THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2011-CP-26-7403

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

v.

Wayne B. Bauerle, M.D. and
Wayne B. Bauerle, M.D., P.C.,.....Appellants/Respondents.

APPELLANTS' BRIEF OF RESPONDENTS/APPELLANTS

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STATEMENT OF THE CASE

This is an appeal of the post-trial order of the Honorable Steven H. John, Circuit Court Judge in the Horry County Court of Common Pleas, Granting in Part and Denying in Part Defendants, Wayne B. Bauerle, MD, and Wayne B. Bauerle, MD, PC's, Motion for Set Off ("Setoff Order") dated October 16, 2013, and the Order Denying Plaintiffs Motion to Alter or Amend Order Granting Partial Set-Off dated February 13, 2014.

This action arises from the negligent treatment of Respondents-Appellants-Plaintiffs, Randall M. Green ("Mr. Green") and Ann Green ("Mrs. Green") (collectively "Plaintiffs"), by various medical providers at Grand Strand Regional Medical Center ("GSRMC"), including Appellants-Respondents-Defendants, Wayne B. Bauerle, MD, and Wayne B. Bauerle, MD, PC (collectively "Bauerle"). Plaintiffs were transported to GSRMC for treatment after they were injured in an automobile accident.

Prior to filing the medical malpractice lawsuit, Mr. and Mrs. Green each settled with the at-fault driver. Mr. Green received $100,000.00 under the at-fault driver's liability policy and $150,000.00 in underinsured motorist coverage for injuries he sustained in the wreck. Mrs. Green received $100,000.00 under the at-fault driver's liability policy and $75,000.00 in underinsured motorist coverage for injuries she sustained in the wreck.

On May 30, 2005, Plaintiffs filed this action against Bauerle and Strand Orthopaedic Consultants, LLC. Plaintiffs amended the Complaint to add GSRMC and the ambulance carrier, Carolina Medical Response, Inc. ("CMR"), as defendants. Following the receipt of a nominal payment in the amount of $25,000.00, Plaintiffs released CMR from the action. Prior to trial, Plaintiffs dismissed all claims against Strand Orthopaedic

Consultants, LLC. In his Amended Answer to Defendant GSRMC's Request to Admit, Bauerle admitted, "The employees of Grand Strand Regional Medical Center did not proximately cause or contribute to the injuries and damages alleged to have been sustained by Plaintiffs in the Third Amended Complaint." (R. pp. 501-502).

Plaintiffs filed a separate suit against the Medical University of South Carolina ("MUSC") to recover damages caused by a sponge negligently left in Mr. Green's leg during post GSRMC treatment, which gave rise to distinct and different injuries. Plaintiffs settled with MUSC for $160,000.00.

On October 15, 2012, Plaintiffs amended the Complaint for the fourth time to add causes of action against GSRMC for vicarious liability under the non-delegable duty doctrine and negligent hiring, supervision and training. (R. pp. 32-44). Shortly thereafter, GSRMC filed a Motion for Partial Summary Judgment, and on April 18, 2013, the Honorable Larry B. Hyman, Jr. granted Defendant GSRMC's Motion for Partial Summary Judgment ("Summary Judgment Order"). The Summary Judgment Order dismissed the two new causes of action as to GSRMC, thereby eliminating any vicarious liability under the non-delegable duty doctrine for Bauerle's malpractice. (R. p. 15). The order further found that "[b]ecause the Plaintiffs are barred by the statute of limitations and the statute of repose from asserting a direct cause of action for medical malpractice against [GSRMC's] independent contractors and employees, [GSRMC] cannot be held vicariously liable for their acts or omissions." (R. p. 3).

On May 31, 2013, GSRMC and Plaintiffs executed a Covenant Not to Sue and Covenant Not to Execute Judgment, in which GSRMC paid Plaintiffs the sum of $2,000,000.00 as consideration for various terms, including Plaintiffs' agreement not to

initiate or "prosecute any action... or execute on any judgment... against the Payer, by reason of the alleged negligence in Mr. Green's treatment". (R. p. 505). Bauerle, GSRMC, and Plaintiffs collectively executed a Stipulation of Dismissal with Prejudice as to Grand Strand Regional Medical Center which was filed on June 11, 2013, dismissing GSRMC from this lawsuit with prejudice. (R. p. 17).

The medical malpractice trial against Bauerle commenced on September 9, 2013. At the conclusion of the five-day trial, the jury returned a $2,300,000.00 verdict on Mr. Green's remaining medical malpractice cause of action and a $550,000.00 verdict on Mrs. Green's loss of consortium cause of action. (R. pp. 28-31). The verdict forms did not specify what damages were included or how the jury calculated the awards.

Subsequently, Bauerle filed a Motion and Memorandum of Law in Support of Defendant Bauerle's Motion for Set Off ("Setoff Motion") seeking to set off Plaintiffs' settlements from the at-fault driver, GSRMC, CMR and MUSC from the verdicts. (R. pp. 45-48). Plaintiffs responded in a timely filed Motion and Supporting Memorandum in Opposition asserting that Bauerele is not entitled to setoff. (R. pp. 49-91).

The Honorable Steven H. John granted the setoff only as to Plaintiffs' settlements with GSRMC and CMR. (R. pp. 20-21). Plaintiffs filed a Motion to Alter or Amend Setoff Order. (R. pp. 92-99). Bauerle filed a Motion to Alter or Amend Order Granting Partial Setoff. By separate orders, the trial court denied both parties' motions, reaffirming the previous Setoff Order *in toto* on February 13, 2014. (R. pp. 24-25). Bauerle timely filed a Notice of Appeal on March 11, 2014. Plaintiffs timely filed a Notice of Appeal for the cross-appeal on March 17, 2014. (R. pp. 506-507).

FACTS

In April 2004, Randall M. Green ("Mr. Green") was operating a vehicle in which Mrs. Green and their son, Mark Green, were riding, when the At-Fault Driver struck Mr. Green's vehicle causing it to leave the roadway and flip over. (R. p. 136, lines 13-22). All three passengers sustained serious injuries and were transported by Horry County Fire and Rescue from the scene to GSRMC in Myrtle Beach. (R. p. 136, line 21-p. 137, line 7). As a result of the wreck, Mr. Green suffered a severe laceration of his right arm, "so severe that it cut two of the vital arteries that go to the hand," and a right hip fracture and dislocation. (R. p. 485, lines 13-21; R. p. 195, lines 6-14).

Upon Mr. Green's arrival at the hospital, at approximately 12:00 p.m., he was assessed by emergency room ("ER") physician, Dr. Scott Lintz, and GSRMC nursing staff. (R. p. 432, lines 13-20). Mr. Green was able to communicate coherently, was able to move his legs, and had "normal sensation." (R. p. 343; p. 448, lines 17-19). He did not exhibit any "evidence of spinal cord problems" and "he was moving his legs fine" as "noted by multiple clinicians." (R. p. 486, lines 12-24).

Dr. Lintz then contacted the hand surgeon on-call for the ER, Dr. Ralph Cozart, and the on-call orthopedic surgeon, Dr. Wayne B. Bauerle. (R. p. 434, line 17-p. 435, line 1). Bauerle's own expert, vascular, thoracic and cardiac surgeon Dr. Charles Dorn Smith testified that the record indicates blood was "oozing" from Mr. Green's arm. (R. p. 313, line 2). Approximately one hour after Mr. Green arrived at GSRMC, Dr. Cozart evaluated Mr. Green's right forearm laceration and determined that Mr. Green urgently needed surgery on this right arm. (R. p. 265, line 23-p. 266, line 2). Shortly thereafter, Dr. Cozart called the operating team and ordered Mr. Green transported to the pre-operative holding

area ("Pre-Op"). (R. p. 266, line 20-p. 267, line 3).

Dr. Lintz re-located Mr. Green's dislocated hip in the ER and noted that Mr. Green was alert and felt improvement in his discomfort, before sending Mr. Green from the ER to Pre-Op in preparation for surgery on his right arm. (R. p. 447, lines 1-5). He then made a note that he had contacted Bauerle "a second time" regarding the hip injury and advised that he felt the surgery to repair Mr. Green's forearm was "better warranted than holding up the patient to get the hip CAT scan." (R. p. 345). According to Dr. Lintz, Bauerle disagreed and was "pretty adamant about getting the CAT scan of the hip first." (R. p. 345). Bauerle testified regarding this interaction stating, "I had no disagreement, I knew exactly what needed to be done, it's what I did." (R. p. 291, lines 15-20).

Bauerle testified that when he arrived at GSRMC he went straight to Pre-Op, where he saw Mr. Green for the first time and later noted that Mr. Green was "moving all four extremities," corroborating Dr. Cranberg's testimony that there was "zero evidence of any kind of spinal cord problem before the arrest." (R. p. 292, line 1-p. 293, line 2; p. 486, lines 23-24). At that point, Bauerle decided that Mr. Green needed to go back to the ER and then to CT immediately to obtain additional studies of his hip. (R. p. 419). Mr. Green was taken back to the ER, where a nurse recorded a blood pressure of 72/56 and heart rate of 135, noting that Bauerle was at bedside. (R. p. 365). Mr. Green was then sent to CT scan per Bauerle, who conceded he would not have sent him to CT if he had been aware of his vital signs. (R. p. 308, lines 18-22). He then admitted that he did not recall checking Mr. Green's chart before issuing that order. (R. p. 307, lines 10-15). Plaintiff's expert, vascular and cardiothoracic surgeon, Dr. Edd Chariker, testified that Bauerle "drastically" deviated from the standard of care by sending Mr. Green to CT when he was

"totally unstable" as indicated by his vital signs at that point in time. (R. p. 456, lines 5-16). Further, Bauerle testified that regardless of the CT results, he would not have performed the surgery to repair the acetabular (hip socket) and there was no one at GSRMC who did that type of surgery. (R. p. 301, lines 3-23). Ultimately Mr. Green's acetabular hip repair was done at MUSC.

When Mr. Green left CT, rather than being taken back to Pre-Op for surgery, Mr. Green was taken back to the ER to await the results of his CT, despite the fact that "no matter what the radiologist said, the [forearm] was still going to have to be managed." (R.p. 473, lines 3-18). While in the ER, Mr. Green was placed back on a heart monitor, which indicated that his blood pressure and pulse were zero, in other words "his blood pressure gave out and he arrested, which means his heart stopped." (R. p. 197, line 5-p. 198, line 6). Plaintiffs' expert orthopaedic surgeon, Dr. Richard A. Matza, estimated Mr. Green lost eight units of blood, an amount so significant that it caused Mr. Green to decompensate to the point of cardiac arrest. (R. p. 197, line 17-p.198, line 6). Dr. Cozart arrived and began operating in the middle of the ER to stop the bleeding while resuscitation efforts were ongoing. (R. p. 273, lines 5-19; pp. 346-347). Over the next hour, Mr. Green received four "units" of blood and six "units" of platelets. (R. pp. 361-366). Dr. Lintz performed resuscitation procedures and, according to the resuscitation record, CPR ceased 26 minutes later. (R. p. 446, lines 19-23; p. 488, line 23-p. 489, line 5). Dr. Cranberg testified that during his arrest, Mr. Green's "spinal cord suffered lethal damage." (R. p. 489, lines 6-9). There are no medical records indicating that Mr. Green had feeling in his legs after his arrest. (R. p. 488, lines 2-5). Mr. Green remained in critical condition in GSRMC's Intensive Care Unit for the rest of the evening.

Although the parties dispute exactly how long Mr. Green sustained a blood pressure and heart rate of zero before he was revived, Plaintiffs' expert, Dr. Cranberg testified through his deposition that an "inadequate supply of blood to the spine" can cause cell death in the spinal cord in "as little as a few minutes." (R. p. 481, lines 11-14). Bauerle's expert, Dr. Smith, testified that once Mr. Green suffered a cardiac arrest, minutes and maybe even seconds make the difference in his ability to walk. (R. p. 327, lines 12-23). Dr. Cranberg testified that, Mr. Green's "only problem with his spinal cord occurred after the cardio pulmonary arrest in the Grand Strand Hospital emergency room." (R. p. 484, lines 9-17). Therefore, Dr. Cranberg concluded, "the spinal cord infarct and the various disabilities... were suffered during that arrest." (R. p. 484, lines 9-17).

The following day, Mr. Green was transported via ambulance to MUSC in Charleston by EMS carrier, CMR. A nurse, who received him via stretcher from the ambulance, noted that he was intubated, alert, following commands, and "unable to wiggle [his] toes." (R. p. 418). After he was admitted to MUSC on April 18, 2004, Mr. Green's paraplegia was diagnosed. (R. pp. 348-356). According to MUSC trauma surgeon, Dr. Norcross, the cause of Mr. Green's paraplegia was a spinal cord infarct. (R. p. 449, line 19-p. 450, line 6). Mr. Green had an arrest at GSRMC, "which almost certainly was the cause of the infarction of the spinal cord." (R. p. 449, line 19-p. 450, line 6). That was Dr. Norcross's impression at the time and he "can't find any other explanation for it." (R. p. 451, line 19-p. 450, line 6).

Dr. Cranberg testified that the CT delayed the repair of Mr. Green's severed arteries, during which time Mr. Green continued to lose blood. (R. p. 491, line 18-p.491, line 3). Dr. Chariker testified that but for Mr. Green going to CT, the cardiac arrest would

not have occurred. (R. p. 474, lines 5-8). On cross-examination, Bauerle's expert, vascular, thoracic and cardiac surgeon Dr. Smith, admitted that if you do not stop a bleed you will eventually run out of blood, and if you run out of blood, you are going to suffer a cardiac arrest. (R. p. 319, line 25-p. 320, line 5). Dr. Cranberg testified to a reasonable degree of medical certainty that the most probable cause of Mr. Green's paraplegia and loss of feeling from the belly button down was the cardiac arrest. (R. p. 484, lines 2-17). Further, Dr. Chariker testified that Mr. Green is a paraplegic as a direct result of deviations in the standard of care by Bauerle. (R. p. 479, lines 10-14).

I. THE TRIAL COURT ERRED IN FINDING THAT THE SETTLEMENTS AND VERDICTS INVOLVED A SINGLE INJURY SO THAT S.C. CODE ANN. §15-38-50 MANDATED SETOFF OF THE ENTIRE AMOUNT OF THE SETTLEMENTS AND THE COURT HAD NO DISCRETION TO DETERMINE THE EQUITIES INVOLVED.

The trial court erred in failing to recognize the necessity of making an equitable determination regarding the consideration of a set off against the verdicts awarded separately to Plaintiffs for separate injuries on separate causes of action. Once it became evident that the single GSRMC settlement was unallocated, between causes of action or between two individual Plaintiffs, and that the proof of negligence, and elements of damages for the two verdicts on separate and distinct causes of action were different, the trial court should have determined that § 15-38-50 was not applicable and any set off would have to be equitable. Then, the trial court should have decided, based solely on the facts presented at trial, that the injury to Mr. Green, his paralysis, was the basis for the medical malpractice verdict, and occurred exclusively as a result of the medical negligence of Bauerle.

Mrs. Green's loss of consortium action is a separate cause of action, founded on

her distinct injuries, and asserted direct liability for ordinary negligence and vicarious liability for medical malpractice. The Summary Judgment Order did not affect her direct negligence claim. Furthermore, it is impossible to distinguish what part of that verdict, if any, stemmed from the medical malpractice of Bauerle and; therefore, the court cannot determine what amount of the GSRMC settlement, if any, to set off against that verdict.

There is also ample evidence that the combined amount of Mrs. Green's verdict and the GSRMC settlement would not have approached the amount of economic loss for her loss of consortium claim based on uncontroverted testimony of economic experts and; therefore, double recovery was not possible. Likewise, Mr. Green's verdict and GSRMC settlement combined would barely have approached the amount of his economic loss without any consideration for pain and suffering, loss of enjoyment of life, or other elements inherent to the determination of damages for his total paralysis from the waist down. Any setoff of the GSRMC settlement amount against the two verdicts was therefore unnecessary to prevent a double recovery.

In determining that setoff was mandated in this case, the trial court relied on case law interpreting S.C. Code Ann. § 15-38-50. With respect to settling tortfeasors, this section provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons *liable in tort for the same injury* or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater. . .
>
> S.C. Code Ann. §15-38-50 [emphasis added].

South Carolina courts interpreting this statute have held that statutory setoff is

applied only when a prior settlement has already provided compensation to the plaintiff on the same claim for the same injury for which the plaintiff later receives a verdict against another tortfeasor. See Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct.App.1998); see also Ellis v. Oliver, 335 S.C. 106, 109, 515 S.E.2d 268, 270 (Ct.App.1999). In Hawkins, the Court of Appeals held that Georgia and South Carolina wrongful death actions involved different injuries and were therefore separate claims with no right of setoff. 330 S.C. 92 at 114-15, 498 S.E.2d 395 at 407. More recently, the rule set forth in Hawkins was clarified by the Court of Appeals in Smith v. Widener, which held that the verdict is only reduced by the amount of settlement funds "...paid to compensate the ***same plaintiff*** on a claim for the ***same injury***." 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct.App.2012)(emphasis added)(citing Hawkins, 330 S.C. at 114-15, 498 S.E.2d at 407). However, 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 473, 724 S.E.2d at 191.

In the present case, in the post-trial Setoff Order, the trial court held "[i]n accordance with Ellis v. Oliver and Smith v. Widener," the Settlements shall be set off because "they concerned the same injury as the jury verdict against Dr. Bauerle." (R. pp. 20-21). The trial court further determined that Mr. and Mrs. Green had not "...suffered different injuries." (R. p. 20). The court cited Ellis for the proposition that "[a]pplication of the settlement credit was statutorily mandated;" therefore, the Court has no discretion in determining the equities involved in applying setoff. (R. p. 20). (citing Ellis, 335 S.C. at 113, 515 S.E.2d at 272). However, the court then allocated the Settlement, a remedy fundamentally based on principles of equity.

The trial court erred in holding that the Settlements and verdicts involved a single claim for a single injury, specifically, Mr. Green's paralysis. (R. p. 20). In light of Hawkins and Smith, § 15-38-50 does not apply; therefore, setoff is not statutorily mandated and a setoff could only be equitable in nature. However, Bauerle sought only legal, not equitable, relief.

When setoff does not arise by operation of law under § 15-38-50, the defendant can request that the court *consider* granting equitable relief. Buffington v. T.O.E. Enters., 383 S.C. 388, 392-3, 680 S.E.2d 289, 291 (2009) (emphasis added) (noting all equitable remedies are granted at discretion of the court, not as a matter of legal right). The purpose of an equitable setoff is to prevent plaintiffs from receiving a windfall or double recovery. Hawkins, 330 S.C. at 114-15, 498 S.E.2d at 407. If the court had found that an equitable setoff was necessary to prevent Plaintiffs from receiving a double recovery in the present case, Bauerle could have only been granted a credit on each verdict in the amount of the Settlements allocated to the same cause of action. Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). However, because the Settlements were not allocated, the court could not apply an *equitable* setoff without first allocating the funds.

In order for a court to consider reallocating settlement proceeds, a defendant must satisfy several specific elements. Riley v. Ford Motor Co., Op. No. 5195 (S.C.Ct.App. filed Feb. 5, 2014). Not only did Bauerle fail to ask the court to allocate the Settlements, he failed to assert equitable grounds on which the court could do so or provide evidence to support that position. To the contrary, the court's arbitrary determination that it had to allocate the Settlements in order to comply with § 15-38-50 was in direct conflict with its finding that the Settlements and verdicts compensated the

same single injury, which was the only basis Bauerle asserted in support of his motion.

A. The Settlements did not compensate the same Plaintiff on the same claim for the same injury as the verdicts against Bauerle.

In Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271 (Ct.App.1998), the Court of Appeals found that §15-38-50 applied because the case involved a single "injury," the death of the plaintiff's husband. The Court did not distinguish wrongful death and survival causes of actions as separate claims for separate injuries, and held that the settlement with the hospital compensated the plaintiff on the same claim for the same injury as the verdicts against the doctor. In its holding, the Court interpreted the word "injury" very broadly, to encompass all damages for wrongful death and survivorship resulting from joint negligence.[1] Id. at 112, 515 S.E.2d at 271-72.

Similarly, the trial court in the present case utilized an analysis based upon the finding that the verdicts and the Settlements involved a single claim for a single injury, specifically, Mr. Green's paralysis. Based on this finding, the court combined the loss of consortium and medical negligence verdicts, determined the percentage of the whole represented by each, and allocated the correlating percentage of the Settlements between the same two causes of action. This effectively set off all of the Settlement funds from the sum of the verdicts as though they were indistinguishable, without regard for the principles inherent in the analysis pertaining to equitable reallocation. Accordingly, the trial court's holding was identical in both rationale and result to the decision in Ellis v. Oliver, on which its decision was explicitly based. (R. pp. 20-21).

Ellis conflicts with subsequent South Carolina cases involving wrongful death and

[1] The Court of Appeals addressed the necessity of distinguishing causes of action for wrongful death and survivorship in Smith v. Widener, noting that Ellis v. Oliver was inconsistent with prior and subsequent case law holding that wrongful death and survival actions are separate claims for separate injuries. Smith v. Widener, 397 S.C. 724, S.E.2d 188 (Ct. App. 2012).

survival actions. Ellis held statutory setoff under § 15-38-50 applies to situations involving wrongful death and survival actions because they represent the same claim for the same injury. Subsequent cases distinguish wrongful death and survival actions as separate causes of action and; therefore, apply an equitable setoff based on equitable reallocation of settlement proceeds previously allocated to one or both cause of action. The distinction is extremely significant because an equitable setoff may only be applied to reduce a verdict by the amount paid by another tortfeasor to settle the same cause of action. Rutland v. S.C. Dep't of Transp., at 216-17, 734 S.E.2d at 145.

In Welch v. Epstein, the Court of Appeals distinguished wrongful death and survival actions as separate claims for separate injuries, even though they arose out of the same bodily injury; a death. The Court reasoned that actual damages in a survival action are awarded for the benefit of the decedent's estate, whereas damages in a wrongful death action focus on the damages sustained by the beneficiaries as a result of the death. The Court's holding implied that the term "injury" encompassed more than the death, to include other immeasurable losses and invasions of interest suffered. Welch v. Epstein, 342 S.C. 279, 304, 536 S.E.2d 408, 421 (Ct.App.2000).

Of particular note, the Court was clear that setoff based on a reallocation of settlement proceeds was equitable in nature and that such "...motions are addressed to the discretion of the court—a discretion which should not be arbitrarily or capriciously exercised." Welch, at 313, 536 S.E.2d at 425. As a matter of law, the Estate could only recover the amount of the decedent's medical bills under the wrongful death action, making it possible for the Court to discern whether: (1) the amount allocated to the wrongful death cause of action was supported by the evidence; or (2) setoff was necessary

to prevent a double recovery for this clearly definable economic injury. Accordingly, the Court explicitly stated that the ruling did not contravene §15-38-50 because there was only one complete satisfaction for the decedent's injuries, once again recognizing that this financial loss was a distinct injury separate from the others involved. Id. at 314, 536 S.E.2d at 425.

In Smith v. Widener, the Court of Appeals provided further guidance on what constitutes the same claim for the same injury for purposes of determining the applicability of § 15-38-50. The Court held that because the settlement and verdict were for the same amount, it was clear that both involved a claim for the same financial loss, or injury. Since the settlement and the verdict involved the same claim for the same injuries, § 15-38-50 required that the entire settlement be setoff against the jury verdict. Id. 397 S.C. 468, 471-74, 724 S.E.2d 188, 190-91 (Ct.App.2012). The Court noted, where a settlement involves two claims, only one of which involves the same injury as the claim tried to verdict, the court must make a factual determination of how to allocate the settlement between the claims. Id. at 473-74, 724 S.E.2d at 191.

In footnote 1 of Smith, the Court resolved the inconsistency between Ellis and Rutland by noting that Ellis incorrectly held that survival and wrongful death actions involve the same claim for the same injury. In so doing, the Court implicitly recognized that the term "injury" was not intended to be interpreted so broadly as to encompass all damages arising out of a single death or bodily injury. Smith v. Widener, at 481 n.1, 724 S.E.2d at 195.

1. The verdicts for Loss of Consortium and Medical Malpractice involve different claims for different injuries.

In the present case, the trial court determined that the Settlements and verdicts

involved the same claim for the same injury under § 15-38-50. (R. p. 20). The Court considered the two separate verdicts one indivisible verdict, failing to recognize the individual nature of each claim. (R. p. 20). In actuality, the medical malpractice verdict awarded to Mr. Green and the loss of consortium verdict awarded to Mrs. Green are different claims for different injuries as a matter of law. Page v. Crisp, 303 S.C. 117, 119, 399 S.E.2d 161, 162 (Ct.App.1990) (holding wife's personal injury lawsuit and husband's suit for loss of consortium separate claims); Hiott v. Contracting Servs., 276 S.C. 632, 633, 281 S.E.2d 224, 225 (1981) (holding loss of consortium is an independent action, not derivative). Just as wrongful death and survival actions provide a mechanism for bringing different claims for injuries arising out of, yet distinct from, a single bodily injury (death), South Carolina law clearly recognizes a spouse's right to bring a separate claim to vindicate her losses arising out of a physical injury (or injuries) to her spouse. S.C.Code Ann. § 15-75-20 (1976) ("Any person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse"); construed in Preer v. Mims, 323 S.C. 516, 521, 476 S.E.2d 472, 474 (1996); see also Kizer v. Kinard, 361 S.C. 68, 72, 602 S.E.2d 783,785 (2004).

In relying on the overly broad statutory interpretation in Ellis v. Oliver, the trial court incorrectly found that Mrs. Green's loss of consortium verdict compensated her for the *same injury* that Mr. Green's medical malpractice verdict compensated him because both claims arose out of Mr. Green's paralysis. In actuality, precedent set forth in Welch, Rutland, and Smith dictate that the injuries sustained by Mrs. Green are distinct and separate from those suffered by Mr. Green; therefore, statutory setoff without regard for the equities involved is prohibited. Section 15-38-50 does not mandate setoff in this case;

therefore, any reduction of Plaintiffs' verdicts could only be equitable in nature and subject to an entirely different analysis.

2. *The Settlements compensated Plaintiffs for injuries separate and distinct from Mr. Green's bodily injury and Mrs. Green's loss of consortium.*

On May 31, 2013, Plaintiffs entered into an agreement with GSRMC wherein the latter agreed to pay $2,000,000.00 for and in consideration of a "Covenant Not To Sue" and "Covenant Not to Prosecute or Execute Judgment" ("Covenants"). The Covenants involved a single, indivisible sum paid to Plaintiffs jointly for past and future claims, and expressly stated that they were not limited to the lawsuit pending at the time of the Settlements. (R. p. 505). At the time the parties entered into the Covenants, Mrs. Green's loss of consortium action was the only cause of action still in existence under which either Plaintiff could recover from GSRMC by virtue of the Summary Judgment Order. (R. p. 15). The Settlement funds were also paid as consideration for Plaintiffs covenant not to sue GSRMC on any potential claims for death, protecting GSRMC from exposure to such liability arising during the pendency of the litigation. (R. p. 505).[2]

Finally, the Settlement funds were given in consideration for a hold harmless and indemnification agreement protecting GSRMC from the risk of having to defend claims arising out of allegations made in the pending suit. (R. p. 505). Pursuant to this agreement, Plaintiffs could be responsible for interest, attorney's fees and any other costs of litigation brought against GSRMC by third parties. Consideration paid to assume additional liability for contractual indemnification is not an element of damages

[2] Mrs. Green, still having a pending loss of consortium claim against GSRMC, could amend the pleadings to add additional actions for death arising prior to trial and out of the same transaction or occurrence, as it would relate back to the original filing under Rule 15(c) SCRCP. The evidence presented at trial shows Mr. Green is at risk for, and has suffered, potentially life threatening complications arising out of his injuries. Mrs. Green's cause of action for wrongful death, would be separate from her loss of consortium claim.

recoverable in the tort action against Bauerle, and is not subject to setoff. Vaughn v. City of Anderson, 300 S.C. 55, 61, 386 S.E.2d 297, 301 (1989) (holding settlement providing for costs will not reduce amount due from another tortfeasor because costs not damages).

Unlike Welch v. Epstein, here the Covenants did not release, nor allocate, the entirety of the Settlement funds to the same two causes of action for which the jury returned verdicts against Bauerle. Further, neither the Covenants nor the verdicts involved a cause of action, which was limited to a single claim, such as that for economic injury as in Welch, or that for pain and suffering as in Rutland. GSRMC's $2,000,000.00 payment to Plaintiffs in consideration for the Covenants did not correspond to the amount of either verdict, nor did they correspond to a single, discernible claim for a specific economic injury recoverable under any cause of action settled or tried as in Smith. Accordingly, the trial court erred in finding that the entire amount paid by GSRMC was given to compensate "...the same injury, that being Mr. Green's paralysis and the loss of consortium by Mrs. Green, as was litigated against Dr. Bauerle". (R. p. 20).

The Covenants involved consideration given for contractual terms affecting rights and obligations not recoverable in a tort action for damages, and not subject to setoff. Additionally, they involved claims for injuries that were separate and distinct from Mr. Green's bodily injury and Mrs. Green's loss of consortium. Finally, the two verdicts compensated two *different plaintiffs* for their personal injuries. As such, the funds paid by GSRMC did not compensate the *same plaintiff* on the same claim for the same injury as the verdicts rendered against Bauerle; therefore, § 15-38-50 does not mandate setoff.

B. The court erred in allocating the Settlements to the same two causes of action as the verdicts in order to apply the setoff.

An equitable setoff may be granted when necessary to prevent a plaintiff from

receiving a windfall or double recovery. Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct.App.1998). If the court had found that equitable setoff was necessary to prevent Plaintiffs from receiving a double recovery in the present case, Bauerle could only have been granted a credit on each verdict in the amount of the Settlements allocated to the same cause of action. Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). If the Settlements and verdicts only involved a single claim for a single injury, the court could have applied statutory setoff under § 15-38-50 without further analysis. To the contrary, the Settlements and verdicts involved separate claims for separate injuries; therefore, the trial court was unable to simply apply statutory setoff as Bauerle requested. Rather, the court was forced to allocate the unallocated Settlements to make up for the fact that Plaintiffs did not suffer a single injury. In doing so, the court employed a portion of the analysis appropriate for an equitable setoff, a remedy that Bauerle did not request, eliminating his burden of proving that equitable setoff was necessary to prevent Plaintiffs from receiving a double recovery.

In Hawkins, the Court of Appeals found that the defendant failed to establish that a portion of the jury verdict against him included an economic injury, which was also recoverable under the cause of action previously settled with another defendant. The only mutual element of damages in the two causes of action was that economic injury. Accordingly, the Court found that there was no evidence that setoff was necessary to prevent a double recovery. Hawkins, 330 S.C. at 115, 498 S.E.2d at 407 (Ct.App.1998).

Similarly, in the present case, it is not possible to ascertain what elements of damages were included in the Settlements or verdicts. Without knowing for what damages Plaintiffs were compensated, it is impossible to demonstrate that an equitable

setoff was necessary to prevent a double recovery. Not only did Bauerle fail to claim equitable grounds for relief, he did not present any evidence in support of that argument. In granting an equitable allocation, the court first allocated the Settlements between the medical malpractice and loss of consortium causes of action. If Bauerle had asked the court to employ this process, he would have contradicted his assertion, and the trial court's finding, that the Settlements and verdicts compensated a single indivisible injury.

The jury rendered two separate verdicts compensating each Plaintiff for separate and distinct injuries. There were no findings, evidence, or arguments in support of the proposition that setoff was necessary to prevent Plaintiffs from recovering twice for any of these injuries. Accordingly, there was no legal basis for combining Plaintiffs' two verdicts, determining the percentage of the total represented by each verdict, and allocating the corresponding percentages to the Settlements to reduce to the sum of the verdicts by the entire amount paid by GSRMC. The trial court's finding that the Settlements and verdicts compensated a single injury mandating setoff under § 15-38-50 is inconsistent with the analysis it interpreted the statute to require. Since Bauerle: (1) is not entitled to a setoff under § 15-38-50; (2) did not assert that setoff was necessary to prevent a double recovery; and (3) did not claim entitlement to alternative equitable relief, the Setoff Order should be reversed. Davis v. Monteith, 289 S.C. 176, 181, 345 S.E.2d 724, 727 (1986) (refusing to grant equitable remedy and stating that "[i]t is noteworthy that [Respondent-Appellant] did not seek equitable relief, but only sought to be declared the legal title owner of the property"); Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012); (citing Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct.App.1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985) (holding

appellate courts in this state don't answer questions not asked).

II. THE TRIAL COURT ERRED IN FINDING THAT THE SETTLEMENTS AND VERDICTS WERE FOR THE SAME CAUSES OF ACTION SO THAT THE ENTIRE AMOUNT OF THE SETTLEMENTS HAD TO BE SETOFF AGAINST THE VERDICTS.

Under certain circumstances, funds already received by a plaintiff are offset against that owed by a defendant in order to prevent a plaintiff from receiving a double recovery. Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 114-15, 498 S.E.2d 395. 407 (Ct.App.1998). Under such circumstances, a non-settling defendant is entitled to credit for the amount paid by another defendant to settle **the same cause of action**. Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (emphasis added); see also, Welch v. Epstein, 342 S.C. 279, 314, 536 S.E.2d 408, 426 (Ct.App.2000). "When the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law." Smith v. Widener, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct.App.2012) (citing Hawkins, 330 S.C. at 114-15, 498 S.E.2d at 407). Here, § 15-38-50 does not apply and there is no setoff because the Settlements and verdicts were for different causes of action.

Here, Plaintiffs asserted causes of action for professional negligence/medical malpractice, vicarious liability, negligent hiring, training, and supervision, and loss of consortium against GSRMC and Bauerle in the Fourth Amended Complaint. (R. pp. 36, 40-41). In the Summary Judgment Order, the trial court dismissed Plaintiffs' causes of action for vicarious liability and negligent hiring, training, and supervision. (R. p. 15). Additionally, the trial court held that GSRMC could not be liable for the actions of independent contractors or employees not named as a party to the lawsuit, nor could Plaintiffs hold GSRMC liable for the actions of independent contractors under the non-

delegable duty doctrine. (R. p. 3).

Following the Summary Judgment Order, on May 31, 2013, Plaintiffs entered into the Covenants with GSRMC wherein Plaintiffs received consideration for their agreement, among other things, not to execute any judgments against GSRMC, protecting the hospital from any remaining liability *to Plaintiffs* arising out of the pending lawsuit. (R. p. 505). The Covenants involved a single indivisible sum paid to Plaintiffs jointly as compensation for all past and future claims against GSRMC, and were not limited to claims named in the lawsuit pending at the time of settlement. (R. p. 505). A Stipulation of Dismissal ("Stipulation") was filed on June 11, 2013 wherein all parties consented to the dismissal of GSRMC from the pending lawsuit with prejudice. (R. p. 17). The Summary Judgment Order was not appealed by any of the parties to the litigation. Plaintiffs proceeded to trial against Bauerle on the two remaining causes of action for Medical Malpractice and Loss of Consortium, each receiving a separate verdict.

In the Setoff Order based upon §15-38-50, the trial court held, among other things, that the Settlements and verdicts involved the same cause of action, essentially *allocating* previously *unallocated* funds to a single negligence cause of action. (R. p. 3). Then, the trial court used a mathematical formula to allocate the Settlements entirely between two causes of action and then setoff all the Settlement proceeds from the verdicts, without regard to the equities involved. (R. p. 22). The court's analysis ignored the Summary Judgment Order, which was not appealed, and; therefore, was the law of the case at the time of trial. In so doing, the trial court utilized a circular analysis tailored to produce this result while compensating for the fact that the verdicts were clearly for different causes of action.

A. Different causes of action arising out of the same factual allegations of negligence are not the same cause of action for purposes of setoff.

In Hawkins v. Pathology Assocs. of Greenville, the Court determined the plaintiffs' recovery under the South Carolina and Georgia wrongful death statutes constituted two separate causes of action. Despite the fact that the two causes of action: (1) were founded in negligence; (2) were identified as "wrongful death" actions; (3) were based on factual allegations of medical malpractice; and (4) involved the same bodily injury, setoff did not apply because they did not constitute the same cause of action. 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct.App.1998); see also Welch v. Epstein, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (Ct.App.2000)(stating survival and wrongful death actions arising out of medical malpractice were separate actions for purposes of setoff).

Here, the trial court determined that when the jury renders two separate verdicts to two separate plaintiffs for separate causes of action, they are the same cause of action. (R. p. 20). This conflicts with Hawkins because under the trial court's analysis, any cause of action founded on the same factual allegations of negligence constitutes the same cause of action for purposes of determining the applicability of statutory setoff under § 15-38-50.

B. A cause of action asserting direct negligence against GSRMC is different from a cause of action against GSRMC for Medical Malpractice based on purely vicarious liability for purposes of setoff.

The Uniform Contribution Among Tortfeasors Act ("UCATA") only applies to joint tortfeasors and the Court of Appeals has declined to broaden the Act's scope by expanding the definition of "joint tortfeasors" to include vicariously liable parties. Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct.App.2001), *rev'd on other grounds,* 356 S.C. 238, 588 S.E.2d 588 (2003). "In South Carolina, a master or principal only vicariously liable does not have an aliquot or proportional portion he or she ought to

pay, *but rather may shift the entire loss* to the servant or agent actively responsible, and may recover in full from the servant." Id. at 225, 546 S.E.2d at 670 (emphasis added) (citing Sky City Stores, Inc. v. Gregg Sec. Servs., Inc., 276 S.C. 556, 558, 280 S.E.2d 807, 808 (1981)).

Accordingly, cases eligible for setoff cannot involve a settlement for a principal's purely vicarious liability. The cases relied upon by the trial court and their progeny do not involve vicarious liability and, on that basis, should be distinguished. Welch v. Epstein, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (Ct.App.2000) (setoff settlement with "John Doe" defendant); Rutland v. S.C. Dep't. of Transp., 400 S.C. 209, 218-19, 734 S.E.2d 142, 147 (2012) (setoff for settlement with General Motors which had no agency relationship with SCDOT); Hawkins v. Pathology Assocs. of Greenville, 330 S.C. at 112-13, 498 S.E.2d 395, 406-7 (Ct.App.1998) (setoff settlement with Georgia doctor who had no relationship with Pathology Associates of Greenville); Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 190 (Ct.App.2012) (setoff settlement with bank with no agency relationship with personal representatives of Estate); Ellis v. Oliver, 335 S.C 106, 110-14, 515 S.E.2d 268, 271-72 (Ct.App.1999) (setoff settlement with hospital for survival action resulting from hospital's direct negligence); Riley v. Ford Motor Co., Op. No. 5195 (S.C.Ct.App. filed Feb. 5, 2014) (setoff settlement with at-fault driver with no relationship to Ford).

Here, Plaintiffs asserted causes of action, which could hold GSRMC: (1) *directly* and *vicariously* liable for **ordinary negligence**; and (2) *vicariously* liable for **medical malpractice** of its employees and independent contractors. (R. pp. 36, 41). If GSRMC was liable to each Plaintiff for Bauerle's malpractice, but not directly liable for ordinary

negligence, the parties are not joint tortfeasers and the Act does not apply. Therefore, Bauerle is not entitled to shift the burden of his wrongdoing to another party. To the contrary, the appropriate remedy would belong to GSRMC in the form of indemnity. However, if GSRMC was vicariously liable for Bauerle's malpractice as well as directly liable for ordinary negligence, then setoff might be appropriate for funds paid to settle the loss of consortium cause of action for which it was jointly liable. Accordingly, the trial court's ruling that the Settlements were for a single negligence cause of action failed to consider that neither the *bases* of GSRMC's potential liability, nor the *responsible parties* were uniform across all causes of action. Further, these distinctions would have governed whether Bauerle was entitled to contribution or if *he* was actually liable to GSRMC. (R. pp. 20-21, n.2).

Prior to the Summary Judgment Order, the pleadings allege three different theories under which GSRMC could be liable to Plaintiffs for ordinary negligence, two of which were only asserted by Mrs. Green. The Fourth Amended Complaint asserted allegations of ordinary negligence in the negligent supervision, hiring, and training and loss of consortium causes of action. In order for GSRMC to be liable for ordinary negligence, the duty breached could not be subject to a professional standard of care, which would require a higher burden of proof and expert testimony. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The negligence asserted in support of Mrs. Green's loss of consortium was supported by reasserting previous allegations seeking to hold GSRMC directly liable for promulgating policies and procedures that did not require the exercise of professional judgment and vicariously liable for employee negligence in failing to abide by such policies. Both Plaintiffs

asserted the negligent hiring, training, and supervision cause of action seeking to hold GSRMC directly liable for its employment decisions in the event the individuals involved in Mr. Green's care were classified as employees.

Similarly, prior to the Summary Judgment Order, the pleadings allege two theories under which GSRMC could be liable for medical malpractice, both of which were asserted by each Plaintiff. The pleadings alleged GSRMC was vicariously liable for the professional negligence/medical malpractice of its employees and independent contractors. Accordingly, the pleadings sought to impute liability for professional negligence/medical malpractice based on traditional agency principles applicable to the employee-employer relationship as well as the non-delegable duty doctrine.

The Summary Judgment Order dismissed all but two causes of action. At the time the Covenants were entered into, there were only two causes of action pending; Mr. Green's cause of action for medical malpractice and Mrs. Green's cause of action for loss of consortium. Although these two causes of action were the same two causes of action tried to verdict, the trial court failed to consider *if* GSRMC could be liable for medical malpractice and, if so, whether GSRMC was an innocent principal or a joint tortfeasor. If GSRMC could not be liable for medical malpractice, only the consortium cause of action alleging direct negligence remained as to GSRMC. As a matter of law, GSRMC could not be held liable for malpractice without *some* way to impute professional negligence from at least one individual. Baird v. Charleston County, 333 S.C. 519, 537, 511 S.E.2d 69, 78 (1999) (common law prohibition against the corporate practice of medicine in South Carolina). The Summary Judgment Order precluded Plaintiffs from holding GSRMC *vicariously liable* under the non-delegable duty doctrine or respondeat superior; therefore,

there was no basis for which GSRMC could be held liable for medical malpractice at the time of its settlement with Plaintiffs.

If GSRMC could have been held vicariously liable for medical malpractice, such liability could only be imputed as a result of Bauerle's actions. At trial, both sides presented evidence that physicians at GSRMC disagreed with Bauerle's decision to remove Mr. Green from the preoperative area, where he waited for urgent surgery to repair the major arteries in his arm. Dr. Scott Lintz testified medical records in evidence corroborated that Bauerle was "adamant" about removing Mr. Green and sending him to CT prior to Mr. Green receiving the surgery on his arm. (R. p. 46, lines 10-24). At the conclusion of trial, the jury found that the decision by Bauerle was a deviation from the standard of care and that his actions proximately caused Mr. Green to suffer a cardiac arrest, resulting in his paralysis. (R. p. 28).

Bauerle not only disregarded Dr. Lintz's opposition to remove Mr. Green, Bauerle took a critically-ill patient away from a surgeon moments before he was to receive life-saving surgery. (R. p. 345). This was done without assessing Mr. Green's condition first, which experts for both sides testified constituted a breach of the standard of care. (R. p. 322, line 19-p. 324, line 25). Plaintiffs' expert, Dr. Edd Chariker, testified that the medical records regarding Bauerle's phone conversations with Dr. Lintz indicated that Bauerle "was adamant that he was going to have a reconstructive CT scan done." (R. p. 470, lines 11-22). Even Bauerle admitted that if he had paused to look at Mr. Green's vital signs, he would not have made the same decision. (R. p. 308, lines 18-22). Dr. Chariker, reiterated that Bauerle's decision was a dramatic deviation from the standard of care, that "that one decision was the thing that probably tipped the scales," and that Mr.

Green would not have suffered a cardiac arrest if Bauerle had not taken him to CT. (R. p. 456, lines 5-16; p. 463, lines 12-19; p. 479, lines 7-22). Not only is there no evidence that GSRMC contributed to Bauerle's decision, directly or vicariously, it is undisputed that Bauerle was "adamant" about delaying Mr. Green's care despite the opposition of at least one other doctor, a doctor who felt strongly enough to repeatedly document Bauerle's persistence in the medical records. (R. p. 345).

Bauerle's interruption was the direct cause of Mr. Green's paralysis and in fact, interfered with the course of treatment being carried out by GSRMC. Bauerle and GSRMC were not joint tortfeasors, rather the injury occurred as a result of Bauerle's intervening or superseding negligence.

C. Medical malpractice and loss of consortium are not the same cause of action.

Medical malpractice and loss of consortium are not the same cause of action; therefore, the verdicts were not rendered for the same cause of action. "It is well settled in South Carolina that one spouse's cause of action for medical expenses and loss of consortium resulting from negligent injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action." Graham v. Whitaker, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984) (citing Hiott v. Contracting Servs., 276 S.C. 632, 633, 281 S.E.2d 224, 225 (1981); Priester v. Southern Ry. Co., 151 S.C. 433, 149 S.E. 226, 227 (1929); Ryder v. Jefferson Hotel Co., 121 S.C. 72, 113 S.E. 474, 475 (1922)). Additionally, medical malpractice and loss of consortium require a different burden of proof, different elements of proof, provide different damages to compensate very distinct injuries, and require different verdicts and judgments. Graham, 282 S.C. at 397, 281

S.E.2d at 43. In fact, the two causes of action are so indisputably distinct that the consortium claim is arguably not affected by contributory negligence on the part of the injured spouse and can be subject to a different statute of limitation. *See* Preer v. Mims, 323 S.C. 519, 519-22, 476 S.E.2d 472, 473-75 (1996). Accordingly, the portion of a settlement allocated to a loss of consortium claim does not reduce future recovery by the injured spouse. Kizer v. Kinard, 361 S.C. 68, 72, 602 S.E.2d 783, 785 (2004) (holding where bodily injury limits exhausted by equal payments to husband and injured wife, wife's future recovery is not reduced by amount paid to husband).

Here, the two causes of action involve different elements of damages. A medical malpractice cause of action allows an injured plaintiff to recover for the loss of his ability to provide services to his family, which is a separate and distinct award from the award for loss of services, society and companionship recoverable in an action for loss of consortium. *See* Denaux v. United States, 572 F. Supp. 659, 666 (D.S.C. 1983); Davis v. Tripp, 338 S.C. 226, 238, 525 S.E.2d 528, 534 (Ct.App.1999).

Mrs. Green had the right to prove, as a separate part of her damages, medical expenses *she* incurred for the care and treatment of Mr. Green extending from the time of the injury through the date of the Settlements. Arant v. Stover, 307 F. Supp. 144, 148 (D.S.C. 1969) (citing Sossamon v. Nationwide Mut. Ins. Co., 243 S.C. 552, 560, 135 S.E.2d 87, 92 (1964)). Mrs. Green alone bore the burden of the 24-hour care she provided to Mr. Green, which she testified requires her to manually evacuate his bowels, bathe him, physically move him from chair to bed, change his diapers, and catheterize him six times a day. (R. p. 187, lines 2-14). To accommodate Mr. Green's vigorous catheterization requirements, Mrs. Green has to set an alarm so that she can wake-up in the middle of the

night to catheterize him. (R. p. 186, lines 3-23). The undisputed testimony of Mrs. Green's husband and children shows that she has done this every single day for the past nine years at the expense of her own health, refusing to leave his side long enough to obtain her own medical treatment for a heart condition. (R. p. 129, line 4- p. 130, line 23; p.132, lines 7-p. 133, line 1). Since they would not have been able to afford the cost of the 24-hour care and services Mrs. Green has provided, Mr. Green would not be alive if his wife had not chosen to stay by his side and sacrifice her life for what is left of his. Undisputed evidence presented at trial noted that the value of the medical care Mrs. Green alone provided for her husband prior to trial is $1,262,106.00. (R. p. 385).

In Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998), the Court had to determine whether to set off a settlement under the Georgia wrongful death statute from a verdict under the South Carolina wrongful death statute. The Court held that despite both having a common element of damages, setoff was not warranted because neither party requested that the jury specify how it calculated damages under each of the elements of loss for the South Carolina wrongful death verdict. Additionally, the Court noted that both the settlement and the jury award were less than the amount of pecuniary loss to which an economist testified, making it impossible to discern whether this injury was compensated in the verdict.

Here, the Settlements and verdicts combined were barely sufficient to compensate the $3,006,791.00, in economic damages Plaintiffs' economic expert, Dr. Oliver Wood, estimated Mr. Green suffered, excluding past medical expenses, let alone the myriad of other damages for his paraplegia including pain and suffering and loss of enjoyment of life. (R. pp. 401-404). Further, although Plaintiffs requested a jury verdict form specifying

elements of damages, the jury verdict form used did not permit the jury to specify the amount of the verdict attributed to each element of damages. (R. pp. 28-31; pp 429-430). Accordingly, there is no evidence that Dr. Wood's or Nurse Lustig's figures were included in the Settlements or the verdicts. As in Hawkins, Bauerle cannot establish that the jury awarded either Plaintiff $2,000,000.00 entirely for a specific economic loss. Bauerle also did not establish that the Settlements even involved a cause of action for medical malpractice and, if so, whether GSRMC was jointly liable to Mr. Green for same. As in Hawkins, there was no evidence that setoff was necessary to prevent Plaintiffs from receiving a double recovery.

After holding that the Settlement and the verdicts involved the same negligence cause of action, the trial court attempted to apply a statutory setoff in the entire amount of the Settlements without employing an equitable allocation analysis. However, because the verdicts and Settlements clearly involved different causes of action, the court was forced to allocate the entirety of the Settlements to the same two causes of action as the verdicts in order to achieve the result it interpreted § 15-38-50 to require. The trial court erred in granting Bauerle's motion for a statutory setoff under § 15-38-50 and in allocating the Settlements utilizing a circular analysis tailored to produce the corresponding result.

III. THE TRIAL COURT ERRED IN ALLOCATING THE SETTLEMENTS AND IN DOING SO USING AN ANALYSIS BASED ON THE PERCENTAGE OF THE VERDICTS REPRESENTED BY EACH CAUSE OF ACTION.

Where setoff does not apply by operation of law under § 15-38-50, a court may apply an equitable setoff. "The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d

142, 145 (2012). This type of setoff "is not necessarily founded upon any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction of the court." Welch v. Epstein, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct.App.2000). Such "...motions are addressed to the discretion of the court—a discretion which should not be arbitrarily or capriciously exercised." Welch, 342 S.C. at 313, 536 S.E.2d at 425.

The most recent South Carolina Court of Appeals case addressing setoff and equitable reallocation is Riley v. Ford Motor Co., Op. No. 5195 (S.C.Ct.App. filed Feb. 5, 2014). In that case, the Court held when an *agreed-upon allocation of* settlement proceeds does not meet certain standards, "a non-settling defendant who is entitled to a setoff but was not involved in the settlement negotiation is entitled to have the court *consider reallocating* the proceeds." Id. (emphasis added). The Court explained the Riley opinion uses "permissive language such as 'may,' 'permit,' and 'consider reallocating' because setoff is an equitable remedy a court is not required to grant. Id. at n.6.

In the Setoff Order, the trial court held that a statutory setoff applied and then equitably *allocated* the previously unallocated Settlements in order to setoff the Settlements from the verdicts. (R. p. 22). The court extended precedent established in Rutland, permitting a *reallocation* of settlement proceeds to allow an *allocation* of unallocated Settlements. Rutland can be distinguished from the present situation for several reasons. First, in Rutland the parties allocated the settlement funds and the trial court approved such allocation. Second, the trial court reallocated the settlement based on the facts. Here, the parties did not allocate the Settlements and the trial court used a mathematical equation to allocate the Settlements based purely on a percentage derived from the jury's verdicts against Bauerle. Although no precedent exists to allow the court

to allocate unallocated settlements, if the Parties had agreed upon an allocation of the Settlements, the appropriate analysis for this court to apply to determine whether Bauerle would be entitled to have the court consider *reallocating* the Settlements is set forth in Riley.

Further, because equitable reapportionment is founded in equity, the policy considerations of permitting a court to reallocate settlements between various causes of action, as discussed in the dissent to Smith v. Widener, 397 S.C. 468, 724 S.E.2d 190 (Ct. App.2012) and Rutland, should be considered. These considerations are even more compelling when applied to the present facts, where the parties did not allocate the Settlements between plaintiffs, injuries, or causes of action.

In Smith v. Widener, the Honorable James E. Lockemy, Judge of the Court of Appeals, wrote in his dissent that the Court should not reallocate settlement proceeds because the record did not contain any evidence as to why the parties chose the settlement amount. 397 S.C. 468, 479 n. 4, 724 S.E.2d 188, 194 n.4 (Ct.App.2012) (Lockemy, J., dissenting). After making several guesses, he conceded that "one can only make suppositions" and making guesses based on appearance does not "remove the decision from the realm of conjecture." Id. In conclusion, Judge Lockemy wrote; "[i]t is precarious for a court to become too involved with the reasons behind settlement negotiations." Id. He opined that the Court's involvement in settlement negotiations should be limited to ensuring "the parties agree as to the terms and that the terms meet basic fairness." Id. In the same way, here the Court cannot suppose how the parties intended to allocate the Settlements or what their intentions were at the time of settlement. This is particularly true in light of the Summary Judgment Order eliminating causes of action for vicarious

liability and negligent training, hiring and supervision. (R. p. 15). If Bauerle was uncertain about Plaintiffs' settlement with GSRMC, those concerns should have been asserted at the time he entered into the Stipulation and chose to dismiss GSRMC with prejudice.

Similarly, in Rutland, Justice Costa Pleicones, South Carolina Supreme Court Justice, disagreed with the majority's decision to reallocate settlement proceeds based on Welch v. Epstein, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct.App.2000), which recognized the rule that "the reduction in the [plaintiff's] judgment must be from a settlement for the same cause of action." Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 219, 734 S.E.2d 142, 147 (2012) (Pleicones, J., dissenting). Justice Pleicones wrote, the majority allowed a reallocation among various causes of action, which "nothing in our precedents supports;" therefore he would "overrule Welch to the extent it authorizes reallocation of settlement proceeds among different causes of action." Id. Further, Justice Pleicones wrote "justice is not served" by allowing the court to revise a settlement agreement because "doing so essentially requires a plaintiff to defend to the court the viability of a claim she has not made" and such a practice "violates the settled rule that the plaintiff may choose her defendant." Id. *see* Chester v. S.C. Dep't of Public Safety, 388 S.C. 343, 345-46, 698 S.E.2d 559, 560 (2010). Likewise, here the trial court revised Plaintiffs' Settlements with GSRMC and CMR, who were dismissed from the lawsuit with prejudice by Bauerle and Plaintiffs. Now, in defending Plaintiffs' right to the Settlements, Plaintiffs are forced to speculate as to GSRMC's motive for settling and, further, Plaintiffs are forced to defend that speculation.

Additionally, Justice Pleicones wrote that reallocating a settlement agreement may

inequitably reduce a plaintiff's recovery against at-fault defendants. Rutland, 400 S.C. at 219, 734 S.E. 2d at 147 (Pleicones, J., dissenting); *see* McDermott, Inc. v. AmClyde, 511 U.S. 202, 212-21 (1994) (discussing possible inequities of setting off judgment by full amount of settlement rather than requiring a nonsettling defendant to pay its proportionate share of damages). In Rutland, Justice Pleicones noted that the jury returned a verdict solely on "its determination of the *wrongful death* damages to the decedent's family and not her own survival damages." Rutland, 400 S.C. at 220, 734 S.E.2d at 147 (Pleicones, J., dissenting). On that basis, it was impossible for the Court to determine how the jury would have returned a verdict on the decedent's own damages in a *survival action*, had one been brought. Id. Similarly, here it is impossible to determine if the jury would have found GSRMC liable to Plaintiffs under any theory of negligence and, if so, in what amount the jury would have returned a verdict for Plaintiffs.

Lastly, Justice Pleicones wrote that the inequitable result of the Court's reallocation in Rutland, is that the nonsettling defendant is exempt from payment to the plaintiff. Id. *see* Chester, at 346, 698 S.E.2d at 560; McDermott, 511 U.S. at 219 ("The law contains no rigid rule against overcompensation [of the plaintiff]. Several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation.") Accordingly, Justice Pleicones argues that the "unfortunate" effect of reallocation in Rutland, where there is no suggestion of fraud or other wrongdoing by the plaintiff, is that plaintiffs are discouraged from settling and joint tortfeasors are encouraged to litigate, "contrary to our strong public policy favoring settlement." Id. *see* Chester, at 346, 698 S.E.2d at 560. Similarly, here allocating the Settlements entirely to the same causes of action pursued

against Bauerle at trial results in Bauerle's verdict being significantly reduced to the point that GSRMC and CMR, as settling defendants, end up bearing the majority of the burden. In effect, Bauerle benefits from choosing not to settle and instead play his odds by remaining in the lawsuit.

Even under the analysis set forth in Riley, the trial court should not have considered allocating the funds. Bauerle failed to show that the Settlements compensated the same Plaintiff on the same claim for the same injury, the Settlements were for the same cause of action, GSRMC could be held directly liable for medical malpractice, there was evidence to support a reallocation of settlement proceeds to that cause of action, or setoff was the least bit necessary to prevent a double recovery. By Bauerle's own admission, GSRMC's employees did not proximately cause or contribute to Plaintiffs' injuries. (R. pp 501-502). Bauerle did not challenge or appeal the Summary Judgment Order, which held that GSRMC could not be held liable for the actions of its employees or independent contractors. (R. p. 3). Finally, Bauerle did not request that the GSRMC settlement be allocated, or preserve his right to do so, prior to consenting to dismiss GSRMC from the lawsuit with prejudice. (R. p. 16). He cannot now claim that the Settlements were intended to relieve liability which, by his own admission, didn't exist at that time and benefit at the expense of the parties injured by his actions. Accordingly, the trial court erred in allocating the Settlements and in granting a setoff to Bauerle for funds that it repurposed as consideration for the release of a cause of action on which GSRMC could not be liable.

A. The court used an inappropriate analysis to allocate the Settlements.

In Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., the Court of Appeals

attempted to identify the extent and amount of liability discharged by an *unallocated* settlement agreement and held that there was no way to make such a determination for the purpose of applying the UCATA. 336 S.C. 53, 69, 518 S.E.2d 301, 309-10 (Ct.App.1999). The plaintiff brought a suit against Vermeer and Wood/Chuck for injuries he sustained by a machine manufactured by Wood/Chuck and purchased from Vermeer. The court granted the plaintiff's motion for a nonsuit with prejudice for all claims in the complaint against Wood/Chuck. Subsequently, Vermeer settled with the plaintiff and then brought an action against Wood/Chuck for contribution under the UCATA, among other things. The UCATA "provides that a right of contribution exists in favor of a tortfeasor who has paid more than his pro rata share of the common liability." S.C.Code Ann. § 15-38-20(B) (Supp.1998). The Court of Appeals held that, since the settlement agreement did not place a specific value on any potential claim by the injured man's wife, it was not possible to determine if Vermeer paid more than its pro rata share of liability on a consortium claim, in order to entitle Vermeer to contribution. Id. at 70-71, 518 S.E.2d at 310-11. Additionally, prior to that finding, the Court found that Wood/Chuck's liability to the plaintiff was extinguished when all causes of action against Wood/Chuck were dismissed with prejudice. Accordingly, no liability existed as to Wood/Chuck at the time Vermeer settled with the plaintiff and, as such, there was no common liability to discharge in that settlement. Id.

Similarly, in the present case, the Settlements did not place a specific value on any claim, or potential claim, of Mr. and Mrs. Green. Rather than applying the holding in and determining that the court is unable to determine whether Bauerle paid more than his pro rata share, the trial court essentially allocated the Settlements to a single cause of action

consisting of the very same allegations of negligence asserted against Bauerle. In order to reach this conclusion, the court determined that the Covenants with GSRMC were intended to, and did, extinguish all claims previously asserted. The trial court reasoned that these claims still existed at the time the Covenants were entered into despite the Summary Judgment Order, because Plaintiffs could have appealed that order, incorrectly concluding Plaintiffs still had the right to appeal at the time they entered into the Settlements. (R. pp. 20-21 n. 1). These rulings are erroneous for several reasons.

First, the Covenants were entered into more than 30 days after the Summary Judgment Order was signed and filed. (R. pp. 18-23; 505). ***Second,*** neither Plaintiffs nor Bauerle appealed or challenged the Summary Judgment Order making it the law of this case. *See* Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 173, 525 S.E.2d 869, 871 (2000); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). ***Third***, the lawsuit was dismissed with prejudice as to GSRMC by stipulation of all parties. (R. p. 16). ***Finally***, even if the causes of action common to Bauerle and GSRMC had not been extinguished as of the date the Covenants were executed, there is still no basis for determining that the parties to the Covenants intended any portion of the Settlement funds to be allocated to those claims, or that Bauerle was entitled to a setoff therefrom.

Even assuming, arguendo, that all claims existed when the Covenants were entered into, including Plaintiffs' cause of action attempting to hold GSRMC vicariously liable for the medical malpractice of its independent contractors, employees, and agents not named in the lawsuit, as well as Bauerle, GSRMC still could only be *vicariously* liable for medical malpractice, and could not be jointly liable to either Plaintiff on that

cause of action. Under the reasoning utilized by the trial court, a court could allocate previously unallocated funds to *any* pending cause of action regardless of whether the settling defendant could even be liable on it as a matter of law. Here, this analysis also resulted in the court effectively taking away any consideration paid for contractual terms which were expressly not limited to, or even inclusive of, the issues involved in the pending lawsuit, and repurposed it as consideration for liability which didn't even exist at the time the parties consummated their agreement.

B. Even if the analysis in *Riley v. Ford Motor Co.* was applied, the court erred in allocating the Settlements.

In Riley v. Ford Motor Co., Op. No. 5195 (S.C.Ct.App. filed Feb. 5, 2014), Riley, a personal representative for the decedent, brought a wrongful death and survival claim against Ford Motor Company ("Ford") and the at-fault driver. Prior to trial, the at-fault driver settled with Riley and chose to allocate eighty-percent of the settlement to the survival cause of action and the remaining twenty-percent of the settlement to the wrongful death cause of action. At trial, the jury awarded a verdict against Ford solely on the wrongful death claim. On appeal, the Court reallocated the at-fault driver's settlement and then set off the settlement from Ford's wrongful death verdict. The Court of Appeals held that a non-settling defendant is entitled to have the court consider reallocating settlement proceeds where the previously agreed upon allocation of settlement proceeds is (1) "not reasonably based on the evidence"; (2) "does not fairly advance the policy of preventing double-recovery"; and (3) the non-settling defendant is "entitled to a setoff but was not involved in the settlement negotiation". Id.

The situation at hand can be distinguished from Riley in that the parties specifically chose not to allocate the Settlements. Further, the Settlements were not given

as consideration for the same claims litigated at trial. Riley only grants a court the authority to *reallocate* previously allocated settlement funds. Even if this Court determined that Riley should be expanded to allow allocation of previously unallocated funds, the facts of this case still do not meet the elements of that three-part test.

1. The Parties' decision not to allocate the Settlement proceeds was reasonably based on the evidence.

The trial court's allocation of the Settlements between the loss of consortium and medical malpractice causes of action is not based on the evidence because GSRMC could not be held liable for medical malpractice. As discussed at length above, the Summary Judgment Order dismissed all causes of action under which GSRMC could be held vicariously liable for the negligence of anyone involved in Mr. Green's care, including Bauerle, under the non-delegable duty doctrine or respondeat superior. Accordingly, GSRMC could have only been liable for negligence by virtue of Bauerle's medical malpractice and even then, only if he was an agent of the hospital under a theory supported by the evidence. At trial, no evidence was presented regarding Bauerle's relationship to GSRMC; rather, his classification as an independent contractor or agent is a matter of law that has not been ruled on. This is a topic on which the hospital and Bauerle are more knowledgeable than Plaintiffs, yet both GSRMC and Bauerle chose not to adjudicate prior to dismissing GSRMC from the suit. Since no evidence exists to support a cause of action for medical malpractice as to GSRMC, and it is impossible to determine Bauerle's status as an employee or independent contractor in order to determine a basis for imputing liability, allocation of the Settlements was not reasonably based on the evidence.

Further, in Riley, the Court of Appeals noted that in order to determine whether

equitable reallocation is appropriate, it should not focus solely on the amount of money the settling defendant paid to settle the survival claim, rather the court should examine whether the percentages allocated to one claim or the other by the settling parties are reasonable. Then, the Court held that the at-fault driver's allocation of eighty-percent of the settlement to the survival cause of action and twenty-percent of the settlement to the wrongful death cause of action was not supported by "the minimal evidence of survival damages" in the record. On that basis, the Court apportioned eighty-percent of the settlement to the wrongful death claim and twenty-percent of the settlement to the survival claim.

In the Setoff Order, the trial court allocated the Settlements between the loss of consortium and medical malpractice claims by applying "the percentage of the total verdict given to each Plaintiff by the jury" to the Settlements. (R. pp. 21-22). The court's calculation resulted in an allocation of roughly nineteen-percent of the GSRMC Settlement to Mrs. Green's loss of consortium cause of action and roughly eighty-one-percent of the Settlement proceeds to Mr. Green's medical negligence cause of action without regard to the fact that these were two separate verdicts for two different Plaintiffs. Since GSRMC could not be held liable for Bauerle's negligence by virtue of the Summary Judgment Order, an allocation of eighty-percent of the Settlement to that specific cause of action is not supported by the evidence presented at trial.

In the alternative, if the Court determines the GSRMC Settlement must be allocated, then an allocation based on the evidence requires allocating substantially more than nineteen-percent of the Settlement to the loss of consortium cause of action. The evidence dictates that it should be allocated equally to each cause of action, and equity

requires that it be allocated equally between the two Plaintiffs. Even if the Settlement had been allocated entirely between the medical malpractice and loss of consortium causes of action, the funds would still be marital property to which each Plaintiff is equally entitled. Marsh v. Marsh, 313 S.C. 42, 45, 437 S.E.2d 34, 36 (1993) (proceeds of personal injury settlement acquired during marriage are marital property subject to the family court's jurisdiction). In contrast, here each of the two verdicts awarded each Plaintiff a specific amount on causes of action that could have been asserted in independent lawsuits, even if Plaintiffs had divorced after the Settlement. Lawton v. Hamm, No. 06-933, 2006 WL 2622629, at *1 (D.S.C. Sept. 8, 2006).

The court granted setoff without properly considering whether any evidence supported the existence of a double recovery given the varied and complex injuries and losses involved. Accordingly, though Plaintiffs deny that allocation is appropriate in this case, the only way the GSRMC Settlement could be equitably allocated is to divide it equally between the two persons to whom they were jointly paid, which would result in a setoff of the entire amount of Mrs. Green's loss of consortium verdict and a setoff of $1,000,000 of Mr. Green's medical malpractice verdict.

2. No evidence exists to show that the unallocated proceeds presented a risk of double recovery.

Under certain circumstances, funds already received by the plaintiff are offset against those owed by the defendant in order to prevent a plaintiff from receiving a windfall or double recovery. Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 113, 498 S.E.2d 395, 406 (Ct.App.1998). The South Carolina Supreme Court explained, "[t]he reason for allowing [setoff] is to prevent an injured person from obtaining a second recovery of that part of the damages sustained which has already been paid to him."

Welch v. Epstein, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (Ct.App.2000).

In the present case, there is no evidence that setoff is necessary to prevent Randall or Ann Green from receiving a double recovery. Rather, the evidence suggests that, even without a setoff, Plaintiffs will not be fully compensated for their damages because the verdicts and Settlements combined are less than the loss suffered by each Plaintiff.

The facts in the present case are similar to those in Hawkins v. Pathology Assocs. of Greenville, wherein the Court of Appeals overturned a trial court's order setting off a settlement from one defendant from a verdict against the non-settling defendant. Hawkins, 330 S.C. at 113, 498 S.E.2d at 406. One defendant settled with the plaintiff for $550,000.00 prior to trial under the Georgia Wrongful Death statute, while the non-settling defendants proceeded to trial and received a verdict under the South Carolina Wrongful Death statute. On appeal, the Court of Appeals found that the only common element of damages between the South Carolina and Georgia statutes was an award for the economic value of the decedent's life expectancy. At trial, an economist testified that the economic loss to the decedent's family as a result of the decedent's death was $1,146,023.28. At the close of the trial, the jury awarded the decedent's family $1,100,000.00 in the wrongful death action. In refusing to allow setoff, the Court noted that neither party requested that the jury specify how it calculated damages under each element of loss in the South Carolina wrongful death statute. Additionally, the Court noted that both the settlement and the jury award were less than the amount of pecuniary loss to which an economist testified, making it impossible to discern whether this injury was compensated in the verdict. Despite the evidence presented at trial, the Court held that "there [was] no evidence in the record to indicate how the jury calculated the award",

since neither party requested that the jury specify the amount it awarded for each element of damages under the wrongful death statute. Id. at 114, 498 S.E.2d at 407. This is the exact situation that existed in the present case where the jury did not specify the amount of their verdict attributable to the different elements of damage after the trial court overruled Plaintiffs' request for a jury form that so specified. (R. p. 332, lines 15-23). The Hawkins Court noted that the jury could have completely ignored the economist's testimony and based the award primarily on the grief suffered by the decedent's family. Hawkins, at 114, 498 S.E.2d at 407. Accordingly, the defendants couldn't establish that setoff was necessary to prevent a double recovery, and the trial court abused its discretion in allowing the setoff. Id.

a.) There is no evidence Mr. Green was fully compensated for his damages or that setoff is necessary to prevent a double recovery.

At trial, Plaintiffs' economic loss expert, Dr. Wood, testified that Mr. Green's total financial loss as a result of his paralysis is $3,006,791.00. (R. p. 404). Additionally, certified nurse and Plaintiffs' life care expert, Sarah Lustig, BSN, RN, CLCP, CNLCP testified that Mr. Green has suffered many impediments as a result of his paralysis, in addition to those normally expected of someone in his position, and that those were factored into Dr. Wood's economic loss figure. (R. p. 167, line 23-p. 168, line 3). Additionally, Mr. Green testified that he suffered life threatening injuries after falling from his wheelchair while simply attempting to help his wife shell peas. (R. p. 226, lines 6-24).

Bauerle did not challenge the expert qualifications of Dr. Wood or Nurse Lustig, nor did he provide expert testimony or evidence to the contrary. At the conclusion of trial, the Honorable Steven H. John charged the jury with categories of damages for which they

could compensate Mr. Green. The list included:

> Past and present and future pain and suffering. Past, present and future medical expenses, doctor bills, hospital bills, rehabilitation expense, transportation expense in connection with the medical treatment, past and present and future loss of enjoyment of life, past and present and future impairment of health or bodily function, past present and future disability, past and present and future loss of wages or loss of earning, mental anguish brought about by bodily injury or suffering, depression.

(R. p. 334, lines 3-13). Judge John reiterated that this list does not include every element of damages for which Mr. Green could be compensated, rather damages include "a wide scope of categories". (R. p. 334, lines 14-18). Although the jury charges included a laundry list of types of damages for the jury to consider, the verdict form did not permit the jury to specify what damages were included in the verdict. At the close of the trial, the jury returned a $2,300,000.00 medical negligence verdict in favor of Mr. Green. (R.p. 29).

Based on the evidence presented at trial, Mr. Green's verdict falls short of fully compensating him for his total economic loss, let alone his pain and suffering and other elements of compensable damages. Since it is impossible to ascertain how and in what amount the jury allocated Mr. Green's damages, it is impossible to conclude that GSRMC's Settlement and the verdict against Bauerle compensated Mr. Green for the same damages.

b.) <u>There is no evidence Mrs. Green was fully compensated for her damages or that setoff is necessary to prevent a double recovery.</u>

At trial, Nurse Lustig testified that due to Mr. Green's condition, he requires 24-hour care. (R. p. 158, lines 12-16). Further, since the accident, Mrs. Green has been Mr. Green's sole caregiver, a fulltime job that requires "physically lifting him, washing him, assisting him with meals, hygiene, eating, meal prep, cleaning." (R. p. 160, lines 14-17). Nurse Lustig described what Mrs. Green had to give up in order to be Mr. Green's sole

caregiver and how assuming this role has affected her life, stating "Mrs. Green's social life has been affected tremendously, she's given up her friends and previous (sic) active life." (R. p. 160, lines 8-13). As a result of her husband's loss, Mrs. Green is likely suffering from depression and anxiety. (R. p. 159, lines 1-13). If Mrs. Green had hired someone to provide for Mr. Green, rather than do so herself, she would have spent $134,400.00 annually. (R. p. 167, lines 16-22; p. 385). Accordingly, as of the date of trial, Mrs. Green provided Mr. Green with roughly $1,209,600.00 worth of care.

At trial, Mrs. Green described her daily schedule to the jury, which is almost completely comprised of providing for Mr. Green. (R. p. 186, lines 5-21). Mrs. Green testified that she spends very few hours a day doing things for herself, including sleep more than a few hours a night. (R. p. 186, lines 5-21). Every night for the past nine years she has set an alarm so that she can wake up in the middle of the night to catheterize Mr. Green. (R. p. 186, lines 11-21). Additionally, Mrs. Green confessed that her most intimate marital relations with Mr. Green are no longer possible. (R. p. 190, lines 1-20). She can no longer hold him, or even sleep in the same bed as him for fear of complicating his medical condition. (R. p. 190, lines 16-18). Mrs. Green corroborated Nurse Lustig's testimony that Plaintiffs' home is in desperate need of safety modifications. She expressed fear that if there were a fire while Mr. Green was in his bedroom, there would be no way for him to escape unassisted. (R. p. 188, line 25-p.189, line 3). She has not left the house for any length of time out of fear for her husband's safety. (R. p. 191, line 22-p. 192, line 9). Additionally, Mr. Green testified that his wheelchair is prone to getting stuck in their yard where rattlesnakes are common. (R. p. 225, line 12-p. 226, line 5). Accordingly, he depends on Mrs. Green to "come running" when he shoots his pistol

three times as a signal for help. (R. p. 225, line 20-p. 226, line 5).

At the conclusion of the trial, the judge read the jury charges, which stated in part that Mrs. Green "is entitled to recover the value of those services of [her] spouse which were lost, including the loss of the spouse's society and companionship in the home[,]" and that she is "entitled to recover for any expense incurred in the care and treatment of [her] spouse because of the illness or bodily harm suffered by the spouse." (R. p. 335, line 7-p. 336, line 2). The jury rendered a verdict for Mrs. Green in the amount of $550,000.00. (R. p. 31). Based on the evidence presented at trial, Mrs. Green's loss of consortium verdict falls short of fully compensating her for her losses or even the value of the care and services she has rendered to Mr. Green since the accident, let alone all of the other damages included in her loss of consortium cause of action.

3. Bauerle is not entitled to a setoff and he was involved in the decision to dismiss GSRMC with prejudice.

First, Bauerle is not entitled to a setoff. As of the date of settlement, GSRMC could not be held liable for the malpractice or negligence of GSRMC's independent contractors or employees. (R. p. 7). Furthermore, because GSRMC did not have "sufficient notice of a nondelegable duty claim," the relation back doctrine did not apply and the cause of action for vicarious liability based on that doctrine, as well as the hospital's liability thereunder, was dismissed. (R. p. 7). An order is considered a judgment on the merits when it is a determination of a matter forming whole or part of a cause of action. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006).

In South Carolina, there is a common law prohibition against the corporate practice of medicine. Baird v. Charleston Cty., 333 S.C. 519, 537, 511 S.E.2d 69, 78 (1999). Accordingly, it is impossible for GSRMC to be directly liable for medical

malpractice. There is categorically no support for a medical malpractice cause of action against the hospital without any way to hold it vicariously liable for same. No legal basis remained to hold GSRMC liable to Mr. Green on his *only* remaining cause of action. Accordingly, GSRMC cannot be jointly liable in tort to Mr. Green for medical malpractice, and there is no common liability between GSRMC and Bauerle to discharge in settlement.

Any arguable direct negligence asserted against GSRMC could only be actionable through Mrs. Green's existing cause of action for loss of consortium, rendering her the only Plaintiff for whose injuries GSRMC and Bauerle could have possibly been jointly liable. The plain language of § 15-38-50, which applies to persons ***liable*** in tort for the same injury, does not mandate setoff against the medical malpractice verdict rendered in Mr. Green's favor. Setoff, if any, should be entirely against Mrs. Green's loss of consortium cause of action.

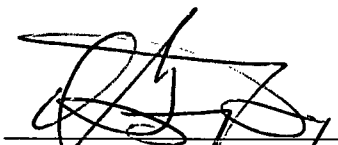
Additionally, Bauerle was involved in the settlement negotiations, specifically the Stipulation dismissing GSRMC from the lawsuit with prejudice. Bauerle chose not to request that the Settlements be allocated, chose not to preserve his right to request an allocation, and did not inquire how liability was affected before he consented to GSRMC's dismissal from the lawsuit with prejudice. It is not fair to allow Bauerle to seek the court's assistance in adjusting the burdens of his wrongdoing onto Plaintiffs now that his own liability is certain. Plaintiffs made a decision not to pursue GSRMC based on the Summary Judgment Order. Similarly, it is manifestly unjust for the trial court to determine *before* trial that GSRMC could not be held vicariously liable for the medical malpractice of its independent contractors/employees, and then determine *after* trial that

GSRMC was jointly liable to Mr. Green for medical malpractice.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court reverse the trial court's order granting setoff to Defendants.

Respectfully submitted,



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December 2, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2011-CP-26-7403

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

v.

Wayne B. Bauerle, M.D. and
Wayne B. Bauerle, M.D., P.C.,.....Appellants/Respondents.

PROOF OF SERVICE

I certify that I have served the below listed briefs in the above-captioned matter upon Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. by depositing a copy in the United States Mail, postage prepaid, on December 18, 2014 addressed to his attorneys of record at their offices as follows:

1. Final Appellants' Brief of Respondents/Appellants;
2. Final Respondents' Brief of Respondents/Appellants;
3. Final Reply Brief of Respondents/Appellants;
4. Respondents/Appellants' Certificate of Counsel's compliance with Rule 211(b), SCRAR

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CERTIFICATE OF COMPLIANCE

The undersigned Counsel for Respondents/Appellants, Randall M. Green and Ann Green, certifies that the following documents comply the Supreme Court's Revised Order Concerning personal identifying information and other sensitive information in Appellate Court Filings, issued April 15, 2014:

1. Final Appellants' Brief of Respondents/Appellants;

2. Final Respondents' Brief of Respondents/Appellants; and

3. Final Reply Brief of Respondents/Appellants.

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CERTIFICATE OF COUNSEL

The undersigned Counsel for Respondents/Appellants, Randall M. Green and Ann Green, certifies that the following documents comply with Rule 211(b), SCACR:

1. Final Appellants' Brief of Respondents/Appellants;

2. Final Respondents' Brief of Respondents/Appellants; and

3. Final Reply Brief of Respondents/Appellants.

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