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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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,

INITIAL BRIEF OF RESPONDENT-APPELLANT DAVID HUDGINS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DECLINING TO GRANT A NEW TRIAL *NISI ADDITUR* AND FINDING THAT THERE WERE NO COMPELLING REASONS TO INVADE THE PROVINCE OF THE JURY?
2. DID THE TRIAL COURT PROPERLY UTILIZE THE FULL AMOUNT OF THE \$100,000 RECEIVED BY APPELLANT FOR A PRE-SUIT COVENANT NOT TO EXECUTE IN APPLYING THE SETOFF MANDATED BY S.C. CODE ANN. 15-38-50 AND DECLINING TO RE-ALLOCATE ANY PORTION OF THAT SETTLEMENT TO DARRELL RUSSELL'S LOSS OF CONSORTIUM CLAIM ON WHICH HE WAS AWARDED NOTHING BY THE JURY?
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.* While Appellant Green sought recovery for personal injury, Mr. Russell only sought damages for an alleged loss of consortium. *Id.*

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 Green Covenant Not to Execute.* Appellant Green’s husband, Darrell Russell, also settled with Edward McGee and his liability insurer for Two Thousand Five Hundred Dollars (\$2,500.00) and executed a “Covenant Not to Execute,” which included a release for all claims Mr. Russell had against Mr. McGee, including claims for “loss of services.” *See Russell 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.

Moreover, following the accident Appellant Green was released from the hospital around 2:00 a.m. and did not stay for any significant length of time. Trial Tr. 225:8-14. The CT scans of Appellant Green's head, cervical spine, pelvis, and chest were all normal. Trial Tr. 225:15-226:5. No imaging was done of Plaintiff's left shoulder until three days after the accident at an Express Care, and the X-ray showed no fracture. Trial Tr. 226:6-13. Moreover, X-rays of Appellant Green's thoracic spine taken on November 30, 2015 were all normal. Trial Tr. 228:1-4. Appellant Green also went back to work full time as a nurse practitioner within eight (8) days of the accident and within two weeks of her surgery without any assistance and has always worked full time other than these two brief periods. Trial Tr. 180:25-181:6; 188:18-22; 223:11-16; 230:17-232:6. The last time she made complaints of any type of chest pain to a physician was on November 30, 2015. Trial Tr. 227:19-25. Appellant Green last complained of any type of back pain to a physician on December 29, 2015. Trial Tr. 228:20-24. She has also not sought treatment for her left shoulder since November 2016. Trial Tr. 237:13-19.

Appellant Green's husband, Darrell Russell, further testified that while the couple lives in Landrum, he works and lives part-time in Chicago, Illinois and will be there for a "couple weeks" at a time and travels quite frequently. Trial Tr. 145:22-146:14; 178:2-6. He estimated that he is away from Landrum approximately 60% of the time. Trial Tr. 178:7-12. While Mr.

Russell is away, Appellant Green is at home and able to do everything she needs to do on her own and work full-time as a nurse practitioner. Trial Tr. 178:13-179:1. He also testified that when Appellant Green went back to work shortly after the accident, she did not need his assistance. Trial Tr. 178:1-181:6.

STANDARD OF REVIEW

“The grant or denial of new trial motions rests within the discretion of the trial [court,] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.” *Hassell v. City of Columbia*, No. 2017-001750, 2020 WL 3551781, at *8 (Ct. App. July 1, 2020) (quoting *Proctor v. Dep’t of Health & Invtl. Control*, 368 S.C. 279, 319-20, 628 S.E.2d 496, 518 (Ct. App. 2006)). “Great deference is given to the trial [court, which] ‘heard the evidence and is more familiar with the evidentiary atmosphere at trial,’ and . . . thus ‘possesses a better-informed view of the damages than this [c]ourt.’” *Id.* “The jury’s determination of damages . . . is entitled to substantial deference.” *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). If a court chooses to grant a new trial *nisi additur*, “the trial judge must state compelling reasons for invading the province of the jury.” *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003); see *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) (“Compelling reasons . . . must be given to justify invading the jury’s province in this manner.”). “A trial court does not abuse its discretion in denying a motion for new trial *nisi additur* where there is evidence in the record to support the jury’s verdict.” *Ligon v. Norris*, 371 S.C. 625, 635, 640 S.E.2d 467, 473 (Ct. App. 2006). In fact, even when other evidence in the record indicates that the jury could have awarded a larger verdict, there is no abuse of discretion in denying a motion or new trial *nisi additur* where the evidence in the record supports the amount of the jury

award. *Steele v. Dillard*, 327 S.C. 340, 345, 486 S.E.2d 278, 281 (Ct. App. 1997).

ARGUMENTS

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND PROPERLY DECLINED TO GRANT A NEW TRIAL *NISI ADDITUR*, AS THERE WERE NO COMPELLING REASONS TO INVADE THE PROVINCE OF THE JURY.

Contrary to Appellant Green's assertion, this is not "the case," where the trial court's failure to grant a motion for new trial *nisi additur* and add money to a jury's duly considered verdict is reversible. "The grant or denial of new trial motions rests within the discretion of the trial [court,] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Hassell v. City of Columbia*, No. 2017-001750, 2020 WL 3551781, at *8 (Ct. App. July 1, 2020) (quoting *Proctor v. Dep't of Health & Invtl. Control*, 368 S.C. 279, 319-20, 628 S.E.2d 496, 518 (Ct. App. 2006)). "Great deference is given to the trial [court, which] 'heard the evidence and is more familiar with the evidentiary atmosphere at trial,' and . . . thus 'possesses a better-informed view of the damages than this [c]ourt.'" *Id.* "The jury's determination of damages . . . is entitled to substantial deference." *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). If a court chooses to grant a new trial *nisi additur*, "the trial judge must state compelling reasons for invading the province of the jury." *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003); see *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("Compelling reasons . . . must be given to justify invading the jury's province in this manner."). "A trial court does not abuse its discretion in denying a motion for new trial *nisi additur* where there is evidence in the record to support the jury's verdict." *Ligon v. Norris*, 371 S.C. 625, 635, 640 S.E.2d 467, 473 (Ct. App. 2006). In fact, even when other evidence in the record indicates

that the jury could have awarded a larger verdict, there is no abuse of discretion in denying a motion or new trial *nisi additur* where the evidence in the record supports the amount of the jury award. *Steele v. Dillard*, 327 S.C. 340, 345, 486 S.E.2d 278, 281 (Ct. App. 1997).

This Court recently held that a trial court did not abuse its discretion in denying a plaintiff's motion for a new trial *nisi additur*, even though the jury awarded the plaintiff the exact amount of his claimed medical bills and nothing else. In *Nestler v. Fields*, 426 S.C. 34, 824 S.E.2d 461 (Ct. App. 2019), the plaintiff and defendant were involved in a car accident, and the defendant "admitted he was at fault in causing the wreck and [the plaintiff's] injuries, so the trial concerned only the amount of [the plaintiff's] damages." 426 S.C. at 37, 824 S.E.2d at 463. The plaintiff claimed injuries of a cervical strain, left elbow contusion, tennis elbow, and a permanent impairment rating of 53% for his left upper extremity, which translated to a 32% impairment rating for the whole person. 426 S.C. at 37, 824 S.E.2d at 463. The plaintiff's counsel focused at trial on the extent of the plaintiff's pain and suffering and the permanency of his injuries and presented evidence regarding these issues. 426 S.C. at 40, 824 S.E.2d at 465. The medical bills submitted into evidence for the plaintiff's alleged injuries totaled \$7,117.50, and the jury awarded \$7,117.50 in actual damages. As in this case, the plaintiff moved for both a new trial *nisi* and a new trial *nisi additur* and argued that he was entitled to such relief because, "despite the extensive evidence as to his permanent impairment, pain and suffering, and other non-economic damages, the jury awarded him the amount of his medical bills." 426 S.C. at 39-40, 824 S.E.2d at 464. This Court found that the trial court did not abuse its discretion in denying these motions. As to the denial of the motion for new trial *nisi*, the Court noted that "[t]he jury had before it evidence that, if believed, undercut [the plaintiff's] credibility," i.e., that the plaintiff had not disclosed a previous car accident in which he had brought a lawsuit and claimed

permanent injuries to his neck and back, and that the plaintiff's impairment rating increased after the plaintiff asked his friend, the doctor, to revise it to help resolve the case. 426 S.C. at 40, 824 S.E.2d at 465. With respect to the denial of the motion for a new trial *nisi additur*, the court stated that "the trial court here found no compelling reason to impose its will on the parties and invade the jury's domain. We must accord the trial court's decision 'great deference,' and respect its superior position to gauge credibility and the field of evidence." 426 S.C. at 41, 824 S.E.2d at 465.

Likewise, in *Todd v. Joyner*, 385 S.C. 509, 685 S.E.2d 613 (Ct. App. 2008), the defendant stipulated to her negligence stemming from an automobile accident with the plaintiff. The plaintiff's medical bills totaled \$37,191.11, and the jury awarded the plaintiff that exact amount. The trial court denied the plaintiff's motion for a new trial *nisi additur*, and this Court affirmed, holding:

The jury awarded Todd \$ 37,191.11, her exact medical costs. In the jury instructions, the circuit court provided the jury with a thorough explanation of how it could determine a monetary value for the damages to which it believed Todd was entitled. This included a full explanation of actual damages, including: "past and future medical charges related to the injury, pharmacy charges, related expenses, pain and suffering, loss of enjoyment of life, as well as mental anguish and impairment of health or physical condition." We find evidence in the record to support the jury's verdict. 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. 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. Because there was evidence in the record to support the jury's verdict, we find no error in the circuit court's denial of Todd's motion for new trial *nisi additur*.

385 S.C. at 518, 685 S.E.2d at 618.

Moreover, in *Lynch v. Carolina Self Storage Ctrs.*, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014), the jury returned a verdict for the exact amount of medical expenses the plaintiff

claimed--\$246,068.42. However, at trial the defendant argued that the plaintiff “failed to prove proximate cause as to the vast majority of her medical expenses because, by ignoring her physician’s medical advice to stay off her foot and keep her cast dry, she was the sole cause of the medical expenses associated with the surgery to repair her ruptured Achilles tendon and the treatment for the resulting infection.” 409 S.C. at 150, 760 S.E.2d at 113. As such, this Court held, “The trial court properly denied Lynch’s motion for new trial *nisi additur* because there was evidence that the medical expenses Lynch incurred to treat her injury and her resulting noneconomic losses were not proximately caused by Carolina Self Storage’s negligence.” 409 S.C. at 163, 760 S.E.2d at 120-21.

In fact, even in cases where the verdict did not cover all of the medical bills claimed by plaintiffs, South Carolina courts have found that it was an abuse of discretion for the trial judge to grant an additur. In *Luchok v. Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010), the plaintiff’s alleged medical bills were \$10,071.00, and the jury returned a verdict for only \$3,023.90. The defendant admitted fault for the accident but did submit evidence questioning whether some of the plaintiff’s chiropractic bills were reasonable and necessary. While the trial judge granted the motion for additur based on the fact that the verdict did not cover all of the chiropractic bills, this Court reversed and held that “[i]n the face of the sharply conflicting evidence, this is not a compelling reason to grant the motion.” 391 S.C. at 265, 705 S.E.2d at 73. Likewise, in *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003), where the jury’s award had been increased from \$2,000.00 to \$14,000.00, this Court held, “Where, as here, the evidence of damages is disputed, the mere listing of Green’s claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury’s province.” 356 S.C. at 570, 590 S.E.2d at 41; *see Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 18, 419 S.E.2d 795, 799

(Ct. App. 1992) (“While the evidence of this case could certainly have supported a much larger verdict, we cannot say as a matter of law that the verdict of the jury in this case was grossly inadequate and resulted from the jury’s disregard of the facts or the trial judge’s instructions.”).

The case of *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000), on which Plaintiffs’ entire argument rests, is clearly distinguishable from this case. In *Waring*, the undisputed medical evidence presented at trial was that the plaintiff’s alleged pain and suffering was caused by the accident. The court noted, “[e]ach doctor who testified expressed his opinion that Waring’s various pains were associated, at least in part, with the accident. Even if the greatest portion of Waring’s pain was caused by her pre-existing conditions, there is no question that the accident aggravated or accelerated those conditions.” 341 S.C. at 260, 533 S.E.2d at 912-13. Thus, unlike this case, in *Waring*, each of the plaintiff’s treating physicians testified at trial and related her injuries to the accident, and there was no evidence presented by the defendant to the contrary. Moreover, the evidence of the amount of pain and suffering endured by the plaintiff in *Waring* was also not in dispute nor was it in dispute that the pain and suffering was at least an aggravation of preexisting conditions. The undisputed evidence from trial was that the plaintiff had sought medical treatment for over five years following the accident, and the court noted:

Waring visited numerous doctors for years after the accident, seeking relief from varying degrees of pain and discomfort. She underwent surgery for a condition which numerous doctors testified was aggravated by the wreck. Waring took advantage of every recommendation of her physicians and, unfortunately, will most likely suffer pain for the remainder of her life. In addition to the pain she has and will continue to suffer, Waring found herself unable to continue her previous active lifestyle.

341 S.C. at 260, 533 S.E.2d at 912. As such, the Court found that the trial court did not err in granting a new trial *nisi additur* for the jury's failure to consider the undisputed pain and suffering associated with the plaintiff's injuries from the accident.

Here, there is substantial evidence in the record to support the jury's verdict, and the trial court did not abuse its discretion in declining to grant Appellant Green's motion for a new trial *nisi additur*. Contrary to Appellant Green's assertion, her pre-existing injuries were very much an issue at trial as well as the medical causation of all of her claimed injuries and pain. *See Appellant's Brf.*, at 9. At trial, Ms. Green admitted that she had a host of pre-existing medical issues that caused her significant pain upon which the jury could have based a determination that some or all of Appellant Green's claimed medical expenses and noneconomic damages were unrelated to the accident. Appellant Green testified that she has been an Insulin-dependent Type I diabetic for years and has had previous complications. Trial Tr. 200:7-25. She has even had a previous frozen right shoulder that was admittedly caused by her diabetes and not related to any trauma. Trial Tr. 210:15-19. She admitted that she continued to have pain in her right shoulder even after the accident. Trial Tr. 241:15-242:22. She further testified that she had been positive for arthralgias or joint pain. Trial Tr. 235:22-236:8. She testified:

Q. Okay. And I'm just talking about that last sentence. It says have you had pain since then and you responded yes in your deposition.

A. May I clarify? I think of day-to-day pain as just being something that I got to live with. I, I mean do I have pain? Yeah, I have pain in my joints. When I'm laying on shoulders, yes, I have pain in them. . . .

Trial Tr. 242:4-11. Appellant Green also admittedly has had chronic hip pain since 2010 and that this gradually worsening hip pain "was definitely not related to the accident." Trial Tr.

233:15-234:23. She also admitted that she had pains in her body simply as a result of getting older and testified:

Q. Okay. But my point is you – as we get older, as I do, you develop pain in other areas just from walking this earth for 50 some years, right?

A. Yes.

Trial Tr. 233:11-14. Appellant Green explicitly admitted that she was not asking the jury to reimburse her for pains that she had from simply walking the earth or for her diabetic right frozen shoulder. Trial Tr. 245:20-246:20.

Conversely, as to Appellant Green’s medical treatment following the accident, the evidence at trial showed that Appellant Green was released from the hospital around 2:00 a.m. the night of the accident and did not stay for any significant length of time. Trial Tr. 225:8-14. The CT scans of Appellant Green’s head, cervical spine, pelvis, and chest were all normal. Trial Tr. 225:15-226:5. No imaging was done of Plaintiff’s left shoulder until three days after the accident at an Express Care, and the X-ray showed no fracture. Trial Tr. 226:6-13. Moreover, X-rays of Appellant Green’s thoracic spine taken on November 30, 2015 were all normal. Trial Tr. 228:1-4.

Unlike in *Waring*, there was absolutely no expert medical testimony presented in this case. None of Ms. Green’s treating physicians testified or offered opinions that her alleged injuries to her left shoulder and back were proximately caused or exacerbated by the November 19, 2015 accident, and there was no medical testimony ruling out the other above conditions possibly being the cause of Appellant Green’s pain. *See Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 217, 143 S.E.2d 376, 384 (1965), (“Reliance 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.”).

Moreover, all of the above issues were “actually raised and argued by defendants’ lawyers.” *See Appellant’s Brf.*, at 10. Without any objection from Appellant Green’s counsel and based on the testimony above, the trial court gave the following instruction to the jury: “I further will inform you that the Plaintiff, Shannon Green, is not entitled to recover for preexisting conditions, injuries, or ailments unrelated to the Defendant’s negligence.” Trial Tr. 335:13-16. In fact, while counsel for Progressive’s closing argument is not transcribed, Appellant Green’s counsel acknowledged in his closing that Progressive had argued that Appellant Green had other issues unrelated to the accident and stated: “First of all, basically, from the defense lawyer for Mr. McGee, what you sort of heard was a she’s not a spring chicken anymore defense. She had other problems, and, you know what, we all have other problems.” Trial Tr. 317:2-5. Furthermore, even if testimony from Plaintiff was not expressly contradicted, “[j]uries do not have to accept even uncontradicted testimony, much less testimony that contradicts itself.” *Nestler*, 426 S.C. at 41, 824 S.E.2d at 465. Thus, as there was no undisputed medical testimony in this case stating otherwise and based on the jury instructions from the trial court, the jury could have found that some of Appellant Green’s alleged injuries, such as her frozen left shoulder that occurred after the accident, were unrelated to the accident and were instead caused solely by these other pre-existing conditions, such as her diabetes or previous joint pain. The jury could have also found that some of Appellant Green’s claimed noneconomic damages for pain and suffering and her claimed inability to perform daily tasks were related solely to these other issues she had previously experienced. As the evidence in the record could

support either finding and the jury's verdict, the trial court did not abuse its discretion, and this Court should continue to provide deference to the jury's verdict.

In addition to causation of Appellant Green's injuries and alleged pain being at issue, the amount of Appellant Green's alleged pain and suffering and other non-economic damages was also highly contested at trial. Although Appellant Green claimed significant continuing pain and suffering from the accident, again, the evidence showed that she was discharged from the hospital the night of the accident. Trial Tr. 225:8-14. She also took no pain medications other than over-the-counter drugs like Advil and Tylenol. Trial Tr. 201:11-21. Appellant Green also went back to work full time as a nurse practitioner within eight (8) days of the accident and within two weeks of her surgery without any assistance and has always worked full time other than these two brief periods. Trial Tr. 180:25-181:6; 188:18-22; 223:11-16; 230:17-232:6. The last time she made complaints of any type of chest pain to a physician was on November 30, 2015—roughly two weeks after the accident. Trial Tr. 227:19-25. Appellant Green last complained of any type of back pain to a physician on December 29, 2015. Trial Tr. 228:20-24. She has also not sought treatment for her left shoulder since November 2016. Trial Tr. 237:13-19. Appellant Green's husband, Darrell Russell, further testified that while the couple lives in Landrum, he works and lives part-time in Chicago, Illinois and will be there for a "couple weeks" at a time and travels quite frequently. Trial Tr. 145:22-146:14; 178:2-6. He estimated that he is away from Landrum approximately 60% of the time. Trial Tr. 178:7-12. While Mr. Russell is away, Appellant Green is at home and able to do everything she needs to do on her own and work full-time as a nurse practitioner. Trial Tr. 178:13-179:1. While the *Waring* plaintiff's physicians stated that she would suffer pain for the rest of her life, there was no medical testimony to that effect at this trial.

Further, Appellant Green admitted that despite certain medications and treatments helping decrease her pain, she was unwilling to take them. For instance, she testified that while two injections helped her pain in her shoulder short term, she was unwilling to take any more of them due to her Diabetes. Trial Tr. 201:4-10. She also refused to take any type of pain medication other than Advil, Aleve, or Tylenol. Trial Tr. 201:11-21. Moreover, she testified that she does not do any formal exercise program because she does not have enough time with her work schedule. Trial Tr. 225:2-6.

As in *Todd*, the trial court “provided the jury with a thorough explanation of how it could determine a monetary value for the damages to which it believed [Appellant Green] was entitled.” *Todd*, 385 S.C. at 518, 685 S.E.2d at 618. In addition to the above instruction on pre-existing conditions, the court instructed the jury on all aspects of potential actual damages, including pain and suffering:

Shannon Green is also requesting compensation or pain and suffering. Pain and suffering compensates the Plaintiff for physical discomfort, and emotional – and emotional response to the sensation of pain caused by the injury itself. There is no definite standard by which to compensate the Plaintiff for pain and suffering. You have the authority to determine the amount, if any, to be allowed for pain and suffering using calm and reasonable judgment to ensure that the damages are just and reasonable in light of the testimony and evidence presented in the case.

Trial Tr. 335:17-336:1. Appellant Green’s counsel also spent a great deal of his closing argument explaining the concept of pain and suffering to the jury:

The judge will charge you about something called pain and suffering. I just referred it to typically as pain or discomfort, but that it – that was asked, if you decide that two Defendants were careless, and it causes the Plaintiff to experience pain and suffering, do you have any problem returning something in your verdict for that pain and suffering. That is because, under the law, if you find there was pain and suffering, the law says you should return something in your verdict for that pain.

Trial Tr. 296:16-24. Appellant Green's counsel even went so far to suggest a particular amount for the jury to award, as he argued:

I'm not saying it's a million dollar case. But it's a big case. It's a very big case. So, hundreds of thousands of dollars for this would not be, at all, inappropriate. Again, she didn't ask for any of this. It was forced on her. Decisions were made.

Trial Tr. 304:20-25.

Accordingly, given all of the above evidence disputing Appellant Green's claims, and the thorough explanation of "pain and suffering" by the trial court and Appellant Green's counsel, it is clear that the jury considered pain and suffering in this case. Simply because the jury thoughtfully considered the law and evidence outlined above and returned a verdict below the amount Appellant Green requested is not a compelling justification for invading the jury's province and granting additur. Because there is evidence in this case supporting the jury's verdict of \$88,546.78 in actual damages, the trial court did not abuse its discretion in denying the extraordinary remedy of a new trial *nisi additur*, and this Court should affirm.

2. THE TRIAL COURT PROPERLY UTILIZED THE FULL AMOUNT OF \$100,000 RECEIVED BY APPELLANT FOR A PRE-SUIT COVENANT NOT TO EXECUTE IN APPLYING THE SETOFF MANDATED BY S.C. CODE ANN. 15-38-50.

As fully addressed in Respondent/Appellant Hudgins' initial brief on his cross-appeal and incorporated herein by reference, the trial court erred in the manner in which it applied the setoff of the \$100,000 received by Appellant Green from Edward McGee in exchange for a Covenant Not to Enforce Judgment. However, contrary to Appellant Green's assertion, the trial court did not err in utilizing the entire \$100,000 settlement proceeds in its setoff analysis, as it is clear that that is the amount received by Appellant Green pre-suit from Mr. McGee's insurer.

When calculating a setoff under S.C. Code Ann. § 15-38-50, "the court must review the documents to determine the amount of the settlement and its terms." *Huck v. Oakland Wings*,

LLC, 422 S.C. 430, 438, 813 S.E.2d 288, 292 (Ct. App. 2018). “Covenants not to execute are treated as contracts and, as such, they are governed by general contract law.” *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013). If a covenant’s “language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract’s language determines the instrument’s force and effect.” 405 S.C. at 46, 747 S.E.2d at 184.

In arguing that the trial court incorrectly used the entire \$100,000 settlement in applying a setoff, Appellant Green discloses in her brief that prior to filing suit, she received the full policy limits of one hundred thousand dollars (\$100,000) under Edward C. McGee’s liability policy from Nationwide and executed a Covenant Not to Enforce Judgment against Mr. McGee for that amount. *See Green Covenant Not to Execute*. However, Appellant Green only briefly addresses the fact in a footnote that her husband and co-Plaintiff, Darrell Russell, also executed a completely separate Covenant Not to Enforce Judgment against Mr. McGee for a settlement of two thousand five hundred dollars (\$2,500.00) from Nationwide and completely ignores what the language of Mr. Russell’s Covenant actually states. *See Russell Covenant Not to Execute*. This separate Covenant with Mr. Russell clearly and unambiguously states that it was given to Mr. Russell for valuable consideration in exchange for a release of “any and all claims demands, damages, costs or expenses, including, but not limited to, any medical or hospital expenses, **loss of services**, actions and cause of action, arising from any act, omission, or occurrence, resulting or to result from the above referenced automobile accident.” *Id.* (emphasis added). Mr. Russell only made a claim for loss of consortium in this case and did not seek any recovery for personal injuries. Both covenants were provided and considered by the trial court at the post-trial motion stage. *See Mtn. for Setoff*.

“It is well settled in South Carolina that one spouse’s cause of action for medical expenses and loss of consortium resulting from negligent injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action.” *Graham v. Whitaker*, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984). In other words, “loss of consortium is an independent action, not derivative.” *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 156, 533 S.E.2d 597, 604 (Ct. App. 2000). Thus, Mr. Russell’s Covenant with Edward McGee, in which Mr. Russell agreed for a total of \$2,500 not to pursue a judgment against Mr. McGee for “any and all claims . . . including, but not limited to . . . loss of services,” clearly shows that this second Covenant applied to any loss of consortium claim brought by Mr. Russell, as such a claim belongs only to Mr. Russell and is separate and independent of any claim belonging to Appellant Green. *See Russell Covenant Not to Execute*. In fact, while Appellant Green’s Covenant includes both her name and Mr. Russell on the Covenant, only Appellant Green signed as the “Plaintiff,” while Mr. Russell only signed as her “Spouse,” providing further indication that the Covenant was only given for Appellant Green’s claims. *See Green Covenant Not to Execute*. Therefore, the trial court did not abuse its discretion in utilizing the full \$100,000 from Appellant Green’s Covenant in calculating the setoff of the judgment in Appellant Green’s favor in this case.

Furthermore, even if Appellant Green’s Covenant also applies to the loss of consortium claims of Mr. Russell, there was still no error by the trial court in refusing to allocate any portion of the \$100,000 to his loss of consortium claims. This Court has held that “when a settlement is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to

allocate the settlement between the two claims.” *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). For instance, in *Rutland v. South Carolina Dept. of Transportation*, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), some of the co-defendants had reached settlements with the plaintiff prior to trial, and the settlement agreements had allocated portions of the total settlement amount between the wrongful death claim and survival claim. GM’s settlement agreement with the plaintiff totaled \$275,000, but the agreement allocated \$137,500 to the wrongful death claim and \$137,500 to the survival claim. 390 S.C. at 82, 700 S.E.2d at 453. During settlement approval, another \$30,000 settlement had \$29,500 allocated to the wrongful death claim and \$500 allocated to the survival claim. *Id.* The total amount of all settlements was \$305,000. At trial, the jury awarded the plaintiff \$300,000 against SCDOT on the wrongful death claim. Although the total in the settlement agreements allocated to the wrongful death claim was \$167,000, and the total allocated to the survival claim was \$138,000, in ruling on SCDOT’s motion for setoff, the trial court reduced the verdict against SCDOT to zero because it “concluded the settlement agreement should be reallocated based on the insufficiency of the evidence to support a survival claim.” 390 S.C. at 82, 700 S.E.2d at 453. On Appeal, this Court affirmed this reallocation and setoff and held, “After reviewing the record, we conclude the trial court did not err in granting SCDOT’s motion for set-off based on the insufficiency of the evidence to support a survival claim. The record does not reveal any evidence tending to show the decedent endured conscious pain and suffering.” 390 S.C. at 84, 700 S.E.2d at 454; *see Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (finding that a trial judge did not err in reallocating a \$450,000 settlement that had \$5,000 allocated to the wrongful death claim and \$445,000 allocated to the survival claim to \$28,535.88 for the survival claim and \$421,464.12 for the wrongful death claim).

Here, the jury heard the same evidence at trial regarding Mr. Russell's claimed loss of consortium that is outlined in Appellant Green's brief. *See Appellant's Brf.*, at 15. The jury also heard the conflicting evidence above regarding Appellant Green's pre-existing conditions, her ability to go back to work full time following the accident, and Mr. Russell's testimony regarding him being away from home 60% of the time and that he did not have to assist his wife at work. Trial Tr. 178:1-181:6. In his closing argument, Appellant Green's counsel reiterated the evidence he believed favored an award for loss of consortium to the jury, and the trial judge gave a thorough jury instruction explaining the law on loss of consortium. Trial Tr. 303:9-25. Having heard all of the evidence, the jury found unanimously that there was not sufficient evidence to support Darrell Russell's claim that he suffered a loss of consortium as a result of the November 19, 2015 accident and awarded him nothing on that claim. *See Verdict Form.*

Again, great deference is given to a jury's findings, and "[a] jury's resolution of factual issues in a law case is binding on trial and appellate courts." *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 480, 629 S.E.2d 653, 672 (2006). Moreover, the jury's finding regarding the lack of a loss of consortium claim was not challenged by Mr. Russell in post-trial motions nor was it appealed, and it is now binding and the law of the case. *See First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding that an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"). In fact, in the *Page v. Crisp*, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1991) decision cited by Appellant Green in her brief, the jury's award of \$0 to the husband on his loss of consortium claim was actually challenged in post-trial motions and on appeal. Thus, in this case, the jury's unappealed finding that there was insufficient evidence to support Darrell Russell's loss of consortium claim is binding on the trial court and this Court, and Appellant Green's claim that despite this finding,

“Plaintiff Russell had a real and valid claim for loss of consortium as a matter of law” is simply nonsensical. *See Appellant’s Brf.*, at 18.

While the unpublished and non-precedential of *Green v. Bauerle*, No. 2019-MO-026, 2019 WL 2289678 (S.C. Unpub. May 29, 2019) relied on by Appellant Green does state that the trial court should consider “all relevant circumstances” in determining the proper amount of setoff, the Court did find that the amounts the jury determined the husband and wife were entitled to “may well be relevant to the ultimate determination of a proper setoff.” *Id.* at *4. Moreover, all of the relevant circumstances in this case were properly considered by the trial court in making its determination to utilize the full \$100,000 in applying the setoff. Not only did the trial court consider the finding by the jury in making this decision, but the court also had before it Mr. Russell’s separate and independent Covenant discussed above on which he was paid for releasing claims for “loss of services.” Both of these items were explicitly argued by undersigned counsel during the post-trial motion hearing:

So, therefore, Your Honor, you are looking at these two things, how do you – do you break up this \$100,000 between Ms. Green and Mr. Russell? And, Your Honor, arguably you should not. Mr. Hudgins should be entitled to the full \$100,000, because, again, Mr. Russell has been paid \$2,500 for relief, including all loss of services. The jury found there was no loss of consortium.

Post-trial Hrg. Tr. 21:22-22:3.

Accordingly, the trial court properly considered all relevant circumstances surrounding Appellant Green’s Covenant and Mr. Russell’s Covenant as well as the jury’s unchallenged finding that there is no evidence to support a loss of consortium claim. Thus, the trial court did not abuse its discretion in declining to re-allocate any of the \$100,000 in Ms. Green’s covenant to any claims of Mr. Russell and utilizing the full \$100,000 settlement for the setoff under S.C. Code Ann. § 15-38-50.

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, Appellant Green argues that the trial court erred in calculating the setoff under S.C. Code Ann. § 15-38-50 by dividing the punitive damages awarded to Appellant Green against Mr. Hudgins and Mr. McGee on a pro-rata basis. As set forth fully in Respondent/Appellant Hudgins' Initial Brief on his cross-appeal and incorporated herein by reference, Respondent/Appellant Hudgins agrees with Appellant Green that the trial court in some ways improperly calculated the setoff to which he is entitled under S.C. Code Ann. § 15-38-50. As set forth below, however, Respondent/Appellant Hudgins disagrees with Appellant Green's suggestion as to how the setoff should be recalculated.

In any event, Appellant Green made several concessions in her initial brief regarding the setoff calculated by the trial court with which Respondent/Appellant Hudgins also agrees. Appellant Green does not challenge on appeal the propriety of the trial court applying the setoff under S.C. Code Ann. § 15-38-50 to punitive damages awards, nor could she given the clear South Carolina authority allowing for such a setoff. *See Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 191 (Ct. App. 2012) (holding 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"). Thus, the ability of the trial court to apply the setoff

under § 15-38-50 to both actual and punitive damages is not in dispute and is now the law of the case. See *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (“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.”); *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (“Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal.”).

Moreover, as fully set forth in Respondent/Appellant Hudgins’ Initial Brief on his cross-appeal, Mr. Hudgins agrees with Appellant Green that in calculating the setoff under § 15-38-50, the trial court improperly combined the \$35,000 punitive damages awarded against Mr. Hudgins and Mr. McGee individually, instead of dealing with them as separate awards against each defendant. Again, 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 statute, the jury’s verdict awarded \$35,000 in punitive damages against Mr. Hudgins and \$35,000 in punitive damages against Mr. McGee and not a \$70,000 joint punitive damages award. However, 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 solely against Mr. Hudgins, particularly the \$35,000 punitive damage award against Mr. McGee. The parties agree that this portion of the setoff calculation was improper, and there is no dispute that the \$35,000 punitive damages award against Mr. Hudgins and the \$35,000 punitive damages award against Mr. McGee should have been considered separately by the trial court when calculating the setoff under § 15-38-50.

The real disagreement between the parties on this appeal is how the setoff of the award under S.C. Code Ann. § 15-38-50 should be calculated after the above items are taken into consideration. Appellant Green suggests that the \$100,000 from her Covenant Not to Execute be applied first to the \$88,546.78 actual damages award, which would leave an additional “credit” of \$11,453.22 to be applied to the punitive damages awards. *See Appellant’s Brf.*, at 18. She then states that if the trial court decided to apply this credit based on the 60-40 split found by the jury, this would result in judgments against Mr. McGee and Mr. Hudgins as follows: “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 (\$6,871.92) against the punitive damages of \$35,000 against him, so he would pay \$28,128.07.” *See Appellant’s Brf.*, at 19 n.3.

However, in calculating the setoff under S.C. Code Ann. § 15-38-50 this way, Appellant Green completely fails to take into account the circumstances of this case and the differences between S.C. Code Ann. § 15-38-50’s application to “tortfeasors” and the setoff an underinsured motorist (“UIM”) carrier is entitled to through its contract with the plaintiff. As set forth in Respondent/Appellant Hudgins’ Initial Brief on his cross appeal, the clear and unambiguous language of S.C. Code Ann. § 15-38-50 shows that its setoff provisions do not apply to underinsured motorist carrier, Progressive, as the statute speaks in terms of “other tortfeasors” and states that a settlement “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.” S.C. Code Ann. § 15-38-50(1) (emphasis added). 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.”).

Instead, UIM setoff does not arise under S.C. Code Ann. § 15-38-50, but is “a different type of set-off” entirely 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). 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. Thus, any “setoff” for Progressive arises not from S.C. Code Ann. § 15-38-50, but from the contractual provisions of Appellant Green’s policy with Progressive, and the analysis is different than the analysis applicable to Mr. Hudgins, as Progressive simply looks to see 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. As such, because Progressive is not an “other tortfeasor,” and the provisions of § 15-38-50 are inapplicable to Progressive, the statute must be applied only to Mr. Hudgins. In other words, 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.

With respect to the amount of the judgment recoverable against Progressive and Mr. Hudgins and the amount to which the \$100,000 setoff will be applied, Appellant Green argues, “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.” *See Appellant’s Brf.*, at 18. However, this ignores the fact that the trial court must apply the setoff under S.C. Code Ann. § 15-38-50 “before entering judgment on a jury verdict.” *Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012). It also ignores the fact that with an award for which two defendants are jointly and severally liable, a plaintiff “is entitled to only one recovery, and the collection of a judgment against one wrongdoer extinguishes any claim against the other.” *Rourk v. Selvey*, 252 S.C. 25, 27-28, 164 S.E.2d 909, 910 (1968). Thus, because the setoff must be calculated prior to judgment being entered, and Appellant Green cannot recover the full amount actual damages from both Mr. Hudgins and Progressive, the trial court must determine an equitable way and non-arbitrary way to apportion the \$88,546.78 between Mr. Hudgins and Progressive when calculating the setoff. The jury found that Mr. McGee was 60% at fault for the accident and that Mr. Hudgins was 40% at fault. *See Verdict Form*. To avoid an arbitrary and capricious setoff calculation, the actual damage award should be apportioned using these percentages for the setoff calculation.

Thus, this would make Mr. Hudgins liable for 40% of the total actual damages, or \$35,418.71. When the punitive damages award of \$35,000 is combined with that figure, the total amount of the claim against Mr. Hudgins for setoff purposes would be \$70,418.71. Because this is less than the \$100,000 received by Appellant Green for her Covenant, then Appellant Green would not be entitled to recover anything from Mr. Hudgins.

CONCLUSION

For the reasons stated herein and Respondent/Appellant Hudgins' Initial Brief for his cross-appeal, this Court should find that the trial court did not abuse its discretion in denying Appellant Green's Motion for New Trial *Nisi Additur*. The Court should further find that the trial court did not abuse its discretion in using the full \$100,000 pre-suit settlement obtained by Appellant Green in calculating the setoff under S.C. Code Ann. §15-38-50. 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 and in Mr. Hudgins' Initial Brief for his cross-appeal.

Respectfully submitted,

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s/James A. Bradshaw

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