

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Trial Court Case No. 2017CP4203523

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Appellate Case No. 2020-000203

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**RECEIVED**

**Jul 31 2020**

**SC Court of Appeals**

Shannon P. Green,  
and Darrell Russell,

Appellant-Respondent,

v.

Edward C. McGee,  
and David Hudgins,

Respondent,  
Respondent-Appellant,

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**INITIAL BRIEF OF RESPONDENT-APPELLANT DAVID HUDGINS  
FOR HIS CROSS-APPEAL**

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN DENYING DAVID HUDGINS' MOTION MADE PURSUANT TO RULE 50(B), SCRPC, FOR A JUDGMENT NOTWITHSTANDING THE VERDICT ("JNOV") AND DECLINING TO SET ASIDE THE VERDICT AGAINST MR. HUDGINS IN ITS ENTIRETY AND ENTER JUDGMENT IN HIS FAVOR?
2. DID THE TRIAL COURT ERR IN DENYING DAVID HUDGINS' MOTION MADE PURSUANT TO RULE 50(B), SCRPC, FOR A JUDGMENT NOTWITHSTANDING THE VERDICT ("JNOV") AND DECLINING TO SET ASIDE THE PUNITIVE DAMAGES AWARD AGAINST MR. HUDGINS?
3. DID THE TRIAL COURT ERR IN CALCULATING THE SETOFF OF \$100,000 DAVID HUDGINS' IS ENTITLED TO UNDER S.C. CODE ANN. § 15-38-50 BY ADDING THE ACTUAL DAMAGE AWARD OF \$88,546.78 TO THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST MR. HUDGINS AND THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST EDWARD MCGEE FOR A TOTAL OF \$158,546.78, SUBTRACTING \$100,000 FROM THAT AMOUNT, AND HOLDING THAT MR. HUDGINS IS RESPONSIBLE FOR 40% OF THE REMAINDER, WHILE MR. MCGEE IS RESPONSIBLE FOR 60% OF THE REMAINDER, RATHER THAN ADDING THE \$35,000 INDIVIDUAL PUNITIVE DAMAGE AWARD AGAINST MR. HUDGINS TO 40% OF THE ACTUAL DAMAGES AWARD AND SUBTRACTING THE \$100,000 FROM THAT AMOUNT?

## STATEMENT OF THE CASE

Appellant Shannon P. Green (hereinafter “Appellant Green”), along with her husband, Darrell Russell, filed this action on September 27, 2017 alleging a cause of action for negligence against Edward C. McGee and David Hudgins for an automobile accident that occurred on November 19, 2015 on Simuel Road in Spartanburg, South Carolina in which Mr. McGee’s Chevrolet 2500 pickup truck crossed the center line and collided with Appellant Green’s vehicle. *See Compl.*

Mr. Hudgins filed his Answer to the Complaint on December 12, 2017, denying his allegations of negligence and asserting multiple affirmative defenses. *See Hudgins’ Answer.* Prior to suit being filed, Appellant Green settled with Edward C. McGee and his liability insurer for One Hundred Thousand Dollars (\$100,000.00) and executed a “Covenant Not to Execute.” *See Covenant Not to Execute.* Hoping to pursue underinsured motorist benefits under her own insurance policy with Progressive Direct Insurance Company (hereinafter “Progressive”), Appellant Green served Progressive with the Complaint, and Progressive answered on May 30, 2018. *See Progressive Answer.*

The case went to trial before a Spartanburg County jury on October 14, 2019, with the Honorable Grace Gilchrist Knie presiding. At the close of Plaintiffs’ case and the close of Defendants’ case, both Mr. Hudgins and counsel for Progressive moved for directed verdict, which was denied. On October 16, 2019, the jury returned a verdict in favor of Appellant Green. *See Verdict Form.* The jury determined that both Mr. Hudgins and Edward C. McGee were negligent and proximately caused the November 19, 2015 accident and found that Mr. Hudgins was forty percent (40%) at fault, while Mr. McGee was sixty percent (60%) at fault. The jury further found that Appellant Green was entitled to actual damages in the amount of \$88,546.78,

while Darrell Russell was not entitled to any damages for Loss of Consortium. Finally, the jury also awarded \$35,000 in punitive damages against Mr. Hudgins and \$35,000 in punitive damages against Mr. McGee. *Id.*

Both Appellant Green and Mr. Hudgins filed timely post-trial motions. On October 25, 2019, Mr. Hudgins submitted a Motion for Judgment Notwithstanding the Verdict (“JNOV”) pursuant to Rule 50(b), S.C.R.C.P., seeking to have the verdict against him set aside in its entirety and judgment entered in his favor, or to at least have the punitive damages award set aside. *See Mtn. for JNOV.* Mr. Hudgins also filed a Motion for Setoff, pursuant to S.C. Code Ann. § 15-38-50, seeking to have the Court properly apply and give Mr. Hudgins credit for the \$100,000 Appellant Green received from Mr. McGee prior to trial as part of the Covenant Not to Execute. *See Mtn. for Setoff.* Appellant Green also filed a Motion for New Trial *Nisi Additur* or, in the alternative, a Motion for a New Trial Absolute.

A hearing was held before Judge Knie on December 20, 2019 on all post-trial motions with representative of all parties in attendance. On January 8, 2020, Judge Knie issued an Order ruling on all post-trial motions. *See Order on Post-Trial Mtns.* The trial court denied all post-trial motions except for the Motion for Setoff. With respect to that motion, the Court held and entered judgment as follows:

Defendant David Hudgins’ Motion for a Setoff of the verdict against him pursuant to S.C. Code Ann. § 15-38-50 of the proceeds received by Plaintiff Shannon P. Green should be and is therefore granted as to both Defendants in the amount of One Hundred Thousand Dollars and no/100 (\$100,000.00); and

That the remaining amount of the verdict to be paid to Plaintiff Shannon P. Green of Fifty-Eight Thousand, Five Hundred Forty-Six and 78/100’s Dollars (\$58,546.78) shall be shared by the Defendants on a pro-rata basis according to the fault assigned to the Defendants by the Jury Verdict; and Defendant McGee shall be responsible for 60% of the remaining amount owed to Plaintiff Green and

Defendant Hudgins shall be responsible for 40% of the remaining amount owed to Plaintiff Green.

*Id.* On February 5, 2020, Appellant Green submitted a Notice of Appeal. *See Notice of Appeal.* On February 10, 2020, Mr. Hudgins timely submitted a Notice of Appeal for a Cross Appeal. *See Notice of Cross Appeal.*

#### STATEMENT OF FACTS

This case arises from an accident that occurred on November 19, 2015 on Simuel Road in Spartanburg, South Carolina, in which the only two vehicles involved were the vehicle driven by Appellant Green, and the Chevrolet 2500 truck that was driven by Edward C. McGee. David Hudgins's vehicle did not impact either of the other vehicles, and he was not involved in the impact whatsoever.

Prior to the accident on November 19, 2015, Mr. Hudgins was working and was driving a Nissan Altima on Interstate 85 from a plant in Blacksburg to his next job at a plant in Spartanburg near Heron Circle. Trial Tr. 250:11-251:7. Traffic was very heavy on the interstate at that time and was "stop and go." Trial Tr. 252:10-19. While Mr. Hudgins was in the left lane on Interstate 85 North, Edward McGee approached him from behind in a Chevrolet 2500 truck. The evidence showed that Mr. McGee was running late for work at the BMW plant in Greer at that time, as he had to be at work at 7:00 and the events of the accident occurred at 7:00. Trial Tr. 88:10-19. Mr. McGee admitted that as he approached Mr. Hudgins on the interstate, he was speeding and flashed his lights at Mr. Hudgins to tell him he was driving too slow and "let's go." Trial Tr. 91:20-92:16. Mr. Hudgins had to apply his brakes, as vehicles in front of him were slowing down or stopping. Trial Tr. 252:23-253:4.

As Mr. Hudgins applied his brakes on these occasions, Mr. McGee admitted that he was traveling so close behind him that he almost hit him. Trial Tr. 48:11-19. Mr. McGee then moved to the middle lane and then “flipped” back to the left lane to get in front of Mr. Hudgins and got so close to him that you may could have gotten “a piece of paper” between them. Trial Tr. 53:12-22. Mr. Hudgins had to slam on brakes and swerve off of the roadway to avoid having an accident. Trial Tr. 266: 2-9. He was in shock and called 911 to report Mr. McGee’s aggressive and reckless driving. Trial Tr. 254:23-255:8.

On this 911 call, which was played at trial, Mr. Hudgins is heard telling the operator Mr. McGee’s license plate number as he continued to travel down the interstate. *See Def. Hudgins Ex. 1 to Trial Tr.*, 911 Call. There is then silence as the operator attempts to get in touch with the South Carolina Highway Patrol for over two minutes. While on the 911 call, Mr. Hudgins exited onto Exit 4B on Interstate 85 Business along with Mr. McGee and other vehicles. Trial Tr. 282:23-283:15. Mr. Hudgins saw Mr. McGee go around Heron Circle at a high rate of speed and almost have another accident, and he can be heard describing this on the 911 call. Trial Tr. 258:19-25. As Mr. McGee turned onto Simuel Road, Mr. Hudgins stated, “He’s gone. I’m not going to chase him.” *See Def. Hudgins Ex. 1 to Trial Tr.*, 911 Call. Then approximately twelve (12) seconds later Mr. Hudgins is heard saying that Mr. McGee “just wrecked.” *Id.*

Mr. Hudgins testified that as Mr. McGee went down Simuel Road, he was six car lengths or more behind him. Trial Tr. 259:9-14. Even Mr. McGee admitted that Mr. Hudgins was at least “two or three carlengths” behind him on Simuel Road. Trial Tr. 100:11-20. Mr. Hudgins never tried to run Mr. McGee off the roadway or pointed a gun at him or did anything else to distract Mr. McGee’s attention from the roadway. Trial Tr. 100:24-25; 101:8-19; 286:2-5. Mr. McGee testified that he was not really concerned with Mr. Hudgins smaller vehicle coming into

contact with his and admitted that at the time of the accident, he was looking ahead at cars going through the intersection and not at Mr. Hudgins' vehicle. Trial Tr. 101:18-102:7; 104:23-105:1.

As he drove on Simuel Road, Mr. McGee's truck crossed the center line and struck the vehicle driven by Appellant Green. Mr. Hudgins' Nissan Altima never struck Appellant Green's vehicle and never struck Mr. McGee's truck. Trial Tr. 182:9-11. Mr. McGee admitted that he was in "total control" of his truck at the time of the accident. Trial Tr. 103:25-104:2. He also testified that he was in "total control" of his truck as he admittedly sped down Simuel Road and admitted:

Q. Okay. No one, other than you, was speeding down Simuel Road, right?

A. Exactly.

Q. Okay. And, again, you, you pled guilty to driving too fast for conditions, right?

A. I admit that, yes, sir. I pleaded guilty to it.

Trial Tr. 104:10-18. Mr. McGee further admitted that he was in "total control" of his truck when he took the curve too fast and crossed the centerline and struck Appellant Green's vehicle. Trial Tr. 104:18-22; 105:16-23.

Appellant Green alleges that she injured her left shoulder and back in the accident and developed a frozen left shoulder. However, Appellant Green has been a severe Type I diabetic for over 40 years, and is insulin dependent. Trial Tr. 200:10-19. She also has pre-existing joint pain. Trial Tr. 242:10. She previously had a frozen shoulder in her right shoulder that she admitted was related to her diabetes and required surgery. Trial Tr. 210:15-19. She further admitted that she had pain in her right shoulder even after the surgery. Trial Tr. 241:12-19. She also admittedly has pre-existing back pain. Trial Tr. 239:10-17. Ms. Green admitted that she had

chronic hip pain since 2010 unrelated to the accident. Trial Tr. 233:15-235:2. No medical physician or other medical expert testified at trial regarding Appellant Green's alleged injuries.

#### STANDARD OF REVIEW

“When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court.” *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006). Rule 50(b) of the South Carolina Rules of Civil Procedure allows the Court discretion to grant a judgment notwithstanding a jury's verdict. Rule 50(b), S.C.R.C.P. “A party making a motion for a directed verdict must state the specific grounds relied upon therefor, and the trial court may grant the motion when the case presents only issues of law.” *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012). “If the motion is denied, the party may thereafter move for a JNOV in order to have the verdict and judgment set aside and a judgment entered in accordance with the party's directed verdict motion.” *Id.* “A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.” *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). A court “cannot ignore facts unfavorable to [the nonmoving] party and it must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.” *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996). Moreover, the “rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury,” and “verdict may not be permitted to rest upon surmise, conjecture, or speculation.” *Small v. Pioneer Mach.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). “[W]hen only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court.” *Id.* In other words, “[i]f only one reasonable inference can be drawn from the evidence,

the motion must be granted.” *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 78, 439 S.E.2d 266, 269 (1993).

#### ARGUMENTS

1. THE TRIAL COURT ERRED IN DENYING DAVID HUDGINS’ MOTION MADE PURSUANT TO RULE 50(B), SCRPC, FOR A JUDGMENT NOTWITHSTANDING THE VERDICT (“JNOV”) AND DECLINING TO SET ASIDE THE VERDICT AGAINST MR. HUDGINS IN ITS ENTIRETY AND ENTER JUDGMENT IN HIS FAVOR.

a. *The Only Reasonable Inference Is that Edward McGee Was the Sole Cause of the Accident.*

The South Carolina Supreme Court has long held that when the evidence is susceptible of only one inference, proximate cause becomes a matter of law for the court. *Wright v. PRG Real Estate Mgmt.*, 426 S.C. 202, 222, 826 S.E.2d 285, 295 (2019). The only reasonable inference from the evidence presented at trial was that Edward McGee’s negligence was the sole proximate cause of the November 19, 2015 accident.

Mr. McGee admitted fault for the November 19, 2015 accident. He testified:

Q. Okay. And you’re at fault for hitting Ms. Green, right?

A. I’ve never denied that.

Trial Tr. 105:24-106:1. The evidence showed that the only vehicle that struck Appellant Green’s vehicle was Mr. McGee’s Chevrolet Silverado truck. Trial Tr. 103:20-24. The evidence also showed that Mr. Hudgins’ Nissan Altima never struck Appellant Green’s vehicle and never struck Mr. McGee’s truck. Trial Tr. 182:9-11. Mr. McGee admitted that he was in “total control” of his truck at the time of the accident. Trial Tr. 103:25-104:2. No one other than Mr. McGee was pushing the accelerator or steering the steering wheel. Trial Tr. 104:3-9. He also

testified that he was in “total control” of his truck as he admittedly sped down Simuel Road and admitted:

Q. Okay. No one, other than you, was speeding down Simuel Road, right?

A. Exactly.

Q. Okay. And, again, you, you pled guilty to driving too fast for conditions, right?

A. I admit that, yes, sir. I pleaded guilty to it.

Trial Tr. 104:10-18. Mr. McGee further admitted that he was in “total control” of his truck when he took the curve too fast and crossed the centerline and struck Appellant Green’s vehicle. Trial Tr. 104:18-22; 105:16-23. Thus, the only reasonable inference that can be drawn from the evidence in this case is the Mr. McGee was solely responsible for the accident and was the sole proximate cause of the accident.

b. *No Evidence Was Presented At Trial Upon Which A Reasonable Jury Could Conclude That Mr. Hudgins Breached a Duty or Proximately Caused the Accident.*

There was simply no evidence presented at trial upon which a reasonable jury could conclude that there was any breach of duty on the part of David Hudgins or that any actions on his part proximately caused the November 19, 2015 accident. “Negligence is not actionable unless it is the proximate cause of the plaintiff’s injury.” *Hubbard v. Taylor*, 339 S.C. 582, 589, 529 S.E.2d 549, 552 (Ct. App. 2000). “Proximate cause requires proof of (1) causation in fact and (2) legal cause.” *Bramlette v. Charter Medical-Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). “Causation in fact is proved by establishing the injury would not have occurred ‘but for’ the defendant’s negligence,” and “[l]egal cause is proved by establishing foreseeability.” *Id.*

The evidence at trial showed that on November 19, 2015, Mr. Hudgins was minding his own business as he drove on Interstate 85 from a plant in Blacksburg to his next job at a plant in

Spartanburg near Heron Circle. Trial Tr. 250:11-251:7. All the evidence clearly showed that Mr. McGee drove aggressively on the interstate and was running late for work at the BMW plant in Greer. Trial Tr. 88:10-19. Mr. McGee admitted that as he approached Mr. Hudgins on the interstate, he was speeding and flashed his lights at Mr. Hudgins to tell him he was driving too slow and “let’s go.” Trial Tr. 91:20-92:16. He testified:

Q. Okay. So, you were being aggressive behind – as you drove behind him, weren’t you?

A. Just trying to wake him up, and let’s go, you know, and really let’s just run the speed limit, and let’s get on up the road.

Trial Tr. 92:12-16. He further admitted that when Mr. Hudgins applied his brakes on the interstate, he was traveling so close behind him that he almost hit him. Trial Tr. 48:11-19. Mr. McGee then moved to the middle lane and then “flipped” back to the left lane to get in front of Mr. Hudgins and got so close to him that you may could have gotten “a piece of paper” between them. Trial Tr. 53:12-22. Mr. McGee admitted that it was his responsibility to make sure that there was enough room to pass. Trial Tr. 94:16-20. Mr. Hudgins testified that he had to slam on brakes and swerve off the roadway to avoid having an accident. Trial Tr. 266: 2-9. He was in shock and called 911 to report Mr. McGee. Trial Tr. 254:23-255:8.

This 911 call was played at trial and admitted into evidence as Defendant Hudgins’ Exhibit 1. *See Def. Hudgins Ex. 1 to Trial Tr.*, 911 Call. This contemporaneous 911 call made by Mr. Hudgins unequivocally shows that he did not proximately cause the accident. Mr. Hudgins is heard telling the 911 operator Mr. McGee’s license plate number as he continues to travel down the interstate. He then sat calmly and not in a state of rage as the 911 operator attempted to get in touch with the South Carolina Highway Patrol for over two minutes—which took almost until the time the accident occurred. This is consistent with Mr. Hudgins’ testimony

at trial that the South Carolina Highway Patrol was not “on it” at that point and that he was calm on the telephone call. Trial Tr. 267:1-8.

Mr. Hudgins then exited onto Exit 4B on Interstate 85 Business—the very exit he planned to take from the beginning of his trip—along with Mr. McGee and other vehicles. Trial Tr. 282:23-283:15. He observed Mr. McGee go around Heron Circle at a high rate of speed and almost have another accident. Trial Tr. 258:19-25. Importantly, as Mr. McGee turned onto Simuel Road, Mr. Hudgins stated, “He’s gone. I’m not going to chase him.” *See Def. Hudgins Ex. 1 to Trial Tr.*, 911 Call. Then approximately twelve (12) seconds later Mr. Hudgins is heard saying that Mr. McGee “just wrecked.” *Id.* However, he was so far back at that time that it was not until over a minute later after Mr. Hudgins went to the accident scene that he realized that Mr. McGee had struck another vehicle. *Id.* This contemporaneous evidence blatantly contradicts any contention otherwise that Mr. Hudgins was chasing Mr. McGee at the time of the accident or was right behind him at the time of the accident. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonably jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”).

In fact, all of the evidence at trial showed that Mr. Hudgins was far away from Mr. McGee’s truck at the time of the accident and not chasing him or trying to run him off the road. Trooper J.R. Helmly testified that on the day of the accident, Mr. Hudgins told him that he was not close to Mr. McGee’s truck at the time of the accident. Trial Tr. 34:14-16. Plaintiff Darrell Russell also testified that just prior to the accident he only saw one set of headlights from Mr. McGee’s truck coming toward their vehicle. Trial Tr. 181:21-182:11. Mr. Hudgins testified that he was six car lengths or more away from Mr. McGee’s truck. Trial Tr. 259:9-14. In fact,

Mr. McGee admitted that as he drove down Simuel Road, Mr. Hudgins was at most “two or three car lengths” away from him. Trial Tr. 100:11-20. He admitted that Mr. Hudgins was not trying to run him off the road and never pointed a gun at him. Trial Tr. 100:24-25; 101:8-19. In other words, Mr. Hudgins was not doing anything to distract Mr. McGee’s attention from the roadway. Trial Tr. 286:2-5.

Mr. McGee also admitted that at the time of the accident, he was paying attention to cars in front of him going through the intersection of Howard and Simuel. He testified:

Q. And, in fact, you were viewing vehicles in front of you go through the four way stop there on – at Simuel and Howell – Howard at the time of the accident, weren’t you?

A. Yes, sir.

Trial Tr. 104:23-105:1. He was not really concerned with Mr. Hudgins being behind him and stated that if Mr. Hudgins’ small car hit his truck, then Mr. Hudgins’ car would not be drivable, as he testified:

A. I’m in the front there. So, I mean how is he gonna run me off the road?

Q. Okay. And in fact, his – Mr. Hudgins vehicle never came in contact with your vehicle at all, did it?

A. No, sir.

Q. Okay. In fact, you weren’t worried about his car coming into contact with your big truck, were you?

A. No.

Q. All right.

A. Why would I be?

Q. Right. And as big as your truck was, if his car hit the back of your truck, his car probably wouldn’t of been drivable, right?

A. Exactly.

Trial Tr. 101:18-102:7. Following the accident, Mr. McGee did not even immediately recognize Mr. Hudgins' car, and it took him a minute to figure out who he was. Trial Tr. 103:4-12.

Thus, again, the only inference susceptible from the evidence presented at trial is that Mr. McGee was the sole proximate cause of the accident. The evidence does not show that Mr. Hudgins ever hit Mr. McGee's truck or ever hit Appellant Green's vehicle. In fact, the evidence shows that Mr. Hudgins did absolutely nothing on Simuel Road to cause Mr. McGee to choose to drive the way he did.

c. *Edward McGee Was An Independent Intervening Cause of the Accident, and At Most, Mr. Hudgins Was a Remote Cause and Not a Proximate Cause.*

While Mr. McGee testified that he somehow felt threatened by Mr. Hudgins being that far behind him, this does not transform Mr. Hudgins into a proximate cause of this accident. "One is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the defendant's negligent act." *Vinson v. Hartley*, 324 S.C. 389, 401, 477 S.E.2d 715, 721 (Ct. App. 1996). Thus, "[w]here the injury complained of is not reasonably foreseeable there is no liability." *Id.*; see *Mellen v. Lane*, 377 S.C. 261, 283, 659 S.E.2d 236, 247 (Ct. App. 2008) (stating same). Additionally, the South Carolina Supreme Court has long held that "when the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause." *Woody v. South Carolina Power Co.*, 202 S.C. 73, 84-85, 24 S.E.2d 121, 125 (1943). In making this determination, courts are instructed to apply the following test:

The test, therefore, by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent act of another, is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in the light of attendant circumstances.

202 S.C. at 85, 24 S.E.2d at 125.

For instance, in *Gray v. State Highway Dep't*, 165 S.C. 248, 163 S.E. 793 (1932), the plaintiff was the passenger in a truck that struck the rear of a sedan that suddenly stopped in front of it. The Highway Department had placed an employee in the road with a flag to warn motorists of a slippery and wet spot in the road. Upon seeing this guard, the driver of the sedan came to a sudden stop. The plaintiff alleged that her injuries were due to this defect in the highway. While the South Carolina Supreme Court acknowledged that plaintiff made a persuasive argument that the alleged defect brought about a succession of other causes that led to plaintiff's injuries, it held, "under the facts disclosed, the defective highway was not the direct or proximate cause, but was either the remote cause, or no cause whatever, of plaintiff's injuries." 165 S.C. at 252, 163 S.E. at 794. With respect to the Highway Department guard, the Court held, "[a]ll that the guard did was to flag the automobile; the manner of its slowing down or stopping was in the control of its driver, and, if the collision and resulting injuries were due to the sudden stopping of the sedan, it is clear that they were due to that cause independently of the condition of the highway." 165 S.C. at 253, 163 S.E. at 794; *see Gibson v. Gross*, 280 S.C. 194, 197, 311 S.E.2d 736 (Ct. App. 1983).

Here, based on the actions of Mr. Hudgins in keeping at least two to three car lengths behind Mr. McGee, not flashing his lights, not trying to run him off the road, not getting right on his bumper, and not doing anything to distract Mr. McGee's attention from the roadway, no reasonable jury could find that Mr. Hudgins was a proximate cause of the accident. If Mr.

Hudgins had been following Mr. McGee at all, then this had ended well before the accident, as shown by the contemporaneous 911 call in which Mr. Hudgins stated that he was not going to chase Mr. McGee. *See Skipper v. Hartley*, 242 S.C. 221, 226, 130 S.E.2d 486, 489 (1963) (“A participant who abandons the race, to the knowledge of the other participants, before the accident and injury, may not be held liable.”); *see also Johnson v. Johnson*, 171 So.2d 710, 712 (La. App. 1965) (finding that when a vehicle following another vehicle was about two blocks from the vehicle when it was involved in an accident, there was “not even the remotest causal connection between the pursuit . . . and the accident or injury.”). Furthermore, if Mr. McGee truly felt threatened by Mr. Hudgins, in addition to being unreasonable from the standpoint of an ordinary prudent person, Mr. McGee’s actions in driving at a high rate of speed down Simuel Road and then crossing the centerline and striking Appellant Green constitutes an independent intervening cause. Mr. McGee admitted that he had a number of other options other than driving down Simuel Road in the manner in which he did on November 19, 2015 and causing this accident. He could have called 911, pulled into the QT gas station off of Heron Circle, or even pulled to the side of the roadway and let Mr. Hudgins pass. Trial Tr. 97:15-99:9. He testified:

Q. Okay. And, again, there were a lot of other things you could of done other than to choose to drive the way you did down Simuel Road and cause this accident? Yes?

A. Yes, sir, I mean I could of done a lot of different things. I could of not went to work that night and I didn’t anyway, but --.

Trial Tr. 99:10-16.

Yet, Mr. McGee chose to continue down the roadway in such a manner that caused this accident. Thus, even if Mr. McGee did somehow feel threatened by Mr. Hudgins keeping a distance of between two and three car lengths behind him, no reasonable juror could find that it

would be reasonably foreseeable that such actions would lead to an accident. If that were the case any motorist following at a safe distance behind another vehicle that is involved in an accident could be drug into a lawsuit based merely on the other driver's subjective statement that he somehow felt threatened by the vehicle having been behind him for some distance.

Accordingly, as the only reasonable inference from the evidence presented at trial is that the November 19, 2015 accident was proximately caused solely by Edward McGee and not by David Hudgins, Mr. Hudgins respectfully requests that Court reverse the trial court's ruling on his Motion for JNOV and direct that the verdict against him be set aside in its entirety and that judgment in his favor be entered on all claims.

d. *No Medical Evidence Was Presented At Trial Upon Which a Jury Could Determine That Appellant Shannon Green's Alleged Injuries Were Proximately Caused by the Accident.*

In addition to there being absolutely no evidence presented at trial upon which a reasonable jury could find that David Hudgins proximately caused the accident, there was also no evidence presented at trial upon which a jury could find that Appellant Shannon Green's alleged injuries were proximately caused by the accident. Again, a "verdict may not be permitted to rest upon surmise, conjecture, or speculation." *Small v. Pioneer Mach.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). "The general rule in South Carolina is that where a subject is beyond the common knowledge of the jury, expert testimony is required." *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013). In fact, "[A]ll jurisdictions require expert testimony at least where the issues are medically complex and outside common knowledge and lay experience." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practice and Prods. Liab. Litig.*, 226 F. Supp. 3d 557 (D.S.C. 2017). The South Carolina Supreme Court has held that "[r]eliance on lay testimony is not justified when the medical

question is a complicated one and likely to carry the fact-finding body into realms which are more properly within the province of medical experts.” *Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 217, 143 S.E.2d 376, 384 (1965).

Here, Appellant Green claimed that she injured her left shoulder and back in the November 19, 2015 accident. However, Appellant Green did not even have an X-ray of her shoulder performed at the hospital following the accident, and it was not until three days after the accident that she sought medical treatment for her left shoulder at an Express Care and obtained an X-ray that showed no fractures. Trial Tr. 226:6-16. She also stopped seeking any medical treatment for any back pain two months after the accident. Trial Tr. 228:20-24. Moreover, evidence was presented at trial that showed that Ms. Green has several pre-existing issues that make it questionable whether these injuries were in fact related to the accident. Ms. Green has pre-existing joint pain. Trial Tr. 242:10. She has also been a severe Type I diabetic for over 40 years, and is insulin dependent. Trial Tr. 200:10-19. She previously had a frozen shoulder with her right shoulder in 2010 through 2011 that had no traumatic cause and was related to her diabetes and required surgery. Trial Tr. 210:15-19. Appellant Green testified that she continued to have pain in her right shoulder even after the surgery. Trial Tr. 241:12-19. She also admittedly has pre-existing back pain. Trial Tr. 239:10-17. Further, Ms. Green admitted that she had chronic hip pain since 2010 unrelated to the accident. Trial Tr. 233:15-235:2. Now Ms. Green claims that the accident caused her to develop back pain and left shoulder pain and eventually a diabetic frozen left shoulder.

However, no doctor or other qualified medical expert testified at trial regarding medical causation or attempted to rule out these other possible causes. There was also no medical expert testimony opining to a reasonable degree of medical certainty that her injuries were most

probably related to the accident. Without such evidence, the jury was left to only speculate and conjecture as to the cause of Appellant Green's alleged injuries. In other words, without expert testimony linking Appellant Shannon Green's alleged soft tissue injuries to this accident rather than her other pre-existing issues or other possible causes, the jury's verdict cannot stand. For this additional reason, the Court should reverse the trial court's ruling on his Motion for JNOV and direct that the verdict against him be set aside and judgment be entered in his favor.

2. THE TRIAL COURT ERRED IN DENYING DAVID HUDGINS' MOTION MADE PURSUANT TO RULE 50(B), SCRPC, FOR A JUDGMENT NOTWITHSTANDING THE VERDICT ("JNOV") AND DECLINING TO SET ASIDE THE PUNITIVE DAMAGES AWARD AGAINST MR. HUDGINS.

Should the Court not aside the entire verdict against Mr. Hudgins, the jury's award of punitive damages in the amount of \$35,000 against Mr. Hudgins should be set aside and judgment on the question of punitive damages should be entered in Mr. Hudgins' favor. There was absolutely no evidence presented at trial against Mr. Hudgins that could sustain an award of punitive damages. In order to recover punitive damages, a plaintiff must establish, by clear and convincing evidence, that a defendant's behavior was willful, wanton, or reckless and caused the accident. S.C. Code Ann. § 15-32-520(D). The test for willful, wanton, or reckless behavior is whether it is:

committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of plaintiff's rights. It is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tortfeasor. In other words, at the time of his act or omission to act the tortfeasor must be conscious, or chargeable with consciousness, of his wrongdoing.

*Cody P. v. Bank of America, N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 479 (Ct. App. 2011).

In addition to not providing any evidence at trial that Mr. Hudgins was negligent, Appellant Green certainly did not provide any evidence upon which a jury could find by clear

and convincing evidence that there was willful, wanton, or reckless conduct on the part of Mr. Hudgins that caused the November 19, 2015 accident. As set forth above, no reasonable jury could find that Mr. Hudgins' actions in being at a minimum of two or three car lengths from Mr. McGee's truck, not trying to run him off the road, not flashing his lights at Mr. McGee, and not otherwise distracting Mr. McGee somehow constitutes willful, wanton, or reckless conduct. In fact, the contemporaneous 911 call made by Mr. Hudgins at the time of the accident proves that there was no conscious disregard for the rights of Appellant Green at the time of the accident, as it shows that he calmly waited on the line with the 911 operator while he reported Mr. McGee's conduct, waited patiently while the operator tried to contact the Highway Patrol, and stated that he was not going to chase him as Mr. McGee traveled at a high rate of speed down Simuel Road. *See Def. Hudgins Ex. 1 to Trial Tr.*, 911 Call.

While Mr. Hudgins did admit that he pled guilty to driving too fast for conditions, it is only “[t]he causative violation of a statute [which] constitutes negligence *per se* and is evidence of recklessness and willfulness.” *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) (emphasis added). Again, as explained above, there is no evidence that any action on the part of Mr. Hudgins proximately caused this accident or caused Mr. McGee to drive in the manner in which he did. Additionally, the Supreme Court had held that a “[v]iolation of a statute does not constitute recklessness, willfulness, and wantonness *per se*, but is some evidence that the defendant acted recklessly, willfully, and wantonly.” *Id.* In other words, “it is not obligatory as a matter of law for the jury to make such a finding in every case of a statutory violation.” *Id.* Here, Mr. Hudgins emphatically denied that he was driving too fast for conditions and explained that his guilty plea was merely a financial decision. Trial Tr. 281:20-25; 284:16-285:7. Given the totality of the other evidence presented at trial, no reasonable jury could find that Mr.

Hudgins acted recklessly on November 19, 2015. To the contrary, the only reasonable inference in this case is that he was not acting recklessly but merely trying to report on a dangerous driver. Therefore, Mr. Hudgins should not be punished for his actions and the evidence presented at trial does not provide a reasonable basis for a punitive damages award. As such, should the Court not entirely reverse the trial court's decision on his Motion for JNOV, Mr. Hudgins respectfully requests that the Court reverse the trial court regarding the punitive damages award against him and find that such an award was improper.

3. THE TRIAL COURT ERRED IN CALCULATING THE SETOFF OF \$100,000 DAVID HUDGINS' IS ENTITLED TO UNDER S.C. CODE ANN. § 15-38-50 BY ADDING THE ACTUAL DAMAGE AWARD OF \$88,546.78 TO THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST MR. HUDGINS AND THE \$35,000 PUNITIVE DAMAGE AWARD AWARDED INDIVIDUALLY BY THE JURY AGAINST EDWARD MCGEE FOR A TOTAL OF \$158,546.78, SUBTRACTING \$100,000 FROM THAT AMOUNT, AND HOLDING THAT MR. HUDGINS IS RESPONSIBLE FOR 40% OF THE REMAINDER, WHILE MR. MCGEE IS RESPONSIBLE FOR 60% OF THE REMAINDER, RATHER THAN ADDING THE \$35,000 INDIVIDUAL PUNITIVE DAMAGE AWARD AGAINST MR. HUDGINS TO 40% OF THE ACTUAL DAMAGES AWARD AND SUBTRACTING THE \$100,000 FROM THAT AMOUNT.

Finally, the trial court erred in calculating the setoff Mr. Hudgins is entitled to under S.C. Code Ann. § 15-38-50 for the \$100,000, Appellant Green received from Edward McGee prior to suit. Under South Carolina law, "there can be only one satisfaction for an injury or wrong." *Truesdale v. South Carolina Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975).

Section 15-38-50 of the South Carolina Code states in full as follows:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

- (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater;

and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50. Thus, under this statute, “[a] non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action.” *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015). “Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained.” *Rutland v. S.C.D.O.T.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). This settlement credit is “statutorily mandated,” and “Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors.” *Ellis by Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999).

Here, as stated above, the jury found that Appellant Green is entitled to actual damages in the amount of \$88,546.78. *See* Verdict Form. The jury further awarded punitive damages to Appellant Green in the amount of \$35,000.00 solely against Edward C. McGee. *Id.* The jury then separately awarded Appellant Green punitive damages in the amount of \$35,000.00 solely against Mr. Hudgins. Finally, the jury found that Mr. Hudgins was forty percent (40%) at fault for the accident, and Mr. McGee was sixty percent (60%) at fault.

In calculating the setoff under S.C. Code Ann. § 15-38-50 of the \$100,000 settlement amount received by Appellant Green from Edward C. McGee pre-suit in exchange for a Covenant Not to Execute, the trial court simply added the \$88,546.78 in actual damages to the \$35,000 in punitive damages awarded individually against Mr. Hudgins and the \$35,000 in punitive damages awarded individually against Mr. McGee for a total of \$158,546.78. The court

then subtracted the \$100,000 settlement from that amount and held that “the remaining amount of the verdict to be paid to Plaintiff Shannon P. Green of Fifty-Eight Thousand, Five Hundred Forty-Six and 78/100’s Dollars (\$58,546.78) shall be shared by the Defendants on a pro-rata basis according to the fault assigned to the Defendants by the Jury Verdict; and Defendant McGee shall be responsible for 60% of the remaining amount owed to Plaintiff Green and Defendant Hudgins shall be responsible for 40% of the remaining amount owed to Plaintiff Green.” *See* Jan. 8, 2020 Order, at 4.

To be clear, in this appeal, Mr. Hudgins does not appeal or take issue with the propriety of the trial court applying the setoff amount to the punitive damages awards. Mr. Hudgins also does not appeal the trial court’s use of the jury’s apportionment of 40% of fault to Mr. Hudgins and 60% of fault to Mr. McGee in calculating the setoff or the application of these percentages to actual damages. Nor does Mr. Hudgins appeal or take issue with the trial court using the full amount of the \$100,000 settlement in making the setoff. Upon information and belief, Appellant Green is also not appealing the trial court’s holding on Mr. Hudgin’s Motion for a Setoff nor any of the issues discussed above or relating to the calculation of the setoff.

“It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.” *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998); *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (“An unappealed ruling is the law of the case and requires affirmance”). “Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal.” *Id.* In fact, even “[a] portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.” *Ulmer v. Ulmer*, 369 S.C. 486, 490, 632

S.E.2d 858, 861 (2006). Moreover, the “law of the case” doctrine applies “both to those issues explicitly decided and to those issues [that] were necessarily decided.” *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). As such, the trial court’s decisions that the setoff under S.C. Code Ann. § 15-38-50 applies to punitive damages, that the full \$100,000 settlement should be setoff, and that the finding by the jury of 40% of fault for Mr. Hudgins and 60% of fault for Mr. McGee should be used in apportioning the amount of the actual damages each is responsible for paying are all the law of the case.

In fact, as to whether setoff under S.C. Code Ann. § 15-38-50 applies to punitive damages, regardless of the “law of the case” doctrine, South Carolina law clearly answers this question in the affirmative. The South Carolina Court of Appeals has held that with respect to setoff under S.C. Code Ann. § 15-38-50, “when a plaintiff seeks actual and punitive damages in the same claim, both types of damages arise out of the same injury.” *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 191 (Ct. App. 2012). As such, “a plaintiff’s claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1).” *Id.* In other words, reading this holding into S.C. Code Ann. § 15-38-50(1) and the word “claim” in that section, the setoff “reduces the claim [**for actual and punitive damages**] against the others to the extent of any amount stipulated by the release or covenant.” S.C. Code Ann. § 15-38-50(1). The Court of Appeals has consistently applied the setoff under § 15-38-50(1) to punitive damages awards. For instance, in *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008), the jury awarded the plaintiff \$2,200,000 in actual damages and \$500,000 in punitive damages against a single defendant. *Vortex*, 662 S.E.2d at 448. The total amount of settlements from the other defendants was \$700,000. The trial court setoff the amount of damages against the remaining defendant to

\$2,000,000, and the Court of Appeals held, “we find the trial court did not err in setting off Vortex’s award with its settlement from Ware.” *Id.* at 451. Thus, S.C. Code Ann. § 15-38-50 clearly allows setoff of punitive damages in addition to actual damages.

In any event, the only portion of the trial court’s order regarding the setoff that Mr. Hudgins appeals is the trial court’s decision to simply add together the full actual damage award along with the individual punitive damage awards against Mr. Hudgins and Mr. McGee and then applying the setoff under S.C. Code Ann. § 15-38-50 to that total of \$158,546.78. Again, the jury found that Appellant Green had \$88,546.78 in actual damages and also found that she was entitled to punitive damages against Mr. Hudgins in the amount of \$35,000 and punitive damages against Mr. McGee in the amount of \$35,000. *See* Verdict Form. While the total amount of actual damages and punitive damages is \$158,546.78, it was improper for the court to simply add all of the various damages up this way for purposes of applying the setoff, as it improperly subjects Mr. Hudgins and Mr. McGee to liability for damages for which the jury did not find them liable.

The South Carolina Supreme Court has long held that a “court can not properly order judgment entered against a defendant for an amount not found by the jury.” *Rourk v. Selvey*, 252 S.C. 25, 35, 164 S.E.2d 909, 914 (1968). In *Rourk*, the jury returned a verdict against two defendants on a special verdict form in the amount of \$5,000 against one defendant and \$45,000 against the other. On appeal, the plaintiff asked the court to “construe the verdict as an award of \$50,000.00 against both defendants and authorize the entry of judgment accordingly.” *Id.* However, the Court held, “This, we may not do.” *Id.*

With respect to awards of punitive damages, S.C. Code Ann. § 15-32-520(G) makes clear that “[i]n an action with multiple defendants, a 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.**” S.C. Code Ann. § 15-32-520(G) (emphasis added). In recognition of this prohibition, the verdict form had two separate sections for the jury to calculate punitive damages awards against Mr. McGee and Mr. Hudgins, respectively, and the jury concluded as follows:

11. Please state the amount of Punitive Damages you award to the Plaintiff Shannon P. Green against the Defendant Edward C. McGee?

\$ 35,000 punitive damages

13. Please state the amount of punitive damages you award to the Plaintiff Shannon P. Green against the Defendant David Hudgins?

\$ 35,000 punitive damages

*See* Verdict Form. Thus, the jury awarded separate punitive damages awards against Mr. Hudgins and Mr. McGee for \$35,000 each and did not somehow improperly award a joint award of \$70,000 in punitive damages against them both.

However, in calculating the setoff under § 15-38-50 by adding the actual damages award to the two separate individual punitive damages awards for a total of \$158,546.78, the trial court did just that and improperly imposed a judgment against Mr. Hudgins for an “amount not found by the jury.” *Rourk*, 252 S.C. at 35, 164 S.E.2d at 914. In other words, in starting its setoff calculation with a total of \$158,546.78, the trial court improperly bundled damages awarded solely against Mr. McGee with the damages awarded against Mr. Hudgins, particularly the \$35,000 punitive damage award against Mr. McGee. Thus, the trial court thereby increased the “claim” against Mr. Hudgins to be reduced by the setoff amount under S.C. Code Ann. § 15-38-50. As such, the \$35,000 punitive damages award against Mr. Hudgins and the \$35,000 punitive damages award against Mr. McGee must be considered separately when calculating the setoff under § 15-38-50.

The next question in calculating the setoff under § 15-38-50 then becomes how to deal with the \$88,546.78 in actual damages. The South Carolina Supreme Court, albeit in an unpublished decision, has stated that “setoffs should be calculated based upon the entirety of relevant circumstances.” *Green v. Bauerle*, No. 2019-MO-026, 2019 WL 2289678, at \*4 (S.C. May 29, 2019) (Unpublished). As the Court well knows, under joint and several liability principles, a plaintiff “is entitled to only one recovery, and the collection of a judgment against one wrongdoer extinguishes any claim against the other.” *Rourk*, 252 S.C. at 27-28, 164 S.E.2d at 910. Thus, Appellant Green would never be entitled to a double recovery of the full \$88,546.78 from Mr. Hudgins and Progressive, and therefore, the full \$88,546.78 cannot be added to each of the \$35,000 punitive damages awards in calculating the setoff.

As such, because setoff is required to be calculated by the court under § 15-38-50 “before entering judgment on a jury verdict,” the trial court must somehow apportion the amount of actual damages to be paid by each defendant before applying the setoff. *See Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012). Here, as the trial court recognized, the jury assigned fault for the accident to Mr. Hudgins and Mr. McGee in the amounts of 40% and 60%, respectively. As stated above, Mr. Hudgins does not appeal or take issue with the trial court’s application of these percentages to the actual damages award in this case in calculating the setoff. In fact, so as to not have a setoff that was arbitrary and capricious, the only split of the actual damages the trial court could have made was this 40%/60% split between Mr. Hudgins and Mr. McGee, respectively. In other words for purposes of calculating the setoff between the Mr. Hudgins and Progressive in this case prior to entering the judgment, the amount of damages attributable to Mr. Hudgins was the \$35,000 in punitive damages plus 40% of the actual damages or \$35,418.71, which is a total of \$70,418.71.

In calculating the setoff Mr. Hudgins is entitled to under § 15-38-50, the next question then becomes how to deduct the \$100,000 payment made to Appellant Green by Mr. McGee pre-suit in exchange for a Covenant Not to Execute. A cursory reading of the statute shows that the setoff provisions of S.C. Code Ann. § 15-38-50 do not apply to underinsured motorist carrier, Progressive. “It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question.” *Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017). “Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning.” *Id.* As stated above, the statutory setoff provision explicitly states that it applies to “other tortfeasors.” See S.C. Code Ann. §15-38-50(1). Progressive, as the underinsured motorist carrier, is not one of these “other tortfeasors” under the statute. See *McCrary ex rel. McCrary v. Byrd*, 559 S.E.2d 821, 827 (N.C. App. 2002) (“An underinsured motorist carrier is not a tort-feasor and thus has no right of contribution.”); *Broome v. Watts*, 319 S.C. 337, 340, 461 S.E.2d 46, 48 (1995) (“Although the UIM carrier ‘steps into the shoes’ of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist.”). In fact, even if Progressive could ostensibly be said to be the same as Mr. McGee, the statute would still not apply because Mr. McGee is the one who gave Appellant Green the covenant and is not an “other tortfeasor.”

Instead, the type of setoff that a UIM carrier is entitled to is “a different type of set-off,” and is really not a setoff at all, but is based on contract principles. See *Ellis by Ellis v. Oliver*, 335 S.C. 106, 111, 515 S.E.2d 268, 271 (Ct. App. 1999). “An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law.” *Nationwide Insurance Company of America v. Knight*, 428 S.C. 451, 455, 835 S.E.2d 538, 540 (Ct. App. 2019). “[U]nderinsured motorist coverage is optional

coverage provided by an insurance carrier in the event damages are sustained by the insured in excess of the at fault driver's liability coverage, recovery therefrom being additional to any recovery from the at fault motorist, *total recovery not to exceed the damages sustained.*" *Broome v. Watts*, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995) (emphasis in original). UIM coverage arises of the underinsured motorist statute, S.C. Code Ann. § 38-77-160, which provides that the purpose of UIM coverage is "to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist." S.C. Code Ann. § 38-77-160. Courts hold that "[t]he very definition of UIM insurance mandates a set-off." *Broome*, 319 S.C. at 341, 461 S.E.2d at 48. In other words, the setoff inherent in Appellant Green's contractual UIM coverage with Progressive is different from the setoff mandated by S.C. Code Ann. § 15-38-50 for other tortfeasors and can hardly be termed a setoff. Instead, it arises from the contractual provisions of Appellant Green's policy with Progressive, which provide that the coverage under the policy is only triggered if the amount awarded by the jury against underinsured motorist, Edward McGee, was greater than the \$100,000 already paid on his behalf from his liability insurer.

Therefore, because Progressive is not an "other tortfeasor," and the provision of § 15-38-50 are inapplicable to Progressive, the statute must be applied only to Mr. Hudgins. Thus, as the only "other tortfeasor" from Mr. McGee, under § 15-38-50, Mr. Hudgins receives the full benefit of the \$100,000 settlement paid to Appellant Green, as that is the "amount stipulated by . . . the covenant." S.C. Code Ann. § 15-38-50. Because the \$100,000 is more than the \$70,418.71 attributable to Mr. Hudgins, application of the setoff under § 15-38-50 to Mr. Hudgins results in Appellant Green being precluded from any recovery from Mr. Hudgins. The result would be the same if the Court chooses to reverse the trial court's finding on motion or JNOV on the punitive

damages award against Mr. Hudgins, as \$35,418.71 is less than \$100,000.

While application of this setoff provision under § 15-38-50 may seem to lead to an inequitable result for Appellant Green, “Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors.” *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999). This Court has even held, “We recognize that a strict application of the statute may lead to unintended results; however, this is a matter for the legislature to correct if our interpretation is contrary to its intent.” *Id.* Moreover, it should be noted that it is Appellant Green who chose to bring suit against Mr. Hudgins in addition to pursuing underinsured motorist benefits from Progressive, and she cannot now be heard to complain of the consequences of applying these various applicable setoff provisions to her award. *See Smith v. Tiffany*, 419 S.C. 548, 563, 799 S.E.2d 479, 487 (2017) (“Indeed, this right of the plaintiff to choose her defendant has been recognized in South Carolina jurisprudence for almost two hundred years.”).

Therefore, should the Court not reverse the trial court on Mr. Hudgins’ Motion for JNOV and set aside the verdict against him in its entirety, the Court should find that the trial court erred in calculating the setoff under S.C. Code Ann. § 15-38-50 and instead calculate it as outlined above and preclude Appellant Green from recovery against Mr. Hudgins.

#### CONCLUSION

For the reasons stated, this Court should reverse the trial court’s ruling on Mr. Hudgins’ Motion for JNOV and set aside the verdict against Mr. Hudgins in its entirety and enter judgment in his favor. Alternatively, the Court should reverse the trial court’s ruling on Mr. Hudgins’ Motion for JNOV and set aside the punitive damages award against him. Finally, the Court

should find that the trial court improperly calculated the setoff of the \$100,000 settlement Appellant Green received from Edward McGee that Mr. Hudgins is entitled to under S.C. Code Ann. § 15-38-50, and instead direct that the setoff be calculated as described above.

July 31, 2020

Respectfully submitted,



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David Hudgins

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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**Jul 31 2020**

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

SC Court of Appeals

Grace Gilchrist Knie, Circuit Court Judge

Trial Court Case No. 2017CP4203523

Appellate Case No. 2020-000203

Shannon P. Green,  
and Darrell Russell,

Appellant-Respondent,

v.

Edward C. McGee,  
and David Hudgins,

Respondent,  
Respondent-Appellant,

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent-Appellant David Hudgins for his Cross-Appeal and Designation of Matter to be Included in the Record on Appeal on all attorneys of record, by electronic delivery on July 31, 2020, addressed as follows:

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July 31, 2020

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**Jul 31 2020**  
SC Court of Appeals

***Via Email Only***

The Honorable Jenny Abbott Kitchings  
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**Re: *Shannon P. Green and Darrell Russell v. Edward C. McGee and David Hudgins***  
***Appellate Case No. 2020-000203***

Dear Ms. Kitchings:

Attached for filing please find the Initial Brief of Respondent-Appellant David Hudgins for his Cross-Appeal and Designation of Matter to be Included in the Record on Appeal, along with Proof of Service of same.

If you have any questions, please do not hesitate to contact me.

With kind regards, I am,

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.



Drew Bradshaw

JAB/meb  
Enclosures

cc: Douglas A. Churdar, Esq. (*via email only*)  
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