

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

S.C. SUPREME COURT

Appellate Case No. 2016-000864  
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.

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**PETITIONERS' BRIEF OF PETITIONERS-RESPONDENTS**

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## **QUESTION PRESENTED**

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.,<sup>1</sup> 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

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<sup>1</sup> 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.

## ARGUMENT

- I. The trial court erred in failing to find the rule of law from *Graham v. Whitaker* was applicable and in failing to find that the at-fault driver was legally liable for the damages awarded by the jury against Dr. Bauerle for the spinal paralysis, the consequential damages and the loss of consortium.**

In *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984), this Court ruled that "the negligence of an attending physician is reasonably foreseeable." 321 S.E.2d at 44. This Court further 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.

In the trial court, Judge Steven John erred in rejecting the application of the *Graham* rule, and in fact, Judge John did not even provide any explanation as to why the rule did not apply. 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. The settlements paid by the at-fault driver extinguished all tort liability for that original tortfeasor and thus settled claims for those same injuries.

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 insurer.<sup>2</sup> 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.

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<sup>2</sup> Dr. Bauerle has abandoned his set-off claim for the \$225,000 received by the Greens from their own underinsured motorist insurer.

Thus, the Court of Appeals, like the trial court, erred in failing to apply the *Graham* rule, which is not even cited in the Court of Appeals' opinion. The evidence indisputably shows that 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. Specifically, in their case-in-chief, the Greens presented the expert testimony of Dr. Richard Matza, who like Dr. Bauerle is an orthopaedic surgeon. Dr. 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.

The Greens will likely argue that the at-fault driver was liable for additional injuries as well. Arguably, the at-fault driver would be liable for the original injuries from the motor vehicle accident, including the right forearm laceration and the fracture/dislocation of the right hip, both of which Dr. Bauerle was not liable for. However, the record clearly shows, as discussed at length above, that there were substantial other injuries that the at-fault driver and Dr. Bauerle were *both* liable for in tort – the spinal paralysis, the consequential damages therefrom, and certainly the loss of consortium.

Importantly, the case law governing set-offs does not require that *all* of the injuries must be the same. In fact, this Court has previously explained that "[t]he reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that *part* of the amount of damages sustained which has already been paid him." *Truesdale v. South Carolina Highway Dept.*, 264 S.C. 221, 213 S.E.2d 740 (1975). (Emphasis added). This Court used the words "that part" and not the word "all."<sup>3</sup> Here, Dr. Bauerle has clearly shown that the same injuries, at least in part, were settled by the at-fault driver and were also compensated by the jury's verdict. Hence, there is a "second recovery" which is not permitted.

In short, Judge John erred in concluding that the proceeds paid in settlement of the motor vehicle negligence and loss of consortium claims were for a "different injury." (R. 21). That was clearly incorrect given the application of the rule in *Graham*. Likewise, Judge John should not have simply denied the set-off in *toto* for the amounts paid by the at-fault driver. Instead, at the very least, Judge John should have engaged in an equitable allocation process. The failure to engage in that process was reversible error and subject to a remand. *See, Hucks v. Oakland Wings, LLC*, Op. No. 5500 (S.C. Ct. App. 2017) (Court of Appeals remanded after

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<sup>3</sup> This very language was recently repeated by the Court of Appeals in *Hucks v. Oakland Wings, LLC*, Op. No. 5500 (S.C. Ct. App. 2017), where the Court writes: "The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of *that part of the amount of damages* sustained which has already been paid to him." (Emphasis added).

ruling that defendant "is entitled to a setoff" and that "it was the trial court's function to determine the amount of the setoff").

In *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), the Court of Appeals explained that a trial court possesses "jurisdiction to set off one judgment against another [which] is equitable in nature and should be exercised when necessary to provide justice between the parties." 528 S.E.2d at 688. The trial court should use its equitable powers "to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him." *Id.* Again, the Court in *Smalls* focused on "that part of the amount of damages" and did not rule a trial court may only apply a set-off where "all of the amount of damages" are the same.<sup>4</sup>

In sum, Dr. Bauerle has shown that, in accordance with the rule in *Graham*, the at-fault driver was "liable in tort for the same injury" which required that the trial court apply a set-off. Even where *all* of the injuries may not be the same but rather *some* of the injuries are the same, that does not make a set-off unavailable and allow a party to receive a double recovery. In that instance, the trial court is required to exercise its equitable authority and to determine a fair and just

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<sup>4</sup> In *Chester v. South Carolina Department of Public Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010), this Court favorably referenced the "procedure outlined in *Smalls*." 698 S.E.2d at 560.

apportionment of the settlement amounts to allow a set-off for the "same injury." Here, Judge John should have, at the very least, made an equitable determination of what portion of the settlement proceeds paid by the at-fault driver were paid for the spinal paralysis and the resulting loss of consortium, and he should have allowed a set-off in those amounts. Clearly, the loss of consortium is related to the spinal paralysis; there is no evidence that the loss of consortium damages as claimed by Ann Green resulted from the original injuries sustained in the accident. And as for Randall Green, the vast majority of the settlement amounts were paid for the most severe of the injuries, that being the spinal paralysis and the resulting damages therefrom.


Accordingly, 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, or at the very least, a significant portion of the \$200,000.

## 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 reverse in part the decision of the South Carolina Court of Appeals. The Court is requested to remand with direction that the Petitioners-Respondents be granted an additional set-off of the \$200,000 paid by the at-fault driver, or alternatively, an equitable portion of that amount to be determined on remand.

Respectfully submitted,

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November 16, 2017

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**CERTIFICATE OF SERVICE**

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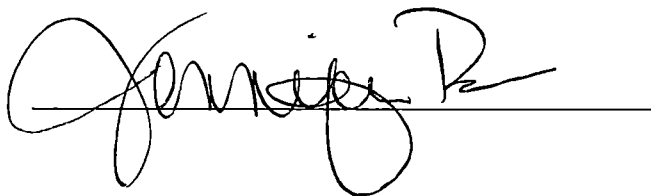
The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Petitioners-Respondents, does hereby certify that service of the **Petitioners' Brief of Petitioners-Respondents** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 16th day of November 2017:

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