THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC SUPREME COURT

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

Op. No. 2016-UP-052
(S.C. Ct.App. filed February 3, 2016)

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

v.

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

AMENDED JOINT APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2014-000460

Appeal From Horry County
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2016-UP-052
Heard November 18, 2015 – Filed February 3, 2016

AFFIRMED

Andrew F. Lindemann, Davidson & Lindemann, P.A., of Columbia; John B. McCutcheon, Jr. and Lisa Arlene Thomas, Thompson & Henry, P.A., both of Conway, for Appellants/Respondents.

O. Grady Query, Michael W. Sautter, and Elizabeth Brooke Hurt, Query Sautter Forsythe, LLC, all of Charleston; Cristin A. Uricchio, Uricchio Law Firm, of

Charleston; and L. Morgan Martin, L. Morgan Martin, PA, of Conway; for Respondents/Appellants.

PER CURIAM: Randall and Ann Green sued Dr. Wayne B. Bauerle and several other defendants for medical malpractice and loss of consortium. The Greens claimed Dr. Bauerle negligently treated Mr. Green for injuries resulting from a car accident, causing Mr. Green to become paralyzed. The Greens settled or dismissed their claims against all defendants except Dr. Bauerle and Dr. Bauerle's professional corporation. The Greens also settled their claims against the at-fault driver. A jury awarded Mr. Green $2.3 million for the malpractice claim and Mrs. Green $550,000 for loss of consortium. Dr. Bauerle filed a motion for setoff, and the trial court granted setoff only as to the proceeds of the Greens' settlement with Grand Strand Regional Medical Center, LLC—the hospital where Dr. Bauerle treated Mr. Green—and Carolina Medical Response, Inc.—an ambulance operator that transported Mr. Green from Grand Strand to the Medical University of South Carolina after Dr. Bauerle treated Mr. Green.

The Greens and Bauerle filed cross-appeals. The Greens contend the trial court erred in (1) finding South Carolina Code section 15-38-50 (2005) mandated setoff, (2) finding the entire amount paid by Grand Strand and Carolina Medical Response had to be set off against the verdict, and (3) allocating the proceeds of the Greens' settlement with Grand Strand and Carolina Medical Response between the Greens' claims. Bauerle contends the trial court erred in denying setoff as to the funds paid by the at-fault driver and the Greens' underinsured motorist carrier. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in granting setoff for the funds paid by Grand Strand Regional Medical Center and Carolina Medical Response: *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." (quoting *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012)); *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998) (stating allowing this credit—or setoff—ensures "there can only be one satisfaction for an injury or wrong"); S.C. Code Ann. § 15-38-50 (2005) ("When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it does not discharge any of the other tortfeasors from liability for the injury or

wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater . . . ."); *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012) (stating when section 15-38-50 applies, courts have no discretion in applying setoff).

2. As to whether the trial court erred in denying setoff for the funds paid by the at-fault driver and the Greens' underinsured motorist carrier: *Widener*, 397 S.C. at 472, 724 S.E.2d at 190 ("[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, *so long as* the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." (emphasis added)); *Hawkins*, 330 S.C. at 113-14, 498 S.E.2d at 406-07 (holding—in a South Carolina wrongful death claim—the trial court should not have set off the plaintiff's recovery from a Georgia wrongful death claim because "the damages recoverable in each claim were not the same"); *id.* (stating the damages recoverable under the Georgia and South Carolina wrongful death statutes were not the same because the Georgia statute provided damages for the value of the human life lost and the South Carolina statute provided for losses as a result of the death).

3. As to whether the trial court erred in allocating the settlement proceeds between the Greens' claims: *Widener*, 397 S.C. at 473, 724 S.E.2d at 191 ("[W]hen a settlement is argued to involve two claims . . . the circuit court must make the factual determination of how to allocate the settlement between the two claims."); *Rutland*, 400 S.C. at 216, 734 S.E.2d at 145 (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).

AFFIRMED.

FEW, C.J., and KONDUROS and LOCKEMY, JJ., concur.

The South Carolina 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.

Appellate Case No. 2014-000460

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.

______________________ C.J.

______________________ J.

______________________ J.

Columbia, South Carolina

FILED
March 24, 2016

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The Honorable Steven H. John

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.

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.

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February 18, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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.

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,

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Columbia, South Carolina

February 18, 2016

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[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

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.

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

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February 18, 2016
Charleston, South Carolina

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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.

February 18, 2016

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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.

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.[1]

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.

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[1] 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).[2] 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

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[2] 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.[3]

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.,

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[3] 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,

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March 2, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
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Op. No. 2016-UP-052
(S.C. Ct.App. filed February 3, 2016)

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

v.

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

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Petitioners-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., does hereby certify that service of the **Amended Joint Appendix** was made upon all counsel of record (minus the briefs, Record on Appeal and Supplemental Records on Appeal filed with the Court of Appeals) 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 June 2016:

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