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Unpublished Opinion No. 2016-UP-052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 the **Respondents-Petitioners' Return to Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C.'s Petition for Writ of Certiorari** 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, first class postage prepaid, addressed to his attorneys of record, Andrew F. Lindemann and Jack McCutcheon, at the addresses below:

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COUNTER-STATEMENT OF THE CASE

This medical malpractice action arose out of injuries sustained by Randall Green ("Mr. Green") following a serious car accident on April 17, 2004. On the way to his niece's birthday party, Mr. Green was driving his truck in which his wife, Ann Green ("Mrs. Green"), and their son, Mark Green were riding when a car crossed the median and struck them head on. The first ambulance to arrive immediately transported Mrs. Green to Grand Strand Regional Medical Center ("GSRMC") in Myrtle Beach. The second ambulance to arrive also took both Mr. Green and Mark to GSRMC. (R. pp. 136- 137).

As a result of the accident, Ann Green sustained severe physical injuries requiring a lengthy hospitalization. (R. p. 137). She subsequently accepted the $100,000.00 per person limits from the at-fault driver's liability insurer for her bodily injuries. Her settlement agreement was not submitted in support of Bauerle's inaccurate assertion that, contrary to established insurance law, the funds were paid entirely for loss of consortium arising out of her husband's injuries.

Randall Green arrived in the Emergency Room ("ER") at GSRMC in **stable** condition for treatment of **non-emergent injuries.** However, his arrival at GSRMC marked the start of an inconceivable series of events involving multiple acts of negligence by various individuals, resulting in numerous additional injuries. As a result of injuries Mr. Green sustained **after** the car accident, he endured a lengthy hospitalization before being discharged to a rehabilitation facility months later. Prior to filing the medical malpractice lawsuit against Bauerle, he settled with the other driver for the injuries sustained in the accident, receiving the $100,000.00 per person bodily injury limits from the driver's policy. This settlement agreement was not submitted in support of Bauerle's motion for setoff in the present action. Additionally, Mr. Green settled a lawsuit against MUSC for a serious

infection and severe complications resulting from a negligently retained sponge. (R. p. 217; p. p. 264, line 25- p. 265, line 6; p. 268; p. 269; p. 313, line 20- p. 314, lines 1-6).

On May 30, 2005, Mr. and Mrs. Green ("The Greens") filed this action against Bauerle and his practice. The Complaint was subsequently amended to add GSRMC and Carolina Medical Response ("CMR") as Defendants, and was then amended two more times to allege additional causes of action against the hospital for injuries sustained prior to Mr. Green's arrival at MUSC. CMR was released following a settlement of $25,000.00 for injuries sustained in transit from GSRMC to MUSC. The Greens jointly accepted $2,000,000.00 from GSRMC for injuries expressly not limited to, or all-inclusive of, those alleged in the pending lawsuit. GSRMC was subsequently released by stipulation of all parties. (R. pp. 1-15; p. 17; pp. 518-522).

The medical malpractice trial against Bauerle commenced on September 9, 2013. The five day trial concluded with a jury verdict for Mr. Green in the amount of $2,300,000.00 for "injuries" he sustained as a result of Bauerle's malpractice and $550,000 for Mrs. Green's loss of consortium cause of action. The verdict form did not specify what injuries or damages were included in these awards. (R. pp. 28-31)

The trial court declined to grant Bauerle's motion to setoff the Greens' separate settlements with the at-fault driver's insurer and their own UIM insurer for injuries they sustained in the auto accident against the jury verdicts for injuries resulting from Bauerle's medical malpractice, finding that they involved different injuries. Bauerle's motion to setoff the funds paid by MUSC for injuries resulting from the retained sponge was also denied. Setoff was granted as to the settlements with GSRMC and CMR, which the Greens appealed. Bauerle appealed the denial of setoff as to the settlements with the auto insurers.

The Court of Appeals affirmed the judgment of the circuit court *in toto*. 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. On April 25, 2016, Bauerle filed a Petition for Writ of Certiorari, asking this Court to review the Court of Appeals' reliance on established precedent applicable to the law of setoff rather than applying the unrelated holding in Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984).

COUNTER-STATEMENT OF FACTS

Mr. Green arrived in the ER at GSRMC at 12:00 p.m. for non-emergent treatment of a forearm laceration and fractured and dislocated hip. He was noted to have "normal sensation," and was cooperative, awake, alert, making eye contact, communicating with normal speech, exhibiting no confusion, and had no signs of face or head trauma. He was not exhibiting any "evidence of spinal cord problems" and "was moving his legs fine" as "noted by multiple clinicians." Mr. Green was characterized as a stable admission and his injuries at that point were not life-threatening. The ER physician, Dr. Lintz, then consulted with the on-call orthopedic surgeon, Dr. Wayne Bauerle, over the phone regarding the hip injury. The hip injury was "absolutely not urgent, emergent." (R. p. 217; p. 235; pp. 264-268; p. 313, line 20 – p. 314, line 6; pp. 343-344; p. 357; p. 359; p. 361; p. 362; pp. 434-435; p. 462; pp. 485- 486).

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. There was conflicting testimony as to whether the arm was bleeding during this time. (R. p. 234; p. 264; pp. 312-313; pp. 441-442).

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).

Bauerle testified that, when he arrived at the hospital, he went into Pre-Op where he saw Mr. Green for the first time. He noted that the patient was "moving all four extremities," corroborating testimony that there was "zero evidence of any kind of spinal cord problem before the arrest." Bauerle then sent 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 done this if he had 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. Bauerle did not consult with the anesthesiologist of the hand specialist before moving Mr. Green. (R. pp. 292-293; p. 308, lines 18-22; p. 365; p. 419; p. 456; p. 459, lines 13-15; p. 486).

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 ER. 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 at MUSC being treated for innumerable serious injuries and conditions before being discharged to a rehabilitation facility. Dr. Norcross, a trauma surgeon at MUSC, testified that "Mr. Green had an arrest at GSRMC, which almost certainly was the cause of the infarction of the spinal cord." He further stated, "[i]t was our impression at the time and we can't find any other explanation for it." (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.** Further, there was conflicting evidence in support of various theories at trial as to the *physiological* reason for the cardiac arrest, though the jury verdicts were not dependent on this issue. (R. pp. 128-132; pp. 134-136; pp. 138-141; pp. 144-145; pp. 151-174; pp. 176-181; pp. 185-192; p. 350; pp. 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 "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. This injury was supported by evidence of distinctive damages to **both** Plaintiffs, inclusive of the past and future cost of catheters over the course of 25.65 years totaling $393,214.50 and the value of Mrs. Green's care in catheterizing him five to six times a day. 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).

Furthermore, there is no evidence on the Record as to the provisions of the Greens' separate settlements with the liability insurers. The at-fault driver was never a party to this lawsuit, and the injuries that Mr. Green sustained in the car accident have **never** been alleged to result from Bauerle's deviations from the standard of care. Certainly, the injuries *Mrs.* Green sustained in the accident were not at issue in the medical malpractice trial.

ARGUMENT

Under Rule 242(b), SCACR, a "writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Petitioner makes no argument regarding any "special and important reasons" why this Court should exercise its discretion to grant the Petition. Further, none of the "character of reasons" listed in Rule 242(b)(1)-(5), SCACR, which may be considered in this decision, are applicable to Petitioner's argument.

The Court of Appeals affirmed the lower court's denial of setoff as to the settlement with the at-fault driver, appropriately relying on established precedent directly addressing

the issue of setoff. Failing to cite *a single case* addressing setoff, Petitioner argues that the Court of Appeals erred in failing to apply the holding in Graham v. Whitaker, which is not applicable to the issues in the present case. Specifically, Petitioner concedes that he and the at-fault driver caused different injuries, and does not attempt to argue that the settlement compensated the same injury as the verdicts. Rather, he relies on the assertion that his own conduct was foreseeable, theorizing that this renders the at-fault driver automatically liable for all "additional injuries" included in the verdicts as a matter of law. However, even if it was applicable, Petitioner misconstrues the very case on which he relies as that holding made clear that the issue of proximate cause remained within the province of the jury.

The trial court and Court of Appeals were correct in making the determination that Petitioner was not entitled to setoff a settlement clearly compensating Respondents' different injuries than the verdicts against him. South Carolina courts have long recognized the collateral source rule, which prohibits a wrongdoer from benefitting from compensation paid to an injured party by a source wholly independent from the wrongdoer. Young v. Warr, 252 S.C. 179, 165 S.E.2d 797(1969); Farmers Mercantile Co. v. Seaboard Air Lone Railway, 102 S.C. 348, 86 S.E. 678 (1915). The collateral source rule prohibits Bauerle from benefitting from a payment made by a source wholly independent from himself, which was not made on his behalf, and to which he did not contribute. Citizens & S. Nat'l Bank of S.C. v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

I. IT WAS NOT ERROR TO DENY SETOFF OF MRS. GREEN'S SETTLEMENT WITH A NON-PARTY FOR DIFFERENT INJURIES AND CAUSES OF ACTION THAN THE VERDICTS AGAINST THE NON-SETTLING DEFENDANT.

Mrs. Green received multiple, serious injuries in the car wreck with the at-fault driver. There was uncontroverted testimony regarding her injuries, and her hospitalization for these injuries was undisputed. Petitioner nevertheless makes the preposterous claim that Bauerle is entitled to set off the entire $100,000 paid by the at-fault driver for these injuries to Mrs. Green. Mrs. Green was awarded a verdict by the jury, which was exclusively for her loss of consortium cause of action.

Petitioner makes the absolutely unsubstantiated claim that "with respect to her loss of consortium claim, Mrs. Green received $100,000 in settlement with the at-fault driver." (Pet. for Writ, p. 4). However, there is not one scintilla of evidence in the record that Mrs. Green made any claim for loss of consortium against the at-fault driver, nor is there any reference to the settlement documents with the at-fault driver to support attributing any part of that settlement to loss of consortium. It would be absurd to conclude that Mrs. Green received no compensation for *her* serious personal injuries, but instead received the entire amount of the at-fault driver's liability limits for loss of consortium. Both the trial court and the court of appeals correctly determined that Bauerle was not entitled to set off any portion of Mrs. Green's settlement with the at-fault driver[1].

II. IT WAS NOT ERROR TO DENY SETOFF OF MR. GREEN'S SETTLEMENT WITH A NON-PARTY FOR DIFFERENT INJURIES AND CAUSES OF ACTION THAN THE VERDICTS AGAINST THE NON-SETTLING DEFENDANT.

Bauerle next claims that the right to set off the proceeds from the at-fault driver's liability coverage against the verdict for his medical malpractice, by attempting to improperly apply the holding in the case of Graham v. Whitaker, 282 S.C. 393, S.E.2d 40

[1] It is noteworthy that Bauerle even attempted to set off Mr. and Mrs. Green's proceeds from their own underinsured motorist policy, an argument he did not abandon until after the Order of the Court of Appeals.

(1984). Whether under South Carolina Code Section 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 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 arising out of different conduct at different points in time. The injuries that Mr. Green sustained in the car accident have **never** been alleged to result from Bauerle's deviations from the standard of care. Certainly, the injuries *Mrs.* Green sustained in the accident were not at issue in the medical malpractice trial. Bauerle even concedes in his Petition that his actions resulted in "additional injuries." As the settlement with the at-fault driver clearly did not compensate the same injuries as the verdicts, there is no right to setoff.

In support of his argument, Bauerle relies on a misapplication of the rule articulated in Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40, 44 (1984) ("The general rule is that if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury.") Bauerle asserts that Mr. Green's "paralysis and consequential damages including Mrs. Green's loss of consortium, were a foreseeable and proximate result of the original injury which resulted from the motor vehicle accident," rendering the at-fault driver liable "*for all of the injuries and damages claimed against Dr. Bauerle,* including

Mrs. Green's loss of consortium." Bauerle misinterprets the rule in Graham to extend automatic liability to the at-fault driver for the "additional injuries" caused by his own malpractice, asserting that he and the at-fault driver are thus "liable in tort for the same injury." Foreseeability alone is not determinative of what injuries were included in the settlement with the at-fault driver or what injuries were included in the verdicts against Bauerle.

A. Even if applicable to the issue of setoff, the facts of this case do not meet the elements of the rule articulated in Graham v. Whitaker.

In Graham, the plaintiff fell and suffered a broken hip as a result of the negligence of her ophthalmologist. As a result of the negligent repair of the hip fracture by a surgeon of her choice, she suffered an aggravation of the original injury, necessitating a second surgery to replace the entire hip. This Court found that the negligence of her physician who performed that surgery was reasonably foreseeable since it resulted in the aggravation of the initial injury. Accordingly, it was not an intervening cause, which would have broken the chain of causation and relieved the original tortfeasor from liability. This Court stated, "[t]he general rule is that if an **injured person** uses ordinary care in selecting a physician for **treatment of his injury**, the law regards the **aggravation of the injury** resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury." Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984) (emphasis added). However, this Court made very clear that the issue of proximate cause with regard to the original tortfeasor was still a jury question. Id., 282 S.C. at 400, 321 S.E.2d at 44.

The general rule articulated in Graham is not applicable to the present case as it has no relevance as to whether the settlement with the at-fault driver compensated the same

injury as the jury verdicts against Bauerle. *Even if* Graham was relevant and could be extended to permit a retroactive allocation of the settlement funds paid by the driver to "all injuries and damages claimed against Dr. Bauerle," the hip injury and forearm laceration sustained in the accident were **still** not alleged against Bauerle, and **there can be no setoff if these injuries were 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).

Moreover, the facts in this case don't meet the elements of the rule in Graham as (1) the injuries resulting from Mr. Green's infarction did not constitute an "aggravation of the [forearm] injury" but rather distinct injuries to entirely different body systems; (2) Plaintiffs did not select Bauerle, and no one selected him to treat *any* injury at that point in time; and (3) there were no allegations that Bauerle aggravated the hip injury for which he was consulted. Accordingly, even though the at-fault driver was never a party and never asserted the affirmative defense of intervening negligence, Bauerle's interruption in Mr. Green's treatment *was* an intervening act sufficient to break the chain of causation. Finally, as further set forth below, the causal link between the injuries sustained in the accident and the spinal infarction has not been established.

There have been no findings that blood loss from any injury caused the cardiac arrest, and there was conflicting evidence regarding this issue. Bauerle mischaracterizes testimony in asserting, "Dr. Matza testified that Mr. Green had lost a 'sizeable amount of blood' from the right forearm laceration and from the fractured hip." While Dr. Matza stated that, although the hip fracture would have bled based on his experience, he testified that there is no way of documenting how much blood Mr. Green lost in that hip. He did not testify that such bleeding was continuing at the time Bauerle intervened or that it contributed to the "sizeable amount," or approximately eight units, of blood lost from the

time of arrival at the hospital until the time of the cardiac arrest. Furthermore, Dr. Nicholson, testifying on behalf of Bauerle, indicated that his review of the radiology studies indicated **only a small amount of blood** in the hip socket. (R. pp. 197-198; pp. 212-213; p. 233).

B. Though irrelevant to the issue of setoff, the rule in Graham is not dispositive of whether the at-fault driver's negligence was a proximate cause of the injuries included in the verdict against Bauerle.

Bauerle asks this Court to make a determination that the at-fault driver was liable for "all of the injuries and damages claimed against Dr. Bauerle" because Bauerle's negligence was foreseeable and thus not an intervening act. His argument that the original tortfeasor is liable for "all of the injuries" where the original injury required treatment and "the medical care as provided resulted in additional injuries" does not refute the trial court's finding that the settlements compensated different injuries than the verdicts. Yet, on page seven of his Petition, Bauerle asserts "the malpractice committed by the medical providers in treating the original injuries is reasonably foreseeable as a matter of law, and as a result, the malpractice cannot serve as an intervening act or cause that breaks the causal chain." This suggests that the rule in Graham can be extended to find that the at-fault driver was also liable for the "additional injuries" he caused, bypassing the basic requirement of proving proximate causation.

Bauerle misapplies the rule in Graham by confusing the purpose it served in that case. In Graham, this Court did hold that the negligence of a third party physician was foreseeable, thus it was not presumptively an intervening act sufficient to break the chain of causation and relieve the original tortfeasor from liability. However, this Court made clear that the issue of proximate causation with regard to the original tortfeasor was still a jury question because the evidence was susceptible to more than one interpretation. The

holding made very clear that the failure of the defense of third party intervening negligence was not being utilized as a basis for *imposing* liability for any injury. Therefore, the rule in Graham cannot be used in the present case to retroactively determine, twelve years later, that the at-fault driver's negligence was a proximate cause of *any* of the injuries alleged in the medical malpractice trial against Bauerle.

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

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

To apply the rule as Bauerle suggests, as a means to extend liability to the at-fault driver "for all injuries and damages claimed against Dr. Bauerle," would fundamentally change the causation analysis underlying our current tort system. Additionally, repurposing the rule in Graham as a test for determining the full *theoretical* extent of the at-fault driver's *potential* liability would contradict our strong public policy favoring settlements. Further, it would ignore the extent of *Bauerle's* liability for the injuries caused by his actions. Clearly, foreseeability is not the only element requisite to a finding of liability for an injury. Young v. Tidecraft, 270 S.C. 452, 462, 242 S.E.2d 671, 675 (1978); Hanselmann v. McCardle, 275 S.C. 46, 267 S.E.2d 531 (1980); Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236 (2008). Even if Bauerle's negligence was foreseeable under the rule articulated in Graham, this is not sufficient to conclude, as a matter of law, that the at-fault driver's negligence proximately caused the cardiac arrest and spinal infarction, or which injuries

resulted therefrom. It certainly is not sufficient to conclude that the settlements included all damages for all injuries alleged against Bauerle.

Extending the rule in Graham to impose liability on the at-fault driver for *all* injuries and damages alleged against Bauerle ignores the jury's role as fact finder. Further, public policy requires that the nature of a tortfeasor's wrongdoing be considered in analyzing the extent of his or her liability. *See* Gossett v. Burnett, 251 S.C. 548, 164 S.E.2d 578 (1968) (Littlejohn, J., concurring). Recognizing this common sense principle, South Carolina courts have considered the nature of the subsequent negligence in creating an exception to the general rule that an original wrongdoer remains liable for an injury resulting from the foreseeable acts of a third party. Young v. Tidecraft, 270 S.C. 452, 242 S.E.2d 671 (1978). In Young v. Tidecraft, this Court determined that the original tortfeasor was not liable for the consequences of a third party's conduct where the third party was aware that his conduct was "inherently dangerous" and "not advisable." Id. at 460-461, 242 S.E.2d at 676. Accordingly, the third party's actions were "highly improbable" and unforeseeable, thus constituting the sole proximate cause of the resulting death as a matter of law. Id. at 460-461, 242 S.E.2d at 675.

Here, Bauerle knew the danger involved in interrupting the treatment of a patient in Mr. Green's condition for a CT scan. Additionally, he made this decision despite Dr. Lintz's objection, and admitted that had he would not have done so if he had been aware of Mr. Green's vital signs. Bauerle's own expert conceded that it is the responsibility of the physician to know the condition of a patient before issuing orders. (R. pp. 307-308; p. 322; p. 345).

Similar to the facts in Tidecraft, Bauerle realized the "inherently dangerous" nature of his decision, and expert testimony indicated that it was a drastic deviation from

the standard of care. It is common knowledge in the trade that removing a patient on the verge of cardiac arrest from Pre-Op to go to CT where he could not be monitored, was "not adviseable." Bauerle's own expert testified that the old surgical adage "never argue with the doctor looking at the patient" was applicable to the disagreement between Bauerle and Dr. Lintz. Finally, this Court found in Tidecraft that the only reasonable inference to be drawn from the evidence in that case was that death would not have occurred in the natural course as a result of the original tortfeasor's negligence. Similarly, Dr. Chariker testified that Mr. Green's cardiac arrest was not inevitable; rather but for Bauerle's negligence, it would not have occurred. Therefore, it cannot seriously be contended that Bauerle's actions were a probable consequence of the at-fault driver's negligence. (R. p. 199; p. 308; pp. 324-325; p. 456; pp. 459-460; p. 474).

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

Bauerle's assertion that Graham v. Whitaker extends liability for "all of the injuries and damages claimed against Dr. Bauerle" partially depends on a finding that blood loss from the forearm and hip injuries caused the cardiac arrest and spinal cord infarction. While both parties presented theories as to the *physiological* cause, the jury verdicts were not dependent on making that determination.

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).

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. Plaintiffs' expert, Dr. Matza, testified that "there are critical moments in everything we do and this happened to be one of them." Testifying for Bauerle, Dr. Ralph Cozart, conceded that Mr. Green was not stable and that he would have deferred a CT scan on an unstable patient. (R. p. 196; pp. 280-281; p. 308, lines 18-22; p. 365; p. 419; p. 456; p. 459, lines 13-15).

Dr. Matza testified, and Bauerle conceded, that Mr. Green's vitals were not being monitored when he was taken to CT, and there was "no way" to control them during this time. He further testified that, if Mr. Green had remained in Pre-Op, his vital signs could have been monitored and controlled. (R. pp. 199-200; p. 297).

Plaintiffs' expert, Dr. Chariker, testified that he believed blood loss had "a great deal" to do with the cardiac arrest, however, "[s]o many things had gone awry," there was **no way** to determine a specific physiological cause. However, he testified that the *location* away from Pre-Op at the *time* of the arrest was the critical causative factor. He explained that Bauerle took Mr. Green away from Dr. Peters, who could perform the necessary procedures to prevent the arrest. Bauerle conceded that Dr. Peters wasn't in the ER to assist until "further into the resuscitation process." Dr. Chariker testified that, if Mr. Green had been in Pre-Op, " . . . with greater than 51 percent certainty, I would be willing to say the arrest could have been prevented." (R. pp. 294-295; p. 346; p. 462; pp. 463- 465; p. 479).

In other words, it doesn't matter *why* Mr. Green's heart stopped. The only finding implicit in the jury's verdicts was that it would not have stopped if Bauerle had not removed him from Pre-Op. Bauerle's assertion that blood loss from the arm caused the cardiac arrest is in direct conflict with his position at trial that the arm was **not** bleeding. Further there was conflicting evidence as to whether the arm was bleeding. (R. p. 122, line 25; p. 233; p. 252; p. 261; p. 264; p. 270; pp. 283-284; pp. 312-313; p. 316; p. 319; p. 441).

Both parties presented conflicting theories as to *physiological* causes; however, this issue was not dispositive of whether Bauerle deviated from the standard of care, whether that deviation was a proximate cause of the spinal cord infarction, or what injuries resulted from that infarction. Bauerle's experts testified that the arrest was caused by neurogenic shock, and Dr. Matza conceded that there was "no way" to determine if it was inevitable. Furthermore, the jury could have discounted theories asserted by both parties as to the physiological cause, determining that it could have been unrelated to injuries sustained in the accident as supported by evidence that an EKG on admission showed Mr. Green's heart was exhibiting pre-existing "non-specific ST/T wave abnormalities" and didn't exhibit any "acute" ischemia. Quite simply, the jury did not make a finding that the cardiac arrest resulted from blood loss or from an injury for which the at-fault driver was liable. (R. p. 210; p. 215; pp. 237-238; p. 270; p. 277; p. 284; p. 315; pp. 317-318; p. 344; p. 460; p; 462; p. 465).

D. The settlements with the auto insurer were for different injuries giving rise to different causes of action as the verdicts against Bauerle.

A right to setoff only arises under S.C.Code Ann. § 15-38-50 when a prior settlement was ". . . paid to compensate the same plaintiff on a claim for the **same injury**." Smith v. Widener, 397 S.C. 468, 472, 724 S.E.2d 188 (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, 397 S.C. at 472-473. This Court, as well as the Court of Appeals, have repeatedly recognized that the term "injury" is not so broad as to encompass *all* damages recoverable under all potential causes of action and "naturally flowing" from a single injury. Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015); Rutland v. South Carolina Dep't. of Transp., 400 S.C. 209, 734 S.E. 2d 142 (2012) (emphasis added); Smith v. Widener, 397 S.C. 468, 472, 724 S.E.2d 188 (Ct.App.2012); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998).

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).

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. According to uncontroverted evidence offered by 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 his 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. pp. 237- 239; pp. 242-243; p. 250; pp. 276-277; pp. 290-291; pp. 311-312; pp. 316-318; p. 350; p. 389; pp. 481-482).

As an example, 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 distinct damages to Plaintiffs, inclusive of the value of 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 Bauerle was correct in his assertion that

the rule in Graham renders the at-fault driver liable for "all injuries and damages" claimed to have resulted from the infarction, and even if this could result in a determination that all of those injuries and damages were included in the settlements, **there can be no setoff if all of those injuries and damages were not also 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).

Moreover, there is simply no way to determine what injuries or causes of action were included in the settlements with the at-fault driver as the settlement agreements were never made part of the Record. While the settlements might be sufficient to establish the driver was at a least partially liable for causing the accident, there is no way to determine the specific injuries and causes of action settled without any evidence of the provisions of the settling parties' contracts. Furthermore, many of the injuries alleged to have resulted from the spinal infarction *did not even exist* at the time of the settlements with the at-fault driver. Not only has Bauerle not offered any evidence to support a contrary finding, he rests on the assertion that the foreseeability of his own conduct imposes liability on the at-fault driver for *all* injuries. (R. pp. 222-223; p. 226).

Further distinguishing this case from situations where courts have allowed setoff is that the settlements were paid to multiple Plaintiffs who sustained multiple injuries, none of which were subject to the litigation against Bauerle. For example, to this day, Mr. Green can't even make a fist with his right hand as a result of the forearm injury sustained in the accident. (R. p. 221). At no time did the Greens allege that this injury resulted from the spinal infarction, and it clearly **could not** be included in the jury verdicts. Accordingly, Bauerle is not entitled to setoff any part of the $100,000.00 per person bodily injury limits paid to Mr. Green for this injury. Furthermore, Bauerle is

absolutely not entitled to benefit from any portion of the $100,000.00 per person bodily injury limits paid to Mrs. Green for the injuries she sustained in the accident. Bauerle's claim that he is entitled to benefit from funds Mr. Green received for the loss of use of his hand or from funds paid to Mrs. Green for her serious injuries indicates an ongoing failure to appreciate the magnitude of the impact of his negligent actions.

CONCLUSION

The rule on which Bauerle relies does not establish that any of the Plaintiffs' separate settlements with the at-fault driver involved *any* of the same injuries or causes of action as the jury verdicts against him. Further, his argument assumes not only that the forearm laceration and hip injuries were included in the verdicts, but that the cardiac arrest resulted from blood loss from one or both of those injuries, a position in direct conflict with the position he asserted at trial. However, there has been no such finding, and the jury's verdict was not dependent on same. There was no evidence to support a finding that any injury compensated in the settlements was included in either of the jury verdicts, and the trial court and Court of Appeals were correct in denying setoff of those funds.

Respectfully Submitted,

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May 25, 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-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 the **Respondents-Petitioners' Return to Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C.'s Petition for Writ of Certiorari** 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, first class postage prepaid, addressed to his attorneys of record, Andrew F. Lindemann and Jack McCutcheon, at the addresses below:

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Date: 5/25/2016

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC SUPREME COURT

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I certify that I have served the **Randall M. Green and Ann Green's Return to Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C.'s 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 attorney of record, Andrew F. Lindemann and Jack McCutcheon, at the addresses below:

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