THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-000203

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017-CP-42-03523

Shannon P. Green and
Darrell Russell,
v.

Plaintiff(s),

Edward C. McGee and
David Hudgins,

Respondent(s),

Of whom Shannon P. Green is Appellant/Respondent

And

Of whom David Hudgins is the Respondent/Appelant.

INITIAL BRIEF OF APPELLANT/RESPONDENT SHANNON GREEN

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STATEMENT OF CASE

Appellant/Respondent ("Green") and Plaintiff Darrell Russell filed a Complaint against Defendant Edward C. McGee ("Defendant McGee') and Respondent/Appellant David Hudgins ("Defendant Hudgins") for injuries arising from a collision. The case was tried, and a verdict was returned on October 16, 2019. The following Post-Trial Motions were timely filed with the Court on October 25, 2019: Plaintiff's Rule 59 Motion for a New Trial *Nisi Additur* or, in the alternative, New Trial Absolute; and Defendant Hudgins Rule 50(b) Motion for Judgment Notwithstanding the Verdict and, in the alternative, Motion for Setoff. The Trial Court filed its Order on January 8, 2020 and denied Green's Motion for New Trial *Nisi Additur* and Motion for New Trial Absolute. Further, it denied Defendant Hudgins' Motion for Judgment Notwithstanding the Verdict. Finally, it granted Defendant Hudgins' Motion for Setoff. Green timely filed her Notice of Appeal on February 5, 2020.

FACTS

This is a car wreck case where Plaintiff ("Green") was not comparatively negligent nor was it argued she was. Likewise, this is not a minor impact case resulting in soft tissue damages. This case involves a substantial impact to Green's driver door by a large truck traveling at a high rate of speed, resulting in a left shoulder injury (a torn bicep tendon requiring surgery), two (2) fractured ribs, and upper back pain. None of these injuries are even arguably pre-existing.

Green was seriously injured on November 19, 2015 because of a road rage incident between the Defendants. Tr 265. The incident began on I-85 near the Cherokee County/Spartanburg County line about 15-20 minutes before Green was injured. Tr 43, 45, 61. Defendant Edward C. McGee (hereafter "Defendant McGee"), driving a large Chevrolet 2500 pickup truck, ran up behind Defendant David Hudgins (hereafter "Defendant Hudgins") driving a red Nissan. Defendant McGee was driving 65-70 mph. Tr 46. Traffic was heavy. Tr 44. Defendant Hudgins slammed on his brakes, and Defendant McGee came withing 2 to 3 feet of hitting him. Tr 46-48. According to Defendant McGee, Defendant Hudgins came close to "wearing my grill." Tr 48, 264. This happened at least three (3) more times as they continued southwest on I-85. Tr 48, 264. The two Defendants swerved around and in front of each other going 70 mph, and at times they were so close "you could have slipped a piece of paper between [them]." Tr 50-54. Defendant McGee got in front of Defendant Hudgens, and Defendant Hudgins followed him- "drafting" on him- onto Business I-85, then Hearon Circle, and then onto Simuel Road. Tr 55; 58-66. Defendant McGee, attempting to get away from Defendant Hudgins, then traveled 60-90 mph down Simuel Road. Tr 29; 160; 175; 275-276. Defendant McGee was being "chased" by Defendant Hudgins. Tr 32. Simuel Road has a speed limit of 25 or 35 mph. Tr 29.

Defendant McGee came to a sharp right curve. Tr 65. Meanwhile, Green was driving her small black Kia on that same sharp curve but from the opposite direction. She was traveling 5-10 mph, having just stopped at a stop sign. Tr 150; 189. She was in her lane. Tr 150. Defendant McGee lost control of his Chevrolet 2500 truck, crossed the center line, and struck Green's Kia in the driver door. Tr 29; 151.

It is significant that Green is a nurse practitioner with an acute nurse practitioner degree from the University of South Carolina. Tr 187. She has worked in surgical intensive care and currently works in internal medicine. Tr. 192.

The following are uncontradicted facts that support Green's contention the collision was not minor, that her injuries were both serious and proximately caused by the collision, and that her injuries were not pre-existing.

1. Green's Kia sustained a severe blow from Defendant McGee's Chevrolet 2500 truck. Her driver's door "crumpled into the vehicle." There was 6+ inches of intrusion into the driver compartment. See Exhibits 4, 5 & 6 and Tr 151, 155-156.

2. The cell phone on Green's left hip was actually bent and would not function after the collision. Tr 217-218.

3. Green was initially unconscious. She remembers nothing about the collision itself but woke up to a blaring horn. Tr 151 and 190.

4. Green's face was covered in blood. She had glass in her mouth, eyes, and hair. Tr 151, 158-159; 190.

5. Green could not see. Tr 191.

6. Green could not breathe; she was gasping for air. Tr 158, 190-191.

7. Because Green could not breathe, she was afraid she would be intubated. Tr 192.

8. Green could not talk. Tr 158.

9. Green thought she was going to die. Tr 192.

10. Green felt extreme pain in her chest and sternum. Tr 190.

11. Green felt pain in her left side. It was later determined she sustained two (2) broken ribs. Tr. 195.

12. Green felt pain in her left arm and left shoulder. Tr 159, 190.

13. Green could not move her left arm or left shoulder and believed her collar bone was fractured. Tr 190.

14. Green had to be extricated from her Kia using the "jaws of life." Tr 161.

15. Green was placed on a backboard, transferred to Spartanburg Regional Hospital, and was discharged at 2am the next morning. Tr 161,193-194.

16. After returning home, Green could not sleep and could not get herself out of bed. Tr 194.

17. For several weeks, Green could not sleep in her bed at all and had to use a recliner chair. Tr. 163. She could not use the bathroom by herself or even wipe herself. She could not put her clothes or underwear on or remove them. Tr 163-164. She could not do her hair or shave her legs or armpits. She could not accomplish any activities of daily living without help from her husband. Tr 163-164;194.

18. Green's left arm was bruised from the top of her shoulder to the elbow and swollen 1.5 times the size of her right arm. Tr 126.

19. Green had "intense pain" in her upper back- "between the shoulder blades." Tr 197. (It is important to note here that she has never claimed injury to her lower back.)

20. For treatment, Green initially went to her family doctor. Tr 195. She complained about her pain in her left shoulder, chest, and upper back. Tr 227.She later went to an walk-in clinic because of she was still hurting, and she was diagnosed with two (2) fractured ribs. Tr 195-196.

21. Green missed eight (8) days of work. Tr 164, 203.

22. For a solid month, Green could not drive, and her husband transported her everywhere. Tr 165.

23. Green could not sleep in her bed for approximately a year. Instead, she slept in a recliner chair. Tr 167. Green still sleeps in a recliner chair a couple of nights per week. Tr 172.

24. When Green returned to work, she was unable to perform all of her work without help from her fellow employees. Tr 203.

25. Plaintiff's family doctor referred her to Piedmont Orthopedic Associates, where she began receiving treatment for her left shoulder by a surgeon, Shay Koch, MD., and her upper back by a nurse practitioner, Jaime Elliotte. Tr 196-198.

26. The pain in Green's back was "right between the shoulder blades." Tr 197.

27. Dr. Koch eventually diagnosed Green with a torn bicep tendon in her left shoulder as well as impingement/entrapment of her left shoulder. Tr 199.

28. Dr. Koch gave Green two injections for her left shoulder. Tr 198. Green is diabetic, so the injections caused her blood sugar to skyrocket. Tr 198-201. Thus, the injections made Green feel sick, nauseated, thirsty and caused her to urinate. Tr 201.

29. Dr. Koch referred Green for physical therapy to her left shoulder but eventually scheduled her for surgery in April of 2016. Tr 201.

30. Meanwhile, Jaime Elliotte, who treated Green's upper back, offered steroid injections to Green's upper back and a referral to pain management. Tr. 243-245.

31. Because of Green's diabetes, she could not undergo the steroid injections. Tr 200, 244.

32. Likewise, because of her work as a nurse practitioner, Green could not take narcotic prescriptions. Tr 201.

33. So to treat her pain, Green took two to three Advil per day until she got gastritis. Tr 212.

34. Green's gastroenterologist instructed her to stop taking so many NSAIDS. Tr 212.

35. Currently she takes one (1) Advil per day and uses Aspercreme. Tr 212.

36. Dr. Koch performed surgery on Green's left shoulder in April 2016. Tr 201-202. He cut her biceps tendon away from the shoulder and reattached it to the humerus bone in a different spot near the shoulder. Tr 201-202. He also cut a centimeter out of her collar bone to shorten it and take pressure off her left shoulder. Tr 201-202.

37. After the surgery, Green testified "it was like starting over." Her arm was in a sling and pinned against her body for six (6) weeks. Tr 205-207. She could not dress herself, go to the bathroom, or do housework. Tr 207. She missed two (2) more weeks of work. Tr 205.

38. Once again, Green could not drive for several weeks, and her husband had to transport her everywhere. Tr 205.

39. She underwent more physical therapy- first to address range of motion and then to address strength. Tr 208.

40. By July 2016, Green had developed a posttraumatic or post-surgical frozen left shoulder, because her arm was in a sling for six (6) weeks. This is "completely different from a diabetic frozen shoulder." Tr 209-210.

41. Green underwent a release of the frozen shoulder under anesthesia. She missed more work.

42. When she returned to work, she again could not do her job without help from others.

43. It has been more than four (4) years since the collision. Green plateaued a few years ago. Tr 173. She has daily pain in her left shoulder and upper back, which she self-treats with Advil and Aspercreme. Tr 211-212; 215. She does not have full range of motion in her shoulder. She cannot reach over her head with her left arm or behind her- cannot latch her bra in the back. Tr 211. She does not have full strength. Tr 213. She has crackling/crepitus in her left shoulder. Tr 214. Her lack of strength affects her work each day, as she cannot carry her laptop in her left arm and type with her right hand. She cannot do things she enjoys, like gardening. Tr 213-214. She pays someone to do home maintenance that she used to do and to chop/cut wood for the wood boiler that heats her house. She has spasms in her left bicep when she attempts to use her arm much. Tr 214. She cannot safely carry a pitcher of tea and has dropped one, so she doesn't attempt it. Tr 214. Her energy level is lower. Her sleep is affected- she must put a pillow under her left arm and sleep only on her right side. Tr 212-213. At least two (2) nights per week, she ends up sleeping in a recliner. Tr 212-213. Green's intimate relationship with her husband has been affected-their sexual activity is less frequent. Tr 215-216. Green's physical therapist taught her exercises and stretches to do at home. In an attempt to maintain her current level of pain and functioning, she does them every morning. Tr 208-209; 215.

44. Green has a life expectancy of thirty (30) years. Tr 336.

45. Green's husband has been affected by her injuries. After the collision, he had to take care of her most basic daily needs, including dressing her, shaving her legs and armpits, curling her hair, and helping her use the bathroom. Tr 164. When she returned to work, he had to drive her to work- 45 minutes from their home. Tr 165. He would then go to work in North Carolina and later in the afternoon drive another 45 minutes to pick her up and return her home. Tr 165. This went on "for a solid month." Tr 165.

Because of Green's limitations and lower energy, the couple doesn't do "a lot of things we used to do as a married couple," and he provided the examples of whitewater rafting. Tr 171-172. He also indicated Green's injuries have affected the couple's level of intimacy, which Green confirmed. Tr 173, 216.

Green's economic damages, including medical bills of $82,560.04, the cost of getting a new cell phone in the amount of $83.06, and lost income of $5,903.68 were accurately outlined on Exhibit 10. At the end of the evidence, the jury received standard charges on noneconomic damages including pain and suffering. The jury returned a verdict for the exact amount of Green's economic damages outlined on Exhibit 10, namely $88,546.78. The jury also returned a verdict of "0" for Plaintiff Russell's loss of consortium claim.

ARGUMENT

1. THIS IS "THE CASE" WHERE A TRIAL COURT ABUSED ITS DISCRETION BY DECLINING TO GRANT ADDITUR WHEN A JURY DECIDED TO AWARD NOTHING TO AN INJURED PLAINTIFF FOR PAIN AND SUFFERING.

When the Plaintiff filed her Motion for New Trial Nisi Additur, the trial court was "require[d]... to consider the adequacy of the verdict in light of the evidence presented." *Krepps v Ausen*, 324 SC 597, 479 SE2d 290 (Ct App 1996). Although the trial court has considerable discretion in this regard, "such discretion is not absolute." *Waring v. Johnson* 341 SC 248, 257, 533 SE2d 906 (Ct. App 2000). It is appropriate to grant additur when "it cannot be seriously argued that [an injured plaintiff] was adequately compensated for the injuries she sustained. *Graham v. Whitaker, MD*, 282 SC 393, 402, 321 SE2d 40 (SC 1984). Here, the trial court abused its discretion by declining to grant additur after the jury awarded nothing for Green's pain and suffering and impairment.

It is indisputable that the jury did not award anything to Plaintiff other than her economic damages. To the penny. This court has found that awarding a Plaintiff's medical expenses "to the penny" renders any argument that the jury included anything in its verdict for pain and suffering "patently untenable." *Waring v. Johnson*, 341 SC at 260. It is also indisputable that Plaintiff experienced pain and suffering and impairment as a result of Defendants' actions. Plaintiff will not repeat here the litany of undisputed facts provided previously. However, anyone reading this brief knows it is not humanly possible for a 50-year-old woman who is struck by a vehicle traveling 60-90 mph; who cannot breathe and thinks she's going to die; who sustains a torn biceps tendon requiring surgery and two (2) fractured ribs, not to experience pain and suffering. It is significant that Green's orthopedic practice gave her injections to deal with the pain and that one of them suggested pain management. Because Green could not endure the results of such injections, she ate NSAIDS until she got gastritis.

Pre-existing injuries are not an issue here. There was no evidence or argument made that Plaintiff had a torn left biceps tendon or two (2) fractured ribs or intense pain "right between the shoulder blades" before being violently struck on her left side by Defendant McGee's truck. All of the evidence relating to her impairment is completely consistent with the type of injuries she sustained.

In response to Green's Motion for New Trial *Nis Additur*, Defendants cited other cases where this court has upheld the decision of trial courts to deny additur, even those in which verdicts were returned for medicals only, or reversed the decision of trial courts to grant additur. Defendants will undoubtedly cite those cases here. However, those cases are easily distinguished from this case. In those cases, the plaintiffs had one or more

serious proof problems, and very importantly those proof problems were actually raised and argued by defendants' lawyers. The proof problems are summarized below:

1. Collisions that are so minor as to make injury reasonably questionable. *Vinson v. Hartley*, 324 SC 396, 410, 477 SE2d 715 (Ct App 1996) ("Vinson's own description of the collision showed it was minor and inconsequential... in the nature of a 'bump'....While questioning Vinson, defense counsel introduced photographs of Vinson's car to demonstrate the small amount of damage."); *Todd v. Joyner*, 385 SC 509, 518, 685 SE2d 613 (Ct App 2008) ("The jury awarded Todd $37,191.11, her exact medical costs...Joyner cited the relatively low impact of the collision along with Todd's apparently limited injury immediately following the accident in support of her position.")

2. Proximate cause of the injury or injuries is disputable. *Vinson v. Hartley*, 324 SC at 397 (["Vinson] did not complain of any injuries at the scene. No evidence was introduced that Vinson went to the emergency room...or even went to the hospital....Defense counsel stated Vinson 'was not injured as a result of this accident...'") *Green v. Fritz*, 356 SC 566, 568-569, 590 SE2d 39 (Ct. App. 2003) ("[A]t the hospital, Green did not complain of, and was not treated for, neck, back or muscle pain...Four weeks after the accident, Green sought treatment from Dr. Shay, a chiropractor. Dr. Shay diagnosed Green with cervical subluxation...[D]efense counsel challenged the causal link between the accident and Green's subluxation diagnosis....Dr. Shay was asked whether Greens' back injury could have been caused by something other than the car accident, and Dr. Shay admitted it that was possible.") *Todd v. Joyner*, 385 SC at 518. ("Joyner argued that all of Todd's claimed damages were not proximately caused by the accident and that all of the medical treatment was not reasonably

necessary."); *Luchok v. Vena*, 391 SC 262, 264, 705, SE2d 71 (SC App. 2010) ("The only two points made by defense counsel in her opening statement were to argue that Plaintiff did not prove causation...and...whether those treatments were reasonable and necessary....[Luchok] testified she did not need an ambulance, she did not go to the emergency room, and she drove herself home after the accident.") *Lynch v. Carolina Self Storage*, 409 SC 146, 150, 760 SE2d 111 (Ct App 2014) ("The jury returned a verdict for Lynch and awarded her $246,068.42- the exact amount of the medical expenses she claimed resulted from her injury...Carolina Self Storage argued Lynch failed to prove proximate cause for the majority of her medical expenses because...she was the sole cause of the medical expenses associated with the surgery."); *Nestler v. Fields*, 426 SC 34, 36, 824 SC2d 461 (Ct App 2019) ("Nestler did not introduce...his medical bills into evidence....[Defendant] offered them. Nestler's trial strategy focused on his pain and suffering. The jury awarded him $7,159.70 [the amount of his medical bills]...Nestler boasted a semi-photographic memory, but could not recall a prior lawsuit he had brought alleging permanent injuries to his neck and back."

3. **Plaintiff has substantial credibility problems**. *Vinson v. Hartley*, 324 SC at 410 ("Vinson stated he missed time from work as a result from the accident. Evidence concerning a lost wages claim was developed during direct examination. However, Vinson acknowledged he was not working at the time of the accident...Vinson's credibility may have been seriously weakened by his first claiming lost wages, then withdrawing that claim when confronted with deposition testimony which indicated he had no lost wages and was not making such a claim....During closing argument, defense counsel argued about the credibility of witnesses and Vinson's referral to the doctors by

his attorney."); *Nestler v. Fields*, 426 SC at 41-42, ("The jury had before it evidence that, if believed, that undercut Nestler's credibility....Nestler boasted a semi-photographic memory, but could not recall a prior lawsuit he had brought alleging permanent injuries to his neck and back arising from a different wreck. Nester did not disclose the lawsuit and discovery, and the trial court instructed the jury they could infer the information withheld would have been unfavorable to Nestler. Fields assailed the veracity of Nestler's permanency rating, bringing to light that the doctor's initial eight percent impairment rating for the entire person shot up to 32% after Nestler (his good friend) asked him to revisit it in an effort to resolve the case....The jury could have found serious credibility gaps...")

Again, these proof problems must be "real" issues, not contrived. And if they are real issues, they will be argued by Defendants' attorneys. None of that happened here. Nowhere in the record did Defendants' attorneys argue that Green's injuries from this collision were caused by some other event or were caused by Green herself or were pre-existing.

Defendant McGee did use a common and often effective strategy in defense of injury cases, that is to make sure the jury knows a plaintiff is no spring chicken and doesn't have perfect health. Defendant McGee brough up other conditions of Green's that are completely unrelated to this case and for which she clearly was not attempting to recover. He referred to the conditions as "pain in other areas just from walking this earth for 50 years, right." He raised three issues. First, he raised the issue of past lower back pain, and Green was clear that this collision "did not cause lower back pain for me...[rather] upper back pain between the shoulder blades." Tr 234. Second, he raised

the issue of past hip pain, which Green testified "was not the result of trauma" and "was definitely not related to the accident." Tr 234. The "hip pain turned out to be a trochanter bursitis." Tr 239. Third, he raised the issue of a past right frozen shoulder that both he and Green acknowledged was "also unrelated to this accident,". It was clear that "the right shoulder was frozen from diabetes." Tr 241. Green was adamant she was not attempting to recover for "pains that all of us get from walking this earth." Tr 245. She testified that she was limiting her request to injuries sustained in the collision. "I'm not asking to be compensated for low back pain and trochanter bursitis...or even the right frozen shoulder...[T]hat's not part of this claim." Tr 246. As a result of the fact Green wasn't claiming pre-existing and unrelated conditions in this case, neither Defendant argued she was not credible or that the injuries she did claim were not caused by Defendant McGee's collision with her.

If pain and suffering and impairment are actually elements of a claim that, if proven to be caused by Defendants, must be compensated under South Carolina law, and if a motion for additur can be considered a viable option, there must be a case where failure to add money to a verdict for pain and suffering is reversible. This is "the case." This case provides an opportunity for guidance to the bench and bar, such as adoption of the following: In a case where property damage is not minor, and where a plaintiff sustains objective injury, e.g. broken bones or a torn tendon, and where such injuries would naturally cause pain and suffering to a normal human being, and where there is no reasonable argument as to proximate cause, and where there is no realistic argument that Plaintiff was comparatively negligent, then the jury must return a verdict that includes

money for pain and suffering. If the jury will not do so, the trial court must grant a motion for additur.

2. THE TRIAL COURT ERRED BY APPLYING AN OFFSET AGAINST PLAINTIFF'S AWARD FOR ALL UIM BENEFITS PAID WHEN, IN FACT, THE UIM BENEFITS ALSO COVERED CLAIMS BY CO-PLAINTIFF.

Before trial, Defendant's liability carrier, Nationwide, paid Green and her husband, Plaintiff Russell, $100,000 in UIM benefits[1]. In exchange for that payment, Nationwide required both Green and Plaintiff Russell to sign a Covenant Not to Execute. Plaintiff Russell gave up the right to execute a judgment against Defendant McGee for "any and all claims...including...loss of services." Accordingly, the trial court should have attributed some amount of the $100,000 payment to Plaintiff Russell and subtracted that amount from the offset amount applied to Green's verdict.

To be sure, Plaintiff Russell had a real and valid claim for loss of consortium as a matter of law[2]. In *Page v. Crisp*, 303 SC 117, 118, 399 SE2d 161 (Ct. app. 1990) a wife was seriously injured, and the jury returned a verdict for $44,000. The same jury simultaneously returned a verdict on her husband's loss of consortium claim for "zero dollars." *Id.* The trial court refused to send the jury back to award money damages to the husband or to grant a Motion to Amend the Judgement. *Id.* at 119. This court reversed and remanded. It held that the "seriousness of the wife's injuries [were] reflected in the $44,000 jury award." *Id.* at 188. It noted that the husband had testified about how the wife's injuries had affected the couple's daily lives and relationship, including a sex life

[1] Plaintiff Russell also received a settlement from Nationwide for a leg injury, and he signed a Covenant Not to Execute in exchange for $2500.00. However, Green was not required to sign the Covenant for Russell's leg injury.

[2] Plaintiff Russell did not file an appeal, but he should have received a money award in the verdict for his loss of consortium as a matter of law. This supports Green's contention that the $100,000 UIM payment covered loss of the real and valid loss of consortium claim.

that was "just put on a back burner." *Id.* at 118. Because there was no actual credibility issue with husband's testimony, so some amount should have been awarded for loss of consortium. *Id.* at 119.

Plaintiff Russell's case for loss of consortium is as strong as, if not stronger than, the husband's claim in *Page*. For starters, his wife's medical bills were much higher than the wife's in *Page*. For many weeks Plaintiff Russell had to dress Green and take care of her most basic needs, from wiping her to shaving her armpits. For months, he had to drive Green around and also to and from work in Greenville before going to work himself in North Carolina. He testified that he and his wife don't do a lot of the fun activities they used to do together. Finally, he testified that the couple's sex life has been affected. Tr 173.

Guidance on handling the type of allocation this situation requires is limited. However, in *Green v. Bauerle*, No. 2019-MO-026, 2019 SC Unpub. LEXIS 27. (S.C. Unpub. May 29, 2019), an unpublished opinion cited by Defendant Hudgins in support of his Motion for Setoff, such guidance is found. (Plaintiff's counsel refers to this case only because it has already been cited by Defendant Hudgins and is directly on point.) Procedurally, this allocation requires a hearing to consider all relevant circumstances.

In *Green v. Bauerle*, a husband and wife, Mr. and Mrs. Green, filed suit against three (3) defendants. Mr. Green alleged malpractice, and Mrs. Green alleged loss of consortium. *Id.* Before trial, Mr. and Mrs. Green settled with two (2) of the defendants, but (as in this case) neither of the settlements was allocated between Mr. and Mrs. Green's claims. *Id.* Verdicts were returned in favor of both Mr. and Mrs. Green against the non-settling third defendant, and he moved for setoff of Mr. and Mrs. Green's

settlements against the jury verdicts. The trial court "found it 'reasonable, fair, and just to utilize the jury's verdict as to the [Green's] claims', and as a result, '[applied] the percentage of the total verdict given to each [spouse] by the jury to apportion the settlements between Mr. Green's claim for medical malpractice and Mrs. Green's claim for loss of consortium." *Id.*

The Supreme Court "conclude[ed] the trial court's determination of the specific amounts to be setoff from the verdicts was arbitrary, as the determination was based solely upon the ratios both verdicts bore to the whole." Id. It held that while such ratios may be "relevant..., they are not necessarily the sole relevant circumstance." Id. Accordingly, the Supreme Court vacated the trial court's order on the allocation and remanded the issue to the trial court with instructions to hold a hearing to consider all relevant circumstances. *Id.*

So, two things are clear with respect to the amount of the setoff that should have been applied to the verdict in favor of Plaintiff Green: 1.) The setoff should not have been $100,000; and 2.) The fact that the jury returned zero to Plaintiff Russell in a clear case for loss of consortium is not controlling, i.e. not the "sole relevant circumstance" in determining the amount of the setoff against Green's verdict. Reliance on the jury verdict alone in establishing the proper amount of setoff would be deemed arbitrary.

Assume the shoe was on the other foot. Assume Green received her verdict of $88,546.78 in actual damages, and Plaintiff Russell received a verdict on his loss of consortium claim in the amount of $20,000. In such a case, the parties and the trial court would have to deal with setoff in light of the $100,000 UIM payment, which was paid in part for Plaintiff Russell's willingness not to execute a judgement against Defendant

McGee for "any and all claims...including...loss of services." If the $100,000 were applied only to the verdict in favor of Green, the UIM payment would not be exhausted. A balance of $11,453.22 would exist. Clearly Defendant McGee and Defendant Hudgins would argue that such balance of $11,453.22 (if not also the $2,500 payment to him alone) must be subtracted from Plaintiff Russell's $20,000 verdict for loss of consortium. It is clear Plaintiff Russell's loss of consortium claim was real and valid and covered by the $100,000 UIM payment. Before applying the setoff, a determination should have been made by the trial court as to the value of the claim Plaintiff Russell gave up when he signed the covenant for $100,000. That value should have been subtracted from the setoff amount applied to Green's verdict.

3. THE TRIAL COURT ERRED BY DIVIDING PUNITIVE DAMAGES AWARDS AGAINST TWO DEFENDANTS ON A PRO-RATA BASIS.

The jury returned a verdict for $88,546.78 in actual damages and found that Defendant McGee was 60% at fault and that Defendant Hudgins was 40% at fault. The jury also returned a verdict for $35,000 in punitive damages against Defendant McGee and $35,000 in punitive damages against Defendant Hudgins. Defendant Hudgins filed a Motion for a Setoff, which the trial court granted as to both Defendants in the amount of $100,000. The trial court then found that the remaining amount of the verdict to be paid to Green would be $58, 546.78 and that said amount must be shared by Defendants on a pro-rata basis based upon the fault assigned to each of them by the jury. Thus, Defendant McGee is responsible for 60% of the remaining amount owed to Green, and Defendant Hudgins is responsible for 40% of the remaining amount owed to Green. This was division was error.

In this case, Defendants acted together to cause indivisible injury to Green, and the South Carolina Contribution Among Tortfeasors Act applied to the actual damages award. That is why the jury was required to apportion percentages of fault, and Defendant Hudgins filed his Motion for Setoff pursuant to Section 15-38-50 SC Code. The setoff is part of the comprehensive scheme outlined in the Act. Section 15-38-10, *et seq* SC Code.

At the same time, punitive damages are not subject to joint and several liability. When punitive damages are awarded against more than one defendant, the "punitive damages award must be specific to each defendant and each defendant is liable only for the amount of the award made against that defendant." Section 15-32-520 (G) SC Code.

Since Defendant McGee and Defendant Hudgins each had punitive damages awarded against them in the amount of $35,000, each is responsible for those judgements, regardless of the percentage of fault assigned to them by the jury for the actual damages. Assuming a setoff of $100,000 against Green's verdict of $88,546.78 is appropriate (and it is not), there remains a "credit" of $11,453.22. That credit cannot be divided based upon Section 15-38-15 SC Code. Defendants are not entitled to an apportionment of the actual damages since they were found by the jury to have engaged in conduct that was willful, wanton, reckless, etc. Likewise, it is not valid for the trial court or Defendants to apply the credit based on such apportionment. That credit must be applied pursuant to Sections 15-38-20 and/or 15-38-40, and it was not. Under those sections, Defendant McGee and/or Defendant Hudgins could have made a motion under 15-38-40 (B) seeking a determination of how the remaining "credit" should be applied. Whether the court

ultimately decided that the credit should be split 60-40 is one issue, but it is clear that only the credit should be divided and not the separate punitive damages awards[3].

CONCLUSION

Based on the foregoing, the Trial Court's Order should be reversed and remanded with instructions to issue an additur, to determine the amount of the $100,000 UIM payment to be applied as an offset to Green's total verdict, and not to divide the punitive damages awards against each Defendant.

Respectfully submitted this **31st** day of July, 2020.

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Attorney for Appellant/Respondent
Shannon P. Green

[3] This is a real issue that affects the amount of the judgement against each Defendant. Under the court's order, Defendant McGee would pay 60% of $58,546.78, which is $35,128.07, and Defendant Hudgins would pay 40% of $58,546.78, which is $23,418.71. If only the remaining $11,453.22 of the credit is divided 60-40, Defendant McGee gets a 40% credit ($4,581.29) against the punitive damages award of 35,000 against him, so he would pay $30,418.71, and Defendant Hudgins gets a 60% credit ($6,871.93) against the punitive damages of $35,000 against him, so he would pay $28,128.07.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-000203

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Trial Court Case No. 2017-CP-42-03523

Shannon P. Green and
Darrell Russell, Plaintiff(s),

v.

Edward C. McGee and
David Hudgins, Respondent(s).

Of whom Shannon P. Green is Appellant/Respondent

And

Of whom David Hudgins is Respondent/Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant/Respondent Shannon P. Green on Edward C. McGee and David Hudgins by electronic mail on July 31, 2020, addressed to each of their attorney of record as follows:

Michael T. Coulter, Esquire CLARKSON, WALSH, & COULTER, P.A. Post Office Box 6728 Greenville, South Carolina 29606 Email: mcoulter@clarksonwalsh.com; mendemann@clarksonwalsh.com; majones@clarksonwalsh.com	James A. Bradshaw, Esquire GALLIVAN, WHITE & BOYD, P.A. P.O. Box 10589 Greenville, South Carolina 29603 Email: dbradshaw@gwblawfirm.com

July 31, 2020

Douglas A. Churdar (SC Bar No. 11971)
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Attorney for Appellant/Respondent
Shannon P. Green

Churdar Law Firm
Douglas A. Churdar

July 31, 2020

RECEIVED
Jul 31 2020
SC Court of Appeals

VIA EMAIL ONLY (ctappfilings@sccourts.org)

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Shannon P. Green and Darrell Russell, Plaintiffs v. Edward C. McGee and David Hudgins, Respondents, of whom Shannon P. Green is Appellant/Respondent and of whom David Hudgins is Respondent/Appellant*
Case No. 2017-CP-42-03523

Dear Ms. Kitchings:

Enclosed you will find an original and one (1) copy of the Initial Brief of Appellant/Respondent, Designation of Matter to be Included in the Record on Appeal, and Proof of Service in the above-referenced. Please return a filed copy in the enclosed self-addressed envelope.

Please call me with any questions. Thank you very much.

Sincerely,

Douglas A. Churdar

DAC/wpf
Enclosure(s)
cc: Michael T. Coulter (via email only)
James A. Bradshaw (via email only)