

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

RECEIVED

JUN 21 2016

S.C. SUPREME COURT

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

v.

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

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STATEMENT OF THE CASE

This is an appeal from a medical malpractice action. The Respondents-Petitioners 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 Petitioner-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

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

cardiac arrest and was successfully resuscitated. Mr. Green sustained damage to his spinal cord which resulted in the paralysis of his lower extremities.

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 the South Carolina Court of Appeals, and the Greens filed a cross-appeal.

In an unpublished opinion filed on February 3, 2016, the Court of Appeals affirmed the rulings of Judge John and denied the relief sought by both sides on appeal. Dr. Bauerle filed a petition for rehearing, which was subsequently denied on March 24, 2016. The Greens also filed a petition for rehearing which was denied on the same date.

ARGUMENTS

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. Dr. Bauerle submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is entirely unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion.

Second, the opinion of the Court of Appeals was unpublished and a *per curiam* opinion issued in accordance with Rule 220(b)(1), SCACR, and thus the opinion has no precedential value.

Third, contrary to the Greens' claim, the decision of the Court of Appeals does not conflict with any existing decisions of this Court.

Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance. The *per curiam* opinion has no precedential value, and as a result, the Court of Appeals' decision will have no application to other cases.

Based upon these considerations, there is no need for this Court to review the decision of the Court of Appeals.²

II. The majority of the arguments made by the Greens for the issuance of a writ of certiorari are not preserved for review because they were not raised or ruled upon in the courts below.

Rule 226(d)(2), SCACR, governs the issues that may properly be raised in a petition for writ of certiorari. Rule 226(d)(2) provides that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 226(d)(2), SCACR. Moreover, it is well settled that "[a]n issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari." *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218, 221 (2000). Finally, it is equally well settled that "one cannot present and try his case on one theory and then change his theory on appeal." *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. Ap. 1995).

² As Dr. Bauerle informed the Court of Appeals by motion, he is willing to accept the result by the Court of Appeals and for the Remittitur to be issued. He filed a petition for rehearing in the Court of Appeals as a conditional petition. He has filed a petition for writ of certiorari in this Court for the same reason – to preserve and pursue his issues on appeal only in the event that the Greens filed a petition for certiorari, which they have now done.

In light of these clear preservation rules, the Court is urged to consider whether the Greens' arguments as made in their petition for writ of certiorari are indeed the arguments that were made and ruled on by Judge John at the trial level or were even pursued on appeal to the Court of Appeals. In short, as will be discussed in more detail below, a majority of the arguments that the Greens now pursue have been made for the first time on appeal and, in fact, some for the first time in their petition for rehearing.³ As a result, much of what is now being argued is not properly preserved for judicial review by this Court, which should be a critical consideration in assessing whether a writ of certiorari is indeed warranted.

III. The courts below were correct in equitably allocating the settlements between the medical malpractice claim and the loss of consortium claim.

As a first argument raised in their petition for writ of certiorari, the Greens claim that it was error for the trial court to allocate an unallocated settlement, particularly one paid jointly to a husband and wife. The Greens further argue that the trial court should have concluded that the unallocated settlement was

³ In *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001), the Supreme Court explained that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." 564 S.E.2d at 322. See also, *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same).

reasonable, and there was no basis for "reallocation." Finally, the Greens remarkably argue that Judge John utilized an "arbitrary" method of allocation using his "own formula" which had "no factual basis" and "disregarded the intentions of the settling parties." In short, the Greens conclude that the trial court erred in failing to allocate the \$2 million settlement equally to both of the Greens' claims, which would have resulted in a \$0 judgment for Mrs. Green but a \$1.3 million judgment for Mr. Green.

Most importantly, this argument was never made to or ruled upon by the trial court. The issue was raised for the first time on appeal and specifically in the petition for rehearing.

In the trial court, the Greens argued against any set-off. They never presented any evidence of their "intentions" regarding the unallocated settlement with Grand Strand. They never argued that there should be a \$1 million set-off to each of their claims. That was never raised even as an alternative position. Therefore, not surprisingly, that issue was never ruled upon by Judge John. Moreover, that issue was not raised in the Greens' Rule 59(e) motion. This was admitted to by the Greens where they write: "the trial court and Court of Appeals in the present case failed to provide any discussion or findings regarding these issues." *See*, Greens' Petition, p. 15. The reason for that – ***the courts below did not rule on issues that were never raised.*** In fact, the Greens' new theory that

after the set-offs Mr. Green should have a \$1.3 million judgment was never argued even in the petition for rehearing in the Court of Appeals. *It is a new theory pursued for the first time in their petition for writ of certiorari.*

As indicated, in the trial court, the Greens never presented evidence that their intention was to allocate the \$2 million settlement equally between the spouses. The Greens never argued that the \$2 million was joint marital property – which nonetheless makes no difference to an equitable allocation between claims.⁴ The Greens never argued that the non-allocation was reasonable and should have been treated as an equal allocation. Thus, it is entirely disingenuous for the Greens to now argue – for the first time in a petition for writ of certiorari – that Judge John "entirely disregarded the intentions of the settling parties." *See, Greens' Petition, p. 15.*⁵

Nonetheless, even if this Court is willing to overlook the preservation issues and address the merits, the ruling of the trial court, as affirmed by the Court of Appeals, was a correct one. The Greens maintain that Judge John allocated the

⁴ The Greens cite several times to the case of *Ex Parte Government Employee's Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 ((2007). The relevance or applicability of that case is unclear. That case does not involve any equitable set-off nor any attempt to allocate or reallocate a settlement. It is simply a case where this Court denied an insurer's attempt to intervene in a Family Court matter to determine whether two individuals were common law spouses.

⁵ The Greens also complain at one point that Dr. Bauerle did not request that the settlements be allocated, but Dr. Bauerle was not a party to the prior settlements. *See, Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, 426 (Ct. App. 2000) (the non-settling defendant was not

settlement between Mr. Green's malpractice claim and Mrs. Green's loss of consortium claim without providing a factual analysis. They claim that Judge John's allocation was "arbitrary." This argument, however, simply disregards the fact that Judge John's allocation is based upon the ratio established *by the jury's verdict*. Judge John found that "it is reasonable, fair, and just to utilize the jury's verdict as to the Plaintiffs' claims" so as to provide for an equitable allocation of the settlement amounts. (R. 21). Accordingly, the trial court "appl[ie]d the percentage of the total verdict given to each Plaintiff by the jury to apportion the settlements between Mr. Green's claim for medical malpractice and Mrs. Green's claim for loss of consortium." (R. 21).

The Greens, nonetheless, insist that this method of allocation is not supported by the evidence. To the contrary, Judge John based the allocation on the jury's own allocation of total damages awarded. Without dispute, the jury's determination of damages for both Randall Green and Ann Green was based on the evidence. The Greens cannot reasonably argue otherwise.⁶ The jury's verdict after hearing all of the damages evidence sustained by the Greens is most certainly a reasonable method of allocation.

a party to the settlement and is not bound by its terms). Thus, he was not in a position to contest the settlement and seek additional terms to that settlement.

⁶ Under South Carolina law, there is "a presumption ... that the amount awarded by the jury was in response to the measure of damages given by the trial judge." *Turner v. Carey*, 227 S.C. 298, 87 S.E.2d 871, 875 (1955).

The Greens rely on this Court's decision in the case of *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015). However, in that case this Court did not conclude that an allocation of settlement proceeds based on a "percentages" analysis is *per se* invalid or without merit. This Court limited its ruling to the circumstances of that case (i.e., this Court used the language "under these circumstances"), and in fact this Court found the "reapportioning" of the settlement proceeds to have been erroneous only because the settling parties' own allocation between the two claims was "unquestionably reasonable under the facts." 777 S.E.2d at 831. In the present case, unlike in *Riley*, there was no attempt made by the settling parties to allocate the \$2 million settlement between Mr. Green's claim and Mrs. Green's claim, and that makes the decision in *Riley* inapplicable. Here, there was no "reallocation" made by Judge John – despite the Greens attempt to now portray it as such in order to try to make this case fit the circumstances in *Riley*.

In sum, there is no basis for the issuance of a writ of certiorari to address new theories and arguments that were not first made to the trial court, and by the Greens' own admission, were never ruled on by the trial court. These issues – with the exception of the claim that Judge John's allocation was "arbitrary" and not "fact-based" – were never asserted even in the Court of Appeals.

IV. The courts below correctly ruled that the settlement with Grand Strand Regional Medical Center was for the same causes of action and the same injuries as were ultimately recovered against Dr. Bauerle.

As a second argument raised in their petition for writ of certiorari, the Greens argue that the settlement with Grand Strand Regional Medical Center was for different causes of action and different injuries as were ultimately recovered against Dr. Bauerle. These points will be addressed in turn.

The Greens argue that the settlement with Grand Strand was for a different cause of action than that asserted against Dr. Bauerle. The Greens claim that the negligence cause of action against Grand Strand was limited to conduct by the hospital staff occurring before Dr. Bauerle began his care, and hence the settlement with Grand Strand was not related to the negligence claim against Dr. Bauerle. This argument is not preserved for consideration on certiorari because it was made for the first time on rehearing. Importantly, the argument was never made to the trial court nor did the trial court rule on this issue.

However, that argument, even if timely raised, lacks merit based specifically on the pleadings and the settlement documents. The first cause of action alleged in the Fourth Amended Complaint, which is the claim that went to trial, makes *the very same allegations of negligence against all Defendants* including both Grand Strand and Dr. Bauerle. (R. 1-15). There was no attempt to distinguish between Grand Strand and Dr. Bauerle. In addition, the "Covenant Not to Sue and

Covenant Not to Prosecute or Execute Judgment" executed by the Greens in settlement with Grand Strand reflect that the parties settled all claims against the hospital including all direct and vicarious liability claims. (Supp. R. 518-522). Thus, the \$2 million paid by Grand Strand was in settlement of the same negligence claim that ultimately went to trial and on which the jury returned a verdict.

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

common law. Therefore, this argument that Grand Strand and Dr. Bauerle were not "joint tortfeasors" under the UCATA is immaterial and does not alter the ultimate result. As the courts below agreed, Dr. Bauerle is entitled to an equitable set-off for the Grand Strand settlement.

In short, the courts below correctly ruled that the settlement paid by Grand Strand was for a negligence cause of action and a loss of consortium cause of action, which are the same causes of action that were pled and tried against Dr. Bauerle.

The Greens also argue that the settlement with Grand Strand compensated them for different injuries than the verdicts awarded at trial against Dr. Bauerle. The Greens again offer a new argument *which was raised for the first time in their petition for rehearing*, which is not allowed. They argue that the settlement with Grand Strand was only for injuries suffered by Mr. Green prior to Dr. Bauerle's participation in his care. The Greens never made this argument to the trial court, and certainly 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

At any rate, the evidence in the record shows that the \$2 million paid in exchange for the Covenants is for "the injuries, treatment, and damages of said Payee as well as any future claims for damages of any kind whatsoever." (R.

519).⁷ Similarly, the verdicts returned by the jury against Dr. Bauerle included all compensable damages as charged by Judge John which the jury concluded had been proven. Those compensable damages awardable to Mr. Green were described in the jury charge as follows:

Actual or compensatory damages include compensation for all of the injuries which are naturally the result of the alleged wrongful conduct if you found wrongful conduct. They include, and I'm giving you categories, I'm not saying that they exist in this case, that's your job and responsibility to decide but these are categories that you can look at to compensate the plaintiff if you think that is the right and the proper thing to do. Past and present and future pain and suffering. Past, present and future medical expenses, doctor bills, hospital bills, rehabilitation expense, transportation expense in connection with the medical treatment, past and present and future loss of enjoyment of life, past and present and future impairment of health or bodily function, past, present and future disability, past and present and future loss of wages or loss of earnings, mental anguish brought about by bodily injury or suffering, depression. Those are all different types of categories.

(R. 334).

In addition, the evidence presented does not support the Green's new theory that any negligent acts or omissions by Grand Strand's employees caused injuries to Mr. Green, including a brain injury or "injuries to various organs," before any

⁷ 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.

care was provided by Dr. Bauerle. The factual record does not support that argument. Frankly, the parties did not address this issue nor present evidence on this issue because the issue was never raised in the trial court.⁸

In sum, the same injuries 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. Accordingly, the decision of the trial court, as affirmed by the Court of Appeals, is correct. There is no basis for further review on certiorari.

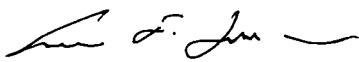
⁸ The Greens appear to argue that they did not present evidence at trial of the injuries caused by Grand Strand. They have not shown, however, that there were damages recovered in the settlement with Grand Strand that were not sought from the jury during the Bauerle trial. The evidence of damages presented at trial, in fact, indicate otherwise – the Greens presented evidence, including a Life Care Plan, that accounted for all of the Mr. Green's injuries and his ultimate medical condition. Nonetheless, even if that were the case, that very argument has been previously rejected. 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. The Court in *Ellis* 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.

CONCLUSION

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

Respectfully submitted,

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Columbia, South Carolina

June 15, 2016

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CERTIFICATE OF SERVICE

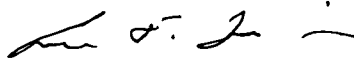
The undersigned employee of Davidson & Lindemann, P.A., counsel for the Petitioners-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., does hereby certify that service of **Petitioners-Respondents' Return to Respondents-Petitioners' Petition for Writ of Certiorari** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 15th day of June 2016:

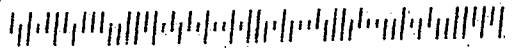
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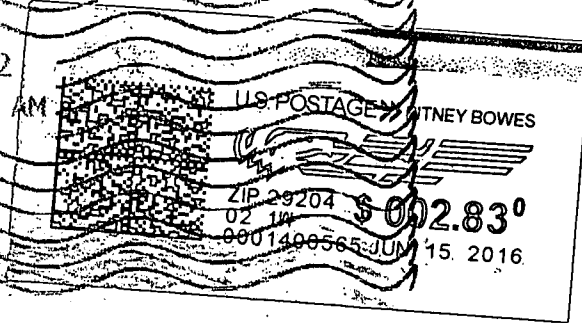
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