

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

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

RECEIVED
MAY 19 2016
SC COURT OF APPEALS

Randall M. Green and Ann Green,.....Petitioners,
v.

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

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Unpublished Opinion No. 2016-UP-052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,

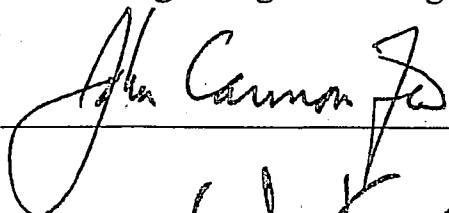
v.

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

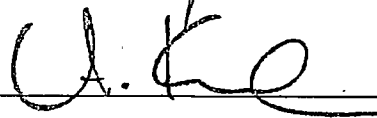
Appellate Case No. 2014-000460

ORDER

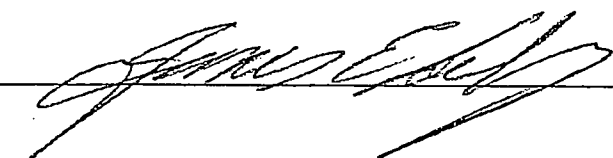
After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

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FILED

March 24, 2016

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Lisa Arlene Thomas, Esquire
The Honorable Steven H. John

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

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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.
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February 18, 2016
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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.

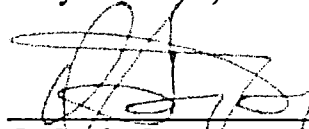
Similarly, the Greens presented expert testimony to establish actual damages to Mrs. Green for her services as sole caretaker in the amount of \$1,209,600.00, as of the date of the trial. (R. p. 167; p. 385). This figure does not include compensation to Mrs. Green for her loss of consortium. Based on 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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v.

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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:

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February 18, 2016

S. Brook Hunt

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

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in denying a set-off to the Appellants-Respondents for the amounts paid to the Greens in settlement of the motor vehicle negligence and loss of consortium claims including the claims against the at-fault driver and the underinsured motorist claims?

STATEMENT OF THE CASE

This is an appeal from a medical malpractice action. The Respondents-Appellants Randall M. Green and Ann Green were involved in a motor vehicle accident on April 17, 2004, when a vehicle crossed the center line and collided with the Greens' vehicle. Randall Green was seriously hurt and was transported to Grand Strand Regional Medical Center where he was initially treated in the Emergency Room for a fracture/dislocation of his right hip and a severe laceration of his right forearm.

During the course of Mr. Green's care in the ER, the Appellant-Respondent Wayne B. Bauerle, M.D.,¹ the on-call orthopaedic surgeon, was summoned to the ER to treat the fracture/dislocation of his right hip. Dr. Bauerle learned the ER physician had already reduced the hip, but Dr. Bauerle requested a CT scan of the hip to ensure that the reduction was proper and to check for bone fragments that could require immediate surgery. At the time of the CT scan, Mr. Green was in the holding area for the operating room waiting to undergo surgery to repair the laceration of his right forearm. Following the CT scan, Mr. Green went into cardiac arrest and was successfully resuscitated. Mr. Green sustained damage to his spinal cord which resulted in the paralysis of his lower extremities.

¹ For ease of discussion, the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. shall be referred to collectively as "Dr. Bauerle."

The Greens filed this medical malpractice action against Dr. Bauerle and his practice as well as Grand Strand Regional Medical Center, LLC ("Grand Strand") and Carolinas Medical Response, Inc., which was the ambulance provider. The lawsuit included a claim for loss of consortium by Ann Green. Prior to trial, Grand Strand settled all claims with the Greens for \$2 million, and Carolinas Medical Response settled for \$25,000. In addition, Randall Green settled with the at-fault driver for \$100,000, and he received \$150,000 in settlement of his underinsured motorist (UIM) claim. Likewise, with respect to her loss of consortium claim, Mrs. Green received \$100,000 in settlement with the at-fault driver and an additional \$75,000 in settlement of her UIM claim.

The medical malpractice action against Dr. Bauerle and his practice was tried before a jury during the week of September 9, 2013, with Circuit Judge Steven H. John presiding. The jury found for Randall M. Green in the amount of \$2.3 million on his medical negligence claim and for Ann Green in the amount of \$550,000 on her loss of consortium claim. (R. 28-31).

At the close of the trial, Dr. Bauerle moved for a set-off of the amounts paid in settlement on behalf of Grand Strand, Carolinas Medical Response, and the at-fault driver (including the underinsured motorist payments). (R. 45-48, 338-339). By Order filed October 17, 2013, Judge John granted in part and denied in part the Motion for Set-Off. (R. 18-23). Judge John allowed for a set-off of the settlements received from Grand Strand and Carolinas Medical Response, but he

denied the set-off for the amounts paid for the release of the at-fault driver and the UIM insurer. Judge John directed the Clerk of Court to enter judgment in the amount of \$665,789.47 in favor of Randall M. Green and to enter judgment in the amount of \$159,480.53 in favor of the Ann Green. (R. 22).

Dr. Bauerle filed a Rule 59(e) Motion to Alter or Amend Order challenging the denial of the set-off for the settlements received from the at-fault driver and the UIM insurer, and that motion was denied by Order filed February 13, 2014. (R. 24, 100-102). Dr. Bauerle thereafter filed a timely appeal to this Court, and the Greens filed a cross-appeal.

ARGUMENTS

- I. **The trial court erred in denying a set-off to the Appellants-Respondents for the amounts paid to the Greens in settlement of the motor vehicle negligence and loss of consortium claims including the claims against the at-fault driver and the underinsured motorist claims.**

South Carolina law recognizes that a trial court possesses "jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682, 688 (Ct. App. 2000). This Court has explained that "the reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong." *Id.* Under facts very similar to the present case, this Court in *Smalls* concluded:

Equity dictates Department be given a credit for the amount paid by the settling parties and thus, a double recovery is avoided. The settlement amount represents, in effect, the portion of total damages attributable to Bussiere.

528 S.E.2d at 688-689. See also, *Rutland v. South Carolina Department of Transportation*, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010).

It is well established that "[a] nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395, 406 (Ct. App. 1998), citing *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967); *Vaughn v. City of Anderson*, 300 S.C. 55, 386 S.E.2d 297 (Ct. App. 1989). "Therefore, before 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." *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188, 190 (Ct. App. 2012), citing *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395, 406 (Ct. App. 1998). "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." *Smith*, 724 S.E.2d at 190, citing *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268, 271-72 (Ct. App. 1999). "Therefore, 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 v. Widener*, 397 S.C. 468, 724 S.E.2d 188, 191 (Ct. App. 2012).

In *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), this Court explained that "[a]pplication of the settlement credit was statutorily mandated in this case. 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." 515 S.E.2d at 272..

Following the trial, Dr . Bauerle moved for a set-off under S.C. Code Ann. § 15-38-50(1) for the amounts paid in settlement for other tortfeasors, specifically the at-fault driver, Grand Strand Regional Medical Center, LLC, and Carolinas Medical Response, Inc. Circuit Judge Steven H. John granted the motion in part and allowed for a set-off for the amounts paid by Grand Strand and Carolinas Medical Response. Judge John, however, denied a set-off for the amounts paid in settlement for the at-fault driver, including the amounts received by the Greens from the underinsured motorist insurer.

Judge John found that "the Plaintiffs' settlements with Grand Strand and Carolinas Medical Response were for the same injury, that being Mr. Green's paralysis and the loss of consortium by Mrs. Green, as was litigated against Dr. Bauerle and for which the jury returned its verdict against Dr. Bauerle." (R. 21). Yet, Judge John also ruled that "the settlements on behalf of the at-fault driver (including the underinsured motorist payments) ... concerned different injuries than the injury for which the jury found Dr. Bauerle liable." (R. 21). More specifically, he found that "the settlement with the at-fault driver concerning events occurring prior to Mr. Green's paralysis do not concern the same injury." (R. 21).

Dr. Bauerle believes that the trial court was correct in granting a set-off for the amounts paid in settlement by Grand Strand and Carolinas Medical Response.

He submits, however, that the same reasoning applies equally to the settlements paid by the at-fault driver and the UIM insurer. Judge John erred in concluding that the proceeds paid in settlement of the motor vehicle negligence and loss of consortium claims were for a "different injury."

In their Fourth Amended Complaint, the Greens allege that Dr. Bauerle committed medical malpractice while treating Mr. Green following the April 17, 2004 motor vehicle accident with the at-fault driver. (R. 32-43). The at-fault driver's actions thus caused Mr. Green to seek medical care and treatment immediately following the accident, including the orthopaedic care from Dr. Bauerle, and as a result, the at-fault driver was legally liable for the injuries resulting from the medical malpractice found by the jury.

South Carolina law clearly holds that "the negligence of an attending physician is reasonably foreseeable" and 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." *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40, 44 (1984). 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). Consequently, where the original accident resulted in injuries that required medical care and the medical

care as provided resulted in additional injuries, the original tortfeasor is clearly liable under South Carolina law *for all of the injuries*. In short, Judge John committed an error of law in concluding that the injuries resulting from the alleged malpractice were not the "same injuries" for which the at-fault driver was also liable.

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. No one has taken the position that Dr. Bauerle was not properly selected to tend to Mr. Green's orthopaedic care following the accident. In fact, Dr. Matza described Dr. Bauerle as "an excellent orthopaedic surgeon." (R. 213).

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. Without question, South Carolina law provides that the at-fault driver was liable *for all of the injuries and damages claimed against Dr. Bauerle*, including Mrs. Green's loss of consortium.

In effect, Dr. Bauerle and the at-fault driver are "liable in tort for the same injury." S.C. Code Ann. § 15-38-50. As a result, Dr. Bauerle is entitled to a set-off for all amounts paid in settlement of the motor vehicle negligence and loss of consortium claims, including the amounts paid in settlement of the UIM claims. Mr. Green settled with the at-fault driver for \$100,000, and he received \$150,000

in settlement of his UIM claim. Mrs. Green received \$100,000 in settlement with the at-fault driver and an additional \$75,000 in settlement of her UIM claim.

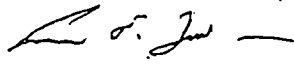
Consequently, Dr. Bauerle is entitled to an additional set-off of \$250,000 from Mr. Green's verdict, which should reduce his judgment to \$415,789.47. Likewise, Dr. Bauerle is entitled to an additional set-off of \$175,000 from Mrs. Green's verdict, which should reduce her judgment to zero dollars.. Judge John erred in denying these additional setoffs.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. respectfully request that the Court reverse in part the Order Granting in Part and Denying in Part the Motion for Set Off as issued by Circuit Judge Steven H. John, filed October 17, 2013. The Court is requested to remand with direction that the Appellants-Respondents be granted additional set-offs as follows: (1) an additional set-off of \$250,000 thereby reducing the judgment in favor of Randall M. Green to \$415,789.47, and (2) an additional set-off of \$175,000 thereby reducing the judgment in favor of Ann Green to zero dollars.

Respectfully submitted,

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SC Court of Appeals

The undersigned counsel for the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. certifies that the Final Appellant's Brief of Appellants-Respondents complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

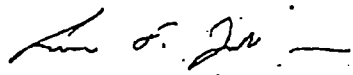
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The undersigned counsel for the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. certifies that the Final Appellant's Brief of Appellants-Respondents complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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November 20, 2014

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.

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STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN FINDING THAT THE SETTLEMENTS AND VERDICTS INVOLVED A SINGLE INJURY SO THAT S.C. CODE ANN. §15-38-50 MANDATED SETOFF OF THE ENTIRE AMOUNT OF THE SETTLEMENTS AND THE COURT HAD NO DISCRETION TO DETERMINE THE EQUITIES INVOLVED.

II. THE TRIAL COURT ERRED IN FINDING THAT THE SETTLEMENTS AND VERDICTS WERE FOR THE SAME CAUSE OF ACTION SO THAT THE ENTIRE AMOUNT OF THE SETTLEMENTS HAD TO BE SETOFF AGAINST THE VERDICTS.

III. THE TRIAL COURT ERRED IN ALLOCATING THE SETTLEMENTS AND IN ALLOCATING THE SETTLEMENTS USING AN ANALYSIS BASED ON THE PERCENTAGE OF THE VERDICTS REPRESENTED BY EACH CAUSE OF ACTION.

STATEMENT OF THE CASE

This is an appeal of the post-trial order of the Honorable Steven H. John, Circuit Court Judge in the Horry County Court of Common Pleas, Granting in Part and Denying in Part Defendants, Wayne B. Bauerle, MD, and Wayne B. Bauerle, MD, PC's, Motion for Set Off ("Setoff Order") dated October 16, 2013, and the Order Denying Plaintiffs Motion to Alter or Amend Order Granting Partial Set-Off dated February 13, 2014.

This action arises from the negligent treatment of Respondents-Appellants-Plaintiffs, Randall M. Green ("Mr. Green") and Ann Green ("Mrs. Green") (collectively "Plaintiffs"), by various medical providers at Grand Strand Regional Medical Center ("GSRMC"), including Appellants-Respondents-Defendants, Wayne B. Bauerle, MD, and Wayne B. Bauerle, MD, PC (collectively "Bauerle"). Plaintiffs were transported to GSRMC for treatment after they were injured in an automobile accident.

Prior to filing the medical malpractice lawsuit, Mr. and Mrs. Green each settled with the at-fault driver. Mr. Green received \$100,000.00 under the at-fault driver's liability policy and \$150,000.00 in underinsured motorist coverage for injuries he sustained in the wreck. Mrs. Green received \$100,000.00 under the at-fault driver's liability policy and \$75,000.00 in underinsured motorist coverage for injuries she sustained in the wreck.

On May 30, 2005, Plaintiffs filed this action against Bauerle and Strand Orthopaedic Consultants, LLC. Plaintiffs amended the Complaint to add GSRMC and the ambulance carrier, Carolina Medical Response, Inc. ("CMR"), as defendants. Following the receipt of a nominal payment in the amount of \$25,000.00, Plaintiffs released CMR from the action. Prior to trial, Plaintiffs dismissed all claims against Strand Orthopaedic

Consultants, LLC. In his Amended Answer to Defendant GSRMC's Request to Admit, Bauerle admitted, "The employees of Grand Strand Regional Medical Center did not proximately cause or contribute to the injuries and damages alleged to have been sustained by Plaintiffs in the Third Amended Complaint." (R. pp. 501-502).

Plaintiffs filed a separate suit against the Medical University of South Carolina ("MUSC") to recover damages caused by a sponge negligently left in Mr. Green's leg during post GSRMC treatment, which gave rise to distinct and different injuries. Plaintiffs settled with MUSC for \$160,000.00.

On October 15, 2012, Plaintiffs amended the Complaint for the fourth time to add causes of action against GSRMC for vicarious liability under the non-delegable duty doctrine and negligent hiring, supervision and training. (R. pp. 32-44). Shortly thereafter, GSRMC filed a Motion for Partial Summary Judgment, and on April 18, 2013, the Honorable Larry B. Hyman, Jr. granted Defendant GSRMC's Motion for Partial Summary Judgment ("Summary Judgment Order"). The Summary Judgment Order dismissed the two new causes of action as to GSRMC, thereby eliminating any vicarious liability under the non-delegable duty doctrine for Bauerle's malpractice. (R. p. 15). The order further found that "[b]ecause the Plaintiffs are barred by the statute of limitations and the statute of repose from asserting a direct cause of action for medical malpractice against [GSRMC's] independent contractors and employees, [GSRMC] cannot be held vicariously liable for their acts or omissions." (R. p. 3).

On May 31, 2013, GSRMC and Plaintiffs executed a Covenant Not to Sue and Covenant Not to Execute Judgment, in which GSRMC paid Plaintiffs the sum of \$2,000,000.00 as consideration for various terms, including Plaintiffs' agreement not to

initiate or “prosecute any action... or execute on any judgment... against the Payer, by reason of the alleged negligence in Mr. Green’s treatment”. (R. p. 505). Bauerle, GSRMC, and Plaintiffs collectively executed a Stipulation of Dismissal with Prejudice as to Grand Strand Regional Medical Center which was filed on June 11, 2013, dismissing GSRMC from this lawsuit with prejudice. (R. p. 17).

The medical malpractice trial against Bauerle commenced on September 9, 2013. At the conclusion of the five-day trial, the jury returned a \$2,300,000.00 verdict on Mr. Green’s remaining medical malpractice cause of action and a \$550,000.00 verdict on Mrs. Green’s loss of consortium cause of action. (R. pp. 28-31). The verdict forms did not specify what damages were included or how the jury calculated the awards.

Subsequently, Bauerle filed a Motion and Memorandum of Law in Support of Defendant Bauerle’s Motion for Set Off (“Setoff Motion”) seeking to set off Plaintiffs’ settlements from the at-fault driver, GSRMC, CMR and MUSC from the verdicts. (R. pp. 45-48). Plaintiffs responded in a timely filed Motion and Supporting Memorandum in Opposition asserting that Bauerele is not entitled to setoff. (R. pp. 49-91).

The Honorable Steven H. John granted the setoff only as to Plaintiffs’ settlements with GSRMC and CMR. (R. pp. 20-21). Plaintiffs filed a Motion to Alter or Amend Setoff Order. (R. pp. 92-99). Bauerle filed a Motion to Alter or Amend Order Granting Partial Setoff. By separate orders, the trial court denied both parties’ motions, reaffirming the previous Setoff Order *in toto* on February 13, 2014. (R. pp. 24-25). Bauerle timely filed a Notice of Appeal on March 11, 2014. Plaintiffs timely filed a Notice of Appeal for the cross-appeal on March 17, 2014. (R. pp. 506-507).

FACTS

In April 2004, Randall M. Green ("Mr. Green") was operating a vehicle in which Mrs. Green and their son, Mark Green, were riding, when the At-Fault Driver struck Mr. Green's vehicle causing it to leave the roadway and flip over. (R. p. 136, lines 13-22). All three passengers sustained serious injuries and were transported by Horry County Fire and Rescue from the scene to GSRMC in Myrtle Beach. (R. p. 136, line 21-p. 137, line 7). As a result of the wreck, Mr. Green suffered a severe laceration of his right arm, "so severe that it cut two of the vital arteries that go to the hand," and a right hip fracture and dislocation. (R. p. 485, lines 13-21; R. p. 195, lines 6-14).

Upon Mr. Green's arrival at the hospital, at approximately 12:00 p.m., he was assessed by emergency room ("ER") physician, Dr. Scott Lintz, and GSRMC nursing staff. (R. p. 432, lines 13-20). Mr. Green was able to communicate coherently, was able to move his legs, and had "normal sensation." (R. p. 343; p. 448, lines 17-19). He did not exhibit any "evidence of spinal cord problems" and "he was moving his legs fine" as "noted by multiple clinicians." (R. p. 486, lines 12-24).

Dr. Lintz then contacted the hand surgeon on-call for the ER, Dr. Ralph Cozart, and the on-call orthopedic surgeon, Dr. Wayne B. Bauerle. (R. p. 434, line 17-p. 435, line 1). Bauerle's own expert, vascular, thoracic and cardiac surgeon Dr. Charles Dorn Smith testified that the record indicates blood was "oozing" from Mr. Green's arm. (R. p. 313, line 2). Approximately one hour after Mr. Green arrived at GSRMC, Dr. Cozart evaluated Mr. Green's right forearm laceration and determined that Mr. Green urgently needed surgery on this right arm. (R. p. 265, line 23-p. 266, line 2). Shortly thereafter, Dr. Cozart called the operating team and ordered Mr. Green transported to the pre-operative holding

area ("Pre-Op"). (R. p. 266, line 20-p. 267, line 3).

Dr. Lintz re-located Mr. Green's dislocated hip in the ER and noted that Mr. Green was alert and felt improvement in his discomfort, before sending Mr. Green from the ER to Pre-Op in preparation for surgery on his right arm. (R. p. 447, lines 1-5). He then made a note that he had contacted Bauerle "a second time" regarding the hip injury and advised that he felt the surgery to repair Mr. Green's forearm was "better warranted than holding up the patient to get the hip CAT scan." (R. p. 345). According to Dr. Lintz, Bauerle disagreed and was "pretty adamant about getting the CAT scan of the hip first." (R. p. 345). Bauerle testified regarding this interaction stating, "I had no disagreement, I knew exactly what needed to be done, it's what I did." (R. p. 291, lines 15-20).

Bauerle testified that when he arrived at GSRMC he went straight to Pre-Op, where he saw Mr. Green for the first time and later noted that Mr. Green was "moving all four extremities," corroborating Dr. Cranberg's testimony that there was "zero evidence of any kind of spinal cord problem before the arrest." (R. p. 292, line 1-p. 293, line 2; p. 486, lines 23-24). At that point, Bauerle decided that Mr. Green needed to go back to the ER and then to CT immediately to obtain additional studies of his hip. (R. p. 419). Mr. Green was taken back to the ER, where a nurse recorded a blood pressure of 72/56 and heart rate of 135, noting that Bauerle was at bedside. (R. p. 365). Mr. Green was then sent to CT scan per Bauerle, who conceded he would not have sent him to CT if he had been aware of his vital signs. (R. p. 308, lines 18-22). He then admitted that he did not recall checking Mr. Green's chart before issuing that order. (R. p. 307, lines 10-15). Plaintiff's expert, vascular and cardiothoracic surgeon, Dr. Edd Chariker, testified that Bauerle "drastically" deviated from the standard of care by sending Mr. Green to CT when he was

“totally unstable” as indicated by his vital signs at that point in time. (R. p. 456, lines 5-16). Further, Bauerle testified that regardless of the CT results, he would not have performed the surgery to repair the acetabular (hip socket) and there was no one at GSRMC who did that type of surgery. (R. p. 301, lines 3-23). Ultimately Mr. Green’s acetabular hip repair was done at MUSC.

When Mr. Green left CT, rather than being taken back to Pre-Op for surgery, Mr. Green was taken back to the ER to await the results of his CT, despite the fact that “no matter what the radiologist said, the [forearm] was still going to have to be managed.” (R.p. 473, lines 3-18). While in the ER, Mr. Green was placed back on a heart monitor, which indicated that his blood pressure and pulse were zero, in other words “his blood pressure gave out and he arrested, which means his heart stopped.” (R. p. 197, line 5-p. 198, line 6). Plaintiffs’ expert orthopaedic surgeon, Dr. Richard A. Matza, estimated Mr. Green lost eight units of blood, an amount so significant that it caused Mr. Green to decompensate to the point of cardiac arrest. (R. p. 197, line 17-p.198, line 6). Dr. Cozart arrived and began operating in the middle of the ER to stop the bleeding while resuscitation efforts were ongoing. (R. p. 273, lines 5-19; pp. 346-347). Over the next hour, Mr. Green received four “units” of blood and six “units” of platelets. (R. pp. 361-366). Dr. Lintz performed resuscitation procedures and, according to the resuscitation record, CPR ceased 26 minutes later. (R. p. 446, lines 19-23; p. 488, line 23-p. 489, line 5). Dr. Cranberg testified that during his arrest, Mr. Green’s “spinal cord suffered lethal damage.” (R. p. 489, lines 6-9). There are no medical records indicating that Mr. Green had feeling in his legs after his arrest. (R. p. 488, lines 2-5). Mr. Green remained in critical condition in GSRMC’s Intensive Care Unit for the rest of the evening.

Although the parties dispute exactly how long Mr. Green sustained a blood pressure and heart rate of zero before he was revived, Plaintiffs' expert, Dr. Cranberg testified through his deposition that an "inadequate supply of blood to the spine" can cause cell death in the spinal cord in "as little as a few minutes." (R. p. 481, lines 11-14). Bauerle's expert, Dr. Smith, testified that once Mr. Green suffered a cardiac arrest, minutes and maybe even seconds make the difference in his ability to walk. (R. p. 327, lines 12-23). Dr. Cranberg testified that, Mr. Green's "only problem with his spinal cord occurred after the cardio pulmonary arrest in the Grand Strand Hospital emergency room." (R. p. 484, lines 9-17). Therefore, Dr. Cranberg concluded, "the spinal cord infarct and the various disabilities... were suffered during that arrest." (R. p. 484, lines 9-17).

The following day, Mr. Green was transported via ambulance to MUSC in Charleston by EMS carrier, CMR. A nurse, who received him via stretcher from the ambulance, noted that he was intubated, alert, following commands, and "unable to wiggle [his] toes." (R. p. 418). After he was admitted to MUSC on April 18, 2004, Mr. Green's paraplegia was diagnosed. (R. pp. 348-356). According to MUSC trauma surgeon, Dr. Norcross, the cause of Mr. Green's paraplegia was a spinal cord infarct. (R. p. 449, line 19-p. 450, line 6). Mr. Green had an arrest at GSRMC, "which almost certainly was the cause of the infarction of the spinal cord." (R. p. 449, line 19-p. 450, line 6). That was Dr. Norcross's impression at the time and he "can't find any other explanation for it." (R. p. 451, line 19-p. 450, line 6).

Dr. Cranberg testified that the CT delayed the repair of Mr. Green's severed arteries, during which time Mr. Green continued to lose blood. (R. p. 491, line 18-p.491, line 3). Dr. Chariker testified that but for Mr. Green going to CT, the cardiac arrest would

not have occurred. (R. p. 474, lines 5-8). On cross-examination, Bauerle's expert, vascular, thoracic and cardiac surgeon Dr. Smith, admitted that if you do not stop a bleed you will eventually run out of blood, and if you run out of blood, you are going to suffer a cardiac arrest. (R. p. 319, line 25-p. 320, line 5). Dr. Cranberg testified to a reasonable degree of medical certainty that the most probable cause of Mr. Green's paraplegia and loss of feeling from the belly button down was the cardiac arrest. (R. p. 484, lines 2-17). Further, Dr. Chariker testified that Mr. Green is a paraplegic as a direct result of deviations in the standard of care by Bauerle. (R. p. 479, lines 10-14).

I. THE TRIAL COURT ERRED IN FINDING THAT THE SETTLEMENTS AND VERDICTS INVOLVED A SINGLE INJURY SO THAT S.C. CODE ANN. §15-38-50 MANDATED SETOFF OF THE ENTIRE AMOUNT OF THE SETTLEMENTS AND THE COURT HAD NO DISCRETION TO DETERMINE THE EQUITIES INVOLVED.

The trial court erred in failing to recognize the necessity of making an equitable determination regarding the consideration of a set off against the verdicts awarded separately to Plaintiffs for separate injuries on separate causes of action. Once it became evident that the single GSRMC settlement was unallocated, between causes of action or between two individual Plaintiffs, and that the proof of negligence, and elements of damages for the two verdicts on separate and distinct causes of action were different, the trial court should have determined that § 15-38-50 was not applicable and any set off would have to be equitable. Then, the trial court should have decided, based solely on the facts presented at trial, that the injury to Mr. Green, his paralysis, was the basis for the medical malpractice verdict, and occurred exclusively as a result of the medical negligence of Bauerle.

Mrs. Green's loss of consortium action is a separate cause of action, founded on

her distinct injuries, and asserted direct liability for ordinary negligence and vicarious liability for medical malpractice. The Summary Judgment Order did not affect her direct negligence claim. Furthermore, it is impossible to distinguish what part of that verdict, if any, stemmed from the medical malpractice of Bauerle and; therefore, the court cannot determine what amount of the GSRMC settlement, if any, to set off against that verdict.

There is also ample evidence that the combined amount of Mrs. Green's verdict and the GSRMC settlement would not have approached the amount of economic loss for her loss of consortium claim based on uncontroverted testimony of economic experts and; therefore, double recovery was not possible. Likewise, Mr. Green's verdict and GSRMC settlement combined would barely have approached the amount of his economic loss without any consideration for pain and suffering, loss of enjoyment of life, or other elements inherent to the determination of damages for his total paralysis from the waist down. Any setoff of the GSRMC settlement amount against the two verdicts was therefore unnecessary to prevent a double recovery.

In determining that setoff was mandated in this case, the trial court relied on case law interpreting S.C. Code Ann. § 15-38-50. With respect to settling tortfeasors, this section provides:

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. . .

S.C. Code Ann. §15-38-50 [emphasis added].

South Carolina courts interpreting this statute have held that statutory setoff is

applied only when a prior settlement has already provided compensation to the plaintiff on the same claim for the same injury for which the plaintiff later receives a verdict against another tortfeasor. See Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct.App.1998); see also Ellis v. Oliver, 335 S.C. 106, 109, 515 S.E.2d 268, 270 (Ct.App.1999). In Hawkins, the Court of Appeals held that Georgia and South Carolina wrongful death actions involved different injuries and were therefore separate claims with no right of setoff. 330 S.C. 92 at 114-15, 498 S.E.2d 395 at 407. More recently, the rule set forth in Hawkins was clarified by the Court of Appeals in Smith v. Widener, which held that the verdict is only reduced by the amount of settlement funds "...paid to compensate the *same plaintiff* on a claim for the *same injury*." 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct.App.2012)(emphasis added)(citing Hawkins, 330 S.C. at 114-15, 498 S.E.2d at 407). However, when a prior settlement involves compensation for a different injury than the one tried to verdict, there is no setoff as a matter of law. Smith, at 473, 724 S.E.2d at 191.

In the present case, in the post-trial Setoff Order, the trial court held "[i]n accordance with Ellis v. Oliver and Smith v. Widener," the Settlements shall be set off because "they concerned the same injury as the jury verdict against Dr. Bauerle." (R. pp. 20-21). The trial court further determined that Mr. and Mrs. Green had not "...suffered different injuries." (R. p. 20). The court cited Ellis for the proposition that "[a]pplication of the settlement credit was statutorily mandated;" therefore, the Court has no discretion in determining the equities involved in applying setoff. (R. p. 20). (citing Ellis, 335 S.C. at 113, 515 S.E.2d at 272). However, the court then allocated the Settlement, a remedy fundamentally based on principles of equity.

The trial court erred in holding that the Settlements and verdicts involved a single claim for a single injury, specifically, Mr. Green's paralysis. (R. p. 20). In light of Hawkins and Smith, § 15-38-50 does not apply; therefore, setoff is not statutorily mandated and a setoff could only be equitable in nature. However, Bauerle sought only legal, not equitable, relief.

When setoff does not arise by operation of law under § 15-38-50, the defendant can request that the court *consider* granting equitable relief. Buffington v. T.O.E. Enters., 383 S.C. 388, 392-3, 680 S.E.2d 289, 291 (2009) (emphasis added) (noting all equitable remedies are granted at discretion of the court, not as a matter of legal right). The purpose of an equitable setoff is to prevent plaintiffs from receiving a windfall or double recovery. Hawkins, 330 S.C. at 114-15, 498 S.E.2d at 407. If the court had found that an equitable setoff was necessary to prevent Plaintiffs from receiving a double recovery in the present case, Bauerle could have only been granted a credit on each verdict in the amount of the Settlements allocated to the same cause of action. Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). However, because the Settlements were not allocated, the court could not apply an *equitable* setoff without first allocating the funds.

In order for a court to consider reallocating settlement proceeds, a defendant must satisfy several specific elements. Riley v. Ford Motor Co., Op. No. 5195 (S.C.Ct.App. filed Feb. 5, 2014). Not only did Bauerle fail to ask the court to allocate the Settlements, he failed to assert equitable grounds on which the court could do so or provide evidence to support that position. To the contrary, the court's arbitrary determination that it had to allocate the Settlements in order to comply with § 15-38-50 was in direct conflict with its finding that the Settlements and verdicts compensated the

same single injury, which was the only basis Bauerle asserted in support of his motion.

A. **The Settlements did not compensate the same Plaintiff on the same claim for the same injury as the verdicts against Bauerle.**

In Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271 (Ct.App.1998), the Court of Appeals found that §15-38-50 applied because the case involved a single “injury,” the death of the plaintiff’s husband. The Court did not distinguish wrongful death and survival causes of actions as separate claims for separate injuries, and held that the settlement with the hospital compensated the plaintiff on the same claim for the same injury as the verdicts against the doctor. In its holding, the Court interpreted the word “injury” very broadly, to encompass all damages for wrongful death and survivorship resulting from joint negligence.¹ Id. at 112, 515 S.E.2d at 271-72.

Similarly, the trial court in the present case utilized an analysis based upon the finding that the verdicts and the Settlements involved a single claim for a single injury, specifically, Mr. Green’s paralysis. Based on this finding, the court combined the loss of consortium and medical negligence verdicts, determined the percentage of the whole represented by each, and allocated the correlating percentage of the Settlements between the same two causes of action. This effectively set off all of the Settlement funds from the sum of the verdicts as though they were indistinguishable, without regard for the principles inherent in the analysis pertaining to equitable reallocation. Accordingly, the trial court’s holding was identical in both rationale and result to the decision in Ellis v. Oliver, on which its decision was explicitly based. (R. pp. 20-21).

Ellis conflicts with subsequent South Carolina cases involving wrongful death and

¹ The Court of Appeals addressed the necessity of distinguishing causes of action for wrongful death and survivorship in Smith v. Widener, noting that Ellis v. Oliver was inconsistent with prior and subsequent case law holding that wrongful death and survival actions are separate claims for separate injuries. Smith v. Widener, 397 S.C. 724, S.E.2d 188 (Ct. App. 2012).

survival actions. Ellis held statutory setoff under § 15-38-50 applies to situations involving wrongful death and survival actions because they represent the same claim for the same injury. Subsequent cases distinguish wrongful death and survival actions as separate causes of action and; therefore, apply an equitable setoff based on equitable reallocation of settlement proceeds previously allocated to one or both cause of action. The distinction is extremely significant because an equitable setoff may only be applied to reduce a verdict by the amount paid by another tortfeasor to settle the same cause of action. Rutland v. S.C. Dep't of Transp., at 216-17, 734 S.E.2d at 145.

In Welch v. Epstein, the Court of Appeals distinguished wrongful death and survival actions as separate claims for separate injuries, even though they arose out of the same bodily injury; a death. The Court reasoned that actual damages in a survival action are awarded for the benefit of the decedent's estate, whereas damages in a wrongful death action focus on the damages sustained by the beneficiaries as a result of the death. The Court's holding implied that the term "injury" encompassed more than the death, to include other immeasurable losses and invasions of interest suffered. Welch v. Epstein, 342 S.C. 279, 304, 536 S.E.2d 408, 421 (Ct.App.2000).

Of particular note, the Court was clear that setoff based on a reallocation of settlement proceeds was equitable in nature and that such "...motions are addressed to the discretion of the court—a discretion which should not be arbitrarily or capriciously exercised." Welch, at 313, 536 S.E.2d at 425. As a matter of law, the Estate could only recover the amount of the decedent's medical bills under the wrongful death action, making it possible for the Court to discern whether: (1) the amount allocated to the wrongful death cause of action was supported by the evidence; or (2) setoff was necessary

to prevent a double recovery for this clearly definable economic injury. Accordingly, the Court explicitly stated that the ruling did not contravene §15-38-50 because there was only one complete satisfaction for the decedent's injuries, once again recognizing that this financial loss was a distinct injury separate from the others involved. Id. at 314, 536 S.E.2d at 425.

In Smith v. Widener, the Court of Appeals provided further guidance on what constitutes the same claim for the same injury for purposes of determining the applicability of § 15-38-50. The Court held that because the settlement and verdict were for the same amount, it was clear that both involved a claim for the same financial loss, or injury. Since the settlement and the verdict involved the same claim for the same injuries, § 15-38-50 required that the entire settlement be setoff against the jury verdict. Id. 397 S.C. 468, 471-74, 724 S.E.2d 188, 190-91 (Ct.App.2012). The Court noted, where a settlement involves two claims, only one of which involves the same injury as the claim tried to verdict, the court must make a factual determination of how to allocate the settlement between the claims. Id. at 473-74, 724 S.E.2d at 191.

In footnote 1 of Smith, the Court resolved the inconsistency between Ellis and Rutland by noting that Ellis incorrectly held that survival and wrongful death actions involve the same claim for the same injury. In so doing, the Court implicitly recognized that the term "injury" was not intended to be interpreted so broadly as to encompass all damages arising out of a single death or bodily injury. Smith v. Widener, at 481 n.1, 724 S.E.2d at 195.

I. The verdicts for Loss of Consortium and Medical Malpractice involve different claims for different injuries.

In the present case, the trial court determined that the Settlements and verdicts

involved the same claim for the same injury under § 15-38-50. (R. p. 20). The Court considered the two separate verdicts one indivisible verdict, failing to recognize the individual nature of each claim. (R. p. 20). In actuality, the medical malpractice verdict awarded to Mr. Green and the loss of consortium verdict awarded to Mrs. Green are different claims for different injuries as a matter of law. Page v. Crisp, 303 S.C. 117, 119, 399 S.E.2d 161, 162 (Ct.App.1990) (holding wife's personal injury lawsuit and husband's suit for loss of consortium separate claims); Hiott v. Contracting Servs., 276 S.C. 632, 633, 281 S.E.2d 224, 225 (1981) (holding loss of consortium is an independent action, not derivative). Just as wrongful death and survival actions provide a mechanism for bringing different claims for injuries arising out of, yet distinct from, a single bodily injury (death), South Carolina law clearly recognizes a spouse's right to bring a separate claim to vindicate her losses arising out of a physical injury (or injuries) to her spouse. S.C.Code Ann. § 15-75-20 (1976) ("Any person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse"); construed in Preer v. Mims, 323 S.C. 516, 521, 476 S.E.2d 472, 474 (1996); see also Kizer v. Kinard, 361 S.C. 68, 72, 602 S.E.2d 783,785 (2004).

In relying on the overly broad statutory interpretation in Ellis v. Oliver, the trial court incorrectly found that Mrs. Green's loss of consortium verdict compensated her for the *same injury* that Mr. Green's medical malpractice verdict compensated him because both claims arose out of Mr. Green's paralysis. In actuality, precedent set forth in Welch, Rutland, and Smith dictate that the injuries sustained by Mrs. Green are distinct and separate from those suffered by Mr. Green; therefore, statutory setoff without regard for the equities involved is prohibited. Section 15-38-50 does not mandate setoff in this case;

therefore, any reduction of Plaintiffs' verdicts could only be equitable in nature and subject to an entirely different analysis.

2. *The Settlements compensated Plaintiffs for injuries separate and distinct from Mr. Green's bodily injury and Mrs. Green's loss of consortium.*

On May 31, 2013, Plaintiffs entered into an agreement with GSRMC wherein the latter agreed to pay \$2,000,000.00 for and in consideration of a "Covenant Not To Sue" and "Covenant Not to Prosecute or Execute Judgment" ("Covenants"). The Covenants involved a single, indivisible sum paid to Plaintiffs jointly for past and future claims, and expressly stated that they were not limited to the lawsuit pending at the time of the Settlements. (R. p. 505). At the time the parties entered into the Covenants, Mrs. Green's loss of consortium action was the only cause of action still in existence under which either Plaintiff could recover from GSRMC by virtue of the Summary Judgment Order. (R. p. 15). The Settlement funds were also paid as consideration for Plaintiffs covenant not to sue GSRMC on any potential claims for death, protecting GSRMC from exposure to such liability arising during the pendency of the litigation. (R. p. 505).²

Finally, the Settlement funds were given in consideration for a hold harmless and indemnification agreement protecting GSRMC from the risk of having to defend claims arising out of allegations made in the pending suit. (R. p. 505). Pursuant to this agreement, Plaintiffs could be responsible for interest, attorney's fees and any other costs of litigation brought against GSRMC by third parties. Consideration paid to assume additional liability for contractual indemnification is not an element of damages

² Mrs. Green, still having a pending loss of consortium claim against GSRMC, could amend the pleadings to add additional actions for death arising prior to trial and out of the same transaction or occurrence, as it would relate back to the original filing under Rule 15(c) SCRCP. The evidence presented at trial shows Mr. Green is at risk for, and has suffered, potentially life threatening complications arising out of his injuries. Mrs. Green's cause of action for wrongful death, would be separate from her loss of consortium claim.

recoverable in the tort action against Bauerle, and is not subject to setoff. Vaughn v. City of Anderson, 300 S.C. 55, 61, 386 S.E.2d 297, 301 (1989) (holding settlement providing for costs will not reduce amount due from another tortfeasor because costs not damages).

Unlike Welch v. Epstein, here the Covenants did not release, nor allocate, the entirety of the Settlement funds to the same two causes of action for which the jury returned verdicts against Bauerle. Further, neither the Covenants nor the verdicts involved a cause of action, which was limited to a single claim, such as that for economic injury as in Welch, or that for pain and suffering as in Rutland. GSRMC's \$2,000,000.00 payment to Plaintiffs in consideration for the Covenants did not correspond to the amount of either verdict, nor did they correspond to a single, discernible claim for a specific economic injury recoverable under any cause of action settled or tried as in Smith. Accordingly, the trial court erred in finding that the entire amount paid by GSRMC was given to compensate "...the same injury, that being Mr. Green's paralysis and the loss of consortium by Mrs. Green, as was litigated against Dr. Bauerle". (R. p. 20).

The Covenants involved consideration given for contractual terms affecting rights and obligations not recoverable in a tort action for damages, and not subject to setoff. Additionally, they involved claims for injuries that were separate and distinct from Mr. Green's bodily injury and Mrs. Green's loss of consortium. Finally, the two verdicts compensated two *different plaintiffs* for their personal injuries. As such, the funds paid by GSRMC did not compensate the *same plaintiff* on the same claim for the same injury as the verdicts rendered against Bauerle; therefore, § 15-38-50 does not mandate setoff.

B. The court erred in allocating the Settlements to the same two causes of action as the verdicts in order to apply the setoff.

An equitable setoff may be granted when necessary to prevent a plaintiff from

receiving a windfall or double recovery. Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct.App.1998). If the court had found that equitable setoff was necessary to prevent Plaintiffs from receiving a double recovery in the present case, Bauerle could only have been granted a credit on each verdict in the amount of the Settlements allocated to the same cause of action. Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). If the Settlements and verdicts only involved a single claim for a single injury, the court could have applied statutory setoff under § 15-38-50 without further analysis. To the contrary, the Settlements and verdicts involved separate claims for separate injuries; therefore, the trial court was unable to simply apply statutory setoff as Bauerle requested. Rather, the court was forced to allocate the unallocated Settlements to make up for the fact that Plaintiffs did not suffer a single injury. In doing so, the court employed a portion of the analysis appropriate for an equitable setoff, a remedy that Bauerle did not request, eliminating his burden of proving that equitable setoff was necessary to prevent Plaintiffs from receiving a double recovery.

In Hawkins, the Court of Appeals found that the defendant failed to establish that a portion of the jury verdict against him included an economic injury, which was also recoverable under the cause of action previously settled with another defendant. The only mutual element of damages in the two causes of action was that economic injury. Accordingly, the Court found that there was no evidence that setoff was necessary to prevent a double recovery. Hawkins, 330 S.C. at 115, 498 S.E.2d at 407 (Ct.App.1998).

Similarly, in the present case, it is not possible to ascertain what elements of damages were included in the Settlements or verdicts. Without knowing for what damages Plaintiffs were compensated, it is impossible to demonstrate that an equitable

setoff was necessary to prevent a double recovery. Not only did Bauerle fail to claim equitable grounds for relief, he did not present any evidence in support of that argument. In granting an equitable allocation, the court first allocated the Settlements between the medical malpractice and loss of consortium causes of action. If Bauerle had asked the court to employ this process, he would have contradicted his assertion, and the trial court's finding, that the Settlements and verdicts compensated a single indivisible injury.

The jury rendered two separate verdicts compensating each Plaintiff for separate and distinct injuries. There were no findings, evidence, or arguments in support of the proposition that setoff was necessary to prevent Plaintiffs from recovering twice for any of these injuries. Accordingly, there was no legal basis for combining Plaintiffs' two verdicts, determining the percentage of the total represented by each verdict, and allocating the corresponding percentages to the Settlements to reduce to the sum of the verdicts by the entire amount paid by GSRMC. The trial court's finding that the Settlements and verdicts compensated a single injury mandating setoff under § 15-38-50 is inconsistent with the analysis it interpreted the statute to require. Since Bauerle: (1) is not entitled to a setoff under § 15-38-50; (2) did not assert that setoff was necessary to prevent a double recovery; and (3) did not claim entitlement to alternative equitable relief, the Setoff Order should be reversed. Davis v. Monteith, 289 S.C. 176, 181, 345 S.E.2d 724, 727 (1986) (refusing to grant equitable remedy and stating that "[i]t is noteworthy that [Respondent-Appellant] did not seek equitable relief, but only sought to be declared the legal title owner of the property"); Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012); (citing Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct.App.1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985) (holding

appellate courts in this state don't answer questions not asked).

II. THE TRIAL COURT ERRED IN FINDING THAT THE SETTLEMENTS AND VERDICTS WERE FOR THE SAME CAUSES OF ACTION SO THAT THE ENTIRE AMOUNT OF THE SETTLEMENTS HAD TO BE SETOFF AGAINST THE VERDICTS.

Under certain circumstances, funds already received by a plaintiff are offset against that owed by a defendant in order to prevent a plaintiff from receiving a double recovery. Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct.App.1998). Under such circumstances, a non-settling defendant is entitled to credit for the amount paid by another defendant to settle **the same cause of action**. Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (emphasis added); see also, Welch v. Epstein, 342 S.C. 279, 314, 536 S.E.2d 408, 426 (Ct.App.2000). "When the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law." Smith v. Widener, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct.App.2012) (citing Hawkins, 330 S.C. at 114-15, 498 S.E.2d at 407). Here, § 15-38-50 does not apply and there is no setoff because the Settlements and verdicts were for different causes of action.

Here, Plaintiffs asserted causes of action for professional negligence/medical malpractice, vicarious liability, negligent hiring, training, and supervision, and loss of consortium against GSRMC and Bauerle in the Fourth Amended Complaint. (R. pp. 36, 40-41). In the Summary Judgment Order, the trial court dismissed Plaintiffs' causes of action for vicarious liability and negligent hiring, training, and supervision. (R. p. 15). Additionally, the trial court held that GSRMC could not be liable for the actions of independent contractors or employees not named as a party to the lawsuit, nor could Plaintiffs hold GSRMC liable for the actions of independent contractors under the non-

delegable duty doctrine. (R. p. 3).

Following the Summary Judgment Order, on May 31, 2013, Plaintiffs entered into the Covenants with GSRMC wherein Plaintiffs received consideration for their agreement, among other things, not to execute any judgments against GSRMC, protecting the hospital from any remaining liability *to Plaintiffs* arising out of the pending lawsuit. (R. p. 505). The Covenants involved a single indivisible sum paid to Plaintiffs jointly as compensation for all past and future claims against GSRMC, and were not limited to claims named in the lawsuit pending at the time of settlement. (R. p. 505). A Stipulation of Dismissal (“Stipulation”) was filed on June 11, 2013 wherein all parties consented to the dismissal of GSRMC from the pending lawsuit with prejudice. (R. p. 17). The Summary Judgment Order was not appealed by any of the parties to the litigation. Plaintiffs proceeded to trial against Bauerle on the two remaining causes of action for Medical Malpractice and Loss of Consortium, each receiving a separate verdict.

In the Setoff Order based upon §15-38-50, the trial court held, among other things, that the Settlements and verdicts involved the same cause of action, essentially *allocating* previously *unallocated* funds to a single negligence cause of action. (R. p. 3). Then, the trial court used a mathematical formula to allocate the Settlements entirely between two causes of action and then setoff all the Settlement proceeds from the verdicts, without regard to the equities involved. (R. p. 22). The court’s analysis ignored the Summary Judgment Order, which was not appealed, and; therefore, was the law of the case at the time of trial. In so doing, the trial court utilized a circular analysis tailored to produce this result while compensating for the fact that the verdicts were clearly for different causes of action.

A. **Different causes of action arising out of the same factual allegations of negligence are not the same cause of action for purposes of setoff.**

In Hawkins v. Pathology Assocs. of Greenville, the Court determined the plaintiffs' recovery under the South Carolina and Georgia wrongful death statutes constituted two separate causes of action. Despite the fact that the two causes of action: (1) were founded in negligence; (2) were identified as "wrongful death" actions; (3) were based on factual allegations of medical malpractice; and (4) involved the same bodily injury, setoff did not apply because they did not constitute the same cause of action. 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct.App.1998); see also Welch v. Epstein, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (Ct.App.2000)(stating survival and wrongful death actions arising out of medical malpractice were separate actions for purposes of setoff).

Here, the trial court determined that when the jury renders two separate verdicts to two separate plaintiffs for separate causes of action, they are the same cause of action. (R. p. 20). This conflicts with Hawkins because under the trial court's analysis, any cause of action founded on the same factual allegations of negligence constitutes the same cause of action for purposes of determining the applicability of statutory setoff under § 15-38-50.

B. **A cause of action asserting direct negligence against GSRMC is different from a cause of action against GSRMC for Medical Malpractice based on purely vicarious liability for purposes of setoff.**

The Uniform Contribution Among Tortfeasors Act ("UCATA") only applies to joint tortfeasors and the Court of Appeals has declined to broaden the Act's scope by expanding the definition of "joint tortfeasors" to include vicariously liable parties. 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 South Carolina, a master or principal only vicariously liable does not have an aliquot or proportional portion he or she ought to

pay, *but rather may shift the entire loss* to the servant or agent actively responsible, and may recover in full from the servant.” *Id.* at 225, 546 S.E.2d at 670 (emphasis added) (citing Sky City Stores, Inc. v. Gregg Sec. Servs., Inc., 276 S.C. 556, 558, 280 S.E.2d 807, 808 (1981)).

Accordingly, cases eligible for setoff cannot involve a settlement for a principal’s purely vicarious liability. The cases relied upon by the trial court and their progeny do not involve vicarious liability and, on that basis, should be distinguished. Welch v. Epstein, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (Ct.App.2000) (setoff settlement with “John Doe” defendant); Rutland v. S.C. Dep’t. of Transp., 400 S.C. 209, 218-19, 734 S.E.2d 142, 147 (2012) (setoff for settlement with General Motors which had no agency relationship with SCDOT); Hawkins v. Pathology Assocs. of Greenville, 330 S.C. at 112-13, 498 S.E.2d 395, 406-7 (Ct.App.1998) (setoff settlement with Georgia doctor who had no relationship with Pathology Associates of Greenville); Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct.App.2012) (setoff settlement with bank with no agency relationship with personal representatives of Estate); Ellis v. Oliver, 335 S.C. 106, 110-14, 515 S.E.2d 268, 271-72 (Ct.App.1999) (setoff settlement with hospital for survival action resulting from hospital’s direct negligence); Riley v. Ford Motor Co., Op. No. 5195 (S.C.Ct.App. filed Feb. 5, 2014) (setoff settlement with at-fault driver with no relationship to Ford).

Here, Plaintiffs asserted causes of action, which could hold GSRMC: (1) *directly* and *vicariously* liable for **ordinary negligence**; and (2) *vicariously* liable for **medical malpractice** of its employees and independent contractors. (R. pp. 36, 41). If GSRMC was liable to each Plaintiff for Bauerle’s malpractice, but not directly liable for ordinary

negligence, the parties are not joint tortfeasers and the Act does not apply. Therefore, Bauerle is not entitled to shift the burden of his wrongdoing to another party. To the contrary, the appropriate remedy would belong to GSRMC in the form of indemnity. However, if GSRMC was vicariously liable for Bauerle's malpractice as well as directly liable for ordinary negligence, then setoff might be appropriate for funds paid to settle the loss of consortium cause of action for which it was jointly liable. Accordingly, the trial court's ruling that the Settlements were for a single negligence cause of action failed to consider that neither the *bases* of GSRMC's potential liability, nor the *responsible parties* were uniform across all causes of action. Further, these distinctions would have governed whether Bauerle was entitled to contribution or if *he* was actually liable to GSRMC. (R. pp. 20-21, n.2).

Prior to the Summary Judgment Order, the pleadings allege three different theories under which GSRMC could be liable to Plaintiffs for ordinary negligence, two of which were only asserted by Mrs. Green. The Fourth Amended Complaint asserted allegations of ordinary negligence in the negligent supervision, hiring, and training and loss of consortium causes of action. In order for GSRMC to be liable for ordinary negligence, the duty breached could not be subject to a professional standard of care, which would require a higher burden of proof and expert testimony. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The negligence asserted in support of Mrs. Green's loss of consortium was supported by reasserting previous allegations seeking to hold GSRMC directly liable for promulgating policies and procedures that did not require the exercise of professional judgment and vicariously liable for employee negligence in failing to abide by such policies. Both Plaintiffs

asserted the negligent hiring, training, and supervision cause of action seeking to hold GSRMC directly liable for its employment decisions in the event the individuals involved in Mr. Green's care were classified as employees.

Similarly, prior to the Summary Judgment Order, the pleadings allege two theories under which GSRMC could be liable for medical malpractice, both of which were asserted by each Plaintiff. The pleadings alleged GSRMC was vicariously liable for the professional negligence/medical malpractice of its employees and independent contractors. Accordingly, the pleadings sought to impute liability for professional negligence/medical malpractice based on traditional agency principles applicable to the employee-employer relationship as well as the non-delegable duty doctrine.

The Summary Judgment Order dismissed all but two causes of action. At the time the Covenants were entered into, there were only two causes of action pending; Mr. Green's cause of action for medical malpractice and Mrs. Green's cause of action for loss of consortium. Although these two causes of action were the same two causes of action tried to verdict, the trial court failed to consider *if* GSRMC could be liable for medical malpractice and, if so, whether GSRMC was an innocent principal or a joint tortfeasor. If GSRMC could not be liable for medical malpractice, only the consortium cause of action alleging direct negligence remained as to GSRMC. As a matter of law, GSRMC could not be held liable for malpractice without *some* way to impute professional negligence from at least one individual. Baird v. Charleston County, 333 S.C. 519, 537, 511 S.E.2d 69, 78 (1999) (common law prohibition against the corporate practice of medicine in South Carolina). The Summary Judgment Order precluded Plaintiffs from holding GSRMC *vicariously liable* under the non-delegable duty doctrine or respondeat superior; therefore,

there was no basis for which GSRMC could be held liable for medical malpractice at the time of its settlement with Plaintiffs.

If GSRMC could have been held vicariously liable for medical malpractice, such liability could only be imputed as a result of Bauerle's actions. At trial, both sides presented evidence that physicians at GSRMC disagreed with Bauerle's decision to remove Mr. Green from the preoperative area, where he waited for urgent surgery to repair the major arteries in his arm. Dr. Scott Lintz testified medical records in evidence corroborated that Bauerle was "adamant" about removing Mr. Green and sending him to CT prior to Mr. Green receiving the surgery on his arm. (R. p. 46, lines 10-24). At the conclusion of trial, the jury found that the decision by Bauerle was a deviation from the standard of care and that his actions proximately caused Mr. Green to suffer a cardiac arrest, resulting in his paralysis. (R. p. 28).

Bauerle not only disregarded Dr. Lintz's opposition to remove Mr. Green, Bauerle took a critically-ill patient away from a surgeon moments before he was to receive life-saving surgery. (R. p. 345). This was done without assessing Mr. Green's condition first, which experts for both sides testified constituted a breach of the standard of care. (R. p. 322, line 19-p. 324, line 25). Plaintiffs' expert, Dr. Edd Chariker, testified that the medical records regarding Bauerle's phone conversations with Dr. Lintz indicated that Bauerle "was adamant that he was going to have a reconstructive CT scan done." (R. p. 470, lines 11-22). Even Bauerle admitted that if he had paused to look at Mr. Green's vital signs, he would not have made the same decision. (R. p. 308, lines 18-22). Dr. Chariker, reiterated that Bauerle's decision was a dramatic deviation from the standard of care, that "that one decision was the thing that probably tipped the scales," and that Mr.

Green would not have suffered a cardiac arrest if Bauerle had not taken him to CT. (R. p. 456, lines 5-16; p. 463, lines 12-19; p. 479, lines 7-22). Not only is there no evidence that GSRMC contributed to Bauerle's decision, directly or vicariously, it is undisputed that Bauerle was "adamant" about delaying Mr. Green's care despite the opposition of at least one other doctor, a doctor who felt strongly enough to repeatedly document Bauerle's persistence in the medical records. (R. p. 345).

Bauerle's interruption was the direct cause of Mr. Green's paralysis and in fact, interfered with the course of treatment being carried out by GSRMC. Bauerle and GSRMC were not joint tortfeasors, rather the injury occurred as a result of Bauerle's intervening or superseding negligence.

C. Medical malpractice and loss of consortium are not the same cause of action.

Medical malpractice and loss of consortium are not the same cause of action; therefore, the verdicts were not rendered for the same cause of action. "It is well settled in South Carolina that one spouse's cause of action for medical expenses and loss of consortium resulting from negligent injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action." Graham v. Whitaker, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984) (citing Hiott v. Contracting Servs., 276 S.C. 632, 633, 281 S.E.2d 224, 225 (1981); Priester v. Southern Ry. Co., 151 S.C. 433, 149 S.E. 226, 227 (1929); Ryder v. Jefferson Hotel Co., 121 S.C. 72, 113 S.E. 474, 475 (1922)). Additionally, medical malpractice and loss of consortium require a different burden of proof, different elements of proof, provide different damages to compensate very distinct injuries, and require different verdicts and judgments. Graham, 282 S.C. at 397, 281

S.E.2d at 43. In fact, the two causes of action are so indisputably distinct that the consortium claim is arguably not affected by contributory negligence on the part of the injured spouse and can be subject to a different statute of limitation. See Preer v. Mims, 323 S.C. 519, 519-22, 476 S.E.2d 472, 473-75 (1996). Accordingly, the portion of a settlement allocated to a loss of consortium claim does not reduce future recovery by the injured spouse. Kizer v. Kinard, 361 S.C. 68, 72, 602 S.E.2d 783, 785 (2004) (holding where bodily injury limits exhausted by equal payments to husband and injured wife, wife's future recovery is not reduced by amount paid to husband).

Here, the two causes of action involve different elements of damages. A medical malpractice cause of action allows an injured plaintiff to recover for the loss of his ability to provide services to his family, which is a separate and distinct award from the award for loss of services, society and companionship recoverable in an action for loss of consortium. See Denaux v. United States, 572 F. Supp. 659, 666 (D.S.C. 1983); Davis v. Tripp, 338 S.C. 226, 238, 525 S.E.2d 528, 534 (Ct.App.1999).

Mrs. Green had the right to prove, as a separate part of her damages, medical expenses *she* incurred for the care and treatment of Mr. Green extending from the time of the injury through the date of the Settlements. Arant v. Stover, 307 F. Supp. 144, 148 (D.S.C. 1969) (citing Sossamon v. Nationwide Mut. Ins. Co., 243 S.C. 552, 560, 135 S.E.2d 87, 92 (1964)). Mrs. Green alone bore the burden of the 24-hour care she provided to Mr. Green, which she testified requires her to manually evacuate his bowels, bathe him, physically move him from chair to bed, change his diapers, and catheterize him six times a day. (R. p. 187, lines 2-14). To accommodate Mr. Green's vigorous catheterization requirements, Mrs. Green has to set an alarm so that she can wake-up in the middle of the

night to catheterize him. (R. p. 186, lines 3-23). The undisputed testimony of Mrs. Green's husband and children shows that she has done this every single day for the past nine years at the expense of her own health, refusing to leave his side long enough to obtain her own medical treatment for a heart condition. (R. p. 129, line 4- p. 130, line 23; p.132, lines 7-p. 133, line 1). Since they would not have been able to afford the cost of the 24-hour care and services Mrs. Green has provided, Mr. Green would not be alive if his wife had not chosen to stay by his side and sacrifice her life for what is left of his. Undisputed evidence presented at trial noted that the value of the medical care Mrs. Green alone provided for her husband prior to trial is \$1,262,106.00. (R. p. 385).

In Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998), the Court had to determine whether to set off a settlement under the Georgia wrongful death statute from a verdict under the South Carolina wrongful death statute. The Court held that despite both having a common element of damages, setoff was not warranted because neither party requested that the jury specify how it calculated damages under each of the elements of loss for the South Carolina wrongful death verdict. Additionally, the Court noted that both the settlement and the jury award were less than the amount of pecuniary loss to which an economist testified, making it impossible to discern whether this injury was compensated in the verdict.

Here, the Settlements and verdicts combined were barely sufficient to compensate the \$3,006,791.00, in economic damages Plaintiffs' economic expert, Dr. Oliver Wood, estimated Mr. Green suffered, excluding past medical expenses, let alone the myriad of other damages for his paraplegia including pain and suffering and loss of enjoyment of life. (R. pp. 401-404). Further, although Plaintiffs requested a jury verdict form specifying

elements of damages, the jury verdict form used did not permit the jury to specify the amount of the verdict attributed to each element of damages. (R. pp. 28-31; pp 429-430). Accordingly, there is no evidence that Dr. Wood's or Nurse Lustig's figures were included in the Settlements or the verdicts. As in Hawkins, Bauerle cannot establish that the jury awarded either Plaintiff \$2,000,000.00 entirely 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.

After holding that the Settlement and the verdicts involved the same negligence cause of action, the trial court attempted to apply a statutory setoff in the entire amount of the Settlements without employing an equitable allocation analysis. However, because the verdicts and Settlements clearly involved different causes of action, the court was forced to allocate the entirety of the Settlements to the same two causes of action as the verdicts in order to achieve the result it interpreted § 15-38-50 to require. The trial court erred in granting Bauerle's motion for a statutory setoff under § 15-38-50 and in allocating the Settlements utilizing a circular analysis tailored to produce the corresponding result.

III. THE TRIAL COURT ERRED IN ALLOCATING THE SETTLEMENTS AND IN DOING SO USING AN ANALYSIS BASED ON THE PERCENTAGE OF THE VERDICTS REPRESENTED BY EACH CAUSE OF ACTION.

Where setoff does not apply by operation of law under § 15-38-50, a court may apply an equitable setoff. "The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d

142, 145 (2012). This type of setoff “is not necessarily founded upon any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction of the court.” Welch v. Epstein, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct.App.2000). Such “...motions are addressed to the discretion of the court—a discretion which should not be arbitrarily or capriciously exercised.” Welch, 342 S.C. at 313, 536 S.E.2d at 425.

The most recent South Carolina Court of Appeals case addressing setoff and equitable reallocation is Riley v. Ford Motor Co., Op. No. 5195 (S.C.Ct.App. filed Feb. 5, 2014). In that case, the Court held when an *agreed-upon allocation* of settlement proceeds does not meet certain standards, “a non-settling defendant who is entitled to a setoff but was not involved in the settlement negotiation is entitled to have the court *consider reallocating* the proceeds.” Id. (emphasis added). The Court explained the Riley opinion uses “permissive language such as ‘may,’ ‘permit,’ and ‘consider reallocating’ because setoff is an equitable remedy a court is not required to grant. Id. at n.6.

In the Setoff Order, the trial court held that a statutory setoff applied and then equitably *allocated* the previously unallocated Settlements in order to setoff the Settlements from the verdicts. (R. p. 22). The court extended precedent established in Rutland, permitting a *reallocation* of settlement proceeds to allow an *allocation* of unallocated Settlements. Rutland can be distinguished from the present situation for several reasons. First, in Rutland the parties allocated the settlement funds and the trial court approved such allocation. Second, the trial court reallocated the settlement based on the facts. Here, the parties did not allocate the Settlements and the trial court used a mathematical equation to allocate the Settlements based purely on a percentage derived from the jury’s verdicts against Bauerle. Although no precedent exists to allow the court

to allocate unallocated settlements, if the Parties had agreed upon an allocation of the Settlements, the appropriate analysis for this court to apply to determine whether Bauerle would be entitled to have the court consider *reallocating* the Settlements is set forth in Riley.

Further, because equitable reapportionment is founded in equity, the policy considerations of permitting a court to reallocate settlements between various causes of action, as discussed in the dissent to Smith v. Widener, 397 S.C. 468, 724 S.E.2d 190 (Ct. App.2012) and Rutland, should be considered. These considerations are even more compelling when applied to the present facts, where the parties did not allocate the Settlements between plaintiffs, injuries, or causes of action.

In Smith v. Widener, the Honorable James E. Lockemy, Judge of the Court of Appeals, wrote in his dissent that the Court should not reallocate settlement proceeds because the record did not contain any evidence as to why the parties chose the settlement amount. 397 S.C. 468, 479 n. 4, 724 S.E.2d 188, 194 n.4 (Ct.App.2012) (Lockemy, J., dissenting). After making several guesses, he conceded that “one can only make suppositions” and making guesses based on appearance does not “remove the decision from the realm of conjecture.” Id. In conclusion, Judge Lockemy wrote; “[i]t is precarious for a court to become too involved with the reasons behind settlement negotiations.” Id. He opined that the Court’s involvement in settlement negotiations should be limited to ensuring “the parties agree as to the terms and that the terms meet basic fairness.” Id. In the same way, here the Court cannot suppose how the parties intended to allocate the Settlements or what their intentions were at the time of settlement. This is particularly true in light of the Summary Judgment Order eliminating causes of action for vicarious

liability and negligent training, hiring and supervision. (R. p. 15). If Bauerle was uncertain about Plaintiffs' settlement with GSRMC, those concerns should have been asserted at the time he entered into the Stipulation and chose to dismiss GSRMC with prejudice.

Similarly, in Rutland, Justice Costa Pleicones, South Carolina Supreme Court Justice, disagreed with the majority's decision to reallocate settlement proceeds based on Welch v. Epstein, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct.App.2000), which recognized the rule that "the reduction in the [plaintiff's] judgment must be from a settlement for the same cause of action." Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 219, 734 S.E.2d 142, 147 (2012) (Pleicones, J., dissenting). Justice Pleicones wrote, the majority allowed a reallocation among various causes of action, which "nothing in our precedents supports;" therefore he would "overrule Welch to the extent it authorizes reallocation of settlement proceeds among different causes of action." Id. Further, Justice Pleicones wrote "justice is not served" by allowing the court to revise a settlement agreement because "doing so essentially requires a plaintiff to defend to the court the viability of a claim she has not made" and such a practice "violates the settled rule that the plaintiff may choose her defendant." Id. see Chester v. S.C. Dep't of Public Safety, 388 S.C. 343, 345-46, 698 S.E.2d 559, 560 (2010). Likewise, here the trial court revised Plaintiffs' Settlements with GSRMC and CMR, who were dismissed from the lawsuit with prejudice by Bauerle and Plaintiffs. Now, in defending Plaintiffs' right to the Settlements, Plaintiffs are forced to speculate as to GSRMC's motive for settling and, further, Plaintiffs are forced to defend that speculation.

Additionally, Justice Pleicones wrote that reallocating a settlement agreement may

inequitably reduce a plaintiff's recovery against at-fault defendants. Rutland, 400 S.C. at 219, 734 S.E. 2d at 147 (Pleicones, J., dissenting); see McDermott, Inc. v. AmClyde, 511 U.S. 202, 212-21 (1994) (discussing possible inequities of setting off judgment by full amount of settlement rather than requiring a nonsettling defendant to pay its proportionate share of damages). In Rutland, Justice Pleicones noted that the jury returned a verdict solely on "its determination of the *wrongful death* damages to the decedent's family and not her own survival damages." Rutland, 400 S.C. at 220, 734 S.E.2d at 147 (Pleicones, J., dissenting). On that basis, it was impossible for the Court to determine how the jury would have returned a verdict on the decedent's own damages in a *survival action*, had one been brought. Id. Similarly, here it is impossible to determine if the jury would have found GSRMC liable to Plaintiffs under any theory of negligence and, if so, in what amount the jury would have returned a verdict for Plaintiffs.

Lastly, Justice Pleicones wrote that the inequitable result of the Court's reallocation in Rutland, is that the nonsettling defendant is exempt from payment to the plaintiff. Id. see Chester, at 346, 698 S.E.2d at 560; McDermott, 511 U.S. at 219 ("The law contains no rigid rule against overcompensation [of the plaintiff]. Several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation.") Accordingly, Justice Pleicones argues that the "unfortunate" effect of reallocation in Rutland, where there is no suggestion of fraud or other wrongdoing by the plaintiff, is that plaintiffs are discouraged from settling and joint tortfeasors are encouraged to litigate, "contrary to our strong public policy favoring settlement." Id. see Chester, at 346, 698 S.E.2d at 560. Similarly, here allocating the Settlements entirely to the same causes of action pursued

against Bauerle at trial results in Bauerle's verdict being significantly reduced to the point that GSRMC and CMR, as settling defendants, end up bearing the majority of the burden. In effect, Bauerle benefits from choosing not to settle and instead play his odds by remaining in the lawsuit.

Even under the analysis set forth in Riley, the trial court should not have considered allocating the funds. Bauerle failed to show that the Settlements compensated the same Plaintiff on the same claim for the same injury, the Settlements were for the same cause of action, GSRMC could be held directly liable for medical malpractice, there was evidence to support a reallocation of settlement proceeds to that cause of action, or setoff was the least bit necessary to prevent a double recovery. By Bauerle's own admission, GSRMC's employees did not proximately cause or contribute to Plaintiffs' injuries. (R. pp 501-502). Bauerle did not challenge or appeal the Summary Judgment Order, which held that GSRMC could not be held liable for the actions of its employees or independent contractors. (R. p. 3). Finally, Bauerle did not request that the GSRMC settlement be allocated, or preserve his right to do so, prior to consenting to dismiss GSRMC from the lawsuit with prejudice. (R. p. 16). He cannot now claim that the Settlements were intended to relieve liability which, by his own admission, didn't exist at that time and benefit at the expense of the parties injured by his actions. Accordingly, the trial court erred in allocating the Settlements and in granting a setoff to Bauerle for funds that it repurposed as consideration for the release of a cause of action on which GSRMC could not be liable.

A. The court used an inappropriate analysis to allocate the Settlements.

In Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., the Court of Appeals

attempted to identify the extent and amount of liability discharged by an *unallocated* settlement agreement and held that there was no way to make such a determination for the purpose of applying the UCATA. 336 S.C. 53, 69, 518 S.E.2d 301, 309-10 (Ct.App.1999). The plaintiff brought a suit against Vermeer and Wood/Chuck for injuries he sustained by a machine manufactured by Wood/Chuck and purchased from Vermeer. The court granted the plaintiff's motion for a nonsuit with prejudice for all claims in the complaint against Wood/Chuck. Subsequently, Vermeer settled with the plaintiff and then brought an action against Wood/Chuck for contribution under the UCATA, among other things. The UCATA "provides that a right of contribution exists in favor of a tortfeasor who has paid more than his pro rata share of the common liability." S.C.Code Ann. § 15-38-20(B) (Supp.1998). The Court of Appeals held that, since the settlement agreement did not place a specific value on any potential claim by the injured man's wife, it was not possible to determine if Vermeer paid more than its pro rata share of liability on a consortium claim, in order to entitle Vermeer to contribution. *Id.* at 70-71, 518 S.E.2d at 310-11. Additionally, prior to that finding, the Court found that Wood/Chuck's liability to the plaintiff was extinguished when all causes of action against Wood/Chuck were dismissed with prejudice. Accordingly, no liability existed as to Wood/Chuck at the time Vermeer settled with the plaintiff and, as such, there was no common liability to discharge in that settlement. *Id.*

Similarly, in the present case, the Settlements did not place a specific value on any claim, or potential claim, of Mr. and Mrs. Green. Rather than applying the holding in and determining that the court is unable to determine whether Bauerle paid more than his pro rata share, the trial court essentially allocated the Settlements to a single cause of action

consisting of the very same allegations of negligence asserted against Bauerle. In order to reach this conclusion, the court determined that the Covenants with GSRMC were intended to, and did, extinguish all claims previously asserted. The trial court reasoned that these claims still existed at the time the Covenants were entered into despite the Summary Judgment Order, because Plaintiffs could have appealed that order, incorrectly concluding Plaintiffs still had the right to appeal at the time they entered into the Settlements. (R. pp. 20-21 n. 1). These rulings are erroneous for several reasons.

First, the Covenants were entered into more than 30 days after the Summary Judgment Order was signed and filed. (R. pp. 18-23; 505). *Second*, neither Plaintiffs nor Bauerle appealed or challenged the Summary Judgment Order making it the law of this case. See Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 173, 525 S.E.2d 869, 871 (2000); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). *Third*, the lawsuit was dismissed with prejudice as to GSRMC by stipulation of all parties. (R. p. 16). *Finally*, even if the causes of action common to Bauerle and GSRMC had not been extinguished as of the date the Covenants were executed, there is still no basis for determining that the parties to the Covenants intended any portion of the Settlement funds to be allocated to those claims, or that Bauerle was entitled to a setoff therefrom.

Even assuming, *arguendo*, that all claims existed when the Covenants were entered into, including Plaintiffs' cause of action attempting to hold GSRMC vicariously liable for the medical malpractice of its independent contractors, employees, and agents not named in the lawsuit, as well as Bauerle, GSRMC still could only be *vicariously* liable for medical malpractice, and could not be jointly liable to either Plaintiff on that

cause of action. Under the reasoning utilized by the trial court, a court could allocate previously unallocated funds to *any* pending cause of action regardless of whether the settling defendant could even be liable on it as a matter of law. Here, this analysis also resulted in the court effectively taking away any consideration paid for contractual terms which were expressly not limited to, or even inclusive of, the issues involved in the pending lawsuit, and repurposed it as consideration for liability which didn't even exist at the time the parties consummated their agreement.

B. Even if the analysis in *Riley v. Ford Motor Co.* was applied, the court erred in allocating the Settlements.

In *Riley v. Ford Motor Co.*, Op. No. 5195 (S.C.Ct.App. filed Feb. 5, 2014), Riley, a personal representative for the decedent, brought a wrongful death and survival claim against Ford Motor Company ("Ford") and the at-fault driver. Prior to trial, the at-fault driver settled with Riley and chose to allocate eighty-percent of the settlement to the survival cause of action and the remaining twenty-percent of the settlement to the wrongful death cause of action. At trial, the jury awarded a verdict against Ford solely on the wrongful death claim. On appeal, the Court reallocated the at-fault driver's settlement and then set off the settlement from Ford's wrongful death verdict. The Court of Appeals held that a non-settling defendant is entitled to have the court consider reallocating settlement proceeds where the previously agreed upon allocation of settlement proceeds is (1) "not reasonably based on the evidence"; (2) "does not fairly advance the policy of preventing double-recovery"; and (3) the non-settling defendant is "entitled to a setoff but was not involved in the settlement negotiation". Id.

The situation at hand can be distinguished from Riley in that the parties specifically chose not to allocate the Settlements. Further, the Settlements were not given

as consideration for the same claims litigated at trial. Riley only grants a court the authority to *reallocate* previously allocated settlement funds. Even if this Court determined that Riley should be expanded to allow allocation of previously unallocated funds, the facts of this case still do not meet the elements of that three-part test.

1. The Parties' decision not to allocate the Settlement proceeds was reasonably based on the evidence.

The trial court's allocation of the Settlements between the loss of consortium and medical malpractice causes of action is not based on the evidence because GSRMC could not be held liable for medical malpractice. As discussed at length above, the Summary Judgment Order dismissed all causes of action under which GSRMC could be held vicariously liable for the negligence of anyone involved in Mr. Green's care, including Bauerle, under the non-delegable duty doctrine or respondeat superior. Accordingly, GSRMC could have only been liable for negligence by virtue of Bauerle's medical malpractice and even then, only if he was an agent of the hospital under a theory supported by the evidence. At trial, no evidence was presented regarding Bauerle's relationship to GSRMC; rather, his classification as an independent contractor or agent is a matter of law that has not been ruled on. This is a topic on which the hospital and Bauerle are more knowledgeable than Plaintiffs, yet both GSRMC and Bauerle chose not to adjudicate prior to dismissing GSRMC from the suit. Since no evidence exists to support a cause of action for medical malpractice as to GSRMC, and it is impossible to determine Bauerle's status as an employee or independent contractor in order to determine a basis for imputing liability, allocation of the Settlements was not reasonably based on the evidence.

Further, in Riley, the Court of Appeals noted that in order to determine whether

equitable reallocation is appropriate, it should not focus solely on the amount of money the settling defendant paid to settle the survival claim, rather the court should examine whether the percentages allocated to one claim or the other by the settling parties are reasonable. Then, the Court held that the at-fault driver's allocation of eighty-percent of the settlement to the survival cause of action and twenty-percent of the settlement to the wrongful death cause of action was not supported by "the minimal evidence of survival damages" in the record. On that basis, the Court apportioned eighty-percent of the settlement to the wrongful death claim and twenty-percent of the settlement to the survival claim.

In the Setoff Order, the trial court allocated the Settlements between the loss of consortium and medical malpractice claims by applying "the percentage of the total verdict given to each Plaintiff by the jury" to the Settlements. (R. pp. 21-22). The court's calculation resulted in an allocation of roughly nineteen-percent of the GSRMC Settlement to Mrs. Green's loss of consortium cause of action and roughly eighty-one-percent of the Settlement proceeds to Mr. Green's medical negligence cause of action without regard to the fact that these were two separate verdicts for two different Plaintiffs. Since GSRMC could not be held liable for Bauerle's negligence by virtue of the Summary Judgment Order, an allocation of eighty-percent of the Settlement to that specific cause of action is not supported by the evidence presented at trial.

In the alternative, if the Court determines the GSRMC Settlement must be allocated, then an allocation based on the evidence requires allocating substantially more than nineteen-percent of the Settlement to the loss of consortium cause of action. The evidence dictates that it should be allocated equally to each cause of action, and equity

requires that it be allocated equally between the two Plaintiffs. Even if the Settlement had been allocated entirely between the medical malpractice and loss of consortium causes of action, the funds would still be marital property to which each Plaintiff is equally entitled. Marsh v. Marsh, 313 S.C. 42, 45, 437 S.E.2d 34, 36 (1993) (proceeds of personal injury settlement acquired during marriage are marital property subject to the family court's jurisdiction). In contrast, here each of the two verdicts awarded each Plaintiff a specific amount on causes of action that could have been asserted in independent lawsuits, even if Plaintiffs had divorced after the Settlement. Lawton v. Hamm, No. 06-933, 2006 WL 2622629, at *1 (D.S.C. Sept. 8, 2006).

The court granted setoff without properly considering whether any evidence supported the existence of a double recovery given the varied and complex injuries and losses involved. Accordingly, though Plaintiffs deny that allocation is appropriate in this case, the only way the GSRMC Settlement could be equitably allocated is to divide it equally between the two persons to whom they were jointly paid, which would result in a setoff of the entire amount of Mrs. Green's loss of consortium verdict and a setoff of \$1,000,000 of Mr. Green's medical malpractice verdict.

2. No evidence exists to show that the unallocated proceeds presented a risk of double recovery.

Under certain circumstances, funds already received by the plaintiff are offset against those owed by the defendant in order to prevent a plaintiff from receiving a windfall or double recovery. Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 113, 498 S.E.2d 395, 406 (Ct.App.1998). The South Carolina Supreme Court explained, "[t]he reason for allowing [setoff] is to prevent an injured person from obtaining a second recovery of that part of the damages sustained which has already been paid to him."

Welch v. Epstein, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (Ct.App.2000).

In the present case, there is no evidence that setoff is necessary to prevent Randall or Ann Green from receiving a double recovery. Rather, the evidence suggests that, even without a setoff, Plaintiffs will not be fully compensated for their damages because the verdicts and Settlements combined are less than the loss suffered by each Plaintiff.

The facts in the present case are similar to those in Hawkins v. Pathology Assocs. of Greenville, wherein the Court of Appeals overturned a trial court's order setting off a settlement from one defendant from a verdict against the non-settling defendant. Hawkins, 330 S.C. at 113, 498 S.E.2d at 406. One defendant settled with the plaintiff for \$550,000.00 prior to trial under the Georgia Wrongful Death statute, while the non-settling defendants proceeded to trial and received a verdict under the South Carolina Wrongful Death statute. On appeal, the Court of Appeals found that the only common element of damages between the South Carolina and Georgia statutes was an award for the economic value of the decedent's life expectancy. At trial, an economist testified that the economic loss to the decedent's family as a result of the decedent's death was \$1,146,023.28. At the close of the trial, the jury awarded the decedent's family \$1,100,000.00 in the wrongful death action. In refusing to allow setoff, the Court noted that neither party requested that the jury specify how it calculated damages under each element of loss in the South Carolina wrongful death statute. Additionally, the Court noted that both the settlement and the jury award were less than the amount of pecuniary loss to which an economist testified, making it impossible to discern whether this injury was compensated in the verdict. Despite the evidence presented at trial, the Court held that "there [was] no evidence in the record to indicate how the jury calculated the award",

since neither party requested that the jury specify the amount it awarded for each element of damages under the wrongful death statute. Id. at 114, 498 S.E.2d at 407. This is the exact situation that existed in the present case where the jury did not specify the amount of their verdict attributable to the different elements of damage after the trial court overruled Plaintiffs' request for a jury form that so specified. (R. p. 332, lines 15-23). The Hawkins Court noted that the jury could have completely ignored the economist's testimony and based the award primarily on the grief suffered by the decedent's family. Hawkins, at 114, 498 S.E.2d at 407. Accordingly, the defendants couldn't establish that setoff was necessary to prevent a double recovery, and the trial court abused its discretion in allowing the setoff. Id.

a.) There is no evidence Mr. Green was fully compensated for his damages or that setoff is necessary to prevent a double recovery.

At trial, Plaintiffs' economic loss expert, Dr. Wood, testified that Mr. Green's total financial loss as a result of his paralysis is \$3,006,791.00. (R. p. 404). Additionally, certified nurse and Plaintiffs' life care expert, Sarah Lustig, BSN, RN, CLCP, CNLCP testified that Mr. Green has suffered many impediments as a result of his paralysis, in addition to those normally expected of someone in his position, and that those were factored into Dr. Wood's economic loss figure. (R. p. 167, line 23-p. 168, line 3). Additionally, Mr. Green testified that he suffered life threatening injuries after falling from his wheelchair while simply attempting to help his wife shell peas. (R. p. 226, lines 6-24).

Bauerle did not challenge the expert qualifications of Dr. Wood or Nurse Lustig, nor did he provide expert testimony or evidence to the contrary. At the conclusion of trial, the Honorable Steven H. John charged the jury with categories of damages for which they

could compensate Mr. Green. The list included:

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 earning, mental anguish brought about by bodily injury or suffering, depression.

(R. p. 334, lines 3-13). Judge John reiterated that this list does not include every element of damages for which Mr. Green could be compensated, rather damages include “a wide scope of categories”. (R. p. 334, lines 14-18). Although the jury charges included a laundry list of types of damages for the jury to consider, the verdict form did not permit the jury to specify what damages were included in the verdict. At the close of the trial, the jury returned a \$2,300,000.00 medical negligence verdict in favor of Mr. Green. (R.p. 29).

Based on the evidence presented at trial, Mr. Green’s verdict falls short of fully compensating him for his total economic loss, let alone his pain and suffering and other elements of compensable damages. Since it is impossible to ascertain how and in what amount the jury allocated Mr. Green’s damages, it is impossible to conclude that GSRMC’s Settlement and the verdict against Bauerle compensated Mr. Green for the same damages.

b.) There is no evidence Mrs. Green was fully compensated for her damages or that setoff is necessary to prevent a double recovery.

At trial, Nurse Lustig testified that due to Mr. Green’s condition, he requires 24-hour care. (R. p. 158, lines 12-16). Further, since the accident, Mrs. Green has been Mr. Green’s sole caregiver, a fulltime job that requires “physically lifting him, washing him, assisting him with meals, hygiene, eating, meal prep, cleaning.” (R. p. 160, lines 14-17). Nurse Lustig described what Mrs. Green had to give up in order to be Mr. Green’s sole

caregiver and how assuming this role has affected her life, stating “Mrs. Green’s social life has been affected tremendously, she’s given up her friends and previous (sic) active life.” (R. p. 160, lines 8-13). As a result of her husband’s loss, Mrs. Green is likely suffering from depression and anxiety. (R. p. 159, lines 1-13). If Mrs. Green had hired someone to provide for Mr. Green, rather than do so herself, she would have spent \$134,400.00 annually. (R. p. 167, lines 16-22; p. 385). Accordingly, as of the date of trial, Mrs. Green provided Mr. Green with roughly \$1,209,600.00 worth of care.

At trial, Mrs. Green described her daily schedule to the jury, which is almost completely comprised of providing for Mr. Green. (R. p. 186, lines 5-21). Mrs. Green testified that she spends very few hours a day doing things for herself, including sleep more than a few hours a night. (R. p. 186, lines 5-21). Every night for the past nine years she has set an alarm so that she can wake up in the middle of the night to catheterize Mr. Green. (R. p. 186, lines 11-21). Additionally, Mrs. Green confessed that her most intimate marital relations with Mr. Green are no longer possible. (R. p. 190, lines 1-20). She can no longer hold him, or even sleep in the same bed as him for fear of complicating his medical condition. (R. p. 190, lines 16-18). Mrs. Green corroborated Nurse Lustig’s testimony that Plaintiffs’ home is in desperate need of safety modifications. She expressed fear that if there were a fire while Mr. Green was in his bedroom, there would be no way for him to escape unassisted. (R. p. 188, line 25-p.189, line 3). She has not left the house for any length of time out of fear for her husband’s safety. (R. p. 191, line 22-p. 192, line 9). Additionally, Mr. Green testified that his wheelchair is prone to getting stuck in their yard where rattlesnakes are common. (R. p. 225, line 12-p. 226, line 5). Accordingly, he depends on Mrs. Green to “come running” when he shoots his pistol

three times as a signal for help. (R. p. 225, line 20-p. 226, line 5).

At the conclusion of the trial, the judge read the jury charges, which stated in part that Mrs. Green “is entitled to recover the value of those services of [her] spouse which were lost, including the loss of the spouse’s society and companionship in the home[,]” and that she is “entitled to recover for any expense incurred in the care and treatment of [her] spouse because of the illness or bodily harm suffered by the spouse.” (R. p. 335, line 7-p. 336, line 2). The jury rendered a verdict for Mrs. Green in the amount of \$550,000.00. (R. p. 31). 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.

3. Bauerle is not entitled to a setoff and he was involved in the decision to dismiss GSRMC with prejudice.

First, Bauerle is not entitled to a setoff. As of the date of settlement, GSRMC could not be held liable for the malpractice or negligence of GSRMC’s independent contractors or employees. (R. p. 7). Furthermore, because GSRMC did not have “sufficient notice of a nondelegable duty claim,” the relation back doctrine did not apply and the cause of action for vicarious liability based on that doctrine, as well as the hospital’s liability thereunder, was dismissed. (R. p. 7). An order is considered a judgment on the merits when it is a determination of a matter forming whole or part of a cause of action. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006).

In South Carolina, there is a common law prohibition against the corporate practice of medicine. Baird v. Charleston Cty., 333 S.C. 519, 537, 511 S.E.2d 69, 78 (1999). Accordingly, it is impossible for GSRMC to be directly liable for medical

malpractice. There is categorically no support for a medical malpractice cause of action against the hospital without any way to hold it vicariously liable for same. No legal basis remained to hold GSRMC liable to Mr. Green on his *only* remaining cause of action. Accordingly, GSRMC cannot be jointly liable in tort to Mr. Green for medical malpractice, and there is no common liability between GSRMC and Bauerle to discharge in settlement.

Any arguable direct negligence asserted against GSRMC could only be actionable through Mrs. Green's existing cause of action for loss of consortium, rendering her the only Plaintiff for whose injuries GSRMC and Bauerle could have possibly been jointly liable. The plain language of § 15-38-50, which applies to persons *liable* in tort for the same injury, does not mandate setoff against the medical malpractice verdict rendered in Mr. Green's favor. Setoff, if any, should be entirely against Mrs. Green's loss of consortium cause of action.

Additionally, Bauerle was involved in the settlement negotiations, specifically the Stipulation dismissing GSRMC from the lawsuit with prejudice. Bauerle chose not to request that the Settlements be allocated, chose not to preserve his right to request an allocation, and did not inquire how liability was affected before he consented to GSRMC's dismissal from the lawsuit with prejudice. It is not fair to allow Bauerle to seek the court's assistance in adjusting the burdens of his wrongdoing onto Plaintiffs now that his own liability is certain. Plaintiffs made a decision not to pursue GSRMC based on the Summary Judgment Order. Similarly, it is manifestly unjust for the trial court to determine *before* trial that GSRMC could not be held vicariously liable for the medical malpractice of its independent contractors/employees, and then determine *after* trial that

GSRMC was jointly liable to Mr. Green for medical malpractice.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court reverse the trial court's order granting setoff to Defendants.

Respectfully submitted,



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December 2, 2014

RECEIVED

CERTIFICATE OF COUNSEL

MAY 19 2016

SC Court of Appeals

The undersigned Counsel for Respondents/Appellants, Randall M. Green and Ann Green, certifies that the following documents comply with Rule 211(b), SCACR:

1. Final Appellants' Brief of Respondents/Appellants;
2. Final Respondents' Brief of Respondents/Appellants; and
3. Final Reply Brief of Respondents/Appellants.

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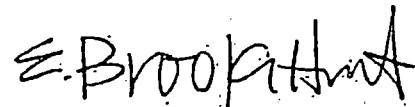
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SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned Counsel for Respondents/Appellants, Randall M. Green and Ann Green, certifies that the following documents comply the Supreme Court's Revised Order Concerning personal identifying information and other sensitive information in Appellate Court Filings, issued April 15, 2014:

1. Final Appellants' Brief of Respondents/Appellants;
2. Final Respondents' Brief of Respondents/Appellants; and
3. Final Reply Brief of Respondents/Appellants.



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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

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MAY 19 2016

SC Court of Appeals

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 the below listed briefs 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, on December 18, 2014 addressed to his attorneys of record at their offices as follows:

1. Final Appellants' Brief of Respondents/Appellants;
2. Final Respondents' Brief of Respondents/Appellants;
3. Final Reply Brief of Respondents/Appellants;
4. Respondents/Appellants' Certificate of Counsel's compliance with Rule 211(b),
SCRAR

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

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STATEMENT OF THE CASE

This is an appeal from a medical malpractice action. The Respondents-Appellants Randall M. Green and Ann Green ("Greens") were involved in a motor vehicle accident on April 17, 2004, when a vehicle crossed the center line and collided with the Greens' vehicle. Randall Green was seriously hurt and was transported to Grand Strand Regional Medical Center where he was initially treated in the Emergency Room for a fracture/dislocation of his right hip and a severe laceration of his right forearm.

During the course of Mr. Green's care in the ER, the Appellant-Respondent Wayne B. Bauerle, M.D.,¹ the on-call orthopaedic surgeon, was summoned to the ER to treat the fracture/dislocation of his right hip. Dr. Bauerle learned the ER physician had already reduced the hip, but Dr. Bauerle requested a CT scan of the hip to ensure that the reduction was proper and to check for bone fragments that could require immediate surgery. At the time of the CT scan, Mr. Green was in the holding area for the operating room waiting to undergo surgery to repair the laceration of his right forearm. Following the CT scan, Mr. Green went into cardiac arrest and was successfully resuscitated. Mr. Green sustained damage to his spinal cord which resulted in the paralysis of his lower extremities.

¹ For ease of discussion, the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. shall be referred to collectively as "Dr. Bauerle."

The Greens filed this medical malpractice action against Dr. Bauerle and his practice as well as Grand Strand Regional Medical Center, LLC ("Grand Strand") and Carolinas Medical Response, Inc., which was the ambulance provider. The lawsuit included a claim for loss of consortium by Ann Green. Prior to trial, Grand Strand settled all claims with the Greens for \$2 million, and Carolinas Medical Response settled for \$25,000. In addition, Randall Green settled with the at-fault driver for \$100,000, and he received \$150,000 in settlement of his underinsured motorist (UIM) claim. Likewise, with respect to her loss of consortium claim, Mrs. Green received \$100,000 in settlement with the at-fault driver and an additional \$75,000 in settlement of her UIM claim.

The medical malpractice action against Dr. Bauerle and his practice was tried before a jury during the week of September 9, 2013, with Circuit Judge Steven H. John presiding. The jury found for Randall M. Green in the amount of \$2.3 million on his medical negligence claim and for Ann Green in the amount of \$550,000 on her loss of consortium claim. (R. 28-31).

At the close of the trial, Dr. Bauerle moved for a set-off of the amounts paid in settlement on behalf of Grand Strand, Carolinas Medical Response, and the at-fault driver (including the underinsured motorist payments). (R. 45-48, 338-339). By Order filed October 17, 2013, Judge John granted in part and denied in part the Motion for Set-Off. (R. 18-23). Judge John allowed for a set-off of the settlements received from Grand Strand and Carolinas Medical Response, but he

denied the set-off for the amounts paid for the release of the at-fault driver and the UIM insurer. Judge John directed the Clerk of Court to enter judgment in the amount of \$665,789.47 in favor of Randall M. Green and to enter judgment in the amount of \$159,480.53 in favor of the Ann Green. (R. 22).

Dr. Bauerle filed a Rule 59(e) Motion to Alter or Amend Order challenging the denial of the set-off for the settlements received from the at-fault driver and the UIM insurer, and that motion was denied by Order filed February 13, 2014. (R. 24). Dr. Bauerle thereafter filed a timely appeal to this Court, and the Greens filed a cross-appeal.

ARGUMENTS

The Greens present numerous arguments challenging the decision of Circuit Court Judge Steven John to grant a set-off of the settlement amounts paid by Grand Strand and Carolinas Medical Response. The Greens' analysis in their Appellant's Brief is rambling, convoluted, often repetitive, and flawed in numerous respects. In order to address those arguments in a coherent and organized manner, Dr. Bauerle will address the following points: (1) whether Judge John erred in granting a set-off under Section 15-38-50; (2) whether the settlements compensated the Greens for the same injury; (3) whether the settlements were for the same causes of action as litigated against Dr. Bauerle; and (4) whether Judge John erred in equitably allocating the settlements between the medical malpractice claim and the loss of consortium claim. Those issues will be addressed in turn below.

- I. The trial court was correct in applying Section 15-38-50 and in concluding that the set-off of the settlement amounts received by the Greens was mandatory and by operation of law.**

The Greens contend that Judge John erred in concluding that Section 15-38-50 mandated a set-off of the settlement amounts paid by Grand Strand and Carolinas Medical Response. Section 15-38-50(1) provides:

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 ... 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.

S.C. Code Ann. § 15-38-50(1). (Emphasis added). In applying Section 15-38-50(1), Judge John found that "the Plaintiffs' settlements with Grand Strand and Carolinas Medical Response were for the same injury, that being Mr. Green's paralysis and the loss of consortium by Mrs. Green, as was litigated against Dr. Bauerle and for which the jury returned its verdict against Dr. Bauerle." (R. 20).

As an initial challenge to the set-off granted by Judge John, the Greens argue that a statutory set-off under Section 15-38-50 was not mandated for the simple reason that the Greens were multiple plaintiffs asserting different causes of action. Randall Green sued for medical malpractice, and Ann Green sued for loss of consortium. The Greens further maintain that Judge John "combined" the medical malpractice and consortium claims and treated them as "a single claim for a single injury." *See*, Greens' Appellants' Brief, p. 15. The Greens' reasoning is flawed in several significant respects.

First, the Greens' reading of Judge John's order is incorrect. Judge John did not "combine" the medical malpractice and consortium claims nor did he treat the causes of action as "a single claim for a single injury." Judge John recognized that the Greens had pursued both medical malpractice and consortium claims at the trial

against Dr. Bauerle and that those claims had been pled and settled against Grand Strand and Carolinas Medical Response. However, he "reject[ed] the Plaintiffs' argument that their settlements were for different causes of action." (R. 20). He likewise rejected the argument that they sought "different damages" against the settling parties. (R. 20).²

Second, given the unique nature of a loss of consortium claim, Judge John was correct in concluding that Mr. Green's malpractice claim and Mrs. Green's consortium claim arise from the same injury, that being Mr. Green's physical injury. While South Carolina law recognizes that loss of consortium is an independent action, it is equally well settled that "a loss of consortium claim cannot arise if no tort is committed against the impaired spouse." *Creighton v. Coligny Plaza Limited Partnership*, 334 S.C. 96, 512 S.E.2d 510, 523 (Ct. App. 1999). "In order to prevail in an action for loss of consortium, a plaintiff must prove the defendant's liability for the spouse's injuries, as well as damages to the plaintiff *resulting from the spouse's injury*." *Id.* (Emphasis added). Therefore, it is the impaired spouse's injury that gives rise to any liability for loss of consortium. In this case, it was the injury to Mr. Green -- specifically his cardiac arrest and

² These latter two issues are addressed in Sections II and III below.

ensuing paralysis -- that resulted in his damages for medical malpractice and also resulted in Mrs. Green's damages for loss of consortium.³

Third, the fact that the settlements with Grand Strand and Carolinas Medical Response were with two plaintiffs, husband and wife, does not prohibit a statutory set-off under Section 15-38-50. Likewise, the fact that the verdicts against Dr. Bauerle were in favor of husband and wife plaintiffs does not prohibit a statutory set-off under Section 15-38-50.

Fourth, the fact that the Greens brought separate causes of action for medical malpractice and loss of consortium does not prohibit a statutory set-off under Section 15-38-50. There is substantial case law where the courts have applied a statutory set-off to the separate and related causes of action for wrongful death and survival. *See e.g., Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). There is no basis for treating the separate and related causes of action of medical malpractice and loss of consortium any differently.

³ In their Appellant's Brief, the Greens write: "[T]he medical malpractice verdict awarded to Mr. Green and the loss of consortium verdict awarded to Mrs. Green are different claims for different injuries as a matter of law." *See*, Greens' Appellant's Brief, p. 17. That is not correct. They are different claims for different *damages*, but they both arise out of the same injury to the impaired spouse. Later in their brief, the Greens write: "[M]edical malpractice and loss of consortium require a different burden of proof, different elements of proof, provide different damages to compensate very distinct injuries, and require different verdicts and judgments." *See*, Greens' Appellant's Brief, p. 30. The Greens cite to *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984), for this proposition of law. But *Graham* does not say this. There frankly is no different burden of proof or elements of proof. Nor do the damages arise from "different injuries." In fact, the actual quote from *Graham* states that a loss of consortium

In order to fully understand the flaws in the Greens' reasoning, it is instructive to briefly review the history of set-off under South Carolina law. Section 15-38-50 is part of the South Carolina's Uniform Contribution Among Tortfeasors Act (UCATA) which was enacted by the General Assembly in 1988. Prior to 1988, however, South Carolina courts allowed for a set-off for amounts paid in settlement by settling tortfeasors. In *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967), the South Carolina Supreme Court recognized that "one tortfeasor is entitled to credit for the amount paid by another tortfeasor for a covenant not to sue." 156 S.E.2d at 761. The Supreme Court later explained that "[t]he reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong." *Truesdale v. South Carolina Highway Dept.*, 264 S.C. 221, 213 S.E.2d 740 (1975).

After 1988 and the adoption of the UCATA, including Section 15-38-50, the first case that actually applied the statutory set-off was *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999). In *Ellis*, the plaintiff brought survival and wrongful death claims alleging medical malpractice against Dr. Oliver. The jury returned a verdict in the plaintiff's favor on both claims, awarding \$411,102 for the

claim "result[s] from negligent injuries to the other spouse." 321 S.E.2d at 43. To reiterate, it is the impaired spouse's injury that gives rise to the loss of consortium claim and damages.

survival action and \$288,898 for the wrongful death action. The plaintiff had previously received a settlement of \$140,000 from a hospital defendant. Dr. Oliver sought a set-off of the settlement by the hospital, which was granted by the trial court. In affirming the trial court, this Court explained that "[a]pplication of the settlement credit was statutorily mandated in this case. 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." 515 S.E.2d at 272.

Earlier, in 1998, this Court decided the case of *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). Although Section 15-38-50 had been adopted and was applicable given that the cause of action arose after the statute's effective date, this Court in *Hawkins* made no mention of a statutory set-off. To the contrary, the *Hawkins* Court noted that the rule on set-off "is not founded on any statute or fixed rule of court." 498 S.E.2d at 406. Moreover, instead of focusing on the "same injury" as in Section 15-38-50, this Court determined that "the reduction in the judgment must be from a settlement for the same cause of action." 498 S.E.2d at 407, citing *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986). This Court then proceeded to deny a set-off for a settlement from a Georgia wrongful death action upon determining that a Georgia wrongful death action is not the same as a South Carolina wrongful

death action. Therefore, *Hawkins* does not control the application of a statutory set-off under Section 15-38-50.

That is where the Greens err in their analysis. Citing *Hawkins*, the Greens write: "South Carolina courts interpreting this statute [Section 15-38-50] have held that the statutory set-off is applied only when a prior settlement has already provided compensation to the plaintiff on the same claim for the same injury for which the plaintiff later receives a verdict against another tortfeasor." *See*, Greens' Appellant's Brief, p. 12. As noted above, *Hawkins* did not address nor even cite Section 15-38-50. *Hawkins* certainly did not "interpret" Section 15-38-50.

A proper reading of Section 15-38-50 must focus on the "injury" and whether the settling party and the non-settling party are "liable in tort for the same injury." *See*, S.C. Code Ann. § 15-38-50(1). The existence of the same or different causes of action is immaterial. This distinction is well illustrated by the recent case of *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012). In that case, this Court explained that "when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law." 724 S.E.2d at 191. Moreover, "when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law." *Id.* In *Smith*, the plaintiff had asserted causes of action for civil conspiracy, conversion, slander and negligence against the settling party (CitiStreet) and causes of action for civil conspiracy, conversion, slander and

fraud against the non-settling defendants who later sought a statutory set-off. Despite the non-overlap of causes of action in part, this Court found that "the injury [plaintiff] alleged she suffered as a result of tortious conduct of all defendants was the same" and as a result "the trial court was required to grant the request for a set-off [under Section 15-38-50]." 724 S.E.2d at 190.⁴

Moreover, the Greens are also incorrect in their attempt to equate "same injury" as used in Section 15-38-50 with "same damages." In *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), the plaintiff claimed that Section 15-38-50 was inapplicable because the measure of damages in wrongful death and survival claims differ. While acknowledging that the measure of damages differs, this Court explained that the plaintiff "confuses the concept of damages with the meaning of the word injury, as used in the statute." 515 S.E.2d at 272. This Court found that "injury" has a broad construction to include all damages "which result from the joint negligence of the various responsible parties." *Id.* Thus, the "injury" is not synonymous with "damages" but is inclusive of all elements of damages resulting from a particular harm. This conclusion was echoed in *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012), where this Court

⁴ Similarly, in *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008), this Court affirmed a statutory set-off under Section 15-38-50 that had been granted by the trial court. In that case, the plaintiff Vortex argued that "the settlement with Ware [a settling defendant] was based on different causes of action than those is prevailed on against CSMG and the injury caused by CSMG was not the same as that caused by Ware." 662 S.E.2d at 451. This Court rejected those arguments and upheld the set-off.

explained that "when a plaintiff seeks actual and punitive damages in the same claim, both types of damages arise out of the same injury." 724 S.E.2d at 191. The *Smith* Court recognized that damages are awarded for an injury. *Id.* Thus, the same injury may give rise to different elements of damages, including in the present case the damages sought and recovered by Mr. Green in his medical malpractice action and the loss of consortium damages sought and recovered by Mrs. Green in her related consortium action. They are all damages arising from the same injury.

In sum, the Greens' rambling and convoluted argument that Section 15-38-50 is inapplicable fails. Even though this action involves different but related causes of action brought by husband and wife plaintiffs, Judge John was correct to apply Section 15-38-50 and to conclude that the set-off was by operation of law.

II. The trial court was correct in ruling that the Greens' settlement with Grand Strand Regional Medical Center was not for different injuries or damages than the verdicts returned at trial against Dr. Wayne Bauerle.

The Greens also contend that the settlement with Grand Strand compensated them for different injuries than the verdicts awarded at trial against Dr. Bauerle. Judge John was correct in rejecting that argument.⁵

⁵ Note that the Greens do not challenge the set-off for the settlement with Carolinas Medical Response.

Citing to the "Covenant Not to Sue and Covenant Not to Prosecute or Execute Judgment" ("Covenants") executed by the Greens in favor of Grand Strand, the Greens suggest that they released claims for different damages than what was litigated at the Bauerle trial. There is no factual basis for that argument. 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. 505). 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.

In comparison, 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 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). Judge John also charged the damages recoverable for loss of consortium.

(R. 335-336).

The Greens cannot show that their settlement with Grand Strand was for different injuries, let alone different damages. 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.⁶

The Greens nonetheless argue that the \$2 million was paid by Grand Strand in exchange for a hold harmless and indemnification agreement. The only indemnity provision is for the costs of "medical, drug, hospital or other services" as paid by "any private insurance company, Medicare, Medicaid, or any branch of the United States Government." (R. 505). This is no more than protection for Grand Strand from any medical liens that may have existed. The Greens, in fact, agreed

⁶ The Greens have not shown that there were elements of damages recovered in the settlement 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.

that "any such claims or liens will be satisfied out of the proceeds of settlement." (R. 505). Contrary to the representation by the Greens, this does not represent the "assumption of liability" by the Greens which has a value that is not subject to a set-off. The Greens have, in essence, agreed to satisfy medical liens for medical expenses that *they* – not Grand Strand – owed to private insurers or the federal government.

In sum, Judge John was correct in ruling that the settlement with Grand Strand was not for different injuries or damages than the verdicts returned at trial against Dr. Bauerle.

III. The trial court was correct in ruling that the Greens' settlement with Grand Strand Regional Medical Center was not for different causes of action than those litigated against Dr. Wayne Bauerle at trial.

The Greens further contend that the settlement with Grand Strand was for different causes of action than those litigated against Dr. Bauerle at trial. Judge John was also correct in rejecting that argument.⁷

The Greens' argument is convoluted and depends primarily on an interlocutory order granting partial summary judgment prior to the settlement

⁷ The Greens appear to concede that Ann Green's loss of consortium claim that was settled by Grand Strand was the same loss of consortium claim that was tried against Dr. Bauerle. Therefore, Dr. Bauerle is entitled to a set-off for Grand Strand's settlement of the loss of consortium claim.

reached with Grand Strand. Specifically, by Order filed May 1, 2013, Judge Larry Hyman granted partial summary judgment to Grand Strand on the causes of action for vicarious liability and negligent hiring, supervision and training. Nonetheless, Judge Hyman did not dismiss the Greens' negligence cause of action which was the first cause of action alleged in the Fourth Amended Complaint where the very same allegations of negligence were alleged against all Defendants including Grand Strand and Dr. Bauerle. (R. 1-15).

The Greens also go to great lengths in an attempt to portray the Hospital's liability as limited to vicarious liability for the malpractice of Dr. Bauerle. Clearly, the first cause of action, which is the only claim (other than Mrs. Green's loss of consortium claim) that survived the partial summary judgment, is not pled as a vicarious liability claim. Instead, Grand Strand was sued for its direct negligence. (R. 36-39).

Further, applying the Greens' own reasoning, Grand Strand had been granted summary judgment on the vicarious liability claims based upon the expiration of the statute of limitations and statute of repose. Judge Hyman ruled as follows: "Grand Strand cannot be held vicariously liable for the acts or omissions of its independent contractor physicians – or any other independent contractors or employees for that matter – because both the statute of limitations and the statute of repose have expired as to Grand Strand's independent contractors and employees, none of whom have been named in any of the five versions of the

Complaint." (R. 3). To the extent that this ruling was correct, that would be inclusive of any vicarious liability claim attributable to the malpractice of Dr. Bauerle. Judge Hyman recognized that none of Grand Strand's independent contractors had been named as a party-defendant in any version of the Complaint. (R. 3). Implicit in that ruling is that Dr. Bauerle, who was named as a party-defendant, was not an independent contractor for whom Grand Strand could be vicariously liable. Hence, there was no vicarious liability claim pending, even one for Dr. Bauerle's conduct.

Nonetheless, the Greens are also mistaken in their suggestion that a set-off cannot be granted for monies paid in settlement by a party who is vicariously liable. As a procedural point, this argument was not raised in the trial court and cannot be asserted for the first time on appeal. The Greens never argued below that Grand Strand and Dr. Bauerle were not "joint tortfeasors." In addition, this issue was not addressed by Judge John in his order, and the issue was not included in the Greens' subsequent Rule 59(e) motion in order to obtain a ruling from the trial court.⁸ Thus, the issue is not preserved for appellate review.

⁸ The Supreme Court and this Court have repeatedly explained that an appellant cannot raise an issue on appeal that was not first raised to and decided by the lower court. In *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), citing *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d

On its merits as well, the argument fails. The Greens rely on this Court's decision in *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), which was never cited to nor addressed by Judge John. The Greens argue that *Andrade* stands for the proposition 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. In actuality, 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.

At any rate, even after the partial summary judgment was granted by Judge Hyman, Grand Strand remained liable for its direct negligence as pled in the first cause of action.⁹ Thus, Grand Strand continued to have liability exposure, which is further evidenced by Grand Strand's willingness to settle for \$2 million. That was

716, 724 (2000). "It is well settled that an appellate court cannot address an issue unless it was raised to, *and ruled upon by*, the trial court." *Id.* (Emphasis in original).

⁹ In their Rule 59(e) motion, the Greens acknowledged that, even after the partial summary judgment was granted, Grand Strand remained liable for the negligent failure to have "appropriate policies, procedures and protocols" in place. (R. 94). Dr. Bauerle submits that the remaining liability of Grand Strand was more extensive, but the Greens acknowledge some liability remained. The Greens then argue that there is no "overlapping negligence claims between Dr. Bauerle and Grand Strand." (R. 94). Even if that were true, it would not prohibit a set-off. As discussed at length above, such cases as *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012), have held that overlapping causes of action are unnecessary. What is required is that the "same injury" is alleged to have resulted from the tortious conduct of both the settling and non-settling parties. In the case at bar, that condition is met, and the set-off was proper.

not a gift to the Greens; it is fair to conclude that Grand Strand acknowledged that it continued to have substantial liability. Moreover, a review of the Covenants reflects that Grand Strand settled *all claims* with the Greens and not just the claims that remained after the partial summary judgment was granted. That would be inclusive of all direct and vicarious liability claims, including the negligent hiring and supervision claims.

As a corollary to that point, the settlement with Grand Strand occurred before any appeal rights were extinguished. The Greens still had the right until thirty days *after final judgment* was entered to appeal the grant of partial summary judgment by Judge Hyman,¹⁰ and as stated above, the Greens' settlement with Grand Strand was intended to and did extinguish all claims, direct and vicarious, against Grand Strand.

¹⁰ The Greens contend that the appeal rights were extinguished by the time the Covenants were executed by the Greens because the thirty days had passed from the filing of Judge Hyman's Order. That is not only incorrect, it is also legally immaterial. The Covenants are undated, but according to the Greens' brief, they were executed on May 31, 2013. *See*, Greens' Appellant's Brief, p. 18. Judge Hyman's Order was filed May 1, 2013, and the deadline to file an *interlocutory* appeal would run thirty days from the date of receipt of written entry of that order. Clearly, those thirty days had not elapsed by May 31, 2013. Nonetheless, it is undisputed that Judge Hyman's Order granted only partial summary judgment, and Grand Strand remained a party-defendant after the entry of that order. Therefore, like the appellant in *Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990), the Greens were entitled "under § 14-3-330(1), to wait until final judgment to appeal the summary judgment ruling against [them]." 393 S.E.2d at 179. Thus, the Green retained the right to appeal until thirty days after final judgment. At the time that the Covenants were executed, no appeal rights had been extinguished.

In sum, Judge John was correct in ruling that the settlement with Grand Strand was not for different causes of action than those litigated against Dr. Bauerle at trial.

IV. The trial court was correct in equitably allocating the settlements between the medical malpractice claim and the loss of consortium claim.

Lastly, the Greens contend that Judge John erred in allocating the settlements between the medical malpractice claim and the loss of consortium claim. Judge John recognized that the settlements between the Greens and Grand Strand and Carolinas Medical Response did not provide for a specific allocation of the settlement amounts between the medical malpractice and loss of consortium claims. Consequently, there was no allocation for the trial court to review and/or apply to effectuate the set-off. Thus, it became necessary for the trial court to determine an equitable allocation between the Greens' claims.

The Greens, however, contend that Judge John lacked the authority to allocate the settlements because the set-off was statutorily mandated under Section 15-38-50. They further argue that the trial court's allocation based upon the ratio established by the jury's verdict was inappropriate or otherwise unfair. Each of these issues will be addressed in turn.

South Carolina law recognizes that a trial court possesses "jurisdiction to set off one judgment against another [which] is equitable in nature and should be

exercised when necessary to provide justice between the parties." *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682, 688 (Ct. App. 2000). This Court has explained that "the reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong." *Id.* Under facts very similar to the present case, this Court in *Smalls* concluded:

Equity dictates Department be given a credit for the amount paid by the settling parties and thus, a double recovery is avoided. The settlement amount represents, in effect, the portion of total damages attributable to [the settling defendant].

528 S.E.2d at 688-689.

Nonetheless, the Greens argue that Judge John lacked the authority to allocate the settlements because the set-off was statutorily mandated under Section 15-38-50. There is no case law holding that a court cannot exercise its equitable authority to allocate settlement amounts where the set-off is required under Section 15-38-50. The Greens have certainly cited no such authority. To the contrary, in *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), this Court found that the set-off complied with Section 15-38-50. This Court also affirmed the trial court's equitable reallocation of the \$450,000 settlement between the survival action and the wrongful death action. Thus, a set-off under Section 15-38-50 did

not preclude the exercise of equitable authority to reallocate the settlement to effect "fairness and justice." 536 S.E.2d at 426.

The Greens also maintain that Judge John did not have the equitable authority to allocate what were previously unallocated settlement proceeds. The Greens appear to claim that a court has the authority to reallocate settlement proceeds differently than the parties to the settlement had allocated them; however, if the parties fail to allocate at all between two claims, then the court is powerless. Quite frankly, that is illogical.¹¹ As Judge John recognized, the South Carolina appellate courts have repeatedly authorized the equitable *reallocation* of settlements. *See, Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); *Rutland v. South Carolina Dept. of Transportation*, 400 S.C. 209, 734 S.E.2d 142 (2012); *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (Ct. App. 2014). Therefore, as Judge John concluded, "it logically follows that a court may make an

¹¹ That argument was rejected by the Supreme Court in a related context. In *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995), the Supreme Court addressed whether an underinsured motorist carrier was entitled to a set-off for the amount of the liability insurer's settlement with the plaintiffs. In *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), this Court relied on *Broome* and called it "[a] similar but not exact situation" as the entitlement of a set-off under Section 15-38-50. In *Broome*, the plaintiffs "argued[d] that because the settlement agreement did not provide for allocation of the damages award as between Mr. and Mrs. Broome, the set-off was improper." 461 S.E.2d at 49, n.4. The Supreme Court found that argument to be "without merit" and further explained that "[t]he lack of any allocation cannot be used to recover more than § 37-77-160 permits." *Id.*

equitable *allocation* in a case where the settling parties did not even agree to any particular allocation between them." (R. 22). (Emphasis in original).¹²

In arguing against the equitable allocation of previously unallocated settlement proceeds, the Greens rely primarily on the dissents in *Smith* and *Rutland*. Those arguments, however, have been previously rejected by the majority and do not require revisiting. Moreover, this case does not involve the revision of a prior settlement because the parties to the settlement -- the Greens and Grand Strand -- did not make any allocation between the malpractice claim and the loss of consortium claim; there is no revision or reallocation. Also, unlike in *Riley* or *Rutland*, both claims settled by Grand Strand were actually tried to a jury against Dr. Bauerle. Thus, there is not an allocation between one claim that was tried against the non-settling defendant and one claim that was not.¹³ Further, as

¹² The Greens' reliance on this Court's decision in *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999), is misplaced. That case involved a claim for contribution by a wood chipper retailer against the manufacturer. The retailer sought contribution for its settlement of a loss of consortium claim that had never been brought by the spouse against the retailer. However, the retailer settled the loss of consortium in an unallocated settlement with the injured husband and his wife. This Court did not allow the contribution action to proceed in the absence of an allocated settlement because the Court was unable to "determine whether [retailer] paid more than its pro rata share of liability to [the spouse]." 518 S.E.2d at 311. Unlike *Vermeer*, this case does not involve a contribution action or a determination whether one tortfeasor has paid more than its pro rata share of the common liability. Consequently, the Greens' suggestion that Judge John should have considered whether Dr. Bauerle has paid more than his pro rata share is absurd. Dr. Bauerle is not seeking contribution from Grand Strand; he is seeking the set-off mandated under Section 15-38-50.

¹³ In *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (Ct. App. 2014), the plaintiff settled both the survival action and the wrongful death action with one defendant before trial. Then, at trial, the plaintiff withdrew the survival claim and the jury returned a verdict only on the wrongful death claim. Similarly, in *Rutland v. South Carolina Dept. of Transportation*,

discussed below, the fairness of the allocation by Judge John cannot be reasonably challenged because he used the jury's determination of the value of the Greens' claims to establish the allocation. That was eminently fair, just and reasonable. Additionally, the suggestion that Dr. Bauerle unfairly benefits from the settlements is not sound because, in accordance with Section 15-38-50, Dr. Bauerle is barred by operation of law from seeking contribution from the settling defendants. The trade-off for extinguishing the settling defendants' exposure to a contribution action is the non-settling defendant's entitlement to a set-off. Finally, the Greens complain that Dr. Bauerle did not request that the settlements be allocated, but Dr. Bauerle was not a party to those 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).

Finally, the Greens argue that the Judge John's allocation based upon the ratio established by the jury's verdict was in error. 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

400 S.C. 209, 734 S.E.2d 142 (2012), the plaintiff settled with two defendants and allocated the settlement proceeds between the survival action and the wrongful death action. The plaintiff then proceeded to trial against SCDOT only on the wrongful death claim.

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).

Remarkably, the Greens argue 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 argue otherwise. They did not seek an additur or otherwise challenge the jury's verdicts as insufficient or improper. Under South Carolina law, "[j]uries are presumed and bound to follow the instructions of the trial judge." *Buff v. South Carolina Dept. of Transportation*, 342 S.C. 416, 537 S.E.2d 279, 284, n.4 (2000). In addition, 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). The Greens have not appealed any of Judge John's instructions on damages. They have now shown that he failed to charge some element of damages. Likewise, there are no elements of damages that were specifically excluded in or not covered by the Covenants executed by the Greens in favor of Grand Strand. Therefore, it is inappropriate for the Greens to now argue on appeal that the jury's verdicts did not fully compensate them for the medical malpractice and the loss of consortium claims. It is also incorrect for the Greens to take the position that the allocation based on the verdicts is unsupported by evidence.

Lastly, the Greens argue that there is no evidence that a set-off is necessary to prevent a double recovery. The Greens' total damages are established by the jury's verdicts for the reasons cited above. If the Greens receive the jury's verdict in addition to the settlement amounts from Grand Strand and Carolinas Medical Response, then that will constitute a windfall or double recovery. Those verdicts alone are sufficient evidence that a windfall will result. Consequently, the equitable allocation as determined by Judge John is required to prevent that windfall.

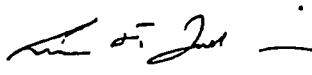
In sum, the equitable allocation of the settlement proceeds between two claims is permitted even when the set-off is mandatory under Section 15-38-50. Here, Judge John's reliance on the percentage of the total verdict given to each of the Greens by the jury to apportion the settlements between Mr. Green's claim for medical malpractice and Mrs. Green's claim for loss of consortium was fair, just, and reasonable. The equitable allocation should therefore be affirmed.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. respectfully request that the Court affirm the Order Granting in Part and Denying in Part the Motion for Set Off as issued by Circuit Judge Steven H. John, filed October 17, 2013, to the extent he granted a set-off for the settlement amounts paid by Grand Strand Regional Medical Center, LLC and Carolinas Medical Response, Inc.

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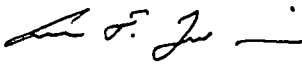
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November 20, 2014

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. certifies that the Final Respondent's Brief of Appellants-Respondents complies with Rule 211(b), SCACR.

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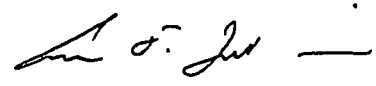
November 20, 2014

CERTIFICATE OF COMPLIANCE

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NOV 20 2014
SC Court of Appeals

The undersigned counsel for the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. certifies that the Final Respondent's Brief of Appellants-Respondents complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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November 20, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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.

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in denying a setoff to the Appellants-Respondents for the amount paid to Plaintiffs in settlement of the motor vehicle negligence and loss of consortium claims including the claims against the at-fault driver and the underinsured motorist coverage?

STATEMENT OF THE CASE

This is an appeal of the post-trial order of the Honorable Steven H. John, Circuit Court Judge in the Horry County Court of Common Pleas, Granting in Part and Denying in Part Defendants, Wayne B. Bauerle, MD, and Wayne B. Bauerle, MD, PC's, Motion for Set Off ("Setoff Order") dated October 16, 2013, the Order Denying Plaintiffs Motion to Alter or Amend Order Granting Partial Set-Off dated February 13, 2014, and the Order denying Defendant's Motion to Alter or Amend Order Granting Partial Set-off filed February 13, 2014. (R. pp. 1-15, 25).

This action arises from the negligent treatment of Respondents-Appellants-Plaintiffs, Randall M. Green ("Mr. Green"), and Ann Green ("Mrs. Green") (collectively "Plaintiffs"), by various medical providers at Grand Strand Regional Medical Center ("GSRMC"), including Appellants-Respondents-Defendants, Wayne B. Bauerle, MD, and Wayne B. Bauerle, MD, PC, (collectively "Bauerle") after Plaintiffs were injured in an automobile accident. (R. p. 117, lines 7-9).

Prior to filing the medical malpractice lawsuit, Mr. and Mrs. Green each settled with the at-fault driver. Mr. Green received \$100,000.00 under the at-fault driver's liability policy and \$150,000.00 in underinsured motorist coverage for injuries he sustained in the wreck. Mrs. Green received \$100,000.00 under the at-fault driver's liability policy and \$75,000.00 in underinsured motorist coverage for injuries she sustained in the wreck.

On May 30, 2005, Plaintiffs filed this action against Bauerle and Strand Orthopaedic Consultants, LLC. Plaintiffs amended the Complaint to add GSRMC and the ambulance carrier, Carolina Medical Response, Inc. ("CMR"), as defendants. Following

the receipt of a nominal payment in the amount of \$25,000.00, Plaintiffs released CMR from the action. Prior to trial, Plaintiffs dismissed all claims against Strand Orthopaedic Consultants, LLC. In their Amended Answer to Defendant GSRMC's Request to Admit, Bauerle admitted, "[t]he employees of Grand Strand Regional Medical Center did not proximately cause or contribute to the injuries and damages alleged to have been sustained by Plaintiffs in the Third Amended Complaint." (R. pp. 501-502).

Plaintiffs filed a separate suit against the Medical University of South Carolina ("MUSC") to recover damages caused by a sponge negligently left in Mr. Green's leg while obtaining treatment after leaving GSRMC, which gave rise to distinct and different injuries and causes of action. Plaintiffs settled with MUSC for \$160,000.00.

On October 15, 2012, Plaintiffs amended the complaint for the fourth time to add causes of action against GSRMC for vicarious liability under the non-delegable duty doctrine and negligent hiring, supervision and training. (R. pp. 32-44). Shortly thereafter, GSRMC filed a Motion for Partial Summary Judgment, and on April 18, 2013, the Honorable Larry B. Hyman, Jr. issued an Order Granting Defendant Grand Strand Regional Medical Center, LLC's Motion for Partial Summary Judgment ("Summary Judgment Order"). (R. pp. 1-15). The Summary Judgment Order dismissed the two new causes of action as to GSRMC thereby eliminating any vicarious liability under the non-delegable duty doctrine for Bauerle's malpractice. (R. p. 1). The Order further found that "[b]ecause the Plaintiffs are barred by the statute of limitations and the statute of repose from asserting a direct cause of action for medical malpractice against [GSRMC's] independent contractors and employees, [GSRMC] cannot be held vicariously liable for their acts or omissions." (R. p. 3).

On May 31, 2013, GSRMC and Plaintiffs executed a Covenant Not to Sue and Covenant Not to Execute Judgment ("Covenants"), in which GSRMC paid Plaintiffs the sum of \$2,000,000.00 as consideration for various terms, including Plaintiffs' agreement not to initiate or "prosecute any action... or execute on any judgment... against the Payer, by reason of the alleged negligence in Mr. Green's treatment." (R. p. 505). Bauerle, GSRMC, and Plaintiffs collectively executed a Stipulation of Dismissal with Prejudice as to GSRMC ("Stipulation"), which was filed on June 11, 2013, dismissing GSRMC from this lawsuit with prejudice. (R. p. 17).

The medical malpractice trial against Bauerle commenced on September 9, 2013. At the conclusion of the five-day trial, the jury returned a \$2,300,000.00 verdict on Mr. Green's medical malpractice cause of action and a \$550,000.00 verdict on Mrs. Green's loss of consortium cause of action. (R. pp. 29, 31). The verdict forms did not specify which damages were included or how the jury calculated the awards.

Subsequently, Bauerle filed a Motion and Memorandum of Law in Support of Defendants Bauerle and Strand Orthopaedic Consultants, LLC's Motion for Set Off ("Setoff Motion") seeking to set off Plaintiffs' Settlements from the at-fault driver, GSRMC, CMR and MUSC from the verdicts. (R. pp. 45-48). Plaintiffs responded in a timely filed Motion and Supporting Memorandum in Opposition asserting that Bauerele is not entitled to setoff. (R. pp. 49-91).

The Honorable Steven H. John granted the setoff only as to Plaintiffs' Settlements with GSRMC and CMR. (R. p. 4). Plaintiffs filed a Motion to Alter or Amend Setoff Order. (R. pp. 92-99). Bauerle filed a Motion to Alter or Amend Order Granting Partial Setoff. (R. pp. 100-101). By separate orders, the trial court denied both parties' motions,

reaffirming the previous Setoff Order *in toto* on February 13, 2014. (R. pp. 24-25).

Bauerle timely filed a Notice of Appeal on March 11, 2014. Plaintiffs timely filed a Notice of Appeal for the cross-appeal on March 17, 2014. (R. p. 506).

FACTS

In April 2004, Randall M. Green ("Mr. Green") was operating a vehicle in which Mrs. Green and their son, Mark Green, were riding when they were involved in a serious accident. All three passengers sustained serious injuries and were transported by Horry County Fire and Rescue from the scene to GSRMC in Myrtle Beach. (R. p. 136, line 13-p. 137, line 7). Mr. Green suffered multiple injuries including, but not limited to, a right forearm laceration, a right hip fracture and dislocation, and a closed head injury. (R. p. 485, lines 13-21). Additionally, he complained of sharp abdominal pain. (R. pp. 357).

When Mr. Green arrived at the hospital around 12:00 p.m., emergency room ("ER") physician, Dr. Scott Lintz, and GSRMC nursing staff assessed him. (R. p. 361; p. 432, lines 13-20). Mr. Green was able to communicate coherently, was able to move his legs, and had "normal sensation." (R. p. 343). He did not exhibit any "evidence of spinal cord problems" and "he was moving his legs fine" as "noted by multiple clinicians." (R. p. 486, lines 2-24). He was complaining of pain in his chest, arm, and hip. (R. p. 343). An EKG revealed some "non-specific" heart rhythm "abnormalities." (R. p. 344).

Dr. Lintz then contacted the hand surgeon on-call for the ER, Dr. Ralph Cozart, and the on-call orthopedic surgeon, Dr. Wayne Bauerle. (R. p. 434, line 17-p. 435, line 1). There is conflicting testimony as to whether the arm was bleeding during this time. (R. p. 234, lines 5-17; p. 264, lines 8-17; p. 312, line 8-p. 313, line 11; p. 441, line 22-p. 442, line 7). Approximately one hour after Mr. Green arrived at GSRMC, Dr. Cozart evaluated Mr. Green's right forearm laceration and determined that Mr. Green needed surgery. (R. p. 265, line 7-p. 267, line 3). Dr. Cozart testified that the arm was not bleeding when he examined it, and that the surgery was intended to re-establish blood

flow to the hand and could be performed within a four to six hour window. (R. p. 268, lines 2-4; p. 264, lines 8-17).

Dr. Lintz re-located Mr. Green's dislocated hip in the ER, noting that the patient was alert and felt improvement in his discomfort, before sending him from the ER to the Pre-Operative area ("Pre-Op") in preparation for surgery on his right arm. (R. p. 345; p. 447, lines 1-5). He then made a note that he had contacted Bauerle "a second time" regarding the hip injury and advised that he felt the surgery to repair Mr. Green's forearm was "better warranted than holding up the patient to get the hip CAT scan." (R. p. 345). According to Dr. Lintz, Bauerle disagreed and was "pretty adamant about getting the CAT scan of the hip first." (R. p. 345). Bauerle testified regarding this interaction stating, "I had no disagreement, I knew exactly what needed to be done, it's what I did." (R. p. 291, lines 15-20).

Bauerle testified that when he arrived at GSRMC he went straight to Pre-Op, where he saw Mr. Green for the first time and later noted that Mr. Green was "moving all four extremities," corroborating Dr. Cranberg's testimony that there was "zero evidence of any kind of spinal cord problem before the arrest." (R. p. 292, line 1-p. 293, line 2; p. 486, lines 23-24). Bauerle ordered Mr. Green to be taken back to the ER and then to CT immediately to obtain additional studies of his hip. (R. p. 419). Mr. Green was taken back to the ER, where a nurse recorded a blood pressure of 72/56 and heart rate of 135, noting that Bauerle was at bedside. (R. p. 365). Mr. Green was then sent to CT scan per Bauerle, who conceded he would not have made that decision if he had been aware of his vital signs. (R. p. 308, lines 18-22). He then admitted that he did not recall checking Mr. Green's chart before issuing that order. (R. p. 307, lines 10-15). Plaintiffs' expert,

vascular and cardiothoracic surgeon, Dr. Edd Chariker, testified that Bauerle “drastically” deviated from the standard of care by sending Mr. Green to CT Scan when he was “totally unstable” as indicated by his vital signs at that point in time. (R. p. 456, lines 5-16). Further, Bauerle testified that regardless of the CT results, he would not have performed the surgery to repair the acetabulum (hip socket) and there was no one at GSRMC who did that type of surgery. (R. p. 301, lines 3-23). Ultimately, Mr. Green’s hip repair was done at MUSC.

When Mr. Green left CT, rather than being taken back to Pre-Op for surgery, he was taken back to the ER to await the results of his CT Scan. (R. p. 473, lines 3-18). When Mr. Green was placed back on a heart monitor, it was discovered that his blood pressure and pulse were zero. (p. 197, line 5-p. 198, line 6; p. 365). Dr. Matza explained that “his blood pressure gave out and he arrested, which means his heart stopped.” (R. p. 197, line 5-p. 198, line 6). Dr. Lintz paged Dr. Peters, the anesthesiologist who had been with Mr. Green in Pre-Op, before intubating and attempting to resuscitate Mr. Green himself. (R. p. 419; p. 346; p. 446, lines 19-23). According to the resuscitation record, CPR ceased 26 minutes later. (R. p. 365; p. 488, line 23-p.489, line 5). Dr. Cranberg testified that during his arrest, Mr. Green’s “spinal cord suffered lethal damage.” (R. p. 489, lines 6-9). Mr. Green remained in critical condition in GSRMC’s Intensive Care Unit for the rest of the evening.

Although the parties dispute exactly how long Mr. Green’s cardiac arrest lasted, Plaintiffs’ expert, Dr. Cranberg, testified that an “inadequate supply of blood to the spine” can cause cell death in the spinal cord in “as little as a few minutes.” (R. p. 481, lines 11-14). Bauerle’s own expert, Dr. Charles Dorn Smith, testified that once Mr. Green

suffered a cardiac arrest, minutes and maybe even seconds could make the difference in Mr. Green's ability to walk. (R. p. 327, lines 12-23). Dr. Cranberg testified that, Mr. Green's "only problem with his spinal cord occurred after the cardio pulmonary arrest in the Grand Strand Hospital Emergency Room," concluding that "the spinal cord infarct and the various disabilities... were suffered during that arrest." (R. p. 484, lines 2-17).

The following day, Mr. Green was transported to MUSC in Charleston by EMS carrier, CMR. The nurse receiving him via stretcher from the ambulance noted that he was intubated, alert, following commands, and "unable to wiggle [his] toes." (R. p. 418). After he was admitted to MUSC on April 18, 2004, Mr. Green's paraplegia was diagnosed. (R. p. 417). According to trauma surgeon Dr. Norcross at MUSC, the cause of Mr. Green's paraplegia was a spinal cord infarction, stating "Mr. Green had an arrest at GSRMC, which almost certainly was the cause of the infarction of the spinal cord." (R. p. 449, lines 11-14). "It was our impression at the time and we can't find any other explanation for it." (R. p. 451, line 20-p.452, line 4).

Dr. Chariker testified that but for Mr. Green going to CT, the cardiac arrest would not have occurred. (R. p. 474, lines 5-8). Dr. Cranberg testified to a reasonable degree of medical certainty that the most probable cause of Mr. Green's paraplegia, loss of feeling from the belly button down, and various other injuries was the infarction suffered during the cardiac arrest. (R. p. 484, lines 2-17). Dr. Chariker testified that, in his opinion, Mr. Green is a paraplegic today as a direct result of deviations in the standard of care by Bauerle. (R. p. 479; lines 10-14).

ARGUMENT

I. THE COLLATERAL SOURCE RULE PROHIBITS SETOFF OF THE AMOUNT PAID BY THE AUTO INSURERS.

In his Initial Appellant Brief, Bauerle asserts that he is “entitled to a set-off for all of the amounts paid in settlement of the motor vehicle negligence and loss of consortium claims, including the amounts paid in settlement of the UIM claims.” (Appellant’s Initial Br., p. 10). However, South Carolina courts have long recognized the collateral source rule, which prohibits a wrongdoer from benefitting from compensation paid to an injured party by a source wholly independent from the wrongdoer. Young v. Warr, 252 S.C. 179, 165 S.E. 2d 797 (1969); Farmers Mercantile Co. v. Seaboard Air Line Railway, 102 S.C. 348, 86 S.E. 678 (1915). A source is wholly independent of the wrongdoer when the wrongdoer has not contributed to it and when payments to the injured party were not made on behalf of the wrongdoer. Citizens & S. Nat’l Bank of S.C. v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995); Mount v. Sea Pines Co., 337 S.C. 355, 357, 523 S.E.2d 464, 465 (Ct.App.1999). This rule clearly applies to underinsured motorist (“UIM”) proceeds. Estate of Rattenni v. Grainger, 298 S.C. 276, 379 S.E.2d 890 (1989); Pustaver v. Gooden, 350 S.C. 409, 414, 566 S.E.2d 199, 201-202 (Ct.App.2002). This rule applies, even if it results in the injured party recovering twice for the same loss. Rattenni, 778, 379 S.E.2d at 890. The policy rationale behind the collateral source rule is the premise that:

reducing recovery by the amount of the benefits received by the plaintiff would grant a windfall to the defendant by allowing a credit for the reasonable value of those benefits. Such credit would result in the benefits being effectively directed to the tortfeasor and from the intended party - the injured plaintiff. If there is a windfall, it is considered more just that

the injured person profit rather than grant the wrongdoer relief from full responsibility for the wrongdoing.

Bardsley v. GEICO, 405 S.C. 68, 78, 747 S.E.2d 436 (2013) (*quoting* 22 Am. Jur. 2d *Damages* § 392) (citations omitted).

Here, Bauerle seeks to reduce the amount of damages owed to the injured Plaintiffs by the amount of the underinsured benefits they received from their own UIM insurer. However, the South Carolina Supreme Court has repeatedly recognized that UIM benefits are a collateral source, wholly independent of the wrongdoer. Bardsley, at 81, 747 S.E.2d at 442 (citing Rattenni v. Grainger, at 278, 379 S.E.2d at 890).

In Estate of Rattenni, the Court made clear that an at-fault driver could not setoff the amount of UIM benefits received by an injured plaintiff from her own policy for which she paid the premiums. 298 S.C. at 277, 379 S.E.2d at 889. Similarly, Bauerle is a wrongdoer who did not contribute to the premium payments for the Green's UIM policy, and the benefits paid were not made on his behalf, or for his benefit. As Bauerle is a wrongdoer to whom the collateral source rule applies, and the Green's UIM insurer is by law a collateral source, the verdicts against Bauerle are not affected by any payment of UIM benefits to the injured Plaintiffs. Furthermore, as a matter of law, a UIM insurer is not a wrongdoer or tortfeasor pursuant to payment of UIM benefits. Bardsley v. GEICO, at 80, 379 S.E.2d at 442. Accordingly, the Green's UIM insurer could not be "liable in tort" to the Green's pursuant to § 15-38-50, and setoff of those payments is not mandated.

While it is well settled that payment from a joint tortfeasor does not qualify as a collateral source, Citizens & S. Nat'l Bank v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), in this case, the at-fault driver and Bauerle are not joint tortfeasors. In order to qualify as a joint tortfeasor exempted from the rule, the parties must be jointly and

severally liable in tort. Collins v. Bisson Moving & Storage, 332 S.C. 290, 306, 504

S.E.2d 347 (Ct.App.1998). Joint and several liability only arises when the tortfeasors are

liable in tort for causing the same injury. Id.

That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tortfeasors, even in the absence of community of design or concert of action, to a liability which is both joint and several, is a proposition recognized and approved in this state and supported by the great weight of authority elsewhere.

Id. (citing Rourk v. Selvey, 252 S.C. 25, 28, 164 S.E.2d 909, 910 (1968)).

The trial court found that the Settlements and verdicts involved different injuries. The evidence supports this finding and shouldn't be disturbed since the trial judge was in the best position to weigh the evidence as presented. Accordingly, there is no basis for a determination that Bauerle and the at-fault driver are jointly and severally liable in tort for any of the same injuries, and Bauerle is not entitled to benefit from payments made to the injured Plaintiffs from a source wholly independent from himself.

II. BAUERLE IS NOT ENTITLED TO SETOFF THE AUTO INSURERS' SETTLEMENTS BECAUSE THEY DID NOT INVOLVE THE SAME INJURIES AS THE JURY VERDICTS.

In his Initial Appellant Brief, Bauerle alleges that he is "entitled to a set-off for all amounts paid in settlement of the motor vehicle negligence and loss of consortium claims, including the amounts paid in settlement of the UIM claims." (Appellant's Initial Br., p. 10). In support of his position Bauerle alleges that "the paralysis and consequential damages, including Mrs. Green's loss of consortium, [are] a foreseeable and proximate result of the original injury which resulted from the motor vehicle accident," entitling him to a reduction of the verdicts in the total amount of the Settlements. (Appellants' Initial Br. p. 10). However, the trial court correctly found that Bauerle was not entitled to setoff

pursuant to S.C. Code Ann. § 15-38-50 because the Settlements with the auto insurers involved different injuries than the jury verdicts.

In 1988, the Uniform Contribution Among Tortfeasors Act (“UCATA”) codified a tortfeasor’s right to setoff in S.C. Code Ann. § 15-38-50, which Bauerle asserted as the basis for his motion. This section provides:

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...

S.C. Code Ann. § 15-38-50 (Supp.1998) (emphasis added).

Pursuant to this section, when one of two tortfeasors jointly liable in tort settles with an injured plaintiff, a verdict involving the same injury against the non-settling tortfeasor will be reduced by the amount paid in settlement for that same injury. “Therefore, before 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*.” Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct.App.2012) (emphasis added) (citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 406-07 (Ct.App.1998)). However, “[w]hen a prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law.” Smith, at 474, 724 S.E.2d at 191.

In support of his argument, Bauerle relies on a misapplication of the rule articulated in Graham v. Whitaker, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984) (“The 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.”). He asserts that Mr. Green’s “paralysis and consequential damages including Mrs. Green’s loss of consortium, were a foreseeable and proximate result of the original injury which resulted from the motor vehicle accident,” rendering the at-fault driver liable “for all of the injuries and damages claimed against Dr. Bauerle, including Mrs. Green’s loss of consortium.” (Appellant’s Initial Br. p. 10). Bauerle misinterprets the rule in Graham, to extend liability to the at-fault driver for the “additional injuries” caused by his own malpractice, asserting that he and the at-fault driver are thus “liable in tort for the same injury.” (Appellant’s Initial Br. p. 8-10).

Bauerle is not entitled to setoff the amount paid by the auto insurers for several reasons. *First*, the facts of this case do not meet the elements of the rule articulated in Graham. *Second*, the rule in Graham is not dispositive of whether the at-fault driver’s negligence was a proximate cause of the injuries included in the verdict against Bauerle. *Third*, there is no basis for concluding that the Settlements with the auto insurers were for the same injuries as the verdicts against Bauerle. *Fourth*, it cannot be concluded that the cardiac arrest and spinal infarction were caused by blood loss from a specific injury. *Finally*, there is no way for the Court to determine that the auto Settlements compensated the “same injury” as the verdicts because there is no evidence of what injuries were included in the Settlements or verdicts.

A. The facts of this case do not meet the elements of the rule articulated in *Graham v. Whitaker*.

In *Graham*, the plaintiff suffered a broken hip as a result of the negligence of her ophthalmologist and his employees. As a result of the surgery to repair her hip fracture, she suffered further serious injuries and complications, necessitating a second surgery to replace her entire hip. Recognizing that the majority of her injuries occurred during the surgery to fix the initial injury, the Court found that the negligence of the physician performing that surgery was reasonably foreseeable. Accordingly, it was not an intervening cause, which would have broken the chain of causation. The Supreme Court stated, “[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.” *Graham v. Whitaker*, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984) (emphasis added).

The general rule articulated in *Graham* is not applicable to the present case. As further set forth below, Bauerle’s assertion that the paralysis resulted from the forearm injury fails to provide the necessary causal link because (1) Mr. Green’s paralysis did not constitute an “aggravation of the [forearm] injury” but rather a distinct injury to an entirely different body system; (2) Plaintiffs did not select Bauerle to treat Mr. Green, and no one selected him to treat *any* injury at that point in time; and (3) there was no evidence that Bauerle aggravated the hip injury for which he was consulted. Accordingly, Bauerle’s interruption in Mr. Green’s treatment *was* an intervening act sufficient to break the chain of causation. However, the causal link between the injuries sustained in the accident and the spinal infarction and associated injuries has not been established.

1. *Mr. Green's paralysis did not constitute an "aggravation of the [forearm] injury" but rather was a distinct injury to an entirely different body system.*

In Graham v. Whitaker, the original injury to the plaintiff's hip was worsened by a subsequent surgery performed by a surgeon selected by the plaintiff to repair the original injury. As such, the rule in Graham considers an *aggravation* of the original injury as a part of the immediate and *direct* damages caused by that *same* injury. The rule cannot be applied to hold that an *additional* injury to an entirely *different* body system than the original injury is a part of the "immediate and direct" damages of the original injury. Additionally, the rule articulated in Graham does not state that it is foreseeable that a physician will interrupt and intervene in the treatment of the original injury, causing additional and more severe injuries to otherwise healthy body parts.

Here, Mr. Green's injuries following the car accident included, but were not limited to, a forearm laceration, a fractured and dislocated hip, and a closed head injury. (R. p. 349; p. 485, line 13-21). During her emotional testimony, Mrs. Green stated, "[m]y son and I came home with our injuries, and he should have too. He had a hurt hip and hand. At least he could walk, I have no doubt in my mind." (R. p. 191, lines 7-10). Expert testimony at trial confirmed that there was no evidence of damage to the spinal cord as a result of the accident or prior to Bauerle's interruption in Mr. Green's care. (R. p. 479, lines 7-22). Dr. Lee Cranberg testified, that there was no traumatic damage to the spinal cord in the accident. The reason Mr. Green has a spinal cord that is not working is because of the infarct that occurred during the arrest. His spinal cord was fine up until that arrest. (R. p. 487, lines 20-p. 488, line 5). At the conclusion of the trial, the jury found that Mr. Green's spinal injury was a direct and proximate result of Bauerle's

malpractice. Accordingly, Mr. Green's paralysis was not an aggravation of an existing injury, rather a new injury caused by Bauerle's interruption.

2. *The injured Plaintiffs did not select Bauerle, and no one selected him to treat the forearm injury, blood loss, or cardiac issues.*

The rule articulated in Graham v. Whitaker requires that an injured person use "ordinary care" in selecting a physician "for treatment of his injury." 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984). In order to satisfy this portion of the test, Bauerle asserts "no one has taken the position that Dr. Bauerle was not properly selected to tend to Mr. Green's orthopaedic care." (Appellant's Initial Br. p. 9). However, since neither injured Plaintiff selected Bauerle for treatment of his injuries, the test fails regardless of whether Bauerle was negligently selected by a third party or intervened on his own. Furthermore, there existed a factual issue at trial as to whether Bauerle consulted with any of the other involved physicians before he interrupted and redirected Mr. Green's treatment course. (R. p. 468, line 18-p. 469, line 3; p. 473, line 19-p. 474, line 1). Dr. Cozart, the plastic surgeon who was preparing to perform surgery on Mr. Green's forearm testified that he did not speak to Bauerle, and Bauerle testified that he did not recall speaking to the trauma surgeon, Dr. Nicholson. (R. p. 279, lines 5-22; p. 308, lines 8-17; p. 320, line 19-p. 321, line 10).

Not only did Plaintiffs not select Bauerle, no one selected him to treat the forearm injury, blood loss, spinal injuries, or cardiac issues. In fact, Bauerle testified that he does not resuscitate patients, stating, "I stay away. That is not what I do as an orthopaedic surgeon." (R. p. 295, lines 5-24). Finally, Bauerle was not selected by anyone to provide treatment for any injury at the time he removed Mr. Green from Pre-Op. Rather, he deliberately ignored Dr. Lintz's warning and unilaterally interrupted the treatment of an

injury for which he was not consulted, and that he was "adamant" about delaying. (R. p. 300, lines 9-17). The rule in Graham was certainly not intended to permit a reduction of a verdict against a physician whom the injured person has never met, particularly where that physician interrupted the patient's treatment course over the objection of the *treating* physician and without consulting the other physicians involved in the care at that time.

3. *The medical malpractice cause of action was not based on evidence that Bauerle further injured or "aggravated" the hip injury for which he had been consulted.*

There was no evidence that blood loss from the hip contributed to the cardiac arrest. Bauerle mischaracterizes Dr. Matza's testimony to support his position that Mr. Green's paralysis is part of the consequential damages from the injuries sustained in the accident. Specifically he asserts, "Dr. Matza testified that Mr. Green had lost a 'sizeable amount of blood' from the right forearm laceration and from the fractured hip."

(Appellant's Initial Br. p. 9). While Dr. Matza stated that, although the hip fracture would have bled based on his experience, he testified that there is no way of documenting how much blood Mr. Green lost in that hip, and did not testify that such bleeding was continuing at the time Bauerle intervened. (R. p. 212, line 23-p. 213, line 9). Furthermore, Dr. George Nicholson, testifying on behalf of Bauerle, indicated that his review of the radiology studies indicated only a small amount of blood in Mr. Green's hip socket. (R. p. 233, lines 10-20). Additionally, Dr. Matza testified that the reason Mr. Green was in Pre-Op when Bauerle arrived and removed him was because of the forearm laceration, not the hip injury. (R. p. 195, lines 6-14).

Dr. Matza stated that the bleeding from the forearm was the cause of Mr. Green's low blood pressure, and that the *arm* had been bleeding for about two and half hours at

the time Bauerle interrupted the treatment thereof. (R. p. 195, lines 15-24). He testified that Mr. Green had a normal hematocrit of 41 at the time he arrived at the hospital but, that at the time of the cardiac arrest it had dropped to 17, and that Mr. Green “actually suffocated.” (R. p. 197, line 17-p. 198, line 6). Dr. Matza’s opinion was that the blood loss that occurred during this time was the cause of the cardiac arrest, but he did not testify that the hip bled during this period. (R. p. 197, line 17-p.198, line 6; p. 257, lines 15-24). In fact, he explained that the hip fracture would have stopped bleeding once the pressure in the tissue surrounding it equalized with the pressure inside the bleeding vessels, but did not indicate how long this would have taken. (R. p. 212, lines 15-22). Dr. Matza did not testify that bleeding from the hip contributed to the “sizeable amount,” or approximately eight units, of blood lost from the time of arrival at the hospital until the time of the cardiac arrest. (R. p. 197, line 17-p. 198, line 6). Accordingly, there is no evidence that the hip injury that Bauerle was consulted to treat caused sufficient blood loss to cause further injury, much less a cardiac arrest, spinal cord infarction, or paralysis.

B. The rule in *Graham v. Whitaker* is not dispositive of whether the at-fault driver’s negligence was a proximate cause of the injuries included in the verdict against Bauerle.

Bauerle asks this Court to make a determination that the at-fault driver was liable for “all of the injuries and damages alleged against Dr. Bauerle” because Bauerle’s negligence was foreseeable and thus not an intervening act. (Appellant’s Initial Br. p. 10). His argument that the original tortfeasor is liable for “all of the injuries” where the original injury required treatment and “the medical care as provided resulted in additional injuries” does not refute the trial court’s finding that the Settlements compensated different injuries than the verdicts. (Appellant’s Initial Br. p. 8-9). Yet Bauerle asserts

“[i]n short, Judge John committed an error of law in concluding that the injuries resulting from the alleged malpractice were not the ‘same injuries’ for which the at-fault driver was also liable”, suggesting that the rule in Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984), can be extended to find that the at-fault driver was also liable for these “additional injuries,” bypassing the basic requirement of proving proximate causation. Bauerle’s proposition ignores the fact component of the intervening negligence pursuant to which the trial judge determined that there were different injuries not subject to setoff.

Bauerle misapplies the rule in Graham by confusing the purpose it served in that case. In Graham, the Supreme Court references the rule cited by Bauerle in response to the original tortfeasor’s affirmative defense of intervening third-party negligence. The Court held that the negligence of a third party physician was foreseeable, thus it was not presumptively an intervening act sufficient to break the chain of causation and relieve the original tortfeasor from liability. Graham, 282 S.C. at 399, 321 S.E.2d at 44. The Court further held that the issue of proximate causation with regard to the original tortfeasor was still a jury question because the evidence was susceptible to more than one interpretation. Id. 282 S.C. at 400, 321 S.E.2d at 44. Accordingly, the Court did not apply the rule in a manner to impose liability on the at-fault driver “for all injuries and damages claimed against Dr. Bauerle, including Mrs. Green’s loss of consortium.” (Appellant’s Initial Br. p. 10). The holding made very clear that proximate cause remained a jury question and accordingly the failure of the defense of third party intervening negligence was not utilized as a basis for *imposing* liability for any injury. Id. This rule does not become the test of proximate causation; therefore, it cannot be used in the present case to determine whether the at-fault driver’s negligence, as the original tortfeasor, was a

proximate cause of any of the injuries alleged in the medical malpractice trial against Bauerle, the second tortfeasor, because Bauerle's negligence may still be factually determined to be an intervening cause even though it is foreseeable.

At times, the proximate cause analysis of intervening actors is phrased in terms of whether the intervening act was a "superseding cause" or an "independent cause." With this terminology, it is said that the original act is not a proximate or independent cause if a superseding cause is involved. This approach is simply a restatement of the issue in different language, not a test of proximate cause.

E.P. Hubbard & R.L. Felix, *The South Carolina Law of Tort*, (3d.ed. 2004) (citing Restatement (Second) of Torts § 440), *construed in Matthews v. Porter*, 239 S.C. 620, 124 S.E.2d 321 (1962), *see also Shepard v. South Carolina Dep't of Correc.*, 299 S.C. 370, 375, 385 S.E.2d 35 (Ct.App.1989).

To apply the rule as Bauerle suggests, as a means to extend liability to the at-fault driver "for all injuries and damages claimed against Dr. Bauerle, including Mrs. Green's loss of consortium", would fundamentally change the causation analysis underlying our current tort system. (Appellant's Initial Br., p. 10). Additionally, ignoring the *analytical* context in which the rule has been applied and repurposing it as a *test* for establishing proximate causation fails to consider the extent of Bauerle's liability for the injuries caused by his intervention. Graham does not answer the question of whether or not medical negligence is an intervening cause, but rather stands for the proposition that absent a finding that the medical negligence does constitute an intervening cause, the medical negligence is foreseeable and relates back to the original tortfeasor.

Liability can only exist if negligence is a proximate cause of the injury.

Hanselmann v. McCardle, 275 S.C. 46, 48-49, 267 S.E.2d 531, 533 (1980). Graham cannot be used to prove proximate cause. There have been no findings or admissions that

the at-fault driver's negligence proximately caused Mr. Green's cardiac arrest, spinal infarction, or associated injuries, rather it was the interruption in treatment.

"It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence." Mellen v. Lane, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (2008). Proximate cause requires proof of both causation in fact and legal cause. Young v. Tide Craft, 270 S.C. 452, 462, 242 S.E.2d 671, 675 (1978). Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Id. Legal cause is proved by establishing foreseeability. Mellen, at 278, 659 S.E.2d at 245. However, foreseeability is clearly not the only element requisite to a finding of liability for an injury. "Legal cause is ordinarily a question of fact for the jury." Id. at 279, 659 S.E.2d at 246. "Only when the evidence is susceptible to only one inference does it become a matter of law for the court." Id. Even if Bauerle's negligence was foreseeable under the rule articulated in Graham v. Whitaker, the trial court could not conclude that the at-fault driver's negligence proximately caused the cardiac arrest, which caused the spinal infarction that caused the injuries alleged to have resulted therefrom. Clearly there is more than one reasonable inference that can be drawn from evidence that a car accident occurred, or from evidence that the at-fault driver accepted liability for one or more injury sustained in that accident. As set forth in further detail below, there is evidence that Mr. Green had heart abnormalities on arrival at the hospital and there was conflicting evidence as to what caused the cardiac arrest. Additionally, the jury did not find that any injuries sustained in the accident caused the cardiac arrest, or that it would not have occurred but for the accident. (R. p. 28).

In the present case, the trial judge heard all of the evidence regarding the injuries Plaintiffs sustained as well as the nature of Bauerle's conduct. At this juncture the trial judge was the judge of the facts and the law as to setoff and he correctly found that "[b]ecause [the] settlements involved different injuries, this Court rules that those settlements are not subject to setoff." (R. p. 4). Clearly, he was in this best position to make this determination having heard all the evidence and having assessed the credibility of the witnesses. Bauerle did not request that the trial judge make any further findings of fact, nor did he 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. (R. p. 332, lines 15-23; pp. 429-430). Additionally, the paralysis and catastrophic injuries Mr. Green suffered as a result of Bauerle's interruption cannot reasonably be interpreted as a continuation of damages arising out of his hip injury, which could have led to arthritis if left untreated. (R. p. 304, line 21-p. 305, line 2). There is no evidence upon which the trial court could conclude that the injuries resulting from Bauerle's interference in Mr. Green's care were a foreseeable consequence of the at-fault driver's negligence.

The suggestion that the purely analytical concept of foreseeability could be repurposed as a purely mechanical test of causation to determine for what damages someone can justifiably be held liable ignores the jury's role as the fact finder as well as the policy reasons for imposing the burden of proximate cause. Hubbard & Felix, supra, at 150, 156 (citing W. Keeton, et al., Prosser & Keeton on the Law of Torts 297-300 (5th ed. 1984)). Specifically, public policy requires that the nature of a tortfeasor's wrongdoing be considered in analyzing the extent of his or her liability. Hubbard & Felix, supra, at 156; *see also Gossett v. Burnett*, 251 S.C. 548, 164 S.E.2d 578 (1968)

(Littlejohn, J., concurring). Recognizing this common sense principle, South Carolina courts have considered the nature of the subsequent negligence in creating an exception to the general rule that an original wrongdoer remains liable for an injury resulting from the foreseeable acts of a third party. Young v. Tide Craft, 270 S.C. 452, 242 S.E.2d 671 (1978).

In Young v. Tide Craft, the decedent took his boat to a repairman for rewiring. The repairman did not have sufficient cable to repair the system so he spliced in a portion of new cable to replace the frayed portion, the failure of the splice resulted in the decedent's fatal accident. He admitted that his repair rendered the boat "operable" but "dangerous." Id. at 460, 242 S.E.2d at 674. The Court stated "Tide Craft cannot be held liable since the intervening acts of [the repairman] constitute, as a matter of law, the sole proximate cause of the disengagement of the steering wheel." Id. at 460-61, 242 S.E.2d at 675. The opinion noted that the only reasonable inference to be drawn from the evidence was that the repairman's negligent repair was not foreseeable because he knew that splicing was "inherently dangerous" and "not advisable." Id. at 264, 242 S.E.2d at 676. The Court found that there was a high improbability that a repair would be effected in such a manner as it was common knowledge in the trade that splicing was unsafe and far removed from good practice; therefore, the repairman's actions were deemed "highly remote." Id. at 264-65, 242 S.E.2d at 676. After considering the remoteness of the possibility that the repair would be conducted in such a manner as well as the repairman's awareness of the danger, the Court concluded that "it cannot be seriously contended that [the repairman's] actions were a probable consequence on the part of Tide Craft." Id. at 465, 242 S.E.2d at 677.

Similarly, Bauerle knew the danger involved in interrupting the treatment of a patient in Mr. Green's unstable condition. (R. p. 308, lines 18-22). He was negligent, not in his treatment of any injury, but in removing an unstable patient from the care of other physicians without first checking the vital signs. (R. p. 307, lines 6-9). Additionally, he made this decision despite Dr. Lintz's warning that Mr. Green was not stable enough for a CT scan. (R. p. 345). By his own testimony, Bauerle admitted that he did not know Mr. Green's blood pressure when he ordered him to CT. (R. p. 308, line 23-p.309, line 1). He testified that had he known Mr. Green's vital signs, he would not have sent him to CT. (R. p. 308, lines 18-22). His own expert testified that it is the responsibility of a physician to know the condition of a patient before issuing orders. (R. p. 322, lines 14-23).

As in Tide Craft, Bauerle clearly realized the "inherently dangerous" nature of his decision. It is common knowledge in the trade that removing a patient from Pre-Op with a blood pressure of 72/56 and with a heart rate of 135 is "far removed from good practice." (R. p. 199, lines 1-11; p. 308, lines 18-22; p. 459, line 11-p. 460, line 7). Expert testimony was presented at trial indicating that this was a drastic deviation from the standard of care. (R. p. 456, lines 5-10). Additionally, Bauerle had been warned of Mr. Green's condition by Dr. Lintz, and Dr. Smith's testimony confirmed the old surgical adage "never argue with the doctor looking at the patient." (R. p. 324, line 20-p.325, line 25). Therefore, the likelihood of Bauerle's conduct was "highly remote," and it cannot be seriously contended that his actions were a probable consequence of the at-fault driver's negligence. The Court in Tide Craft further found that the only reasonable inference to be drawn from the evidence was that the manufacturer's defects would have only caused an inability to manipulate the steering stick; death would not have occurred in the natural

course as a result. Tide Craft, at 465-66, 242 S.E.2d at 677. Here, 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. (R. p. 474, lines 5-8). Bauerle's interruption in Mr. Green's treatment was inherently dangerous, not advisable, and highly improbable that a physician would interrupt Mr. Green's treatment because it was common knowledge among the testifying physicians that removal of an unstable patient from Pre-Op was unsafe and far removed from good practice.

C. **There is no basis for concluding that the Settlements with the auto insurers were for the same injuries as the verdicts against Bauerle.**

South Carolina Cases involving setoff wherein the courts have either reallocated settlement proceeds between causes of action or determined what injuries were involved in a settlement in order to determine whether setoff was appropriate involve facts where a lawsuit has been filed against the settling party so it is clear what claims the plaintiffs alleged against that party. See, e.g., Riley v. Ford, Op. No. 5195 (S.C.Ct.App. Filed Feb. 5, 2014); Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct.App.2012); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000); Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct.App.2000); Ellis v. Oliver, 335 S.C. 106, 473 S.E.2d 793 (Ct.App.1999); Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998); Ward v. Epting, 290 S.C. 547, 352 S.E.2d 867 (Ct.App.1986). Of note, in Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 212, 734 S.E.2d 142, 143 (2012), a setoff was granted to reduce the amount of a jury verdict by the amount paid by an automobile insurer for an at-fault driver against whom no lawsuit was apparently filed. However, that settlement had been previously allocated almost entirely to a wrongful death cause of action and approved by the trial court. Id. at 217, 734 S.E.2d at 145-46. Accordingly, it

was clear which injuries that settlement included, and those funds were not reallocated. The Court did permit a reallocation of the settlement proceeds paid by another defendant against whom a lawsuit *had* been filed. Id.

Distinguishing this case from the majority of the cases permitting setoff is the fact that it does not involve a wrongful death or survival cause of action, where specific damages recoverable for a single bodily injury, i.e. a death, are at issue. See, e.g., Riley v. Ford, Rutland v. S.C. Dep't of Transp., Ellis v. Oliver and Welch v. Epstein (citations omitted). This case involved multiple extensive physical injuries that resulted in additional damages and injuries recoverable against the at-fault driver under various causes of action that were never asserted and thus remain indeterminable. The facts do not involve a single injury represented by a clearly definable economic loss recoverable under known causes of action settled or tried as in Smith v. Widener. Accordingly, there was no supporting evidence or deductions from which the trial court could logically determine what specific injuries were or could have been included in the Settlements. Furthermore, the sheer number of injuries alleged in this case makes it impossible to determine what was included in the verdicts, and Bauerle did not object when the trial judge declined to utilize a verdict form specifying same. (R. p. 332, lines 15-23).

In order to apply a setoff, the court would first have to determine what injuries were included in the Settlements, which were paid to multiple Plaintiffs who sustained multiple physical and non-physical injuries, none of which were subject to the litigation against Bauerle. In order to determine the applicability of § 15-38-50, the court would then need to determine whether any of those same injuries were included in the jury verdicts and, if so, how the jury calculated those awards. While the Settlements might

be sufficient to establish the driver was at a least partially liable for causing the accident, there is no basis for finding him liable for any specific injuries without any evidence that they were included in the Settlements. Furthermore, there were multiple extensive physical and non-physical injuries alleged to have resulted from the spinal cord infarction aside from Mr. Green's paralysis, and the jury did not reveal which injuries were encompassed in either award. (R. p. 28-31).

D. It cannot be concluded from the jury's verdicts that blood loss from a specific injury caused the cardiac arrest or spinal infarction, and the medical malpractice verdict was not dependent on same.

Bauerle's assertion that Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984), extends liability for "all of the injuries and damages claimed against Dr. Bauerle, including Mrs. Green's loss of consortium," partially depends on a finding that blood loss from the forearm and hip injuries caused the cardiac arrest which caused the spinal cord infarction and paralysis. (Appellant's Initial Br. p. 10). While both parties presented theories as to the specific cause, i.e. whether Bauerle's negligence caused a delay in treatment for blood loss or a delay in treatment of a cardiac event stemming from a pre-existing condition, the jury verdicts were not dependent on making that determination. Rather, the verdicts merely depended on the finding that his interruption of the treatment was negligent and that it caused injury. (R. p. 28).

The only findings necessary to sustain the medical malpractice verdict against Bauerle were that (1) Mr. Green was unstable at the time Bauerle removed him from Pre-Op; (2) such removal was a deviation from the standard of care; and (3) the removal from Pre-Op proximately caused the spinal cord infarction. (R. p. 456, lines 5-16; p. 460, lines 14-24). Additionally, the verdict could be sustained by findings that (1) Mr. Green was

unstable at the time he was returned to the ER; (2) the decision to send an unstable patient to CT at that point, rather than back to Pre-Op, was a deviation from the standard of care; and (3) this deviation proximately caused the spinal cord infarction. (R. p. 216, line 6-p. 218, line 22). As set forth below, such findings are not dependent on the *cause* of the instability or cardiac arrest. Rather, the *response* to, and *duration* of, the arrest are critical as to whether a spinal cord infarction will occur as well as the extent of damage that is done. (R. p. 480, line 14-p.482, line 21).

Bauerle testified that when he arrived at GSRMC just before 2:00 p.m., he went straight to Pre-Op, where he saw Mr. Green for the first time. (R. p. 292, lines 1-5; p. 299, lines 11-13). Dr. Peters, the anesthesiologist who would later be paged to the ER to emergently insert arterial lines necessary to resuscitate Mr. Green, was already present in Pre-Op at that time. (R. pp. 346, 365, 419). Despite clear signs that Mr. Green was unstable, Bauerle ordered him removed from Pre-Op and taken back to the ER, and then for a CT scan. (R. p. 419; p. 309, lines 2-23). Plaintiffs alleged that Mr. Green exhibited signs of distress at this point and should not have been removed from Pre-Op, particularly after Dr. Lintz's protest and without further examination or inquiry into his condition.

Mr. Green was taken back to the ER, where a nurse recorded a blood pressure of 72/56 and heart rate of 135, noting that Bauerle was at bedside. (R. p. 365). Mr. Green was then sent to CT scan per Bauerle, who conceded he would not have sent him for the CT scan if he had been aware of his vital signs. (R. p. 308, lines 18-22). He then admitted that he did not recall checking Mr. Green's chart before issuing that order. (R. p. 307, lines 6-15). Plaintiffs' expert, vascular and cardiothoracic surgeon, Dr. Edd Chariker, testified that Bauerle "drastically" deviated from the standard of care by sending Mr.

Green to CT Scan when his vital signs indicated that he was “totally unstable.” (R. p. 456, lines 5-16). Plaintiffs’ expert, orthopaedic surgeon Dr. Matza, testified that “there are critical moments in everything we do and this happened to be one of them.” (R. p. 196, lines 15-23). Dr. Cozart, who was called by Bauerle, conceded that Mr. Green’s vital signs in the ER were not stable and that he would have deferred a CT scan on an unstable patient. (R. p. 280, lines 8-15; p. 281, lines 3-10).

Dr. Chariker testified that he believed blood loss had “a great deal” to do with the cardiac arrest, however, the *location* away from Pre-Op at the *time* of the arrest was the critical causative factor. (R. p. 462, line 22- p. 464, lines 2-17; p. 479, lines 7-22). He explained that Bauerle diverted Mr. Green away from Dr. Peters who would have probably prevented the arrest by properly resuscitating him based on his eventual response to the code. (R. p. 346; p. 463, lines 4-25). Bauerle conceded that Dr. Peters wasn’t present in the ER to assist until “further into the resuscitation process.” (R. p. 294, line 8-p. 295, line 4). Dr. Matza testified, “you don’t perform procedures on people who aren’t stable,” and “you need to stabilize them first.” (R. p. 198, lines 7-25). Dr. Matza further testified that Bauerle deviated from the standard of care in not making himself aware of Mr. Green’s vital signs or communicating with the other doctors before ordering a CT Scan. (R. p. 199, lines 1-11). According to Dr. Matza, Mr. Green’s vitals were not being monitored when he was taken to CT, and there was “no way” to control them during this time. (R. p. 199, line 12-p. 200, line 1). He stated that, if Mr. Green had remained in Pre-Op, his vitals signs could have been monitored and controlled, and his bleeding stopped. (R. p. 199, line 12-p. 200, line 1). Bauerle conceded that vital signs can not be monitored while in CT. (R. p. 297, lines 104). Dr. Chariker testified that, if Mr.

Green had been in Pre-Op or the OR, "... with greater than 51 percent certainty, I would be willing to say the arrest could have been prevented." (R. p. 463, lines 12-19). In other words, it doesn't matter *why* Mr. Green's heart stopped. The only finding critical to prove proximate cause is that either it would not have stopped, or it would not have stopped for as long, but for Bauerle removing Mr. Green from Pre-Op.

Accordingly, Bauerle deviated from the standard of care in removing an unstable patient from an area where he was being closely monitored by people who could, and eventually did, resuscitate him in a timely manner. (R. p. 295, lines 10-24). Dr. Chariker testified that Mr. Green is a paraplegic as a direct result of deviations in the standard of care by Bauerle. (R. p. 479, lines 10-14). When asked if Mr. Green was paralyzed solely as a result of Bauerle's malpractice, Dr. Chariker stated, "I think there were other factors involved, certainly, but I think that that one decision was the thing that probably tipped the scale." (R. p. 479, lines 15-22).

Regardless of whether Bauerle *caused* the arrest or *prolonged* the amount of time the spine was deprived of blood, the jury found that he deviated from the standard of care, and that his deviation proximately caused Mr. Green damages in the amount of \$2,300,000.00 and Mrs. Green damages in the amount of \$550,000.00. (R. pp. 88-91). The jury did not determine the cause of the cardiac arrest or specify what damages or injuries were included in those verdicts. According to Dr. Cranberg, the *degree* and *duration* of an ischemic event determines whether an infarction will occur as well as the extent of the damage done thereby. (R. p. 481, line 4-p.482, line 21). Accordingly, the injuries resulting from the infarction would have depended on the amount of time the jury

believed Bauerle's negligence prolonged Mr. Green's arrest, whether it be the entire duration or a portion thereof.

Bauerle asserts that Plaintiffs' theory, that blood loss from the arm caused Mr. Green's cardiac arrest, is sufficient to establish the at-fault driver's liability for the spinal cord infarction and resulting paralysis. However, the *cause* of the arrest is not requisite to establish the elements of medical malpractice, and there was no finding that the cardiac arrest resulted from blood loss or from an injury for which the at-fault driver was liable. The jury could have believed testimony by Bauerle's experts that neurogenic shock caused the cardiac arrest, and still found that (1) Bauerle deviated from the standard of care because Mr. Green was exhibiting signs of instability when he was sent to CT; (2) a cardiac arrest, or a spinal infarction, is a foreseeable consequence of this deviation; and (3) either the cardiac arrest would not have occurred, the spinal cord infarction would not have occurred, or all of the additional injuries alleged to have resulted from that infarction would not have occurred if Bauerle had not issued that order.

Both parties presented theories as to the causes of Mr. Green's instability and subsequent cardiac arrest at trial; however, these issues were not dispositive of whether Bauerle deviated from the standard of care, whether that deviation caused the spinal cord infarction, or what injuries resulted from that infarction. (R. p. 210, lines 5-8; p. 237, lines 1-17; p. 238, lines 3-17; p. 270, lines 18-22; p. 277, lines 3-11; p. 284, lines 3-22; p. 315, lines 7-22; p. 317, line 21-p. 318, line 15; p. 460, lines 14-24; p. 462, lines 2-16). Dr. Chariker testified that, so many things went "awry," that it is hard to determine that one thing was caused Mr. Green's instability at the time Bauerle sent him to CT. (R. p. 465, lines 9-20). Furthermore, the jury could have discounted theories asserted by both parties

as to the cause of the arrest, and determined that it was unrelated to injuries sustained in the accident, as supported by evidence that the EKG on admission showed Mr. Green's heart exhibited "non specific ST/T wave abnormalities with no evidence of acute ischemia." (R. p. 344). Additionally, Dr. Matza testified that there was "no way" to determine if the cardiac arrest was inevitable. (R. p. 215, lines 2-6). Finally, Bauerle's argument, that blood loss from the arm caused the cardiac arrest which caused the spinal cord infarction, directly conflicts with his position at trial that there was no bleeding from the arm.

E. **There is no way for the Court to determine the auto Settlements encompassed the "same injury" as the jury verdicts against Bauerle because no evidence exists as to what injuries were encompassed by the Settlements or the verdicts.**

A right to setoff only arises under S.C.Code Ann. § 15-38-50 when a prior settlement was "... paid to compensate the same plaintiff on a claim for the same injury." Smith v. Widener, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct.App.2012) (emphasis added) (citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998)). When a prior settlement involves compensation for a different injury than the one tried to verdict, there is no setoff as a matter of law. Smith, at 472-473, 724 S.E.2d at 191. In Hawkins, the Court of Appeals overturned a trial court's setoff of a Georgia wrongful death lawsuit against a jury verdict in a South Carolina wrongful death case. Despite the fact that both causes of action arose out of the same death, the Court noted that the economic value compensable under each was the only mutual element of damages correlating to the same injury, i.e., a pecuniary loss; accordingly, the term "injury" was not so broad as to encompass all damages arising out of the same death. Id. at 114-15, 498 S.E.2d at 191. With the exception of Ellis v.

Oliver, 335 S.C. 106, 473 S.E.2d 793 (Ct.App.1999), which was distinguished as inconsistent with other holdings in Smith v. Widener, 397 S.C. at 481 n. 1, 397 S.E.2d at 195 n.1, courts applying the same analysis have repeatedly refused to interpret all damages arising out of a physical injury to be part of that same injury. See, e.g., Rutland v. S.C. Dep't. of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012); Riley v. Ford, Op. No. 5195 (S.C.Ct.App. filed Feb. 5, 2014); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). Furthermore, as made clear in Smith v. Widener, 397 S.C. at 481 n. 1, 397 S.E.2d at 195 n. 1, § 15-38-50 intends the term injury to apply equally to *non-physical* losses or invasions of interest.

Here, Mr. Green suffered innumerable *physical* injuries, distinct from his paralysis, as a result of his spinal cord infarction. (R. pp. 494-498). Clearly, multiple physical injuries are distinct injuries as intended by § 15-38-50 in light of case law distinguishing *non-physical* personal injuries from the *physical* injury out of which they arise. See Hawkins, 330 S.C. at 113-115, 498 S.E.2d at 407. Additionally, each Plaintiff suffered such non-physical personal injuries as a result of each physical injury Mr. Green sustained. Consistent with the trial court's finding that the Settlements with the auto insurers "do not concern the same injury" as the verdicts in the medical malpractice trial, many of the injuries alleged to have resulted from the spinal infarction did not even exist at that time. (R. p. 222, line 17-p. 223, line 3, p. 226, lines 6-24). Not only has Bauerle not offered any evidence to support a contrary finding, he rests on the assertion that the foreseeability of his own conduct imposes liability on the at-fault driver for *all* injuries. However, the issue of whether he is entitled to setoff does not depend on for what injuries the at-fault driver *could* have been liable. Rather, the issue before this Court is whether

the Settlements with the auto insurer involved the same injuries as the verdicts. S.C.Code Ann. § 15-38-50 *construed in* Smith, 397 S.C. at 472, 724 S.E.2d at 190.

South Carolina Courts do not interpret § 15-38-50 to define all damages “naturally flowing” from an original injury to be a single, indivisible injury. Smith, 397 S.C. at 472, 472 S.E.2d 190. There is no way for the court to determine that the auto Settlements encompassed the “same injury” as the jury verdicts against Bauerle because no evidence exists as to what injuries were encompassed by either the Settlements or the verdicts. However, even if the forearm and hip injuries *were* included in the Settlements, they are still distinct injuries from the spinal infarction and the innumerable other physical and non-physical injuries that resulted therefrom. Even if it were possible to define accident-related injuries from the transcript of the medical malpractice trial, in which they were not at issue, it is not possible to discern with any level of accuracy which settlement payment could have included them. Accordingly, the trial court was correct in finding that the Settlements with the auto insurers involved different injuries than the verdicts and in denying setoff in these amounts.

In a lawsuit against the at-fault driver, Plaintiffs could have asserted other causes of action in addition to, or in lieu of, ordinary negligence. For example, they could have asserted bystander liability claims seeking damages arising out of witnessing serious bodily injury being inflicted on his or her spouse and child. (R. p. 136, line 13-p. 137, line 14). Expert testimony at trial as to Mr. Green’s elevated heart rate being possibly caused by stress, as well as expert testimony regarding Mrs. Green’s emotional and physical state provide *some* evidence of the physical manifestation of emotional distress necessary to prevail on such claims. (R. p. 323, lines 2-12). Accordingly, such claims

would, as a matter of law, seek different elements of damages for distinct injuries, neither of which were alleged in the medical malpractice suit against Bauerle. State Farm Mut. Auto. Ins. Co. v. Ramsey, 295 S.C. 349, 353, 368 S.E.2d 477, 479 (Ct.App.1988).

Per the analysis in Hawkins, 330 S.C. at 113-14, 498 S.E.2d at 407, causes of action providing for different elements of damages are distinct for purposes of setoff. A cause of action for bystander liability permits recovery of damages resulting from the emotional trauma of witnessing serious injuries being inflicted on someone of close relation, as distinct from the various elements recoverable under medical malpractice and loss of consortium. Accordingly, an equitable setoff would be equally as inapplicable as a statutory setoff in this case because such remedy is only permitted where a settlement is for the same cause of action. See Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012).

Plaintiffs suffered many injuries as a result of the accident, which do not include the spinal infarction and resulting injuries. Furthermore, Bauerle has presented no evidence that any of the Settlements with the auto insurers compensated Plaintiffs for injuries resulting from the spinal infarction, or that those Settlements involved the same injuries, or causes of action, as the verdicts. However, Bauerle asserts entitlement to setoff the entire amount of the Settlements, essentially requesting that this Court take away consideration paid for all of the Green's other injuries. In order to avoid such an outcome in granting the relief Bauerle requests, the Court would first have to determine what injuries were compensated in those Settlements and allocate the funds among each of the injuries and to each Plaintiff. As setoff only applies to funds compensating the same injury, the Court would then have to determine what injuries were encompassed in

the verdicts without any evidence of how the jury calculated those awards. Smith, 397 S.C. at 474, 724 S.E.2d at 192. Furthermore, even if an equitable, rather than purely statutory, setoff was appropriate, the Court would first have to determine what causes of action were settled, despite no lawsuit having been pursued against the at-fault driver, and whether they were identical in order to permit a setoff from the verdicts. See Hawkins, 330 S.C. at 113-115, 498 S.E.2d at 407; see also Rutland, 400 S.C. at 216, 734 S.E.2d at 145. This would be an impossible task without any basis in law or equity.

1. Plaintiff Randall Green suffered serious injuries distinct and separate from those suffered as a result of Bauerle's malpractice.

Prior to his arrival at GSRMC, Mr. Green suffered multiple serious injuries that were separate and distinct from the spinal cord injury, which did not exist until after Bauerle's intervention. (R. p. 21; p. 248, lines 6-24; p. 453, line 7-13). To this day, Mr. Green has limited use of his right hand, and cannot even make a fist. (R. p. 221, lines 12-17). He sustained a serious head injury, which required speech therapy and made it difficult for him to follow commands during physical therapy and examinations at MUSC. (R. pp. 346, 353). He fractured five ribs; which Bauerle's witness asserts was caused by the accident and Plaintiffs alleges were caused by chest compressions performed during the arrest. (R. p. 248, line 21-p. 249 line 9; p. 238, lines 3-17). Mr. Green complained of sharp abdominal pain at the accident scene and underwent exploratory surgery at MUSC that revealed fluid around his kidneys and in his abdomen. (R. pp. 357, 352-353). Defendant's expert, Dr. Smith, testified that Mr. Green had "multiple injuries" which "primarily" included the arm laceration, hip injuries, and "general thoracic trauma." (R. p. 331, lines 14-25). Dr. Cranberg testified that, upon arrival at GSRMC, Mr. Green's "two main problems" were a lacerated forearm and a

fractured hip. (R. p. 485, lines 13-21). When Mr. Green left GSRMC, he still had the lacerated arm and the fractured hip but "he had a new additional problem, which was an infarct of his spinal cord." (R. p. 487, lines 7-18). Not only did the spinal cord infarction constitute a separate and distinct injury, Dr. Cranberg's testimony clearly indicates that the arm and hip injuries were not the only injuries Mr. Green had on arrival at the hospital, though they were his "main problems" at that time. Furthermore, Mr. Green's treating physician, Dr. Garner, testified that his diabetes could have been caused by *either* a pancreatic injury *or* the spinal infarction, but that his high blood pressure was not related to the spinal injury. (R. p. 497, line 21-p.498, line 13; p. 500, lines 2-10). Accordingly, the record clearly indicates the existence of additional injuries after the automobile accident, which are separate and distinct from the spinal cord infarction, hip injuries, and forearm injuries.

Mr. Green suffered many injuries in addition to paralysis as a result of Bauerle's malpractice and there is no evidence as to whether any of these injuries were included in the jury verdict. Dr. Cranberg testified that paralysis is the loss of function in both legs, and is *one* injury that can be sustained as a result of a spinal cord infarction. (R. p. 482, line 22-p. 483, line 5). He further testified as to other injuries that are likely suffered as a result of a spinal infarction, all of which Mr. Green suffered. (R. p. 483, line 6-p. 484, line 1).

In addition to being unable to *move* his legs, Mr. Green cannot feel them, resulting in ulcers and infections on the bottoms of his feet as well as pressure sores, abscesses, and infections on multiple areas of his body. (R. p. 493, lines 17-25; p. 495, line 12-p.496, line 13). According to his family physician, Dr. Garner, Mr. Green is at

increased risk of developing pneumonia and has suffered repeated infections and urinary tract infections, which are a “real problem” for him. (R. p. 494, line 13-p. 495, line 11; p. 497, line 21-p.498, line 13). His bladder and bowels no longer function. (R. p. 494, line 13-p.495, line 11). He was diagnosed with renal failure and he remains at an increased risk of same. (R. p. 497, line 23-p.498, line 9). He has sustained bone loss. (R. p. 165, lines 14-20). He has circulatory issues, which sporadically cause a rapid heartbeat and result in cold intolerance and a persistent feeling of being cold, and injury to his gastrointestinal system causes abdominal discomfort and acid reflux. (R. p. 154, line 12-p. 155, line 10). He has lost sexual function. (R. p. 153, lines 8-13). Mr. Green’s general health has been compromised affecting **every single body system except for his lungs** and he has been hospitalized multiple times for life threatening symptoms of, illnesses resulting from, and bodily responses to, his various injuries. (R. pp. 370-384). He suffers back pain from sitting in his wheelchair and persistent muscle spasms in his lower extremities. (R. p. 151, lines 10-18). He cannot feel when his bladder has become too full, which can happen after four to six hours, causing severe headaches and life-threatening heart irregularities. He lives with the terrifying knowledge that, if Mrs. Green does not catheterize him in time, a condition called osteodysplasia can result in cardiac arrest and death. (R. p. 156, line 9-p. 157, line 8). Obviously, he is depressed. (R. p. 163, line 19-p. 164, line 1). He has fallen out of his wheelchair and suffered another broken hip, requiring surgery and a five-day hospitalization. (R. p. 226, lines 6-24).

Evidence was presented at trial in support of each of the numerous physical injuries above as well as the further economic and non-economic injuries and losses resulting therefrom. Expert testimony at trial indicated that Mr. Green has a greater than

50 percent chance of incurring future medical expenses for all of the above referenced physical injuries, an amount which *alone* exceeds the entire medical malpractice jury verdict. (R. p. 169, line 6-p. 170, line 3; p. 415). In addition to, and as a result of, his physical injuries, Mr. Green has clearly sustained extensive pain and suffering, mental and emotional distress, disfigurement, loss of earning capacity, lost wages, and loss of enjoyment of life as a result of his spinal infarction. (R. pp. 391-404). See Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969) (finding that paraplegic's loss of social and business activities is compensable intangible injury). Not only is there no evidence that Mr. Green has received any compensation for any of these injuries, most of them *didn't even exist* at the time of the Settlements with the auto insurers. (R. pp. 370-395). Furthermore, there is clearly no way to determine if any, all, or some of these innumerable injuries and losses were included in the jury verdicts. (R. p. 28-31). Finally, injuries sustained in the accident, are distinct from those claimed against Bauerle. As Plaintiffs counsel informed the jury during opening arguments, all three passengers sustained injuries in the accident, "[b]ut this case is about medical injuries, we're not going into the other injuries." (R. p. 109, lines 5-17). "When a prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law." Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct.App.2012) (citing Hawkins v. Pathology Assocs. of Greenville, 330 S.C. at 114-15, 498 S.E.2d at 407 (Ct.App.1998)). Accordingly, Bauerle is not entitled to setoff the amount received from the auto insurers.

Even if the court were to determine that the Settlements with the at-fault driver could be allocated to specific injuries, it is well settled that every possible cause of action

and every injury would have to be allocated some portion of each Settlement as consideration for the covenant, and Bauerle would not be entitled to set off consideration paid for injuries that are different from those included in the verdict.

2. ***Plaintiff Ann Green suffered several serious injuries in the car accident, which are separate and distinct from her loss of consortium suffered as a result of Bauerle's malpractice.***

South Carolina Code § 15-75-20 (1969) provides that under a loss of consortium claim, "[a]ny person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse." Loss of consortium includes the loss of services as well as the loss of society and companionship. Davis v. Tripp, 338 S.C. 226, 238, 525 S.E.2d 528, 534 (Ct.App.1999). Ann Green's loss of consortium verdict involves injuries that are separate and distinct from her own physical injuries compensated by the auto settlements.

Testimony at trial provided evidence that Ann Green endured a lengthy hospitalization for severe physical injuries *she* sustained in the accident. (R. p. 137, lines 8-25). While Mrs. Green's loss of consortium verdict compensated her for *some* of the damages which she had suffered as a result of her husband's injuries arising out of the spinal infarction, payments she received from the auto insurers involved the personal injuries *she* sustained as a result of her own bodily injuries. These injuries include bystander liability claims arising out of witnessing serious injuries to her husband and child. (R. p. 136, line 13-p. 137, line 14). Bauerle is not entitled to benefit from any payments intended to compensate Mrs. Green for the extensive physical and mental pain and suffering, scarring and disfigurement, economic losses, and loss of enjoyment of life which she suffered as a result of her own physical injuries. Furthermore, *Mr. Green's* loss

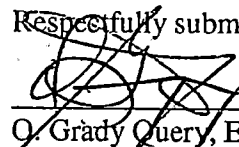
of consortium suffered as a result of his wife's extensive injuries was not an element of damages recoverable in the tort action against Bauerle, and is not subject to setoff. The unallocated settlement has created a Gregorian Knot which cannot be untangled at this stage of the proceedings. Bauerle should have objected at the time of the stipulation of GSRMC's dismissal and required Plaintiffs to allocate the settlement, and he should have also asked that the jury specify the injuries for which they rendered a verdict.

In conclusion, the rule on which Bauerle relies does not establish that any of the Plaintiffs' *separate* Settlements with the auto insurers involved *any* of the same injuries as the *separate* jury verdicts rendered in their favor. Bauerle presented no evidence as to which, or whose, injuries were encompassed in the Settlements with the at-fault driver or the Green's own auto-insurer. Nor did he allege that the cardiac arrest, infarction, or injuries alleged to have occurred from the infarction were included in the Settlements. Finally, Bauerle's argument assumes, not only that the forearm laceration and hip injuries were included in those Settlements, but that the cardiac arrest resulted from blood loss from one or both of those injuries, a position in direct conflict with the position he asserted at trial. However, there has been no such finding, and the jury's verdict was not dependent on same. There was no evidence to support a finding that any injury compensated in the Settlements was included in either of the jury verdicts, and the trial court was correct in finding that they involved different injuries not subject to setoff pursuant to § 15-38-50.

CONCLUSION

The rule articulated in Graham v. Whitaker is inapplicable in analyzing a defendant's entitlement to setoff, as the purpose of that rule is to continue the responsibility of the initial wrongdoer for a physician's aggravation of an injury for which the original tortfeasor is liable. In contrast, setoff is not appropriate unless a settlement with a jointly liable tortfeasor compensates the *same injury* as a verdict rendered on the same cause of action. The trial court did not err in denying setoff to Bauerle for the amount paid to Plaintiffs by the at-fault driver and the Green's UIM carrier. Plaintiffs respectfully request that this Court affirm the portion of the Setoff Order issued by the Honorable Steven H. John denying setoff to Bauerle in the amount of the Settlements paid to Plaintiffs by the auto insurers for the reasons set forth above and for any ground appearing on the record as provided by Rule 220(c) SCACR.

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

RECEIVED
DEC 29 2014
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.

PROOF OF SERVICE

I certify that I have served the below listed briefs 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, on December 18, 2014 addressed to his attorneys of record at their offices as follows:

1. Final Appellants' Brief of Respondents/Appellants;
2. Final Respondents' Brief of Respondents/Appellants;
3. Final Reply Brief of Respondents/Appellants;
4. Respondents/Appellants' Certificate of Counsel's compliance with Rule 211(b),
SCRAR

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CERTIFICATE OF COMPLIANCE

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DEC 29 2014
SC Court of Appeals

The undersigned Counsel for Respondents/Appellants, Randall M. Green and Ann Green, certifies that the following documents comply the Supreme Court's Revised Order Concerning personal identifying information and other sensitive information in Appellate Court Filings, issued April 15, 2014:

1. Final Appellants' Brief of Respondents/Appellants;
2. Final Respondents' Brief of Respondents/Appellants; and
3. Final Reply Brief of Respondents/Appellants.

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The undersigned Counsel for Respondents/Appellants, Randall M. Green and Ann Green, certifies that the following documents comply with Rule 211(b), SCACR:

1. Final Appellants' Brief of Respondents/Appellants;
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December 18, 2014

ORIGINAL

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

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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:

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OF APPELLANTS/RESPONDENTS

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ARGUMENTS

- I. The Greens' reliance on the collateral source rule is misplaced because that rule of law was not asserted by the Greens in the court below and was not the basis for the trial court's ruling.**

The Appellant-Respondent Wayne B. Bauerle, M.D.,¹ contends that Circuit Court Judge Steven H. John committed an error of law in denying a set-off for the amounts paid in settlement for the at-fault driver, including the amounts received by the Respondents-Appellants Randall Green and Ann Green from the underinsured motorist insurer. On this issue, Judge John specifically ruled that "the settlements on behalf of the at-fault driver (including the underinsured motorist payments) ... concerned different injuries than the injury for which the jury found Dr. Bauerle liable." (R. 21). More specifically, he found that "the settlement with the at-fault driver concerning events occurring prior to Mr. Green's paralysis do not concern the same injury." (R. 21).

On appeal, the Greens argue that Judge John ruled correctly because the amounts paid in settlement by the underinsured motorist (UIM) carrier are not subject to a set-off based upon the operation of the collateral source rule. However, this argument was never made in the Circuit Court, and certainly the collateral source rule was not relied upon nor even cited by Judge John as a basis

¹ For ease of discussion, the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. shall be referred to collectively as "Dr. Bauerle."

for his ruling. As mentioned, the Greens never argued at the post-trial hearing (R. 338-340) or in its 33-page memorandum of law submitted at the request of Judge John that the collateral source rule did not allow for a set-off of the UIM settlement. In fact, the collateral source rule cases now cited by the Greens, including *Estate of Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989), were never cited to Judge John, and certainly were not relied upon by Judge John in his Orders.

Instead, Judge John ruled only that the UIM settlement was for a different injury than the injury for which the jury returned its verdict against Dr. Bauerle. However, for the reasons discussed in Dr. Bauerle's opening brief, that ruling was in error given the rule of law from *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984), and its progeny. Therefore, the Greens should not be permitted to raise a new issue on appeal, particularly an issue which was never asserted by them in the Circuit Court and which does not appear in the record below. Instead, the Court is urged to focus solely on whether the settlements paid by both the at-fault driver and the UIM insurer satisfied the test in *Graham* and were for the "same injury." *See*, S.C. Code Ann. § 15-38-50(1).

II. The trial court erred in failing to find the rule of law from *Graham v. Whitaker* was applicable and in failing to find that the at-fault driver was legally liable for all of the damages awarded by the jury against Dr. Bauerle, including the spinal paralysis, the consequential damages and the loss of consortium.

In *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984), the South Carolina Supreme Court ruled that "the negligence of an attending physician is reasonably foreseeable." 321 S.E.2d at 44. The Supreme Court further 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.

Judge John erred in rejecting the application of the *Graham* rule, and in fact, Judge John did not even provide any explanation as to why the rule did not apply. 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. The settlements paid by both the at-fault driver and the UIM insurer extinguished all tort liability by those parties and thus settled claims for those same injuries.

The Greens offer a number of arguments in their attempt to refute the clear impact and governance of *Graham* on this issue. Each of those arguments is unavailing.

First, the Greens argue that the facts of the present case do not satisfy the elements of *Graham*. Because Judge John failed to even address the impact of *Graham*, the Greens are asserting issues that were not argued or decided below. At any rate, the Greens are in error. The Greens attempt to compartmentalize the rule of law announced in *Graham* and suggest that each word is given a strict construction and not be read as a whole.

For instance, *Graham* requires that the injured party must use ordinary care in selecting the physician, and the Greens argue that they did not personally select Dr. Bauerle as the treating orthopaedist. Instead, Dr. Bauerle was on call at Grand

Strand Regional Medical Center. The point of this aspect of the *Graham* rule is to ensure that the treating physician who commits the malpractice is competent and skilled in the care undertaken. In other words, if Dr. Bauerle is not competent and should not have been selected as a treating physician, the original tortfeasor should not be held liable for any ensuing malpractice. Here, the record shows that Dr. Bauerle was competent and an appropriate physician to treat the fracture/dislocation of Mr. Green's right hip. Indeed, the Greens' own orthopaedic expert confirmed that Dr. Bauerle was "an excellent orthopaedic surgeon." (R. 213).

Next, the Greens argue that Dr. Bauerle did not cause an "aggravation" of the injuries with which Randall Green presented at the ER. Instead, they claim the malpractice found by the jury caused a "distinct injury to an entirely different body system." See, Greens' Respondent's Brief, p. 16. Yet, the term "aggravation of the injury" includes a worsening of the original injuries. In other words, *Graham* provides that the original tortfeasor is liable for any worsening of the plaintiff's medical condition resulting from the malpractice. That understanding is supported by the Supreme Court's decision in *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 450 S.E.2d 582 (1994). In that case, the plaintiff suffered neck and back injuries in a motor vehicle accident. As part of her treatment, the plaintiff was treated by a chiropractor "who performed adjustments to her whole body" which resulted in an ankle injury. 450 S.E.2d at 448. The plaintiff took the position that

the at-fault driver was responsible for the ankle injury and sought PIP payments for the medical care related to the ankle injury. On appeal, the Supreme Court found that "[t]he trial judge properly charge the *Graham* causation language," and the Court's opinion includes the exact same language from *Graham* relied upon by Dr. Bauerle. 450 S.E.2d at 450. The Supreme Court further ruled that "State Farm's obligation to pay PIP benefits for any medical expenses 'arising from' the accident would, therefore, include those caused by inappropriate or negligent treatment which aggravated the original injury so long as [plaintiff] used ordinary care in selecting the health care provider." 450 S.E.2d at 450-451. The Supreme Court thus concluded that the ankle injury could constitute an aggravation of the original back and neck injuries. Similarly, in the case at bar, the spinal paralysis resulting from the blood loss caused by the original injuries certainly constitutes an aggravation of the original injuries. By way of illustration, if Mr. Green had sustained a sufficient blood loss from the forearm laceration and from the fractured hip at the scene of the accident and before receiving medical care, which then caused cardiac arrest that resulted in spinal paralysis, the Greens would not be arguing that the paralysis was not an aggravation of the forearm laceration or the fractured hip. The spinal paralysis is precisely the type of aggravation of the original injuries that the *Graham* rule addresses.

Further, the Greens suggest that Dr. Bauerle was on board to treat the fracture/dislocation of Mr. Green's right hip and that the blood loss that triggered

the cardiac arrest resulted from the forearm laceration that Dr. Bauerle was not personally treating. However, the *Graham* rule does not apply only if the aggravation results from the injury to be treated by the very practitioner who commits the malpractice. Not surprisingly, the Greens do not cite any authority for this stilted reading of *Graham*. Nonetheless, Dr. Matza testified: "There were two sources of bleeding in this case. One was the acetabular fracture and the second one was from the arm." (R. 211). Dr. Matza, in fact, estimated that "[y]ou can get two, three units of blood from a fracture/dislocation." (R. 212). Thus, the Greens' own expert offered testimony that the blood loss from the hip, i.e. the original injury actually treated by Dr. Bauerle, contributed to the cardiac arrest that resulted in the spinal paralysis. Nonetheless, it makes no difference whether the bleeding came from the hip or from the forearm. What is critical is that the bleeding came from the original injuries sustained in the motor vehicle accident, and thus, the at-fault driver is liable for the spinal paralysis that resulted from the medical negligence.

Next, the Greens argue that Dr. Bauerle has not shown that the at-fault driver's negligence proximately caused the spinal paralysis. The Greens offer a convoluted argument that quite frankly fails to take into consideration that the rule in *Graham* actually provides *as a matter of law* that "the negligence of an attending physician is reasonably foreseeable." *Graham*, 321 S.E.2d at 44.

Proximate cause requires evidence of causation in fact and legal cause. *McKnight v. South Carolina Department of Corrections*, 385 S.C. 380, 684 S.E.2d 566, 569 (Ct. App. 2009). "Causation in fact is demonstrated by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence, while legal cause is proved by establishing foreseeability." *Id.* "[L]egal cause is proved by establishing foreseeability." *Id.* "The court looks to the natural and probable consequences of the complained of act to determine foreseeability." *Id.*

In the case at bar, both causation in fact and legal cause have been shown. As discussed above and in Dr. Bauerle's opening brief, the spinal paralysis was caused by the loss of blood that resulted in cardiac arrest. The loss of blood was a direct result of the injuries sustained by Mr. Green in the motor vehicle accident. The record demonstrates that Mr. Green 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). Therefore, but for the excessive bleeding sustained in the accident, which was the at-fault driver's fault, the spinal paralysis would never have occurred. Causation in fact is thus established.²

Legal cause is likewise proven by the rule in *Graham*. The Supreme Court held in *Graham* that "the negligence of an attending physician is reasonably foreseeable." *Graham*, 321 S.E.2d at 44. Thus, foreseeability is established.

The Greens, nonetheless, make a convoluted argument that the medical malpractice by Dr. Bauerle is an intervening act that breaks the causal chain. The Greens are mistaken. "The test for whether a subsequent negligent act by a third

² Strangely, the Greens spend multiple pages of their brief trying to distance themselves from their own theory of liability – which was the theory obviously accepted by the jury given its verdict. 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. The Greens now argue that the jury could have accepted the theory by Dr. Bauerle's expert that neurogenic shock caused the cardiac arrest. While that would have exonerated Dr. Bauerle from the alleged malpractice, it would not have let the at-fault driver off the hook. As Dr. George Nicholson testified, the neurogenic shock was caused by trauma, specifically the accident. (R. 243). Dr. Nicholson further agreed that "the spinal infarct was caused by the initial trauma which resulted in swelling of the cord in the enclosed spinal column and spinal cord." (R. 242). Thus, Dr. Nicholson's opinion still placed the blame for the paralysis on the original accident, which was caused by the at-fault driver. Finally, the Greens suggest that the "cardiac event" may have resulted from "a pre-existing condition," but there is simply no expert testimony in the record that the cardiac arrest was unrelated to the injuries sustained in the accident. Obviously, proximate cause in a medical malpractice case requires expert testimony, and there was none supporting that latter theory now offered post-trial by the Greens. See, *Martasin v. Hilton Head Health System, L.P.*, 364 S.C. 430, 613 S.E.2d 795, 800 (Ct. App. 2005).

party breaks the chain of causation to insulate a prior tortfeasor from liability is whether the subsequent actor's negligence was reasonably foreseeable." *Keeter v. Alpine Towers International, Inc.*, 399 S.C. 179, 730 S.E.2d 890 (Ct. App. 2012). In other words, "[f]or an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable." *McKnight*, 684 S.E.2d at 569. Based on *Graham*, "the negligence of an attending physician is reasonably foreseeable." *Graham*, 321 S.E.2d at 44. Thus, as *Graham* holds, there is no unforeseeable negligent act. The malpractice of Dr. Bauerle, as determined by the jury, was reasonably foreseeable as a matter of law. Thus, the Greens' argument that the negligence of Dr. Bauerle was unforeseeable and broke the causal chain simply disregards the *Graham* rule in its entirety and should be soundly rejected.

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. Without question, 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.

III. The trial court erred in denying a set-off even in part to Dr. Bauerle for the amounts paid to the Greens in settlement of the motor vehicle negligence and loss of consortium claims including the claims against the at-fault driver and the underinsured motorist claims.

Lastly, the Greens argue that the trial court could not conclude that the settlements paid by the at-fault driver and the UIM insurer were for the "same injuries" as the jury's verdict against Dr. Bauerle because the settlements with the auto insurers are not in the record. However, the settlement documents are not necessary for this analysis. The auto insurers, in settlement of claims against the at-fault driver and for UIM benefits, fully resolved all potential liability. The Greens have admitted that in their filings in the lower court and cannot now be heard to argue there is an absence of proof, particularly when they controlled that proof, not Dr. Bauerle who was not a party to those settlements. In the lower court, the Greens represented to the court that "[t]he Plaintiffs eventually settled with all of the parties except Bauerle, *thereby releasing the settling parties from liability.*" (R. 50). (Emphasis added). There is no statement to the court that only *partial* liability was resolved. The Greens are being disingenuous in even remotely suggesting that all liability was not fully extinguished by the settlements. Without question, the settlements settled all liability of the at-fault driver, and of course,

that includes, based on the rule in *Graham*, the "same injuries" as the jury verdict against Dr. Bauerle.³

The Greens nonetheless insist that the at-fault driver was liable for different injuries. Arguably, the at-fault driver would be liable for the original injuries, including the right forearm laceration and the fracture/dislocation of the right hip, both of which Dr. Bauerle was not liable for. However, there were substantial other injuries that both the at-fault driver and Dr. Bauerle were both liable for in tort – the spinal paralysis, the consequential damages therefrom, and the loss of consortium.

The case law governing set-offs do not require that *all* of the injuries must be the same. In fact, the Supreme Court explained that "[t]he reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that *part* of the amount of damages sustained which has already been paid him." *Truesdale v. South Carolina Highway Dept.*, 264 S.C. 221, 213 S.E.2d 740 (1975). (Emphasis added). The Court used the words "that part" and not the word "all."

³ The Greens also suggest that the causes of action differed. Although settled prior to the commencement of a lawsuit, the claim against the at-fault driver would obviously sound in negligence, and so did the claim against Dr. Bauerle. At any rate, the existence of the same or different causes of action is immaterial. This point is well illustrated by the recent case of *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012). In that case, the plaintiff had asserted causes of action for civil conspiracy, conversion, slander and negligence against the settling party (CitiStreet) and causes of action for civil conspiracy, conversion, slander and fraud against the non-settling defendants who later sought a statutory set-off. Despite the non-overlap of causes of action in part, this Court found that "the injury [plaintiff] alleged she suffered as a result of tortious conduct of all defendants was the same" and as a result "the trial court was required to grant the request for a set-off [under Section 15-38-50]." 724 S.E.2d at 190.

Here, Dr. Baurle has clearly shown that the "same injuries," at least in part, were settled by the at-fault driver and the UIM insurer as were also awarded by the jury verdict. Hence, there is a "second recovery" which is not permitted.

In short, Judge John erred in concluding that the proceeds paid in settlement of the motor vehicle negligence and loss of consortium claims were for a "different injury." That was clearly incorrect given the application of the rule in *Graham*. Likewise, Judge John should not have simply denied the set-off in toto for the amounts paid by the at-fault driver and the UIM insurer. Instead, at the very least, he should have engaged in an equitable allocation process. The failure to engage in that process was reversible error and subject to a remand.

As Dr. Bauerle has argued in a prior brief, there is no case law holding that a court cannot exercise its equitable authority to allocate settlement amounts even where the set-off is by operation of law pursuant to Section 15-38-50. The Greens have certainly cited no such authority. In *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), this Court explained that a trial court possesses "jurisdiction to set off one judgment against another [which] is equitable in nature and should be exercised when necessary to provide justice between the parties." 528 S.E.2d at 688. The trial court should use its equitable powers "to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him." *Id.* Again, the Court focused on "that part of the amount of damages" and did not

rule a trial court may only apply a set-off where "all of the amount of damages" are the same.

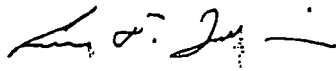
In sum, Dr. Bauerle has shown that, in accordance with the rule in *Graham*, the at-fault driver was "liable in tort for the same injury" which required that the trial court apply a set-off. Even where all of the injuries may not be the same, that does not make a set-off unavailable and allow a party to receive a double recovery. In that instance, the trial court is required to exercise its equitable authority and to determine a fair and just apportionment of the settlement amounts to allow a set-off for the "same injury." Here, Judge John should have, at the very least, made an equitable determination of what portion of the settlement proceeds paid by the at-fault driver and the UIM insurer were paid for the spinal paralysis and the resulting loss of consortium, and he should have allowed a set-off in those amounts. Clearly, the loss of consortium is related to the spinal paralysis; there is no evidence that the loss of consortium damages as claimed by Ann Green resulted from the original injuries. And as for Randall Green, the vast majority of the settlement amounts were paid for the most severe of the injuries, that being the spinal paralysis and the resulting damages therefrom.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. respectfully request that the Court reverse in part the Order Granting in Part and Denying in Part the Motion for Set Off as issued by Circuit Judge Steven H. John, filed October 17, 2013. The Court is requested to remand with direction that the Appellants-Respondents be granted additional set-offs as follows: (1) an additional set-off of \$250,000 thereby reducing the judgment in favor of Randall M. Green to \$415,789.47, and (2) an additional set-off of \$175,000 thereby reducing the judgment in favor of Ann Green to zero dollars, or alternatively a set-off in such amounts as equitably determined by the court.

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November 20, 2014

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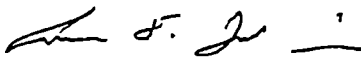
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The undersigned counsel for the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. certifies that the Final Reply Brief of Appellants-Respondents complies with Rule 211(b), SCACR.

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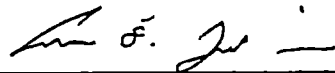
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I. BAUERLE IS NOT ENTITLED TO A SETOFF FROM THE GREEN'S SETTLEMENTS WITH GSRMC AND CMR BECAUSE DR. BAUERLE, CMR AND GSRMC ARE NOT JOINT TORTFEASORS.

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. (R. pp. 501-502). 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 verdicts against Bauerle. (R. p. 20). 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 intervening or joint negligence exists 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. at 460, 242 S.E.2d at 674. 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. Id. at 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. (R. p. 307, lines 6-9; p. 308, lines 18-22). His own expert testified that it is the responsibility of the physician to know the condition of a patient before issuing orders. (R. p. 322, line 14-p. 323, line 4). Yet, as in Young, 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. (R. p. 198, line 7-p. 199, line 11; p. 281, lines 7-15; p. 308, lines 18-22; p. 456, lines 5-10). 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. (R. p. 474, lines 5-15). 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 asserts as the basis for his Setoff Motion, does not apply to parties who are liable solely by virtue of vicariously liability. Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 670 (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 at 669.

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, 537, 511 S.E.2d 69, 78 (1999) (noting a 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 Mr. Green 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 Plaintiffs suffered the same single injury, there would have been no need for the Trial Judge to allocate the GSRMC settlements or to 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, 335 S.C. 106, 515 S.E.2d 268 (Ct.App.1999), 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 of wrongful death and survival causes of action, citing Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000) 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, 342 S.C. at 313, 536 S.E.2d at 425. 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. Welch, 342 S.C. at 313-14, 536 S.E.2d at 425-26.

Bauerle's reliance on Ellis v. Oliver, 335 S.C. 106, 515 S.E.2d 268 (Ct.App.1999) 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. The Ellis Court addresses the inconsistency in footnote 1 of Smith v. Widener, 397 S.C. 468, 481 n.1, 724 S.E.2d 188, 195 (Ct.App.2012), 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.

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. (Appellant Br., 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. Smith, 397 S.C. at 475-76, 724 S.E.2d at 192. 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 Smith 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 at 192. 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 Br., p. 12). What he fails to recognize is that an award for pain and suffering clearly compensates a plaintiff 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 Assocs. 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. Id. 330 S.C. at 114-15, 498 S.E.2d at 407.

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., 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998) 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." Id. at 113, 498 S.E.2d at 406-07. That analysis was cited in Smith v. Widener, which applied a statutory setoff. 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 Br., 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 Cnty., 333 S.C. 519, 537, 511 S.E.2d 69, 78 (1999) (noting a 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." (R. pp. 62-63).

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. (R. p. 505). 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. (R. pp. 1-15). 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, 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998), 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 finding that setoff was necessary to prevent a double recovery. Id. at 114-115, 498 S.E.2d at 407. 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, which permitted the jury to indicate what damages were included in the awards, and now, after standing idly by, asserts that the court should make such a determination. (R. p. 332, lines 15-23; pp. 429-430).

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, 113, 515 S.E.2d 268, 272 (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 Dep't of Education, 339 S.C. 208, 219, 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. (R. pp. 401-404). 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. (R. pp. 28-29). 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, 397 S.C. 468, 472-73, 724 S.E.2d 188, 190-91 (Ct.App.2012) (citing Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 113, 498 S.E.2d 395, 406-07 (Ct.App.1998)). 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.

Respectfully submitted,



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