THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

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Op. No. 6029
(S.C. Ct. App. filed October 4, 2023)
Case No. 2011-CP-26-7403

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RECEIVED

Dec 21 2023

S.C. SUPREME COURT

Randall M. Green and Ann Green, ..... Respondents,

v.

Wayne B. Bauerle, M.D. and
Wayne B. Bauerle, M.D., P.C., ..... Petitioners.

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# PETITION FOR WRIT OF CERTIORARI

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## CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on November 21, 2023.

## QUESTIONS PRESENTED

I. Did the Court of Appeals err in failing to address the appropriate standard of review particularly where the parties disagreed on the issue in briefing and ultimately a reading of the Court of Appeals' opinion reflects that the Court applied the wrong standard of review?

II. Did the Court of Appeals err in affirming the Circuit Court's finding that the Greens intended the $2 million settlement with Grand Strand Regional Medical Center to be allocated equally between them and in failing to recognize that the only "evidence" cited by the Court were arguments of counsel?

III. Did the Court of Appeals err in rejecting, as had the Circuit Court, the only competent and probative evidence of the Greens' intent – that being the April 14, 2016 Consent Order whereby the Greens accepted $64,883.68 to satisfy Mrs. Green's judgment in that amount, thereby acknowledging that her judgment had not been fully satisfied by the Grand Strand settlement?

IV. Did the Court of Appeals err in affirming the Circuit Court's ruling that Ann Green sustained damages almost double what the jury determined, and in doing so, the Court of Appeals misconstrued and misapplied the Supreme Court's ruling in the 2014 appeal that a comparison of the Greens' jury verdicts "may well be relevant to the ultimate determination of a proper setoff"?

V. Did the Court of Appeals err in failing to treat the verdicts and settlement proceeds as marital or joint property, as previously argued by the Greens, and in failing to apply the setoff as dictated by Supreme Court precedent under similar circumstances?

## STATEMENT OF THE CASE

This is an appeal from a medical malpractice action. Randall M. Green and Ann Green were involved in a motor vehicle accident on April 17, 2004, when a vehicle crossed the center line and collided with the Greens' vehicle. Randall Green was seriously hurt and was transported to Grand Strand Regional Medical Center where he was initially treated in the Emergency Room for a fracture/dislocation of his right hip and a severe laceration of his right forearm.

During the course of Mr. Green's care in the ER, the Appellant Wayne B. Bauerle, M.D.,[1] the on-call orthopedic surgeon, was summoned to the ER to treat the fracture/dislocation of his right hip. Dr. Bauerle learned the ER physician had already reduced the hip, but Dr. Bauerle requested a CT scan of the hip to ensure that the reduction was proper and to check for bone fragments that could require immediate surgery. At the time of the CT scan, Mr. Green was in the holding area for the operating room waiting to undergo surgery to repair the laceration of his right forearm. Following the CT scan, Mr. Green went into cardiac arrest and was successfully resuscitated. Mr. Green sustained damage to his spinal cord which resulted in the paralysis of his lower extremities.

The Greens filed this medical malpractice action against Dr. Bauerle and his practice as well as Grand Strand Regional Medical Center, LLC ("Grand Strand") and Carolinas Medical Response, Inc. ("CMR"), which was the ambulance provider. The lawsuit included a claim for loss of consortium by Ann Green. Prior to trial, Grand Strand settled all claims with the Greens for $2 million, and CMR settled for $25,000. (R. 62-66).[2]

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[1] For ease of discussion, the Petitioners Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. shall be referred to collectively as "Dr. Bauerle."

[2] Randall Green also settled with the at-fault driver for $100,000, and he received $150,000 in settlement of his underinsured motorist (UIM) claim. Likewise, with respect to her

The medical malpractice action against Dr. Bauerle and his practice was tried before a jury during the week of September 9, 2013, with Circuit Judge Steven H. John presiding. The jury found for Randall Green in the amount of $2.3 million on his medical negligence claim and for Ann Green in the amount of $550,000 on her loss of consortium claim. (R. 44-47). Judgment in those amounts was initially entered on September 16, 2013. (R. 42-43).

At the close of the trial, Dr. Bauerle moved for a set-off of the amounts paid in settlement on behalf of other Defendants, including $2 million from Grand Strand and $25,000 from CMR. (R. 67-70). By Order filed October 17, 2013, Judge John granted in part and denied in part the Motion for Set-Off. (R. 13-18). Judge John allowed for a set-off of the settlements received from Grand Strand and CMR, but he denied the set-off for the amounts paid for the release of the at-fault driver and the UIM insurer. Judge John directed the Clerk of Court to enter judgment in the amount of $665,789.47 in favor of Randall M. Green and to enter judgment in the amount of $159,480.53 in favor of the Ann Green. (R. 17).

The $2.025 million in settlements was unallocated by the Greens and the settling Defendants. As a result, Judge John equitably allocated the settlements based upon the precise distribution made by the jury in finding the actual damages sustained by the Greens. Thus, as Judge John reasoned:

> [T]he jury found for Mr. and Mrs. Green for a combined verdict of $2.85 million against the Defendants. The jury awarded Mr. Green $2.3 million of the total $2.85 million verdict, or 80.70% of the total verdict. The jury awarded Mrs. Green $550,000 or 19.30% of the total verdict. Using that very allocation, this Court rules that the $2 million settlement with Grand Strand shall off set the verdict for Mr. Green in the amount of $1,614,035.09 and the verdict for Mrs. Green in the amount of $385,694.91. Likewise, the settlement between Plaintiffs and Carolinas Medical Response

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loss of consortium claim, Mrs. Green received $100,000 in settlement with the at-fault driver and an additional $75,000 in settlement of her UIM claim.

> shall off set the verdict for Mr. Green in the amount of $20,175.44 and the verdict for Mrs. Green in the amount of $4,824.56.

(R. 17).

On October 11, 2013, Dr. Bauerle filed a Notice of Appeal with this Court. The Greens subsequently filed a Notice of Cross-Appeal. This is referred hereafter as the "2014 appeal."

On August 5, 2014, the insurer for Dr. Bauerle made an initial payment of $415,789.47 in partial satisfaction of the judgment in favor of Randall M. Green. This sum was not in controversy given the issues raised on appeal by both the Greens and Dr. Bauerle. The remaining judgment was in the amount of $250,000.00 in favor of Randall M. Green and in the amount of $159,480.53 in favor of Ann Green. The Receipt and Partial Satisfaction of Judgment executed by the Greens was filed on August 8, 2014. (R. 125).

On December 10, 2014, a hearing was held on a Motion for Leave of Court to Deposit Funds into Court before Circuit Court Judge Larry Hyman. By Order filed December 11, 2014, Judge Hyman allowed for the sum of $446,669.82 to be paid into the court pursuant to Rule 67, SCRCP, which included $409,480.53 (which was the remainder of the judgment principal) plus $37,189.29 in accrued post-judgment interest through December 10, 2014. (R. 21-25).

On February 3, 2016, the Court of Appeals issued an unpublished opinion affirming the rulings of the trial court and denying the relief sought by both sides on appeal. Dr. Bauerle and the Greens filed petitions for rehearing, which were subsequently denied on March 24, 2016.

At that point, Dr. Bauerle conceded on the setoff issue with respect to the $225,000 received by the Greens from the UIM insurer. As a result, the insurer for Dr. Bauerle then agreed to release $228,505.69 of the amount paid into court because the UIM settlement amount was no longer in controversy. Accordingly, on April 14, 2016, a Consent Order to Partially Release Funds Deposited with Clerk of Court was signed and filed by Circuit Court Judge Larry Hyman. (R. 26-27). That Consent Order was based on the Greens' motion "for an Order

directing that the sum of $228,505.69 be paid by the Clerk of Court to the Plaintiffs Randall Green and Ann Green." (R. 26). That Consent Order further provided that "the judgment in favor of the Plaintiff Randall Green is partially satisfied by the payment of $163,622.01 and the judgment in favor of the Plaintiff Ann Green is partially satisfied by the payment of $64,883.68." (R. 27). On May 6, 2016, the Greens filed a Receipt and Partial Satisfaction of Judgment in the amount of $228,505.69 consistent with the Consent Order. (R. 126).

Thereafter, the only amount of the monies paid into court that remained in controversy was the $200,000 received in settlement from the at-fault driver, plus interest on that amount, thus totaling $218,164.13.

On April 25, 2016, Dr. Bauerle filed a Petition for Writ of Certiorari. On or about May 16, 2016, the Greens filed a Petition for Writ of Certiorari after receiving an extension. On October 2, 2017, this Court granted both Petitions for Writ of Certiorari.

On May 29, 2019, this Court issued an unpublished opinion that affirmed in part, vacated in part, and remanded. This Court affirmed the Court of Appeals and the Circuit Court on several issues. First, this Court rejected Dr. Bauerle's claim of a set-off for the $200,000 paid to the Greens by the auto liability insurer on behalf of the at-fault driver whose accident set in motion Mr. Green's hospital treatment. Second, this Court upheld Dr. Bauerle's entitlement to a set-off of the $2 million from Grand Strand and $25,000 from CMR (the latter of which was no longer contested). This Court wrote: "we agree with the trial court and the court of appeals that a setoff of the amount paid by Grand Strand was warranted." *Green v. Bauerle*, 2016 WL 2289678, *3 (S.C. 2019). However, this Court took issue with the manner by which the trial court allocated the $2 million settlement (which was unallocated by the parties to the settlement) between Mr. Green and Mrs. Green. This Court found "the trial court's method of calculating the setoff was arbitrary," and for that reason, this Court "vacate[s] that portion of the trial court's

order and remand[s] to the trial court for further proceedings." *Id*. On that point, this Court wrote as follows:

> The law requires the total amount paid by Grand Strand to be set off from the verdicts; however, we conclude the trial court's determination of the specific amounts to be set off from the verdicts was arbitrary, as the determination was based solely upon the ratios both verdicts bore to the whole. The setoffs should be calculated based upon the entirety of relevant circumstances, not solely upon such a formula. While these ratios may well be relevant to the ultimate determination of a proper setoff, they are not necessarily the sole relevant circumstance. Therefore, we vacate the trial court's order on this particular point and remand this issue to the trial court and direct it to convene a hearing to consider all relevant circumstances. The trial court shall then issue an order setting forth the amounts to be set off from the two verdicts.

*Id*. This Court did not offer any explanation or guidance as to what the "entirety of relevant circumstances" may entail.[3]

After remand,[4] both sides submitted legal memoranda, and Judge Steven John held a hearing as directed by this Court on August 28, 2019. Judge John issued an Order on October 22, 2019, in which he ruled that "each of the Plaintiff's [sic] verdicts shall be reduced by $1 million." (R. 9). Accordingly, he ruled that "[a]pplication of a $1 million setoff will reduce Mrs. Green's judgment to zero." (R. 8). Additionally, Judge John ruled that Mr. Green's verdict was reduced by $1 million from the Grand Strand settlement and $20,175 from the CMR settlement. (R. 9).

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[3] As mentioned, this Court also recognized in its opinion in the 2014 appeal that "the Greens did not continue their challenge to the trial court's grant of setoff as to the unallocated settlement paid by CMR; therefore, this argument has been abandoned." *Green*, 2016 WL 2289678 at *2. That allocation applied a setoff of $20,175.44 to Mr. Green's verdict and a setoff of $4,824.56 to Mrs. Green's verdict.

[4] By Consent Order filed August 28, 2019, Mark Green, as Personal Representative of the Estate of Randall M. Green, was substituted as a Plaintiff for Randall Green who had died on June 22, 2019. (R. 38-41).

Dr. Bauerle subsequently filed a Motion to Alter or Amend Order, which was summarily denied by an Order filed December 11, 2019. (R. 11-12).

Dr. Bauerle thereafter filed a timely appeal to the Court of Appeals. On October 4, 2023, the Court of Appeals issued a published decision affirming the allocation by Judge John. In its opinion, the Court of Appeals did not address the standard of review that was applicable, despite the parties' divergent views as briefed as to the proper standard of review that applies to the adjudication of the allocation of $2 million settlement to Mr. Green and Mrs. Green.

The Petitioners filed a petition for rehearing, which was summarily denied by Order issued on November 21, 2023.

## ARGUMENTS

### I. The Court of Appeals erred in failing to address the appropriate standard of review particularly where the parties disagreed on the issue in briefing and ultimately a reading of the Court of Appeals' opinion reflects that the Court applied the wrong standard of review.

As a threshold issue, the opinion of the Court of Appeals does not specifically state the applicable standard of review, and from the analysis by the Court of Appeals, it is unclear what standard of review was applied. The Court's opinion has language suggestive that an abuse of discretion standard was applied, despite the correct standard being a *de novo* standard.

As briefed in detail in the Court of Appeals, the parties disagree as to the applicable standard of review which made the issue one that needed to be addressed and resolved. The Respondents argue that the standard of review is abuse of discretion. The Petitioners, on the other hand, maintain that the standard of review is *de novo*.

In the 2014 appeal, this Court recognized that a non-settling defendant's right to a setoff arises by operation of law under S.C. Code Ann. § 15-38-50 as well as by common law. *Green v. Bauerle*, 2019 WL 2289678, *3 (S.C. 2019). This Court explained that S.C. Code Ann. § 15-38-50 "grants the [trial] court no discretion … in applying a set-off." *Id*., *citing Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188, 190 (Ct. App. 2012). This Court also ruled that "[i]n South Carolina, a non-settling defendant's right to setoff also exists under common law, and the jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties." *Id*.

On appeal, courts "review[] all questions of law *de novo*." *Fesmire v. Digh*, 385 S.C. 296, 683 S.E.2d 803, 807 (Ct. App. 2009). Thus, rulings as to the setoff arising by operation of law under S.C. Code Ann. § 15-38-50 should be reviewed *de novo*. Likewise, in matters of equity, all factual findings and legal conclusions are reviewed *de novo*. *Regions Bank v.*

*Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348, 352 (Ct. App. 2011). The Petitioners thus supported their position that the appropriate standard of review is *de novo*.

However, as indicated, the Court of Appeals' opinion does not specifically address the applicable standard of review. From its analysis, there are rulings of "no error," but there are also rulings addressing the sufficiency of the evidence. *See e.g.*, Slip Op. at 10 ("because the circuit court's allocation is supported by the evidence in the record …."); Slip Op. at 9 ("we find the circuit court's allocation is supported by the evidence and is reasonable under the facts of this case"). That suggests the Court of Appeals applied the standard of review for an action at law tried without a jury which requires the appellate court to not disturb the judge's findings of fact unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976). The Petitioners submit that standard of review would be incorrect and that only a *de novo* standard applies to the issues on appeal.

The Court of Appeals refused the request of rehearing to address the parties' dispute as to the applicable standard of review. Accordingly, the issuance of a writ of certiorari is warranted to address that issue. In addition, an adjudication of that issue will be a benefit to the bench and bar for future cases to have this Court decide the appropriate standard of review in this context. This Court is further requested to find that a *de novo* standard applies to all issues presented and to apply that *de novo* standard.

## II. The Court of Appeals erred in affirming the Circuit Court's finding that the Greens intended that the $2 million settlement with Grand Strand Regional Medical Center be allocated equally between them and in failing to recognize that the only "evidence" cited by the Court were arguments of counsel.

As the Circuit Court did, the Court of Appeals overlooked or misapprehended the complete absence of admissible, competent evidence in the record showing that the intention of the Greens was to share equally the $2 million settlement received from Grand Strand Regional Medical Center.

As the Court of Appeals did recognize, the "Covenant Not to Sue and Covenant Not to Prosecute or Execute Judgment" does not provide for an allocation between the settling parties. However, as the Petitioners argued, the intent to equally allocate the $2 million is not shown by any language within the agreement. In other words, the agreement contains no allocation nor any indication that an allocation was even contemplated by the parties. A suggestion to the contrary is pure speculation, and speculation is not evidence. *See*, *Gordon v. Busbee*, 397 S.C. 119, 723 S.E.2d 822, 831 (Ct. App. 2012). Likewise, silence in the Covenant is not evidence that an allocation was contemplated or bargained for.

The Petitioners pointed out that the Circuit Court cited only to the arguments of counsel that the Greens intended to allocate the $2 million settlement equally between them. The Court of Appeals disagreed with that assessment. However, the Circuit Court wrote: "The Plaintiffs asserted before the Supreme Court as well as this Court that the lack of allocation reflects their intentions to share equal entitlement to the funds." (R. 4). That language demonstrates that the Circuit Court relied exclusively on the arguments of counsel, and of course, it is well established that argument by counsel is not evidence nor is it a substitute for evidence. *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are ... not evidence"). Nonetheless, the Court of Appeals did the very same thing when it wrote: "The Greens submit

that their decision not to specifically allocate the settlement funds [in the Covenant] indicates their intent to allocate the funds equally amongst themselves." *See*, Slip Op. at 7. The Court of Appeals relied on the argument of counsel as evidence. In fairness, there is *no evidence* – other than argument of counsel which is not evidence – that the Greens intended to allocate the $2 million equally. Moreover, the Greens' trial testimony as to their damages is not evidence of whether (or how) they allocated a pre-trial settlement. That is simply not credible nor competent evidence of the settling parties' intent.

The Court of Appeals further erred in relying on cases where there is an attempt to "reallocate" an allocated settlement. *See*, Slip Op. at 8. This is not a "reallocation" case. As the Court of Appeals did recognize, the Covenant includes no bargained for allocation by the Greens. Hence, the Petitioners are not seeking a reallocation. There was no allocation in the first place upon which to seek a reallocation. Indeed, that is critical because the burden of proof shifts in a reallocation case. *See*, *Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 878 S.E.2d 696, 711 (Ct. App. 2022) ("the party seeking departure from the application of standard setoff rules bears the burden of proof and must be prepared to justify such reallocation as fair, bona fide, and just").

## III. The Court of Appeals erred in rejecting, as had the Circuit Court, the only competent and probative evidence of the Greens' intent – that being the April 14, 2016 Consent Order whereby the Greens accepted $64,883.68 to satisfy Mrs. Green's judgment in that amount, thereby acknowledging that her judgment had not been fully satisfied by the Grand Strand settlement.

Most importantly, there is one piece of evidence that *does show the Greens' intent*; yet, that evidence was rejected by the Circuit Court as "harmless error" and "should be disregarded." (R. 8). The Court of Appeals then compounded that error by misconstruing that evidence.

As the Petitioners have explained, on April 14, 2016, a Consent Order to Partially Release Funds Deposited with Clerk of Court was signed and filed by Circuit Court Judge Larry Hyman. That Consent Order was based on the Greens' motion "for an Order directing that the sum of $228,505.69 be paid by the Clerk of Court to the Plaintiffs Randall Green and Ann Green." (R. 26). That Consent Order further provided that "the judgment in favor of the Plaintiff Randall Green is partially satisfied by the payment of $163,622.01 and the judgment in favor of the Plaintiff Ann Green is partially satisfied by the payment of $64,883.68." (R. 27).

Thus, Mrs. Green, with her husband's consent, accepted $64,883.68, and they partially satisfied/released the Petitioners in that amount on April 20, 2016. (R. 126). The acceptance of funds by Mrs. Green to partially satisfy the judgment entered in her favor is inconsistent with the Greens' current position that Mrs. Green's allocation was $1 million (as intended by the parties to the Grand Strand settlement) and thus no payment of any amount was required to satisfy Mrs. Green's verdict of $550,000. Yet, by accepting the $64,883.68 and satisfying Mrs. Green's judgment in that amount, the Greens acknowledged that her judgment was not fully satisfied by the Grand Strand settlement. That is clearly evidence demonstrating that the Greens never intended to allocate and *indeed did not allocate* the $2 million equally.

Indeed, that is the *only competent evidence* in the record that reflects the Greens' intent with respect to the $2 million settlement. The Circuit Court erred in disregarding it, and the Court of Appeals did as well. The Court of Appeals, in fact, wrote: "we agree with the Greens that an isolated sentence from a Consent Order directing the release of undisputed funds in the total of a UIM payout has no application here." *See*, Slip Op. at 8.[5] The Court of Appeals was

[5] The reference to a "UIM payout" is a mischaracterization and not substantively material. The Circuit Court likewise erred in characterizing the April 2016 payment as "the disbursal of UIM proceeds." (R. 8). The payment was not "UIM proceeds" or a "UIM payout" and was not made by the UIM insurer. Instead, it was a payment made by the Petitioners'

mistaken. There is no isolated sentence in a Consent Order that is at issue; it is the net effect of that Consent Order. The Greens were asking the Circuit Court to satisfy the judgment in favor of Mrs. Green by $64,883.68, and that satisfaction was indeed accomplished. It is the request and the partial satisfaction of Mrs. Green's judgment that is *probative evidence* that the Greens did not allocate the Grand Strand settlement as they now claim. To reiterate, if the Greens truly intended to allocate the $2 million equally, as they now claim, there would have been no remaining judgment for Mrs. Green to satisfy by the $64,883.68 payment. Again, it is the Greens' actions that reflect their intent – it is indeed the *only competent and probative evidence* of the Greens' intent.

The Court of Appeals also erred in rejecting this evidence of the Greens' intent based on language in an earlier Order filed December 11, 2014, stating "the release of the judgment liens has no effect on any issues currently on appeal[,] including the amount of the verdicts to which the Plaintiffs are ultimately entitled, which will be determined by the appellate courts." (R. 25). The referenced Order was entered in December 2014, long before the Greens sought to partially satisfy the judgment in favor of Mrs. Green. That Order only resolved the Petitioners' request to pay a sum equal to the judgment and accrued interest into court pursuant to Rule 67, SCRCP. (R. 21). The Petitioners also requested "an Order declaring that, upon the deposit of the sum of $409,480.53, plus accrued interest, with the Horry County Clerk of Court, the judgment liens established as a matter of law by the judgments entered in this action are released with respect to any real property owned by the Defendants in Horry County, South Carolina." (R. 21). Judge Larry B. Hyman, Jr. made the following ruling:

> In addition, the Court is advised that the Defendant Wayne B. Bauerle, M.D. is attempting to sell some real property that is presently encumbered by the judgment liens resulting as a matter

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insurer in partial satisfaction of *both* the medical malpractice verdict for Mr. Green and the loss of consortium verdict for Mrs. Green.

> of law from the judgments entered in this litigation. The Defendants seek the release of the judgment liens for properties owned by the Defendants within Horry County. The Court finds that the requested relief is appropriate upon the Defendants making the deposit of $446,669.82 with the Clerk of Court. The amount of funds necessary to fully satisfy the judgments will then be available to the Plaintiffs after the pending appeal, if the Plaintiffs are successful in upholding those judgments. Therefore, the Plaintiffs do not require the protection of the judgment liens in order to obtain satisfaction of those judgments. Accordingly, this Court hereby orders the Defendants to make immediate tender of the check in the amount of $446,669.82 to the Horry County Clerk of Court, and the Court further hereby releases the judgment liens thereby removing those judgment liens as an encumbrance upon the Defendants' properties located in Horry County.

(R. 24). Thus, the purpose of the Order filed December 11, 2014 was simply to release the judgment liens on the Petitioners' property. In the language quoted by the Court of Appeals, it is "the release of the judgment liens" which "has no effect on any issues currently on appeal." (R. 25). The controversy between the parties, however, does not involve "the release of the judgment liens." Indeed, Judge Hyman's Order does not even remotely address the issues related to the allocation, if any, of the $2 million settlement, and it certainly does not preclude or prevent the courts from considering the Greens' later conduct in partially satisfying the judgment in favor of Mrs. Green to be considered for what it is -- competent and probative evidence of the Greens' intent with respect to that settlement. Accordingly, this Court is respectfully requested to grant a writ of certiorari to review the Court of Appeals' erroneous rejection of clearly probative and admissible evidence as to the Greens' intent – evidence that should not have been rejected by the Circuit Court as "harmless error."[6]

[6] It is noteworthy as well that the Greens never even objected to the admissibility or consideration of the Consent Order filed April 14, 2016 during the Circuit Court hearing on remand. No contemporaneous objection was made. The Court of Appeals should not have rejected such evidence where no objection was made. This is an additional point that the Court of Appeals overlooked or did not address in its analysis.

## IV. The Court of Appeals erred in affirming the Circuit Court's ruling that Ann Green sustained damages almost double what the jury determined, and in doing so, the Court of Appeals misconstrued and misapplied the Supreme Court's ruling in the 2014 appeal that a comparison of the Greens' jury verdicts "may well be relevant to the ultimate determination of a proper setoff."

The Circuit Court ruled that Ann Green sustained damages in excess of what the jury determined, thereby justifying her receipt of $1 million of the Grand Strand settlement as compensation for her loss of consortium claim. Likewise, the Circuit Court ruled that such an equal allocation of the $2 million in settlement proceeds prevents the risk of a double recovery, while in reality, the court's allocation leads to just that -- a double recovery. The jury awarded Mrs. Green $550,000 as her consortium damages; yet, with the Circuit Court's ruling, Mrs. Green achieved a result in excess of $1 million as her recovery -- close to twice the jury's determination.

As the Petitioners explained, from an equitable standpoint, any notion that the Greens were equally damaged is entirely unsupported in the evidence. Hence, it is neither fair nor reasonable to allocate fifty percent of the Grand Strand settlement proceeds to each of the Greens. As the record reflects, Mr. Green's injuries, including significant personal injury, impairment, and paralysis as well as medical expenses and a Life Care Plan, far exceeded the loss of consortium suffered by Mrs. Green. The jury's verdict -- $2.3 million in damages for Mr. Green and $550,000 in damages for Mrs. Green -- bears that out and should not be entirely ignored or discounted, as the Circuit Court and the Court of Appeals have done. It is important to note that in the 2014 appeal this Court indicated the ratios based on the verdicts "may well be relevant to the ultimate determination of a proper setoff" but are "not necessarily the sole relevant circumstance." *Green*, 2019 WL 2289678 at *4.

Despite this Court's ruling, the Court of Appeals rejected the Petitioners' position on three bases, each of which merits the issuance of a writ of certiorari and ultimately reversal.

First, the Court of Appeals found that the allocation "is supported by the evidence in the record." *See*, Slip Op. at 10. The Court of Appeals does not state what that evidence is. There is no evidence in the record, however, that would lead a reasonable fact-finder to conclude that Mr. and Mrs. Green's injuries were equal or even closely similar in gravity, severity, or value. Certainly, the jury's decision in that regard cannot and should not be completely disregarded.

Second, the Court of Appeals refers to and rejects the Petitioners' "formula," but there is no "formula" that was presented. *See*, Slip Op. at 10. Instead, the Petitioners argue that the jury's determination of damages and the relative harm sustained by Mr. and Mrs. Green ($2.3 million in damages for Mr. Green vis-à-vis $550,000 in damages for Mrs. Green) is entitled to weight in the analysis. Contrary to the Court of Appeals' analysis, the Petitioners never argued that the jury's verdict is the only evidence to be considered. Moreover, and most importantly, contrary to the Court of Appeals' ruling, a comparison of the Greens' jury verdicts does not "contravene the supreme court's prior opinion in this case." *See*, Slip Op. at 10. Indeed, that represents a misreading of this Court's decision in the 2014 appeal – where this Court *explicitly* stated that the ratios based on the verdicts "may well be relevant to the ultimate determination of a proper setoff" but are "not necessarily the sole relevant circumstance." *Green*, 2019 WL 2289678 at *4. Therefore, proper weight should have been given to the jury's determination of damages sustained by the Greens in assessing the amounts to be set off from the verdicts. The Circuit Court as well as the Court of Appeals erred in rejecting that component of the analysis. It was not improper under this Court's ruling in the 2014 appeal to consider on remand the jury's relative verdicts for the Greens.

Third, the Court of Appeals erred in rejecting the argument that allocating $1 million to Mrs. Green would not result in a windfall or double recovery. The Court of Appeals rejected that argument based solely on inapposite case law where the settling parties explicitly allocated

the settlement proceeds and the non-settling party sought a *reallocation*. *See*, Slip Op. at 10. The case of *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015), has no application to the case at bar. As addressed above, this is *not* a case where the Petitioners have sought a "reallocation" of an allocated settlement. To the contrary, this is a case where there is no allocation, and the Circuit Court was required, sitting in equity, to determine the settling parties' intent and allocate the settlement in the first instance. Thus, the reliance on *Riley*, which permeates the Court of Appeals' opinion, is in error and warrants the issuance of a writ of certiorari and ultimately reversal as clear error.

## V. The Court of Appeals, like the Circuit Court, erred in failing to treat the verdicts and settlement proceeds as marital or joint property, as previously argued by the Greens, and in failing to apply the setoff as dictated by Supreme Court precedent under similar circumstances.

The Petitioners have also argued that the Circuit Court erred in disregarding the position originally taken by the Greens post-trial and in the 2014 appeal that their settlement with Grand Strand is or should be treated as "marital property" and, for that reason, the allocation of the $2 million should be equal. As the Petitioners pointed out, if the $2 million settlement is "marital property," then the verdicts themselves are also collectively "marital property," which is supported by the applicable case law on how proceeds of litigation received during marriage are treated. *See*, *Mears v. Mears*, 313 S.C. 42, 437 S.E.2d 34, 36 (1993) (holding "proceeds of a personal injury settlement acquired during the marriage are marital property"). *See also*, *Marsh v. Marsh*, 313 S.C. 42, 437 S.E.2d 34 (1993); *Covington v. Covington*, 306 S.C. 473, 412 S.E.2d 455 (Ct. App. 1991); *Orszula v. Orszula*, 292 S.C. 264, 356 S.E.2d 114 (1987); S.C. Code Ann. § 20-3-630 (defining "marital property"). Both the Circuit Court and the Court of Appeals erred in rejecting this authority.

After this Court ruled in the 2014 appeal, the Greens changed course and now dispute taking that position, but the record clearly demonstrates otherwise. *See*, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (a litigant is prohibited from "chang[ing] his theory on appeal"). In their Appellants' Brief to the Court of Appeals in the 2014 appeal, the Greens, citing the *Marsh* case on marital property, wrote: "The evidence dictates that it should be allocated equally to each cause of action, and equity requires that it be allocated equally between the two Plaintiffs. Even if the Settlement has been allocated entirely between the medical malpractice and loss of consortium causes of action, the funds would still be marital property to which each Plaintiff is equally entitled." *See*, Greens' Court of Appeals Appellants' Brief (2014 appeal), pp. 42-43. Later, in their Supreme Court brief, the Greens cited *Marsh* again, arguing: "Permitting courts to allocate joint property unequally between a husband and wife without their consent for the purpose of setoff implies that the pecuniary interests of third party tortfeasors conveys upon a trial court the authority to alter an agreement consummated by a married couple and force the division and characterization of their joint property." *See*, Greens' Supreme Court Brief (2014 appeal), p. 21.

As demonstrated, the Greens clearly have taken the position that the Grand Strand settlement was "marital property" and "joint property."[7] Thus, the verdicts and the settlement should be treated as marital property consistent with existing law. Under that approach, the total of the verdicts ($2.85 million) would be subject to the entire setoff ($2.025 million) which leaves

[7] In fact, in their original memorandum of law opposing the Petitioners' Motion for Setoff, the Greens argued that they each had "an undeniable property right in an undisclosed and unallocated portion of the settlement proceeds. Essentially Ann Green owns a portion of every cent of that settlement and Randall Green owns a portion of every cent." (R. 73). As they further wrote, "a set-off of any part of the verdict in favor of Randall Green would deprive Ann Green of her ownership right to the proceeds of the settlement and conversely, the set-off of any portion of Ann Green's verdict would deprive Randall Green of his ownership of a portion of the settlement proceeds." (R. 74).

the total recovery of $825,000 in marital or joint property to be paid jointly to the Greens.

In its opinion rejecting this argument, the Court of Appeals never acknowledged that this position was taken by the Greens or that they ultimately changed their theory after the 2014 appeal. In fact, it appears that the Court of Appeals disagreed with that assessment, but even that is not clear. *See*, Slip Op. at 11. Nonetheless, to compound that error, the Court of Appeals *sua sponte* raised the issue of "mootness," which was not raised in the Circuit Court nor at any point by the Greens to reject this argument. The Court of Appeals included no legal analysis or citations for its ruling that "this argument is now moot – Mr. Green has passed away and the interests of the Estate and its beneficiaries will never be subjected to a divorce proceeding." *See,* Slip Op. at 11.

In actuality, the Court of Appeals erred as a matter of law in rejecting this argument – made by the Greens themselves – on the basis of mootness resulting from Mr. Green's death. The set-off issue is not a fluid one. The right to a set-off of the $2 million in settlement proceeds from Grand Strand -- which this Court has already affirmed -- arose at the time of the verdict in September 2013. In other words, *the right to a set-off in some amount was established at the time of the verdict*, and events that occurred after that date do not impact the accrual of that right. Quite simply, Mr. Green's death did not "moot" the Petitioners' right to a set-off nor the amount of that set-off. The determinative facts are those that exist at the time that the right accrued. The Court of Appeals, in fact, cited no authority for its conclusion that the Petitioners' argument is now moot because of a death occurring in 2019. Frankly, the reason for that is that no such authority exists, which also justifies the issuance of a writ of certiorari on this issue.

In addition, the Court of Appeals misapprehended the precedent based on this Court's decision in *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995). As the Petitioners point out, the *Broome* decision actually addresses how to apply a setoff where there are personal injury and

consortium trial verdicts in favor of spouses. In *Broome*, a husband and wife settled a personal injury claim and consortium claim with the at-fault driver and received an *unallocated* sum of $50,000 (just as what occurred in the case at bar). The husband and wife then made an underinsured motorist (UIM) claim, and this Court addressed whether the UIM carrier was entitled to a setoff for the $50,000. The claims were tried to a jury verdict, as occurred in this case. The husband received a verdict of $90,000 on his personal injury claim and the wife a verdict of $7,500 (after an additur) on her loss of consortium claim. This Court ultimately explained that the $50,000 setoff could be applied to the total verdicts for both husband and wife ($97,500), leaving a judgment *for both spouses* of $47,500.

Thus, consistent with this Court's precedent in *Broome*, it is appropriate to treat the settlements and verdicts as marital or joint property. As indicated, using the framework from *Broome*, the total of the judgment ($2.85 million) should be subject to the entire setoff ($2.025 million) which leaves the total recovery of $825,000 to be paid jointly to the Greens.

The Court of Appeals, nonetheless, relegated the discussion of binding and controlling Supreme Court precedent to a footnote. *See*, Slip Op. at 11, n. 9. The Court of Appeals attempted to distinguish *Broome* by pointing out the setoff in *Broome* was a UIM setoff rather than an equitable setoff, but the Court never explained why that is a significant or even a dispositive difference. Indeed, this is a classic example of a "distinction without a difference." Setoffs are not different under South Carolina law based on their statutory source, or at least, the Court of Appeals did not explain how or why the setoffs are different and/or require different treatment or analysis under the law.

The Court of Appeals also stated that *Broome* did not involve a settlement allocation. *See*, Slip Op. at 11, n. 9. Frankly, that is the very point. What *Broome* does show is how to apply a setoff where there are personal injury and consortium trial verdicts in favor of both

spouses. *Broome* shows that there is no allocation required to be made between spouses. Instead, under *Broome*, the total of the judgments ($2.85 million) is subject to the entire setoff ($2.025 million) which leaves the total recovery of $825,000 to be paid jointly to the spouses. That is precisely why *Broome* is critical precedent that should not have been discounted or ignored.

Rule 242(b)(3), SCACR, specifically states that a writ of certiorari is appropriate "[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court." Rule 242(b)(3), SCACR. Accordingly, this Court is requested to issue a writ of certiorari so that the precedent established by this Court's decision in *Broome* is correctly assessed and applied – precedent which the Circuit Court without proper explanation chose to disregard and which the Court of Appeals erroneously rejected.

## CONCLUSION

Based on the foregoing discussion, the Petitioners Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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