

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM Horry County
Steven H. John, Circuit Court Judge

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

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.

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

Andrew F. Lindemann
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Petitioners

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ARGUMENTS

The Respondents Mark Green, as Personal Representative of the Estate of Randall M. Green, and Ann Green have filed their return to the Petition for Writ of Certiorari. That return, and the positions taken by the Greens, are undergirded by multiple fallacies that are stated over and over again to the point that an exhausted reader may take them to be true and factual. They are not. The Greens' reliance on such fallacies – which also highlight similar errors by the Court of Appeals and the Circuit Court – demonstrate the need for a writ of certiorari to allow this Court to take up the analysis where its earlier opinion in 2019 ended with the remand instructions.

First and foremost, the Greens repeatedly claim that the \$2 million settlement received by Randall Green and Ann Green from Grand Strand Regional Medical Center was an “allocated” settlement. It was not. As the Court of Appeals acknowledged, the “Covenant Not to Sue and Covenant Not to Prosecute or Execute Judgment” does not provide for an allocation between the settling parties. Moreover, the intent to equally allocate the \$2 million is not shown by any language within the agreement. Despite falsely claiming that “the language of the contract provided that they would be equally entitled to the funds,” the Greens have pointed to no such language to suggest the settlement was an allocated one. *See*, Return, p. 13. Ironically, the Greens falsely attack Dr. Bauerle for disregarding or challenging this Court's 2019 opinion (which he has not as discussed below), but it is indeed the Greens who do so. In very clear, unambiguous language, this Court stated: “The settlement paid by Grand Strand was not allocated between Mr. and Mrs. Green.” *Green v. Bauerle*, 2016 WL 2289678, *1 (S.C. 2019). That critical fact could not have been stated more concisely or directly by this Court. That is a

fact – despite the Greens’ repeated references to the settlement as being an “allocated” settlement.

Similarly, the Greens state repeatedly that there is “overwhelming” and “extensive” evidence of the Greens’ intentions to allocate the \$2 million equally between them. There is no such evidence to support that. Again, this Court understood that in the first appeal. Not to be unnecessarily repetitive, but this Court stated: “The settlement paid by Grand Strand was not allocated between Mr. and Mrs. Green.” *Green v. Bauerle*, 2016 WL 2289678, *1 (S.C. 2019). In fact, as logic would dictate, if this Court had determined that the \$2 million settlement had been allocated by the Greens, the case would never have been remanded, and this Court would have simply applied the agreed-upon allocation back in 2019.

Contrary to this Court’s finding, however, the Circuit Court and the Court of Appeals ruled on remand that the Greens did allocate the \$2 million settlement equally. Those lower courts relied solely on the argument of counsel because the Greens’ lawyers argued that the Greens intended to allocated the \$2 million settlement equally. Without question, the Circuit Court cited only to the arguments of counsel as the supporting “evidence”: “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). The Court of Appeals did the same.¹

The Greens baldly claim that there is “evidence in the record of the Greens’ good faith desires and intentions regarding their settlement.” *See*, Return, p. 8. There is, however, no such

¹ In a footnote, the Greens cite to *Pruitt v. South Carolina Medical Malpractice Joint Underwriting Assn.*, 343 S.C. 335, 540 S.E.2d 843 (2001), as an example of a case where this Court considered statements made by counsel as evidence. The evidence in *Pruitt*, however, was not the arguments made by counsel during an oral argument in court or in a brief. The evidence was a pre-lawsuit letter from the lawyer to the defendant advising that his clients were not waiving their rights to settlement proceeds by accepting the opt-out from the annuity company. That letter was literally evidence; the oral or written arguments by counsel in the present case are not evidence.

evidence. Like the Court of Appeals, the Greens point to the evidence of Ann Green's damages, but that evidence does not support a finding that the Greens intended an equal allocation of the \$2 million settlement. Also, the Greens contend that Mr. Green's trial testimony regarding his wife's damages is evidence of an intent to equally allocate the \$2 million settlement. But again, Mr. Green's acknowledgement of Mrs. Green's consortium claim does not show his intent that the \$2 million settlement was to be allocated equally between them. The Greens even resort to arguing that "[p]lacing oneself in Randy's position, it is difficult to imagine he intended to accept a larger portion of the settlement proceeds than Ann." *See*, Return p. 15. Again, that is pure speculation and not competent or admissible evidence.

Yet, remarkably, the one piece of evidence that *does show the Greens' intent* was rejected by the lower courts and continues to be derided and mischaracterized by the Greens. On April 14, 2016, the Greens accepted funds from Dr. Bauerle and his insurer to satisfy a portion of Ann Green's verdict. Mrs. Green, with her husband's consent, accepted \$64,883.68, and they partially satisfied/released Dr. Bauerle in that amount. (R. 26-27). 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. But, 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.

Moreover, in incessantly pressing the false narrative that the \$2 million was an "allocated" settlement, the Greens falsely claim that Dr. Bauerle is seeking to "reallocate" the settlement. Again, logic is on Dr. Bauerle's side. One cannot reallocate a settlement that was

never allocated in the first place. As a back-up position, the Greens now accuse Dr. Bauerle of attempting to “invalidate” the allocated settlement. The same reasoning applies – one cannot invalidate something that does not exist. To reiterate, if the settlement had been allocated by the Greens, this Court would not have remanded in 2019. That is precisely why this Court’s ruling in *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015), has no application to the case at bar. This is not a “reallocation” or “invalidation” case.²

Finally, the Greens’ rejection of this Court’s decision in *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995), reflects the same fallacies that permeate their return. Remarkably, the Greens argue that *Broome* is distinguishable because “[i]t involved an unallocated settlement with a defendant paid to a husband and wife which was setoff from the verdict against the same defendant.” *See*, Return, p. 23. ***However, that is precisely a description of this case.*** To discredit *Broome*, the Greens insist that their settlement was an “allocated settlement.” But we know ***as fact*** that it was not an allocated settlement. This Court said so in 2019: “The settlement paid by Grand Strand was not allocated between Mr. and Mrs. Green.” *Green v. Bauerle*, 2016 WL 2289678, *1 (S.C. 2019). The Greens also insist that *Broome* is distinguishable because it applies “irrelevant automobile insurance law.” *See*, Return, p. 22. That is not the case, Just like the Court of Appeals failed to do, the Greens also fail to explain how or why a UIM setoff and an equitable setoff are different and/or require different treatment or analysis under the law. As Dr.

² It should nonetheless be noted that the Greens misstate the holding in *Riley*. The Greens write: “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.” *See*, Return, p. 20. (Emphasis added). *Riley*, however, does not address the standard for invalidating a “trial court’s settlement allocation” but rather an “agreed-upon allocation of settlement proceeds” by the settling parties as memorialized in an “executed contract” between the settling parties. *Riley*, 777 S.E.2d at 831.

Bauerle pointed out, setoffs are not different under South Carolina law based on their statutory source. The Greens cannot refute that obvious principle of law.³

As an additional fallacy as alluded to above, the Greens repeatedly accuse Dr. Bauerle of disregarding or “challenging” this Court’s 2019 opinion or seeking relief in “direct conflict” with that opinion. Dr. Bauerle has done no such thing. They claim that Dr. Bauerle’s approach based on *Broome* “contradict[s] this Court’s prior Order directing a determination of the settlement ‘amounts’ to be set off from the ‘two verdicts.’” *See, Return*, p. 16. The Greens make that same argument several times.⁴ That is a reference to this Court’s remand instructions requiring: “[t]he trial court shall then issue an order setting forth the amounts to be set off from the two verdicts.” *Green v. Bauerle*, 2016 WL 2289678, *3 (S.C. 2019). The Greens suggest that the Court’s use of the plural version of “amounts” and “verdicts” is to be read as a dispositive ruling rejecting the application of the *Broome* decision by this Court in 2019, despite the fact that this Court did not decide the merits of the allocation of the \$2 million settlement and certainly did not reject the argument based on *Broome*. Indeed, this Court’s 2019 opinion does not even cite *Broome*. Thus, it is difficult to fathom that this Court made or intended to make a dispositive ruling rejecting the *Broome* precedent and disallowing any consideration of *Broome* on remand. Yet, that is what the Greens believe to be the case because this Court used the plural of those words.

³ Notably, the Greens make no attempt to support the Court of Appeals’ erroneous and *sua sponte* application of mootness in rejecting Dr. Bauerle’s argument that the \$2 million settlement and the verdicts should be treated as “marital property” or “joint property” consistent with the position originally taken by the Greens post-trial and in the 2014 appeal. Incidentally, the Greens at least now concede in a footnote that they did make a “marital property” argument in the 2014 appeal and then changed theories after this Court’s remand. They claim, however, that they “incorrectly used the term marital property in the first appeal” and that somehow justifies a change in theories from the 2014 appeal to this one. *See, Return*, p. 22. It does not.

⁴ *See, Return*, p. 5 (“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”).

Similarly, the Greens claim that a comparison of their jury verdicts disregards this Court's 2019 opinion. That is not accurate either. 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*, 2016 WL 2289678, *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.

In sum, Dr. Bauerle submits that this appeal presents a number of important issues that warrant the issuance of a writ of certiorari.

CONCLUSION

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

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

*Counsel for Petitioners Wayne B. Bauerle, M.D.
and Wayne B. Bauerle, M.D., P.C.*

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