THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2011-CP-26-7403

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

v.

Wayne B. Bauerle, M.D. and
Wayne B. Bauerle, M.D., P.C.,.....Appellants/Respondents.

Reply Brief of Respondents/Appellants

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ATTORNEYS FOR RESPONDENTS/APPELLANTS

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CASES

STATUTES AND RULES

I. BAUERLE IS NOT ENTITLED TO A SETOFF FROM THE GREEN'S SETTLEMENTS WITH GSRMC AND CMR BECAUSE DR. BAUERLE, CMR AND GSRMC ARE NOT JOINT TORTFEASORS.

In the pleadings and throughout trial Mr. and Mrs. Green ("Greens" or ("Plaintiffs") argued that Defendants Wayne B. Bauerle, MD and Wayne B. Bauerle, MD, PC (collectively "Bauerle") negligently interrupted the treatment being provided to Mr. Green by Grand Strand Regional Medical Center ("GSRMC") employees, whom Bauerle admitted did not proximately cause or contribute to the injuries and damages sustained by Plaintiffs. (Am. Answer to GSRMC'S Req. to Admit). On that basis Bauerle's negligence was an intervening cause of Plaintiffs' injuries rather than a concurrent cause; therefore, the Trial Judge erred in ruling that Plaintiffs' settlements with GSRMC and CMR compensated Plaintiffs for the same injuries as the verdict against Bauerle. Since Bauerle's intervening negligence caused Mr. Green's paralysis and resulting injuries, the settlements with GSRMC and CMR could not have compensated Plaintiffs for the same injuries under the same causes of action as the verdicts against Bauerle. The South Carolina Supreme Court outlined the proper analysis for determining whether there is intervening or joint negligence in Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978).

In Young, the plaintiff sued Tide Craft, the manufacturer, after her husband died in a boating accident. Husband took the boat to Repairman who made improper temporary repairs and Plaintiff sought to hold manufacturer responsible for negligent repair as foreseeable consequence of negligent manufacture. When Husband took the boat to Repairman for repairs the Repairman did not have sufficient cable to make the

repairs so he spliced in a portion of new cable to replace the frayed portion even though he knew the splicing repair was dangerous. Id. Husband died as a result of an accident caused by the splicing. The plaintiff alleged that the manufacturer was liable for the splicing and resulting accident. The South Carolina Supreme Court held that the manufacturer could not be held liable since the intervening acts of Repairman constituted the sole proximate cause of the accident that caused Husband's death.

The Court concluded that the only reasonable inference to be drawn was that Repairman's actions were not foreseeable. 270 S.C. 464, 242 S.E.2d at 676. He knew and admitted that splicing was dangerous. Id. Based on Repairman's own practice and the knowledge within the industry, it was highly remote that he would splice a steering cable. Id. at 465, 242 S.E.2d at 676. Adding those two facts together, the Court held "it cannot be seriously contended that Repairman's actions were a probable consequence of any wrongdoing on the part of Tide Craft." Id. at 465, 242 S.E.2d at 677. This was not a case where a third party's ignorance led to the creation of a highly dangerous condition, rather Repairman "unleashed" the risk with full knowledge of its danger. Id. With regard to the second question, the Court concluded there was no evidence that the complications would have occurred absent the splicing. Id.

Based on the test utilized by the Court in Young, (1) Bauerle's intervening negligence was not a probable consequence of any negligence by GSRMC employees, (2) nor was it a cause that concurred and combined with the negligence of GSRMC. Mr. Green's paralysis would not have followed in natural course in the absence of Bauerle's interruption of Mr. Green's treatment. By his own testimony, Bauerle admitted that he did not know Mr. Green's blood pressure when he ordered him to CT but had he known

Mr. Green's vital signs, he would not have sent him to CT. (Trial T. 523:6 – 525:3). His own expert testified that it is the responsibility of the physician to know the condition of a patient before issuing orders. (Trial T. 578:14 – 581:25). Yet Bauerle "unleashed the risk with full knowledge of its danger." Further, based on Bauerle's knowledge and experience, it was highly remote that he would interrupt the treatment of a critically ill patient. It is common knowledge in the trade that removing a patient from the preoperative waiting room ("Pre-Op") with a blood pressure of 72/56 and with a heart rate of 135 is "far removed from good practice" and a drastic deviation from the standard of care. (Trial T. 256:20 – 261:12, 449:8-453:12, 523:18 – 524:1; Trial T. 96: Chariker Dep. 19:5-6). Therefore, it cannot be contended that Bauerle's intervening negligence was a probable consequence of nor that it combined and concurred with any wrongdoing on the part of GSRMC. Further, there is no evidence that Mr. Green's paralysis and resulting injuries would have occurred absent Bauerle stopping the ongoing treatment by removing Mr. Green from Pre-Op. Dr. Chariker testified that the cardiac arrest was not inevitable; rather but for Bauerle's negligence, it would not have occurred and Mr. Green would not have been rendered a paraplegic. (Trial T. 96: Chariker Dep. 44:5-8). Since Bauerle's intervening negligence alone proximately caused Mr. Green's paralysis, it cannot be contended that Plaintiffs' settlements with GSRMC and CMR were for the same injury as Plaintiffs' verdict against Bauerle.

Further, even if the Court finds the negligence of GSRMC and Bauerle were concurrent causes of Plaintiffs' injuries, Section 15-38-50 does not apply because GSRMC can only be held liable by virtue of vicarious liability and vicariously liable parties are not joint tortfeasors.

South Carolina case law has made it clear that the Uniform Contribution Among Tortfeasors Act ("UCATA") S.C. Code Ann. § 15-38-50, which Bauerle assets as the basis for his Setoff Motion, does not apply to parties who are liable solely by virtue of vicariously liable. Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct.App.2001), rev'd on other grounds, 356 S.C. 238, 588 S.E.2d 588 (2003). In Andrade the Court states, "Andrade argues this provision prohibits the release of SCE&G and urges the court to expand the definition of tortfeasor under the UCATA to include vicariously liable parties. We decline to do so." Id. 345 S.C. at 223, 546 S.E.2d 665 (Ct.App.2001). No cause of action for medical malpractice ever existed as to GSRMC because a hospital cannot be held directly liable for medical malpractice. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) (common law prohibition against the corporate practice of medicine in South Carolina). Accordingly, GSRMC and Bauerle were not joint tortfeasors because GSRMC could only be held liable for medical malpractice by virtue of vicarious liability for Bauerle's negligence and the UCATA does not consider vicariously liable parties joint tortfeasors.

II. PLAINTIFFS SETTLEMENTS WITH GSRMC AND CMR WERE FOR DIFFERENT INJURIES THAN THE VERDICTS AGAINST BAUERLE.

Paralysis is not the only injury suffered or claimed and there is no evidence or basis upon which the court could find that the entire $2,000,000.00 settlement with GSRMC, the settlement with CMR and both verdicts compensated Mr. Green solely for his paralysis. If the Plaintiffs suffered the same single injury, there would have been no need for the Trial Judge to allocate the settlements or have the jury render separate

verdicts. It cannot be seriously contended that this case involved only one injury in light of incontrovertible evidence of numerous physical and non-physical injuries suffered.

The basis for the trial judge's Setoff Order was the case of Ellis v. Oliver, which Bauerle repeatedly cites to bolster his position that the fact that the Greens brought separate causes of action does not prohibit a statutory setoff. Bauerle alleges "substantial case law" exists in which the courts apply a statutory setoff to the causes of action for wrongful death and survival, citing Welch v. Epstein in addition to Ellis v. Oliver. To the contrary, in Welch the Court clearly states it decided to apply a setoff "equitable in nature", after considering the "facts and equities" involved. Welch v. Epstein, 342 S.C. 279, 313, 536 S.E.2d 408 (Ct.App.2000). The Court only collaterally mentions Section 15-38-50, as an aside, to address the plaintiff's additional argument that the equitable ruling contravenes the statute.

Bauerle's reliance on Ellis v. Oliver for this issue is also misplaced because Ellis is inconsistent with prior and subsequent case law holding wrongful death and survival actions are "different claims for different injuries." 335 S.C. 106, 515 S.E.2d 268 (Ct.App.1999). This Court addresses the inconsistency in footnote 1 of Smith v. Widener and is resolved by reference to Bennett v. Spartanburg Railway, Gas & Electric Co., 97 S.C. 27, 81 S.E. 189 (1914) in which the Supreme Court held that wrongful death and survival actions are different claims for different injuries. Smith v. Widener, 397 S.C. 468 n.1, 724 S.E.2d 188 (Ct.App.2012).

Additionally, Bauerle misstates the holding and subsequent impact of Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct.App.2012). Bauerle argues that the term "injury" is broad enough to encompass all damages arising out of the joint negligence of

responsible parties. (Respondent Brief p. 11). Bauerle misrepresents Smith, which held that actual and punitive damages arose out of the same injury, in order to bolster his flawed reliance on Ellis v. Oliver. In Smith, the Court rejected the plaintiff's assertion that the settlement involved only a claim for punitive damages, partially because it was not credible given the settlement was for the exact amount of the plaintiff's actual damages. The Court referenced the recent South Carolina Supreme Court case of O'Neill v. Smith, 388 S.C. 246, 252, 695 S.E. 2d 531, 534 (2010), which held punitive damages compensate a plaintiff and vindicate his rights arising out of a wrong suffered or injury sustained. Accordingly, the Court held that punitive damages are a different type of damages from actual damages; however, "a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1)." Smith, 397 S.C. at 273, 724 S.E.2d 188 (Ct.App.2012). Since the settlements and verdicts compensated and vindicated a violation of the same private right of the plaintiff, they involved the same injury as a matter of law, regardless of whether the settlement was for actual or punitive damages.

Here, Bauerle erroneously attempts to expand the ruling in Smith v. Widener to support his position that all damages awarded in the malpractice and consortium actions are "all damages arising from the same injury." (Respondent Brief, p. 12). What he fails to recognize is that an award for pain and suffering clearly compensated for the violation of a different private right than an award for loss of enjoyment of life, emotional distress, medical expenses, lost wages or loss of consortium. Moreover, it is not possible to discern what potential elements of damages or physical injuries were included in the jury

verdict. Bauerle's argument fails to correctly interpret the meaning of the term "injury" as exhaustibly defined throughout South Carolina case law.

The South Carolina Court of Appeals further clarified the setoff analysis in Hawkins v. Pathology Associates of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998). The Court held that elements of damages recoverable under a statute must be identical in order for the Court to apply a setoff because it is impossible for the Court to speculate for what elements of damages the jury compensated the plaintiff.

III. PLAINTIFFS' SETTLEMENTS WITH GSRMC AND CMR WERE FOR DIFFERENT CAUSES OF ACTION THAN THE VERDICTS AGAINST BAUERLE.

Hawkins v. Pathology Associates of Greenville, P.A., added an additional hurdle for the party asking for an offset to overcome, holding that "the reduction in the judgment must be from a settlement for the same cause of action." Hawkins, 330 S.C. 92, 113, 498 S.E.2d 395, 406-07 (Ct.App.1998). That analysis was cited in Smith v. Widener, which applied a statutory setoff regardless of whether it actually applied to that situation. Therefore, contrary to Bauerle's position, the analysis in Hawkins does apply in cases involving a statutory setoff, rather than solely in cases applying an equitable setoff.

Here, Plaintiffs' settlements with GSRMC and CMR are not for the same causes of action as the verdicts against Bauerle. Bauerle concedes that "there was no vicarious liability claim pending, even one for Dr. Bauerle's conduct" after the Summary Judgment Order. (Respondent Brief p. 16). Bauerle fails to consider the fact that if no vicarious liability claim remained, then no identical cause of action against GSRMC remained because GSRMC cannot be held directly liable for medical malpractice. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) (common law prohibition against

the corporate practice of medicine in South Carolina). Accordingly, unless GSRMC could be held directly liable for medical malpractice as a result of the acts or omissions of its agents, employees or independent contractors, there is no basis for asserting that GSRMC could have been "liable in tort" to Plaintiffs for the same cause of action as Bauerle.

Bauerle's allegation, that the issue of whether § 15-38-50 applies to vicariously liable parties was not preserved for appeal, is unfounded. Plaintiffs discussed this issue in Plaintiffs' Motion and Supporting Memorandum in Opposition to Defendant's Motion for Setoff in the section entitled "The settling Defendants and Bauerle are not joint tortfeasors." (Pls.' Mot. in Opp. to Setoff, 14-15).

In reference to Bauerle's argument that the settlements with GSRMC and CMR occurred before any appeal rights were extinguished, we concede that in South Carolina, parties have the right to appeal a summary judgment order after the final verdict has been rendered. Here; however, the parties' right to appeal ended at the time the Stipulation of Dismissal became effective. Bauerle entered into the stipulation without objection to the lack of allocation of settlement funds. At that point, Judge Hyman's Summary Judgment Order was the law of the case and all rights of appeal were extinguished as to Plaintiffs and co-defendant Bauerle. For that reason, Bauerle should not be entitled to complain of the failure to allocate the settlement funds at this juncture.

IV. PLAINTIFFS' SETTLEMENTS WITH GSRMC AND CMR COMPENSATED PLAINTIFFS FOR INJURIES AND CAUSES OF ACTION NOT INCLUDED IN THE VERDICTS.

Bauerle, again, mischaracterizes Plaintiffs' position concerning what was included in the settlements with GSRMC and CMR and the verdicts. Plaintiffs asserted that the

settlements with GSRMC and CMR may have compensated Plaintiffs for some of the same injuries and some of the same causes of action as the verdicts but they also included a myriad of additional injuries and causes of action not included in the verdicts.

In Hawkins v. Pathology Associates of Greenville, neither party requested that the jury specify the amount it awarded for each of the elements of damages under the statute. Pathology Associates was not able to establish the jury awarded a fixed amount entirely from the pecuniary loss and on that basis the evidence did not support the trial court's finding the setoff was necessary to prevent a double recovery. Hawkins, 330 S.C. 92, 114-115, 498 S.E.2d 395 (Ct.App.1998). Similarly, we are unable to determine from the verdict form for what damages the jury compensated Plaintiffs and Bauerle has otherwise failed to establish that the jury awarded Mr. Green $2,300,000 or Mrs. Green $550,000 for any specific loss or injury. Bauerle did not object when the trial judge declined to utilize a verdict form suggested by Plaintiffs that permitted the jury to indicate what damages were included in the awards. (Trial T. 643:1 – 645:2; Pls. Ex. 31), and yet after standing idly by asserts that the court should make such a determination.

The verdicts against Bauerle and the settlements with GSRMC and CMR do not compensate Plaintiffs for identical injuries, damages or causes of action. Each potential claim and injury compensated by the settlements requires that consideration be paid for it, therefore setoff requires that the court determine the amount of consideration paid for each existing and potential causes of action and each existing and potential injury. To grant a setoff in the entire amount of the settlements would effectively take away all consideration paid for contractual terms as negotiated by the parties to the agreement.

V. THE COURT HAS NO AUTHORITY TO EQUITABLY ALLOCATE THE SETTLEMENTS WITH GSRMC AND CMR IF SETOFF IS GRANTED PURSUANT TO THE STATUTE.

The trial judge erred in allocating the unallocated settlement funds between the medical malpractice and loss of consortium causes of action. In opposition, Bauerle argues that there is no authority holding that a Court cannot exercise its equitable authority to allocate settlement amounts where the setoff is granted pursuant to § 15-38-50. Likewise, there is no South Carolina case law giving the Court authority to equitably allocate settlement funds where a setoff is granted pursuant to the statute. See Ellis v. Oliver, 335 S.C. 106 (Ct.App.1999) (holding Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors.) Nor is there South Carolina case law giving the trial court authority to equitably allocate previously unallocated settlement funds. Bauerle cites to Smalls v. South Carolina Department of Education, 339 S.C. 208, 528 S.E.2d 682, 688 (Ct.App.2000), for the position that "jurisdiction to set off one judgment against another is equitable in nature". Smalls can be distinguished because the Court applies an equitable, rather than a statutory setoff. Courts applying an equitable setoff can only do so "when necessary to provide justice between the parties." Id. Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained, for it is "almost universally held that there can be only one satisfaction for an injury or wrong." Truesdale v. S.C. Highway Dept., 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), overruled on other grounds by McCall v. Batson, 285 S.C. 243. 329, S.E.2d 741 (1985). The Court would therefore have to first determine that setoff is necessary to prevent double recovery, that the verdicts and

settlements are for the same injury and the same cause of action, and that sufficient facts exist to allocate the settlements among causes of action.

Here, it is clear that the Greens have not received a double recovery based on the testimony of life care expert, Sarah Lustig, BSN, RN, CLCP, CNLCP and economic expert, Dr. Oliver Wood. According to Dr. Wood, the settlements and jury verdicts combined were barely sufficient to compensate Plaintiffs the estimated $3,006,791.00 in economic damages suffered by Plaintiffs, excluding past medical expenses, let alone the myriad of other damages for his paraplegia and numerous other physical and non-physical injuries, including pain and suffering and loss of enjoyment of life. (Plaintiffs' Trial Exhibit 15, Chart 7; Chart 9). Further, although Plaintiffs requested a jury verdict form specifying the elements of damages for which the jury compensated Plaintiffs, the verdict form used did not permit the jury to specify what damages were included in the verdict. (RG verdict form). Accordingly, there is no evidence that Dr. Wood's or Nurse Lustig's figures were included in the settlements with GSRMC and CMR or the jury verdicts. As in Hawkins, Bauerle cannot establish that the jury awarded either Plaintiff a fixed amount solely for a specific economic loss. Bauerle also did not establish that the settlements even involved a cause of action for medical malpractice and, if so, whether GSRMC was jointly liable to Mr. Green for same. As in Hawkins, there was no evidence that setoff was necessary to prevent Plaintiffs from receiving a double recovery.

Bauerle's allegation that "the fairness of the allocation by Judge John cannot be reasonably challenged because he used the jury's determination of the value of the Green's claims to establish allocation is also untrue. The jury's determination is their determination of damages and how the Green's should be compensated on a medical

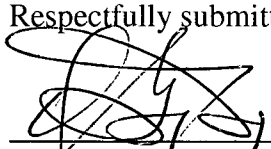
malpractice cause of action for Mr. Green and a loss of consortium cause of action for Mrs. Green against Bauerle. As mentioned above, the settlements with GSRMC and CMR included compensation for all potential and then existing claims against GSRMC. In order for the trial court to allocate the unallocated settlements with GSRMC and CMR, despite the court having no authority to do so, it would first need to allocate consideration to each potential injury and cause of action in consideration of which the settlements were given. However, even if this was possible, there is simply no way to determine which of Plaintiffs' innumerable physical and non-physical injuries are included in the verdicts. Setoff under section 15-38-50 only applies to funds paid to compensate "the same plaintiff on a claim for the same injury." Smith v. Widener citing Hawkins, 330 S.C. at 113, 498 S.E. at 406-07. There is no way to determine which injuries were included in the verdicts; therefore, setoff in the amount of the settlements with GSRMC and CMR was clearly inappropriate in this case.

CONCLUSION

For the foregoing reasons, the Trial Judge's Setoff Order should be reversed in part and Bauerle should not be granted a statutory setoff in the amount the settlement with GSRMC and CMR.

(Signature follows on the next page)

Respectfully submitted,



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RESPONDENT APPELLANTS'
SUPPLEMENTAL DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondents-Appellants propose the following be included in the Record on Appeal:

1. Trial Transcript from September 9, 2013 to September 13, 2013 pp. 72; 96; 256 – 261; 449-453; 523-525; 578-581; 643-645;

I certify that this designation contains no matter which is irrelevant to this appeal.

(Signature follows on the next page.)

August 7, 2014

Respectfully submitted,

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repairs so he spliced in a portion of new cable to replace the frayed portion even though he knew the splicing repair was dangerous. Id. Husband died as a result of an accident caused by the splicing. The plaintiff alleged that the manufacturer was liable for the splicing and resulting accident. The South Carolina Supreme Court held that the manufacturer could not be held liable since the intervening acts of Repairman constituted the sole proximate cause of the accident that caused Husband's death.

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Mr. Green's vital signs, he would not have sent him to CT. (Trial T. 523:6 – 525:3). His own expert testified that it is the responsibility of the physician to know the condition of a patient before issuing orders. (Trial T. 578:14 – 581:25). Yet Bauerle "unleashed the risk with full knowledge of its danger." Further, based on Bauerle's knowledge and experience, it was highly remote that he would interrupt the treatment of a critically ill patient. It is common knowledge in the trade that removing a patient from the preoperative waiting room ("Pre-Op") with a blood pressure of 72/56 and with a heart rate of 135 is "far removed from good practice" and a drastic deviation from the standard of care. (Trial T. 256:20 – 261:12, 449:8-453:12, 523:18 – 524:1; Trial T. 96: Chariker Dep. 19:5-6). Therefore, it cannot be contended that Bauerle's intervening negligence was a probable consequence of nor that it combined and concurred with any wrongdoing on the part of GSRMC. Further, there is no evidence that Mr. Green's paralysis and resulting injuries would have occurred absent Bauerle stopping the ongoing treatment by removing Mr. Green from Pre-Op. Dr. Chariker testified that the cardiac arrest was not inevitable; rather but for Bauerle's negligence, it would not have occurred and Mr. Green would not have been rendered a paraplegic. (Trial T. 96: Chariker Dep. 44:5-8). Since Bauerle's intervening negligence alone proximately caused Mr. Green's paralysis, it cannot be contended that Plaintiffs' settlements with GSRMC and CMR were for the same injury as Plaintiffs' verdict against Bauerle.

Further, even if the Court finds the negligence of GSRMC and Bauerle were concurrent causes of Plaintiffs' injuries, Section 15-38-50 does not apply because GSRMC can only be held liable by virtue of vicarious liability and vicariously liable parties are not joint tortfeasors.

South Carolina case law has made it clear that the Uniform Contribution Among Tortfeasors Act ("UCATA") S.C. Code Ann. § 15-38-50, which Bauerle assets as the basis for his Setoff Motion, does not apply to parties who are liable solely by virtue of vicariously liable. Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct.App.2001), rev'd on other grounds, 356 S.C. 238, 588 S.E.2d 588 (2003). In Andrade the Court states, "Andrade argues this provision prohibits the release of SCE&G and urges the court to expand the definition of tortfeasor under the UCATA to include vicariously liable parties. We decline to do so." Id. 345 S.C. at 223, 546 S.E.2d 665 (Ct.App.2001). No cause of action for medical malpractice ever existed as to GSRMC because a hospital cannot be held directly liable for medical malpractice. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) (common law prohibition against the corporate practice of medicine in South Carolina). Accordingly, GSRMC and Bauerle were not joint tortfeasors because GSRMC could only be held liable for medical malpractice by virtue of vicarious liability for Bauerle's negligence and the UCATA does not consider vicariously liable parties joint tortfeasors.

II. PLAINTIFFS SETTLEMENTS WITH GSRMC AND CMR WERE FOR DIFFERENT INJURIES THAN THE VERDICTS AGAINST BAUERLE.

Paralysis is not the only injury suffered or claimed and there is no evidence or basis upon which the court could find that the entire $2,000,000.00 settlement with GSRMC, the settlement with CMR and both verdicts compensated Mr. Green solely for his paralysis. If the Plaintiffs suffered the same single injury, there would have been no need for the Trial Judge to allocate the settlements or have the jury render separate

verdicts. It cannot be seriously contended that this case involved only one injury in light of incontrovertible evidence of numerous physical and non-physical injuries suffered.

The basis for the trial judge's Setoff Order was the case of Ellis v. Oliver, which Bauerle repeatedly cites to bolster his position that the fact that the Greens brought separate causes of action does not prohibit a statutory setoff. Bauerle alleges "substantial case law" exists in which the courts apply a statutory setoff to the causes of action for wrongful death and survival, citing Welch v. Epstein in addition to Ellis v. Oliver. To the contrary, in Welch the Court clearly states it decided to apply a setoff "equitable in nature", after considering the "facts and equities" involved. Welch v. Epstein, 342 S.C. 279, 313, 536 S.E.2d 408 (Ct.App.2000). The Court only collaterally mentions Section 15-38-50, as an aside, to address the plaintiff's additional argument that the equitable ruling contravenes the statute.

Bauerle's reliance on Ellis v. Oliver for this issue is also misplaced because Ellis is inconsistent with prior and subsequent case law holding wrongful death and survival actions are "different claims for different injuries." 335 S.C. 106, 515 S.E.2d 268 (Ct.App.1999). This Court addresses the inconsistency in footnote 1 of Smith v. Widener and is resolved by reference to Bennett v. Spartanburg Railway, Gas & Electric Co., 97 S.C. 27, 81 S.E. 189 (1914) in which the Supreme Court held that wrongful death and survival actions are different claims for different injuries. Smith v. Widener, 397 S.C. 468 n.1, 724 S.E.2d 188 (Ct.App.2012).

Additionally, Bauerle misstates the holding and subsequent impact of Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct.App.2012). Bauerle argues that the term "injury" is broad enough to encompass all damages arising out of the joint negligence of

responsible parties. (Respondent Brief p. 11). Bauerle misrepresents Smith, which held that actual and punitive damages arose out of the same injury, in order to bolster his flawed reliance on Ellis v. Oliver. In Smith, the Court rejected the plaintiff's assertion that the settlement involved only a claim for punitive damages, partially because it was not credible given the settlement was for the exact amount of the plaintiff's actual damages. The Court referenced the recent South Carolina Supreme Court case of O'Neill v. Smith, 388 S.C. 246, 252, 695 S.E. 2d 531, 534 (2010), which held punitive damages compensate a plaintiff and vindicate his rights arising out of a wrong suffered or injury sustained. Accordingly, the Court held that punitive damages are a different type of damages from actual damages; however, "a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1)." Smith, 397 S.C. at 273, 724 S.E.2d 188 (Ct.App.2012). Since the settlements and verdicts compensated and vindicated a violation of the same private right of the plaintiff, they involved the same injury as a matter of law, regardless of whether the settlement was for actual or punitive damages.

Here, Bauerle erroneously attempts to expand the ruling in Smith v. Widener to support his position that all damages awarded in the malpractice and consortium actions are "all damages arising from the same injury." (Respondent Brief, p. 12). What he fails to recognize is that an award for pain and suffering clearly compensated for the violation of a different private right than an award for loss of enjoyment of life, emotional distress, medical expenses, lost wages or loss of consortium. Moreover, it is not possible to discern what potential elements of damages or physical injuries were included in the jury

verdict. Bauerle's argument fails to correctly interpret the meaning of the term "injury" as exhaustibly defined throughout South Carolina case law.

The South Carolina Court of Appeals further clarified the setoff analysis in Hawkins v. Pathology Associates of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998). The Court held that elements of damages recoverable under a statute must be identical in order for the Court to apply a setoff because it is impossible for the Court to speculate for what elements of damages the jury compensated the plaintiff.

III. PLAINTIFFS' SETTLEMENTS WITH GSRMC AND CMR WERE FOR DIFFERENT CAUSES OF ACTION THAN THE VERDICTS AGAINST BAUERLE.

Hawkins v. Pathology Associates of Greenville, P.A., added an additional hurdle for the party asking for an offset to overcome, holding that "the reduction in the judgment must be from a settlement for the same cause of action." Hawkins, 330 S.C. 92, 113, 498 S.E.2d 395, 406-07 (Ct.App.1998). That analysis was cited in Smith v. Widener, which applied a statutory setoff regardless of whether it actually applied to that situation. Therefore, contrary to Bauerle's position, the analysis in Hawkins does apply in cases involving a statutory setoff, rather than solely in cases applying an equitable setoff.

Here, Plaintiffs' settlements with GSRMC and CMR are not for the same causes of action as the verdicts against Bauerle. Bauerle concedes that "there was no vicarious liability claim pending, even one for Dr. Bauerle's conduct" after the Summary Judgment Order. (Respondent Brief p. 16). Bauerle fails to consider the fact that if no vicarious liability claim remained, then no identical cause of action against GSRMC remained because GSRMC cannot be held directly liable for medical malpractice. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) (common law prohibition against

the corporate practice of medicine in South Carolina). Accordingly, unless GSRMC could be held directly liable for medical malpractice as a result of the acts or omissions of its agents, employees or independent contractors, there is no basis for asserting that GSRMC could have been "liable in tort" to Plaintiffs for the same cause of action as Bauerle.

Bauerle's allegation, that the issue of whether § 15-38-50 applies to vicariously liable parties was not preserved for appeal, is unfounded. Plaintiffs discussed this issue in Plaintiffs' Motion and Supporting Memorandum in Opposition to Defendant's Motion for Setoff in the section entitled "The settling Defendants and Bauerle are not joint tortfeasors." (Pls.' Mot. in Opp. to Setoff, 14-15).

In reference to Bauerle's argument that the settlements with GSRMC and CMR occurred before any appeal rights were extinguished, we concede that in South Carolina, parties have the right to appeal a summary judgment order after the final verdict has been rendered. Here; however, the parties' right to appeal ended at the time the Stipulation of Dismissal became effective. Bauerle entered into the stipulation without objection to the lack of allocation of settlement funds. At that point, Judge Hyman's Summary Judgment Order was the law of the case and all rights of appeal were extinguished as to Plaintiffs and co-defendant Bauerle. For that reason, Bauerle should not be entitled to complain of the failure to allocate the settlement funds at this juncture.

IV. PLAINTIFFS' SETTLEMENTS WITH GSRMC AND CMR COMPENSATED PLAINTIFFS FOR INJURIES AND CAUSES OF ACTION NOT INCLUDED IN THE VERDICTS.

Bauerle, again, mischaracterizes Plaintiffs' position concerning what was included in the settlements with GSRMC and CMR and the verdicts. Plaintiffs asserted that the

settlements with GSRMC and CMR may have compensated Plaintiffs for some of the same injuries and some of the same causes of action as the verdicts but they also included a myriad of additional injuries and causes of action not included in the verdicts.

In Hawkins v. Pathology Associates of Greenville, neither party requested that the jury specify the amount it awarded for each of the elements of damages under the statute. Pathology Associates was not able to establish the jury awarded a fixed amount entirely from the pecuniary loss and on that basis the evidence did not support the trial court's finding the setoff was necessary to prevent a double recovery. Hawkins, 330 S.C. 92, 114-115, 498 S.E.2d 395 (Ct.App.1998). Similarly, we are unable to determine from the verdict form for what damages the jury compensated Plaintiffs and Bauerle has otherwise failed to establish that the jury awarded Mr. Green $2,300,000 or Mrs. Green $550,000 for any specific loss or injury. Bauerle did not object when the trial judge declined to utilize a verdict form suggested by Plaintiffs that permitted the jury to indicate what damages were included in the awards. (Trial T. 643:1 – 645:2; Pls. Ex. 31), and yet after standing idly by asserts that the court should make such a determination.

The verdicts against Bauerle and the settlements with GSRMC and CMR do not compensate Plaintiffs for identical injuries, damages or causes of action. Each potential claim and injury compensated by the settlements requires that consideration be paid for it, therefore setoff requires that the court determine the amount of consideration paid for each existing and potential causes of action and each existing and potential injury. To grant a setoff in the entire amount of the settlements would effectively take away all consideration paid for contractual terms as negotiated by the parties to the agreement.

V. THE COURT HAS NO AUTHORITY TO EQUITABLY ALLOCATE THE SETTLEMENTS WITH GSRMC AND CMR IF SETOFF IS GRANTED PURSUANT TO THE STATUTE.

The trial judge erred in allocating the unallocated settlement funds between the medical malpractice and loss of consortium causes of action. In opposition, Bauerle argues that there is no authority holding that a Court cannot exercise its equitable authority to allocate settlement amounts where the setoff is granted pursuant to § 15-38-50. Likewise, there is no South Carolina case law giving the Court authority to equitably allocate settlement funds where a setoff is granted pursuant to the statute. See Ellis v. Oliver, 335 S.C. 106 (Ct.App.1999) (holding Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors.) Nor is there South Carolina case law giving the trial court authority to equitably allocate previously unallocated settlement funds. Bauerle cites to Smalls v. South Carolina Department of Education, 339 S.C. 208, 528 S.E.2d 682, 688 (Ct.App.2000), for the position that "jurisdiction to set off one judgment against another is equitable in nature". Smalls can be distinguished because the Court applies an equitable, rather than a statutory setoff. Courts applying an equitable setoff can only do so "when necessary to provide justice between the parties." Id. Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained, for it is "almost universally held that there can be only one satisfaction for an injury or wrong." Truesdale v. S.C. Highway Dept., 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), overruled on other grounds by McCall v. Batson, 285 S.C. 243. 329, S.E.2d 741 (1985). The Court would therefore have to first determine that setoff is necessary to prevent double recovery, that the verdicts and

settlements are for the same injury and the same cause of action, and that sufficient facts exist to allocate the settlements among causes of action.

Here, it is clear that the Greens have not received a double recovery based on the testimony of life care expert, Sarah Lustig, BSN, RN, CLCP, CNLCP and economic expert, Dr. Oliver Wood. According to Dr. Wood, the settlements and jury verdicts combined were barely sufficient to compensate Plaintiffs the estimated $3,006,791.00 in economic damages suffered by Plaintiffs, excluding past medical expenses, let alone the myriad of other damages for his paraplegia and numerous other physical and non-physical injuries, including pain and suffering and loss of enjoyment of life. (Plaintiffs' Trial Exhibit 15, Chart 7; Chart 9). Further, although Plaintiffs requested a jury verdict form specifying the elements of damages for which the jury compensated Plaintiffs, the verdict form used did not permit the jury to specify what damages were included in the verdict. (RG verdict form). Accordingly, there is no evidence that Dr. Wood's or Nurse Lustig's figures were included in the settlements with GSRMC and CMR or the jury verdicts. As in Hawkins, Bauerle cannot establish that the jury awarded either Plaintiff a fixed amount solely for a specific economic loss. Bauerle also did not establish that the settlements even involved a cause of action for medical malpractice and, if so, whether GSRMC was jointly liable to Mr. Green for same. As in Hawkins, there was no evidence that setoff was necessary to prevent Plaintiffs from receiving a double recovery.

Bauerle's allegation that "the fairness of the allocation by Judge John cannot be reasonably challenged because he used the jury's determination of the value of the Green's claims to establish allocation is also untrue. The jury's determination is their determination of damages and how the Green's should be compensated on a medical

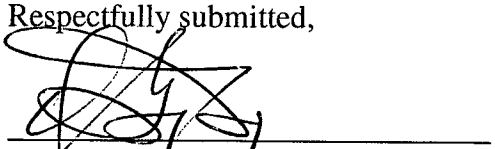
malpractice cause of action for Mr. Green and a loss of consortium cause of action for Mrs. Green against Bauerle. As mentioned above, the settlements with GSRMC and CMR included compensation for all potential and then existing claims against GSRMC. In order for the trial court to allocate the unallocated settlements with GSRMC and CMR, despite the court having no authority to do so, it would first need to allocate consideration to each potential injury and cause of action in consideration of which the settlements were given. However, even if this was possible, there is simply no way to determine which of Plaintiffs' innumerable physical and non-physical injuries are included in the verdicts. Setoff under section 15-38-50 only applies to funds paid to compensate "the same plaintiff on a claim for the same injury." Smith v. Widener citing Hawkins, 330 S.C. at 113, 498 S.E. at 406-07. There is no way to determine which injuries were included in the verdicts; therefore, setoff in the amount of the settlements with GSRMC and CMR was clearly inappropriate in this case.

CONCLUSION

For the foregoing reasons, the Trial Judge's Setoff Order should be reversed in part and Bauerle should not be granted a statutory setoff in the amount the settlement with GSRMC and CMR.

(Signature follows on the next page)

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2011-CP-26-7403

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

v.

Wayne B. Bauerle, M.D. and
Wayne B. Bauerle, M.D., P.C.,.....Appellants-Respondents.

RESPONDENT APPELLANTS'
SUPPLEMENTAL DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondents-Appellants propose the following be included in the Record on Appeal:

1. Trial Transcript from September 9, 2013 to September 13, 2013 pp. 72; 96; 256 – 261; 449-453; 523-525; 578-581; 643-645;

I certify that this designation contains no matter which is irrelevant to this appeal.

(Signature follows on the next page.)

August 7, 2014

Respectfully submitted,

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Wayne B. Bauerle, M.D., P.C.,.....Appellants/Respondents.

PROOF OF SERVICE

I certify that I have served Respondents/Appellants' Reply Brief an Respondents/Appellants' Designation of Matter for Record on Appeal on Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. by depositing a copy of it in the United States Mail, postage prepaid, on August 7, 2014 addressed to his attorneys of record at their offices as follows:

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August 7, 2014

Via U.S. Mail
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RE: Randall M. Green and Ann Green vs. Wayne B. Bauerle, MD and Wayne B. Bauerle, MD, PC
Case: 2011-CP-26-7403
Appellate Case No. 2014-000469

Dear Ms. Kitchings:

Enclosed for filing please find one original and one copy of the Reply Brief and Designation of Matter for Record on Appeal of Respondents/Appellants. I would greatly appreciate you returning the clocked copies to me in the self-addressed, stamped envelope provided. By copy of this letter I have served a copy of the same upon all attorneys of record.

Thank you for your assistance. Should you have any questions, please do not hesitate to contact this office.

With kindest regards, I remain,

Very truly yours,

E. Brooke Hurt

Brooke Hurt

Enclosures

cc: L. Morgan Martin
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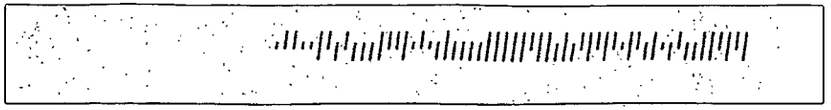
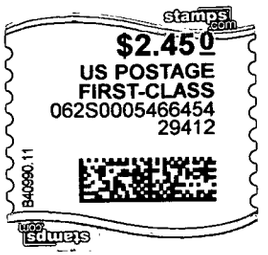
Jack B. McCutcheon, Jr.





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SC Court of Appeals

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