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Unpublished Opinion No. 2016-UP-052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-Petitioners,

v.

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

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RESPONDENTS-PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on March 24, 2016.

QUESTIONS PRESENTED

1. Was it error to allocate an unallocated settlement paid jointly to a husband and wife solely for the purpose of setoff, and to make that allocation based on percentages derived by comparing the separate verdicts where different causes of action and injuries were alleged against the settling and non-settling defendants?

2. Was it error to find that the settling and non-settling parties were joint tortfeasors liable for the same single injury, entitling the non-settling party to setoff of all settlement funds where multiple injuries with different damages were alleged to arise out of separate tortious acts occurring at different times, the settlement was unallocated, and the verdicts did not specify the injuries compensated?

STATEMENT OF THE CASE

This action arises from the negligent treatment of Randall M. Green ("Mr. Green") after he and his wife, Ann Green ("Mrs. Green"), and their son were involved in a severe car accident on April 17, 2004. The Greens settled with the at-fault driver's insurer as well as their own underinsured motorist carrier for injuries sustained in the vehicle accident. Subsequently, Randall and Ann Green ("The Greens") filed a lawsuit on May 30, 2005 against Dr. Wayne Bauerle ("Bauerle"), asserting causes of action for medical malpractice and loss of consortium. Grand Strand Regional Medical Center ("GSRMC") and the ambulance carrier, Carolina Medical Response, Inc. ("CMR") were later named as additional parties in 2007. For a nominal payment of $25,000.00, CMR was released from the action.

On October 15, 2012, the Greens filed a Fourth Amended Complaint asserting a direct negligence claim for Negligent Supervision, Hiring, and Training and specifically

pleading the Non-Delegable Duty doctrine as the basis for GSRMC's vicarious liability for medical malpractice.(R. p. 32-44). On April 18, 2013, summary judgment was granted to GSRMC on both causes of action for vicarious liability and Negligent, Supervision, Hiring, and Training. (R. p. 1-15). The order was not appealed by any of the parties.

Subsequently, the Greens jointly accepted a settlement of $2,000,000.00 from GSRMC in exchange for a Covenant Not Execute and Covenant Not To Sue. The settlement was not allocated to specific causes of action or between the two Plaintiffs. The Covenant specified that it was not intended as full compensation for all injuries and damages alleged in that lawsuit or limited to the claims pending therein. It further specified that the payment was expressly paid only on behalf of GSRMC, and "shall in no way" affect any action against any other person. On June 11, 2013, a stipulation of dismissal with prejudice as to GSRMC was filed by consent of all parties, including Bauerle. (R. p. 17; pp. 518-522).

The five day medical malpractice trial against Bauerle commenced on September 9, 2013. The jury found that Bauerle's deviation from the standard of care caused Mr. Green "injuries," awarding him $2,300,000.00. The jury awarded Mrs. Green $550,000.00 for her loss of consortium in a separate verdict. Bauerle made a motion for setoff based on S.C. Code Ann. § 15-38-50, which was granted as to the entire amounts paid equally to the Greens by GSRMC and CMR. (R. pp. 21-22).

For the purpose of applying the setoff, the court allocated the **unallocated** settlement funds utilizing its **own formula based on percentages** derived by combining the amounts of the Plaintiffs' separate verdicts. There was **no factual determination** as to the settling parties' intentions ***or*** the reasonableness of not allocating the settlement and paying the funds equally to both Plaintiffs. The trial court denied setoff as to the funds paid

to the Greens by MUSC, the at-fault driver, and the Green's own UIM insurer. (R. pp. 20-22).

The Court of Appeals affirmed the judgment of the circuit court. Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., Op. No. 2016-Up-052 (S.C. Ct. App. filed February 3, 2016). Both parties filed Petitions for Rehearing, which were denied on March 24, 2016. Petitioners seek a writ of certiorari to review that decision.

FACTS

Following a car accident on April 17, 2004, Mr. Green was transported to Grand Strand Regional Medical Center ("GSRMC") with a right hip fracture and dislocation, and a laceration on his right arm. He arrived in the Emergency Room ("ER") at 12:00 p.m. and was noted to be cooperative, awake, alert, making eye contact, communicating with normal speech, exhibiting no confusion, and without any signs of face or head trauma. The ER physician, consulted with the on-call orthopedic surgeon, Dr. Wayne Bauerle, over the phone regarding the hip injury. (R. pp. 434–435; . pp. 343- 344; p. 357; p. 359; p. 361; p. 485, lines 13-21; p. 362).

Due to the alleged negligent care Mr. Green received over the next two hours in the emergency room, he developed further injuries and serious conditions. Expert testimony at trial indicated that "[s]o many things had gone awry," there was no way to determine the cause of his increasing instability. Due the decline in his condition, at 2:00 p.m., Mr. Green was urgently taken from the ER to the pre-operative area ("Pre-Op") where he could be closely monitored and an anesthesiologist was present to control his vital signs and perform immediate resuscitative procedures if his condition worsened. Dr. Lintz then called Dr. Bauerle again and told him that he felt Mr. Green needed to be in Pre-Op and there was no

time for a CT scan of his hip. Bauerle disagreed and was "pretty adamant about getting the CAT scan of the hip first." At trial, Bauerle stated, "*I* had no disagreement, I knew exactly what needed to be done, it's what I did." (R. p. 291, lines 15-20; p. 345; p. 447, lines 12-25; pp .457-463; p. 465; p. 471, lines 12-25).

Mr. Green's cognitive functioning had also markedly declined by the time he was taken to Pre-Op at 2:00 p.m. Of significant note, this decline in his cognitive status occurred sometime after his arrival at GSRMC and before Dr. Bauerle's involvement. He would later be diagnosed with a brain injury at MUSC which interferes with his speech and ability to follow commands. This and the other injuries suffered during the previous two hours at the hospital, while subject to the settlement with GSRMC, **were not at issue in the trial against Bauerle**. (R. p. 215; pp. 248-250, p. 349-350; p. 364; p. 419; p. 465; p. 468; pp. 483-484).

When Bauerle arrived at the hospital, he went into Pre-Op and removed Mr. Green for the CT scan of his hip, despite vital signs warning that he was on the verge of a cardiac arrest. Bauerle conceded at trial that he would not have removed him had he been aware of his condition. Expert testimony indicated that Bauerle "drastically" deviated from the standard of care in taking a "totally unstable" patient out of Pre-Op where his vital signs were being closely monitored and controlled by Dr. Peters, the anesthesiologist who could also perform the emergency procedures necessary to prevent a cardiac arrest. (R. p. 308, lines 18-22; p. 365; p. 419; p. 456; p. 459, lines 13-15).

While away from Pre-Op for the CT scan, Mr. Green went into cardiac arrest, which was discovered in a "serendipitous fashion" by Dr. Lintz, who "happened" to be passing by. Dr. Lintz immediately paged Dr. Peters from Pre-Op before intubating and attempting to resuscitate Mr. Green himself in the emergency room. According to the resuscitation

record, CPR ceased 26 minutes later. Mr. Green was transferred to MUSC the next day, and the nurse receiving him from the ambulance noted that he couldn't wiggle his toes, discovering that he was paralyzed. He spent the next two months being treated for innumerable serious injuries and conditions, before being discharged to a rehabilitation facility. (R. pp. 197-198; pp. 263-264; p. 346; p. 348- 356; p. 365; p. 419; p. 446; pp. 488-489).

At trial against Bauerle, the Greens alleged that (1) Bauerle deviated from the standard of care in **removing Mr. Green from Pre-Op**; (2) Mr. Green's location away from Pre-Op proximately caused the cardiac arrest; (3) the cardiac arrest proximately caused a spinal cord infarction; and (4) the spinal cord infarction proximately caused several specific injuries. **Each injury alleged to result from Bauerle's tortious act was supported by evidence of distinct damages, and there was conflicting evidence at trial as to whether specific injuries resulted from the infarction.** (R. pp. 128-132; pp. 134-136; pp. 138-141; pp. 144-145; pp. 151-174; p. 176-181; p. 185-192; p. 350; p. 370-390; pp. 483-484; pp. 493- 500).

At trial, the jury returned verdicts for the Greens in the amount of $2,300,000.00 for Medical Malpractice and $550,000.00 for Loss of Consortium. The verdict form indicated that Bauerle deviated from the standard of care and that this deviation caused Mr. Green's "injuries," but **did not indicate which "injuries" or "actual damages" were included**. At trial, the total future medical expenses for injuries alleged to have resulted from the infarction exceeded the entire medical malpractice jury verdict, indicating that the jury did **not** find that Baurele's negligence proximately caused all injuries and damages alleged. Further, there was evidence that Mr. Green was urinating "without difficulty" upon discharge from MUSC months later, creating conflicting evidence as to whether the bladder

injury resulted from the spinal infarction as alleged by Plaintiffs. This injury was supported by evidence of distinctive damages to **both** Plaintiffs, inclusive of the value of Mrs. Green's care in catheterizing him five to six times a day and the past and future cost of catheters over the course of 25.65 years totaling $393,214.50. There is no way of determining whether the jury included this injury and resulting damages in the malpractice verdict. (R. pp. 28-31; p. 263, line 16- p. 264, line 8; p. 336; p. 348;p. 350; p. 379).

Bauerle filed a motion for setoff, claiming that S.C. Code Ann. §15-38-30 entitled him to setoff of all settlement funds paid by GSRMC, CMR, the at-fault driver, the Green's own UIM insurer, and MUSC for funds paid to settle a separate suit arising out of severe complications resulting from a negligently retained sponge. The basis of his motion was that the Greens ". . . sought recovery from all Defendants for the same injury." The trial court denied the motion as to the at-fault driver, the Greens' UIM insurer, and MUSC. However, the trial court found that both of the verdicts, the entire unallocated settlement with GSRMC, and the settlement with CMR would be set off because they were for the same "injury" and the same cause of action as the jury verdict. (R. p. 21; pp. 45-48).

For the sole purpose of providing Bauerle the benefit of setoff, the trial court then found that the *unallocated* settlement with GSRMC belonging *equally* to Mr. and Mrs. Green would be divided between them and apportioned between medical malpractice and loss of consortium. The order expressly stated that there existed no authority permitting it to allocate an unallocated settlement, but found that it "logically follows" it would be permitted based upon this Court's holding in Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012). Bauerle never requested that the settlement be allocated. Further, there were no arguments or findings as to the settling parties' intentions or whether it was unreasonable for the funds to be paid equally to the Greens and *not* be allocated to

specific causes of action. (R. pp. 18-23; pp. 45-47).

In order to effect the allocation, the court used its own formula which did not involve *any* factual determination regarding the Plaintffs' respective damages as required by prior Supreme Court holdings. Rather, the court found that Plaintiffs had received "a combined verdict of $2.85 million against the Defendants." The court then determined the percentage of this total amount represented by each Plaintiff's individual verdict, allocating these respective amounts to each Plaintiff. Accordingly, the trial court reduced Mrs. Green's equal interest in the $2,000,000.00 settlement to $385,694.91. The remaining $1,614,035.09 was allocated to Mr. Green.

Finally, each of the Plaintiffs' verdicts against Bauerle was then reduced by the newly allocated amounts, reducing Mrs. Green's verdict to $159,480.53 and Mr. Green's verdict to $665,789.47. (R. pp. 21-22). Accordingly, the trial court's order rendered the effect of the verdict against Bauerle far more penalizing to Mrs. Green than it was to the actual tortfeasor. The Court of Appeals affirmed the trial court's rulings *in toto* without analysis.

ARGUMENTS

Pursuant to Rule 242, SCACR, Petitioners respectfully move for a Writ of Certiorari for this Court to review and reverse the Court of Appeals Unpublished Opinion 2016-UP-052 filed February 3, 2016. The Court of Appeals erroneously affirmed the trial court's grant of setoff for the funds paid by Grand Strand Regional Medical Center and Carolina Medical Response, allocating an unallocated settlement between Mr. and Mrs. Green on a percentage basis for the purpose of setoff. On both issues addressed, the Court of Appeals' Opinion conflicts with existing precedent and in the analyses undertaken,

creates novel issues of law for which no precedent exists. In so ruling, the Court of Appeals creates precedent in conflict with judicial economy.

I. IT WAS ERROR TO ALLOCATE AN UNALLOCATED SETTLEMENT PAID JOINTLY TO A HUSBAND AND WIFE SOLELY FOR THE PURPOSE OF SETOFF, AND TO MAKE THAT ALLOCATION BASED ON PERCENTAGES DERIVED BY COMPARING THE SEPARATE VERDICTS WHERE DIFFERENT CAUSES OF ACTION AND INJURIES WERE ALLEGED AGAINST THE SETTLING AND NON-SETTLING DEFENDANTS.

The trial court and Court of Appeals opinions are in direct conflict with this Court's rulings in Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015) and Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012). Specifically, there exists no precedent for allocating an **unallocated** settlement, particularly one paid jointly to a husband and wife. Ex Parte Gov't. Employee's Ins. Co. ("GEICO"), 373 S.C. 132, 644 S.E.2d 699 (2007). Moreover, there exists no precedent for *reallocating* a settlement amongst multiple Plaintiffs in order to allow a non-settling tortfeasor the benefit of setoff, particularly where the causes of action and injuries alleged against the various Defendants were not identical. Ward V. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408(Ct. App. 2000). In cases permitting reallocation of a settlement, such as Rutland, Epting, and Welch, the reviewing court found *no evidence* to support the settling parties' allocation decision thus rendering it, by definition, a sham.

Here, the trial court's reason for allocating the settlement was that Bauerle was entitled to a setoff. As was also noted in the Riley opinion, Bauerle did not suggest that the lack of allocation and Plaintiffs' decision to share equally in the funds was unreasonable. There was no consideration that, as a matter of law, the parties had *no* reason to allocate the settlement as this was not a death case. Further, the married Plaintiffs intended to use the funds for their joint necessities of living, and compelling evidence of Mrs. Green's

damages renders her equal entitlement to the settlement *extremely* reasonable, and the analysis should have ended there. Moreover, the arbitrary method used to perform the allocation certainly should not have been based on the jury determination of the damages *Bauerle* caused. Riley, *supra*. As this Court stated in Riley v. Ford, "where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset." Id. at 196.

The trial court and Court of Appeals 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." However, this case is distinct from Smith v. Widener as that case involved only a single identifiable injury alleged against all defendants; i.e., a specific amount of money that was lost, therefore reallocation was not even at issue in that case. Even if that case was applicable to the present facts, the court in the present case did *not* utilize a "factual determination" as required by the rule for which it and the Court of Appeals cited Smith.

Allocating an unallocated settlement between multiple Plaintiffs in order to apply a setoff, particularly in a case involving multiple injuries and causes of action, represents a departure from the standard setoff rules.

> [T]he party seeking departure from the application of standard set-off rules bears the burden of proof and must be 'prepared to justify such [reallocation] as fair, bona fide, and just,' particularly where 'there is an executed contract between [the parties] which is not contested between them but which is sought to be invalidated by third parties.'

Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015)(*quoting* In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895)). Not only did Bauerle ***not*** request an allocation, he certainly did not

meet his burden of proof in justifying such an allocation as bona fide, fair, and just. The Court reduced Mrs. Green's equal interest in the $2,000,000.00 to a 19.3% share, allocating to her only $385,694.91 of the funds received as consideration to release her claims against GSRMC. As the evidence of her extensive damages was not even a factor in this determination, the resulting amount can't, by definition, be considered bona fide, fair, and just. The arbitrary application of the percentage based upon the comparison of the verdicts did not utilize ***any*** form of factual determination, take into consideration ***any*** evidence of Plaintiffs' respective injuries and damages, or give *any* weight to the intentions of the settling parties or the reasonableness of the Plaintiffs' equal entitlement to the settlement funds.

Even if the settlement and verdicts were for the same injuries and causes of action, and even if an allocation was permissible, the court should have allocated it **equally** between the two Plaintiffs. The lack of allocation is clearly evidence that they intended to share the funds equally, and any division between the husband and wife should have taken this into consideration. Permitting courts to allocate joint property unequally between a husband and wife without their consent for the purpose of setoff conflicts with precedent, and implies that the pecuniary interests of third party tortfeasors grants them standing to intervene and force the division of marital property. Ex Parte Gov't. Employee's Ins. Co. ("GEICO"), 373 S.C. 132, 644 S.E.2d 699 (2007).

Based on the facts, the decision to share equally in the funds would be *extremely* reasonable considering the extensive evidence of Mrs. Green's significant damages. Specifically, Mrs. Green alone provides Mr. Green's 24-hour care, spending very few hours in the day doing things for herself, including sleeping more than a few hours a night. For the past twelve years, she has catheterized her husband five to six times a day, requiring

her to set an alarm to wake up in the middle of the night. She lives with the knowledge that if she fails to do this even once, he will die. She manually evacuates his bowels. She physically lifts him, bathes him, prepares his meals, helps him eat, and takes care of all the household chores. She had not left the house for any length of time in the nine years prior to trial. The trial judge instructed the jury that she was entitled to recover for any expense "...incurred in the care and treatment of [her] spouse because of illness or bodily harm suffered by the spouse." According to the value of the care she provides annually, she had provided approximately $1,209,600.00 worth of care as of the date of trial. The total cost of the future home care *she* will provide to her husband is $2, 584,536.00. Therefore, it certainly would have been reasonable for the settling parties to allocate $1,000,000.00 to Mrs. Green for her damages, and, by definition, the agreement to share the funds equally could not be a fraud or sham. (R. p. 158; p. 160; p. 167, pp. 185- 187; p. 191-192; pp. 335-336; p. 385; p. 495).

"Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify appellate reapportionment for the sole purpose of benefitting [the non-settling defendant]." Riley, 414 S.C. at 197. The fact that the lack of allocation was disadvantageous to Bauerle is not a permissible reason to deprive Mrs. Green of the money for which she had contracted based solely on the erroneous finding that he was entitled to have his own liability against her reduced. The trial court and Court of Appeals are in direct conflict with this Court's holding in Riley v. Ford, wherein the Illinois Court of Appeals was quoted favorably as follows;

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the

> plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling party is worsened by the terms of a settlement, this is a consequence of the refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do. Lard v. AM/FM Ohio, Inc., 901 N.E.2d 1006, 1019 (Ill. App. 2009); *citing* Muro v. Abel Freight Lines, Inc., 669 N.E.2d 1217 (Ill. App. 1996).

Riley v. Ford, 414 S.C. 185, 197, 777 S.E.2d 824 (2015).

Here, the trial court's order, affirmed by the Court of Appeals, referred to Rutland in stating that because "[t]he South Carolina Supreme Court has specifically authorized the equitable *reallocation* of settlements in cases where the settling parties had agreed to a certain allocation between claims," it therefore " . . . logically follows that a court may make an equitable allocation in a case where the settling parties did not even agree to any particular allocation between the claims." (R. p. 22). This reasoning parallels the Court of Appeals holding in Riley v. Ford, wherein the court stated the reallocation "makes sense." Riley at 190. In overruling the Court of Appeals in that case, this Court addressed that same logic before stating;

> Essentially, the court of appeals decided it was within the province of a reviewing court to evaluate the reasonableness of not only the dollar amounts but also the relative percentage of settlement proceeds assigned to each claim.

Riley at 191.

In Riley, this Court ruled that the Court of Appeals had erred in reapportioning the settlement proceeds on the sole basis that the settling parties' allocation did not seem to be *proportionately* reasonable. In footnote 3 of the Riley opinion, this Court noted that the Court of Appeals' decision included no discussion of why the settling parties' allocation

was not reasonably based on the evidence or how it ran afoul of the public policy of preventing a double recovery. Similarly, the trial court and Court of Appeals in the present case failed to provide any discussion or findings regarding these issues. (R. p. 21).

The court used an entirely arbitrary formula which was not based on any equitable considerations or factual determination, and which entirely disregarded the intentions of the settling parties as ***expressly*** set forth in the terms of their contract. In doing so, the court relieved Bauerle of his burden of showing that the unallocated settlement was unreasonable. This penalized Mrs. Green more than it benefitted Bauerle by depriving her of her larger bargained-for portion of the settlement before her verdict was even reduced. This had the further inequitable result that the setoff, even if justified, unfairly diminished Mr. Green's verdict.

The court's allocation resulted in a setoff that reduces Mr. Green's verdict to $665,789.47, and Mrs. Green's verdict to $159,480.53. Though plaintiffs deny that any allocation or setoff should have been applied, a more equitable result would be achieved from application of the settlement to the verdicts in equal amounts as bargained for by the parties, reducing each verdict by $1,000,000.00. This would result in a judgment for Mr. Green in the amount of $1,300,000.00, allowing him to retain $1,000,000.00 of his settlement, for a total recovery equal to his $2,300,000.00 verdict. While it would relieve Bauerle of any payment to Mrs. Green, it would permit her to retain her more valuable bargained for right to an equal amount of the settlement. This result would have been far more equitable in that it would have balanced the interests of *all* parties. The unfortunate result of the present holding was that the sole party who benefitted from the court's allocation of the settlement is also the ***only*** wrongdoer who refused to settle.

II. IT WAS ERROR TO FIND THAT THE SETTLING AND NON-SETTLING PARTIES WERE JOINT TORTFEASORS LIABLE FOR THE SAME SINGLE INJURY, ENTITLING THE NON-SETTLING PARTY TO SETOFF OF ALL SETTLEMENT FUNDS, WHERE MULTIPLE INJURIES WERE ALLEGED TO ARISE OUT OF SEPARATE TORTIOUS ACTS OCCURRING AT DIFFERENT TIMES, THE SETTLEMENT WAS UNALLOCATED, AND THE VERDICTS DID NOT SPECIFY THE INJURIES COMPENSATED.

Whether under § 15-38-50 or common law, "a non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action. Riley v. Ford Motor Company, 414 S.C.185, 195, 777 S.E.2d 824, 830 (2015). A cause of action is a form of redress for an injury or wrong arising out of a single set of facts. Taylor v. Medenica, 324 S.C. 200, 218, 479 S.E.2d 35,45 (1996); Jones v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 456 S.E.2d 429 (Ct.App.1995); Robert Harmon and Bore, Inc. v. Jenkins, 282 S.C. 189, 318 S.E.2d 371 (Ct.App.1984)(distinguishing causes of action in order to prevent a double recovery in the context of election of remedies cases). Where different conduct supports distinct injuries, there is no risk of double recovery, and the Plaintiff may recover under both causes of action. Taylor, 324 S.C. at 218, 479 S.E.2d at 45; Creach v. Sara Lee Corp., 331 S.C. 461, 502 S.E.2d 923 (Ct.App.1998); Jones, 318 S.C. 171, 456 S.E.2d 429 (Ct.App.1995).

The trial court and the Court of Appeals' rulings are in direct conflict with the prior Supreme Court rulings of Riley v. Ford Motor Company, 414 S.C. 185, 777 S.E.2d 824 (2015), Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012), Simmons v. Tuomey Regional Medical Center 341 S.C. 325, 33 S.E.2d 312 (2000), Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999), Rourke v. Selvey, 252 S.C. 25, 28, 164 S.E.2d 909, 910 (1968), and Pendleton v. Columbia Ry. Gas & Elec. Co., 133 S.C. 326, 331, 131 S.E. 265, 267 (1926). Additionally, the rulings are in direct conflict with the prior Court of Appeals holdings in Andrade v. Johnson,345 S.C. 216, 225, 546 S.E.2d 665,

670 (Ct.App.2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003), Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998)) and Collins v. Bison Moving & Storage, 332 S.C. 290, 504 S.E.2d 347 (Ct.App.1998). The hospital was clearly liable for injuries arising at different points in time and out of different conduct than those alleged against Bauerle. Moreover, any portion of the settlement proceeds paid to release GSRMC's vicarious liability for medical malpractice, rather than direct liability for ordinary negligence, would not be subject to setoff under § 15-38-50.

Finally, the injuries alleged against Bauerle were distinct injuries as a matter of law. As there was conflicting evidence regarding the proximate cause of individual injuries with distinct damages at trial, there is simply no way to determine which "injuries" were included in the verdicts. The injuries alleged to have arisen out of the hospital's direct negligence prior to Bauerle's involvement were not the subject of the medical malpractice trial, making it impossible to discern from the evidence what injuries were included in the settlement with the hospital. As it was not possible to determine that the entire settlement and both verdicts *only* compensated the same injuries and respective damages, setoff should have been denied as a matter of law.

A. Plaintiffs did not assert a single cause of action against all Defendants.

In the present case, the Greens alleged that Bauerle was liable for the injuries resulting from a spinal cord infarction resulting from a cardiac arrest which was proximately caused by Mr. Green's *location away from Pre-Op*. There is no evidence that any agent of GSRMC in any way contributed to Bauerle's negligent conduct. To the contrary, the other doctors disagreed with his decision, and Bauerle conceded he made it clear to Dr. Lintz that he was "adamant" he was going to do it anyway. Further, there is no

dispute that the other doctors, nurses, and staff appropriately took Mr. Green to Pre-Op in a timely manner, a point admitted by Bauerle prior to trial. The case against Bauerle depended on the finding that his cardiac arrest and spinal infarction wouldn't have occurred if he had remained there. (R. p. 56; pp. 120-121; pp. 199-200, line 1; pp. 280-281; p. 300, lines 12-17;pp. 461-464; p. 474, lines 5-8; p. 479).

> 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.

Rourke v. Selvey, 252 S.C. 25, 28, 164 S.E.2d 909, 910, (1968)(quoting Pendleton v. Columbia Ry., Gas and Elec. Co., 133 S.C. 326, 331, 131 S.E. 265, 267 (1926).

The claims against GSRMC and Bauerle clearly involved at least some injuries arising out of different negligent acts and at different points in time. Plaintiffs' expert, Dr. Chariker, testified that all of the negligent conduct alleged directly against GSRMC occurred well before he was taken to Pre-Op, at which time organs and tissues had been injured. He was in hemorrhagic shock, his blood was too diluted, he was suffering from severe metabolic derangement from overuse of crystalloids, and "his body was underperfused." At some point during his time at GSRMC, he suffered a brain injury which still makes speech difficult, renal failure, and aspiration which resulted in pneumonia requiring bronchoscopy. **None of these injuries were alleged to have resulted from the spinal infarction which occurred as a result of Mr. Green's location away from Pre-Op at the time he suffered a cardiac arrest.** Accordingly, the trial court and court of appeals rulings are in direct conflict with Riley v. Ford, wherein this Court made clear that setoff only applies to funds paid to settle the same cause of action. (R. p. 151, lines 13-15; p. 238, lines 2-11; pp. 348-356; pp. 459-461; p. 465; p. 465)

Furthermore, S.C. Code Ann. §15-38-50 applies to parties jointly *liable* in tort for the same injury. At the time of settlement, the vicarious liability claims had been dismissed and the only direct negligence allegations against GSRMC under the remaining medical malpractice cause of action asserted the failure to either have protocols or policies governing the treatment of patients with conditions similar to Mr. Green, or in having such policies and failing to ensure they were followed. However, a hospital can't be held liable for medical malpractice, except on the basis of the negligent acts of its agents and servants or under the non-delegable duty doctrine. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999)(common law prohibition against the corporate practice of medicine in South Carolina); Simmons v. Tuomey Regional Medical Center 341 S.C. 325, 33 S.E.2d 312 (2000). Moreover, Plaintiffs' expert, Dr. Chariker, conceded that "I don't think it's the responsibility of the hospital to train doctors to be physicians or to be surgeons or to treat shock." Finally, Bauerle admitted that the employees of GSRMC did not cause or contribute to the injuries and damages alleged in the Third Amended Complaint which only contained the causes of action for medical malpractice and loss of consortium. (R. p. 37; p. 84; p. 461; pp. 468-469; p. 476, lines 8-10).

Any portion of the settlement paid to relieve the hospital's liability for injuries and damages Bauerle caused could only be by virtue of vicarious liability for which there is no right of setoff under §15-38-50. Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 670 (Ct.App.2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003)(declining to expand the definition of joint tortfeasor under §15-38-50 to include vicariously liable parties). Whether GSRMC's liability for a specific injury was direct or vicarious affects whether there is a right to setoff funds paid to settle that claim because a vicariously liable party is not a joint tortfeasor. Vicarious liability gives rise to indemnity, not setoff.

The trial court and Court of Appeals' holding that setoff was permissible, as all allegations and causes of action pled constituted the same "negligence," ignores the holding in Andrade, which makes clear that the *basis* of the party's liability for negligence distinguishes the cause of action for the purpose of setoff. Allocating funds paid by a hospital to a medical malpractice cause of action for the purpose of setoff creates a paradox as the only permissible basis for the existence of such liability is vicarious, prohibiting setoff as a matter of law. Even if setoff were permissible in the present case, it would only be permissible as to that *portion* of funds paid to settle claims for injuries arising out of negligent acts for which the hospital was *directly* liable. However, there was no evidence that the hospital in any way contributed to Bauerle's malpractice in removing Mr. Green from Pre-Op, and it certainly couldn't be directly liable for injuries resulting from that act.

B. Plaintiffs suffered multiple injuries with distinct damages and causation issues, and there is no way to determine if the verdicts compensated the same injuries as the settlement.

The 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. Cases involving setoff have involved a **single identifiable injury such as a death or identifiable economic loss**, rendering setoff appropriate to prevent a double recovery where the causes of action settled and tried provide for identical damages for that single injury. Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015); Rutland

v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012); 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 392 (Ct.App. 1986)(no setoff where damages different for single injury and no way to determine what jury included in award); Ward v. Epting, 290 S.C. 547, 352 S.E.2d 867 (Ct.App.1986). "Joint and several liability arises only when two or more tortfeasors are responsible for a *single* injury." Collins v. Bisson Moving and Storage, Inc. 332 S.C. 290, 504 S.E.2d 247 (Ct.App.1998).

The present case involved multiple extensive physical and non-physical injuries, many of which were not subject to the medical malpractice trial against Bauerle, and the jury did not reveal what injuries were included in the verdicts. There was clearly no dispute that there were multiple injuries at issue at trial **as the verdict form itself used the term "injuries."** Accordingly, the trial court and Court of Appeals finding that the settlements and verdicts were all for the "same injury" was clearly based on Bauerle's assertion that Plaintiffs *sought* the same recovery from all Defendants. Even if this assertion were true, *seeking* the same recovery for the same injuries does not render multiple injuries a single, indivisible injury, particularly where each injury has distinct damages and is subject to separate proof of causation, giving rise to different causes of action. The trial court allowed Bauerle to introduce evidence regarding causation as to specific injuries alleged at trial, utilize a verdict form which allowed the jury to award damages only for the "injuries" they found he caused, and then claim *after* trial that *all* damages alleged against *all* defendants arose from a single injury for the purpose of setoff. The Court of Appeals opinions did not address these inconsistencies. (R. pp.28-31; pp. 88-91; p. 291, lines 4-11; p. 336).

As the previously cited case law has made exhaustively clear, the correct analysis regarding the issue of setoff is **whether the settlement compensates the same damages for the same injury giving rise to the same cause of action as the verdicts.** If there is no way to determine what injury or injuries the jury included in the verdicts, it is simply impossible to determine that it is the same as that included in the settlement. Under such circumstances, setoff should be denied. Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 392 (Ct.App. 1986)(no setoff where damages different for single injury and no way to determine what jury included in award).

At trial against Bauerle, Plaintiffs alleged that the spinal infarction of Mr. Green's lower thoracic cord resulted in (1) paralysis of both legs; (2) loss of feeling from his belly button down; (3) loss of use of his bowels; (4) loss of use of his bladder; and (5) loss of sexual functioning. Additionally, Plaintiffs alleged that Mr. Green suffered five fractured ribs as a result of chest compressions performed during the cardiac arrest. Each of these injuries was supported by evidence of distinct damages. Furthermore, loss of enjoyment of life is an element of damages 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). (R. pp. 128-132; pp. 134-136; pp. 138-141; pp. 144-145; pp. 151-174; pp. 176-181; pp. 185-192; pp. 370-390; pp. 248-250; pp. 483-484).

"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). Legal cause is a question of fact for the jury unless the evidence is susceptible to only one inference. Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962). The issue of proximate cause is a question for the jury if there is a fair difference of opinion as to whose act caused the injury. Ballou v. Sigma Nu Fraternity, 291 S.C. 140, 147-148, 352

S.E.2d 488, 493 (Ct.App.1986). Here, the issue of which injuries resulted from Bauerle's actions was a jury question as there was conflicting evidence as to the proximate cause of individual injuries which Plaintiffs' alleged to have been caused by the spinal infarction. (R. pp. 237- 239; pp. 242-243; p. 250; pp. 276-277; pp. 290-291; pp. 311-312; pp. 316-318; p. 350).

According to Dr. Cranberg, the only testifying neurologist, the degree and duration of an ischemic event determines whether an infarction will occur as well as the extent of damage that is done thereby. Accordingly, the fact that Mr. Green suffered a spinal infarction does not mean that *all* of Mr. Green's injuries and damages resulted from that infarction. Further, the Life Care Plan demonstrated that *just* the future medical expense damages for *just* the paralysis, bowel, and bladder injuries equaled $3,668,176.00, an amount which *alone* exceeded the medical malpractice jury verdict, indicating that the jury did *not* include *all* injuries and damages alleged against Bauerle. (R. p. 389; pp. 481-482).

Evidence that Mr. Green was urinating "without difficulty" upon discharge from MUSC months later conflicted with evidence that the bladder injury resulted from the spinal infarction. (R. p. 350). Further, this injury was supported by evidence of distinctive damages to **both** Plaintiffs, inclusive of the value of Mrs. Green's care in catheterizing him five to six times a day and the total past and future cost of catheters over the course of 25.65 years totaling $393,214.50. (R. p. 379). This element of damages could be included in the jury verdicts **only if** the jury found that the bladder injury resulted from the infarction. Even if the trial court and Court of Appeals were correct in assuming that *all* injuries alleged against *all* parties were included in the settlement with GSRMC, **there can be no setoff if this injury was not included in the jury verdicts**. *See* Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998).

Furthermore, there is no evidence as to what injuries were included in the settlement with GSRMC. Dr. Chariker's testimony made clear that Mr. Green suffered injuries to various organs as a result of lack of oxidation, severe acidosis, and metabolic derangement. Given this severe decline in his condition over those two hours, it is abundantly clear that Mr. Green suffered *some* injury or injuries after his arrival at the hospital and prior to Bauerle's involvement. Mr. Green's cognitive status markedly declined during the two hours he was at GSRMC prior to Bauerle even arriving; and he suffered a **brain injury which was severe enough that it interferes significantly with this speech and ability to follow commands**. Further evidence as to the severity of the brain injury was not presented at the medical malpractice trial as **Plaintiffs did not allege that it was caused by Bauerle.** (R. p. 238; pp. 343-344; pp. 348-356; p. 362; pp. 370- 384; p. 419; p. 465; p. 468; pp. 479-498, line 13; p. 500).

Without any way of determining which injuries were included in the verdicts or settlements, it was error to determine that Bauerle was entitled to setoff. Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015); Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012); 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, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998).

CONCLUSION

Setoff was not appropriate in this case involving multiple injuries and causes of action, as there is no way to determine what was included in the settlements or verdicts. Accordingly, there is no way to determine that either Plaintiff would receive a double

recovery in the absence of setoff. Further, for the sole purpose of applying setoff, and despite the trial court's admission that there was no authority to do so, the holding expanded current case law to permit the allocation of and *unallocated* settlement a in non-death case without regard for the decision between the husband and wife to share the funds equally. Finally, the analysis for *applying* that allocation directly contradicted precedent by relying on a "percentages" analysis based on multiple verdicts to multiple Plaintiffs, without any factual determination or consideration of the settling parties' intentions. The findings and conclusions by the Court of Appeals in affirming the trial court's order discourages future settlements, goes against judicial economy, and should be reviewed by this Court. On both issues, the Court of Appeals deviated from binding precedent and created a novel analysis. Plaintiffs therefore respectfully request that this Court grant the relief sought herein, inquire further into these matters, and reverse the Court of Appeals.

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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-Petitioners,

v.

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

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CERTIFICATE OF MAILING

I certify that I have served Respondents-Petitioners' Petition for Writ of Certiorari and Appendix on Petitioners-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, postage prepaid, addressed to his attorneys of record, Andrew F. Lindemann and Jack McCutcheon, at the addresses below by placing the same in the U.S. Mail with first class postage prepaid:

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PETITION FOR WRIT OF CERTIORARI

I certify that I have served the Petition for Writ of Certiorari and Appendix 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, postage prepaid, on September 15, 2000, addressed to his attorney of record, Andrew F. Lindemann and Jack McCutcheon, at the addresses below by placing the same in the U.S. Mail with first class postage prepaid:

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