

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Appellate Case No. 2023-001966
(S.C. Ct. App. Op. No. 6029 Filed October 4, 2023)

Mark Green, as Personal Representative of the Estate of Randall M. Green
and Ann Green,..... Respondents,

v.

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

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This is the Petitioners' second appeal attempting to further reduce his liability in this tragic case arising out of horrific injuries suffered two decades ago.¹ Randy and Ann Green were injured in a car accident on April 17, 2004. Thereafter, Randy was taken to Grand Strand Regional Medical Center ("GSRMC") with hip injuries and an arm laceration. He was stable, alert, and talkative with no signs of a head injury. (R. 396, lns. 13-21; 426-431). The ER doctor, Dr. Lintz, called the on-call orthopedic surgeon, Dr. Bauerle ("Bauerle") about the hip injuries. (R. 404-405; 412-413). Two hours later, Randy had deteriorated, and surgical correction of the arm was deemed urgent. (R. 368-374; 376; 378-383; 406-410). He was **urgently** taken to the Pre-Operative area ("Pre-Op") (R. 304; 338, lns. 8-13; 370; 373-374; 382; 410-411; 412-416; 430-435; 471-473). Lintz called Bauerle again to tell him Randy had to go to Pre-Op and that there was no time for a second hip CAT scan. He noted Bauerle was "pretty adamant about getting the CAT scan of the hip first." (R. 179, lns. 23-25; 180, lns. 13-14). Bauerle testified about their disagreement stating, "I had no disagreement, I knew exactly what needed to be done, it's what I did."² (R. 339, lns. 15-20).

When Bauerle arrived, he took Randy out of Pre-Op for the CAT scan *despite* Lintz's protest and *despite* vital signs warning he was on the verge of a cardiac arrest. (R. 367; 381; 415-416; 471). Experts testified it was a "dramatic" deviation from the standard of care to take a "totally unstable" patient out of Pre-Op where his vital signs were being closely monitored and controlled by an anesthesiologist (Dr. Peters) who could prevent and stop a cardiac arrest. (R. 305-307; 337;

¹ At oral arguments before the Court of Appeals, Judge McDonald questioned Bauerle's counsel regarding the motive for the second appeal, stating "[w]hat I don't understand is why we are up here again? You know, I think the Defendants were pretty lucky."

² At oral arguments before this Court in the first appeal, Justice Hearn questioned the equity of the size of the benefit given to Bauerle by the previous setoff calculation as he was "arguably the most culpable party" in a series of multiple "horrific" acts of negligence.

338; 367-370; 374; 399; 401-402). Bauerle conceded he wouldn't have removed Randy if he had been aware of his condition (R. 341). His own expert agreed he should have looked at Randy's vital signs and chart and stated that a doctor shouldn't issue orders without being aware of a patient's condition *or* argue with the doctor who is looking at the patient. (R. 342-344).

While away from Pre-Op, Randy's heart stopped. This was discovered by Lintz, who "happened" to be passing by. (R. 375). He first paged Dr. Peters, who had to run over to the ER from Pre-Op. While waiting for Dr. Peters to arrive and insert arterial lines, Lintz intubated Randy and began CPR. Randy's other treating surgeons ran in and began operating in the middle of the ER. (R. 180-182). Bauerle was present but stated "I don't run code. . . I watched." (R. 340, Ins. 22-24). They struggled to get his heart beating for 26 minutes. (R. 415-416; 430-435). He was transferred to MUSC in Charleston the following night and spent months there being treated for many injuries before being discharged to a rehab facility. (R. 335-336; 417-425).

The Greens filed a medical malpractice and loss of consortium lawsuit against Bauerle on May 30, 2005. GSRMC was added two years later and settled for a single joint payment of \$2M in May 2013. (R. 62-66). A stipulation of dismissal was filed by consent of all. (R. 60-61). The \$2M was paid equally to the Greens via a single joint check and was not otherwise allocated. (R. 2; 3; 33; 62-66; App. 11-12). They maintained the funds jointly in both of their names, using it for their joint expenses. (Appendix 11-12). At the time of settlement, they were aware that Ann had provided \$1,209,600.00 worth of skilled care and that she intended to continue. (R. 232; 246-248; 451; 466; App. 11-12). She had become trained and qualified to do this. (R. 232; 246-248).

Bauerle refused to settle. The five-day trial began September 9, 2013. The Greens presented evidence that (1) Bauerle was negligent in removing Randy from Pre-Op; (2) His removal from Pre-Op caused the cardiac arrest; and (3) The cardiac arrest caused infarction (death) of specific spinal nerve cells causing loss of leg, bowel, bladder, and sexual function. (R. 370; 374; 394-395;

397-399). Each injury was supported by evidence of distinct damages, and Bauerle contested causation as to specific injuries. (R. 185-194; 196-204; 223-234; 239-258; 263-266; 275; 277; 283; 289; 292; 299-303; 332-334; 339, lns. 4-11; 370; 374; 394-395; 397-399; 419; 423; 436-470).

The jury awarded Randy a verdict of \$2.3M for Medical Malpractice and Ann a verdict of \$550K for Loss of Consortium. The verdict forms indicated that Bauerle's negligence caused "injuries," but didn't say which injuries or damages were included. (R. 44-47). Bauerle made a motion for setoff pursuant to S.C. Code Ann. § 15-38-50. (R. 67). The trial court denied Bauerle's motion to set off the amounts received many years prior by the Greens from the automobile insurers for different injuries, including Ann's own serious injuries. (R. 1-2; 13; 32-33). In order to apply a setoff of the \$2M GSRMC settlement, the trial court allocated it based on percentages derived by combining the amounts of the separate verdicts and determining the ratio each bore to the whole.

Both parties appealed. After the Court of Appeals affirmed the trial court as to the automobile settlements, Bauerle conceded in his Petition for Rehearing that he was not entitled to set off amounts received by the Greens from their own UIM insurer. (Supp. R. 7, fnt. 1). A Consent Order was filed directing that the Clerk of Court release "the sum of Two Hundred Twenty-Eight Thousand Five Hundred Five and 69/100 Dollars (\$228,505.69) to the Plaintiffs Randall and Ann Green by delivery of such check to their attorneys of record" and that the Plaintiffs file a "Partial Satisfaction of Judgment" reflecting the amounts still owing pursuant to the disputed allocation ruling. (R. 26). A joint payment of \$228,505.69 was issued, and the subsequent Receipt and Partial Satisfaction reflected only this amount. (R. 126).

Subsequently, this Court affirmed the Court of Appeals' finding that Bauerle wasn't entitled to set off the automobile liability settlements. (R. 34). As to the GSRMC settlement, this Court vacated the trial court's method of calculating the setoff, finding that it was "arbitrary" and that

the “setoffs should be calculated based upon the entirety of the “relevant circumstances, not solely upon such a formula.” (R. 36). On remand, the trial court was directed to “convene a hearing to consider all relevant circumstances.” (R. 36). The Remittitur vacating the prior settlement allocation was filed on June 17, 2019. Randy passed away a few days later on June 22, 2019. His son, Mark Green, was appointed Personal Representative on July 29th. A Consent Order to Substitute the Estate of Randall M. Green for Plaintiff Randall M. Green was entered. (R. 38).

Both sides submitted memoranda, and a hearing was held on August 28, 2019. The trial court issued a nine (9) page Order on October 22, 2019 applying a \$1 million dollar setoff against each Plaintiff’s verdict. The Order set forth a thorough and detailed analysis of the relevant circumstances and supporting evidence before allocating the settlement as directed by this Court. (R. 1-10; 36). Bauerle’s Motion to Alter or Amend was denied on December 11, 2019. (R. 11-12).

Bauerle subsequently filed a *second* appeal seeking reversal of the trial court’s allocation and a directive on remand to combine the Greens’ separate independent jury verdicts and enter a joint judgment in the amount of \$825,270.00, apparently challenging this Court’s Order directing the trial court to determine the “amounts” to be setoff from the “two verdicts.” (Applnt. Br. 23; R. 36).³ On October 4, 2023, the Court of Appeals issued its Opinion affirming the trial court on all issues presented. Bauerle’s Petition for Rehearing was denied on November 21, 2023.

ARGUMENT

Pursuant to Rule 242(b), SCACR, a writ of certiorari will be granted only when there are special and important reasons. None of the examples enumerated as the character of reasons which will be considered are present in this case. To the contrary, the relief sought by Petitioners (“Bauerle”) is in direct conflict with a prior Order of this Court. Specifically, this Court found that

³ Bauerle also urged the courts below to determine the allocation based solely on the sizes of the two jury verdicts **as expressly prohibited by this Court.** (R. 36).

“the trial court’s [original] 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.” (R. 36) (emphasis added). Therefore, this Court stated

[W]e 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. at. 6 (emphasis added). The trial court thoroughly complied with these clear instructions, and the Court of Appeals conducted its own review and analysis before affirming the findings. However, Bauerle continues to challenge this Court’s prior Order, arguing **that the courts below should not have determined the proper settlement amounts to be setoff from the two verdicts but should have instead combined the two verdicts into a single judgment to be setoff by the total amount of the settlement.** (Pet. Writ 18-19). The **only** “relevant circumstances” he relies on involve the amounts of the jury verdicts. His “new” formula creates the same result as the vacated “arbitrary” formula and would strip the Plaintiffs of their rights to their independent jury verdicts for separate and distinct causes of action.⁴ This is the **only** relief Bauerle sought. The courts below correctly followed this Court’s instruction that “[t]he setoffs should be calculated based on the entirety of the relevant circumstances, not solely upon such a formula.” (R. 36).

S.C. Code §15-38-50 reduces the “claim” against a nonsettling torfeasor by the greater of the amount “stipulated by the release” or the amount “paid” by another to settle that same claim. "A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142,

⁴ In South Carolina, “unlike that of some other states, loss of consortium is an independent action, not derivative.” Preer v. Mims, 323 SC 516, 521, 476 SE2d 472, 474 (1996). It “is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action.” Graham v. Whitaker, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984).

145 (2012) (citing Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000)); Hawkins v. Pathology Assocs. 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 (Ct.App.1986). Notably, in reference to the application of a setoff, S.C. Code §15-38-50 does **not** authorize modification of good faith settlements. The court must determine the intentions of the parties to a settlement agreement as far as possible from the terms, and such intentions must be given effect. Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 658 S.E.2d 539 (Ct.App.2008). “The courts in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes at the time the contract was entered.” Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620 (Ct. App. 1986). "The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses; and subsequent acts are relevant to show whether a contract was intended." Caulder v. Knox, 251 S.C. 337, 345, 162 S.E.2d 262 (1968).

This Court has made clear that courts may not modify a good faith settlement for the sole purpose of benefitting a non-settling defendant in the application of a setoff.

A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff’s ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling party is worsened by the terms of a settlement, this is a consequence of the refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Riley v. Ford, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015) (quoting Lard v. AM/FM Ohio, 901 N.E.2d 1006 (Ill. App. 2009)(citing Muro v. Abel Freight Lns., 669 N.E.2d 1217 (Ill. App. 1996)).

In Riley, this Court reversed a Court of Appeals’ decision modifying a settlement allocation in order to apply a setoff. The Court held that it is error to reapportion proceeds just because the allocation is not “proportionately reasonable” or solely to benefit a non-settling defendant.

Moreover, the holding clarified that non-settling defendants who ask the court to invalidate a settlement allocation must prove an amount is so unreasonable as to demonstrate a fraudulent or bad faith intent to obtain an unfair double recovery. Riley at 196-197 (quoting Lard, 901 N.E.2d 1006, 1018 ("Although the manipulation of an allocation can be evidence of bad faith in a settlement negotiation, it is not per se bad faith to engage in the advantageous apportioning of a settlement.")). Consistent with the Riley opinion, courts have only found that this threshold was met in very few cases where *no evidence* existed to support the dollar amount apportioned to an individual claim. Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (instant death involved no suffering or medical expenses so any allocation to survival action was clearly unreasonable); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (no evidence of suffering so allocating more than medical expenses to survival action was clearly unreasonable).

[T]he party seeking departure from the application of standard set-off rules bears the burden of proof . . . particularly where 'there is an executed contract between [the parties] which is not contested between them but which is sought to be invalidated by third parties.'

Riley, 414 S.C. 185, 196-197 (quoting In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895)). Riley recognized South Carolina's 'strong public policy favoring the settlement of disputes.' Id. at 196 (quoting Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010)). This policy is served by protecting settling Plaintiffs' right to control over the allocation of their settlements and to retain the leverage inherent in advantageous apportionment, with the caveat that, consistent with the "good faith" requirement of § 15-38-50, it is not fraudulent or a sham.

Here, the trial court's task on remand was to conduct a hearing to consider all of the relevant circumstances and allocate the settlement between the plaintiffs' two independent causes of action in order to determine the amounts to be setoff against the corresponding "two verdicts." (R. 36). Not only did the trial court find that the evidence weighed overwhelming in favor of the

Greens' stated intentions to share equal entitlement to the settlement, but it also further found that these intentions, as well as the dollar amounts resulting therefrom, were both extremely reasonable under the facts. (R. 4-6). Therefore, the settlement was allocated in a manner consistent with the parties' intended terms. The amount allocated to each cause of action was then correctly set off from each verdict for the same cause of action in the manner dictated by S.C. Code Ann. § 15-38-50 and relevant tort case law. (R. 5). The Court of Appeals conducted its own review and analysis of the relevant circumstances and agreed with these findings, *completely* unpersuaded by Bauerle's arguments seeking to invalidate *both* the settlement allocation *and* the separate independent nature of the verdicts.

However, Bauerle *continues* to assert that the evidence in the record of the Greens' good faith desires and intentions regarding their settlement should be disregarded in favor of an analysis more advantageous to himself. His arguments ignore extensive relevant case law on construction of settlement agreements and application of setoffs, threatening public policy concerns providing the framework for the *correct* analysis of these issues. In doing so, he grossly misrepresents that the courts below relied *only* on statements of counsel to determine the Greens' intentions as to their GSRMC settlement, despite all of the evidence set forth and analyzed in the orders below.⁵ (R. 4; Op. 7). He does not dispute that the correct analysis involved the determination of the Greens' settlement intentions. (Pet. Writ 17). However, he argues that the verdicts, which did not exist at the time of the settlement, are persuasive evidence of those intentions while the Greens' own testimony regarding their damages is not. (Pet. Writ 11). This is even more nonsensical considering, as did both courts below, Randy's testimony that he believed the evidence presented

⁵ He also incorrectly argues that statements by counsel regarding their clients' settlement intentions have no relevance. See Pruitt v. S.C. Med. Mal. Liab. Jt. Underwriting Ass'n, 343 S.C. 335, 540 S.E.2d 843 (2001) (language of the agreement, statements made by counsel, and Plaintiffs' subsequent conduct was sufficient to support trial court's rulings as to their intentions).

to the jury had “omitted an awful lot” of Ann’s damages. (Op. 7, *ftnt.*8; R. 330, *Ins.* 10-11).

Bauerle admits that the trial court was required “to determine the settling parties’ intent and allocate the settlement in the first instance,” but he now claims the resulting setoff is not “fair,” arguing that Ann will receive a “windfall” if she is allowed to keep settlement funds exceeding the amount of her jury verdict against him. (Pet. Writ 15-17). As the courts below found, this directly inverts the definition of a double recovery which did **not** exist here because each Plaintiff’s verdict was reduced by the settlement amount allocated to their claim. **This afforded Randy a total recovery equal to his \$2.3M verdict and eliminated all of Bauerle’s liability to Ann.** (R. 6; 9).

Bauerle further states that he did not ask the Court of Appeals to reallocate the trial court’s settlement allocation and that he is not seeking to have it reallocated now. Therefore, he makes the baseless assertion that simply seeking to *invalidate* the allocation altogether rather than *reallocate* it distinguishes this case from Riley and other relevant cases and thus relieves his burden of proving that the amount allocated to either Plaintiff was unreasonable.⁶ Presumably realizing that the *proper* analysis on remand cannot be manipulated to produce a more favorable result than that reached by both courts below, Bauerle essentially resorts to challenging this Court’s prior Order, arguing that the verdicts should have been combined into a single judgment and no settlement allocation performed at all. There is no support for this in our jurisprudence.

I. THE COURT OF APPEALS DID NOT RESTRICT ITSELF TO ANY OVERLY DEFERENTIAL STANDARD OF REVIEW WHERE ITS OWN IN-DEPTH ANALYSIS RESULTED IN THE SAME FINDINGS AS THE TRIAL COURT.

Bauerle decontextualizes language referencing his burden of proof, confusing it with the standard of review. The Court of Appeals made clear that, in applying a setoff, it may find facts in accordance with its own view of the preponderance of the evidence. (Op. 4). The Court went out

⁶ There is no merit to this argument as Riley directly references attempts by a non-settling party to “**invalidate**” an allocation. Riley, 414 S.C. 185, 196-197 (quoting In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895) (emphasis added)).

of its way to detail its own review and analysis of the evidence, relevant circumstances, and legal and factual findings. It unanimously agreed with the trial court on *every single issue*.⁷ “The presence of *de novo* review and a willingness, after review, to defer to the fact finder should not be viewed as contradictory positions.” Lewis v. Lewis, 392 S.C. 381, 389, 709 S.E.2d 650 (2011). Bauerle received the broad, in-depth appellate review he requested and *still* did not prevail. He now essentially resorts to seeking further adjudication of a moot point on behalf of the Greens, asserting that the “parties’ dispute” needs to be resolved in a clearer, more satisfactory manner. He seeks to force an explanatory ruling that would not impact the outcome, reflecting a thinly veiled attempt to manufacture unnecessary confusion and dispute, thus perpetuating the pursuit of increasingly tortuous arguments and never-ending appeals.

De novo review, the broadest standard of review, “permits appellate fact-finding, notwithstanding the presence of evidence supporting the trial court’s findings.” Id. at 390. The appellant must still “satisfy the appellate court that the preponderance of the evidence is against the finding of the trial court.” Id. at 391. It does not **require** the appellate court to ignore the trial court’s findings or prevent it from recognizing that the trial court is in a better position to judge the credibility of the witnesses. Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001) (citing Dorchester County Dep’t of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct.App.1996)). “Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings.” Pinckney at 387-388.

In claiming that the Court of Appeals might have employed an abuse of discretion standard of review, Bauerle misleadingly relies on the findings that (1) the allocation is “supported by the

⁷ There was no disagreement with the trial court indicated in the Court of Appeals’ Opinion, so a standard of review requiring more deference would not impact the outcome. Rish v. Rish, 296, S.C. 14, 15, 370 S.E.2d 102, 103 (Ct. App. 1988) (“Overly simplified, abuse of discretion involves the extent of disagreement.”)

evidence in the record and is reasonable under the facts of this case” and (2) that there was “no error” found. (Op. 8-9; Pet. Writ 9). These findings do not reflect the standard of review utilized by the Court of Appeals. They reflect Bauerle’s failure to meet his burden of proof. They were in response to his arguments on appeal that the trial court (1) erred in allocating to Ann’s consortium claim an amount larger than her jury verdict and (2) “erred in concluding that such an allocation prevents the risk of a double recovery.” (Op. 8). The Court disagreed, further noting Bauerle’s contention that the “circuit court should have abandoned its own analysis of the evidence altogether and relied solely on a comparison of the two jury verdicts to find ‘Mr. Green’s injuries far exceeded the loss of consortium.’” (Op. 8). The Court also rejected this proposition, citing Riley, 414 S.C. at 191, 77 S.E.2d at 828 (it is not “within the province of a reviewing court” to evaluate the reasonableness of “the relative percentage of settlement proceeds assigned to each claim.”)

The Court’s findings that the allocation was supported by the evidence and reasonable under the facts reflects a redirection from Bauerle’s proposed alternative analysis back to the *proper* framework for evaluating the reasonableness of the dollar amounts themselves, not the relative ratios between them. Id; See also Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (instant death involved no evidence of suffering or medical expenses so any allocation to survival action was unreasonable); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (no evidence of suffering so allocating more than amount of medical expenses to survival was unreasonable). The appellate courts in Rutland and Welch applied this same analysis as to whether the *circuit courts* erred in reallocating settlements where there was no evidence to support any dollar amount being allocated to a claim. This does not reflect the *standard of review* applicable to appellate courts. It represents the proper analysis for *any* court to determine whether it is appropriate to disturb a settlement allocation or modify it in a manner inconsistent with the parties’ intentions at the behest of a nonsettling defendant.

Bauerle simply failed to convince the appellate court that the trial court's findings were against the preponderance of the evidence on a single issue. His failure to meet his burden of proof does not suggest appellate error regarding the standard of review, particularly under the broad in-depth review given to these issues. The burden of Petitioners' alleged confusion as to the standard utilized does not rest on the appellate courts and is not a "special and important reason" to justify the grant of his Petition.

II. THE COURTS BELOW CORRECTLY FOUND THAT THE GREENS INTENDED THEIR PRE-TRIAL GSRMC SETTLEMENT TO BE ALLOCATED EQUALLY.

"A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it." Riley, 414 S.C. at 197, 777 S.E.2d at 831 (quoting Lard, 901 N.E.2d 1006 (citing Muro, 669 N.E.2d 1217)). The courts must determine the intentions of the parties as far as possible from the terms of a settlement agreement, and such intentions must be given effect. Pee Dee Stores Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009); Pruitt, 343 S.C. 335, 540 S.E.2d 843; Mattox, 289 S.C. 57, 344 S.E.2d 620. "The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes at the time the contract was entered." Mattox, 289 S.C. at 61. "The court should put itself, as best it can, in the same position occupied by the parties when they made the contract. In doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language." Klutts Resort Realty v. Down'round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20 (1977).

Bauerle misrepresents that both courts below relied solely on the arguments of counsel as

evidence of the Greens' intentions regarding the GSRMC settlement.⁸ He also argued to the Court of Appeals that there was no evidence to support the trial court's finding that the Greens intended to share the settlement equally. However, the Court adamantly disagreed, further adding that it was unable to find any persuasive evidence to support a contrary finding. (Op. 7).

The Court of Appeals identified extensive evidence in support of the Greens' assertion that they intended the settlement to be allocated equally. (Op. 7). Specifically, the Court found that their stated intention to share equally in the settlement was supported by

. . .their joint bargaining for and acceptance of the agreement, the language of the agreement, Mrs. Green's testimony regarding her damages (including the extensive skilled care she provided her husband), Mr. Green's trial testimony acknowledging the extent of his wife's damages and care, and the Greens' Life Care Plan...Mrs. Green provided Mr. Green with more than \$1,000,000.00 in round-the-clock skilled care.

(Op. 7). The Court further included direct quotes from Randy's trial testimony that directly contradicts Bauerle's assertion that a comparison of the jury verdicts reflects the Greens' true settlement intentions. (Op. 7, fnt. 8). The trial court's Order painstakingly sets forth in even greater detail how and why the Greens' position that they intended to share equal entitlement to the settlement was amply supported by the evidence.

It is undisputed that the GSRMC settlement agreement involved a single joint payment to the Greens. (R. 2; 4; 62; App. 11). The courts below found that the language of the contract provided that they would be equally entitled to the funds, and that this was evidence of their stated intentions in this regard. (R. 4). Additionally, both courts below recognized that ample evidence of the tragic circumstances impacting every moment of the Greens' lives at the time of the GSRMC settlement

⁸ The rule against relying on arguments of counsel is only applicable to assertions of disputed facts not supported by other evidence. See also McManus v. Bank of Greenwood, 171 S.C. 84, 89 (1933); Gilmore v. Ivey, 290 S.C. 53, 348 S.E. (2d) 180 (Ct. App. 1986); Johnson v. Life Insurance Co. of Georgia, 227 S.C. 351, 369, 88 S.E. (2d) 260; Edwards v. Lawton, 244 S.C. 276, 278, 136 S.E.2d 708 (1964).

further supports their intentions to share equally in the funds. As noted by the trial court, the settlement was entered into on May 31, 2013 which was just before the trial against Bauerle. (R. 62). Evidence in the record extensively detailing Ann’s suffering during the previous nine (9) years painted a vivid picture of the Greens’ daily life and their knowledge and beliefs as to their own and each other’s experiences at the time of settlement. “The court should put itself, as best it can, in the same position occupied by the parties when they made the contract. . . to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words. . .” Klutts, 268 S.C. at 89, 232 S.E.2d 20.

This case is unique in that it involves **extraordinary** consortium damages relative to those of the physically injured spouse. From the day Randy came home in 2004 until his death in 2019, Ann alone provided his 24-hour care, spending very few hours a day doing things for herself or sleeping more than a few hours at a time. (R. 231; 284-294). She had done all of this for nine (9) years at the time of the GSRMC settlement.⁹ She was forced to give up a very active social life, and experts testified that she was “supremely tired” and suffering from anxiety, depression, and caregiver role strain. (R. 232-235). Experts testified that this was a “family tragedy” and that Ann needed psychological treatment as a result. (R. 242). Her children tearfully testified that she refused to leave Randy’s side long enough to receive treatment for a heart condition. (R. 191-195; 203-204; 233; 283; 330, Ins. 15-20).

For fifteen (15) years, Ann catheterized her husband five to six times a day, requiring her to set an alarm to wake up at midnight *every night*. (R. 289; 291-292). She was forced to live with the knowledge that if she failed to do this even once, he would die. (R. 229-230; 292). She manually evacuated his bowels. (R. 224-225; 299). She physically lifted him, bathed him, prepared his meals, helped him eat, and took care of all the household chores. (R. 233, Ins. 14-19; 300). She

⁹ The settlement agreement was entered into a few months before trial.

couldn't leave the house for any length of time, stating "I can't go far. I don't go far. Time is my enemy now." (R. 283, Ins. 7-8). She testified that she intended to provide all his future care, stating "[h]e would do the same for me and I will do it until I die . . . He has taken care of me all these years, it's my turn and I will do it until I can't." (R. 303, Ins. 1-9).

Placing oneself in Randy's position, it is difficult to imagine he intended to accept a larger portion of the settlement proceeds than Ann. His uncontroverted testimony at trial confirmed his belief that she "is sacrificing her life for what is left of mine." (R. 330, Ins. 22-23). This is consistent with his decision to execute a settlement agreement which provided his wife with an equal interest in the proceeds. It is indisputable that the Greens knew at the time of settlement that Ann had "lost her husband as he was," that her life was now solely dedicated to his care, and that she had sustained **immense** damages. (R. 231-233; 292; 330). At trial, Randy further testified that she had a serious health condition that "she won't go get fixed because she won't leave me." (R. 330, Ins. 19-20). **He testified that he believed her damages exceeded those supported by the evidence at trial.** When asked if the testimony regarding her daily routine accurately represented everything she did for him, Randy testified, "In my opinion it is not. I think she omitted an awful lot of it." (R. 330, Ins. 10-11).

The Greens' Life Care Plan also provides evidence of the intentions underlying the decision to negotiate a settlement which provided them an equal interest in the \$2 million proceeds. This was prepared in 2011, prior to the GSRMC settlement, and reflects the monetary value of the care Ann had been providing. (R. 436; 451). Thus, at the time of settlement, the Greens knew that Ann had provided more than \$1M worth of skilled care which she intended and agreed to continue. (R. 165, Ins. 12-18; 248-249; 303; 451; 463; 466; App. 11-12). Experts testified that this "was a fulltime job" and that she was providing "nursing and caregiving skills which [take] a lot of effort and work and organization and coordination and facilitation of care . . . She [was] trained by nurses,

doctors, [and] physical therapists to provide the care. . .” (R. 232-233; 246-249). Moreover, this required her to live in a constant state of hypervigilance which was defined as a “mentality that you are maybe sleeping but you know that in a second’s time[,] if there is someone that calls out for help then you are alert and oriented and ready to provide assistance.” (R. 234-235).

There is extensive evidence in the record supporting the findings of both courts below regarding the Greens’ intentions to share equally in the settlement funds at the time of the agreement. However, Bauerle argues that Riley is not relevant here because he did not ask the Court of Appeals to *reallocate* the trial court’s settlement allocation and that he is not seeking to have it *reallocated* now. (Pet. Writ p. 11). He asserts that this shifts the burden of proof away from him, implying that this offers an avenue to challenge the Court of Appeals’ finding that there was no persuasive evidence to support his arguments regarding the Greens’ intentions. To be clear, he challenges the findings regarding their intentions in order to *invalidate* the trial court’s allocation.¹⁰ He offers no support for the implication that a non-settling defendant doesn’t carry the burden of proving that a trial court’s allocation is not supported by the evidence when they are seeking to *invalidate* the allocation altogether as opposed to having it *reallocated*. The policy concerns are the same in either scenario, and Riley makes clear that the burden remained firmly on his shoulders, “particularly where ‘there is an executed contract between [the parties] which is not contested between them but which is sought to be **invalidated** by third parties.’” Riley, 414 S.C. 185, 196-197 (quoting In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895) (emphasis added)).

While the Court of Appeals agreed with all of the trial court’s findings based on its own review of the evidence and relevant circumstances appearing in the record, it is notable that the

¹⁰ He argues that the two verdicts should be combined into a single judgment and no settlement allocation performed at all, contradicting this Court’s prior Order directing a determination of the settlement “amounts” to be set off from the “two verdicts.” (R. 36).

trial judge was in the best position to weigh the Greens' credibility with regard to their stated intentions, a recognized principle throughout our jurisprudence and apparent in the Riley opinion and the cases it relied upon. It is not usually "appropriate for an appellate court to re-evaluate [an] agreed-upon, and court approved, settlement allocation." Riley at 191-192. The trial judge personally witnessed Ann and Randy's interactions in the court room during the weeklong trial, including those not witnessed by the jury. He witnessed Ann's constant state of hypervigilance and urgency as she repeatedly wheeled her husband out of the courtroom during the proceedings and was aware that this was in order to catheterize him in a nearby hotel room rented solely for this task. (R. 322). He was aware of technical, procedural, and factual details not presented to the jury as well as the case's complexity and the existence of factors likely impacting settlement decisions amongst various parties. (R. 7). The trial judge was best qualified to place himself in the Greens' position at settlement and weigh evidence and circumstances relevant to their intentions. There is no basis in law, fact, or equity to disturb his findings, particularly findings with which the Court of Appeals, even under its own in-depth analysis, unanimously and unequivocally agreed.

III. THE COURTS BELOW CORRECTLY FOUND THAT LANGUAGE IN A POST-TRIAL CONSENT ORDER REFLECTING THE JUDGMENT AMOUNTS UNDER THE NOW VACATED ALLOCATION RULING WAS NOT PERSUASIVE AS TO THE GREEN'S INTENTIONS REGARDING THE PRE-TRIAL SETTLEMENT.

Bauerle's 2013 post-trial motion for setoff in the total amount of settlements with the automobile insurers for unrelated injuries was denied, and he appealed. During the pendency of the first appeal, he filed a motion seeking to deposit funds with the Horry County Clerk of Court and to release liens encumbering his sale of property. The circuit court issued an Order Granting Leave to Deposit Funds and Release Judgment Liens in December 2014. In 2016, a Consent Order was entered which stated "Following an unpublished decision by the South Carolina Court of Appeals entered on February 3, 2016 in *Green*, Op. No. 2016-UP-052, and the subsequent denial of the Petitions for Rehearing by the Court of Appeals, **the sum of \$228,505.69 deposited with**

the Clerk of Court is no longer contested.” (R.26). This reflected the amount of the Greens’ settlement with their UIM insurer. It further states that it would be enforced **“in accordance with the terms and conditions as set forth in the Order Granting Leave to Deposit Funds Into Court and Releasing Judgment Liens filed December 11, 2014.”** (R. 27). The 2014 Order to Deposit states it would have **“no effect on the 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). If the Greens prevailed on appeal, it stated Bauerle and **“the South Carolina Medical Malpractice Patients’ Compensation Fund will be liable for the judgments as determined by the Appellate Courts.”** (R. 25) (emphasis added).

Quoting all of the above language, the Court of Appeals correctly rejected Bauerle’s argument that the Greens’ intentions regarding the *pre-trial* GSRMC settlement were reflected by a sentence in the 2016 Consent Order entered *after* the trial which, again, directed the release of undisputed funds in the total amount of the UIM settlement.¹¹ (Op. 8). As recognized by both courts below, the UIM settlement was for *different* injuries than those at issue in the case against Bauerle, including Ann’s own bodily injuries. (Op. 8; R. 33-35). The Court of Appeals further noted that Bauerle did not subsequently pursue his argument regarding the UIM settlement before this Court. The Court of Appeals stated

[W]e agree with the Greens than an isolated sentence from a Consent Order directing the release of undisputed funds in the total amount of a UIM payout has no application here. We note the UIM settlement addressed injuries suffered in the car accident - not in relation to the malpractice claim - and the Consent Order simply referenced judgments still owed under a since-vacated allocation order.

(Op. 8).

¹¹ The sentence was added to the Consent Order by Bauerle’s counsel and referenced calculations based on the amount (\$64,883.68) remaining under Ann’s judgment at the time pursuant the original allocation ruling. This would have ensured that Bauerle received credit for the entire amount disbursed *had* the prior allocation ruling withstood appeal. It did not.

The amount disbursed pursuant to the Consent Order was based on an unrelated settlement not subject to setoff and was utterly irrelevant to the issues or analysis on remand. The point of making this, quite frankly, convoluted argument is that the innocuous language Bauerle relies on simply reflects the previous now-vacated allocation formula. It is a strained attempt to twist the analysis back solely onto this formula while simultaneously asserting that he is not advocating for direct defiance of this Court's Order. This Court has already expressly refused to even consider the arguments regarding the Consent Order. (R. 30; Supp. R. 126-133). Nevertheless, he attempted to resurrect these arguments on remand before the trial court *and* before the Court of Appeals. He claimed the Consent Order was the "law of the case and entitled to preclusive effect" and *continues* to argue now that it is "the *only competent evidence* in the record that reflects the Greens' intent with respect to the \$2 million settlement." (Applnt. Br. 14; Pet. Writ 12). To be clear, the now-vacated allocation ruling was already pending appeal by the Greens **at the time of this Consent Order**. It absolutely **does not** reflect the Greens' concession or belief that the ruling was correct, and it is utterly disingenuous to *even argue* otherwise.¹²

IV. THE COURTS BELOW CORRECTLY FOUND THAT THE ALLOCATION WAS REASONABLE UNDER THE FACTS AND AVOIDED A DOUBLE RECOVERY.

Bauerle argued to the courts below, and *continues* to argue now, that a comparison of the Greens' jury verdicts governs the analysis of their respective rights to their GSRMC settlement proceeds in order to circularly determine their rights to their jury verdicts.¹³ Not only is this

¹² Bauerle misrepresents that the courts below did not consider his arguments as to the Consent Order and that it was improperly rejected as evidence. (Pet. Writ 14, fn. 6). Both courts considered and ruled on his arguments. (R. 8; Op. 8). Finally, the Circuit Court's finding that the language at issue was "harmless error" and "shall be disregarded" was made in order to apply the setoff while still allowing Bauerle credit for the disbursement. This was done at the suggestion of **both** parties. (R. 8-9).

¹³ Bauerle misrepresents that he did not argue below that the verdicts were the only evidence to consider. He argued that the allocation was "based on the fallacy that the jury's determination of the damages was wrong and is not entitled to preclusive effect." (Applnt. Br. 15).

nonsensical and in violation of this Court’s directives on remand, it ignores evidence set forth in the orders below specifically addressing *why* the verdicts weren’t persuasive or relevant to the Greens’ intentions in this case.¹⁴ Bauerle argues that the trial court’s allocation, though the analysis *admittedly* correctly focused on the Greens’ intentions, should be invalidated because it wasn’t “fair,” i.e., it doesn’t result in setoffs as advantageous as the prior formula now that it doesn’t correspond with the two verdicts. (Applnt. Br. 15-19; Pet. Writ 15).

Non-settling defendants who ask an appellate court to invalidate a trial court’s settlement allocation must prove an amount is so unreasonable as to demonstrate a fraudulent or bad faith intent to obtain an unfair double recovery. Riley at 196-197 (quoting Lard, 901 N.E.2d 1006, 1018 (“Although the manipulation of an allocation can be evidence of bad faith in a settlement negotiation, it is not per se bad faith to engage in the advantageous apportioning of a settlement.”)) Courts have only found that this threshold was met in very few cases where *no evidence* existed to support the dollar amount apportioned to an individual claim. Rutland, 400 S.C. 2019, 734 S.E.2d 142; Welch, 342 S.C. 279, 536 S.E.2d 408.

Bauerle therefore argues that the Court of Appeals relied on “inapposite” case law of Riley in finding that the trial court’s allocation did not result in a “windfall” or “double recovery,” implying once again that these terms are somehow defined differently here because, though he does seek to *invalidate* the allocation, he doesn’t wish for it to then be *reallocated*.¹⁵ Though he states that the trial court was required “to determine the settling parties’ intent and allocate the settlement in the first instance,” he is simply now unhappy with the result, asserting that Ann will

¹⁴ Randy testified that he believed the evidence presented to the jury had “omitted an awful lot” of Ann’s damages. (Op. 7, ftnt.8; R. 330, Ins. 10-11)

¹⁵ Riley addresses attempts by a non-settling party to “**invalidate**” an allocation. Riley, at 196-197.

receive a “windfall” if she is allowed to retain settlement proceeds exceeding the amount of her jury verdict against him. (Pet. Writ 15-17). As the courts below recognized, Bauerle’s argument directly inverts the very definition of a double recovery as established by extensive case law and § 15-38-50. A jury verdict does not cap the amount a Plaintiff is entitled to retain from a settlement with another defendant. Riley expressly forbids “appellate reapportionment” just to make it more advantageous to a non-settling defendant. Riley at 197. Moreover, this would effectively obliterate one of the strongest motivating factors for parties considering settlement as it would no longer afford any protection against the unpredictability and uncertainty of litigation. “Indeed, parties regularly reach compromise settlements for a variety of reasons, including the vagaries and unpredictability of litigation and the desire for finality.” Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007).

The trial court’s allocation here did not result in a double recovery because each Plaintiff’s verdict was reduced by the settlement amount allocated to their claim. As noted by *both* courts below, **this afforded Randy a total recovery equal to his \$2.3M verdict and eliminated all of Bauerle’s liability to Ann** while still allowing her to retain her equal bargained-for right to the settlement proceeds. (R. 6; 9; Op. 10). In contrast with the very few cases which have met the high threshold for reapportionment of a trial court approved allocation, there is **no** evidence here of bad faith or fraudulent intent to deprive Bauerle of a benefit to which he would have otherwise been entitled. Not only is it indisputable that Ann Green suffered damages and that an allocation of funds to the consortium claim was reasonable, there was also **ample** evidence to support damages in the amount of at least \$1M. Expert testimony labeled this as a “tragedy” for Ann. (R. 242). She lost her previous life as well as her husband as he was before. (R. 232). There is **overwhelming** evidence that she suffered, and would continue to suffer, horribly. Moreover, the Life Care Plan valued the 24-hour care that she was spending every day of her life providing at \$1.2 M, with

future care more than doubling this amount. (R. 451; 463; 466; App. 11-12).

“If the position of a nonsettling party is worsened by the terms of a settlement, this is a consequence of the refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.” Riley, 414 S.C. at 197. As the non-settling defendant, Bauerle is not entitled to the leverage of advantageous apportionment that is afforded to settling parties, and he concedes that the correct issue before the trial court was to determine the Greens’ intentions. (Pet. Writ 17). The issue he is now up against and failing to articulate is that he clearly should not have filed an appeal seeking to invalidate an allocation to a cause of action that was so obviously reasonably supported by such overwhelming evidence of damages. It is not at all surprising that he utterly failed to meet this burden as there is absolutely no indication that the Greens’ stated intentions were fraudulent or in bad faith, nor was there ever any reasonable basis for asserting otherwise.

V. THE COURTS BELOW WERE CORRECT IN DECLINING TO TREAT THE SETTLEMENT AND VERDICTS AS MARITAL PROPERTY AND IN REFUSING TO APPLY IRRELEVANT AUTOMOBILE INSURANCE LAW.

Bauerle curiously continues to assert that the GSRMC settlement should be treated as marital property, falsely assuming that this classification (1) is legally tenable in the absence of a pending divorce and (2) would somehow justify either court below combining the separate, independent verdicts into a single judgment in favor of both Ann and the Estate.¹⁶ This is prohibited

¹⁶ It is unclear why Bauerle continues to relentlessly point out that the Greens incorrectly used the term marital property during the first appeal. These few references were in support of the argument that, if a setoff was appropriate, the settlement should be allocated equally. The incorrect use of the term didn’t dilute the point being made which was that it was unfair to deprive either of them of their intended equal entitlement to the funds and that allocating it unequally was inconsistent with their settlement decisions and could have unintended implications in their lives. It borders on belligerence to continue to assert that a prior incorrect use of this term in a different context required the courts below to hold the Greens accountable on remand by (1) defying this Court’s prior Order and (2) applying utterly incorrect and inapplicable law to strip them of their rights to their separate independent jury verdicts. As there is no practical application to *any* issues in this case, the whole point is utterly moot.

under South Carolina law¹⁷ and, again, directly violates this Court's directive that the trial court issue an order "setting forth the **amounts** to be set off from the **two verdicts**." (R. 36) (emphasis added). "Each Litigant was entitled to a verdict based on the law and the evidence." Page v. Crisp, 303 S.C. 117, 119, 399 S.E.2d 161, 162 (Ct. App. 1990). Further, property is only deemed "marital" if it is "owned as of the date of filing or commencement of marital litigation." Sexton v. Sexton, 298 S.C. 359 (1989). S.C. Code Ann. § 20-7-420(2) grants the Family Courts exclusive jurisdiction for the settlement of all rights "to the real and personal property of the marriage." The assertion that the settlement and verdicts should be treated as marital property fails to recognize that such a classification, even if permissible, would derail the analysis from all existing arguments and considerations to utterly irrelevant factors applicable to the division of marital property while also divesting the trial court of jurisdiction on remand.

Finally, the lone case which Bauerle claims as precedent to combine the separate, independent jury verdicts into one judgment makes **no** such finding *and* is entirely irrelevant to these facts. Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995). It does **not even address** any issues related to a court's allocation or re-allocation of a settlement. It involved an unallocated settlement with a defendant paid to a husband and wife which was setoff from the verdict against **that same defendant**. Under our automobile insurance laws, a loss of consortium claim is subject to the same per person bodily injury limits as the physically injured spouse. This does not alter the separate, independent nature of the claims but merely caps the insurance benefits available to

¹⁷ "Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative." Preer v. Mims, 323 S.C. 516, 521, 476 S.E.2d 472, 474 (1996). Consortium "is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action." Graham v. Whitaker, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984). See also Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998); Cook v. Atlantic Coast Ln. R.R., 196 S.C. 230 (1941).

satisfy them. Thus, the insurer's total liability for **both** of the two spouses' verdicts could not exceed the per person bodily injury limits set by the insurance contract. See Kizer v. Kinard, 361 S.C. 68, 72, 602 S.E.2d 783 (2004) (citing Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); Sheffield v. Am. Indem. Co., 245 S.C. 389, 140 S.E.2d 787 (1965)). The sum of the two verdicts was *only* considered because of the limitations and definitions in an insurance policy and automobile insurance law. It is entirely irrelevant to the issues in the present case and provides no support for combining the separate verdicts into a single judgment *or* for allocating the settlement based on a formula derived from such a sum.

Conclusion

There is **no precedent or support** for invalidating a settlement allocation based upon a comparison of subsequent jury verdicts for different Plaintiffs and causes of action. Further, combining the two verdicts into one is *expressly* prohibited by extensive case law and this Court's directive that the trial court consider all of the "relevant circumstances" to determine "the **amounts** to be set off from the **two verdicts**." (R. 36) (emphasis added). The trial court, as affirmed by the Court of Appeals, correctly applied the setoffs against the two verdicts in the amounts of the settlement proceeds to which each Plaintiff was entitled consistent with proper factual findings as to the parties' settlement intentions as amply supported by the record. The analysis and findings below are consistent with this Court's clear directives and result in application of the setoff in a manner which prevents a double recovery while protecting this State's strong public policy in favor of promoting and fostering the settlement of disputes. Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,


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