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

1875

RECEIVED

FEB 22 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.

PETITION FOR REHEARING OF RESPONDENTS-APPELLANTS RANDALL M. GREEN AND ANN GREEN

O. Grady Query, Esquire
Michael W. Sautter, Esquire
Michèle Patrão Forsythe, Esquire
Elizabeth Brooke Hurt, Esquire
Query Sautter Forsythe, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29413

L. Morgan Martin, Esquire
L. Morgan Martin, PA
1121 Third Avenue
Conway, South Carolina 29526

Cristin Uricchio, Esquire
Uricchio Law Firm
The Wappoo Centre
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412

Counsel for Respondents-Appellants

February 18, 2016
Charleston, South Carolina

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. Section 15-38-50 does not apply to the facts at hand. 1

A. Respondents-Appellants' Settlement with Grand Strand Regional Medical Center was not for the same cause of action as the verdicts against Bauerle. 1

B. Respondents-Appellants' Settlement with Grand Strand Regional Medical Center compensated for different injuries than the verdicts against Bauerle. 3

II. The Court's Opinion Erroneously Allows for an Allocation of a Settlement Between two Causes of Action without a Factual Analysis. 5

III. The Greens Have Not Been Fully Compensated For Their Injuries. 7

CONCLUSION 8

INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(i), SCACR the Respondents-Appellants Randall M. Green and Ann Green ("the Greens"), respectfully petition this Court for a rehearing of Unpublished Opinion No. 2016-UP-052, filed February 3, 2016. Rehearing is warranted when the Court has overlooked or misapprehended an argument. Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001). The grounds for this motion which the Court overlooked or misapprehended are set forth in detail below.

ARGUMENT

I. Section 15-38-50 does not apply to the facts at hand.

The Trial Court erroneously labeled all of Mr. Green's injuries as a single injury for "paralysis," and lumped all of conduct of the various parties into a single "negligence" cause of action.

A. Respondents-Appellants' Settlement with Grand Strand Regional Medical Center was not for the same cause of action as the verdicts against Bauerle.

In reaching its opinion, this Court relied on Riley v. Ford Motor Co., 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015), "a non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same *cause of action*." (emphasis added). In the present case, the Greens' settlement with Grand Strand Regional Medical Center ("GSRMC") was for a different cause of action than the verdict against Bauerle. The Greens asserted a direct negligence cause of action against GSRMC; whereas, the Greens' alleged a medical malpractice cause of action against Bauerle.

The direct negligence causes of action asserted against GSRMC were based on the hospital's failure to implement and enforce policies and procedures. Specifically, the hospital

staff was inconsistent and insufficient in documenting vital statistics, communicating among the trauma team and, failing to have a team leader oversee Mr. Green's course and coordinating his care (R. p. 461, 468-469). As a result of GSRMC's negligence, Mr. Green suffered injuries over a two hour time period prior to Bauerle's arrival at the hospital. The Green's expert, Dr. Chariker, testified that all of the negligent conduct alleged directly against the hospital occurred well before Mr. Green was taken to PreOp and seen by Dr. Bauerle (R. p. 461).

On the other hand, the medical malpractice alleged against Bauerle was only for his unforeseen conduct in negligently removing Mr. Green from PreOp, ultimately causing Mr. Green's paralysis. Based on the test utilized by the Court in Young v. Tide Craft, 270 S.C. 452, 242 S.E.2d 671 (1978), (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. Neither Mr. Green's infarction nor the injuries the jury found to result therefrom would have occurred 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. (R. p. 307, lines 6-9; p. 308, lines 18-22). His own expert testified that it is the physician's responsibility to know the condition of a patient before issuing orders. (R. p. 322, line 14-p. 323, line 4). 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. (R. p. 198, line 7-p. 199, line 11; p. 281, lines 7-15; p. 308, lines 18-22; p. 456, lines 5-10). Based on Bauerle's knowledge and experience, it was highly remote that he would interrupt the treatment of a critically ill patient. 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. Bauerle's negligent acts in fact caused the cessation of the hospital's treatment and sent the care and treatment of Mr. Green in an entirely different direction. After Bauerle's intervention, the treatment by the hospital was limited to correcting the damage done by Bauerle and then shipping Mr. Green to the Medical University of South Carolina for treatment of his original injuries.

Further, there is no evidence that Mr. Green's paralysis would have occurred absent Bauerle stopping Mr. Green's treatment by removing him 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 be a paraplegic. (R. p. 474, lines 5-15). Since Bauerle's intervening negligence alone proximately caused Mr. Green's spinal infarction and paralysis, it cannot be contended that the Greens' Settlement with GSRMC was for the same injury or cause of action as their 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 for medical malpractice by virtue of vicarious liability, and vicariously liable parties are not joint tortfeasors. Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), *rev'd on other grounds,* 256 S.C. 238, 588 S.E.2d 588 (2003).

B. Respondents-Appellants' Settlement with Grand Strand Regional Medical Center compensated different injuries than the verdicts against Bauerle.

In rendering its opinion, this Court relied on Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998), stating allowing setoff ensures "there can only be one satisfaction for an injury or wrong." In Hawkins, there is clearly

one identifiable injury, that being the decedent's death. Just as there was also only one identifiable injury in Riley v. Ford, Rutland v. S.C. Dep't of Transp., and Smith v. Widener.

The Court overlooked or misapprehended that, in the present case, Mr. Green suffered many different physical injuries as a result of the hospital's negligence. The Greens did not allege that the negligence of the hospital caused the cardiac arrest or resulting injuries. Before Bauerle's arrival, Mr. Green was continually administered IV fluids and was administered morphine despite increasing instability. Dr. Chariker testified that the tissues of his body were not receiving enough oxygen. (R. p. 465). As a result, Mr. Green was alleged to have suffered brain damage as well as injuries to various organs due to lack of oxidation.

Mr. Green also suffered many different injuries as a result of Bauerle's negligence and the resulting spinal infarction including, but not limited to, paralysis (inability to move or feel his legs), loss of sexual functioning, neurogenic bowel, and neurogenic bladder. Further, each of these injuries resulted in different damages.

Clearly, there are many injuries distinct from Mr. Green's inability to walk, which result in very different economic damages, and different levels of loss of enjoyment of life, an element of damages which is so distinct for a paraplegic that it has been held to be a compensable intangible injury in South Carolina as a matter of law. Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969). The Green's settlement with GSRMC was for all of the injuries Mr. Green suffered at the hospital, as a result of their negligent conduct, prior to Bauerle interrupting Mr. Green's care. The jury awarded a verdict against Bauerle for the injuries and damages the jury determined that Bauerle caused. The Court overlooked or misapprehended that, without any evidence as to what injuries were included in the settlement or verdict, it was error to determine that Bauerle was entitled to setoff. Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998)

II. The Court's Opinion Erroneously Allows for an Allocation of a Settlement Between two Causes of Actions without a Factual Analysis.

In reaching its opinion, this Court relied on Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012) holding "when a settlement is argued to involve two claims . . . the circuit court must make a factual determination of how to allocate the settlement between the two claims." This Court specifically looked at Smith's application in Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012), holding the trial court correctly reallocated settlement proceeds - which allocated money specifically to the plaintiff's pain and suffering – when no evidence supported pain and suffering. The Court misapprehended or overlooked the differences between Rutland and the case at bar.

In Rutland, the negligence of all the defendants was based on the same injury (a death) resulting in the same damages, claimed under the wrongful death and survival causes of action, arising out of the same facts; i.e., that the negligence of all the defendants combined to result in the death of the decedent as a result of her being partially ejected from the side window of the vehicle. Defendant one, GM, was liable as a result of the window being made of the wrong type of glass, and defendant two, SCDOT, was liable in causing the accident that caused the window to break resulting in decedent being partially ejected. The only inference that could be drawn from the evidence in that case was that she would not have been partially ejected if either: (1) the accident had not occurred; or (2) the window was properly constructed and did not break.

Here, the Court overlooked or misapprehended that there was no *factual determination* by the trial court as to how to allocate the claims. The trial court allocated the Greens' settlement with GSRMC based on a percentages analysis derived from the verdicts rendered for the injuries Bauerle caused. This is inequitable in that at trial, the Greens did not present any evidence as to the injuries caused by GSRMC because the only defendant remaining in the case at that point

was Bauerle. Moreover, the form of the verdict specifically limited the jury to a finding that Bauerle's conduct "caused Plaintiff Randall M. Green's injuries." (R. p. 28 – 31.)

The present case is distinguishable from other setoff cases because it does not involve only one single identifiable economic injury as in Smith, and because it involves an unallocated settlement. Accordingly, the Court overlooked or misapprehended two very important points; (1) "[t]he party seeking departure from the application of standard setoff rules bears the burden of proof"; and (2) the party must demonstrate that the allocation sought is "fair, bona fide, and just." Riley v. Ford, *citing* Lard v. AM/FM Ohio, Inc., 901 N.E.2d 1006, 1018 (Ill.App.2009). Furthermore, the Supreme Court in Riley made clear that, in meeting this burden, the defendant can submit evidence of manipulation of an allocation in order to show bad faith in negotiations; however, advantageous apportioning of the settlement is not *per se* bad faith. Id. In the present case, Bauerle did not request an allocation of the settlement. More importantly, Bauerle did not even allege that the parties' failure to allocate the settlement was in bad faith, or that it was bona fide, fair and just for the court to perform an allocation based on a "percentages" analysis. This is particularly true under facts where such an analysis ensured setoff of the entire amount of the settlement without regard for consideration paid for injuries or causes of action which would not have been included in the verdicts against him.

The Riley opinion did distinguish that the "percentages" analysis was "manifestly without merit" under the circumstances of that case. However, the percentages analysis used was also based on the relative reasonableness of the settling parties' previous allocations. It was not based on the jury verdicts, and it was not based on facts involving different causes of action for different injuries to multiple plaintiffs. In this particular case, the unfortunate result has been that Bauerle has escaped payment for injuries which the jury decided he alone caused, and the Greens

have been deprived of all consideration paid as a result of their good faith willingness to negotiate and settle.

III. The Greens Have Not Been Fully Compensated For Their Injuries.

The Court has consistently held that the purpose of S.C. Code Ann. § 15-38-50 is to prevent a double recovery. Riley v. Ford, 414 S.C. 185. 777 S.E.2d 824 (2015). In the case at bar, the Green's entered into a $2,000,000.00 settlement agreement with GSRMC for damages GSRMC caused the Greens. At the conclusion of trial, the jury awarded a $2,300,000.00 verdict against Bauerle for injuries he caused Mr. Green, as well as a $550,000.00 verdict against Bauerle for Mrs. Green's loss of consortium claim.

At trial, the Greens presented expert testimony valuing the total cost of Mr. Green as a result of his paralysis over his life expectancy at $3,668,176.00 (R. p. 167-168.) The figure presented at trial did not include any monetary amount as compensation for pain and suffering or loss of enjoyment of life. Based on the evidence presented at trial, the sum of Mr. Green's verdict and settlement falls short of fully compensating him for his total economic loss, let alone his pain and suffering and other elements of compensable damages.

Similarly, the Greens presented expert testimony to establish actual damages to Mrs. Green for her services as sole caretaker in the amount of $1,209,600.00, as of the date of the trial. (R. p. 167; p. 385). This figure does not include compensation to Mrs. Green for her loss of consortium. Based on the evidence presented at trial, Mrs. Green's loss of consortium verdict falls short of fully compensating her for her losses or even the value of the care and services she has rendered to Mr. Green since the accident, let alone all of the other damages included in her loss of consortium cause of action.

CONCLUSION

WHEREFORE, the Respondents-Appellants, Randall and Ann Green, seek an Order granting Respondents-Appellants a rehearing.

Respectfully submitted,

February 18, 2016

O. Grady Query, Esquire
Michael W. Sautter, Esquire
Michèle Patrão Forsythe, Esquire
Elizabeth Brooke Hurt, Esquire
Query Sautter Forsythe, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29413

L. Morgan Martin, Esquire
L. Morgan Martin, PA
1121 Third Avenue
Conway, South Carolina 29526

Cristin Uricchio, Esquire
Uricchio Law Firm
The Wappoo Centre
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412
Counsel for Respondents-Appellants

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.

PROOF OF SERVICE

I certify that I have served Respondents-Appellants' Petition for Rehearing in the above-captioned matter upon Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. by depositing a copy in the United States Mail, postage prepaid, addressed to his attorneys of record at their offices as follows:

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

Andrew F. Lindemann, Esquire
Davidson & Lindemann, P.A.
Post Office Box 8568
Columbia, South Carolina 29202

February 18, 2016

E. Brook Hunt

QUERY SAUTTER FORSYTHE, LLC
ATTORNEYS AND COUNSELORS AT LAW

The Wappoo Centre
147 Wappoo Creek Drive
Suite 202
Charleston, South Carolina 29412
Telephone 843.795.9500 Facsimile 843.762.1500

O. Grady Query*
*Certified Circuit Court Arbitrator and Mediator
*Certified National Trial Advocacy Civil Trial Specialist

Michèle Patrão Forsythe***
***Certified Family Court Mediator

Michael W. Sautter**
**Managing Partner
Elizabeth Brooke Hurt

February 18, 2016

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C..
Civil Action No. 2011-CP-26-7403
Appellate Case No. 2014-000460

Dear Ms. Kitchings:

Enclosed for filing, please find one original and seven (7) copies of Respondents-Appellants' Petition for Rehearing with regard to the above-referenced matter, as well as a $25 check for filing. Please file the original and return the clocked copy to me in the self-addressed, postage prepaid envelope enclosed for your convenience.

Your attention to this request is greatly appreciated. Should you have any questions, please do not hesitate to contact this office.

With kindest regards, I remain,

Very truly yours,

EBrooke Hurt

Brooke Hurt
Enclosures

cc: L. Morgan Martin, Esquire
L. Morgan Martin, PA
1121 Third Avenue
Conway, South Carolina 29526
(843) 248-3177

Cristin Uricchio, Esquire
Uricchio Law Firm
The Wappoo Centre
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412
(843) 795-9300

John B. McCutcheon, Jr., Esquire
Lisa A. Thomas, Esquire
Thompson & Henry, PA
1300 Second Avenue, Third Floor
Post Office Box 1740
Conway, South Carolina 29528
(843) 248-5741

Andrew F. Lindemann, Esquire
Davidson & Lindemann, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222