

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**  
MAR 02 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.

---

**RETURN TO RESPONDENTS-APPELLANTS'  
PETITION FOR REHEARING**

---

The Respondents-Appellants Randall M. Green and Ann Green have petitioned this Court for a rehearing of its recent unpublished opinion in *Green v. Bauerle*, Op. No. 2016-UP-052 (S.C. Ct. App. filed February 3, 2016). In response, the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. submit that this Court properly ruled on the issues challenged by the Greens in their petition for rehearing.

## I.

As a first issue for rehearing, the Greens argue that the settlement with Grand Strand Regional Medical Center ("Grand Strand") was for a different cause of action than that asserted against Dr. Bauerle. The Greens offer a new argument for the first time on rehearing whereby they claim that the negligence cause of action against Grand Strand was limited to conduct by the hospital staff occurring before Dr. Bauerle began his care, and hence the settlement with Grand Strand was not related to the negligence claim against Dr. Bauerle.<sup>1</sup>

However, that argument, even if timely raised, should be rejected based merely on reference to the pleadings and to the settlement documents. The first cause of action alleged in the Fourth Amended Complaint, which is the claim that went to trial, makes *the very same allegations of negligence against all Defendants* including both Grand Strand and Dr. Bauerle. (R. 1-15). There was no attempt to distinguish between Grand Strand and Dr. Bauerle. In addition, the "Covenant Not to Sue and Covenant Not to Prosecute or Execute Judgment" executed by the Greens in settlement with Grand Strand reflect that the parties settled all claims against the hospital including all direct and vicarious liability claims. (Supp. R.

---

<sup>1</sup> In *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001), the Supreme Court explained that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." 564 S.E.2d at 322. See also, *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same).

518-522). Thus, the \$2 million paid by Grand Strand was in settlement of the same negligence claim that ultimately went to trial and on which the jury returned a verdict.

The Greens also reassert their argument based on *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), that a party which is vicariously liable cannot be a joint tortfeasor under the UCATA and thus settlements by such a party are not subject to a set-off under Section 15-38-50. That issue, which was never made in the Circuit Court or ruled upon by Judge John, lacks merit. In *Andrade*, this Court ruled that a covenant not to sue given to an agent also extinguishes the liability of a principal, which of course is not the issue in the case at bar. *Andrade* did not involve any issues regarding set-off and certainly does not hold that a settlement by a party which is vicariously liable is not subject to a set-off. Furthermore, that argument applies only to vicarious liability and not to direct liability, which is inconsistent with the Greens' earlier argument that Grand Strand was only responsible for its direct negligence and not any vicarious liability.

In short, this Court correctly ruled that the settlement paid by Grand Strand was for a negligence cause of action, which is the same cause of action that was pled and tried against Dr. Bauerle.

## II.

The Greens also argue that the settlement with Grand Strand compensated them for different injuries than the verdicts awarded at trial against Dr. Bauerle. The Court correctly affirmed Judge John on this issue.

The Greens again offer a new argument for the first time in their petition for rehearing, which is not allowed. They argue that the settlement with Grand Strand was only for injuries suffered by Mr. Green prior to Dr. Bauerle's participation in his care. There is, however, no support for that position. The \$2 million paid in exchange for the Covenants is for "the injuries, treatment, and damages of said Payee as well as any future claims for damages of any kind whatsoever." (R. 519).<sup>2</sup> Similarly, the verdicts returned by the jury against Dr. Bauerle included all compensable damages as charged by Judge John which the jury concluded had been proven. Those compensable damages awardable to Mr. Green were described in the jury charge as follows:

Actual or compensatory damages include compensation for all of the injuries which are naturally the result of the alleged wrongful conduct if you found wrongful conduct. They include, and I'm giving you categories, I'm not saying that they exist in this case, that's your job and responsibility to decide but these are categories that you can look at to compensate the plaintiff if you think that is

---

<sup>2</sup> While the term "Payee" is singular and undefined, the Covenants are given by *both* Randall Green and Ann Green, who are both signatories, and it is clear that "Payee" includes both Greens. Further, the Greens readily admit throughout their brief that Ann Green's claims are extinguished by the settlement with Grand Strand.

the right and the proper thing to do. Past and present and future pain and suffering. Past, present and future medical expenses, doctor bills, hospital bills, rehabilitation expense, transportation expense in connection with the medical treatment, past and present and future loss of enjoyment of life, past and present and future impairment of health or bodily function, past, present and future disability, past and present and future loss of wages or loss of earnings, mental anguish brought about by bodily injury or suffering, depression. Those are all different types of categories.

(R. 334).

In sum, the same injury and the same damages were pled against all Defendants. Moreover, the jury's verdicts at trial included all damages, past, present and future, proven by the Greens, which are no different than the damages included in the settlement with Grand Strand. The Greens' second argument for rehearing lacks merit.

### III.

The Greens further argue that Judge John allocated the settlement between Mr. Green's malpractice claim and Mrs. Green's loss of consortium claim without providing a factual analysis. This argument disregards the fact that Judge John's allocation is based upon the ratio established by the jury's verdict. Judge John found that "it is reasonable, fair, and just to utilize the jury's verdict as to the Plaintiffs' claims" so as to provide for an equitable allocation of the settlement amounts. (R. 21). Accordingly, the trial court "appl[ied] the percentage of the

total verdict given to each Plaintiff by the jury to apportion the settlements between Mr. Green's claim for medical malpractice and Mrs. Green's claim for loss of consortium." (R. 21).

The Greens, nonetheless, insist that this method of allocation is not supported by the evidence. To the contrary, Judge John based the allocation on the jury's own allocation of total damages awarded. Without dispute, the jury's determination of damages for both Randall Green and Ann Green was based on the evidence. The Greens cannot reasonably argue otherwise. There could be a no more reasonable method of allocation to utilize than that.<sup>3</sup>

Moreover, the Greens suggest that this court should not be permitted to allocate the Grand Strand settlement between the malpractice and consortium claims. The Greens appear to rely to some extent on the Supreme Court's decision in the case of *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015). However, in that case the Supreme Court did not conclude that an allocation of settlement proceeds based on a "percentages" analysis is *per se* invalid or without merit. The Supreme Court limited its ruling to the circumstances of that case (i.e.,

---

<sup>3</sup> The Greens baldly contend that they did not present evidence of the injuries caused by Grand Strand. They have not shown, however, that there were elements of damages recovered in the settlement with Grand Strand that were not sought from the jury during the Bauerle trial. Nonetheless, even if that were the case, this Court has previously rejected that very argument. In *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), the plaintiff argued that she had not presented the jury with the medical expenses attributable to the hospital's negligence. This Court rejected that argument finding that the plaintiff was not prevented from presenting to the jury evidence of the full amount of the decedent's medical bills.

the Court used the language "under these circumstances"), and in fact the Supreme Court found the "reapportioning" of the settlement proceeds to have been erroneous only because the settling parties' own allocation between the two claims was "unquestionably reasonable under the facts." In the present case, unlike in *Riley*, there was no attempt made by the settling parties to allocate the \$2 million settlement between Mr. Green's claim and Mrs. Green's claim, and that makes the decision in *Riley* inapplicable. Here, there was no "reallocation" made by Judge John.

Finally, the Greens complain that Dr. Bauerle did not request that the settlements be allocated, but Dr. Bauerle was not a party to the prior settlements. *See, Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, 426 (Ct. App. 2000) (the non-settling defendant was not a party to the settlement and is not bound by its terms). Thus, he was not in a position to contest the settlement and seek additional terms to that settlement.

#### IV.

As a final issue, the Greens argue that they have not been fully compensated for their injuries because the jury returned a verdict that was less than the damages calculated by their expert witnesses. This issue is meritless.

In making this argument, the Greens are presuming that their expert testimony is correct and that the jury was somehow bound to accept. Such a

premise is absolutely incorrect. Under South Carolina law, there is "a presumption ... that the amount awarded by the jury was in response to the measure of damages given by the trial judge." *Turner v. Carey*, 227 S.C. 298, 87 S.E.2d 871, 875 (1955). Moreover, the jury was not bound to accept the expert's calculation of damages. It is well settled that "the jury is free to accept or reject in whole or in part the testimony of any witness, including an expert witness." *Sauers v. Polin Brothers Homes, Inc.*, 328 S.C. 601, 493 S.E.2d 503, 505 (Ct. App. 1997). "The jury is also free to accept a portion of a witness's testimony and reject a portion. All of this is basic law generally included in every jury charge and is the law upon which this court must base its decisions." *Smith v. Safeco Life Ins. Co.*, 303 S.C. 131, 399 S.E.2d 427, 429 (Ct. App. 1990). Finally, if the Greens believed that the verdict was insufficient, they could have sought an additur or otherwise challenged the jury's verdicts as insufficient or improper. That did not occur. In short, the Greens cannot dispute the sufficiency of the jury's verdict at this stage.

CONCLUSION

Based on the foregoing discussion, the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. respectfully request that this Court deny the Greens' petition for rehearing.

Respectfully submitted,

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

March 2, 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

MAR 02 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.

---

**CERTIFICATE OF SERVICE**

---

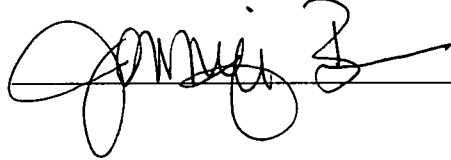
The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellants-Respondents, does hereby certify that service of the **Motion to Accept Filing of Return Out of Time and Return to Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 2nd day of March 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



---