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)

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

v.

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

RESPONDENTS'-PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

O. Grady Query
S.C. Bar No. 4610
Michael W. Sautter
S.C. Bar No. 4944
Elizabeth Brooke Hurt
S.C. Bar No. 100649
Query Sautter Forsythe, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, SC 29412
(843)795-9500

L. Morgan Martin
S.C. Bar No. 3667
L. Morgan Martin, PA
1121 Third Avenue
Conway, South Carolina 29526
(843)248-3177

Cristin Uricchio
S.C. Bar No. 79044
Uricchio Law Firm
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412
(843)795-9300
Counsel for Respondents

TABLE OF CONTENTS

I. THE GREENS PROPERLY PRESERVED THE ARGUMENT THAT IF THE SETTLEMENT ALLOCATION WAS APPROPRIATE, IT SHOULD HAVE BEEN ALLOCATED EQUALLY BETWEEN THE PLAINTIFFS.

In responding to the Greens' Petition for Writ of Certiorari, Bauerle relies on the false assertion that the Greens have never before raised the argument that it would have been more just to allocate the settlement equally between the two Plaintiffs. Specifically, he first states that ***"[i]t is a new theory pursued for the first time in their petition for writ of certiorari."*** (Return to Pet. for Writ of Cert., p. 10). Then, he incorrectly states that this position was raised for the first time on appeal in the petition for rehearing. (Return to Pet. for Writ of Cert., p. 9). Not only are these assertions patently false, the suggestion that any allocation should have been equal did not present a separate legal issue; rather, it was made to demonstrate the existence of a more reasonable alternative **in support of the argument** that the trial court's percentages analysis was impermissible, unnecessary, and inequitable.

The Appellate Court Rule regarding certiorari to the Court of Appeals states that "[a] question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 226(d)(2), SCACR. The trial court's method of allocation has been a central issue in controversy raised to the trial court, argued **extensively** by both sides on appeal, and was very clearly raised in the Petitioners' Petition for Rehearing. The lack of any allocation of the settlement between the two Plaintiffs renders their proportionate rights to the funds, by definition, equal. The existence of simpler and more equitable alternative methods of allocation available to the trial court is a subsidiary question incumbent in any analysis of the equity and legality of the novel method which the trial court arbitrarily created.

First, as previously argued by the Greens, it is significant that Bauerle did not request that the trial court allocate the settlement in his Memorandum in Support of Motion for Setoff.

Accordingly, the Greens could not have made arguments regarding the trial court's reasons for making the unilateral decision to perform the allocation, nor could they make arguments against the court's unforeseeable decision to utilize a percentages analysis based on the jury verdicts until *after* the order created these issues. Nevertheless, in their Memorandum in Opposition to Motion For Setoff, the Greens repeatedly argued that setoff was **not** appropriate partially *because* the settlement was paid ***equally*** to multiple Plaintiffs in a case involving multiple injuries and causes of action, and that the lack of allocation further prevented any determination that Bauerle was *entitled* to setoff. (R. pp. 49-69). Remarkably, the Plaintiffs' arguments suggesting the absurdity and injustice of such a circular analysis was confirmed shortly thereafter by the Supreme Court in the Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015) opinion, which noted that the *amount* allocated to one claim or the other affects the Defendants' very entitlement to the setoff in the first place.

Second, Bauerle misrepresents that Plaintiffs' did not argue that it would have been more equitable to allocate the settlement equally until their Petition for Writ of Certiorari. (Return to Pet. for Writ of Cert., p. 10). In response to the trial court's order revealing its novel methodology for allocating the settlement, the Greens unequivocally argued that "[t]he settlement should be viewed by the court as belonging to both of the parties. Here, the court applies an ex post facto analysis to grant setoff, using the ratios between the jury verdict for Mr. Green and the jury verdict for Mrs. Green . . ." (R. p. 96). Further, the Greens expressly argued "[i]f the Court determines that [the] allocation between the parties is permitted based on the cases that allowed reallocation between causes of action, the only fair and reasonable way to do so would be to allocate one half of the settlement proceeds to each of the Plaintiffs and then for each of the Plaintiffs' portions of the settlement to be set off against his or her individual verdict." (R. pp. 96-97). In their Appellant

Brief of Respondents-Appellants', the Greens stated that, in the event that an allocation was appropriate, "[t]he 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." (Appellant Br. of Resp't-Appellant, pp. 42-43). As set forth in the Greens' Petition for Rehearing, it was *Bauerle's* burden to demonstrate a bona fide, fair, and just manner of allocation. (Am. J.A., p. 20). Nevertheless, he attempts to shift this burden onto the Plaintiffs, falsely arguing that their suggestion of a far more equitable method has never before been raised despite the previously cited exhaustive evidence to the contrary.

Third, Bauerle argues that the Greens only argued against any setoff in the trial court, and "never presented any evidence of their 'intentions' regarding the unallocated settlement with Grand Strand." (Return to Pet. for Writ of Cert., p. 9). However, the Greens initially argued that any allocation would require that the trial court "revise the settlement agreement between Grand Strand and the Plaintiffs," suggesting that their intentions were to share the funds equally. (R. p. 65). They asserted that the entire settlement was paid to both Plaintiffs and that "[n]either equity or legal precedent would allow this Court to deprive either of the Plaintiffs of their claim to the entire amount of the Settlement proceeds or any portion thereof." (R. p. 66). The initial arguments to the trial court discussed, at length, that there was insufficient evidence available to permit a fair and equitable allocation and, because it was unclear what the jury included in its awards, there was simply no evidence to support a finding that either Plaintiff would receive a double recovery. Accordingly, not only was there no basis for determining that Bauerle was *entitled* to setoff, there was no way to *apply* a setoff under the facts and circumstances of the case. (R. pp. 78-79). Further, following the trial court's order, the Greens responded in their Rule 59(e) motion that the settlement amount was bargained for in light of disputed legal issues within the summary judgment

ruling regarding the extent of Grand Strand's potential liability under the non-delegable duty doctrine and respondeat superior. (R. p. 98).

Furthermore, Bauerle is also incorrect in his assertion that the "Greens never argued that the $2 million settlement was joint marital property. . ." (Return to Pet. for Writ of Cert., p. 10). ***As further evidence of the inequity of an unequal allocation***, the Greens clearly argued that "[e]ven if the settlement has been allocated entirely between medical malpractice and loss of consortium causes of action, the funds would still be marital property to which each Plaintiff is equally entitled. (Appellant Br. of Resp't-Appellants, p. 43) *citing* 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). The Greens further supported the inequity of an unequal allocation by pointing out that they could have asserted their causes of action in separate lawsuits even if they had divorced after the settlement. (Appellant Br. of Resp't-Appellants, p. 43) *citing* Lawton v. Hamm, No, 06-933, 2006 WL 2622629, at *1 (D.S.C. Sept. 8, 2006)). The case of Ex Parte Government Employee's Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007), which Bauerle claims is inapplicable, was clearly cited in the Petition for Writ of Certiorari to this Court as further support of the trial court's lack of authority to perform the allocation. This case makes clear that the pecuniary interests of a third party is insufficient to grant standing to intervene in a marriage. Here, Bauerle's pecuniary interests are also insufficient to convey authority to the trial court to divide marital funds between the Greens, particularly when that division is based solely on the jury's determination of Bauerle's liability without any consideration for the Greens right to share the property equally.

Of note, this Court issued its ruling in Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015), during the pendency of the appeal of this case after all briefs had been filed and prior to oral

arguments. The Greens submitted the case as a supplemental citation pursuant to Rule 208(b)(8), SCACR, stating that "This Supreme Court opinion is pertinent to Respondents/Appellants' position that the Trial Court's allocation of the settlement proceeds among claims based on a percentages analysis is without merit, particularly where the settlement is unquestionably reasonable under the facts." (Nov. 3rd Correspondence). In response, Bauerle wrote to the Court of Appeals consenting to the Court's consideration of the Riley case, specifically stating that both sides had relied on that case's now-overruled opinion in their briefs, though he argued that the Supreme Court opinion now rendered it inapplicable to the facts of the present case. Accordingly, it was conceded that the issues of the permissibility and method of the allocation had been previously raised, argued by both sides, and preserved for review. Implicitly recognizing that the Riley case confirmed the errors in the trial court's rulings, Bauerle now claims these issues haven't been preserved.

Furthermore, as set forth above and below, the Greens argued repeatedly that the settlement was paid to both of them equally and that any allocation should be consistent with this clearly conceded point. As set forth in the Petition for Rehearing which was the first opportunity to address this argument in the context of the new Riley opinion, it was not the Plaintiffs' burden to demonstrate an equitable method of allocation or to justify their reasons for accepting the funds equally. The issue of the impermissibility of the trial court's method of allocation was more than adequately preserved in the Petition For Rehearing, and Bauerle's suggestion that Plaintiffs did not reassert their suggestion for an alternative compromise methodology is a remarkable attempt to benefit from his failure to meet his own burden of proof as clearly set forth in Riley.

II. BAUERLE FALSELY REPRESENTS THAT THE DISTINCTION IN HIS OWN CONDUCT AND THAT FORMING THE BASIS OF GSRMC'S LIABILITY WAS FIRST MADE ON REHEARING.

Remarkably, Bauerle claims that the Greens' argument that his conduct was different from that of GSRMC was not raised until their Petition for Rehearing. Once again, this issue has been a central point of contention argued extensively throughout this case. In support of the argument against setoff, the Greens have repeatedly argued that GSRMC's negligence was not based on the same conduct resulting in the same injuries as Bauerle. In short, GSRMC and Bauerle were not joint tortfeasors. Even if it could reasonably be argued that the exact nature and timing of GSRMC's conduct was not the *same exact* issue as whether it was distinguishable from Bauerle's negligent conduct and resulting injuries, it is certainly a *subsidiary* issue absolutely intrinsic to the analysis. "A question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 226(d)(2), SCACR.

The argument that the settling and non-settling defendants engaged in different negligent conduct resulting in different injuries certainly implies that such conduct occurred at different times. In the interest of efficiency in responding to Bauerle's assertion that the Greens have never argued GSRMC's conduct and resulting injuries occurred prior to his own, Petitioners' respectfully direct the Court's attention to the following quotations from previous briefs submitted to both the trial court and Court of Appeals:

> (1) "By way of the Stipulation and Covenant, the only causes of action asserted at trial against Bauerle were for Bauerle's negligence in interrupting Mr. Green's treatment. . . . Therefore, Grand Strand's settlement funds were given to the Plaintiffs in consideration for completely different causes of action than those pursued against Bauerle at trial and for which the jury rendered a verdict." (R. P. 55.)
>
> (2) "The damages the Plaintiffs sought to recover from Grand Strand negligently failing to implement policies and procedures are different than those the Plaintiffs sought to recover from Bauerle for negligently interrupting treatment to Mr. Green. But for Bauerle's negligence, all of the expert medical testimony admitted at trial was that Grand Strand's administrative negligence could have caused Mr. Green minimal harm from blood loss and enduring low pressure for a prolonged period. Further, the Plaintiffs' experts testified at trial that absent the interruption by

Bauerle, Mr. Green's cardiac arrest was not inevitable. . . The injuries alleged by the Plaintiffs [to be] caused by Grand Strand are separate and apart from those found to have been caused by Bauerle." (R. p. 58).

(3) "Here, the judgment against Bauerle was [for] the injuries Mr. Green sustained when Bauerle negligently delayed Mr. Green's care. . . At trial, Dr. Chariker testified that the interruption in treatment to Mr. Green's right arm caused by Bauerle's order for [the] CAT Scan 'tipped the scales' and caused Mr. Green's arrest." (R. p. 9).

(4) "In the pleadings and throughout trial [the Greens] argued that [Bauerle] negligently interrupted the treatment being provided to Mr. Green by [GSRMC] employees, whom Bauerle admitted did not proximately cause or contribute to the injuries and damages sustained by Plaintiffs." (Reply Br. of Resp't. Appellants, p. 1).

(5) "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. (Reply Br. Of Resp't. Appellants, p. 2).

(6) "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. . . Dr. Chariker testified that the cardiac arrest was not inevitable rather, but for Bauerle's negligence it would not have occurred. . ." (Reply Br. Of Resp't. Appellants, p. 3).

(7) "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." (Appellants' Br. of Resp't. Appellants, p. 26).

(8) "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." (Appellants' Br. of Resp't. Appellants, p. 28)

(9) "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." (Appellants' Br. of Resp't. Appellants, p. 26-27).

(10)"At trial, both sides presented evidence that physicians at GSRMC disagreed with Bauerle's decision to remove Mr. Green from the preoperative area . . ." (Appellants' Br. of Resp't. Appellants, p. 28).

(11)"The Covenants involved a single indivisible sum paid to Plaintiffs jointly as compensation for past and future claims against GSRMC, and were not limited to claims named in the lawsuit pending at the time of settlement." (Appellants' Br. of Resp't. Appellants, p. 23).

As further support of the inequity of granting a setoff in this case, the Greens have argued that they are being forced to demonstrate *what* injuries resulted from GSRMC's negligent conduct, by citing only to the record of a trial against *Bauerle* in which *GSRMC's* negligence and liability for specific injuries **was not even at issue**. Bauerle even concedes this point in his Return to Petitioners' Petition for Writ of Certiorari, stating "[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." (emphasis added)(Return Pet'rs' Writ. Crt., p. 13). Of first note, the first cause of action was for medical malpractice, and the allegations against Bauerle and GSRMC under this cause of action were absolutely **not** identical as the claim regarding the lack or inadequacy of policies and procedures was clearly **only** alleged against GSRMC. (R. p. 37). Moreover, Bauerle has previously admitted that GSRMC did not cause or contribute to the injuries and damages alleged under the medical malpractice cause of action. (R. pp. 83-84). Of second note, the second cause of action, which **did not make it to trial,** was Negligent Supervision, Hiring, and Training, and it was very clearly alleged **only against GSRMC**.

Not only is it manifestly unjust to require the Greens to prove that the injuries and causes of action settled were different from those tried by ***using only the transcript of the trial against Bauerle***, but the burden of proving his entitlement to setoff was on *Bauerle* in the first place. This issue only further clarifies the distinction between this case and the other cases involving setoff; that there are **multiple injuries** arising out of **different conduct**. There is simply no way to

conclude that whatever injuries the jury included in its verdicts were identical to those included in the settlement. Nor is it possible to determine that GSRMC settled *entirely* for the same medical malpractice cause of action as the verdicts, where the hospital could not even be held directly liable on this cause of action as a matter of law.

III. PETITIONERS PRESERVED THE ARGUMENT THAT S.C. CODE § 15-38-50 WAS INNAPPLICABLE BECAUSE BAUERLE AND GSRMC WERE NOT JOINT TORTFEASORS.

Bauerle next claims that Petitioners did not raise the argument that the UCATA does not apply to vicariously liable parties. Plaintiffs respectfully direct this Court's attention to their Memorandum in Opposition to Motion for Setoff under section III(b) entitled "The settling Defendants and Bauerle are not joint tortfeasors." (R. 62). Of note, the first sentence of this section states "[s]ection 15-38-50 only applies to true joint tortfeasors." (R. p. 62). This argument was also addressed by **both** sides in the appellate briefs, as well as in the Petition for Rehearing of Respondents-Appellants.

In addressing the actual merits of this argument, Bauerle further overlooks the relevance of 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), stating that "*Andrade* did not involve any issues regarding setoff and certainly does not hold that a settlement by a party which is vicariously liable is not subject to setoff." (Return to Pet. for Writ of Cert., p. 14). The Andrade opinion actually directly cites § 15-38-50, referring to it as a codification of the newer common law rule, holding that the UCATA does not apply to vicariously liable parties. The court makes clear that the UCATA, *as its name implies*, governs **contribution** amongst joint tortfeasors, distinguishing this concept from indemnity existing between the principal and agent in vicarious liability situations. Id. at 226. The Andrade court dictates that "[t]hus, the UCATA only applies in situations involving joint

tortfeasors." Id. at 226. Here, any settlement funds allocated to the medical malpractice cause of action could only be for vicarious liability for *Bauerle's* conduct as the hospital cannot, as a matter of law, be held directly liable for medical malpractice. Nevertheless, Bauerle claims entitlement to an *equitable* setoff, which is not at issue. His motion for setoff was based entirely on § 15-38-50, and the trial court's analysis was also based entirely on this statute, stating "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." (R. p. 20). Remarkably, Bauerle claims that "this argument that Grand Strand and Dr. Bauerle were 'not joint tortfeasor[s]' under the UCATA is immaterial and does not alter the ultimate result. As the courts below agreed, Dr. Bauerle is entitled to an equitable setoff for the Grand Strand settlement." (Return to Pet. for Writ of Cert., p. 15). As an initial response to Bauerle's argument, neither the trial court nor the Court of Appeals have undergone any equitable analysis rather, the setoff was **expressly** based on the statute. Furthermore, this argument ignores the entire analysis behind the holding in Andrade which clearly explains that contribution is only applicable between joint tortfeasors, even expressly stating that the statute was a codification of this common law principal. Id. at 223-226. Finally, Bauerle concedes in his brief that the settlement with GSRMC encompassed "all direct **and vicarious** liability claims[,]" **conceding that the entire settlement was not paid to settle joint liability**. (Return to Pet. for Writ of Cert., p. 14)(emphasis added). As made clear in Andrade, any payment by GSRMC to protect itself from liability for *Bauerle's* negligent conduct would raise issues of *indemnification* rather than *contribution*, and would most likely be governed in large part by the contractual relationship between Bauerle and the hospital.

IV. THE GREENS PRESERVED THE ARGUMENT THAT THE SETTLEMENT WITH GSRMC COMPENSATED DIFFERENT INJURIES THAN THE VERDICTS AWARDED AT TRIAL AGAINST BAUERLE.

Bauerle states that "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." (Return to Pet. for Writ of Cert., p. 15). Respectfully, this statement is a brazen misrepresentation to this Court. That there was no way to determine that the settlement and verdicts compensated the same single injury has been the very foundation of every major issue and argument raised at both the trial and appellate level. The issue of *what* injuries were caused by GSRMC's conduct is clearly a subsidiary issue probative of the question of whether they were the same injuries resulting from Bauerle's conduct.

At the trial level, reference must only be made to the trial court's order which expressly grants setoff based entirely on the holding that there was only one single injury at issue, rejecting Plaintiffs' arguments that different injuries were suffered. (R. p. 20). Nevertheless, the Greens initially argued in their Memorandum in Opposition to Motion For Setoff under Section II(b), which was entitled "**[t]he settlements and judgment are for different injuries,**" that the ". . . settlements do not compensate the Plaintiffs for the same injuries as the judgment against Bauerle." (R. p. 53). The very basis of their argument against setoff was that **Bauerle** "must prove that all of the settling Defendants and Bauerle caused the Plaintiffs to suffer one indivisible injury for which the Settling Defendants and Bauerle settled or litigated under the same cause of action." (R. p. 57). The Plaintiffs have argued from the start that "[t]he injuries alleged by the Plaintiffs [to be] caused by Grand Strand are separate and apart from those found to have been caused by Bauerle." (R. p. 58).

In their Rule 59(e) motion, the Plaintiffs asked that the trial court "consider and rule on all arguments set forth in the Plaintiff's Memorandum Opposing Setoff. . ." (R. p. 93). Further, the

Plaintiffs discussed the holding in Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (2000), arguing that, even though that case only involved a single physical injury, the two causes of action arising out of the death were still considered separate claims compensating different losses. (R. p. 96). In other words, it is imperative that the court consider *what* is being compensated when determining whether two causes of action are distinct, as the purpose of permitting setoff is to prevent a double recovery. Further, the Greens argued that the **existence** and **amount** of Grand Strand's potential liability for each of the various causes of action was "impossible to ascertain from the jury's verdict [against Bauerle]." (R. p. 98). The Greens further argued the inequity of forcing them to defend claims against Grand Strand which were not even at issue in the trial against Bauerle, clearly indicating that they did not seek identical recoveries from the settling and non-settling defendants. (R. p. 97).

In the interest of efficiency, Petitioners respectfully direct this Court's attention to the following example excerpts from the appellate briefs which, in addition to those referenced in the above sections, they unequivocally argued that the trial court erred in holding that the verdicts and settlements compensated the same single injury:

(1) **"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."** (Appellants' Br. of Resp't. Appellants, pp. 2, 10).

(2) "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." (Appellants' Br. of Resp't. Appellants, p. 19).

(3) The injuries alleged by the Plaintiffs [to be] caused by Grand Strand are separate and apart from those found to have been caused by Bauerle." (Appellants' Br. of Resp't. Appellants, p. 32).

(4) "Similarly, in the present case, it is not possible to ascertain what elements of damages were included in the Settlements or verdicts." (Appellants' Br. of Resp't. Appellants, p. 20).

(5) "If Bauerle had asked the court to employ this [allocation] process, he would have contradicted his assertion, and the trial court's finding, that the Settlements and verdicts compensated a single, indivisible injury." (Appellants' Br. of Resp't. Appellants, p. 21).

(6) "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." (Appellants' Br. of Resp't. Appellants, p. 21).

(7) "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." (Appellants' Br. of Resp't. Appellants, p. 32).

(8) "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." (Appellants' Br. of Resp't. Appellants, p. 32).

(9) "The injuries alleged by the Plaintiffs [to be] caused by Grand Strand are separate and apart from those found to have been caused by Bauerle." (Appellants' Br. of Resp't. Appellants, p. 43).

(10) ". . .it is impossible to conclude that GSRMC's settlement and the verdict against Bauerle compensated Mr. Green for the same damages." (Appellants' Br.Of Resp't. Appellants, p. 46).

(11) "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." (Rpl. Br. Of Resp't. Appellants. p. 3).

(12) "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. . . 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." (Rpl. Br. Of Resp't. Appellants. pp. 4-5).

(13) "Moreover, it is not possible to discern what potential elements of damages or physical injuries were included in the jury verdict." (Rpl. Br. Of Resp't. Appellants. pp. 6-7).

(14) ". . . 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." (Rpl. Br. Of Resp't. Appellants. p. 9).

(15) ". . . Bauerle has otherwise failed to establish that the jury awarded Mr. Green $2,3000,000.00 or Mrs. Green $550,000.00 for any specific loss or injury." (Rpl. Br. Of Resp't. Appellants. p. 9).

(16) "The verdicts against Bauerle and the settlements with GSRMC and CMR do not compensate Plaintiffs for identical injuries, damages, or causes of action." (Rpl. Br. Of Resp't. Appellants. p. 9).

Bauerle asserts that the Greens "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." (Return to Pet. for Writ of Cert., p. 17, ftnt. 8). Further, he argues that they were not prevented from doing so, implying that the Greens should have presented evidence of injuries not at issue in the case against Bauerle. Implicitly recognizing that this argument fails under any theory of law, Bauerle attempts to meet his burden by asserting that the Life Care Plan "accounted for all of Mr. Green's injuries and his ultimate medical condition." Id. Of first note, this statement represents an admission that there were multiple injuries alleged, in contradiction of the trial court's finding that there was a single "injury." Of second note, the Life Care Plan lists, at the top of each page, the injuries included therein, stating "Diagnosis: T6 paraplegia, neurogenic bladder, neurogenic bowel." (R. pp. 385-390). Clearly, this does not include any damages other than the future medical expenses for these three injuries, nor does it include the damages resulting from the loss of sexual functioning which was also specifically alleged to be caused by the infarction resulting from Bauerle's conduct. It certainly doesn't include any injuries not alleged to have resulted from the infarction.

Conclusion

The basis of all arguments at both the trial and appellate levels has been that there is no way to determine what injuries were included in the jury verdicts and no way to determine what injuries and causes of action were encompassed in the settlement with Grand Strand. Further, the evidence clearly demonstrates that there is no risk of a double recovery. Nonetheless, the trial court and Court of Appeals ignored existing precedent, and arbitrarily created a novel analysis with no basis in law or equity in order to reduce the liability for which the jury determined Bauerle was responsible. Contrary to Bauerle's claim that this case does not involve any issue of great public importance or interest, it involves catastrophic injuries requiring future medical care with an estimate cost **far exceeding** the total recovery if the setoff is upheld. Furthermore, the ruling runs afoul of several public policy concerns such as that favoring settlement of disputes. Based on the foregoing and any other reason appearing on the record, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari.

Respectfully Submitted,

O.Grady Query
Elizabeth Brooke Hurt
Michael W. Sautter
Query, Sautter, Forsythe, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, SC 29412
843.795.9500

Cristin Uricchio
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412
843.795.9300

L. Morgan Martin
1121 Third Avenue
Conway, South Carolina 29526
843.248.3177
Counsel for Petitioners

Charleston, South Carolina
July 1, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2016-UP-052 (S.C. Ct. App. filed Feb. 3, 2016)

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

v.

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

CERTIFICATE OF SERVICE

I certify that I have served the **Respondents-Petitioners' Reply Petition for Writ of Certiorari** on Respondents, Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., by depositing a copy of it in the United States Mail, first class postage prepaid, addressed to his counsel of record, Andrew F. Lindemann and Jack McCutcheon, at the addresses below:

Andrew F. Lindemann
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
Attorney for Respondents

John B. McCutcheon, Jr.
Lisa A. Thomas
Thompson & Henry, PA
Post Office Box 1740
Conway, South Carolina 29528

Date: 7/1/16

E. Brockhurst

QUERY SAUTTER FORSYTHE, LLC
ATTORNEYS AND COUNSELORS AT LAW

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

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

Michael W. Sautter**
**Managing Partner

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

Elizabeth Brooke Hurt

July 1, 2016

Via U.S. Mail
The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C.
Civil Action No. 2011-CP-26-7403
Appellate Case No. 2016-000864

Dear Mr. Shearouse:

With reference to the above case, enclosed for filing please find one unbound original and seven (7) bound copies of Respondents-Petitioners', Randall and Ann Green, Reply in Support of Writ of Ceriorari and Certificate of Servic showing that the return has been served on all counsel of record.

Please return a filed copy of each in the self-addressed postage prepaid envelope I have provided. By copy of this correspondence, copies of the enclosed Reply and Certificate of Service are being served on all counsel of record.

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

With kindest regards, I remain,

Very truly yours,

E. Brooke Hurt

Brooke Hurt
Enclosures

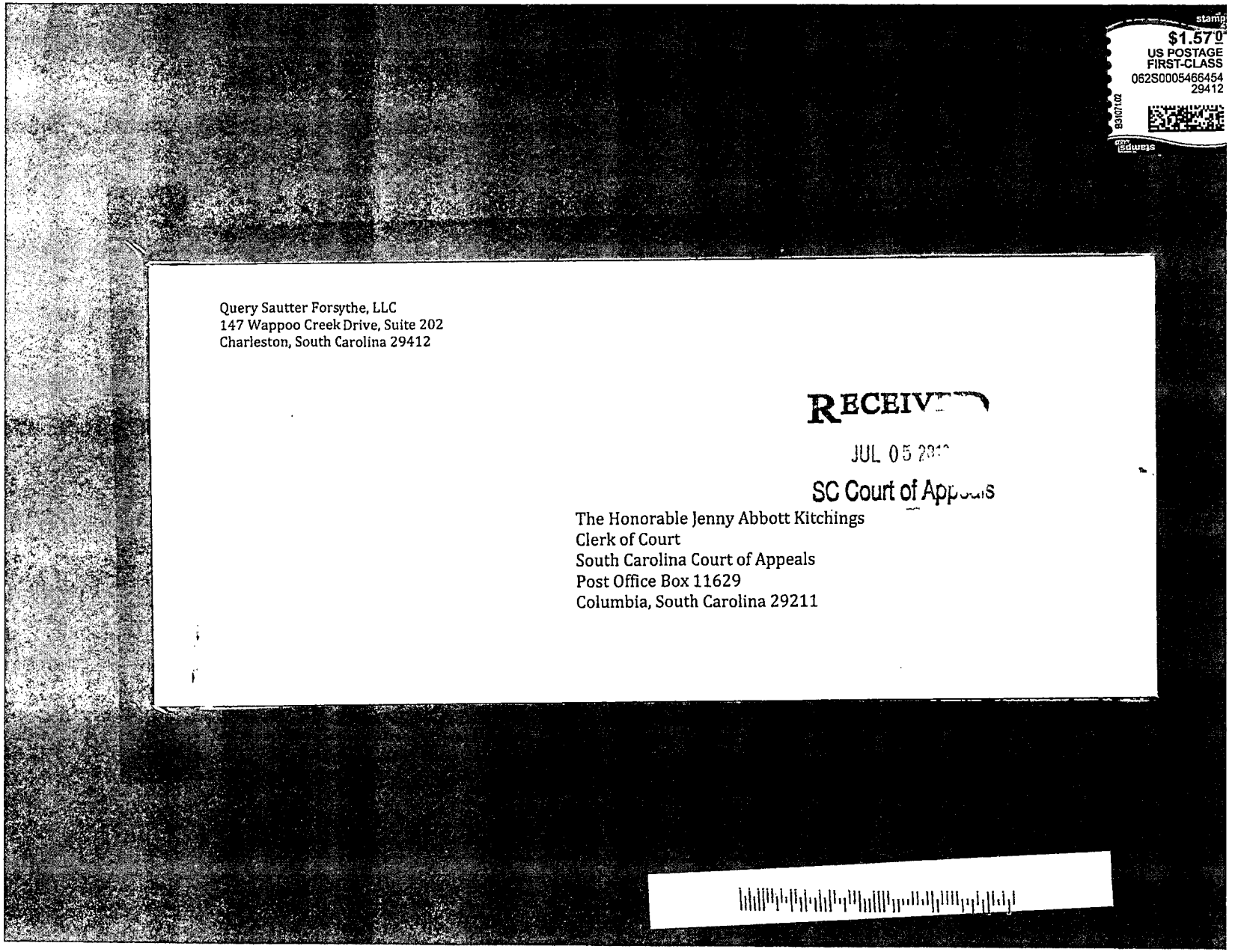
cc: The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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

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

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

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



stamp
$1.57
US POSTAGE
FIRST-CLASS
062S0005466454
29412
B3107102

Query Sautter Forsythe, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29412

RECEIVED
JUL 05 2011
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211