

78726

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

FEB 18 2016

SC Court of Appeals

APPEAL FROM HORRY COUNTY
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.

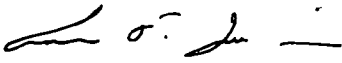
PETITION FOR REHEARING

The Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. petition the South Carolina Court of Appeals for a rehearing in part of the Court's recent decision in *Green v. Bauerle*, Op. No. 2016-UP-052 (S.C. Ct. App. filed February 3, 2016).

The grounds for the Appellants'-Respondents' petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellants'-Respondents' petition for rehearing is based on the Court's decision in *Green v. Bauerle*, Op. No. 2016-UP-052 (S.C. Ct. App. filed February 3, 2016); the supporting memorandum filed herewith; the briefs, Record on Appeal and Supplemental Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

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

Columbia, South Carolina

February 18, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2011-CP-26-7403

RECEIVED
FEB 18 2016
SC Court of Appeals

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

v.

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

**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

The Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. (hereafter collectively referred to as "Dr. Bauerle") have petitioned this Court for a rehearing in part of its recent decision in *Green v. Bauerle*, Op. No. 2016-UP-052 (S.C. Ct. App. filed February 3, 2016). Dr. Bauerle respectfully submits that the following points were overlooked or misapprehended by this Court:

In its opinion, this Court concluded that the trial court did not err in denying the set-off for the settlement amounts paid by the at-fault driver and by the Greens' underinsured motorist carrier. Given the Court's citations which is the only analysis provided given the disposition under Rule 220(b), SCACR, Dr. Bauerle understands that the Court must have concluded that the injuries resulting from the alleged malpractice were not the "same injuries" for which the at-fault driver was also liable.

Dr. Bauerle submit that the Court, like the trial court, overlooked the rule of law in *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984), which is not cited in the Court's opinion. In *Graham*, the South Carolina Supreme Court explained that "[t]he general rule is that if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury." *Id.* See also, *Bessinger v. DeLoach*, 230 S.C. 1, 94 S.E.2d 3 (1956); *Fairchild v. South Carolina Department of Transportation*, 385 S.C. 344, 683 S.E.2d 818 (Ct. App. 2009), *aff'd*, 398 S.C. 90, 727 S.E.2d 407 (2012). Accordingly, South Carolina law provides that where the original accident resulted in injuries that required medical care and the medical care as provided results in additional injuries, the original tortfeasor is liable *for all of the injuries* as a matter of law. Under this rule of law, the malpractice committed by the medical providers in treating the original injuries is reasonably

foreseeable as a matter of law, and as a result, the malpractice cannot serve as an intervening act or cause that breaks the causal chain.

This Court, like the trial court, erred in failing to apply the *Graham* rule. As Dr. Bauerle argues, the original tortfeasor, i.e., the at-fault driver who caused the motor vehicle accident that necessitated Randall Green's hospitalization and the medical care rendered by Dr. Bauerle and others, was legally liable in tort for the very "same injuries" on which the jury returned its verdict, specifically the injuries resulting from the malpractice found by the jury.

In their case-in-chief, the Greens presented the expert testimony of Dr. Richard Matza, who like Dr. Bauerle is an orthopaedic surgeon. Mr. Matza testified that Dr. Bauerle "was brought in as an orthopaedic surgeon because of [a] fracture/dislocation of [Mr. Green's] right hip." (R. 194). The fracture/dislocation resulted from motor vehicle accident. Mr. Green also presented at the ER with "a severe laceration to his right forearm that was bleeding profusely." (R. 34-35). Dr. Matza testified that Mr. Green had lost "a sizeable amount of blood" from the right forearm laceration and from the fractured hip. (R. 198, 211-212). That loss of blood "was the cause, the direct cause for [Mr. Green's] decompensation, crashing, arresting and the need to be resuscitated." (R. 198). Further, Dr. Matza opined as follows:

[T]he delay of treatment of the bleeding which led to the arrest, which led to a zero blood pressure for a period of time, at least a half hour to 40 minutes, led to decreased

blood flow or no blood flow to the arteries in the spine and it is through the lack of blood supply to the spine that the ultimate injury to the spine occurred between the mid thoracic region of T6 to T12, somewhere in that area where the artery resides and directly led to the paraplegia or the paralysis of both Mr. Green's lower extremities.

(R. 201). Thus, according to Dr. Matza's testimony and the Greens' theory of liability against Dr. Bauerle, the delay in the surgery to repair the right forearm laceration, as caused by Dr. Bauerle's alleged insistence that a CT scan of the hip be taken, proximately caused Mr. Green's paralysis.

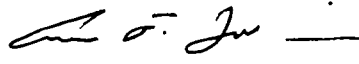
In sum, the Greens' theory of liability makes the paralysis and consequential damages, including Mrs. Green's loss of consortium, a foreseeable and proximate result of the original injury which resulted from the motor vehicle accident. The rule of law as described in *Graham* and later cases applies here. South Carolina law provides that the at-fault driver was liable *for all of the injuries and damages claimed against Dr. Bauerle*, including Ann Green's loss of consortium. In other words, given the rule of law in *Graham*, which this Court did not address, the settlement by the at-fault driver was for the "same injuries" as resulted from the medical malpractice.

Accordingly, Dr. Bauerle respectfully requests that the Court grant a rehearing of this one particular issue and to conclude that Dr. Bauerle is entitled to a set-off for the \$200,000 paid for the at-fault driver in settlement of the motor

vehicle negligence and loss of consortium claims.¹ Mr. and Mrs. Green received \$100,000 each in their settlement with the at-fault driver. Dr. Bauerle requests on rehearing that the Court grant the additional set-off for those amounts.

Respectfully requested,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

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

Columbia, South Carolina

February 18, 2016

¹ Dr. Bauerle has abandoned his set-off claim for the \$225,000 received by the Greens from their own underinsured motorist insurer.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

FEB 18 2016

SC Court of Appeals

APPEAL FROM Horry COUNTY
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.

CERTIFICATE OF SERVICE

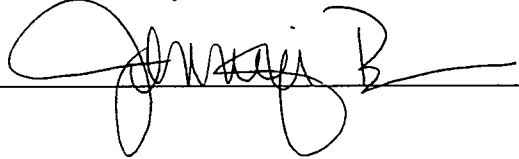
The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellants-Respondents, does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 18th day of February 2016:

O. Grady Query, Esquire
E. Brooke Hurt, Esquire
Query Sautter Forsythe, LLC
The Wappoo Centre
147 Wappoo Creek Drive - Suite 202
Charleston, South Carolina 29412

L. Morgan Martin, Esquire
Law Offices of L. Morgan Martin, P.A.
1121 Third Avenue
Conway, South Carolina 29526

Cristin A. Uricchio, Esquire
Uricchio Law Firm
147 Wappoo Creek Drive - Suite 205
Charleston, South Carolina 29412

John B. McCutcheon, Jr., Esquire
Lisa A. Thomas, Esquire
Thompson & Henry, P.A.
Post Office Box 1740
Conway, South Carolina 29528



RECEIVED

DAVIDSON & LINDEMANN, P.A.

FEB 18 2016

ATTORNEYS AND COUNSELLORS AT LAW

SC Court of Appeals

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.†
Robert D. Garfield
Michael B. Wren

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855
www.dml-law.com

Daniel C. Plyler
Joel S. Hughes
David A. DeMasters
Steven R. Spreeuwiers
Todd R. Flippin

*Also Admitted In North Carolina
†Certified Mediator

February 18, 2016

Of Counsel
Kenneth P. Woodington

Writer's Email: alindemann@dml-law.com

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and
Wayne B. Bauerle, M.D., P.C.
Appeal Tracking Number: 2014-000460
Civil Action Number: 2011-CP-26-7403
Claim Number: CB053262M
Our File Number: 22.9301

Dear Ms. Kitchings:

Please find enclosed for filing the originals and seven copies each of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my courier. I have also enclosed my firm's \$25.00 check for the filing fee.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

The Honorable Jenny Abbott Kitchings
February 18, 2016
Page Two

cc: (w/ Enclosures)

O. Grady Query, Esquire
E. Brooke Hurt, Esquire
Query Sautter Forsythe, LLC
The Wappoo Centre
147 Wappoo Creek Drive - Suite 202
Charleston, South Carolina 29412

L. Morgan Martin, Esquire
Law Offices of L. Morgan Martin, P.A.
1121 Third Avenue
Conway, South Carolina 29526

Cristin A. Uricchio, Esquire
Uricchio Law Firm
147 Wappoo Creek Drive - Suite 205
Charleston, South Carolina 29412

John B. McCutcheon, Jr., Esquire
Lisa A. Thomas, Esquire
Thompson & Henry, P.A.
Post Office Box 1740
Conway, South Carolina 29528