

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2013-CP-38-00992  
2013-CP-38-00994

Appellate Case No. 2016-001807

**RECEIVED**  
MAY 22 2019  
SC Court of Appeals

Denetra Glover.....Respondent,

v.

William Shervon Stack and Shervon Latrese Simpson, .....Defendants,

Of whom

Shervon Latrese Simpson.....Appellant.

AND

Shirley Davis.....Respondent,

v.

William Shermon Stack and Shervon Latrese Simpson.....Defendants,

Of Whom Shervon Latrese Simpson.....Appellant.

**APPELLANT'S PETITION FOR REHEARING**

Appellant Shervon Latrese Simpson, through her undersigned counsel and pursuant to Rules 219, 221, and 240 of the South Carolina Appellate Court Rules, hereby respectfully petitions for a rehearing or rehearing *en banc* of the decision in this appeal based on the following grounds:

Appellant raised two points of error in this appeal. The first regarded whether South Carolina law allows an offset for amounts paid by a second tortfeasor in settlement of claims for the same injuries to prevent a double recovery. The issue of whether South Carolina *common law* allows for this offset was properly raised and ruled upon by the Circuit Court – either explicitly or implicitly – as the Circuit Court ruled that no such offset was allowed. Therefore, this issue was properly preserved for appeal and should be addressed by this Court.

The second issue regarded whether a default damages hearing establishes the amount of a plaintiff's total damages arising out of an indivisible injury. With regard to this issue, the Court failed to address Appellant's argument that the Circuit Court judge operated under an error of law when he held that the default damages award did not constitute an award for all of Respondents' damages sustained in the collision. The Circuit Court itself recognized that this initial holding was outcome-determinative to its ultimate decision. Additionally, this Court's holding that South Carolina Code § 15-38-50 does not apply after a judgment has been entered against a party is inconsistent with the plain meaning and legislative purpose of the statute.

The Opinion of the Court creates a result that South Carolina law has long prohibited: Respondents are receiving a double recovery. A trier of fact determined Respondents each sustained \$18,000 in damages. Respondents have each been paid \$18,000 by co-tortfeasors, satisfying their damages. Unless the Circuit Court's order is overruled, then Respondents Glover and Davis will now receive an additional \$12,000 and \$11,000, respectively, resulting in a double recovery. This result is not allowed under South Carolina law, and the issue should be addressed.

- 1. The Court misapprehended or overlooked the fact that the common law question was raised and ruled upon by the Circuit Court and should have been addressed on its merits by this Court.**

In its May 8, 2019 unpublished, *per curiam* opinion, this Court declined to rule on the question of whether a set-off applies as a matter of law under the common law. While recognizing

that the issue was raised to the Circuit Court in the summary judgment hearing, this Court found that the Circuit Court did not rule on the issue. Respectfully, the issue was raised, ruled upon, and preserved.

“[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.” *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Error preservation rules are not designed to be a trap into which a party may fall, but instead “are intended ‘to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.’” *Id.* (quoting *I’On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). “Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.” *Id.* Issue preservation rules are “designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.” *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 648 n.3, 817 S.E.2d 273, 277 n.3 (2018) (stating it was error for the Court of Appeals to find issue was not preserved for appellate review).<sup>1</sup>

---

<sup>1</sup> Notably, the Supreme Court in *Pertuis* found it was an abuse of discretion for the Court of Appeals to raise the question of issue preservation *sua sponte* and not give an appellant the opportunity to address the issue. *Id.* Like the respondents in *Pertuis*, Respondents in this case never argued that the common law issue was not preserved. To the contrary, one of the sections in Respondents’ Brief is titled: “The trial court correctly concluded there was no right to set off under either common or statutory law based on the circumstances of these cases.” (Respondents’ Br. p. 7) (emphasis added). The Court never gave any warning that it believed an issue was not properly preserved for review, and instead issued its opinion where it raised the issue for the first time *sua sponte* without giving Appellant an opportunity to address the preservation question. Avoidance of an issue on preservation grounds is disfavored because “[j]udicial economy is not served when a case, ripe for decision, is decided on a procedural technicality of this nature. In the interests of justice and fair play, cases should be decided on the merits when deficiencies of this nature can be easily corrected.” *Id.* (citations omitted).

This Court's May 8, 2019 Opinion acknowledges that the common law argument was presented to the Circuit Court on Appellant's Motion for Entry of Satisfaction of Judgment. In its Memorandum in Support of Motion for Entry of Satisfaction of Judgment, Appellant argued "South Carolina applies this rule both by statute and case law." (R. pp. 43, 60). Appellant cited the Supreme Court's decision in *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015), for its statement that principles of equity – i.e., common law – use setoff which "prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong." (R. pp. 43, 60). Appellant also cited the Supreme Court's decision in *Riley* which recognized that "these equitable principles were codified as part of the South Carolina Contribution Among Tortfeasors Act . . . ." *Id.* (R. pp. 43, 60). Therefore, *Riley v. Ford* was cited both for its statement of this common law principle and statutory principle.

Appellant also raised the common law issues at the hearing on the motion, arguing that the prohibition against double recovery was "based upon law in South Carolina both under the common law where we had the equitable principle of set-off<sup>2</sup> and . . . by statute in Section 15-38-50 . . . ." (R. pp. 99, 107-108). Therefore, the common law issue was raised and argued to the Circuit Court.

The last requirement for issue preservation is simply that the Circuit Court ruled on the matter. On July 26, 2016, the Circuit Court signed a six-page order denying the motion. (R. pp. 1-12). Although the written order admittedly focused heavily on the statutory argument, the judge did not ignore the case law cited by Appellant. The Circuit Court held, "[t]he law cited by Simpson is distinguishable from the facts of this case and does not support the relief she requests." (R. pp.

---

<sup>2</sup> The transcript has a typographical error using the word "settle" instead of "set-off."

5, 11). Furthermore, the Circuit Court discussed equitable principles, which are not part of the statutory analysis. (R. pp. 3-4, 9-10) (“The law does not provide for or intend such an inequitable result . . .”). The Circuit Court also found there was no double recovery. (R. p. 5, 11) (“This does not mean Plaintiff would obtain double recover; rather, it simply means all of Plaintiff’s claims would be adjudicated, with specific determinations of liability as to all defendants.”). Thus, the Circuit Court considered the common law arguments and rejected them. The issues were preserved.

“[T]his Court will not apply the rules of error preservation so rigidly as to bar an otherwise properly presented issue.” *Chastain v. Hiltabidle*, 381 S.C. 508, 516, 673 S.E.2d 826, 830 (Ct. App. 2009). The Supreme Court has previously expressed “concern about the ‘over-zealous application’ of ‘long-standing error preservation rules’” and discouraged a “‘hypertechnical application’ of those rules resulting in appellate arguments being procedurally barred.” *Pertuis*, 423 S.C. at 648 n.3, 817 S.E.2d at 277 n.3 (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)). Furthermore, this Court has repeatedly held that an issue that is implicitly rejected by a trial court is properly preserved, and a trial court need not expressly address each and every argument on a motion in order for the issue to be properly preserved.

For example, in *Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 528 n.2, 469 S.E.2d 630, 632 n.2 (Ct. App. 1996), this Court found that an issue was properly preserved for appellate review where the “pleadings clearly asserted” the issue and “the trial court implicitly ruled on and rejected” an argument. This Court has repeatedly recognized that a trial court may implicitly rule on an issue, and thus preserve the issue for appellate review. *See, e.g. Gartside v. Gartside*, 383 S.C. 33, 44, 677 S.E.2d 621, 626 (Ct. App. 2009) (holding trial court implicitly rejected argument

of appellant); *Doe v. City of Duncan*, 417 S.C. 277, 282, 789 S.E.2d 602, 605 (Ct. App. 2016) (holding that appellant preserved an issue because, “[a]lthough the circuit court did not specifically state it did not believe the Act applied in this case, it implicitly rejected Doe’s argument by finding service was not timely”); *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (holding that issue was preserved for appeal because trial court implicitly denied appellant’s claim).

In *Elam v. Elam*, 275 S.C. 132, 268 S.E.2d 109 (1980), the South Carolina Supreme Court addressed issue preservation in the context of a combined statutory and common law argument. In that case, a party challenged the constitutionality of a statute abolishing parental immunity only in motor vehicle accident cases. The trial court held the statute unconstitutional and the suit barred. On appeal, the party also argued that the common-law parental immunity doctrine was unconstitutional. Although the trial court did not specifically address the common law doctrine, the Supreme Court held, “in holding the statute unconstitutional, the trial court implicitly held no cause of action existed due to the [common-law] immunity doctrine; therefore the issue was preserved for appeal.” *Id.* at 135, 268 S.E.2d at 110.

Although Appellant contends the Circuit Court expressly ruled on the common law issue by rejecting the case law cited by Appellant, at a minimum the Circuit Court implicitly ruled on the issue by denying the Motion for Entry of Satisfaction of Judgment. As an initial matter, the Circuit Court denied Appellant’s motion in its entirety, thus implicitly ruling that Appellant was not entitled to the set-off under either the statute or the common law. Moreover, the Circuit Court held:

If Simpson’s argument was correct (that the default judgment determined the entirety of Plaintiff’s damages arising from the accident), then Plaintiff would never have been able to recover more than \$18,000.00 as a result of the accident or obtain a jury verdict as

to the other, non-defaulting defendant. The Court finds that such result would be contrary to South Carolina law and the notions of our justice system because it would foreclose every plaintiff's ability to obtain a jury verdict as to damages if a default judgment is entered as to one of multiple defendants before trial, and would also deprive the non-defaulting defendant from his or her right to a jury trial on the issue of damages.<sup>3</sup>

(R. pp. 4-5). This holding implicitly rejects the common law argument that a set-off is necessary to prevent a double recovery. The Circuit Court implicitly rejected the common law argument by finding that the default judgment did not determine all of Respondents' damages – thus avoiding the issue of a double recovery altogether. Thus, at a minimum the Circuit Court implicitly ruled on the common law issue if it did not expressly rule on the issue. Either way, the matter is properly preserved for this Court's review and to hold otherwise would place this Court's holding at odds with numerous prior decisions regarding issue preservation.

**2. The Court failed to address the argument that the Circuit Court judge operated under an error of law by holding that the default damages award did not constitute all of Respondents' damages sustained in the collision.**

The Circuit Court operated under the misapprehension that the default damages hearing only determined a portion of the Respondents' damages. This issue was argued at the hearing. (R. p. 15). In its written order, the Circuit Court expressly acknowledged that it may have reached a different decision if a default damages judgment constituted a final determination of the entirety of a plaintiff's damages: "Had the default judgment entered against Simpson made a final determination of the entirety of Plaintiff's damages caused by the motor vehicle accident, or an adjudication of the entire case, then Simpson's argument may have merit. However, because the

---

<sup>3</sup> As noted below in Section 2, and as argued in Appellant's previous briefs, this statement by the Circuit Court exhibits a misunderstanding of what the default judgment represents.

default judgment by its terms was limited to determining the liability of Simpson – as opposed to the total damages of Plaintiff – Simpson’s argument is misplaced.” (R. p. 3, n.1); (R. p. 9, n.1).

Respectfully, the Circuit Court erred because the special referee at a default damages hearing does make a determination of the total damages sustained in an automobile accident.<sup>4</sup> In a default damages case, the special referee has no authority to allocate damages or make any other reductions in damages. *See e.g., Calise v. Hidden Valley Condo. Ass’n, Inc.*, 773 A.2d 834 (R.I. 2001) (holding that a party in default cannot seek to prove comparative fault of settling co-defendant); *Rodriguez v. Parks and Woolson Machine Co., Inc.*, 22 Mass. L. Rptr. 643 (Mass. Sup. Ct. 2007) (holding party cannot submit evidence of comparative fault at a Rule 55(b)(2) damages hearing). The very purpose of a Rule 55(b)(2) hearing is “to determine the amount of damages . . .” Rule 55(b)(2), SCRCP. Therefore, the Circuit Court erred by finding that the special referee awarded something less than Respondents’ total damages.

Respectfully, this Court did not address the Circuit Court’s error of law. Because the Circuit Court itself acknowledged that a correct understanding of the special referee’s role at the damages hearing may have impacted the Circuit Court’s decision, this error of law materially impacted the case and should be addressed by this Court. Moreover, if the special referee determined the total amount of damages Respondents sustained as a result of the collision, then any recovery in excess of that amount constitutes an unlawful double recovery. Therefore, this Court should grant the petition for rehearing and address this important issue.

---

<sup>4</sup> This issue was raised in Appellant’s Brief and took up the entirety of section II.A, pages 14-19 in its Opening Brief, and Section I, pages 2-5 of the Reply Brief.

**3. The Court interpreted South Carolina Code § 15-38-50 in a way that is inconsistent with the plain meaning of the statute and its legislative.**

Quoting from *Riley v. Ford motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015), this Court's May 8, 2019 Opinion recognizes that South Carolina Code § 15-38-50 "represents the [l]egislature's determination of the proper balance between preventing double-recovery and South Carolina's strong public policy favoring the settlement of disputes." (2019-UP-167, p. 2). However, the Court's holding that § 15-38-50 does not apply after a judgment has been entered against a party runs contrary to the purpose of the Act.

This Court has previously held that statutes should be interpreted "in a way that harmonizes the language at issue with the . . . purpose of the statute." *South Carolina Dept. of Social Services v. Gamble*, 337 S.C. 428, 432, 523 S.E.2d 477, 479 (Ct. App. 1999). "[W]hen the purpose of [a] statute and its literal meaning conflict, the purpose of the statute must be given effect." *Meyer v. Paschal*, 330 S.C. 175, 181, 498 S.E.2d 635, 638 (1998). As this Court recognizes, § 15-38-50 strikes the balance between encouraging settlement and preventing a double recovery. The statute requires an offset to avoid double recovery, and it strikes that balance by protecting the paying party from a future contribution action from its co-defendants. Respectfully, the Court's opinion fails to protect either of these two statutory purposes.

If a post-judgment settlement does not result in a reduction of the outstanding judgment, then a plaintiff can obtain a double recovery. The default judgments in this case constitute a determination of Respondents' total damages. In fact, the Respondents here will have obtained \$29,000 and \$30,000, respectively, even though a trier of fact determined that they only sustained damages of \$18,000 each. By definition, this is a double recovery. By requiring full satisfaction of those judgments after Respondents recover from a co-tortfeasor, Respondents will recover more than their total damages – the very thing the General Assembly intended to prevent.

By its plain terms, South Carolina Code § 15-38-50 establishes that in exchange for a settling joint tortfeasor having no liability for contribution to its other joint tortfeasors, the other joint tortfeasors enjoy an offset for the amount of the settlement. S.C. Code § 15-38-50(1)-(2). The statute creates a comprehensive *quid pro quo* system. Therefore, if § 15-38-50(1) establishing the offset does not apply to a party who has already sustained a verdict, then § 15-38-50(2) preventing liability for contribution for other joint tortfeasors also does not apply. Rather, the party with a default judgment entered against it maintains a right of contribution against any other at-fault party. See S.C. Code § 15-38-40(A) (“Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury . . . contribution may be enforced by separate action.”).<sup>5</sup> Thus, if this interpretation of the statute is correct, as to all other defendants it removes the incentive for settlement merely because there is a judgment against any one defendant, in essence discouraging settlement in such case. Thus, this Court’s interpretation of § 15-38-50 would discourage settlements and thwart the General Assembly’s intent in enacting the statute.

### CONCLUSION

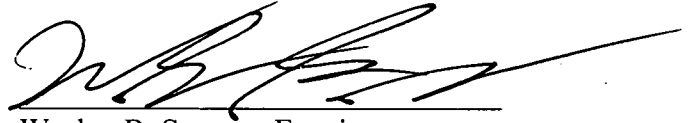
For the above-stated reasons, Appellant respectfully petitions this Court for rehearing or rehearing *en banc*. Because the ruling on issue preservation is inconsistent with numerous prior decisions by this Court that a matter raised and implicitly ruled upon by the trial court is properly preserved, Respondent respectfully petitions for a rehearing *en banc* pursuant to Rule 219.

Respectfully submitted this 22nd day of May, 2019.

---

<sup>5</sup> This argument is made on page 9 of Appellant’s Opening Brief.

MURPHY & GRANTLAND, P.A.



Wesley B. Sawyer, Esquire

S.C. Bar No. 100229

Murphy & Grantland, P.A.

P.O. Box 6648

Columbia, SC 29260

(803) 782-4100

[wsawyer@murphygrantland.com](mailto:wsawyer@murphygrantland.com)

Attorney for Appellant

Other Counsel of Record:

Shane M. Burroughs

David C. Marshall

250 Gibson Street (29115)

P.O. Drawer 2789

Orangeburg, SC 29116

Phone: (803) 268-9800

Fax: (803) 531-3465

Attorney for Respondents

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2013-CP-38-00992  
2013-CP-38-00994

Appellate Case No. 2016-001807

**RECEIVED**  
MAY 22 2019  
SC Court of Appeals

Denetra Glover.....Respondent,

v.

William Shervon Stack and Shervon Latrese Simpson, .....Defendants,

Of whom

Shervon Latrese Simpson.....Appellant.

AND

Shirley Davis.....Respondent,

v.

William Shermon Stack and Shervon Latrese Simpson.....Defendants,

Of Whom Shervon Latrese Simpson.....Appellant.

**PROOF OF SERVICE**

I certify that I have served the Appellant’s Petition for Rehearing on the Respondents, on their counsel of record addressed below, by depositing a copy of it in the United States Mail with postage prepaid on May 22, 2019:

Shané M. Burroughs, Esquire  
David Marshall, Esquire  
Lanier & Burroughs, LLC  
P.O. Drawer 2789  
250 Gibson Street  
Orangeburg, SC 29116  
*Attorneys for Respondents*  
*Denetra Glover and Shirley Davis*



---

Wesley B. Sawyer, Esquire  
S.C. Bar No. 100229  
Murphy & Grantland, P.A.  
P.O. Box 6648  
Columbia, SC 29260  
Phone: (803) 782-4100  
Fax: (803) 782-4140  
[W.sawyer@murphygrantland.com](mailto:W.sawyer@murphygrantland.com)  
Attorney for Appellant

Columbia, South Carolina  
May 22, 2019



MURPHY & GRANTLAND, P.A.

Wesley B. Sawyer  
Direct Dial 803-454-1233  
wsawyer@murphygrantland.com

May 22, 2019

**Hand Delivered**

Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: Shirley Davis vs. William Shermon Stack and Shervon Latreese Simpson  
Appellate Case No. 2016-001807  
Claim No.: 391201348]  
Our File No.: 2100-0494

Dear Ms. Abbott-Kitchings:

Enclosed please find the original and eight copies of Appellant's Petition for Rehearing and Proof of Service with regard to the above-referenced matter. It would be most appreciated if you would file the original and return two clocked copies to me. By copy of this correspondence, I am serving same on opposing counsel.

With warm personal regards, I am

Sincerely yours,

Wesley B. Sawyer

WBS/dlb  
Enclosure

cc: Shane M. Burroughs Esquire  
David Marshall, Esquire  
Peter Farr, Esquire (via email)

**RECEIVED**  
MAY 22 2019  
SC Court of Appeals