THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

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 Appellant/Petitioner

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2. WHETHER THE COURT OF APPEALS ERRED IN FINDING THAT SOUTH CAROLINA DOES NOT RECOGNIZE "PRE-IMPACT" FEAR AS A "COMPENSABLE CAUSE OF ACTION"?

3. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S EQUITABLE REALLOCATION OF SETTLEMENT PROCEEDS?

STATEMENT OF THE CASE

This action arises out of a single car accident which occurred on June 7, 2003 on S.C. Highway 301 in Orangeburg County, South Carolina. The decedent, Tiffanie Rutland ("Tiffanie" or "Decedent" hereinafter), was a passenger in a 1999 S-10 Blazer driven by Joseph Bishop which lost control and left the roadway. At the conclusion of the wreck, Tiffanie was partially ejected through a rear driver side window and suffered fatal injuries.

On the date of her death, Tiffanie was the backseat passenger in the Blazer being driven by her uncle, Joseph Bishop. Tiffanie's husband, Clarence Rutland, and their infant son were also in the backseat. Her aunt, Tina Bishop, rode in the front passenger seat. (R. pp. 136-137). After an afternoon of fishing and eating at a family member's home, Tiffanie needed to go to Wal-Mart in Orangeburg to shop for a birthday present for her mother. (R. p. 138). While traveling to Orangeburg, Mr. Bishop drove in a generally northbound direction on S.C. Highway 301 in a heavy rain storm. (R. p. 139). Due to the conditions, Mr. Bishop slowed and drove approximately 45-50 miles an hour, though the posted speed limit on this portion of Highway 301 is 60 m.p.h. (R. pp. 134, 135, 137, 140). As the Blazer approached a private driveway for the Stillinger residence, the vehicle began to hydroplane. (R. p. 139).

Without dispute, the wreck that followed the hydroplane was not a simple, immediate "collision." The collision began when the Blazer hit the defective portion of Highway 301 which collected and held water. At the moment the hydroplane began, Clarence Rutland, in the back seat with his wife, felt the vehicle being "pulled" or "snatched" by the water. (R. p. 139, II. 6-25; R. p. 40, 11.14-20). Recognizing the loss of

control at the beginning of the collision, Clarence had time to lift his hands over his body and then lean his body over his wife and child in an effort to protect them. (*Id.*) The vehicle spun on the roadway, left the roadway, and hit a culvert, which sent the vehicle airborne. Eyewitness Brenda Kitrell viewed the accident in progress long enough to see the Blazer become airborne after hitting the culvert and to see Mr. Rutland completely ejected from the rear of the vehicle. (R. p. 151,11. 12-21). After the Blazer hit the culvert and became airborne, Clarence Rutland was ejected and thrown some distance from the car. After his ejection, he walked to the overturned Blazer where a couple of people had stopped to assist. Clarence Rutland went to the vehicle with these witnesses, attempted to get the motor to stop running, and then searched for an object to break windows to get the remaining occupants out. At this point, he slipped in the ditch and saw Tiffanie, whose head and neck protruded through a side window of the vehicle, partially ejected. (R. p. 159). Mr. Rutland testified in his deposition that he was told by a passerby who offered assistance that Tiffanie still had a pulse when the passerby went to her aid. (R. p. 160). However, at trial Clarence Rutland acknowledged that as soon as he saw his wife, he thought that she was dead. (R. p. 142, l. 25 - p. 143, l. 8).

The Decedent's husband, Clarence Rutland, was appointed as the Personal Representative of the Estate of Tiffanie Rutland on August 26, 2004. As personal representative he was able to negotiate the payment of all available insurance limits on the vehicle the Decedent was killed in, totaling $30,000.00 under a policy of insurance issued to Joseph Bishop. On February 7, 2005, the Petitioner filed a wrongful death Complaint in the Orangeburg County Court of Common Pleas against the South Carolina

Department of Transportation ("SCDOT").[1]

Petitioner later filed an Amended Complaint for wrongful death on May 8, 2006. This Amended Complaint added REA Construction Company and General Motors Corporation as parties to the action. Rutland asserted a products liability claim against GM which sounded in strict liability, negligence, and breach of warranties, alleging that GM failed to design and/or manufacture the windows in the Blazer with materials sufficient to withstand ejectment.[2] (R. pp. 28-29). Against REA, the Amended Complaint asserted similar theories of negligence as were asserted against the SCDOT, as REA had resurfaced this roadway prior to the Rutland accident. (R. pp. 27-28). Finally, on May 22, 2006, Petitioner filed his Second Amended Complaint for wrongful death, adding J.A. Jones Construction Company to the litigation as an upstream contractor for construction work to the stretch of highway 301 at issue.[3]

Prior to the trial of this case, the Petitioner reached a settlement with GM ("the GM Settlement"). On August 9, 2007, counsel for the Petitioner, SCDOT, and GM appeared before the Honorable Dianne S. Goodstein for a settlement approval hearing pursuant to S.C. Code Ann. § 15-51-42. GM's settlement with the Rutland Estate totaled $275,000.00. From the total settlement proceeds from all parties ($305,000.00 total), GM and the Petitioner agreed to allocate $167,000.00 to wrongful death and $138,000.00 to the survival claim. The viability and existence of evidence to support a survival action on

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[1] Petitioner alleged that the SCDOT had constructive and/or actual knowledge of a defect in the roadway which caused water to accumulate on the road surface, thereby causing the dangerous condition that proximately caused the accident which killed Mrs. Rutland. (R. pp. 22-23).

[2] The six (6) year statute of limitations to bring a survival action on behalf of Tiffanie under a warranty theory against GM had not expired at the time of this settlement.

[3] Due to their bankruptcies, both REA and J.A. Jones Construction were voluntarily dismissed from this action prior to trial without any settlement funds being exchanged.

behalf of Tiffanie was stipulated between GM and Petitioner, although Petitioner had only filed a wrongful death claim at that point against GM.[4]

At the GM settlement hearing counsel for the SCDOT appeared and made a record of his objections to the settlement, particularly that the SCDOT did not stipulate to any factual findings. (R. p. 92, 1.18 - p. 93, 1.14). SCDOT also sought to preserve the right to contest the allocation of the settlement for setoff purposes in the event of a verdict against the SCDOT. (*Id.*) Petitioner acknowledged SCDOT's ability to pursue its setoff argument if a verdict was entered against it at trial. (R. p. 91, 11. 8- 15).

The Petitioner's case against SCDOT was tried before a jury from January 28-31, 2008. The sole action before the jury was for the wrongful death of Tiffanie, as no survival action was pled against the SCDOT. The jury returned a verdict in favor of the Estate of Tiffanie Rutland for $300,000.00 in compensatory damages for her wrongful death. (R. p. 20).

Both Petitioner and SCDOT filed post-trial motions. Rutland sought either a new trial absolute or a new trial nisi *additur*. (R. pp. 46-49). The SCDOT requested a setoff against the verdict for the entire proceeds of the GM and Bishop Settlements. (R. p. 52). By Order dated February 28, 2008, the trial court entered an Order denying Petitioner's new trial motions and summarily granting the SCDOT's motion for setoff in the amount of $300,000.00.[5] (R. pp. 1-10). Petitioner timely filed his Motion for Reconsideration pursuant to Rule 59(e), SCRCP on March 18, 2008. (R. pp, 57-59). The trial court then

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[4] This stipulation was entered only between the Appellant and GM and Judge Goodstein made a finding of fact that "there exists some evidence, however slight" to support the survival cause of action and corresponding allocation of proceeds between the settling parties. (R. p. 91, lines 16-21).

[5] The Court's Order incorrectly stated that Plaintiff had stipulated to setoff in the amount of $300,000.00 and did not consider the parties' arguments concerning the allocation of the underlying GM settlement and proceeds received from Joseph Bishop's insurance.

issued a final Order of September 2, 2008, denying Petitioner's post-trial motions and clarifying its previous ruling on the issue of setoff. In this Order the court found that insufficient evidence existed to support the apportionment of the settlement proceeds to Tiffanie's survival claim and the Court therefore equitably reallocated all settlement proceeds to the wrongful death claim. (R. pp. 9-10). Based on this finding, all prior settlement proceeds were applied to the SCDOT's right to setoff on the wrongful death claim, resulting in a verdict of $0.00 for the Plaintiff. (R. p. 10).

Petitioner timely filed his notice of appeal on September 8, 2008. On August 4, 2010, the Court of Appeals issued Opinion No. 4721, which affirmed the trial Court's ruling. The Court of Appeals specifically ruled (1) that there was not sufficient evidence from which a jury could have concluded that the decedent experienced conscious pain and suffering; (2) South Carolina does not "recognize 'pre-impact fear' as a compensable cause of action;" and, (3) that the "SCDOT trial court did not abuse its discretion in reallocating the settlement proceeds to the wrongful death verdict against SCDOT." Petitioner timely filed his Motion for Rehearing and Motion for Rehearing *En Banc* on August 19, 2010. (APP 68). By Orders filed October 29, 2010, the Court of Appeals issued final Orders denying the Appellant's request for Rehearing and for Rehearing *En Banc*. (APP 102). This Court granted Certiorari on October 19, 2011 to review the decision below.

ARGUMENTS

The Court of Appeals' Opinion of August 4, 2010, which affirmed the trial court’s grant of SCDOT's post-trial motion for set-off, is founded upon the misapplication of numerous binding precedents. The opinion below overrules the well-settled precedent of

Spaugh v. Atlantic Coast Line Railroad Co., 158 S.C. 25, 155 S.C. 145 (1930) and other binding precedent of this Court allowing the mental distress of a decedent as an appropriate element of damages in a survival action. The Court of Appeals' opinion also misapplies and misapprehends a long line of binding precedent stating the evidentiary standards to be met in order to maintain a survival cause of action. Furthermore, the opinion misapprehends the law concerning "pre-impact fear" and the ruling on that issue creates a novel issue that has not been addressed by our Courts.

The opinion below has far reaching implications that affect all current and future classes of plaintiffs in South Carolina who seek compensatory damages under survival actions. For the reasons that follow, the Petitioner respectfully requests that this Court reverse the Opinion of the Court of Appeals.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT INSUFFICIENT EVIDENCE EXISTS FROM WHICH A JURY COULD CONCLUDE THAT THE DECEDENT EXPERIENCED CONSCIOUS PAIN AND SUFFERING; AND, IN SO RULING, THE COURT OF APPEALS' OPINION CONFLICTS WITH THIS COURT'S PRECEDENT CONCERNING THE EVIDENTIARY STANDARDS TO SUPPORT A CLAIM FOR CONSCIOUS PAIN AND SUFFERING.

In the Opinion below the Court of Appeals fails to recognize and apply the standards enunciated in several illustrative and binding South Carolina cases which here require a finding that the Petitioner presented sufficient evidence to support a claim for survival. In essence, the Court of Appeals ignores the "any evidence" standard as announced by this Court in Croft v. Hall, 208 S.C. 187,37 S.E.2d 537 (1946), confirmed by a host of cases, and recently addressed by Hancock v. Mid-South Management Co., Inc., 381 S.C. 326,673 S.E.2d 801 (2008). The "any evidence" standard is equivalent to a "scintilla of evidence." Hancock, 381 S.C. 326, 673 S.E.2d 801 (2008). Rather than test

the record below for the existence of any evidence, the Court of Appeals substituted its view of the effectiveness or weight of the evidence. This is not the test employed on review, as the correct test is to determine whether any evidence exists from which a jury could conclude that the decedent suffered conscious pain and suffering.

In South Carolina "[i]f there is *any* evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering," then the claim must be submitted to the jury. Vereen v. Liberty Life Ins. Co., 306 S.C. 423, 432, 412 S.E.2d 425,431 (Ct. App. 1991); Smalls v. South Carolina Department of Education, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000). It is well settled that under this "any evidence" standard, even "weak" evidence is sufficient. Croft, supra. Furthermore, in this analysis the evidence - even if only a scintilla exists - must be viewed in the light most favorable to the non-moving party. Vereen. If that evidence is susceptible of more than one reasonable inference, the evidence is sufficient to support the survival cause of action. Id., 306 S.C. at 432, 412 S.E.2d at 431.

Croft v. Hall is a seminal case addressing conscious pain and suffering. In that case, this Court addressed a factual showing that it noted to be "weak" and concluded that sufficient evidence existed that the issue should go to the jury. The only testimony in Croft which supported a pain and suffering claim was the testimony of the decedent's mother that her daughter "recognized her" and that the decedent "opened her eyes and looked at [her] several times." Id. at 540. In contrast to this testimony, the attending physicians and nurses testified that in their medical opinions, there was no conscious suffering. Id. Faced with the mother's testimony that the decedent opened her eyes and recognized her mother, the Court held:

> There was positive testimony of the physician, nurses and others that in their opinion there was no conscious suffering, which may convince the jury upon trial to that conclusion, and it might so persuade us were we empowered to find the facts; but that was the jury's province in this, a case at law .... [O]ur decision is not of the preponderance of the evidence but whether there was any from which the jury could reasonably find conscious pain and suffering.

Id.

Vereen v. Liberty Life Ins. Co., is another illustrative case where wholly circumstantial and "weak" evidence of conscious pain and suffering nevertheless supported a viable cause of action for survival. In Vereen, the trial court directed a verdict against the plaintiff on his survival cause of action and this Court reversed. The investigating law enforcement officer arrived on the scene to find the sole occupant of the vehicle already deceased. The officer testified, however, that upon arrival he "saw an eight foot trail of blood leading away from Vereen's body and who observed Vereen's hands clutching his chest with leaves and pine needles on them." Id. at 431. A photograph showing how the hands were positioned was also admitted into evidence. This Court held that this evidence constituted sufficient circumstantial evidence to preclude a directed verdict on the survival cause of action. This Court held:

> A reasonable jury could conclude from the proffered evidence that Vereen lived long enough to crawl eight feet from the point of the shooting and attempted to cover his wound with his hands. They could also infer that anyone who lived long enough to do these things lived long enough to experience conscious pain and suffering before his death. The directed verdict, therefore, should not have been granted.

Id., 306 S.C. at 432, 412 S.E.2d at 431.

In the opinion below the Court of Appeals states that the Petitioner's sole evidence to support a survival claim is that "a passerby indicated the decedent had a pulse after the accident." This is incorrect. In fact, the circumstantial evidence in this case is much more akin to that of Vereen. Rather than an eight foot trail of blood, here Tiffanie Rutland endured a "trail" of physical injury, terror, and fear for her very life as the vehicle in which she rode with her family hydroplaned, skidded, rolled and flipped, ultimately partially ejected her, and crushed her under the vehicle. When the vehicle in which she was riding first hit water on the road, Clarence Rutland felt the vehicle "pulled" or "snatched" by the water. (R. p. 139, II. 6·25; R. p. 40, 11.14·20). Recognizing the beginning of this collision, the Petitioner, who was seated in the back seat with his wife and child, had sufficient time to recognize the danger, to lift his hands over his body, and to then lean his body over his wife and child in an attempt to protect them. (*Id.*) The vehicle then spun in the roadway, exited the roadway, and then hit a culvert, which sent the vehicle airborne. An eyewitness viewed the accident in progress long enough to see the vehicle go airborne and to observe the Petitioner as he was completely ejected from the rear of the vehicle.

Based on this testimony from multiple witnesses concerning the accident, a jury could reasonably conclude that prior to her death Tiffanie Rutland suffered physical injuries during the violent unfolding of this collision, whether before the partial ejection that sent her head through a window, or before the vehicle's weight ultimately landed on her head, neck, and torso. The temporal length of the collision also factors in to a jury's reasonable consideration of the issue. The Petitioner testified that at the initial triggering event of this accident, hitting the water on the road, he actually and consciously

recognized the danger to himself and the vehicle's occupants and had time to shield and protect his family. A jury could therefore reasonably conclude that Tiffanie endured the same realization and, aside from physical injuries, she suffered mental anguish and emotional fright before she was killed. Mental or emotional distress, when accompanied by physical injury, is a compensable element of damages.[6] While a jury might ultimately conclude that this evidence failed to prove that there was conscious pain and suffering, evidence sufficient to present the question to a jury exists, particularly when viewing this evidence in the light most favorable to the Petitioner.

Based on the violent course of this accident before Tiffanie Rutland was killed, factual issues exist from which a jury could conclude that prior to being ejected, as this car spun, tumbled into a ditch, and then became airborne, Tiffanie received significant injuries before her death, injuries which were accompanied by significant emotional and mental distress. Sufficient evidence exists from which a jury could reasonably find conscious pain and suffering. The standards of Vereen, Croft, and Hancock, *et al.*, being thus satisfied, the analysis of the opinion below ignores substantial circumstantial evidence to support the viability of a survival action. Because of the misapplication of the "any evidence" or "mere scintilla" standard by the Court below, reversal is warranted.

II. SOUTH CAROLINA HAS LONG ALLOWED RECOVERY FOR MENTAL OR EMOTIONAL INJURIES ACCOMPANIED BY PHYSICAL INJURY; EVEN IF THE LABEL "PRE-IMPACT FEAR" IS ATTACHED, THE COURT OF APPEALS ERRED IN HOLDING THAT SOUTH CAROLINA DOES NOT, OR SHOULD NOT, RECOGNIZE IT AS "A COMPENSABLE CAUSE OF ACTION."

South Carolina case law involving proof of survival actions has generally addressed the question of whether a decedent was conscious of pain for the time period

[6] This concept is discussed in detail in Section II of the Petition.

between bodily injury and death. However, decisions of this Court have long recognized that a plaintiff may recover for "bodily injury" for emotional damages or mental suffering without suffering actual physical injury. In this context, Tiffanie's emotional and mental damages suffered in the short time between the start of the wreck and her death are proper under the survival statute. The opinion below misconstrued the arguments of the Petitioner, as well as the law of South Carolina, in determining that "South Carolina does not recognize 'pre-impact fear' as a compensable cause of action." (Opinion, Section B).

The Petitioner does not argue that the mental distress and anguish suffered by the decedent before her death constituted a discrete cause of action, whether novel or already existing, whether named "pre-impact fear," or called by any other name. Rather, mental or emotional distress endured by a plaintiff who is killed is simply an element of damages that has long been recognized as compensable in South Carolina under existing causes of action. "Recovery for mental or emotional disturbance based upon violation of a legal right for which other damages are recoverable has long been accepted in this state. Perhaps the most common example occurs when damages for mental suffering are allowed in a personal physical injury suit. See Mack v. South Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898)." Ford v. Hutson, 276 S.C. 157, 159, 276 S.E.2d 776, 777 (1981). Moreover, the Court of Appeals has acknowledged that in a survival action, the "mental distress of the deceased" is an appropriate element of damages, amongst others. Scott v. Porter, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000). "Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." Id.

Notwithstanding the settled principles above, the Court of Appeals held that a survival action decedent may not recover for damages "when the decedent suffered mental trauma before actual physical injury resulting in the decedent's death." This holding directly conflicts with the authorities above. Similarly, the opinion below reverses this Court's decision of Spaugh v. Atlantic Coast Line Railroad Co., supra, which stands for a correct proposition of the law. While Petitioner agrees that some *dicta* in Spaugh stems from a time, outlook, and social rationale much different from ours today[7], Spaugh's recognition of the compensability of mental distress caused by the negligence of others, even without actual physical injury, is consistent with the principles of law concerning mental distress.

Even if the damages at issue are denominated as "pre-impact fear," the Opinion below mistakenly concludes that South Carolina does not recognize "pre-impact fear" as "a compensable cause of action." This conclusion is based upon the South Carolina Federal District Court case of Hoskins v. King, 676 F. Supp. 2d 441,451 (D.S.C. 2009). However, upon review of Judge Anderson's ruling in that non-binding case, there is no statement, express or implied, that South Carolina does not recognize "pre-impact fear" as a compensable element of damages. Instead, the District Court merely concludes that under the facts before it, there was no factual issue as to whether the decedent could have endured conscious pain and suffering or pre-impact fear. The District Court's discussion of the issue follows:

> In addition to seeking the more established post-impact survival damages, Hoskins seeks damages for the split second between when the rear tire of the bicycle touched the front bumper of the Pacifica and the impact of Thomas

[7] "The woman '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."

> Hoskins on the windshield. However, this position does not find support under South Carolina law. Hoskins has cited many cases, from other jurisdictions which recognize recovery for pre-impact fright. In nearly all of these cases the victims knew they were going to die for a period of at least some seconds, not fractions of a second. Moreover, there was evidence in almost all of the cases that the victim saw their ending coming and there was no question that the victim consciously perceived the cause of his or her death such as a car crashing in to the back of a tractor trailer, an imminent plane crash, or a pedestrian trapped on roadway.
>
> In this case the King's car closed from the rear at a high rate of speed, causing a tremendous impact-throwing Thomas Hoskins seventy-five feet in the air-and instantly killing him. A survival claim requires that the deceased consciously endure pain and suffering. Due to the severity of the impact, the court finds that the evidence does not demonstrate that the decedent had time to consciously perceive the means of his death, much less consciously suffer pain. Accordingly, for the reasons above, King's motion for summary judgment regarding the survival action is granted.

Id. at 451.

When compared to the facts of the case at bar, Judge Anderson's factual analysis actually militates for a finding for the Petitioner on the issue of pre-impact fear. The decedent in Hoskins was involved in a "split-second" impact. The District Court concluded that the "evidence does not demonstrate that the decedent had to consciously perceive the means of his death, much less consciously suffer pain." Due to the circumstances of this wreck, as discussed herein, significant factual issues exist from which a jury could conclude that Tiffanie Rutland actually "perceived the means of her death," as certainly her husband, the Petitioner, perceived the same. Thus, the Court of Appeals' reliance on Hoskins is misplaced.

Finally, the Court of Appeals' reliance on a Federal District Court case to address the "pre-impact fear" issue is inappropriate. While the opinion might be persuasive authority, Hoskins certainly is not binding. Moreover, by its reliance on the merely persuasive authority of Hoskins, the Court of Appeals ignored the binding precedent of Mack v. South Bound R. Co., supra; Ford v. Hutson; and, Scott v. Porter, supra.

To the extent the opinion below creates a novel issue by declining to recognize "pre-impact" fear as a viable element of damages in South Carolina, this Court should address the issue. To allow pre-impact fear as an element of damages in a survival action (as opposed to a discrete cause of action as stated by the Court of Appeals) would be consistent with modern jurisprudence from other jurisdictions. Georgia, Florida, Texas, Louisiana, Nebraska, Michigan, and Maryland, are but a few of the jurisdictions which recognize the compensability of pre-impact fear in survival actions.[8] In Beynon v. Montgomery Cablevision Limited Partnership, 351 Md. 460, 718 A.2d 1161 (Md. 1998), the Maryland Supreme Court undertook an exhaustive analysis to determine "whether 'pre-impact fright,' or any other form of mental and emotional disturbance or distress, suffered by an accident victim who dies instantly upon impact is a legally compensable element of damages in a survival action." The Beynon Court concluded:

> [D]amages for emotional distress or mental anguish are recoverable in Maryland, provided that it is proximately caused by the wrongful act of the defendant and it results in a physical injury, or is capable of objective determination. This standard, we recognize, does not hold sacred the common law sequence of events for recovery of emotional

[8] See, Solomon v. Warren, 540 F.2d 777, 796-97 (5th Cir. 1976); Haley v. Pan American World Airways, 746 F.2d 311 (5th Cir. 1984); Thomas v. State Farm Insurance Co., 499 So.2d 562 (La. App. 2d Cir. 1986); Hood v. State, 587 So.2d 755 (La. App. 2d Cir. 1991); Kozar v. Chesapeake & Ohio Ry. Co., 320 F.Supp. 335, 365-66 (W.D. Mich. 1970); Monk v. Dial, 212 Ga.App. 362,441 S.E.2d 857 (1994).

> damages: wrongful act, physical impact, physical injury and then emotional injury. It is more accommodating.
> . . .
> It is no great leap to conclude that the compensability of "pre-impact fright" is permissible when it is the proximate result of a wrongful act and it produces a physical injury or is manifested in some objective form.

Id., 351 Md. At 505, 718 A.2d at 1183. Furthermore, as one Court has noted, "[t]here exists no legal or logical distinction between permitting a decedent's estate to recover as an element of damages for a decedent's post-injury pain and suffering and mental anguish and permitting such an estate to recover for the conscious prefatal injury mental anguish resulting from the apprehension and fear of impending death." Nelson v. Dolan, 230 Neb. 848, 434 N.W.2d 25 (1989).

In the case at bar, had Tiffanie Rutland survived this accident, the mental anguish, trauma, distress, and terror she suffered during the accident would be an allowable and compensable element of her damages. The opinion below, in declining to recognize this concept, relieves the SCDOT for liability of these allowable damages simply because Mrs. Rutland died as a result of the wreck. Had she merely broken her arm in the wreck though, one must presume that these same mental distress damages would be recoverable by her. To hold contrary would reward a tortfeasor for the death of a victim. Because survival action damages are limited to those recoverable by the decedent had she lived, the same mental and emotional damages should be allowed under a survival theory.

To the extent that the Opinion below actually rules upon or addresses the seemingly novel question of whether "pre-impact fear" damages are recoverable in South Carolina, Petitioner respectfully requests that this Court recognize “pre-impact fear” as a compensable element of damages under the South Carolina survival statute. To the

extent the opinion below has characterized pre-death mental distress or "pre-impact fear" as a "cause of action," as opposed to an element of damages, the Court of Appeals erred. In light of existing South Carolina precedent which allows for survival action decedents to recover mental distress, the Court of Appeals' opinion conflicts with settled law of this Court and reversal is required.

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE EQUITABLE REALLOCATION OF SETTLEMENT PROCEEDS.

The Court of Appeal's decision upholding the equitable reallocation by the trial court is premised upon the conclusion that no evidence exists to support a survival claim. As discussed in Sections I and II above, there are substantial and compelling reasons why reversal of the Court of Appeals' decision below is required on the issue of the sufficiency of evidence of survival. Because sufficient evidence exists to support the decedent's survival claim, as in Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986), equitable reallocation is inappropriate and reversal is warranted. Based on Ward and Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), the Court of Appeals' affirmation of the equitable reallocation should be reversed.

A motion to set off one judgment against another is "equitable in nature and should be exercised when necessary to provide justice between the parties." Welch. Such discretion may be exercised when a settlement or judgment is based on fraud or a sham. Id. The precedent relied upon by the Court of Appeals in affirming equitable reallocation simply does not support the Court's conclusions. To the contrary, Ward and Welch instruct that under the facts of this case, the Petitioner presented adequate evidence to sustain a survival cause of action and equitable reallocation is inappropriate.

The seminal case addressing setoff and equitable reallocation is Ward v. Epting.

In that case, Defendant Epting argued that the plaintiff's pain and suffering cause of action was a sham. The trial judge refused to attack the prior settlement absent a showing of fraud or lack of jurisdiction. The trial court noted that under the "any evidence" standard of Croft, evidence existed from which a jury could reasonably find conscious pain and suffering existed. Ward, 290 S.C. at 559-560, 351 S.E.2d at 874-75.

On the other hand, the case which the Court of Appeals erroneously found the facts of this case to most closely mirror is Welch v. Epstein. Welch was a medical malpractice suit dealing with substandard *post-operative* care. In Welch, the decedent's estate brought wrongful death and survival actions against Aiken Hospital and two attending physicians. Prior to trial, the estate settled with the hospital and allocated $445,000.00 out of a $450,000.00 settlement to the survival action. At trial against the two physicians, a substantial wrongful death verdict was rendered against Dr. Epstein, the attending neurosurgeon. The jury awarded only $28,535.88 for the survival action, representing the medical expenses incurred by the decedent. The trial court granted defendant Epstein's post-trial motions to reallocate the proceeds of the estate's settlement with the hospital, finding the parties' allocation between wrongful death and survival claims was fraudulent. In upholding the trial court's finding that the allocation of the hospital's settlement to the survival action was a sham, the sole factual basis for the decision was that absolutely no evidence existed that the decedent endured conscious pain and suffering as a result of the negligence of Dr. Epstein. On this utter lack of evidence of pain and suffering the Court commented:

> Welch [decedent] fell into a coma at the time of his arrest and did not recover from that condition. While the personal representative claims Welch was in considerable pain prior

> to the arrest, that pain was directly related to the back surgery.

Id. at 426.

As noted in the Court's recitation of the facts, there was "no issue concerning Dr. Epstein's performance of the neurosurgery." Id. at 413. Rather, the jury's finding of negligence against Dr. Epstein dealt solely with post-operative care. All pain and suffering endured by Welch was related to the underlying neurosurgery, not the postoperative care. It followed, as a matter of law, that the negligent acts of Dr. Epstein were not causally related to any conscious pain or suffering endured by Welch; the only pain and suffering endured was a result of the surgery itself, which was not at issue in the case. Therefore, in Welch, absolutely no evidence existed of conscious pain and suffering that was attributable or proximately caused by Dr. Epstein. Based on these facts, it is readily apparent why the trial court viewed the allocation of $450,000.00 to the survival action as a fraud and was affirmed by the Court of Appeals. It is also apparent why the court used its equitable powers to reallocate the settlement with the hospital and apply the set off to the verdict against Dr. Epstein.

The facts presented in the case at bar are clearly distinguishable between the sham settlement allocations presented in Welch. Unlike Welch, the Petitioner's allocation of portions of the GM settlement to the survival action is supported by credible evidence. The facts here are therefore more closely aligned with Ward v. Epting. Ward was also a medical malpractice suit where the remaining Defendant sought setoff of another defendant's pre-trial settlement. The trial court refused Dr. Epting's motion for reallocation because there was no showing that the allocation of settlement proceeds was a sham. Id. at 560. In finding that the settlement was not a sham, the Ward Court set

forth the level of proof required to resist the argument that a settlement allocation was a sham. Ward directly cited to the standard established in Croft v. Hall, 208 S.C. 187, 37 S.E.2d 537 (1946), as the level of proof required to present a conscious pain and suffering claim:

> Unless respondent's intestate consciously suffered there could be no recovery of damages on that account. [Citations omitted]. We think, like the lower court finally concluded, that the evidence required that the jury pass upon this issue.
>
> Respondent's factual showing thereabout was weak but there was more than a scintilla of evidence tending to prove the point…
>
> ... [O]ur decision is not of the preponderance of evidence but whether there was any from which the jury could reasonably find conscious pain and suffering.

Id. at 539-540. Croft establishes that if a Plaintiff can satisfy the "any evidence" standard to overcome a summary judgment motion, the allocation cannot be deemed a sham or fraudulent. Applying the standard, as Chief Justice Toal recently held: "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock, 673 S.E.2d at 803 (2009).

In further distinguishing the facts of this case from those of Welch, in her Order Approving Settlement, Judge Goodstein necessarily found that evidence of conscious pain existed to support the allocation of the proceeds to the survival claim. Her Order speaks for itself as to SCDOT's objection to the allocation and SCDOT's ability to contest the allocation at the appropriate post-verdict juncture. However, a flaw in the trial court's analysis was to limit the review of the survival claim solely to the evidence presented

during the wrongful death trial. Rather, the trial court's post-verdict review should have questioned whether the record as a whole, as was considered by Judge Goodstein, supported her finding that evidence sufficient to satisfy the Croft standard existed. In fact, it is wholly unfair for the trial court to rely solely upon evidence presented during a wrongful death trial to determine if evidence of survival existed. With a judicial finding that evidence sufficient to support a survival claim existed, the trial court was bound to equitably reallocate the settlement only if no evidence existed to support the claim.

Evidence of Tiffanie Rutland's conscious pain and suffering, as well as pre-death emotional and mental trauma certainly exists beyond a mere scintilla of evidence. Whether limited to the trial of the wrongful death case or in viewing the record as a whole as suggested by Petitioner, the standards of Croft and Ward have been satisfied. The issues of whether the Appellant's allocation of proceeds with GM stand in stark contrast to the utter lack of evidence presented in Welch v. Epstein. For these reasons, the Court of Appeals' affirmation of equitable reallocation and set off must be rejected and reversal is required.

Finally, because equitable reapportionment is founded in equity and the notion that "justice be done between the parties," Petitioner is compelled to address policy considerations. Following the verdict in this case, the valid, fair and reasonable settlements obtained from joint tortfeasors (the driver and GM) have been collaterally attacked and the jury's findings against the SCDOT have been completely nullified. The Petitioner acknowledges the SCDOT's statutory right of set-off as well as the trial court's inherent power to order equitable set-off under the common law.

However, the result of affirming this equitable reallocation finding requires that the plaintiff in a wrongful death trial introduce and prove elements of damages under a survival action, a standard which is inherently unfair and simply contrary to the existing case law addressing equitable reapportionment. To require such a showing produces a chilling effect on the settlement of claims with other tortfeasors, because it would serve little purpose to release joint tortfeasors by settlement if the Plaintiff then has to present that same evidence against remaining defendants in order to stave off the post-verdict settlement analysis. Such a requirement also would necessarily require the introduction of irre1evant, prejudicial, and potentially confusing evidence into the trial against the remaining defendant. Moreover, the broad expansion of the law regarding setoff and equitable reallocation that results from the Court of Appeals' Opinion provides disincentive for defendants such as SCDOT to enter into reasonable, good faith settlement negotiations. The stifling and impeding of fair, just settlements being reached against tortfeasors is contrary to the public policy of South Carolina. Albeit in a different context as between joint tortfeasors, as noted recently in Fowler v. Hunter, 668 S.E.2d 803 (Ct. App. 2008):

> South Carolina has shown a willingness to depart from the common law in order to promote reasonable settlements between tortfeasors and injured parties. In Bartholomew v. McCartha, 255 S.C. 489, 179 S.E.2d 912 (1971), our Supreme Court concluded the common-law rule regarding the release of one joint tortfeasor was not in the best interests of justice.
>
> Being untrammeled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of parties and extol technicality, we adopt the view that the release of one tortfeasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact,

> received full compensation amounting to a satisfaction. Id. at 492,179 S.E.2d at 914.
>
> While acknowledging the inherent benefits of settlement, we also note South Carolina promotes the careful examination of settlement agreements to avoid the potential for complicity or wrongdoing.
>
> We are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law. In fact, this Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party. However, these settlement agreements must be carefully scrutinized in order to determine their efficiency and impact upon the integrity of the judicial process.

Fowler. As addressed above, in the allocations at issue in this appeal, there is no fraudulent or sham allocation to the survival action, as sufficient evidence existed on the issue of conscious pain and suffering and/or pre-death mental and emotional distress. Nor does the allocation of settlement proceeds in the amount of $167,000.00 towards the wrongful death claim and $138,000.00 towards survival contravene public policy or the law, or indicate complicity or wrongdoing on behalf of the settling parties from a policy standpoint. It follows that the SCDOT's arguments concerning the equitable reallocation and setoff of the settlement proceeds at issues are without merit. Furthermore, taken to their logical conclusion, the standards sought to be applied by respondent have substantial and real adverse policy ramifications for those injured by the negligence of a governmental entity in conjunction with other joint tortfeasors.

Under the analysis of the "any evidence" standard above, and the existence of facts sufficient to support a survival claim, the Court of Appeals erred in declaring the settlement allocation in the case at bar to be a sham. The Court of Appeals therefore erred in affirming the equitable reallocation of the settlement proceeds in this case and

the Court of Appeals' analysis under Welch and Ward is mistaken. Furthermore, for valid policy reasons, the Court of Appeals' affirmation of the trial court's equitable reallocation should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals' Opinion of August 4, 2010.

Respectfully submitted,

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