THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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

v.

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

AMENDED PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. certifies that their Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on March 24, 2016. (App. 4-5).

QUESTION PRESENTED

I. Did the Court of Appeals err in denying a set-off to the Petitioners-Respondents for the amounts paid to the Greens in settlement of the motor vehicle negligence and loss of consortium claims brought against the at-fault driver?

STATEMENT OF THE CASE

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

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

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

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

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

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

At the close of the trial, Dr. Bauerle moved for a set-off of the amounts paid in settlement on behalf of Grand Strand, Carolinas Medical Response, and the at-fault driver (including the underinsured motorist payments). (R. 45-48, 338-339).

By Order filed October 17, 2013, Judge John granted in part and denied in part the Motion for Set-Off. (R. 18-23). Judge John allowed for a set-off of the settlements received from Grand Strand and Carolinas Medical Response, but he denied the set-off for the amounts paid for the release of the at-fault driver and the UIM insurer. Judge John directed the Clerk of Court to enter judgment in the amount of $665,789.47 in favor of Randall M. Green and to enter judgment in the amount of $159,480.53 in favor of the Ann Green. (R. 22).

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

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

ARGUMENTS

In its opinion, the South Carolina Court of Appeals concluded that the trial court did not err in denying the set-off for the settlement amounts paid by the at-fault driver and by the Greens' underinsured motorist carrier. Given the Court of Appeals' citations which are the only analysis provided given the disposition under Rule 220(b), SCACR, Dr. Bauerle assumes that the Court of Appeals must have concluded that the injuries resulting from the alleged malpractice were not the "same injuries" for which the at-fault driver was also liable.

Dr. Bauerle submits that the Court of Appeals, like the trial court, overlooked and failed to apply the rule of law in *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984), which is not cited in the Court of Appeals' opinion. In *Graham*, this Court explained that "[t]he general rule is that if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury." *Id.* *See also*, *Bessinger v. DeLoach*, 230 S.C. 1, 94 S.E.2d 3 (1956); *Fairchild v. South Carolina Department of Transportation*, 385 S.C. 344, 683 S.E.2d 818 (Ct. App. 2009), *aff'd*, 398 S.C. 90, 727 S.E.2d 407 (2012). Accordingly, South Carolina law provides that where the original accident resulted

in injuries that required medical care and the medical care as provided results in additional injuries, the original tortfeasor is liable *for all of the injuries* as a matter of law. Under this rule of law, the malpractice committed by the medical providers in treating the original injuries is reasonably foreseeable as a matter of law, and as a result, the malpractice cannot serve as an intervening act or cause that breaks the causal chain.

The Court of Appeals, like the trial court, erred in failing to apply the *Graham* rule. As Dr. Bauerle argues, the original tortfeasor, i.e., the at-fault driver who caused the motor vehicle accident that necessitated Randall Green's hospitalization and the medical care rendered by Dr. Bauerle and others, was legally liable in tort for the very "same injuries" on which the jury returned its verdict, specifically the injuries resulting from the malpractice found by the jury.

In their case-in-chief, the Greens presented the expert testimony of Dr. Richard Matza, who like Dr. Bauerle is an orthopaedic surgeon. Mr. Matza testified that Dr. Bauerle "was brought in as an orthopaedic surgeon because of [a] fracture/dislocation of [Mr. Green's] right hip." (R. 194). The fracture/dislocation resulted from motor vehicle accident. Mr. Green also presented at the ER with "a severe laceration to his right forearm that was bleeding profusely." (R. 34-35). Dr. Matza testified that Mr. Green had lost "a sizeable amount of blood" from the right forearm laceration and from the fractured hip. (R. 198, 211-212). That loss of

blood "was the cause, the direct cause for [Mr. Green's] decompensation, crashing, arresting and the need to be resuscitated." (R. 198). Further, Dr. Matza opined as follows:

> [T]he delay of treatment of the bleeding which led to the arrest, which led to a zero blood pressure for a period of time, at least a half hour to 40 minutes, led to decreased blood flow or no blood flow to the arteries in the spine and it is through the lack of blood supply to the spine that the ultimate injury to the spine occurred between the mid thoracic region of T6 to T12, somewhere in that area where the artery resides and directly led to the paraplegia or the paralysis of both Mr. Green's lower extremities.

(R. 201). Thus, according to Dr. Matza's testimony and the Greens' theory of liability against Dr. Bauerle, the delay in the surgery to repair the right forearm laceration, as caused by Dr. Bauerle's alleged insistence that a CT scan of the hip be taken, proximately caused Mr. Green's paralysis.

In sum, the Greens' theory of liability makes the paralysis and consequential damages, including Mrs. Green's loss of consortium, a foreseeable and proximate result of the original injury which resulted from the motor vehicle accident. The rule of law as described in *Graham* and later cases applies here. South Carolina law provides that the at-fault driver was liable *for all of the injuries and damages claimed against Dr. Bauerle*, including Ann Green's loss of consortium. In other words, given the rule of law in *Graham*, which the Court of Appeals did not even cite or address, the settlement by the at-fault driver was for the "same injuries" as

resulted from the medical malpractice.

Accordingly, Dr. Bauerle respectfully requests that this Court grant a writ of certiorari to address this one particular issue and to conclude that Dr. Bauerle is entitled to a set-off for the $200,000 paid for the at-fault driver in settlement of the motor vehicle negligence and loss of consortium claims.[2] Mr. and Mrs. Green received $100,000 each in their settlement with the at-fault driver. Dr. Bauerle requests that this Court grant the additional set-off for those amounts.

[2] Dr. Bauerle has abandoned his set-off claim for the $225,000 received by the Greens from their own underinsured motorist insurer.

CONCLUSION

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

Respectfully submitted,

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Columbia, South Carolina

July 20, 2016

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Petitioners-Respondents, does hereby certify that service of the **Amended Petition for Writ of Certiorari** in the above referenced action was made upon the Clerk of the South Carolina Court of Appeals by hand delivery and upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 20th day of July 2016:

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