THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court Of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case No: 2008-CP-05-235

Laura Riley as the Personal Representative
of the Estate of Benjamin Riley ..... Respondent,

v.

Ford Motor Company ..... Appellant.

FINAL BRIEF OF APPELLANT

Curtis L. Ott
Laura W. Jordan
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, South Carolina 29202
Tel: 803.779.1833
Fax: 803.779.1767

J. Kenneth Carter, Jr.
David C. Marshall
Carmelo B. Sammataro
TURNER, PADGET, GRAHAM & LANEY, P.A.
1901 Main Street, 17th Floor
Columbia, SC 29201
Tel: 803.254.2200
Fax: 803.799.3957

ATTORNEYS FOR APPELLANT

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INTRODUCTION

This wrongful death case arises from a fatal collision when a teenage driver failed to yield the right-of-way and struck Jasper County Sheriff Benjamin Riley's 1998 Ford F-150 truck. The impact caused Riley's truck to leave the roadway, roll over, and strike a tree. Riley died from injuries sustained when he was ejected from the vehicle. The Personal Representative of his estate ("the Estate") filed this action against Appellant Ford Motor Company ("Ford") alleging negligent design of the truck's door-latch system.

The trial court erred in allowing this case to reach a jury and erred in denying Ford's motions for judgment as a matter of law. The Estate presented no evidence of a design flaw in the door-latch system, no evidence that a design flaw caused the truck to be defective and unreasonably dangerous, and no evidence of a feasible alternative design. The door-latch system in Riley's truck was the same system used in 90% of vehicles on the road at the time, and the Estate presented no evidence that the Ford F-150's doors were more likely to come open in collisions than doors on any other vehicle. The Estate failed to present evidence supporting a viable negligent design claim as a matter of law.

After erring by allowing the claim to reach the jury, the trial court further erred by deciding post-verdict to *triple* the jury's damages award. The trial court impermissibly discounted the jury's damages evaluation as unacceptable based on Riley's stature in the community, and the court substituted its own calculation of non-economic damages for that of the jury without a compelling reason. The trial court erred in ordering a new trial *nisi additur* and arbitrarily increasing the jury's damages award from $300,000 to $900,000.

Finally, the trial court erred by denying Ford's motion for a set off of $25,000.00 from the verdict. Because the Estate settled its claims with the at-fault driver of the other vehicle involved in the collision, South Carolina law entitles Ford to a set off equivalent to the full amount of that settlement.

STATEMENT OF THE CASE

On November 26, 2008, Respondent Laura Riley, the Personal Representative of the Estate, brought wrongful death and survival claims pursuant to S.C. Code Ann. § 15-51-10, *et seq.* (1976), and S.C. Code Ann. § 15-5-90, *et seq.* (1976), respectively, against Ford and Andrew Marshall Carter, II ("Carter"), the at-fault driver of the vehicle that collided with Riley's truck. (R. p. 11).[1] The Estate's claims against Ford were based on a products liability negligence theory that Riley's injuries were enhanced by a defectively designed door-latch system in his Ford truck. (R. p. 11). The Estate dismissed Carter from the case in April 2010 after settling with him for $25,000.00, with $20,000.00 allocated to the survival claim and $5,000.00 to the wrongful death claim.[2] (R. p. 29; R. p. 1; R. p. 4).

In September 2011, the Estate filed an Amended Complaint against Ford, again alleging wrongful death and survival claims premised on a negligent design defect theory regarding the door-latch system. (R. p. 14). Ford's Answer denied liability and, among other things, averred that it was entitled to a set off or credit for any amounts paid to the Estate by any third-parties for the injuries and damages sought against Ford. (R. p. 17).

A jury trial commenced on September 19, 2011. Immediately prior to the directed verdict stage, the Estate withdrew its survival action. (R. p. 342, line 23-p. 343, line 2). At the close of the Estate's evidence regarding liability,[3] Ford moved for directed

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[1] The Estate's initial complaint also alleged claims against other insurance company defendants who were dismissed upon settlement early in this litigation.

[2] The Estate also received $50,000.00 from an underinsured motorist carrier.

[3] The trial court sought Ford's agreement to allow testimony from two of the Estate's damages witnesses after consideration of Ford's directed verdict motion, and Ford

verdict on the Estate's claim of negligent design and its request for punitive damages.[4] (R. p. 343, line 9; p. 344, line 4-p. 346, line 7; R. p. 34). The trial court denied Ford's directed verdict motions. (R. p. 346, line 8-p. 347, line 1).

At the close of all evidence, Ford renewed its directed verdict motions as to the Estate's design defect claim and its claim for punitive damages. (R. p. 365, line 5-p. 367, line 4). The motion was denied as follows: "I just think it's, obviously, a factual dispute and factual issues. You got --- as typical in these types of cases, you got the battle of the experts --- one saying one thing and one saying the other and it's obviously a question for the jury on both issues of actual and punitive damages. So, I respectfully deny the motion." (R. p. 344, lines 7-13).

The sole claim submitted to the jury was the Estate's wrongful death claim alleging that Riley's injuries were enhanced by a design defect in the door-latch system. During its deliberations, the jury submitted a question inquiring whether actual damages were to be awarded as a "lump sum or per year" figure. (R. p. 1530). With the agreement of the parties, the trial court instructed the jury that actual damages were to be calculated as a lump sum.

On September 29, 2011, the jury returned a verdict in favor of the Estate for $300,000.00 in actual damages. Although the jury also found that Ford's actions "were

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expressed no objection "subject to the understanding that [the witnesses would] not add[] anything substantive other than information on damages." (R. p. 342, lines 3-17).

[4] Ford also moved for directed verdict to the extent that the Estate had asserted a claim based upon failure to warn. (R. p. 343, lines 9, 17-19). The Estate conceded that no testimony regarding warnings had been presented at trial, (R. p. 343, lines 20-24), and the trial court "grant[ed] directed verdict . . . if there were any claims as to the design defect being as a result of failure to warn, that's no longer a part of the case." (R. p. 343, line 25-p. 344, line 3).

willful, wanton, or reckless," the jury awarded "zero" dollars in punitive damages. (R. p. 378; R. p. 374, line 9-p. 375, line 5).

On October 10, 2011, Ford timely moved for judgment notwithstanding the verdict ("JNOV") and/or a set off. (R. p. 42). Ford's JNOV motion renewed its previous request for judgment as a matter of law on several grounds, two of which are relevant to this appeal: (1) the Estate failed to prove that the truck was defective and unreasonably dangerous; and (2) the Estate failed to satisfy all of the required elements of a crashworthiness claim. (R. pp. 44-46). Ford also moved for a set off from the jury's verdict in the amount of $25,000.00 to account for the full amount of the Estate's settlement with Carter. (R. pp. 49-51). By form order entered on January 25, 2012, the trial court denied both Ford's JNOV motion and Ford's request for set off. (R. p. 5). Ford received written notice of entry of the Order on January 27, 2012.

Also on October 10, 2011, the Estate filed a motion seeking: (1) a new trial absolute because the verdict purportedly was grossly inadequate; (2) a new trial under the "thirteenth juror" doctrine because the verdict was contrary to the fair preponderance of the evidence; or (3) a new trial *nisi additur* because the verdict was merely inadequate. (R. p. 52). The trial court heard the motion on November 21, 2011. The trial court focused at the hearing on the Estate's request for new trial *nisi additur*. (R. p. 376, line 5-p. 377, line 16). Thereafter, the trial court requested additional briefing on the limited issue of new trial *nisi additur*, and both parties submitted supplemental memoranda. (R. p. 67; R. p. 80).

On January 10, 2012, the trial court granted the Estate's motion for new trial *nisi additur* and ordered Ford to pay "an additional $600,000 in actual damages . . . bringing

the total verdict to $900,000, or a new trial will be granted." (R. p. 6). Ford received written notice of entry of the order on January 19, 2012.

On February 7, 2012, Ford served its Notice of Appeal of two decisions by the trial court: (1) the January 25, 2012 Order Denying Defendant's Motion for Judgment Notwithstanding the Verdict and/or Set Off; and (2) the January 10, 2012 Order Granting the Estate's Motion for New Trial *Nisi Additur.*

STATEMENT OF FACTS

A. The Accident

On August 29, 2007, Benjamin Riley was traveling in Bamberg County when Andrew Carter, who was sixteen years old, failed to yield the right-of-way and drove his truck into Riley's lane. (R. p. 104, lines 3-5; p. 104, line 17-p. 105, line 17; p. 110, lines 10-13). Although Riley took evasive action, the vehicles "side-slap" collided, causing Riley's truck to leave the roadway, roll over, and then strike a tree. (R. p. 220, line 20-p. 221, line 4; p. 305, lines 3-9; p. 308, lines 5-24). When the approximately 4,000-pound truck was rolling over, Riley was ejected from the vehicle, (R. p. 221, lines 5-8; p. 292, lines 3-6), and he died from injuries sustained from the ejection, (R. p. 305, lines 5-13). Ford presented evidence that Riley was not wearing his seatbelt. (R. p. 116, line 12-p. 117, line 2; p. 146, lines 10-18). The Estate could not affirmatively show that Riley was belted and instead relied on testimony that it was Riley's habit to wear a seatbelt. (R. p. 117, lines 10-20; p. 141, line 23-p. 142, line 2).

The Estate's door defect expert, Andrew N. Gilberg, theorized that the driver's door on the subject truck unlatched during the initial offset frontal impact with Carter's truck, (R. p. 270, lines 7-21; p. 305, lines 5-6), and was open when the vehicle rolled over

and the top of the truck struck the ground, (R. p. 282, lines 14-20).

B. The Door-Latch System

The door-latch system in the 1998 Ford F-150 "PN96" model truck that Riley was driving was a "rod-linkage" system, as opposed to a "cable" system. A rod-linkage system, as the name suggests, contains a rod (in this case a compression rod) that connects the door handle inside the vehicle to an actuator mechanism inside the door that operates the door latch. A cable system uses a cable to attach the door handle to the actuator. The Estate's theory at trial was that Riley's truck was defective because it used a rod-linkage system instead of a cable system.[5]

[5] Specifically, in a rod-linkage system, the inside handle used to open the door from the interior is located in the middle of the vehicle door and attached to a "remote control" or "actuator" that affixes the handle to the door itself. (R. p. 187, line 24-p. 188, line 10; p. 191, lines 1-5). The rear of the door is held closed by a "latch" which attaches to a strike plate. (R. p. 189, line 19-p. 191, line 7). The rod-linkage system connects the remote control in the middle of the door to the latch at the rear of the door. (R. p. 188, lines 6-8; p. 196, lines 15-23). The latch itself contains a "striker" that rotates a pin called a "for[k] bolt" to open or close the door when in contact with the strike plate. (R. p. 188, lines 16-24). When the door handle is pulled, the remote control moves the rod rearward to open the latch from the strike plate. (R. p. 188, lines 6-8; p. 191, lines 6-10). If the latching system relies on a compression rod, the rod is *pushed* to open the door; if the rod used is a "tension" rod, it must be *pulled* to open the door. (R. p. 189, lines 2-5). A cable-linkage system employs both tension and compression mechanisms such that the latch is triggered when the cable is pulled and the housing is pushed. (R. p. 189, lines 6-14).

It is undisputed that, during the relevant time period when the subject truck was designed, rod linkages were the predominant latching systems used by all car manufacturers. (R. p. 269, line 23-p. 270, line 1). Even the Estate's expert, Gilberg, conceded that "in the mid 90s, nearly 90% of the cars on the road had rod linkages" in their latch systems. (R. p. 269, lines 9-11). Although Ford utilized both rods and cables in the vehicles it designed and manufactured during the relevant time period, (R. p. 268, lines 1-4), many other truck manufacturers, including Chevrolet and Dodge, relied exclusively on the rod-linkage system in the design of their pickup trucks, (R. p. 268, line 9-p. 269, line 3). Ford's use of compression rods was an undisputed improvement over the tension rods used by other manufacturers during the same time period. (R. p. 269, lines 15-22; p. 285, line 25-p. 286, line 7).

The subject truck was part of a new F-series truck platform designated as the PN96, a successor model to the 1992-1995 F-150 F-series. (R. p. 162, lines 20-25). The PN96 model was produced with the rod-linkage system, not the cable system. (R. p. 207, lines 16-19). Although the PN96's predecessor platform did employ a cable linkage in its door-latch system, (R. p. 204, lines 20-22), the 1992 predecessor F-150 series model was recalled in November 1991 due to a potential defect in the cable system. The recall coincided with the initial design phase of the PN96, (R. p. 287, line 8-p. 288, line 14), and was prompted by Ford's findings that water could invade the cable linkage system and freeze the cable, preventing the door from opening, (R. p. 287, line 16-p. 288, line 6). Thus, although the cable system was used in the PN96's predecessor F-150 series platform, it was not used in the PN96. It is undisputed that Ford tested the PN96 to the level of standards specified both internally by Ford and externally by the federal

government. (R. p. 209, lines 11-13).

Riley's PN96 truck, which was conceptualized in 1991, was not produced until October 1997. (R. p. 299, lines 20-22). It was sold as the 1998 F-150 to the Sheriff's Department in July 1998. (R. p. 162, lines 5-6; p. 97, line 8-p. 98, line 6).[6]

C. The Potential for Rod Foreshortening

The Estate presented evidence that frontal collisions can potentially cause "foreshortening" – a decrease in the distance between the remote control and latch due to the rod being compressed, bent, or shortened. (R. p. 191, lines 6-21). When foreshortening causes the remote control to move too close to the latch "for some reason like a crash, the latch releases" and may cause the door to open without pulling the handle. (R. p. 191, lines 18-21).

Ford's design team found that the risk of foreshortening could be minimized by implementing "intrusion beams and reinforcements" in vehicles with the rod-linkage system. (R. p. 148, line 20-p. 149, line 4). During the relevant time period, Ford found "that all truck data available to date would indicate that foreshortening can be managed in the latch design." (R. p. 289, line 4-p. 290, line 2). Indeed, Gilberg admitted that the use of a rod in the subject vehicle does not render it defective. (R. p. 275, lines 3-15). It is undisputed that during the design of the PN96 door-latch system, Ford conducted a failure mode effects analysis and continued to test the design to internally- and externally-set standards. (R. p. 291, lines 10-18). The subject PN96 truck contained a

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[6] Ford never sold a 1996 PN96 model. (R. p. 206, lines 8-15). The 1997 PN96 model was sold side-by-side with the previous F-150 Series 1996 model, which was a carryover model denominated as the "Heritage." (R. 206, line 8-p. 207, line 15). The Heritage contained the cable linkage system, (R. p. 207, lines 7-24), while the PN96 model had the rod-linkage system, (R. p. 207, lines 16-19).

rod system supplemented with a "214 intrusion beam," (R. p. 276, line 25-p. 277, line 15), a design tactic intended to protect the rod from foreshortening, (R. p. 149, lines 1-4). The intrusion beam was spot-welded to the door structure at the ends, (R. p. 277, lines 12-20), providing a "robustness in the door . . . and [giving] the door very, very strong strength from front to rear of those two pillars [forming the frame of the door on either side]," (R. p. 364, lines 4-14). The National Highway Traffic Safety Administration ("NHTSA") has recognized that intrusion beams can reduce the risk of a door opening during a collision. (R. p. 279, lines 20-25).

D. Testimony from the Estate's Design Expert

Gilberg was the Estate's only design expert. (R. p. 180, lines 21-25). His theory was that Ford should have used a cable system rather than a rod-linkage system in Riley's truck. Gilberg admitted, however, that the use of a rod, rather than a cable, does *not* render the design defective. (R. p. 275, lines 3-15). Gilberg further admitted that the predominant linkage used by 1990s-era truck manufacturers was the rod system, not the cable system. (R. p. 269, line 23-p. 270, line 1).

Gilberg nonetheless testified that he believed the cable-linkage system would have been a superior alternative design in preventing the door from opening *in this particular crash.* (R. p. 273, lines 13-25). Gilberg based that belief solely on the fact that the door in this crash allegedly opened. Gilberg's ultimate conclusion was "I believe that the door in Riley's truck was defective. I believe it came open without damage to the latch. That shouldn't have happened." (R. p. 181, lines 6-14). He testified that "had [a cable] latch system been in Sheriff Riley's door it wouldn't have come open in this collision." (R. p. 273, lines 13-25).

Gilberg was "unwilling to say," however, that a cable system was a better alternative design than rod-linkage systems in foreseeable crash scenarios in general:

> Q. But you're unwilling to say that the design as a whole is a good design for all reasonably foreseeable crashes?
>
> A. *I am unwilling to say that. That's correct, yea.*

(R. p. 273, lines 13-25) (emphasis added). As with the rod linkage, Gilberg also recognized that cable-actuated systems are not impervious to failure either, as "every engineering component has failure modes." (R. p. 274, lines 7-16).

E. Testimony Regarding Damages

The sole claim that proceeded to trial was a negligence claim brought pursuant to the Wrongful Death statute. The parties stipulated that Riley's life expectancy under S.C. Code Ann. § 19-1-150 (1976) was 19 years. The Estate presented testimony from Dr. Oliver Wood, who conducted a "study on the economic loss to [Riley's] family." (R. p. 309, lines 2-10). Wood opined that the statutory beneficiaries suffered a total pecuniary loss of $226,605.00, which was comprised of lost earning capacity and alleged replacement cost for family services that Riley provided. (R. p. 314, lines 15-17; R. p. 478).

Wood's $169,017.00 estimate of net loss in earning capacity assumed that Riley, who was sixty-seven years old at the time of his death, would have been reelected to another four-year term as Sheriff. (R. p. 311, lines 8-11 (explaining that his future earning calculations were based upon representations by "Mrs. Riley [that] Riley intended to work until approximately December 31, 2012"); p. 313, lines 13-15 (calculating Riley's net loss in earning capacity before trial to be $128,980.00); p. 314, lines 8-13 (estimating Riley's net loss in earning capacity after trial to be $40,037,

assuming that "he had been reelected")). Wood also calculated a total loss of family services of $57,588.00 based upon "Mrs. Riley['s] indicat[ions] that he performed an average of 10 hours a week of these activities before he passed . . . includ[ing] such things as cooking, washing dishes, laundry, vacuum, general household cleaning, grocery shopping, and lawn and yard care," which Wood valued at "eight dollars per hour." (R. p. 311, line 20-p. 312, line 1). All of Riley's children were adults, and two of the five children did not attend trial or testify. (R. p. 318, lines 7-20).

ARGUMENT

I. The Trial Court Erred In Submitting the Case to the Jury and Denying Ford's JNOV Motion Because The Estate Failed, As A Matter Of Law, To Show That Ford's Design Was Defective Or Unreasonably Dangerous When The Estate Presented No Expert Testimony Of Either A Design Flaw Beyond Mere Failure Or An Alternative Feasible Design That Was Crashworthy

A. Standard of Review

This Court reverses a trial court's denial of a directed verdict or JNOV "when there is no evidence to support the ruling or when the ruling is governed by an error of law." *Watson v. Ford Motor Co.,* 389 S.C. 434, 455, 699 S.E.2d 169, 180 (2010) (quoting *Austin v. Stokes–Craven Holding Corp.,* 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010)). "[W]here the only reasonable inference from the evidence is that there has been a failure of proof as to a material element of the plaintiff's cause of action, it becomes the duty of the court to resolve the issue against the party having the burden of proof by directing a verdict." *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 534-35, 462 S.E.2d 321, 323-24 (Ct. App. 1995).

B. Required Elements of a Design Defect Claim

No evidence supports the trial court's denial of Ford's motions for a directed verdict and for JNOV. The Estate failed to offer proof of two essential elements of a design-defect claim: (1) a design defect that made the product unreasonably dangerous; and (2) an alternative design that would have prevented the product from being unreasonably dangerous.

"It is well-established that one cannot draw an inference of a defect from the mere fact a product failed." *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 80, 735 S.E.2d 650, 658 (2012) (citing *Sunvillas Homeowners Ass'n v. Square D Co.*, 301 S.C. 330, 333, 391 S.E.2d 868, 870 (Ct. App. 1990)). "South Carolina does not follow the doctrine of

res ipsa loquitur," and the fact that an accident occurred is not enough to establish a negligence products liability claim. *Watson*, 389 S.C. at 452-53, 699 S.E.2d at 179. "Accordingly, the plaintiff must offer some evidence beyond the product's failure itself to prove that it is unreasonably dangerous." *Graves,* 401 S.C. at 80, 735 S.E.2d at 658-59 (emphasis added). Even if considered a malfunction, "the mere fact that a product malfunctions does not demonstrate the manufacturer's negligence or the product's defectiveness." *Bragg*, 319 S.C. at 543, 462 S.E.2d at 328.

Instead, in a products liability action, the plaintiff must establish three things, regardless of the theory of recovery: (1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user. *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 8-9 (2010). The South Carolina Supreme Court recently reiterated that in a negligent design defect case like this one, "the only way to meet the [required showing that the product was in a defective condition unreasonably dangerous to the user] . . . is by 'point[ing] to a design flaw in the product and show[ing] how his alternative design would have prevented the product from being unreasonably dangerous.'" *Graves,* 401 S.C. at 79, 735 S.E.2d at 658 (quoting *Branham,* 390 S.C. at 225, 701 S.E.2d at 16); *see also* J. Rhoades White, Jr., *Products Liability Law for Design Defects in South Carolina: The Aftermath of Branham v. Ford Motor Co.*, 62 S.C. L. Rev. 781, 790 (Summer 2011)("Under the new rule, a plaintiff in a products liability design defect action must: 1) 'point to a design flaw' in the allegedly defective product; 2) 'present evidence of a reasonable alternative design'; and 3) 'show how his alternative

design would have prevented the [allegedly defective] product from being unreasonably dangerous.'"). [7]

"Academically, it may be argued that all products are defective because they can be made more safe. However, it does not automatically follow that the products are deemed 'unreasonably dangerous.'" *Claytor v. General Motors Corp.*, 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982). As the South Carolina Supreme Court observed more than thirty years ago:

> Most any product can be made more safe. Automobiles would be more safe with disc brakes and steel-belted radial tires than with ordinary brakes and ordinary tires, but this does not mean that an automobile dealer would be held to have sold a defective product merely because the most safe equipment is not installed. By a like token, a bicycle is more safe if equipped with lights and a bell, but the fact that one is not so equipped does not create the inference that the bicycle is defective and unreasonably dangerous. . . . There is, of course, some danger incident to the use of any product.

Marchant v. Mitchell Distributing Co., 270 S.C. 29, 35-36, 240 S.E.2d 511, 513-14 (1977). This principle has the "longstanding approval" of the South Carolina Supreme Court:

> In every design defect case the central recurring fact will be a product that failed causing damage to a person or his property. Consequently, the focus will be whether the product was made safe enough. This inquiry is the core of a risk-utility balancing test in design defect cases, *yet we do not suggest a jury question is created merely because a product can be made safer.*

Branham, 390 S.C. at 224, 701 S.E.2d at 16 (emphasis added).

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[7] Because the Estate's claim against Ford sounds in negligence, it bore the additional burden, above and beyond the three elements required in all products liability cases, "of demonstrating . . . [that Ford] failed to exercise due care in some respect . . . , and liability is determined according to fault." *Bragg,* 319 S.C. at 539-40, 462 S.E.2d at 326. Nevertheless, "[t]he fault-based element is of no moment where, as here, there is no showing in the first instance of a product in a defective condition unreasonably dangerous to the user." *Branham*, 390 S.C. at 210, 701 S.E.2d at 9.

In a crashworthiness case like this one, liability is premised on the theory that Ford "designed and sold a defective product that did not . . . cause the accident, but rather caused an enhanced injury when the car was involved in an accident . . . ." *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 452-53 (4th Cir. 2001)(applying South Carolina law). The South Carolina Supreme Court has imposed a duty on automobile manufacturers to use due care in car design so as not to create an unreasonable risk of enhanced injury to passengers in a collision situation. *Mickle v. Blackmon,* 252 S.C. 202, 242, 166 S.E.2d 173, 191-92 (1969). Nevertheless "[t]his duty is not absolute. No liability will attach unless the negligent design was unreasonably dangerous." *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 154 (4th Cir. 1978)(applying South Carolina crashworthiness law and considering numerous factors including "[t]he intended use of the vehicle, styling, cost to change design, the obviousness of the defect, and the circumstances of the accident itself"). Notably, "[i]n assessing crashworthiness, rather than focus on the allegedly defective part of the automobile, the jury must consider whether the vehicle was unreasonably dangerous *as a whole." Jimenez,* 269 F.3d at 459 (emphasis in original).

In a case like this one where the alleged product defect is "too complex to be within the ken of the ordinary lay juror," that evidence must be in the form of expert testimony. *Graves,* 401 S.C. at 80, 735 S.E.2d at 659. The South Carolina Supreme Court has held that the field of automobile design is, as a matter of law, one of those complex domains where expert testimony explaining the alleged design flaw is required. *Watson,* 389 S.C. at 445, 699 S.E.2d at 175 ("[E]xpert testimony is required where a factual issue must be resolved with scientific, technical, or any other specialized

knowledge."). Thus, when a plaintiff has failed to produce expert testimony beyond the product's failure to prove that a product is unreasonably dangerous, its "claims are subject to dismissal." *Graves*, 401 S.C. at 81, 735 S.E.2d at 659.

C. The Estate Failed to Establish a Design Flaw Beyond Mere Failure of the Latch System

The Estate utterly failed to present expert testimony identifying a design flaw in the door-latch system of the 1998 F-150 truck. Instead, the Estate relied exclusively – and impermissibly – on the fact that the door opened in the accident as evidence of defect. Under South Carolina law, the Estate's lack of expert testimony is fatal to its claim that the system was defective and unreasonably dangerous. *Watson,* 389 S.C. at 445, 699 S.E.2d at 175; *Graves*, 401 S.C. at 81, 735 S.E.2d at 659.

In the final analysis, Gilberg provided only one reason for his conclusion that the PN96 rod-linkage system was defective: The door opened in this accident. Gilberg's testimony is replete with references to the alleged failure of the latch system on the subject truck. When pressed to identify a defect in the PN96 door-latch design, Gilberg opined that it "fails without even stressing the latch," (R. p. 275, lines 7-8), and "came open without damage to the latch. That shouldn't have happened," (R. p. 181, lines 9-11). He repeatedly insisted that a non-defective latch system is simply one that protects the door from opening when subjected to longitudinal crush. (R. p. 251, lines 6-11 ("[T]here are a lot of rod doors out there that don't come open in similar circumstances, but they have various ways of protecting the rods."); p. 284, lines 8-9 ("A rod system could be made safe if it were protected against crush."); p. 276, lines 5-9 ("It is the whole system that makes it unreasonably dangerous. The rod linkage – you could build it with or without the rod linkage. As long as the rod linkage were protected in a longitudinal crash

situation it wouldn't matter, *but in this door it doesn't.*" (emphasis added))). Gilberg's allegations of a design defect are nothing more than a tautological loop; his theory is that because the door opened in this accident, the rod linkage must not have been protected and therefore a flaw must exist in the design.[8]

Although Gilberg made a conclusory statement that the door-latch system of Riley's truck was defectively designed, (R. p. 181, lines 9-11; p. 249, line 10-p. 250, line 6; p. 272, lines 11-12), he failed to specify the facet of Ford's rod-linkage system that was, in his opinion, a design flaw. Indeed, Gilberg was only particularly clear about what was *not* a design defect: he emphasized that the use of a rod rather than a cable is not, in itself, a design flaw. (R. p. 275, lines 3-15; p. 276, line 14 ("[T]here is nothing inherently wrong with rods . . .")) The undisputed evidence showed that rod linkages were the predominant latching systems used in approximately 90% of cars on the road when the subject truck was designed, (R. p. 269, line 9-p. 270, line 1), and Gilberg was not aware of any published data discouraging the auto industry from using rod linkages during the relevant time period, (R. p. 284, lines 3-9).

Gilberg himself therefore admitted that opting for a rod over a cable is not a design flaw, and that 90% of the vehicles at that time were equipped with rods. Gilberg provided no evidence to set Ford's rod-linkage design apart from the 90% of other cars utilizing rods at the time. Gilberg admitted that he knew of no statistical studies showing

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[8] Gilberg's assertion that foreshortening of the rod caused the door to open in this collision is just another version of this same conclusion that the rod-linkage system was defective because a failure occurred. Even assuming that foreshortening occurred in this accident, Gilberg identified no design flaw that caused the alleged foreshortening, other than the decision to use a rod-linkage system which he admitted was not "inherently wrong." (R. p. 276, line 14).

that Ford PN96 doors are more likely to come open in collisions than doors on any other vehicle, (R. p. 283, lines 20-25), and no evidence was presented to show that the PN96 model had an unreasonably higher rate of collision door openings or injuries when compared with other vehicles.

Instead, Gilberg suggested generally that the use of a rod linkage is appropriate so long as it is properly implemented. (R. p. 276, lines 7-16). He did not, however, offer any testimony regarding the manner in which Ford implemented the rod system on the PN96 model, nor did he offer any testimony regarding alternative means to implement a rod system. He noted that the thickness of the intrusion beam in the F-150 may have been changed, (R. p. 297, line 7-p. 301, line 5), but he did not offer any testimony as to how this would change the characteristics of the system or if it even applied to the subject truck.[9] There was no evidence regarding improper implementation of the rod linkage in this design.

That Gilberg relies solely on the alleged failure as evidence of a design flaw is further evidenced by his utter inability to identify a well-implemented rod system. Although he believes that a non-defective "design . . . [should] account for [rods'] weaknesses, and their vulnerabilities," (R. p. 276, lines 1-16), he cannot point to even one American-made car or truck manufactured prior to 1998 that had a well-designed, non-defective door-latch system, despite having examined "hundreds, if not thousands of different model doors," (R. p. 271, line 23-p. 273, line 6). Indeed, Gilberg could not

[9] Nor did Gilberg conduct any testing on the intrusion beam used in the door. Gilberg admitted that he did not test how much compression force it would take to "squish" an intrusion beam, (R. p. 277, line 23-p. 278, line 10), and the foreshortening demonstration he conducted for the jury bypassed the intrusion beam on his modified demonstrative exhibit, (R. p. 294, line 2-p. 296, line 5).

identify any such vehicle worldwide. (R. p. 272, line 21-p. 273, line 2). According to Gilberg, "I wouldn't be able to do that because that's not what I do." (R. p. 272, lines 5-6).

But as the Estate's sole design expert in this case, that is exactly what Gilberg was *required* to do to warrant submission of the design defect claim to the jury. As recently reiterated in *Graves*, proof that the latch design may have failed in this accident is legally insufficient standing alone to establish a design defect claim under South Carolina law.[10] Gilberg's failure to specify the design flaw is fatal to the Estate's design defect claim.

D. The Estate Failed to Present Evidence of an Alternative Design that Would Prevent the Subject Truck from Being Unreasonably Dangerous

Moreover, Ford was due judgment as a matter of law on the Estate's design defect claim for a second, independently sufficient reason: The Estate failed to propose a feasible crashworthy alternative design that "would have prevented the product from being unreasonably dangerous." *Graves*, 401 S.C. at 79, 735 S.E.2d at 658; *Branham,* 390 S.C. at 225, 701 S.E.2d at 16. A cognizable design defect theory under South Carolina law must include a showing that "'omission of the alternative design renders the product not reasonably safe.'" *Branham,* 390 S.C. at 224, 701 S.E.2d at 16 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998)). Gilberg's admission that he could not identify a single well-designed, non-defective door-latch system using a design other than the one in the subject vehicle, (R. p. 271, line 23-p. 273,

[10] When pressed, Gilberg even conceded that the mere fact that a door opens during a crash does not mean that door was defectively designed. (R. p. 293, lines 8-14). Ford's design expert echoed that conclusion, noting that numerous factors could cause the opening of a door during a crash and "certain types of crashes . . . make every door come open." (R. p. 362, line 19-p. 363, line 11).

line 12), entitles Ford to judgment as a matter of law.

Branham clarified the contours of what is required to meet the plaintiff's burden, holding that "the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design." 390 S.C. at 220, 701 S.E.2d at 14. The risk-utility test analyzes whether "the danger associated with the use of the product outweighs the utility of the product." 390 S.C. at 218, 701 S.E.2d at 13 (quoting *Bragg*, 319 S.C. at 543, 462 S.E.2d at 328). Consistent with its prior holdings that the ability to make a product safer does not alone make a product defective or unreasonably dangerous, the South Carolina Supreme Court specified that "numerous factors must be considered [when determining whether a product is unreasonably dangerous], including the usefulness and desirability of the product, the cost for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger." *Branham*, 390 S.C. at 218-19, 701 S.E.2d at 13 (quoting *Claytor*, 277 S.C. at 265, 286 S.E.2d at 132). *Branham* leaves no doubt, however, that evidence of a feasible design alternative is a necessary component of the risk-utility analysis:

> In sum, in a products liability design defect action, the plaintiff *must* present evidence of a reasonable alternative design. The plaintiff will be *required* to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design *must* include consideration of the costs, safety and functionality associated with the alternative design.

390 S.C. at 225, 701 S.E.2d at 16 (emphasis added).

In this case, the crashworthiness doctrine, with its underlying rationale to require design of a product that is reasonably safe for reasonably foreseeable crash scenarios, also bears on the risk-utility analysis. *See* Ralph King Anderson, Jr., ANDERSON'S SOUTH

CAROLINA REQUESTS TO CHARGE - CIVIL, § 32-22 (2009) ("A manufacturer has a duty to exercise ordinary care to design a vehicle that is reasonably safe . . . for its intended and reasonably foreseeable use . . . includ[ing] the potential of a collision. Accordingly, an automobile manufacturer has a duty to design reasonably crashworthy vehicles, so that the effects of accidents are minimized."). Evidence of an alternative feasible design in a crashworthiness case must demonstrate not only prevention of the harm in the particular crash at issue, but also general crashworthiness in other reasonably foreseeable crash scenarios. *See* Anderson, *supra*, § 32-22.[11] To permit a plaintiff to rely on an alternative design that may have prevented the crash at issue yet poses a high risk of harm in other foreseeable crash scenarios would defeat the rationale behind the doctrine. If that were the law, the same design could be defective in one case and non-defective in a different case, creating inconsistency in judicial proceedings and uncertainty for manufacturers.

Nevertheless, that is precisely the theory the Estate advances. While it points to the cable system as a "reasonable alternative design," (R. p. 250, lines 11-14), its only design expert admitted that he does not stand behind the cable system as a reasonable design for *any* foreseeable crash other than the one involving Riley:

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[11] Indeed, that is the perspective adopted by the trial court, as reflected in its jury charges:

> A manufacturer has a duty to exercise ordinary care to design a vehicle that is reasonably safe in the event of an accident . . . therefore, an automobile manufacturer has a duty to design reasonably crashworthy vehicles so that the effects of accidents are minimized.
> ...
> A manufacturer must use reasonable and due care in the adoption of plan or design for its products. It must design a vehicle so that during a collision the vehicle will secure its occupants from harm.

(R. p. 370, lines 1-9; p. 371, lines 2-4).

Q. Alright, sir. We have talked about this 1996 door from Ford with the [cable linkage] door latch system. Do you have an opinion that that door latch system and door is well designed and non-defective?

A. No. No, I don't do that, but I will say that had that latch system been in Sheriff Riley's door it wouldn't have come open in this collision.

Q. In this one collision?

A. Yes.

Q. But you're unwilling to say that the design as a whole is a good design for all reasonably foreseeable crashes?

A. I am unwilling to say that. That's correct, yea.

(R. p. 273, lines 13-25). As noted above, throughout his testimony, Gilberg continued to emphasize his opinion that the cable system would have prevented the door from opening "in this crash." (*E.g.,* R. p. 266, line 25-p. 267, line 3). Gilberg even recognized that cable-actuated systems are not impervious to failure either, as "every engineering component has failure modes." (R. p. 274, lines 7-16).

Instead of addressing the required elements of a design defect claim, the Estate engaged in an abstract comparison of rods versus cables. That Gilberg preferred a cable over a rod is not probative of a design defect under South Carolina law. The salient inquiry is whether there is a specific flaw in a rod system that can be remedied by the use of a different design. Gilberg utterly failed to make that showing. He admitted he has "no beef" with rods, (R. p. 276, lines 10-12), and could not identify even one well-designed, non-defective door-latch system using cables or any other design for that matter, (R. p. 271, line 23-p. 273, line 12).

Gilberg's admission that his analysis of the cable design's crashworthiness was limited to this particular accident, coupled with his refusal to speculate how the alternative design would perform in any other reasonably foreseeable accident, can only yield one result: the Estate presented no evidence of a crashworthy design alternative to the rod-linkage system used in the PN96. Although Gilberg made a conclusory statement that the cable system was "clearly more crashworthy" than the rod-linkage system, (R. p. 205, lines 15-22), he undermined his own conclusion, not only by refusing to bank on the cable system's crashworthiness in any crash other than this one, but also by conceding that a true assessment of "the safest latch system out there" would require a comprehensive comparison in a number of different areas that he did not consider, (R. p. 302, line 15-p. 303, line 3). Gilberg failed to consider the most essential part of a crashworthiness case, namely, how crashworthy the proffered design alternative would be in other reasonably foreseeable crashes.

The factors outlined in *Branham* support the conclusion that the proper risk-utility analysis was not conducted in this case. It is well-settled that the "presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design." *Branham*, 390 S.C. at 225, 701 S.E.2d at 16. "The analysis asks the trier of fact to determine whether the potential increased price of the product (if any), the potential decrease in the functioning (or utility) of the product (if any), *and the potential increase in other safety concerns (if any) associated with the proffered alternative design* are worth the benefits that will inhere in the proposed alternative design." *Branham*, 390 S.C. at 225 n.16, 701 S.E.2d at 16 n.16 (emphasis added)(citing *Claytor*, 277 S.C. at 265, 286 S.E.2d at 132 (recognizing that any product

"can be made more safe" and that "numerous factors must be considered, including the usefulness and desirability of the product [and] the cost involved for added safety")). In other words, there can be no comparison of the risk and utility of a proposed design if there is no evidence regarding the potential risk reduction by the use of that design in other accidents.

This Court has made clear that adequate proof of an alternative design requires a plaintiff's expert to "conduct[] a risk-utility analysis regarding their proposed design alternative" and a risk-utility analysis "weigh[ing] the benefits of [the proposed design] against the costs and potentially adverse consequences." *Holst v. KCI Konecranes Int'l Corp.*, 390 S.C. 29, 37, 699 S.E.2d 715, 719 (Ct. App. 2010). The Estate "cannot establish [that the subject truck] was defective and unreasonably dangerous as a matter of law" because it has "failed to produce evidence of a feasible design alternative or that a risk-utility analysis was conducted." *Holst*, 390 S.C. at 37, 699 S.E.2d at 719-20. Nor has the Estate shown that "'omission of the alternative design renders the product not reasonably safe.'" *Branham,* 390 S.C. at 224, 701 S.E.2d at 16 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998)).

The only reasonable inference that can be drawn from the evidence presented at trial is that the Estate failed, as a matter of law, to show that Ford's design was defective or unreasonably dangerous both because the Estate presented no expert testimony of a design flaw beyond the mere occurrence of the accident and because it failed to prove an alternative feasible design with respect to the door's latching system. Thus, the trial court erred by failing to enter judgment in favor of Ford, and reversal of the ruling denying Ford's motion for JNOV is warranted.

II. The Trial Court Erroneously Invaded the Province of the Jury By Granting the Estate's Motion for New Trial *Nisi Additur* and Arbitrarily Tripling the Jury's Damages Award

The trial court further erred by granting the Estate's motion for a new trial *nisi additur* and then arbitrarily *tripling* the jury's damages award. The order granting a new trial *nisi additur* amounts to an error of law for multiple reasons: (1) it fails to enumerate compelling reasons for the decision; (2) it relies on evidence that was not relevant to the recoverable damages; and (3) it fails to afford substantial deference to the jury's determination of intangible damages and instead substitutes the trial court's personal calculation. Any one of these errors of law standing alone is sufficient to warrant reversal and reinstatement of the jury's verdict.

A. Standards of Review for New Trial *Nisi Additur*

A new trial *nisi additur* is not a vehicle for simply increasing a plaintiff's recovery via judicial fiat. A trial judge may grant a new trial *nisi additur* only if the jury's damages award was so "grossly . . . inadequate" that "it must be deemed the result of the jury's disregard of the facts and the court's instructions." *Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 18-19, 419 S.E.2d 795, 798-99 (Ct. App. 1992). A trial court must afford substantial deference to the jury's determination of damages, and the trial judge must give "compelling reasons" for invading the jury's province. *Bailey v. Peacock,* 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995); *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton,* 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993); *Green v. Fritz,* 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003); *Waring v. Johnson,* 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). "[T]he trial court may not impose its will on a party by substituting its judgment for that of the jury." *Krepps v. Ausen*, 324 S.C. 597,

608, 479 S.E.2d 290, 295 (Ct. App. 1996).

A court granting a new trial *nisi additur* cannot replace the jury's interpretation of the evidence with its own, particularly when the jury could have discredited the testimony. *See Pelican*, 311 S.C. at 61, 427 S.E.2d at 676 (reversing the trial judge's grant of a new trial *nisi additur* because, although the trial judge properly charged the jury members that they could believe as much or as little of each witness' testimony they deemed proper, the grant of additur ignored the possibility that the jury could have disbelieved testimony which would account for the jury verdict).

This Court reviews a trial court's grant of a new trial *nisi additur* for an abuse of discretion amounting to an error of law. *Bailey*, 318 S.C. at 14, 455 S.E.2d at 691; *Pelican*, 311 S.C. at 61, 427 S.E.2d at 676; *Green*, 356 S.C. at 570, 590 S.E.2d at 41; *Waring*, 341 S.C. at 257, 533 S.E.2d at 911. The Court reverses an additur order when either compelling reasons are not given or "inapplicable grounds are given." *Green*, 356 S.C. at 570, 590 S.E.2d at 41 (citing *Bailey*, 318 S.C. at 14-15, 455 S.E.2d at 692)).

B. The Jury's Damages Award Was Not Grossly Inadequate, and the Trial Court Failed to Give Compelling Reasons for Tripling the Award

The trial court here failed to afford substantial deference to the jury's determination of damages and failed to give "compelling reasons" for its decision to triple the jury's damages award. Despite having correctly charged the jury with the "duty as judges to evaluate the evidence and determine which evidence convinces you of its truth," (R. p. 369, lines 11-15), and the responsibility for determining "[w]hat is reasonable compensation for monetary damages . . . [in] your sound discretion, and your judgment," (R. p. 373, lines 11-13), the trial court injudiciously substituted its own

assessment of the damages for the jury's discretion.

The trial court's order does not demonstrate "compelling reasons" showing that the jury's damages award was "grossly" inadequate and "resulted from the jury's disregard of the facts and the court's instructions." Indeed, the trial court believed that mere recitation of the damages testimony, which it deemed to be "emotionally compelling," satisfied the requirement. (R. pp. 8-9). On this matter, the South Carolina Supreme Court is clear: the mere listing of the plaintiff's claimed damages by the trial judge does not constitute a compelling reason for invading the jury's province when damages are debatable. *Green*, 356 S.C. at 571, 590 S.E.2d at 41.

Nor were the claimed damages necessarily the actual damages awarded in this case, despite speculation by the trial court about how the jury arrived at its total verdict of $300,000.00. It is clear that the trial court presumed that the jury awarded $226,605.00 in pecuniary damages – the exact amount advocated by the Estate's expert which the trial court characterized as "undisputed, uncontroverted." (R. pp. 7-8).[12] In reality, *no one* knows how much the verdict awarded for pecuniary loss because the general verdict form asked only for the jury's total actual damage award without division into separate amounts of economic and non-economic damages. (R. p. 378). The court's analysis thus consisted of: (1) guessing how the jury might have calculated damages;[13] and (2)

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[12] The trial court apparently adopted the Estate's contention that "[w]ith $226,605.00 of a $300,000 verdict being uncontested economic damages, the jury at best only awarded $74,000.00 in non-economic damages." (R. p. 74).

[13] Here the jury had options – it could have configured the ratio between economic and non-economic damages in any number of ways (particularly given that $73,395.00 is an unusual number for noneconomic damages if the jury intended to award the full pecuniary damages sought). For example, there is simply no way to divine whether the jury was persuaded that reelection was sufficiently certain to include the additional post-

evaluating whether that hypothetical award was sufficient in this case. Such rank speculation is not a compelling reason to invade the jury's province.

That is especially true in a wrongful death case like this one. Most of the elements of wrongful death damages are decidedly intangible in nature. *See* 11 S.C. Jur. Damages §24; *Mishoe v. Atlantic Coast Line R. Co.*, 186 S.C. 402, 416, 197 S.E. 97, 104-05 (1973); *Garner v. Houck*, 312 S.C. 481, 487-88, 435 S.E.2d 847, 850 (1993). "There is no yardstick" by which suffering, wounded feelings, grief, loss, and other intangible elements can be measured in dollars and cents – those elements "must be estimated by the jury in the exercise of their sound judgment under all the facts and circumstances." *Kapuschinsky v. U.S.*, 259 F. Supp. 1, 6 (D.S.C. 1966); *Lucht v. Youngblood*, 266 S.C. 127, 137, 221 S.E.2d 854, 859 (1976).

That is precisely how the jury was charged in this case: with the responsibility to determine "actual damages [which] would be the actual losses and expenses which the plaintiff has suffered because of the defendant's negligence," (R. p. 372, lines 4-16); with the right to believe or disbelieve witness testimony, (R. p. 369, lines 9-25); and with the discretion to set "[w]hat is reasonable compensation for monetary damages . . . [by] consider[ing] a number of things in determining the amount of monetary damages," (R. p. 373, lines 11-17). It is undisputed both that the verdict exceeded the amount of pecuniary damages the Estate presented and that the jury awarded at least $73,795.00 for intangible losses. *See Hyload, Inc. v. Pre-Engineered Products, Inc.*, 308 S.C. 277, 281, 417 S.E.2d 622, 625 (Ct. App. 1992) (upholding the denial of a motion for new trial *nisi remittitur* because "the damages awarded were within the range of the evidence, therefor,

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election earnings in its calculation.

we cannot hold the verdict was excessive as a matter of law"). However, instead of deferring to the value the jury assigned to these intangible losses incapable of numeric measurement,[14] the trial court substituted its own amount that was at least $600,000.00 more than the jury's.

C. The Trial Court's Reliance on Inapplicable Grounds to Increase the Jury's Verdict Constitutes an Error of Law

Just as the failure to enumerate compelling reasons warrants reversal, so does a trial court's reliance on "inapplicable grounds . . . for granting additur." *Green*, 356 S.C. at 570, 590 S.E.2d at 41. The trial court's order cites to not one – but two – inapplicable grounds in its additur decision: (1) testimony regarding the loss sustained by non-statutory beneficiaries; and (2) the jury's punitive damage verdict finding "willful, wanton, or reckless conduct" but awarding "zero" damages. (R. pp. 3-4, 6).

First, the trial court's order is replete with references to the losses sustained by Riley's community, church, peers, colleagues, and even his fellow citizens, none of which are recoverable as damages under the South Carolina Wrongful Death statute. This Court has made clear that a wrongful death claim "is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as a result of the death." *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 114, 498 S.E.2d 395, 407 (Ct. App. 1998); *Self v. Goodrich*, 300 S.C. 349, 351 387 S.E.2d 713, 714 (Ct. App.1993). *See also Zorn v. Crawford*, 252 S.C. 127, 136-37, 165 S.E.2d 640, 645 (1969).

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[14] There can be no doubt that the jury was attentive when evaluating the matter of damages – the only question submitted by the jury during its deliberations was a question about whether the figure should be expressed as a lump sum or annual allotment. (R. p. 1530).

Nevertheless, the trial court in this case devoted a significant portion of its additur order to the recitation of evidence of that very type – testimony regarding the value of Riley's life to non-beneficiaries:

> "The evidence at trial showed that Benjamin Riley was . . . a central figure not only in the lives of his family, but also . . . within his church and community." (R. p. 8-9);
>
> "[The Estate] presented numerous witnesses who were peers, colleagues, and fellow citizens . . . . These witnesses established Riley's role as a husband father and community leader, dedicated law enforcement official, and general pillar of his community." (R. p. 9);
>
> "While presiding over this two week trial, it became readily apparent that Riley was a pivotal member of both the Ridgeland community as well as his family. He was not merely a member of his community, but rather he was an integral part of the community." (R. p. 9).

Not insignificantly, the recitation of the inapplicable evidence above immediately preceded the trial court's statement that "[f]or all of the compelling reasons listed above, it is abundantly clear that the verdict in this case was inadequate . . . ." (R. p. 9). There can be no other reasonable conclusion but that the trial court considered that inapplicable testimony to be a "compelling reason" (if not *the* compelling reason) for its decision.

Second, the trial court's order impermissibly cites to the jury's finding that "Ford's conduct rose to the level of willful, wanton, and reckless conduct," noting that the jury "nonetheless awarded Zero ($0.00) Dollars in punitive damages." (R. p. 6). While the trial court's order did not expressly rely on the punitive damage verdict in its additur analysis, it is clear that the Estate tried to use this finding to its benefit by arguing that "the jury found conduct warranting [an award of punitive damages]," which "should be significant in the consideration of a new trial additur." (R. p. 73).

The jury's finding of willful, wanton, or reckless conduct as a precursor to a

punitive damages award is completely inapplicable to the analysis of whether the jury's *actual damages* award was adequate. Any attempt by the trial court to compensate for the jury's lack of a punitive damage award by adding to the actual damages award would offend numerous constitutional safeguards, warranting reversal.

For either – or both – of these reasons, reversal is warranted because the trial court's additur order cited inapplicable grounds for its decision.

D. Permitting the Jury to Evaluate Credibility of the Damages Evidence Does Not Mean that Damages Were Undisputed

Finally, the trial court erred by basing its additur decision in part on its conclusion that the damages were "undisputed." The jury was permitted to exercise its discretion to discredit portions of the damages testimony that it determined were overstated or inaccurate. While Ford did not attack the alleged damages, the jury very well could have doubted Wood's estimate of pecuniary loss.

Wood made several assumptions that the jury could have reasonably chosen to reject, including that:

(1) Riley, who was sixty-seven years old at the time of his death, would not only run for reelection instead of retiring but *would actually be reelected*, (R. p. 311, lines 8-11 (explaining that his future earning calculations were based upon representations by "Mrs. Riley [that] Riley intended to work until approximately December 31, 2012"); p. 314, lines 9-10 (stating that in computing estimates he presumed "Riley had been reelected")); and

(2) the family suffered a loss of over $57,000 in family services despite any evidence that the family had ever hired someone to perform those tasks, (R. p. 311, line 20-p. 312, line 1 (explaining that his family services calculations were premised on "Mrs. Riley['s] indicat[ions] that he performed an average of 10 hours a week of these activities before he passed . . . includ[ing] such things as cooking, washing dishes, laundry, vacuum, general household cleaning, grocery shopping, and lawn and yard care" which Wood valued at "eight dollars per hour" to replace); p. 313,

> lines 16-21 (estimating the total before-trial loss to replace family services was $16,070); p. 314, lines 5-7 (calculating the post-trial "[d]iscounted present value of the chores that he would have done and replacing the[m] - $41,518")).

Furthermore, the jury's valuation could also have considered that all of Riley's children were adults, (R. p. 318, lines 7-20), who may not have relied exclusively on him for financial support. Indeed, two of the five children did not attend trial or testify about their loss, if any, (R. p. 318, lines 17-20), and thus the jury was free to assume that these beneficiaries suffered minimal or no loss.

Against that backdrop of variable damages, it was entirely inappropriate for the trial court to additur the verdict on the basis that damages were "undisputed." (R. p. 6 (concluding that in the absence of direct dispute of the evidence, Ford "did not contest damages"); p. 7 (finding that the Estate "presented undisputed, uncontroverted evidence of pecuniary loss in the amount of $226,605.00"); p. 8 ("On the issue of damages, there was no dispute . . . . The intangible elements of wrongful death . . . were . . . shown to be significant through uncontested, emotionally compelling testimony")). The South Carolina Supreme Court has made clear, "[t]he fact that evidence is not contradicted by direct evidence does not render it undisputed, as there still remains the question of its inherent probability and the credibility of the witness or his interest in the result." *Terwilliger v. Marion*, 222 S.C. 185, 188, 72 S.E.2d 165, 166 (1952). "'If there is anything tending to create distrust in his [or her] untruthfulness, the question must be left to the jury.'" *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) (quoting *Terwilliger,* 222 S.C. at 188, 72 S.E.2d at 166). There was no stipulation of damages in this case, and the jury was free to award all of the claimed damages or only a portion thereof.

Additur is not appropriate in a case like this when the jury awarded damages that were both intangible and debatable. In *Steele v. Dillard*, 327 S.C. 340, 486 S.E.2d 278 (Ct. App. 1997), this Court affirmed the denial of a plaintiff's motion for new trial *nisi additur*, reiterating the jury's right to disbelieve even uncontradicted evidence when evaluating damages to award:

> We disagree with Steele's final contention that the trial court erred in denying his post-trial motions. Steele moved for a judgment notwithstanding the verdict, new trial *nisi additur* or a new trial absolute on the grounds that the jury's verdict was grossly inadequate.
>
> Although the evidence indicates the jury could have awarded a verdict larger than $6,662.88, there is evidence in the record, as mentioned above, that supports the amount that the jury did award, irrespective of the manner in which it may have calculated its award.

Steele, 327 S.C. at 345, 486 S.E.2d at 281.

The amount of damages to which the Estate was entitled – whether tangible or intangible – was a question of fact for the jury, and the jury was free to weigh the evidence and reach its own conclusion on that issue. As this Court has observed when examining the propriety of additur: "the trial court may not impose its will on a party by substituting its judgment for that of the jury." *Krepps*, 324 S.C. at 608, 479 S.E.2d at 295.[15] Otherwise, the result would be a *de facto* bench trial, and the purpose for having a

[15] The trial court's reliance on its own assessment of the evidence effectively, and inappropriately, adopts the "thirteenth juror" stance. Although the South Carolina Supreme Court has reaffirmed the trial court's "thirteenth juror" prerogative to grant a new trial absolute upon a finding that the balance of the evidence does not justify the verdict, *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990), the Court has specifically prohibited the use of that standard in the context of a new trial *nisi additur*, *Bailey*, 318 S.C. at 15, 455 S.E.2d at 692 (requiring a finding that the verdict was inadequate for additur). A proper additur inquiry focuses on whether the verdict was merely insufficient given the evidence and does not involve a complete substitution of the court's interpretation of the evidence. Although not expressly premised on the thirteenth juror doctrine, the trial court's additur analysis in this case is certainly reminiscent of it.

jury in the first instance would be lost.

That is precisely what occurred in this case. After outlining the testimony at trial regarding "the intangible elements of wrongful death," the trial court credited that testimony as "significant," "emotionally compelling," and indicative that "this family . . . suffered great loss." (R. p. 8). In so doing, the trial court weighed the evidence in the same manner prohibited in *Pelican* – it "ignored the possibility that the jury could have disbelieved testimony which would account for the jury verdict" and substituted its own evaluation of the evidence. *Pelican*, 311 S.C. at 61, 427 S.E.2d at 676. A trial judge is not permitted to usurp the jury's duty and power to determine the facts based on the evidence, and the grant of additur in this case was an error of law that amounts to an abuse of discretion.

For all of these reasons, if the Court does not grant judgment to Ford as a matter of law, Ford respectfully requests that the Court reverse the trial court's grant of a new trial *nisi additur* as an abuse of discretion and reinstate the jury's original verdict of $300,000.00.

III. The Trial Court Erred By Denying Ford's Request For An Offset From The Jury's Verdict in the Full Amount of the Estate's Settlement With a Co-Defendant

Regardless of whether this Court ultimately decides to reinstate the jury's original verdict or affirm the trial court's grant of a new trial *nisi additur*, Ford is entitled to a set off of $25,000.00 from the final verdict amount, and the trial court erred in denying Ford's motion. (R. p. 5).

"The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties."

Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 219, 528 S.E.2d 682, 688 (Ct. App. 2000). It is well-established that a non-settling defendant is entitled to credit for the amount paid by another defendant who settles. *Hawkins*, 330 S.C. at 92, 498 S.E.2d at 395; *Powers v. Temple*, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967); *Vaughn v. City of Anderson*, 300 S.C. 55, 61, 386 S.E.2d 297, 301 (Ct. App. 1989). As the South Carolina Supreme Court has explained, "the reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong." *Smalls*, 339 S.C. at 219-20, 528 S.E.2d at 688. South Carolina Code § 15-38-15(E) also codifies a defendant's right to set off. *See* S.C. Code Ann. § 15-38-15(E) (Supp. 2005) ("[S]et off from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant's percentage of liability.").

It is undisputed that the Estate received $25,000.00 upon settlement of its claims, split between the survival claim ($20,000.00) and the wrongful death claim ($5,000.00). Because the Estate withdrew its survival claim against Ford during trial due to an undisputed lack of evidence, (R. p. 342, line 23-p. 343, line 2), Ford is entitled to a set off on the wrongful death claim for the full $25,000.00 received from Carter's liability insurance.

That the Estate's settlement with Carter was apportioned between the two claims does not reduce or inhibit Ford's entitlement to a set off. Where a settlement with one defendant is allocated between survival and wrongful death claims, South Carolina law permits the trial court, post-verdict, to reallocate that settlement for purposes of set off.

See, e.g., Welch v. Epstein, 342 S.C. 279, 312-14, 536 S.E.2d 408, 425-26 (Ct. App. 2000) (affirming reallocation of settlement proceeds between survival and wrongful death claims because "the allocation between the survival and wrongful death claims must yield to fairness and justice"). The reasoning employed by this Court in *Welch* applies with equal force to the circumstances of this case, which are indistinguishable. *See also Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 209-10, 662 S.E.2d 444, 451 (Ct. App. 2008) (upholding application of a set off even though the plaintiff asserted different causes of action against the defendants, because the term injury "is broad enough to include all damages").

Because Ford was entitled to a full set off from the jury's verdict in the amount of the Estate's $25,000 settlement with Carter, reversal of the trial court's denial of Ford's motion for set off is warranted.

CONCLUSION

Ford's design of its F-150 truck was not to blame for this accident. The only reasonable inference to be drawn from the evidence is that Ford's latch system was not defective or unreasonably dangerous because the Estate presented no expert testimony of a specific design flaw or a non-defective alternative design. The Court should reverse the trial court's denial of Ford's motions for judgment as a matter of law.

Alternatively, the Court should vacate the trial court's additur and grant Ford a set off from the damages award.

April 18, 2013 By: _____

Curtis L. Ott
Laura W. Jordan
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, South Carolina 29202
Tel: 803.779.1833
Fax: 803.779.1767

J. Kenneth Carter, Jr.
David C. Marshall
Carmelo B. Sammataro
TURNER, PADGET, GRAHAM & LANEY, P.A.
1901 Main Street, 17th Floor
Columbia, SC 29201
Tel: 803.254.2200
Fax: 803.799.3957

ATTORNEYS FOR APPELLANT

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In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court Of Common Pleas

The Honorable Doyet A. Early III, Circuit Court Judge

Case No: 2008-CP-05-235

Laura Riley as the Personal Representative
of the Estate of Benjamin Riley ..... Respondent,

v.

Ford Motor Company ..... Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Appellant's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Curtis L. Ott
Laura W. Jordan
GALLIVAN WHITE & BOYD, P.A.
P.O. Box 7368
Columbia, South Carolina 29202
Tel: 803-779-1833
Fax: 803-779-1767

J. Kenneth Carter, Jr.
David C. Marshall
Carmelo B. Sammataro
TURNER PADGET GRAHAM & LANEY, P.A.
1901 Main Street, 17th Floor
Columbia, South Carolina 29201
Tel: 803-254-2200
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PROOF OF SERVICE

I, Sandy Moore, the undersigned employee of Gallivan, White & Boyd, P.A., attorneys for the Appellant, do hereby certify that I have served a copy of the foregoing **Appellant's Final Brief**, in connection with the above-referenced case by mailing a copy of the same on April 18, 2013, by United States Mail, postage prepaid, to the following address:

Ronnie L. Crosby
Daniel E. Henderson
Matthew V. Creech
Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
P.O. Box 2500
Ridgeland, SC 29936

Sandy Moore

Columbia, South Carolina