THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2020-000203

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017-CP-42-03523

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

v.

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

Of whom Shannon P. Green is

Appellant/Respondent And

Of whom David Hudgins is the Respondent/Appellant.

FINAL BRIEF OF APPELLANT/RESPONDENT SHANNON GREEN TO RESPONDENT/APPELLANT DAVID HUDGINS' CROSS APPEAL

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3. **WHETHER THE TRIAL COURT ERRED IN APPLYING THE SETOFF FOR DEFENDANT MCGEE'S LIABILITY PAYMENT TO THE TOTAL ACTUAL DAMAGES VERDICT**

FACTS

Respondent/Appellant Hudgins (hereinafter Defendant Hudgins) actively participated in a road rage incident that caused serious injury to Appellant/Respondent Shannon P. Green (hereinafter Plaintiff Green). The incident began around rush hour on November 19, 2015 on I-85 near the Cherokee County/Spartanburg County line. R. pp. 90, lines 4-5; 93, lines 18-21. The incident began 15-20 minutes before Plaintiff Green was injured. R. p. 109, lines 20-23.

While driving in heavy traffic, Respondent Edward C. McGee (hereinafter Defendant McGee) ran up behind Defendant Hudgins. Both Defendants were in the left lane, and the traffic was bumper to bumper in the right lane. R. p. 94, lines 1-2. Defendant Hudgins slammed on his brakes and almost caused an accident. R. p. 95, lines 13-17. ("Yeah, he's slamming on brakes. Not just putting his brake lights on." R. p. 95 lines 13-16.) Defendant Hudgins slammed on his brakes and almost caused an accident three times. R. p. 96, lines 1-25; R. p. 312, lines 2-8. When I-85 widened from two lanes to three, Defendant McGee passed Defendant Hudgins on the right and then attempted to make a lane change in front of Defendant Hudgins, who was still in the left lane. R. pp. 99, line 19 – R. p. 100, line, 2. Defendant Hudgins attempted to block Defendant McGee. They almost collided again. R. p.101, line 16- p. 102, line 18. Defendant McGee testified you could have "slipped a piece of paper" between the two vehicles. R. p. 102 lines 6-18. Defendant Hudgins testified: "I think it was less than that." R. p. 313, lines 2-6.

Defendant McGee then got ahead of Defendant Hudgins at this point. Defendant McGee wanted to get away from him. R. p. 103, lines 8-9. Defendant Hudgins knew it was "best to just stay out of it". R. p. 316, lines 1-2. Nonetheless, Defendant Hudgins followed Defendant McGee – "a couple of car lengths behind me". R. p. 103, lines 12-17. "I would turn my turn signal on to move over, get around another car…it was like, you know, … you were NASCAR or something

or another, and, you know, they're drafting on you." R. p. 103, lines 18-24. Defendant McGee was fearful for his life. R. p. 104, lines 6-17.

Defendant McGee exited I-85 at Hearon Circle in Spartanburg, and Defendant Hudgins was right behind him. "Somehow or another he wiggles his way in there, I don't know how." R. p. 112, lines 3-10. Defendant McGee took the Hearon Circle exit at a high rate of speed. According to Defendant Hudgins, "he was doing 90 miles an hour". R. p. 323, lines 9-24. Defendant McGee turned right on Simuel Road, and Defendant Hudgins was still right behind him. According to Defendant McGee, Defendant Hudgins was "two or three car lengths" behind him. R. p. 148, lines 11-20. Defendant Hudgins was distracting Defendant McGee, causing him to take his eyes off the road. R. p. 113, lines 13-23. Defendant McGee, driving his very large Chevy 2500 truck, took a sharp right turn, crossed the center line, and hit Plaintiff Green. R. p. 91, line 17-23; p. 113, lines 2-12. "I look in my mirror to see if he's still back there, and that's when I went over the center line and hit her." R. p. 113, lines 8-10. At the scene, Defendant McGee told the investigating officer he was being chased by Defendant Hudgins. R. p. 80, lines 12-17.

STANDARD OF REVIEW

When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court, i.e. by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, *Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).*

The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994).* Moreover, "[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). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. *Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).* In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 300, 536 S.E.2d at 419.

ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT HUDGINS' JNOV MOTION AS TO BOTH NEGLIGENCE AND GROSS NEGLIGENCE.

Applying the standard of review outlined above, this Court must simply determine if there was any evidence to support the jury's finding of negligence and gross negligence against Defendant Hudgins. If such evidence exists, then the trial court properly denied Defendant Hudgins' JNOV Motion with respect to both.

There is evidence that Defendant Hudgins acted negligently and was grossly negligent from the moment he encountered Defendant McGee on I-85. The Interstate was crowded; bumper to bumper in the right lane. R. p. 92, lines 7-21; p. 94, lines 1-3. Defendants were driving 65-70 miles per hour. R. p. 94, lines 1-3. When Defendant McGee pulled up behind Defendant Hudgins, Defendant Hudgins chose to slam on his brakes. He could have continued driving at the same speed or increased his speed until he could eventually move into the right lane. He didn't even "tap" his brakes. "He's slamming on brakes. Not just putting his brake lights on." R. p. 95, lines 13-16. He is "almost causing an accident". This happened three separate times in crowded traffic.

There is also evidence that Defendant Hudgins then attempted to cut Defendant McGee off. Defendant McGee passed him on the right and started to move over into the

left lane in front of Defendant Hudgins. Defendant Hudgins "speeds up as I look over, you know, like he's gonna try to block me from coming over." R. p. 99, lines 19 – p. 100, line 2. This incident also almost caused a collision. This is the point at which you could have "slipped a piece of paper" between the two Defendants' vehicles. R. p. 102, lines 6-18; p. 303, lines 2-6. Defendant Hudgins said it was Defendant McGee who tried to cut him off but that "he almost crashed me." R. p. 313, lines 2-6.

Finally, there is evidence that Defendant Hudgins "chased" Defendant McGee until he struck Plaintiff Green. "NASCAR" says everything you need to know. Defendant McGee testified that Defendant Hudgins was driving like NASCAR.

Q. Did he follow you?

A. He sure did.

Q: How close was he?

A: A couple of car lengths behind me. I mean, you know, you could – it was evident he was back there every time I changed lanes.

Q. What happened when you changed lanes?

A. I would turn my turn signal on to move over, get around another car, turn my turn signal and he was – it was like … you were NASCAR or something or another, and, you know, they're drafting on you.

Q. With Mr. Hudgins drafting on you?

A. Yeah, that's what I'm saying. He was right behind me.

Q. So, you change lanes, and he changes lanes?

A. Exactly.

Q. You change lanes, and he changes lanes?

A. Exactly.

Q. You change lanes, and he changes lanes?

A. Exactly.

Q. Alright, did you become concerned?

A. Real concerned.

R. p. 103, lines 12 – p. 104, line 7. According to Defendant McGee, Defendant Hudgins was right behind him; there were no other vehicles between them. R. p. 112, lines 9-10; p. 112, line 22- p. 113, line 1; p. 113, lines 13-15. Defendant Hudgins was distracting Defendant McGee, which caused him to take his eyes off the road. R. p. 113, lines 13-20. That, along with Defendant McGee's excessive speed, caused him to hit Plaintiff Green.

This evidence of Defendant Hudgins' speeding, following too closely, and almost crashing (repeatedly) would support a finding of negligence and gross negligence. However, there is further evidence of Defendant Hudgins' gross negligence. First, he knew better. He knew from past experience it was "best to just stay out of it... if you can." R. p. 316, lines 1-2. Yet, after reporting Defendant McGee to the Highway Patrol and providing a description of his truck and license tag number, he chose to chase Defendant McGee. Second, based on Defendant McGee's testimony, Defendant Hudgins had fifteen (15) to twenty (20) minutes to back off and let Defendant McGee go. R. p. 109, lines 15-23. (According to Defendant Hudgins, he had 10 minutes. R. p. 316, lines 12-14.) That's a lot of time to make a conscious decision, i.e. "For the safety of all those on the road, maybe I should back off." Instead, he "drafted" behind Defendant McGee and followed him at a high rate of speed. Third, Defendant Hudgins pled guilty to driving too fast for conditions. R. p. 328, line 24 – p. 329, line 10. This guilty plea alone required the issue of punitive damages to be submitted to the jury. "Violation of a statute is some evidence

the defendant acted recklessly, willfully and wantonly." *Austin v. Specialty Transportation Services, Inc.*, 358 SC 298, 315, 594 SE2d 867 (Ct. App. 2004). And fourth, it was obvious to the jury and to the court that Defendant Hudgins had not learned a lesson as a result of Plaintiff Green's injury. As a matter of fact, he would do the very same thing again under the same circumstances.

Q. You played no part in this collision whatsoever?

A. No, sir.

Q. You don't feel like you did anything wrong?

A. No, sir.

Q. And you don't feel like you would do anything different... under the same circumstances?

A. That's right.

Q. The very same thing?

A. That's right.

Q. Yes?

A. Yes, sir.

R. p. 325, lines 12-22. Thus, Defendant Hudgins personifies the need for punitive damages, i.e. deterrence.

In *Clark v. S.C. Dept. of Public Safety*, 362 SC 377, 608 SE2d 573 (2005), a woman, Clark's daughter, was killed when her vehicle was struck by a man being pursued by a State Trooper. The trial court submitted the issue of gross negligence on the part of the Department to the jury, and the jury returned a verdict against the Department. The Department filed a motion for JNOV, and the trial court denied the motion. In affirming

both the trial court and this court, the Supreme Court found that the trial court properly submitted the case to the jury to consider whether the Trooper was grossly negligent in initiating and failing to terminate the pursuit. Id. at 383. Construing the evidence in a light most favorable to Clark, the pursuit should have been called off once it was obvious the fleeing driver was willing to do whatever it took to get away and after he attempted to run the Trooper off the road, almost colliding with another vehicle. Id. at 385.

Clark is analogous to this case with one glaring distinction. The Trooper in *Clark* was a law enforcement officer who was actually charged with enforcing the law and whose job required him to pursue people. In this case, we have Defendant Hudgins who is simply angry, frustrated, and vengeful, so he continued to pursue Defendant McGee even when it was obvious he was not going to stop. And as in *Clark,* the pursuit almost caused other collisions and ultimately did cause the collision with Defendant Green's vehicle. Based upon *Clark*, it is clear that both the issue of negligence and gross negligence were properly submitted to the jury.

2. PROOF OF CAUSATION FOR PLAINTIFF GREEN'S INJURIES DID NOT REQUIRE EXPERT TESTIMONY.

Plaintiff Green's KIA sustained a severe blow from Defendant McGee's Chevrolet 2500 truck. Her driver's door "crumpled into the vehicle". There was 6+ inches of intrusion into the driver compartment, which was on Plaintiff Green's left side. R. pp. 453-454; 199, lines 18-25; 203, line 6-204 line 10. The cell phone on Plaintiff Green's left hip was actually bent and would not function after the collision. R. pp. 265, line 23-266, line 5. The evidence of severe trauma, e.g. unconsciousness, face covered in blood, glass in mouth, eyes and hair, etc. is outlined further in the facts section of the Initial Brief of Appellant/Respondent.

Thus, it should not be a surprise that Plaintiff Green sustained significant injury on the left side of her body. She sustained two broken ribs. R. p. 243, lines 11-13. She immediately felt pain in her left arm and left shoulder and believed her left collar bone was fractured. R. p. 238, lines 14-17. The morning after she was injured, Plaintiff Green's left arm was bruised from the top of her shoulder to the elbow and swollen 1.5 times the size of her right arm. R. p. 244, lines 14-18. When she went to see her family doctor, she complained about pain in her left shoulder, chest, and upper back. R. pp. 243 lines 17-20; 275, lines 12-14. The pain in Plaintiff Green's upper back was "right between the shoulder blades". It turned out that the problem with her left shoulder was a torn bicep tendon. R. p. 247, lines 5-7.

Expert testimony on the cause of Plaintiff Green's injuries was not required here. In *Wilder v. Blue Ribbon Taxicab Corp.*, 396 SC 139, 719 SE2d 703 (Ct. App. 2011), this Court outlined circumstances in which expert testimony is not required to prove the cause of an injury.

> "Expert testimony is not required to prove proximate cause if the common knowledge or experience of a layperson is extensive enough." *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 271 S.C. 340, 349, 638 SE2d 96, 101 (Ct. App. 2006). "[W]here physical injury is coincident with or immediately follows an accident and is naturally and directly connected with it lay testimony may be sufficient to carry to the triers of the facts the issue of whether or not the accident proximately caused it..." *Roscoe v. Grubb*, 237 S.C. 590, 596, 118 SE2d 337, 340 (1961); see *Armstrong v. Weiland*, 267 S.C. 12, 16, 225 SE2d 851, 853 (1976). ("When the testimony of an expert witness is not relied upon to establish proximate cause, it is sufficient for plaintiff to put forth some evidence which rises above mere speculation or conjecture...").

Id. at 147. Plaintiff Green's physical injuries were "coincident with" the accident, and her complaints were consistent throughout her treatment. Clearly, she "put forth some evidence which rises above mere speculation or conjecture..."

Defendant Hudgins raises several completely unrelated prior conditions in an attempt to make Plaintiff Green's injuries appear medically complex so as to require expert testimony. Those injuries include past lower back pain, a past right frozen shoulder caused by diabetes, and hip pain from trochanter bursitis. However, Plaintiff Green was very clear about the fact that these were entirely separate and unrelated conditions and that she was not requesting compensation for them. "I'm not asking to be compensated for low back pain and trochanter bursitis... or even the right frozen shoulder...[T]hat's not part of this claim." R. p. 294, lines 12-18.

It is significant that Plaintiff Green is a nurse practitioner with an acute nurse practitioner degree from the University of South Carolina. R. p. 235, lines 9-15. She has worked in surgical intensive care and currently works in an internal medicine practice. R. p. 240, lines 2-3. Though she did not offer expert testimony, when it came to explaining her injuries, she was very plain and clear. The jury did not need more.

3. THE TRIAL COURT DID NOT ERR IN APPLYING THE SETOFF FOR DEFENDANT MCGEE'S LIABILITY PAYMENT TO THE TOTAL ACTUAL DAMAGES VERDICT.

Regardless of the amount[1], the setoff from Defendant McGee's liability payment was properly applied to Plaintiff Green's total actual damages verdict and not to 40% of the actual damages verdict, which is the application proposed by Defendant Hudgins. This is the proper application for at least two reasons.

First, although the jury found Defendant Hudgins 40% at fault for the collision that caused Plaintiff Green's injuries, it also found that his actions were willful, wanton, reckless, etc. *See verdict form.* Thus, S.C. Code §15-38-15 does not apply to the actual damages verdict; it is a pure

[1] The setoff should not have been $100,000.00, because a portion of the $100,000.00 liability payment was made to Plaintiff Green's husband, Co-Plaintiff Darrell Russell, to satisfy his claim for loss of consortium.

joint and several verdict. Defendant Hudgins is liable for 100% of the actual damages. S.C. Code § 15-38-15 (f).[2]

Second, applying the setoff to 40% of the actual damages verdict would not be just or equitable. Nor would it be consistent with the purpose for setoff. Specifically, the calculation proposed by Defendant Hudgins would result in Plaintiff Green receiving less than the full verdict.

The Supreme Court discussed and analyzed setoff in *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 SE2d 824 (2015). It stated that "[t]he right to setoff has existed at common law in South Carolina for over 100 years." Id. at 195. It noted that the concept of setoff is "equitable in its nature" and that it grew out of "the inherent equitable jurisdiction which the Court exercises over suitors in it", Id. *citing* *Rookard v. Atlanta and Charlotte Air Line Ry Co.*, 891 S.C. 371, 71 SE 992, 995 (1911). The Court found that "these equitable principals were codified as part of the South Carolina Contribution Among Tortfeasors Act", which includes § 15-38-50. Id. (Emphasis provided).

The Court recognized, as Defendant Hudgins points out, that setoff is intended to prevent double recovery. Id. at 196. "Allowing setoff 'prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong'". Id., *citing* *Rutland v. S.C. Dept. of Transp.*, 400 S.C. 209, 216, 734 SE2d 142, 145 (2012). In other words, preventing double recovery is the legislative intent and purpose behind § 15-38-50. It was clearly not the legislature's intent, and the Supreme

[2] Applying the same reasoning and as noted in Argument 3 of the Initial Brief of Appellant/Respondent, when the setoff for Defendant McGee's $100,000.00 liability payment is applied to the actual damages verdict of $88,546.78, there remains an unused portion of the setoff or a credit in the amount of $11,453.22. Even that amount cannot be applied based upon the jury's apportionment of fault. The remaining credit must be applied pursuant to § 15-38-20 and/or 15-38-40, and it was not.

Court's language makes this clear, to apply a setoff so as to prevent an injured person from receiving a full single recovery. Yet, that is the interpretation Defendant Hudgins proposes.

Take 40% of the actual damages verdict ($88,546.78), which is $35,418.71. Add to it the $35,000.00 punitive damages award against Defendant Hudgins, and you have $70,418.71. Defendant Hudgins contends that $78,418.71 is all he owes Plaintiff Green and that a $100,000.00 setoff applies to that amount. According to Defendant Hudgins' argument, Plaintiff Green has already received from Defendant McGee more than she is entitled to from him.[3] Assuming she is also entitled to the $35,000.00 punitive damages award from Defendant McGee and is able to collect it, she would receive $105,418.71 out of the jury's total verdict of $158,546.78. So while Plaintiff Green would not receive a double recovery, she would also not receive a full single recovery.

The Supreme Court has made clear that the legislative intent of § 15-38-50 was to prevent double recovery and that the equitable principals of setoff, i.e. "to do justice between parties", was codified in § 15-38-50. *Riley,* 414 SC at 195. Defendant Hudgins' interpretation of § 15-38-50 does not effectuate the legislative intent behind it, which is this Court's primary concern. *Ellis v. Oliver,* 335 SC 106, 109, 515 SE2d 268 (Ct. App. 1999). Defendant Hudgins' interpretation of § 15-38-50 would not be just or equitable. He even concedes this. ("While application of this setoff provision under § 15-38-50 may seem to lead to an inequitable result for Appellant Green...") Rather, it leads to an absurd result. "This Court must reject an interpretation of a statute leading to an absurd result that was not possibly intended by the legislature." *Allstate Ins. Co. v. Estate of*

[3] Defendant Hudgins writes on pg. 28 of his Brief: "Because the $100,000.00 is more than the $78,418.71 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".

Hancock, 345 S.C. 81, 87, 545 SE2d 845 (Ct. App. 2001), *citing Hamm v. South Carolina Pub. Serv. Comm'n*, 287 S.C. 180, 181, 336 SE2d 470, 471 (1985).

CONCLUSION

Based on the foregoing, the Trial Court's Order should be affirmed as to its denial of Defendant Hudgins' Motion for JNOV and the application of the setoff (albeit in the wrong amount)[4] from Defendant McGee's liability payment to the total actual damages verdict.

Respectfully submitted this **17th** day of **November** 2020.

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[4] The issue of the amount of setoff has been raised in the Initial Brief of the Appellant/Respondent Shannon Green.

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Nov 17 2020
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant/Respondent Shannon Green to Respondent/Appellant David Hudgins' Cros Appeal complies with Rule 211(b), SCACR.

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