IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

Honorable George C. James, Jr., Circuit Court Judge, Presiding

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Case No.: 2006-CP-38-0486

Clarence Rutland, as Personal Representative
Of the Estate of Tiffanie Rutland,……Appellant/Petitioner

v.

South Carolina Department of Transportation,……...……..Respondent.

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the decision of the trial court that the Appellant/Petitioner presented no evidence of conscious pain and suffering to support a survival action?

2. Did the Court of Appeals err in holding that South Carolina does not recognize pre-impact fear, whether as an element of a survival action or as a cause of action?

3. Should this Court adopt pre-impact fright as an element or component of damages in a survival action, where no evidence of such damages was presented in this case, and so a decision on that issue will not affect the outcome of the case for these parties?

4. Did the Court of Appeals err in affirming the trial court's reallocation of pretrial settlement proceeds to offset the wrongful death verdict?

STATEMENT OF THE CASE

A. Procedural History of the Case

This matter arises from the decision of the Court of Appeals affirming the Circuit Court's Order (R. p. 11) granting setoff and Order Denying Motion to Reconsider (R p.1).

This is a negligence wrongful death action arising from Tiffanie Rutland's death in an automobile accident. No survival cause of action was ever asserted in this action. Appellant/Petitioner, Clarence Rutland, Personal Representative (hereinafter "Rutland") settled with the driver, Joseph Bishop for $30,000, then filed this action against SCDOT. (R. p. 21) The case was removed from the active docket pursuant to *Rule 40(j), SCRCP*, then timely restored. Defendants REA Construction Company ("REA") and General Motors Corporation ("GM") were added by Amended Complaint. Rutland then filed a

Second Amended Complaint for wrongful death, adding J. A. Jones Construction Company ("Jones") as an additional contractor. (R. p. 33) Soon thereafter, Rutland voluntarily dismissed the action as against REA and Jones, which had both filed for protection in bankruptcy. This left only defendants SCDOT and GM. At all times, Rutland asserted only negligent wrongful death. He alleged SCDOT caused or had notice and failed to repair a road defect which he alleged contributed to the rainy weather crash. He alleged GM negligently created a vehicle defect which contributed to the death by allowing the decedent's partial ejection.

Several months prior to the trial of this case, Rutland settled with GM, leaving SCDOT as the only defendant. On August 9, 2007, counsel for Rutland, GM, and SCDOT were present for a hearing before the Honorable Diane S. Goodstein for consideration of the settlement pursuant to *S. C. Code Ann. §15-51-42.* Rutland and GM settled for $275,000.00, and the driver paid $30,000, totaling $305,000. Rutland and GM agreed between themselves to allocate the settlements $167,000 to the wrongful death claim and $138,000 to a survival claim, even though no survival claim had been filed. Rutland and GM stipulated between themselves, with no input from SCDOT's counsel, that there existed evidence to support a survival action. SCDOT's counsel voiced his reservations about the settlement, and requested that the Court make no findings which would be binding on SCDOT, but, instead, expressly preserve SCDOT's right to contest the allocation of the settlement and to seek its reallocation for purposes of setoff against any verdict against SCDOT. Rutland's counsel objected that the allocation of the settlement was not a question ripe for decision, and asserted SCDOT lacked standing to raise the matter. Rutland's counsel acknowledged, however, SCDOT's right to pursue setoff at the appropriate time and to contest the allocation agreed between Rutland and

GM. (R. pp. 89 - 92) Judge Goodstein's Order approving the settlement (R. p. 15) makes reference to that stipulation, but expressly provides the Order is not binding on SCDOT, and provides the settlement may be reallocated after trial. (R. pp. 18 - 19)

The case was tried only for negligent wrongful death. Rutland testified that his wife was dead immediately after the collision. The jury returned a verdict in favor of Rutland for $300,000 in actual damages.

SCDOT requested setoff of the entire settlement proceeds from Bishop (the driver) and GM against the verdict. The trial court entered an Order, without a hearing, denying Rutland's new trial motions and granting SCDOT's motion for setoff of the entire proceeds, reducing the verdict to zero. (R. p. 11) Rutland timely filed a Motion for Reconsideration, which was heard on oral argument. The trial court then issued its Order dated August 28, 2008, denying Rutland's post-trial motions and clarifying the previous ruling on the issue of setoff, but applying the entire settlements from GM and Bishop against the verdict and reducing it to zero. (R. p. 1) The trial court expressly found that no survival evidence was presented at trial to support allocation of settlement funds to a survival claim.

Rutland timely appealed. The three-judge panel of the Court of Appeals unanimously affirmed the trial court, finding the trial court correctly concluded that the record contained no evidence of conscious pain and suffering to support a survival action, that the alleged pre-impact fright of the decedent did not constitute conscious pain and suffering for that purpose, that the SCDOT was not a party to the pretrial settlement agreement and not bound by its terms, and that the settlement proceeds should be reallocated and offset against the wrongful death verdict against SCDOT. The Court of Appeals held the trial court did not abuse its discretion in the reallocation of the

settlement. *Rutland v. South Carolina Dept. of Transportation*, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010)(No. 4721).

Petitions for Rehearing and Rehearing en Banc were timely filed and were denied. On October 19, 2011, this Court granted Certiorari to review the decision of the South Carolina Court of Appeals.

B. Material Facts

On June 7, 2003, Tiffanie Rutland, a young wife and mother, was an unrestrained backseat passenger in a 1999 Chevrolet S-10 Blazer driven by Joseph Bishop, the uncle of Tiffanie Rutland's husband, Rutland. Also in the car were Rutland, the Rutlands' toddler son, and Joseph Bishop's wife, Tina. The vehicle was traveling 45 to 60 miles per hour throughout the trip from Bamberg to the accident scene near Orangeburg. It was raining heavily, and Mr. Bishop had slowed the car to 45 to 50 miles per hour immediately prior to losing control of the vehicle. Mr. Bishop lost control of the vehicle, which left the roadway, struck a culvert, and overturned in a ditch alongside the road. Clarence Rutland was completely ejected from the vehicle, but was able at some point to walk to the vehicle. Rutland's wife had been partially ejected through a rear side window of the vehicle, and the vehicle had come to rest on her neck, pinning her to the ditch wall and leaving her body in the vehicle and her head outside the vehicle, with the weight of the vehicle on her neck. Mr. Rutland testified that when he first saw his wife after the collision, she was not alive. (R. p. 142, line 25, through p. 143, line 8.) No person traveling in the vehicle or at the scene testified that they saw or heard any evidence of Tiffanie Rutland surviving the impact, whether consciously or otherwise, and there was certainly no evidence of conscious survival of the impact. No person testified that Tiffanie Rutland consciously experienced anything between the start of hydroplaning or the driver's loss of control and the discovery of her lifeless body under the car. No person testified to any remarks, screams, or exclamations by Tiffanie Rutland, nor her state or activity, during the car's course from loss of control to final stop, nor any evidence of her being aware of the impending crash. No testimony was presented that she was conscious between the time of injury and death, for even a moment.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR, NOR CONTRADICT THE ESTABLISHED LAW OF SOUTH CAROLINA, IN AFFIRMING THE CIRCUIT COURT DECISION THAT THE APPELLANT DID NOT PROVE CONSCIOUS PAIN AND SUFFERING, AND THAT THE DECEDENT'S LATE-ALLEGED PRE-IMPACT FRIGHT IS NOT COMPENSABLE IN A SURVIVAL ACTION.

A. Even if pre-impact fear is compensable as conscious pain and suffering, Rutland presented no evidence of such damages, and any decision of this Court would be purely advisory.

B. The relevant interval for conscious pain and suffering is between injury and death, and South Carolina does not recognize pre-impact fright.

Rutland asks this Court to reverse the Court of Appeals decision which essentially rejected as unproven Rutland's assertion, made for the first time in arguing a motion to reconsider setoff after trial, of conscious pain and suffering, and its further decision that any such pain and suffering prior to crash and injury are not compensable. This Court need only review the record in this case to determine that the record contains no proof of any conscious pain and suffering, before or after the crash. Thus, the Court need not reach the question of whether pre-impact fright is compensable in a South Carolina survival action. Even if South Carolina recognizes pre-impact fright, whether as an element of damages recoverable in a survival action or as a cause of action, there is no proof in the record to support the claim, so the issue is moot. *See Hoskins v. King*, 676 F.Supp.2d 441 (D.S.C. 2009).

In South Carolina, an award of damages for pain and suffering is intended to compensate the injured person for physical discomfort and the emotional response to the sensation of pain caused by a physical injury itself. *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001). In South Carolina, the cause of action for physical injury survives, even if the injured person does not, and the established law of South Carolina recognizes pain and suffering as damages in such a survival action, but the law requires that it be

proven and that it be **consciously** suffered. *Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 28 S.E.2d 683 (1944). Speculation is not allowed. In *Camp*, the evidence considered by the Supreme Court was that a man was heard groaning from within a car before he died of injuries sustained in the wreck. There was no evidence, however, that he was "conscious of pain and suffering." 204 S.C. at 138, 28 S.E.2d at 685. Thus, the claim was rejected. Conversely, in *Scott v. Porter*, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000), conscious pain and suffering was established by testimony the child spoke to his mother, and made clear he was in conscious pain. Likewise, conscious pain and suffering between injury and death was established in the cases of *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991)(shooting victim crawled away leaving eight foot trail of blood and clutched leaves and pine needles to his chest wound); *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000)(child moved fingers when spoken to); and *Croft v. Hall*, 208 S.C. 187, 37 S.E.2d 537 (1946)(daughter opened eyes in response to mother's voice). Cases of death upon impact have never been accepted as appropriate for an award of damages for conscious pain and suffering in South Carolina.

Rutland has urged this Court, alternatively, to declare that conscious pain and suffering, for purposes of a survival cause of action, has always included emotional distress suffered during the course of events leading to the physical injury that produces death, or, that such suffering is recognized as an element of survival damages commencing with this case. Throughout his brief, in his Reply to Respondent's Return to Petition for Rehearing (App. 95), and on page 13 of his Petition for Writ of Certiorari, Rutland has set off this element, pre-impact fright or pre-impact fear, in quotation marks, and asserted or implied that this concept is mislabeled. Yet, the first mention of such an element of damages in this case came from Rutland in argument of a Motion to

Reconsider the trial court's setoff order, when Rutland's counsel, for the first time ever in this action, asserted "there was testimony in this trial that would support a survival cause of action, the **pre-impact fear**." R. p. 121, line 16. Counsel acknowledged South Carolina has not "determined specifically that **pre-impact fear** is an element of damages for a survival cause of action," and then urged the trial court to adopt a line of reasoning from other states on "an element of damages for mental distress, emotional distress, without the physical impact." R. p. 121, line 24, through p. 122, line 5. The label applied by the Court of Appeals is the label applied by Rutland in an argument made over four months after trial, and applied in the few states adopting Rutland's reasoning. South Carolina has never adopted this concept proposed by Rutland, and those states which have are a minority. Only a very few states have ventured onto the slippery slope of recognizing pre-impact mental distress as an element of damages in a survival action. Others have addressed and rejected it, including Kentucky, *Steel Technologies, Inc., v. Congleton,* 234 S.W. 3d 920 (Ky. 2007)(impact rule requires compensable emotional distress be caused by contact; no compensation for negligent infliction of emotional distress not preceded by contact and physical injury); Pennsylvania, *Nye v. Com., Dept. Of Transp.*, 331 Pa. Super. 209, 480 A.2d 318 (Pa. Super. 1984); Massachusetts, *Gage v. City of Westfield,* 26 Mass. App. Ct. 681, 532 N.E.2d 62 (Mass. App.Ct. 1988); and Kansas, *Fogarty v. Campbell 66 Express, Inc.*, 640 F.Supp. 953 (D. Kan. 1986). Contrary to Rutland's assertion, no Michigan state court cases have recognized pre-impact fear as compensable in a survival action. Rather, the cited case, *Kozar v. Chesapeake & Ohio Ry. Co.*, 320 F.Supp. 335 (W.D. Mich. 1970), is a case decided using federal law under the Federal Employers Liability Act (FELA), the federal railroad version of a workers' compensation case.

In the states recognizing pre-impact fear/fright as an element of conscious pain

and suffering, the award is "based upon an injured or deceased person's perception that he or she is about to suffer grave injury or death." *Lang v. Bouju,* 245 A.D.2d 1000, 667 N.Y.S.2d 440 (N.Y.A.D.3rd Dept. 1997). Furthermore, in those states, proof is required that the decedent experienced fright, and the issue is not left to speculation. Meg Ellen Phillips, Note, *A Post-Impact Fear of Pre-Impact Fright,* 99 Ky.L.J. 401 (2011). In *Martin v. Reedy,* 194 App.Div.2d 255, 606 N.Y.S.2d 455 (1994, 3rd Dept.), the decedent died of a fractured neck, and was not proven conscious after the accident, but was conscious before impact. There, the victim said, "Hold on," as the truck was sliding out of control into a drainage ditch, and the court held that pre-impact fear would not be compensated where the plaintiff had not proven the decedent was aware of his impending death. The court noted that a record showing practically instantaneous death will not support an award for conscious pain and suffering. Conversely, such an award was upheld where a motorcyclist's avoidance maneuver and prolonged hard braking evidenced he was aware of his impending doom. *Lang, supra.* Likewise, defensive driving maneuvers evidenced pre-impact fright and supported awards in Maryland, *Smallwood v. Bradford,* 352 Md. 8, 720 A.2d 586 (1998), and Michigan, *Meek v. Dept. of Transp.,* 240 Mich. App. 105, 610 N.W.2d 250 (2000).

The Maryland case cited by Rutland on the subject of pre-impact fright acknowledges the matter should not be left to "rank speculation," but should be capable of objective determination. *Beynon v. Montgomery Cablevision Limited Partnership,* 351 Md. 460, 509718 A.2d 1161, 1185 (Ct. App., 1998). In *Beynon,* the Court noted the decedent driver applied brakes (obviously consciously and in a position to foresee the impending impact), leaving seven and one-half feet of skid marks, which allowed objective determination that he may have experienced some mental distress.

Here, there is no proof of conscious pain and suffering, whether before or after the

crash. While it is unrefuted that the driver of the car involved in this action lost control of the vehicle before it crashed, and that it traveled astray of its planned path for at least a brief moment before landing upside down in a ditch and entrapping the body of the decedent, there is no proof that between an injury and her death, the decedent was conscious and consciously suffered pain. Rutland has offered speculation in his legal arguments that passenger Tiffanie Rutland was consciously frightened during the course of events between loss of control and the wreck (pre-impact fright). There was no proof, however, that she was conscious during those events, nor was there any testimony of her emotional state. The testimony concerning a pulse after the crash was immaterial, as it does not establish consciousness. "[T]he relevant inquiry [where conscious pain and suffering is at issue] is not whether the decedent's vital functions continued after impact, but rather whether the decedent exhibited some cognitive awareness." *Fanning v. Sitton Motor Lines, Inc.*, 695 F. Supp.2d 1156 (D. Kan. 2010); *St. Clair v. Denny*, 245 Kan. 414, 422, 781 P.2d 1043, 1049 (1989). Rutland asserts the jury could conclude Tiffanie Rutland suffered injury during the vehicle's course between loss of control and impact, but no testimony nor evidence was offered at trial of any injury suffered by Tiffanie Rutland other than the fatal blow of the vehicle landing on her neck.

Rutland points out that the sole action before the jury was for a wrongful death, and that an attempt to introduce evidence of conscious pain and suffering may have met objection and exclusion. Not pleading a survival action along with the wrongful death action may have been a matter of strategy, or perhaps plaintiff's attorneys viewed the case as not having a survival component. Certainly, the way to present and preserve the survival claim was to bring it and develop a record with evidence so as to preserve issues for appeal. Nonetheless, Rutland asserts there was evidence, prior to trial, of conscious pain and suffering, which simply was not presented at trial. No such evidence is in the

record before this Court, and none was presented to the lower court for consideration in its determination of the setoff motion and motion to reconsider the setoff order. Furthermore, the record reveals no attempt at an offer of proof to the trial judge, outside the presence of the jury, for purposes of the setoff motion which Rutland anticipated from the time of the pre-trial settlement approval hearing. R. pp. 88 - 89, 93. Moreover, as of the date of the pre-trial settlement with one defendant, contrary to the assertions made at the settlement hearing and discussed below, there was no evidence of conscious pain and suffering. Rutland's deposition testimony, at page 74, line 23, through page 81, line 6 (R.p.159) describes the course of the vehicle toward impact, but makes no mention of fright, pain, suffering, or even consciousness of Tiffanie Rutland. To the contrary, he clearly expressed in his deposition testimony that his wife was dead from the moment he saw her. This Court should also find it noteworthy that, not only was "pre-impact fright" not documented in the record of the settlement hearing, it was not mentioned until four months after trial, as set forth above.

There being no proof in the record, whether at trial, pre-trial settlement approval hearing, or post-trial setoff and reconsideration motion hearing, of any conscious pain and suffering of Tiffanie Rutland after impact or during the course of the crash, this Court need not and should not consider whether to declare South Carolina's law on pre-impact fright compensability. Without proof of the damages sought, a determination of the Supreme Court does nothing to affect the outcome of this case for these parties, producing a merely academic discussion and a purely advisory opinion for future litigants. Respondent asserts that, if this Court affirms the trial court's finding and the Court of Appeals decision, that there was no evidence of pre-impact fright or other conscious pain and suffering, there is then no justiciable controversy presented as to whether South Carolina recognizes pre-impact fright as an element or aspect of damages

for personal injury or survival actions, and the discussion becomes merely abstract, hypothetical, and academic. *Byrd v. Irmo High School*, 321 S.C. 426, 468 S.E.2d 861 (1996); *Darden v. S. C. Dept. of Highways*, 291 S.C. 270, 353 S.E.2d 279 (1987); *Guimarin & Doan, Inc., v. Georgetown Textile & Mfg. Co.*, 249 S.C. 561, 155 S.E.2d 618 (1967). If there is no proof of the debated damages, then that conclusion is dispositive, and the Court need venture no further. *Earthscapes Unlimited, Inc., v. Ulbrich*, 390 S.C. 609, 617, 703 S.E.2d 221 (2010).

As for the time in which the conscious pain and suffering must have occurred, the Supreme Court has recognized that the relevant period for such pain and suffering of a decedent is "the interval between his injury and death." *Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 28 S.E.2d 683 (1944). In *Camp*, the Supreme Court held, "as a prerequisite to any recovery on account of pain and suffering, it was incumbent upon the plaintiff ... to establish that [decedent] **was conscious after the collision occurred and before he died and that during such conscious period he experienced pain and suffering.**" *204 S.C. at 139.* South Carolina does not recognize pre-impact fright as conscious pain and suffering for purposes of a survival action, and did not recognize it during the discovery, pretrial proceedings, and trial in this action.

South Carolina Code Ann. §15-5-90 (1976, as amended), provides for the survival to the decedent's estate of an action which the decedent could have brought had she survived her injuries. Tiffanie Rutland could not have recovered for pre-impact fright had she survived. Pre-impact fear is not compensable in South Carolina. Negligent infliction of emotional distress, as a separate damage, without physical injury causing or caused by the distress, has never been held compensable in South Carolina. Rutland relies on *Spaugh v. Atlantic Coast Line Railroad Co.*, 158 S.C. 25, 155 S.E. 145 (1930), in support of his claim. Yet, *Spaugh* did not make an award for emotional distress independent of

physical injury. The legal innovation in *Spaugh* was a recognition that a negligently inflicted emotional injury which results in, not from, a physical injury is compensable. In *Spaugh*, the Court, men of their times, recognized the emotional distress caused a physical injury to the lady, who "'became highly nervous' and 'suffered from troubles peculiar to ladies, which condition was brought on her by the exposure and experience she was subjected to." While medical evidence today might dispute the finding, the Court found the emotional distress compensable because it brought on a manifested physical injury. The modern day case of *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994) construes *Spaugh* to allow recovery for negligently inflicted emotional trauma so long it is proven to have proximately caused a bodily injury. *See also Jefferson-Pilot Fire & Cas. Co. v. Sunbelt Beer Distributors, Inc.*, 839 F.Supp. 376 (D.S.C. 1993)(analyzing *Spaugh*).

Like South Carolina, Kansas limits recovery for negligently caused emotional distress to those cases in which it results from or results in bodily injury. In *Stephenson v. Honeywell Intern., Inc*., 669 F.Supp.2d 1259 (D.Kan. 2009), the factual setting was an airplane crash killing a pilot and four passengers on impact, with a twenty-one second period between engine failure and crash. There, it was held that pre-impact fright was not compensable. The rationale expressed was that, unlike an intentional tort, a negligence claim lacks extreme outrage or moral blame, and emotional fright which does not cause physical harm is temporary and easily counterfeited. An ensuing collision and injury did not change the analysis. 669 F.Supp.2d 1259, citing *Fogarty, supra.*

In South Carolina, the effects of negligence on the mind alone are not compensable. *Mack v. South Bound R. Co.*, 52 S.C. 323, 29 S.E. 905 (1898). Emotional distress which neither results from a physical injury nor causes a physical injury is not compensable in a negligence action, but only in an intentional tort case. *Ford v. Hutson*,

276 S.C. 157, 276 S.E. 2d 776 (1981). Had the driver of the Bishop vehicle gone through the swerving described by Rutland, perhaps even flipping through the air, and then somehow miraculously righted the car without physical injury to the occupants, the mental stress they may have endured would not be compensable. The death of an occupant at the close of the collision does not render her pre-impact fright, even if proven, compensable.

There is no prior authority in South Carolina law for pre-impact fright to be compensable in a personal injury action nor considered as conscious pain and suffering in a survival action. Moreover, even if there were such authority, there was no proof. The Court of Appeals correctly applied established law to established facts, rendered its decision accordingly. This Court should not reverse, but should affirm the decision.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE LAW OF SETOFF IN AFFIRMING THE REALLOCATION OF THE PRETRIAL SETTLEMENT PROCEEDS AND APPLYING THE FULL AMOUNT OF THE SETTLEMENT TOWARDS SCDOT'S RIGHT TO SET-OFF.

The Court of Appeals applied established South Carolina law in affirming the setoff of Rutland's pretrial settlement proceeds against the verdict he obtained at trial. Regardless of the pretrial designation of the settlement funds, the record from the pre-trial settlement approval hearing, the trial, and the post-trial setoff and reconsideration motion hearing, contains no evidence of conscious pain and suffering, not even pretrial deposition testimony. Rutland asserted at the pre-trial settlement hearing that the settlement was to be "allocated in the wrongful death and survival actions," yet acknowledged no survival action was ever filed. R. p. 86, line 13; p. 87. Rutland's counsel mentioned the above-referenced comment about a "pulse," but nothing about consciousness or pain and suffering. R. P. 88, line 19.

The settlement proceedings were not binding upon SCDOT, as clearly stated

throughout the transcript of the hearing and the lower court ("settlement court") Order approving settlement. R.p. 15. At the hearing, Rutland acknowledged to the settlement court that the setoff right of SCDOT was preserved, and acknowledged that the allocation could be contested later by SCDOT, which can "argue to the trial judge at some point in time in future that the allocation was not appropriate and needed to be adjusted and get their appropriate setoff." R. p. 89, lines 17 - 21; p. 90, lines 7 - 14. Rutland's counsel acknowledged that the settlement court was not asked to make a finding binding on SCDOT. R. p. 90, line 20, - p. 91, line 22. Indeed, the settlement court's finding, in the context of approving a settlement not yet subjected to offset or contest by the remaining defendant, stipulated by only two of three parties, and supported by no proof, is necessarily limited to a finding made only for purposes of settlement approval.

The settling defendant's attorney pointed out to the settlement court that the stipulation regarding survival action evidence was for settlement purposes only, and that there was testimony of Rutland (arguably hearsay and inadmissible) that a bystander told Rutland his wife was alive, but that Rutland did not believe the statement. R. p. 93, lines 21 - 25. Now, in an about-face, Rutland asserts SCDOT has no standing to argue with the settlement agreement entered by only two of three parties to a lawsuit. This is simply contrary to South Carolina law, which, while encouraging pre-trial settlement, provides the trial court, who sits and views testimony and evidence, with the equitable jurisdiction and authority to do what is right and reallocate settlements where the allocation by only some of the parties proves unsupported upon post-trial review.

The right to set-off arises by operation of law as an equitable power of the trial court. *Ellis v. Oliver,* 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999). The settlement approval order recognized the SCDOT was not a party to the settlement, and that its terms were not binding on SCDOT, which reserved the equitable right to request setoff of

settlement proceeds against any verdict obtained. As there is to be only one recovery for a wrong, SCDOT retained the right to assert setoff, and to ask the Court to exercise its equitable jurisdiction to ensure there was only one recovery. *Truesdale v. South Carolina Hwy. Dept.*, 264 S.C. 221, 213 S.E.2d 740 (1975); *Powers v. Temple,* 250 S.C. 149, 156 S.E.2d 759 (1967) .

In *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), the South Carolina Court of Appeals noted, "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* involved the death of a young child hit by a truck as she attempted to board a school bus. The claims included wrongful death and survival, and the defendants included the state education department, the truck driver, and his employer. Prior to trial, the estate settled with the nongovernmental defendants, allocating $90,000 to the wrongful death action and $10,000 to the survival action. The jury returned a verdict against the state agency for $600,000 for the wrongful death action and $310,000 for the survival action. The verdicts were reduced for the child's comparative negligence as found by the jury, and then further reduced to the caps set forth in the *South Carolina Tort Claims Act, S. C. Code Ann. §15-78-120(a).* Pursuant to *S. C. Code Ann. §15-38-65,* the *Contribution Among Tortfeasors Act* did not apply to the Department of Education, which was the sole entity at trial. Additionally, *S. C. Code Ann. §15-78-100,* requiring the jury to apportion liability between governmental and non-governmental defendants, did not apply, as there was only one defendant left at trial. The trial court denied the Department's motion for setoff.

On appeal, the Court of Appeals recognized in *Smalls* the inequity of allowing the plaintiff to settle an action with some defendants and collect on a verdict against a

nonsettling defendant, and reversed, holding the trial court should have offset the pretrial settlement against the verdict, so that there would be only one total recovery for the wrongful death and survival actions. The Court further held the proper manner of applying setoff is to reduce the original verdicts by the settlement amounts prior to further reduction for comparative negligence and application of the statutory caps.

Reduction of judgment was once available only between settlement and verdict of the same cause of action. *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998); *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867, 875 (Ct. App. 1986). Later decisions, however, recognized the injustice of allowing a plaintiff to settle with one or more defendants, craft a settlement allocation favoring one cause of action, and then proceed to trial only on the other cause of action. *Ward, supra.* In the past, the plaintiff was free to allocate his settlement to his liking, provided it was not a legal sham or fraudulent. Now, however, it is held that the law permits the trial court, post-verdict, to essentially reallocate that settlement for purposes of setoff determination, sham or not. See *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); *Smalls, supra; Rookard v. Atlanta & Charlotte Air Line Ry.*, 89 S.C. 371, 71 S.E. 992 (1911).

In *Welch,* the Court of Appeals cited *Ellis v. Oliver,* 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), for its "one injury" treatment of survival and wrongful death for the purpose of determining the double recovery issue, and implied that *Ward* would have applied to limit Dr. Epstein's set-off to the same cause of action if there had been more evidence at trial of conscious pain and suffering. The Court of Appeals did not, as asserted in Rutland's brief, find the settlement to be "fraud" nor "sham." The Court did, however, note there was no evidence of conscious pain and suffering presented at trial, regardless of what evidence might have been available to the plaintiff and considered by

the settling parties before trial. In *Ellis*, this Court upheld the set-off of a hospital's settlement of a Richland County survival action in the amount of medical bills incurred, against wrongful death and survival verdicts against a physician in Lexington County. In *Vortex Sports & Entertainment, Inc., v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008) rehearing denied, the trial court offset Vortex's pretrial settlement with the officer against its verdict against the competitor, despite Vortex's assertions that the causes of action and damages asserted against the two defendants were separate and distinct. Citing *Ellis*, the Court of Appeals affirmed, and reiterated its construction that the term "injury," is "broad enough to include all damages." *Id., at 209.* Likewise, Tiffanie Rutland's injuries and death are one injury, for which her beneficiaries are entitled to one recovery.

The Court of Appeals, in affirming the settlement reallocation, followed the law of South Carolina, and did not stray from the prior case decisions of that Court nor the Supreme Court. Its decision should be affirmed.

CONCLUSION

The Court of Appeals applied established law to established fact. The record contains no evidence of conscious pain and suffering by the decedent, whether before or after impact. This Court is being asked to render an opinion on the law of South Carolina in a factual vacuum, and it should decline to do so. The setoff was supported by the record, and the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 15, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG)

I, an attorney for Respondent in the appeal of *Ervin M. Mathias, Jr., et al., v. Rural Community Insurance Company, et al.,* Docket No. 2003-CP-25-133, do hereby certify that my agent has served the foregoing **Brief of Respondent** by mailing a copy of the same, with postage prepaid, by United States mail to be attorney(s) at the address(es) indicated as follows:

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Honorable Daniel Shearouse, Clerk
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: *Rutland v. South Carolina Department of Transportation*
Case Number 2006-CP-38-486 (S. C. Ct. App. Op. 4721)

Dear Mr. Shearouse:

Enclosed for filing please find one unbound original, one unbound copy, and fifteen bound copies of **BRIEF OF RESPONDENT**. By copy of this letter, I have served a copy of the brief upon all attorneys of record. Please clock in the unbound copy and return to me in the enclosed envelope.

Thanking you for your assistance, I am

Sincerely yours,

Richard B. Ness

cc:
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