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.

APPELLANT'S FINAL REPLY BRIEF

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Despite having used every one of its allotted fifty pages, the Estate has yet to identify: (1) expert testimony of a specific design flaw and a crashworthy alternative design; (2) any compelling reason articulated by the trial court for rejecting the jury's assessment of non-economic damages and substituting its own; or (3) any justification for the trial court's complete denial of a settlement offset. Instead, like a ship passing in the night, the Estate's brief primarily focuses on matters not raised by Ford on appeal. Without unnecessarily restating the arguments in Ford's initial brief, Ford reexamines the salient issues that require reversal of the trial court's decisions.

I. THE ESTATE'S INABILITY TO PRODUCE EXPERT TESTIMONY OF A SPECIFIC DESIGN FLAW AND A CRASHWORTHY ALTERNATIVE DESIGN WARRANTS JUDGMENT AS A MATTER OF LAW FOR FORD ON THE ESTATE'S DESIGN DEFECT CLAIM.

A design defect claim in a complex case regarding vehicle crashworthiness cannot succeed without: (1) expert testimony pointing to a particular design flaw; and (2) an alternative design that would have prevented the product from being unreasonably dangerous. *See Graves v. CAS Medical Sys., Inc.*, 401 S.C. 63, 79, 735 S.E.2d 650, 658 (2012); *Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010). The Estate's arguments on appeal establish neither.

A. The Estate Still Cannot Identify A Design Flaw In The Latch System.

The "Evidence of Design Defect" section of the Estate's brief epitomizes the circular logic that the Estate has employed throughout this case:

> Mr. Gilberg . . . opined that the latch on the driver's door . . . had been activated due to foreshortening . . . . [which] caused the door to unlatch . . . . This was due to a design defect . . . . of the particular door and rod latch mechanism that would allow the door to unlatch in the foreseeable crash due to a "very small amount of longitudinal crush—end wise crush . . . ," such design disadvantage and risk which had been known to Ford for

> years before the subject truck was manufactured . . . . This design defect rendered the subject vehicle defective and unreasonably dangerous.

(Respondent Initial Brief, 13-14). Not once does the Estate actually name the specific defect which allegedly caused foreshortening and latch activation. Instead, the Estate perpetuates the legally insufficient argument that product failure and/or knowledge of foreshortening evidences a design defect.

The Estate cannot articulate a design flaw because its expert did not identify one. Gilberg never designated a particular flaw in the material, placement, size, or any other feature of the latch that allegedly caused activation, nor did he believe that the use of a rod linkage was, in itself, a design flaw. (R. p. 276, line 14 ("[T]here is nothing inherently wrong with rods . . . .")). Gilberg's result-oriented explanation that a "small amount of longitudinal crush endwise in the door caused it to come open . . . ," (R. p. 250, line 22-p. 251, line 5), is merely product failure by another name. As in *Graves*, the absence of expert testimony identifying a "specific design flaw" is fatal to the Estate's claim and warrants judgment in Ford's favor.

The Estate attempts to fill this void of expert testimony by recounting virtually every piece of circumstantial evidence that it presented at trial, which it believes to be "ample evidence" that Ford's design was unreasonably dangerous. (Respondent Initial Brief, 15-26). This barrage of evidence is unrelated to the threshold inquiry of whether a design flaw exists in the first instance, which is the issue that Ford raises on appeal. Moreover, the Estate's "all but the kitchen sink" approach has already been rejected by the South Carolina Supreme Court in *Graves*. No amount of circumstantial evidence can substitute for expert testimony of a specific design flaw in a case like this beyond the ordinary ken of the jury. *Graves v. CAS Medical Sys., Inc.*, 401 S.C. at 80, 735 S.E.2d at

658 ("In this case, however, we need not determine what quantum of circumstantial evidence of a design defect is necessary to withstand summary judgment because the lack of expert testimony [establishing a defect beyond the product's failure] is nevertheless dispositive of the Graves' claim."); *see also Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010)(holding that complexities in the field of automobile design require expert testimony explaining the alleged design flaw). No matter how strong the Estate believes its evidence of Ford's "own design criteria, testing standards, and internal documentation" to be, it simply is not enough under *Graves*.[1]

B. The Estate's Own Expert Undermines The Existence Of A Crashworthy Alternative Design.

Ford is due judgment as a matter of law for a second, independently sufficient reason: Gilberg could not identify a single well-designed, non-defective, door-latch system using a design other than the one in Riley's vehicle. (R. p. 271, line 23-p. 273, line 12). Even Gilberg admitted that he could only support the use of a cable system to prevent this one collision. (R. p. 273, lines 13-25).

Rather than directly address Gilberg's refusal to endorse the cable system as a reasonable design for any other foreseeable crash scenario, (R. p. 273, lines 13-25), the Estate argues without any supporting citation that an alternative design need not be "impervious to failure," (Respondent Initial Brief, 19). Pursuant to the Estate's logic,

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[1] Despite Gilberg's admission that opting for a rod over a cable is not a design flaw and his acknowledgment that 90% of vehicles at that time were equipped with rods, (R. p. 269, line 9-p. 270, line 1; p. 275, lines 3-15), the Estate devotes several pages of argument to its contention that Ford had "fundamental knowledge of foreshortening within the automotive industry," (Respondent Brief, 23-26). As outlined above, evidence regarding Ford's purported knowledge is of no moment given the absence of an identified design flaw about which Ford could be knowledgeable.

each and every instance of a door latch failure would require Ford to implement a new system designed to prevent only that failure, without any regard for how that new design would perform in other crash scenarios. If that were the case, Ford would be left with no meaningful criteria to select a design that is truly "crashworthy," because the definition of what constitutes a "reasonable" latch design would be different for each crash scenario. While it may be true that no design is fail-proof, neither is a "reasonable alternative design" one that prevents failure in only one crash scenario.[2]

II. THE ADDITUR DECISION WAS AN ABUSE OF DISCRETION.

Just as the Estate cannot correct deficiencies in Gilberg's testimony with its arguments on appeal, neither can it manufacture compelling reasons for additur when the trial court provided none. Ford's initial brief presented three main reasons why the trial court's new trial *nisi additur* decision was improper: (1) it failed to provide compelling reasons; (2) it relied on irrelevant evidence; and (3) it usurped the jury's province to evaluate non-economic damages. The Estate attempts an end run around those reversible errors by suggesting that unless a defendant puts forth affirmative evidence "hotly" contesting a plaintiff's claimed damages, additur is warranted. (Respondent Initial Brief, 39-43).

The Estate's reliance on *Luchok, Green,* and *O'Neal* for this proposition is misplaced. Those decisions collectively confirm the impropriety of additur when damages are fervidly contested at trial; not one of those decisions, however, *authorizes*

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[2] The Estate also suggests that Ford's decision to later change the latch design to a cable linkage somehow proves that the rod linkage was defective. (Respondent Brief, 24-25). Numerous factors influence the decision to alter a design, and a change does not signal that one design is safer or even more desirable than the other. If that were the case, every design change would render the previous generation defective and unreasonably dangerous.

additur simply because a defendant permitted the jury to evaluate damages without presenting evidence of its own. Such a leap in logic erodes the jury's province to disbelieve even uncontradicted evidence when evaluating damages, *see Steele v. Dillard*, 327 S.C. 340, 345, 486 S.E.2d 278, 281 (Ct. App. 1997), and grossly overstates the significance of "contested damages" to the additur analysis.

Undergirding each of the *Luchok, Green*, and *O'Neal* decisions is a reluctance to permit additur if the jury "could have determined" the amount of damages in more than one way. *See, e.g., O'Neal v. Bowles,* 314 S.C. 525, 527, 431 S.E.2d 555, 557 (1993). That is exactly the case when the damages sought are intangible and incapable of precise calculation. *See, e.g., Kalchthaler v. Workman*, 316 S.C. 499, 504, 450 S.E.2d 621, 623 (Ct. App. 1994)("We particularly note her claim for pain and suffering was one that peculiarly fell within the province of the jury to weigh and determine."). The Estate's brief avoids any discussion of this critical distinction between pecuniary loss, such as the medical expenses sought in *Luchok, Green*, and *O'Neal*, and the non-economic wrongful death damages in this case. It would be inappropriate to characterize evidence regarding grief, sorrow, and wounded feelings as "disputed" or "undisputed" because there is no amount to dispute until after the jury assigns a value thereto. Requiring intangible damages to meet the "hotly contested" benchmark is like trying to fit a square peg in a round hole.

It is not surprising that the Estate never identified a compelling reason for the trial court's decision – the trial court failed to provide one. The Estate's brief reads much like the trial court's emotional rendition of the evidence in its additur decision, (Respondent Initial Brief, 30-36), confirming that the trial judge substituted his own beliefs about the

value of the case in place of the jury's assessment. The trial court's determination that the grief, sorrow, and wounded feelings of the statutory beneficiaries were worth far more than what the jury assessed presents the very scenario that the "compelling reasons" requirement aims to prevent. Emotion is not a compelling reason, and a trial court may not substitute its judgment for that of the jury.

Even assuming, *arguendo*, that the trial judge properly replaced the jury's evaluation with his own, reversal nevertheless is warranted because the trial court relied on losses suffered by non-statutory beneficiaries that have no relevance to the additur analysis. The Estate's contention that the extraneous evidence served only to explain "who Ben Riley was," (Respondent Initial Brief, 44), blurs a line that this Court already has clearly defined – 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).

Excluding inapplicable grounds from the additur analysis safeguards the jury verdict from a *de facto* bench trial of irrelevant facts. Contrary to the Estate's assertions, there is no such thing as a trial judge's "harmless" reliance on inapplicable grounds when replacing the jury's verdict with his own. (Respondent Initial Brief, 46 (citing to a non-additur case)). In the additur context, the inclusion of irrelevant grounds warrants reversal even if the trial judge provided compelling reasons for the decision:

> A trial judge may grant a new trial *nisi additur* when a jury's verdict is inadequate. However, to grant such relief, the trial judge must state compelling reasons for invading the province of the jury. Similarly, if inapplicable grounds are given for granting additur, the order fails by error of law.

Green v. Fritz, 356 S.C. 566, 570-71, 590 S.E.2d 39, 41 (Ct. App. 2003)(internal citations omitted). Here, the trial court either failed to provide compelling reasons altogether or it provided inapplicable reasons; either way, the grant of additur must be reversed.

III. THE RECENT CASE OF *RUTLAND V. SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION* SUPPORTS OFFSET OF THE VERDICT BY THE FULL SETTLEMENT AMOUNT.

After acknowledging that the trial court erred because Ford was entitled to a $5,000.00 offset for the wrongful death settlement,[3] the Estate claims that Ford was not entitled to reallocation of the $20,000.00 survival claim settlement because Riley could have suffered conscious pain and suffering. (Respondent Initial Brief, 46-47). Despite having had the opportunity and incentive to present evidence supporting its survival claim at trial, the Estate's "evidence" of conscious pain and suffering consists only of: (1) speculation that swerving to avoid a collision indicates a "conscious realization" of impending death, (Respondent Initial Brief, 47-48); and (2) testimony from an eyewitness ten feet away from Riley's body who heard a "gasping" noise that admittedly could not have come from Riley because he was not breathing, (Respondent Initial Brief, 48; R. p. 112, lines 11-22; R. Appx. p. 1531, lines 11-22).

The South Carolina Supreme Court's November 7, 2012 decision in *Rutland v. South Carolina Department of Transportation*, 400 S.C. 209, 734 S.E.2d 142 (2012), reaffirms that settlement of a survival claim for which no evidence exists should be

[3] The Estate's admission on appeal that Ford is entitled to a $5,000.00 setoff is a distinct departure from its argument to the trial court that Ford was "clearly not entitled to any kind of setoff." (R. Appx. p. 1533, lines 9-13). This is not the first time that the Estate has changed course on this issue. At the hearing before the trial court, the Estate initially conceded that Ford was entitled to a partial setoff, (R. Appx. p. 1532, lines 18-21), but later decided to "take issue that [Ford was] entitled even . . . to the $5,000 . . . ," (R. Appx. p. 1534, lines 6-12). The trial court apparently accepted the latter position over the former, as it denied Ford's request for a setoff altogether. (R. p. 5).

reallocated and offset from the verdict on a wrongful death claim. In *Rutland*, the Court assessed the viability of a hypothetical survival claim and found that no evidence would have supported such a claim if it had been asserted because "the accident ... occurred quickly and the evidence suggests [that the decedent] died instantaneously." *Rutland*, 400 S.C. at 215; 734 S.E.2d at 145. As the Court observed, "even assuming [the decedent] had a pulse, that fact alone is not evidence of conscious pain and suffering." *Id.* Without any evidence of conscious pain and suffering, the settlement proceeds were all allocated to wrongful death and offset from the jury's verdict. *Id.*

This case presents an even stronger scenario for reallocation than *Rutland.* In *Rutland*, the plaintiff never had the opportunity to present evidence directed toward conscious pain and suffering because a survival claim was never filed. *Rutland*, 400 S.C. at 212-13; 734 S.E.2d at 143. Here, the Estate had every opportunity to set forth its best evidence of conscious pain and suffering because the survival claim *was presented* to the jury before it was withdrawn. (R. p. 342, line 23-p. 343, line 2). Even still, the Estate offers only conjecture and unconstructive testimony – insufficient evidence to support allocation of $20,000.00 in settlement proceeds to a survival claim. Accordingly, Ford is entitled to a setoff of the full $25,000.00 that the Estate received from liability insurance.

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 an offset from the damages award.

April 18, 2013 By: 

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CERTIFICATE OF COMPLIANCE

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

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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 Reply 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:

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