F.2d 495, 502 (8th Cir. 1968), the Court held that crashworthiness injuries were "reasonably foreseeable as an incident to the normal and expected use of an automobile." *Id.* "Where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable." *Id.*

In this crashworthiness case, liability is based on the theory that Ford "designed and sold a defective product that... caused an enhanced injury when the car was involved in an accident .... '" *Jimenez* at 452-53 (4th Cir. 2001) (applying South Carolina law).

**B. Elements of a Design Defect Products Liability Claim**

In a products liability action, the plaintiff must establish three things: (1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user. *Branham* v. *Ford Motor Co.,* 390 S.C. 203, 210, 701 S.E.2d 5, 8-9 (2010). A plaintiff who pursues a design defect claim must point "to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous." *Id.,* 390 S.C. at 225, 701 S.E.2d at 16 (2010); *Graves v. CAS Medical Systems, Inc.*, 2012 WL 6193887 (2012).

According to *Branham*, the "very nature of feasible alternative design evidence entails the manufacturer's decision to employ one design over another." *Id.* 390 S.C. at 224, 701 S.E.2d at 16. This weighing of costs and benefits attendant to that decision is the essence of the risk-utility test. *Id. Branham* further states:

> A product... is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design..., and the omission of the alternative design renders the product not reasonably safe.

*Id., citing* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998). The *Branham* Court suggested further:

> The basic issue involves the following fundamental... question: whether the manufacturer's failure to adopt a particular design feature proposed by the plaintiff was, on balance, right or wrong.

> A congruence between this central issue and the liability test requires that the test focus squarely on the issue of what, in particular, allegedly was wrong with the manufacturer's design decision. More specifically, this inquiry asks whether the increased costs (lost dollars, lost utility, and lost safety) of altering the design—in the particular manner the plaintiff claims was reasonably necessary to the product's safety—would have been worth the resulting safety benefits.

*Id.*, quoting, David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro–Balancing" Costs and Benefits,* 75 TEX.L.REV. 1661, 1687 (1997).

### C. The Estate Presented Compelling Evidence that the Ford F-150 PN96 Was in a Defective and Unreasonably Dangerous Condition.

Ford's argument concerning the Estate's liability case reads as if the Estate presented *no* evidence, not even a scintilla of evidence, of defect as to the use of a rod within the door latch system of the Ford F-150. Ford paints the Estate's entire case as one founded on a *res ipsa loquitor* argument that because the truck door opened, the rod system therein must be defective. Ford's arguments miss the mark widely and its brief to this Court completely ignores the evidence developed by the Estate over the course of this trial. The evidence proved that Ford could have reduced or avoided the foreseeable risk of harm posed by its door latch system design using a rod, and Ford's failure to implement the known, tested, safer alternative renders the PN96 defective and unsafe.

Ford's arguments also seek to expand the tests of defective design, the risk utility analysis, and alternative feasible designs. For example, Ford claims that as a matter of law, it is entitled to judgment because the Estate's expert is unwilling to say that the cable actuated system is "good for all foreseeable crashes." In discussing the cable alternative, the Estate's expert acknowledged that "every engineering component has failure modes" and testified that the cable-actuated system itself is not impervious to failure; such

testimony does not undermine the Estate's case in the least. The law does not require that an alternative feasible design be impervious to failure. Plaintiffs in a design defect case are not required to propose an alternative design that protects against every foreseeable crash to which a vehicle might be exposed. In this case, Ben Riley was involved in a foreseeable front end collision. Ford knew their rod-linkage design was unreasonably dangerous in such collisions. The Estate proved that Ford actually tested and implemented a safer design alternative, but in its own risk/utility analysis, Riley's PN96 was manufactured by Ford with the inferior rod system because it cost less to produce.

Sherriff Ben Riley died as a result of the door of his 1998 F-150 opening in a foreseeable crash. The evidence offered by the Estate to prove this design defect case came from four expert witnesses and numerous Ford internal documents. Kendrick Richardson was qualified as an expert in mechanical engineering and accident reconstruction. (R. p. 118, line 23 – p. 126, line 4). Andrew Gilberg, a former Ford employee, was qualified as an expert in the fields of mechanical and forensic engineering. Mr. Gilberg also has extensive knowledge concerning door latches on automobiles generally and specific knowledge about the types of latches used by Ford. (R. p. 1483). The Estate also called Paul Lewis, Jr., who was qualified as a biomechanical expert. (R. p. 1523). Kim Collins, M.D., was qualified as a pathologist. (R. p. 1484). Ford did not challenge the qualifications of any of the Estate's experts to provide their opinions in their respective fields.

The numerous Ford documents introduced conclusively proved that door foreshortening in a foreseeable crash can cause doors to open and that foreshortening is a hazard that must be protected against in the design of a door and latch system. The Ford

documents also demonstrate Ford's knowledge of the inherent weakness of using a rod based design in the F-150 and specifically the Riley F-150. Finally, Ford's own documents prove that a safer alternative design existed at the time of the manufacture of the Riley vehicle which was actually adopted for the following model year by Ford.

## 1. ELEMENTS OF PRODUCTS LIABILITY CLAIMS

### a. Element One; the Plaintiff was Injured by the Product

The Estate presented evidence that Ben Riley's death was the result of being ejected after his door opened in the collision. Paul Lewis, Jr., testified that Riley was ejected through the open door and not the window, as argued by Ford. Lewis further testified that Riley would have remained in the vehicle if the door had remained closed. Lewis testified that Riley would not have sustained life threatening injuries if he had remained in the vehicle. (R. p. 304, line 21 – p. 307, line 4). Dr. Kim Collins testified that Riley died as a result of injuries sustained from the contact with the ground or other objects after being ejected. (R. p. 222, line 4 – p. 7223, line 17).

Mr. Gilberg testified that Riley's driver door unlatched upon impact with the Carter vehicle. The door came open due to forces from the frontal collision. It was undisputed that a reasonably designed door should not have opened due to crash forces from the collision at issue in this case. (R. p. 249, line 10 – p. 250, line 17). Mr. Richardson confirmed that the door came open prior to Riley's ejection based on his examination of the physical evidence on the vehicle itself, not just the door. (R. p. 134, lines 14-17). The Estate offered evidence to support that the Riley F-150 caused Riley's death due to his ejection through an open door. Ford has not contested the sufficiency of proof on this element of the products liability claim.

### b. Element Two; Product in Essentially the Same Condition

Mr. Gilberg testified that his inspection of the vehicle revealed that the door latch system on the Riley vehicle was in substantially the same condition as when sold by Ford, except for crash damage. (R. p. 237, lines 2-15). Ford does not contest the sufficiency of the evidence on this element of proof.

### c. Element Three: The Product was in a Defective Condition Unreasonably Dangerous to the User

The Riley Ford F-150 was defective because it was designed with a door latch system that lacked the necessary robustness to keep its doors closed in the reasonably foreseeable collision that led to Riley's death. The driver's side door on the Riley F-150 unlatched upon impact with the Carter vehicle, allowing the door to come open and Riley to be ejected during the rollover that followed.

Mr. Gilberg testified with no uncertainty that the Riley F-150 had a design defect and that design defect caused the driver's door to unlatch upon impact with the Carter vehicle. (R. p. 249, lines 10-24). Using an exemplar door Mr. Gilberg explained how the latch worked and demonstrated how the design defect allowed the door to open at impact. (R. p. 191, lines 11-23; R. p. 224, line 7–p. 227, line 15). Gilberg testified that in his opinion the Riley F-150 was defective "because a small amount of longitudinal crush endwise in the door caused it to come open and engineers have known about that as a potential danger for decades. They had many alternative designs that would not come open under the same circumstances." (R. p. 250, line 22 – p. 251, line 5). Mr. Gilberg also testified that the defect in the Riley F-150 made it unreasonably dangerous in his opinion. (R. p. 250, line 25 – p. 251, line 5). Given Ford's own finding that an occupant

is twenty times more likely to be ejected if a door comes open in a crash, it is not subject to debate that a door opening in a crash is an unreasonably dangerous situation.

The Estate not only proved this design defect was well known to Ford, but proved that rod foreshortening caused the Riley door to open. Ford's internal documents showed that the rod mechanism would cause he door to unlatch if the rod was foreshortened in a crash by 12 millimeters. (R. p. 241, line 11 – p. 247, line 25). The Estate's expert measured the post-crash foreshortening in the Riley vehicle at 11.58 millimeters. (R. p 460). The spring action (elasticity) of the metal, coupled with or independent of a factory set rod adjustment in the door, resulted in foreshortening dynamically well in excess of the 12 millimeters needed to open the latch during the crash. (R. p. 242, line 8 – p. 251, line 9; R. p. 460; R. pp. 460-469). Gilberg testified that he was 100% confident that the door foreshortened to a point that the door latch released. (R. p. 246).

Such rod deformation triggering unintended door opening is precisely the danger known by Ford Motor Company. However, the evidence shows that rather than adopt the recommendations of its own engineers who favored the cable actuated system, Ford management based its decision by documenting only one disadvantage to cables: higher costs.

As *Branham* instructs, a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by adopting a reasonable alternative design. In this analysis, the "fundamental question" is "whether [Ford's] failure to adopt a particular design feature proposed by the plaintiff was, on balance, right or wrong." *Id. The Estate of Ben Riley presented overwhelming evidence that Ford's failure to adopt cable actuated door latches was wrong* and the analysis turns

to the evidence of the knowledge and information available to Ford as it chose to use the rod actuated door latch system rather than cable.

Even ignoring the fundamental knowledge of foreshortening within the automotive industry, Ford Motor Company had actual knowledge of the dangers of foreshortening and unwanted door openings when a rod door latch system was involved in a crash. Ford's most experienced engineers recorded that foreshortening, or the "relative movement between the release handles and the latch due to vehicle crash deformation," could affect latch integrity in collisions. (R. p. 155, line 9–p. 158, line 15; R. p. 415). Time and time again, Ford engineers advocated for the use of cable systems. Ford engineers concluded that the cable system "can be designed to compensate for side intrusion, angular, frontal, and rearward impacts. Cable systems provide confidence in meeting FMVSS206 and FMVSS 214 inertia and impact advantage." (R. p. 147, line 5 – p. 148, line 13; R. pp. 426-437). According to Ford engineers, "[c]able systems are more robust to crash" and the cable system was recommended in all "higher series" models. (R. p. 148, line 14 - p. 151, line 1; R. pp. 407-409). Ford actually did use the cable system in a number of its vehicles, including the Econoline and Ranger models, produced at the same time as the PN96.

As shown above and based upon Ford's crash test showing unwanted door openings in frontal crash scenarios, Ford actually implemented a cable design on the 1992-1995 F-150 truck. In 1989, Ford's two frontal impact crash tests on F-150's with a rod linkage system indicated door unlatching and/or opening upon impact. (R. pp. 1103-1267; R. p.1327). Based on these two crash tests with the rod linkage systems, Ford chose to discontinue the rod system and change to a cable system in the 1992 F-Series

pickups. (R. p. 201, line 23 – p. 202, line 3; R. p. 204, lines 1-22). Ford's Ranger, F-Series and Econoline Truck Engineering Department, in March of 1990, reported that "rod type connections may cause the door to unlatch during a high speed frontal impact crash test...[and] [t]his unlatching is caused by the compression loading of the rod during excessive door deformation." (R. p. 401).

Ford continued to crash test the F-Series pickups with the cable design and no doors opened in crash testing due foreshortening. (R. p. 201, line 23 – p. 202, line 3; R. p. 204, lines 1-22; R. pp. 847). Despite the advantages of the cable system, the program was revised "from cable to compression [rods]." (R. p. 151, lines 14-21; R. pp. 442-447). Ford management wished to revert to rods. (R. p. 152, line 2–p. 153, line 9). Ford's argument at trial concerning cable freezing was directly contradicted by Ford's engineer Mr. Loschiavo, as addressed above. Loschiavo confirmed that after the freezing cable issue was fixed, Ford engineers continued to advocate for the use us cables. (R. p. 149, lines 14-18). No Ford document tied the move to rods to the cable freezing issue. (R. p. 164, line 1–p. 167, line 6). Instead, Ford's only documented disadvantage concerning the use of cables documented was higher cost. (R. p. 159, line 7–p. 161, line 16; R. pp. 407-409; R. pp. 426-437).

Ford had actual knowledge of the safety risks of rod systems before the manufacture of Riley's Ford PN96. The safety risks were known based on historical data, testing, and an actual crash tests. In March of 1997 Ford Crash Test 10631, performed on an F-150 with the rod linkage design, resulted in door opening. (R. pp. 551). Then, in September 10, 1997, Ford performed Crash Test 10826, using the alternative cable design and the doors remained closed and secure. (R. pp. 847-1099).

Finally, Ford performed Crash Test 10828 on a production level 1997 F-150 with the rod system design where a door opened. (R. p. 474-475; R. p. 2179, lines 3-5).

Interestingly, Ford's post-crash reporting of this crash test differs greatly from the procedure used by Ford to document crash tests. Ford's "Test Authorization" filled out by the engineering entity requesting the test requires the following documentation: 1) test summary; 2) test report; 3) detailed photographs; and, 4) videos from several angles. (R. p. 475). With regard to crash test 10828, instead of following Ford's procedures, instructions were given which suggest Ford sought to conceal the results of this test. Rather than a producing a "crash test report," Ford's Operations Testing Section Supervisor by a letter of December 8, 1997 directed Ford's Test Development Engineer that no crash test report would be written, the test would be identified as an "Experimental crash," and only the Test Authorization and limited documents would be maintained. (R. p. 474). According to James Loschiavo's testimony about the testing protocols of Ford, any such "issue or anomaly" would trigger an investigation. (R. pp. 157-158). However, his crash test was not documented following Ford's crash test protocol and no follow up investigation was made to explore why the door opened. (Id.).

Not only did the Estate offer evidence that the Riley F-150 had a design defect that rendered the vehicle defective; the Estate presented substantial evidence that Ford was aware of the defect when the Riley F-150 was manufactured in October of 1997. Rather than adopt a readily available alternative design already implemented in other vehicles, Ford chose to conceal evidence of its knowledge of the defect. Ford made the wrong decision in manufacturing the Riley F-150 with a rod design in the door latch.

### D. The Estate Presented Ample Evidence of an Alternative Feasible Design by Use of a Cable System within the PN96 Door Latch System

Ford attacks the trial court's denial of its directed verdict motion by arguing that the Estate failed to present evidence of a feasible alternative design. The Estate proved the alternative design by expert testimony. The Estate's expert's alternative design was also Ford's own engineering department's favored design, one implemented in some Ford vehicles. The cable system design, if used, reduces the likelihood and potential seriousness of injury for the obvious danger of occupant ejection in wrecks.

After *Branham*, "the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design." 390 S.C. at 220, 701 S.E.2d at 14. Central to the risk-utility analysis is the question of whether "the danger associated with the use of the product outweighs the utility of the product." *Id.* at 218, 701 S.E.2d at 13. "[N]umerous factors must be considered [when determining whether a product is unreasonably dangerous], including the usefulness and desirability of the product, the cost for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger." *Id.*, 390 S.C. at 218-19, 701 S.E.2d at 13. Furthermore, alternative feasible design analysis must include "consideration of the costs, safety and functionality associated with the alternative design." *Id.*, 390 S.C. at 225, 701 S.E.2d at 16.

Here, all such factors have been met. The Estate presented evidence that was based primarily upon the engineering positions, documents, and design standards of Ford Motor Company itself.

As addressed above, at the time the Riley vehicle was manufactured in October of 1997, the alternative cable design system which prevents foreshortening was available to Ford and used in other vehicles. *Furthermore, Ford documents stated that the 1998 F-*

*150 Ben Riley drove actually was supposed to be equipped with a cable as opposed to rod door latch system.* (R. p. 255, line 21 – p. 263, line 19; R. pp. 500-550; R. p. 497; R. pp. 442-448; R. pp. 498-499). Ford's Product Direction Letter of March 1997 directs the use of cables in the 1998 PN96, (R. p. 497), as did a Program Letter from May of 1995. (R. pp. 498-499). It was therefore feasible to use the cable system in the PN96 model driven by Ben Riley. (R. p. 266, lines 3-24). During the development of the PN96, the cable system was available to Ford. In fact, Ford was manufacturing other vehicles with cable systems at the very same time it manufactured 1998 model year pick-ups with rods. Plaintiff's engineering expert Andrew Gilberg testified "that there were many alternative designs but Ford was already using one... [t]hat was the cable release system." (R. p. 250, lines 7-14). The cable system is superior because unlike the rod system that is subject to compression under foreseeable forces in a wreck, a cable system cannot be pushed and cause a latch to unlock. (R. p. 252, lines 4-8). Ford's own documents recognize the safety advantages of the cable system over the rod system, although the cable system was more expensive by Forty Cents ($.40) per door. (R. pp. 410-414; R. pp. 461-469; R. p. 252, line 9 – p. 255, line 1).

The Estate's engineering expert Mr. Gilberg testified at length concerning the risk-utility analysis factors required by South Carolina law. Gilberg concluded -- as Ford engineers did – that the cable design system was far superior as an alternative design for foreseeable crashes such as Riley's involving frontal impacts (or side, or rear). Also, the Estate presented direct evidence of the risk utility balancing test which had been undertaken by Ford. The Estate introduced Ford's report entitled "PN96 Tension Vs. Compression Rod Study Recommendations," where engineers indicated that a cable

design latch system "has inherent advantages which would lessen the effects of both deformation and inertia." (R. p. 442-448). Despite these advantages, Ford engineering recommended revising the PN96 "program from cable to compression [rods]." Ford management wished to revert to rods. (R. p. 152, line 2 – p. 153, line 9; R. p. 151, lines 14-21; R. pp. 442-448). The only disadvantage of the use of cables documented by Ford was higher cost. (R. p. 159, line 7–p. 161, line 16; R. pp. 407-409; R. pp. 426-437). Such evidence is proof under the risk-utility analysis in its most simple and direct form.

The utility of the vehicle would not have been compromised by the cable system. (R. p. 267, lines 4-18). In weighing and balancing the considerations of rod versus cable design, Ford's engineers consistently advocated the use of cable, as addressed throughout this brief. Importantly, the only disadvantage of cable documented by Ford, whether in testing, development, or production of door latch systems, was the higher cost, being $.40 more expensive per door. The jury properly considered this alternative feasible design evidence.

## II. The Trial Court's Decision to Grant the Estate's Motion for New Trial *Nisi Additur* and to Triple the Jury's Damages Award Was Proper Under the Court's Discretion and Was Supported by Compelling Reasons.

Ford contends 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. When considering the record and the trial court's discretionary powers, Ford's arguments are inaccurate and offer no reason to reverse the trial court's Order.

### A. Standard of Review for New Trial *Nisi Additur*

The trial judge alone has the discretion to order a new trial *nisi additur* when a jury verdict is merely inadequate. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690 (1995). In exercising this discretion the trial judge is required to consider the adequacy of the verdict in light of the evidence presented. *Krepps v. Ausen*, 324 S.C. 597, 608, 479 S.E.2d 290 (Ct. App. 1996). From an appellate review standpoint, it is well established that the trial judge's decision on a motion for new trial *nisi additur* is entitled to great deference by an Appellate Court. *Id.* This is 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. *Id.* Though the trial court's decision to order a new trial *nisi additur* is discretionary, in so ordering the trial judge must give compelling reasons for its decision to grant an *additur*. *Bailey, supra.* On review, the decision of the trial court will not be disturbed absent a finding of abuse of discretion amounting to an error of law. *Id.*

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).

### B. The Trial Judge, Familiar with and Informed by the Evidence, Provided Compelling Reasons for Tripling the Jury's Grossly Inadequate Award.

In his 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, lines 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, line 18 – p. 89, line 3)

The evidence presented at trial did nothing to 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, lines 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:

**i. Laura Riley, widow**

Laura Riley called her husband "Ben" and he called her "Laura Ann." (R. p. 351, lines 10-16). They were married December 21, 1968 and stayed married for 38 years. Their marriage was the first for both. (R. p. 318, lines 15-25). Laura and Ben lived in a home they built their entire married life. (R. p. 317, lines 14-16). At the time Ben died, their youngest daughter Adrian and two grandchildren lived with them. (R. p. 319, lines 9-11). The other children live very close to the family home and saw their parents frequently. (R. p. 336, lines 9-14; R. p. 348, lines 5-10).

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

As a father, Ben Riley was "not harsh but strict." (R. p. 325, lines 9-10). He could and did address misbehavior when necessary as when daughter Lasonya played hooky from school. (R. p. 325, line 4 - p. 326, line 11; R. p. 1286, lines 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, lines 12-22). As husband and wife, Ben and Laura shared their love of and devotion to their church. (R. p. 331, line 4 - p. 332, line 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, lines 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, lines 5-9). Laura tries to be strong for her daughters. (R. p. 340, lines 13-15). Ben's death has nonetheless been "rough," "very rough." (R. p. 335, lines 9-12). Laura misses her husband's companionship the most. (R. p. 335, lines 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, lines 13-21; R. pp. 1101-1102).

**ii. 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, lines 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, lines 5-7). Tonya described her parents as "very close" and "best friends." (R. p. 339, lines 1-5). His death has taken a "big toll" on the family. (R. p. 341, line 1).

**iii. 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, lines 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, lines 10-22). They were taught to "walk the straight and

narrow." (R. p. 350, lines 17-25). She too described her parents as "best friends." Laura won most of the fusses. (R. p. 351, line 17 – p. 352, line 1). God was first in Ben and Laura's lives and family was second. (R. p. 352, lines 13–25). She describes her father as her "friend," "her father," and her "whole lot (life)." (R. p. 353, lines 20-22). Sonya misses her father's "smile," "laugh," "smell," and "talks." (R. p. 355, lines 13-15).

**iv. 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, lines 22-23). She described her parents as "wonderful," "loving," "caring," and "disciplined." (R. p. 357, lines 1-4). Adrian and her sisters were raised "to do the right thing" and "never lacked for anything." (R. p. 357, lines 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, lines 5-16).

**v. 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, lines 3-6). Over many years he got to know the Riley family. (R p. 93, lines 3-10).

On the day of Ben Riley's death, Hughes went to the scene of the crash. (R. p. 94, lines 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, lines 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, lines 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, lines 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, lines 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, lines 12-25).

**vi. 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, lines 1-5; R. p. 135, lines 9-25). He had grown up with Ben's family and knew them his entire life. (R. p. 136, lines 13-15). Hipp described the scene at the Riley home as "horrible," and "one of the worst days" of his life. (R. p. 137, lines 3-9).

He described Ben Riley as a "respectful" and as a "God fearing person." (R. p. 138, line 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, lines 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, lines 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. During the testimony of Dale R. Terry, upon objection by Ford to a question 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. 145, lines 19-21).

Outside of the presence of the jury, the trial court respectfully admonished the Estate about the number of damage witnesses intended to be called. In passing on the importance and credibility of the witnessed that were called by the Estate, the trial court noted:

> ... But it seems to me that we've had a – in fact, I've been doing this a long time and I can't remember a trial that I was either involved in as a lawyer or as a judge where I've heard more glowing testimony and genuine testimony about the person's life and his service to his family and to the community. I mean, it's been – it's been very touching, to be quite frank with you; so tell me what else you want to do other than what you have done.

(R. p. 169, lines 16-24). The trial court went on to exclude 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. 168, line 9 – p. 179, line 17).

Finally, in terms of the purely pecuniary losses sustained by Ben Riley's family, Oliver G. Wood, Ph.D. testified without objection as an expert economist. (R. p. 310, lines 1-7). Dr. Wood's economic loss testimony established that Ben Riley was born October 1, 1945 and died August 29, 2007. He was 61.91 years old when he died and had a life expectancy of 19.06 years. (R. p. 310, lines 20-25). Laura Riley was 60.5 years old at the time of her husband's death and has a life expectancy of 23.27 years. (R. p. 311, lines 2-5). The economic loss to the Riley family totaled $228,605.00. Of this total, $145,050.00 was the post-death/pre-trial loss and $81,555.00 post-trial loss. (R. p.

313, line 2 – p. 314, line 17). This economic loss did not account for the private security income earned by Sheriff Riley. (R. p. 315, lines 6-10). Nor did it account for the costs of the funeral. (R. p. 315, lines 12-14; R. pp. 1101-1102). No economic consideration was given by Dr. Wood to the loss of love, affection, guidance, wounded feelings, or companionship. (R. p. 315, lines 15 – p. 316, line 1).

### C. The Sufficiency Trial Court's Order Granting *Nisi Additur*

In its Order the trial court correctly found that there was "neither dispute nor argument about damages… ." (R. p. 6). While the trial court's Order states the economic loss at $226,605.00 the transcript reflects this at $228,605 (R. p. 314, lines 15-17). 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.).

The opening statement of Ford quoted above provided prescient commentary on the evidence that would unfold during ten days of trial. This case was tried by Ford *only*

on the issue of liability, which was fiercely contested. Ultimately, the Plaintiff prevailed on the issue of liability and convinced the jury not only of negligence, but also of willful, knowing conduct by Ford to the extent punitive conduct was found.

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 reflect the evidence on these issues.

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.

Elements (1) and (6) of a wrongful death cause of action include financial or pecuniary loss to the beneficiaries. Plaintiff's economist, Dr. Oliver Wood, opined a pecuniary loss of $228,605.00, which was undisputed. 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.

Ben Riley was 61 years old when he died and had a life expectancy of nineteen and 6/100 (19.06) years. Although he had recently fought cancer there was no evidence that his life expectancy was decreased by this disease. With $228,000.00 of a $300,000.00 verdict being uncontested economic damages, coupled with the funeral cost of $10,196.00 (R. p. 334, lines 13-21; R. p. 1101), and no consideration being given to the private security income, (R. p. 315, lines 6-10), the jury – at best – only awarded $62,000.00 in non-economic 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*.

The woeful inadequacy of the jury verdict in this case not only warranted, but begged for intervention by the trial court. The trial court's discretion is paramount and its decision comports with the testimony and evidence which was substantial, uncontroverted, and compelling. The grant of *nisi additur* must be affirmed.

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

The lack of contest regarding damages is a central point in South Carolina cases which have addressed the propriety of the court's discretionary powers to grant or deny post-trial motions of either *additur* or *remittitur*. Reference to those South Carolina cases addressing the compelling reasons for the grant of *additur* highlights why trial court, in its broad discretion, properly granted *additur* in this case.

The most recent case addressing the issue of whether a trial judge's grant of *additur* was sustainable was the case of *Luchok v. Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010). *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. 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*, Judge Manning's Order stated as follows:

> During trial, Plaintiff presented evidence that her medical bills alone totaled $10,071.00... Plaintiff testified at trial that the treatment for her injuries was reasonable and necessary...

> Based on the findings of fact as set forth above, the Court concludes and orders:
>
> ...the amount awarded does not approach the amount of medical costs reasonably and necessarily incurred by the Plaintiff.

*Id.* at 263-264. This Court reversed the trial court's decision to grant *additur*. Chief Judge Few's opinion states:

> In *Green,* [3]we repeated the long-standing requirement that "a judge must offer compelling reasons for invading the jury's province by granting a motion for *additur.*" (citations omitted). We find the judge's order does not comply with the requirement.

*Luchok* at 264. This Court's reasoning underpinning its finding of the lack of 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).

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[3] *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003) was a Court of Appeals decision addressing another of Judge Manning's grants of *additur*. The case was factually similar to that of *Luchok* and there the Court reversed because the trial court did not provide a compelling reason in its order and also inappropriately blended some of the thirteenth juror concepts of passion, caprice, and prejudice in support of a new trial *nisi additur*. For purposes of the issues in this brief, *Green v. Fritz* offers little guidance except for the apparent requirement of the finding of compelling reasons.

The contrast between the damages evidence presented in *Luchok* 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* is instructive and again supports the grant of *additur* here. In *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) the Supreme 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*, the Supreme 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.

### E. The Trial Court Relied on Applicable and Proper Grounds to Increase the Jury's Verdict

Ford argues that the trial judge relied on inapplicable grounds to increase the jury's verdict. Ford argues that the court improperly considered (1) losses sustained by non-statutory beneficiaries, and (2) the jury's finding of willful, wanton, and reckless conduct without awarding punitive damages.

It is clear that in South Carolina a wrongful death claim "is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death." *Hawkins v Pathology Association of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). It is also clear that an element of damages includes the "deprivation of the use and comfort of the deceased's society, including the loss of his or her experience, knowledge, and judgment in managing the affairs of himself or herself and of his or her beneficiaries." *Welch v Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); *Scott v Porter*, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000).

The testimony of the family and friends of Ben Riley made it clear that his personal traits, accomplishments, and habits – as well as his standing in the community

which he dutifully served – made the man whose life was lost and from whose death they suffered all the elements of wrongful death damages. To try to dissociate the man and who he was from the damages sustained by the statutory beneficiaries is illogical. The trial court in its Order referred to Ben Riley as a husband and father first, and then the fact that he was a Christian, community leader, law enforcement official and pillar of his community. The latter simply explains who Ben Riley was and goes to the depth of his experience, knowledge, and judgment in managing his and his family's affairs which is addressed as an accepted element of wrongful death damages.

The family continues to show their grief, as well as respect for, the loss of Ben Riley by displaying plates ("keepsakes") on their vehicles containing his image and the fact that he was the Sheriff. (R. p. 354, lines 4-16; R. p. 491). Laura's treasured keepsakes of her husband are his law enforcement badges and the flag which draped his coffin. (R. p. 323, lines 1-6; R. p. 490).

The case of *SCE&G v Aetna*, 235 S.C. 147, 110 S.E.2d 165 (1959), although a venue case, contains language appropriate in the present setting:

> A good name ordinarily is and rightfully should be a benefit rather than a burden to its bearer by virtue of which he should be protected rather than penalized.

*Id.* at 168. Lashonda R. Major, a daughter of Ben Riley, testified that her father's law enforcement career influenced the way he instilled values in his children. "It did. He always stated that, you know, with the position that he held we had to walk the straight and narrow because how can he try to make examples for others and we – basically me – as doing the wrong things; so it did." (R. p. 350, lines 17-25).

The trial court's mention in the Order of Sheriff Ben Riley as other than a family man simply goes to the totality of the factors that supported the damages sustained by the statutory beneficiaries.

There is no evidence whatsoever that the jury's finding of punitive damage conduct on the part of Ford lead to the trial court's decision to grant *additur*. The Order simply states as a fact that although the jury found conduct warranting the imposition of punitive damages, they choose not to impose such damages. The trial court does not use this fact as a compelling reason for granting the *additur*.

The Order's mentioning of matters claimed by Ford to be inappropriate in consideration of a motion for *additur* does not detract from the facts that the trial court gave compelling reasons that are unquestionably related directly to the damages sustained by the statutory beneficiaries. Even assuming *arguendo* that such findings in the Order have no relevance to the issue of *additur*, their inclusion was at worst harmless. *Starkie v Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984). In *Starkie* this Court ruled that even though the trial court considered facts extraneous to the action, such consideration was harmless because the court properly considered the issues involved and ruled on those issues. The consideration of extraneous issues created no prejudice and did not warrant reversal.

## III. The Trial Court Properly Denied Ford's Request to Offset the Jury's Verdict in the Full Amount of the Estate's Settlement with a Co-Defendant

Ford argues it is entitled to a set-off against the Twenty-Five Thousand ($25,000.00) Dollars the Estate received from the insurance carrier for Andrew Carter. Carter was driving the other vehicle that brought about this wreck. The Plaintiff settled with that insurance carrier for $25,000.00 with five thousand ($5,000.00) dollars

apportioned to wrongful death and twenty thousand ($20,000.00) dollars apportioned to conscious pain and suffering. That settlement was approved by Judge Early. (R. pp. 1-3; R. p. 4).

The Estate acknowledges that Ford is entitled to a $5,000.00 setoff representing that portion of the prior settlement allocated to wrongful death.

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, lines 23-25). Ford argues that the Plaintiff'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 simply is not true.

In this crashworthiness case, there are 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 without the 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, lines 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, lines 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, lines 1-15). Moreover, prior to and during the initial phase of the wreck, the evidence is clear that Ben Riley saw and knew of 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 of the impending wreck and the emotional response caused by Carter's negligence has long been 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. This Court acknowledges that 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 post-ejection, 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, line 10 – p. 112, line 20). Ford states the cause

of action for conscious pain and suffering was dismissed "due to an undisputed lack of evidence." (Appellant's Brief p. 37). This is a gross misstatement to this Court.[4]

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 vs. S.C. Department of Education*, 339 S.C. 208, 528 S.E.2d 628 (Ct. App. 2000); *Vaugh vs. City of Anderson*, 300 S.C. 55, 386 S.E.2d 287 (Ct. App. 1989). In *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986), this Court upheld the trial court's decision not to allow a set-off of pre-verdict settlement amount allocated to conscious pain and suffering against a wrongful death verdict. There, the Plaintiff had allocated a majority of the prior settlement to conscious pain and suffering but withdrew that claim prior to the case being submitted to the jury. In sustaining the trial court's decision, this Court stated that there was enough evidence of injury to have submitted the cause of action to the jury had the Plaintiff not voluntarily withdrew it.

Ford's reliance on *Welch vs. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) is misplaced. In *Welch* the Plaintiff's intestate was in a coma at the time of the alleged malpractice and unlike the case of Ben Riley, there was no evidence that Mr. Welch suffered any conscious pain and suffering. *Vortex Sports and Entertainment, Inc. vs. Ware*, 378 S.C. 197, 209-10, 662 S.E.2d 444 (Ct. App. 2008) is also distinguishable. In *Vortex* the court set off an amount paid by a settling defendant. The Plaintiff claimed the set-off damages were for a different cause of action than asserted against the non-settling defendant. The court relied on S.C. Code Ann. §15-38-50 and found the damages

[4] 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).

claimed by the plaintiff were the same in both causes of action, thus entitling the non-settling defendant to a set off. In the instant case, not only are the causes of action different, but certainly the damages for a survival cause of action differ completely from damages in a wrongful death cause of action.

The Estate's earlier settlement with Andrew Carter and his insurance carrier was fair, reasonably apportioned, and approved by the trial court. Moreover, Ford's argument before this Court completely ignores 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.

## CONCLUSION

For the reasons addressed herein the trial court's denial of Ford's directed verdict and judgment notwithstanding the verdict motions was appropriate and must be affirmed. Furthermore, the trial court's grant of *nisi additur* was within the court's discretion and supported by South Carolina precedent. Lastly, the trial court correctly ruled as to Ford's entitlement to only $5,000.00 set-off from a previous settlement with a co-defendant.

Respectfully submitted,

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ATTORNEYS FOR THE RESPONDENT

April 18, 2013
Ridgeland, S.C.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**APPEAL FROM BAMBERG COUNTY**
**Court of Common Pleas**

**Doyet A. Early, II, Circuit Court Judge**

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**Case No.: 2008-CP-05-00235**

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

**v.**

**Ford Motor Company .....Appellant.**

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**Rule 211(b) Certificate of Compliance**

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The undersigned, as counsel for the Respondent Laura Riley as the Personal Representative of the Estate of Benjamin Riley, hereby certifies that the Respondent's Final Brief, served this 18th day of April, 2013, complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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April 18, 2013
Ridgeland, South Carolina

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**v.**

**Ford Motor Company.....Appellant.**

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## PROOF OF SERVICE

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I certify that I have served the within Final Brief of Respondent and Certificate of Compliance with Rule 211(b), SCACR by depositing a copy of it in the United States Mail, postage prepaid, on April 18, 2013, addressed to the respective attorneys of record and the Court as follows:

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