THE STATE OF SOUTH CAROLINA
In The Court of Appeals



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

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Case No. 2011-CP-26-7403

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

v.

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

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# APPELLANTS' BRIEF OF APPELLANTS/RESPONDENTS

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## STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in denying a set-off to the Appellants-Respondents for the amounts paid to the Greens in settlement of the motor vehicle negligence and loss of consortium claims including the claims against the at-fault driver and the underinsured motorist claims?

## STATEMENT OF THE CASE

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

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

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

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

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

At the close of the trial, Dr. Bauerle moved for a set-off of the amounts paid in settlement on behalf of Grand Strand, Carolinas Medical Response, and the at-fault driver (including the underinsured motorist payments). (R. 45-48, 338-339). By Order filed October 17, 2013, Judge John granted in part and denied in part the Motion for Set-Off. (R. 18-23). Judge John allowed for a set-off of the settlements received from Grand Strand and Carolinas Medical Response, but he

denied the set-off for the amounts paid for the release of the at-fault driver and the UIM insurer. Judge John directed the Clerk of Court to enter judgment in the amount of $665,789.47 in favor of Randall M. Green and to enter judgment in the amount of $159,480.53 in favor of the Ann Green. (R. 22).

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

## ARGUMENTS

**I. The trial court erred in denying a set-off to the Appellants-Respondents for the amounts paid to the Greens in settlement of the motor vehicle negligence and loss of consortium claims including the claims against the at-fault driver and the underinsured motorist claims.**

South Carolina law recognizes that a trial court possesses "jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties." *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682, 688 (Ct. App. 2000). This Court has explained that "the reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong." *Id.* Under facts very similar to the present case, this Court in *Smalls* concluded:

> Equity dictates Department be given a credit for the amount paid by the settling parties and thus, a double recovery is avoided. The settlement amount represents, in effect, the portion of total damages attributable to Bussiere.

528 S.E.2d at 688-689. *See also*, *Rutland v. South Carolina Department of Transportation*, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010).

It is well established that "[a] nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395, 406 (Ct. App. 1998), *citing Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967); *Vaughn v. City of Anderson*, 300 S.C. 55, 386 S.E.2d 297 (Ct. App. 1989). "Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188, 190 (Ct. App. 2012), *citing Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395, 406 (Ct. App. 1998). "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." *Smith*, 724 S.E.2d at 190, *citing Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268, 271-72 (Ct. App. 1999). "Therefore, a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1)." *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188, 191 (Ct. App. 2012).

In *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), this Court explained that "[a]pplication of the settlement credit was statutorily mandated in this case. Section 15-38-50 grants the court no discretion in determining the

equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." 515 S.E.2d at 272.

Following the trial, Dr . Bauerle moved for a set-off under S.C. Code Ann. § 15-38-50(1) for the amounts paid in settlement for other tortfeasors, specifically the at-fault driver, Grand Strand Regional Medical Center, LLC, and Carolinas Medical Response, Inc. Circuit Judge Steven H. John granted the motion in part and allowed for a set-off for the amounts paid by Grand Strand and Carolinas Medical Response. Judge John, however, denied a set-off for the amounts paid in settlement for the at-fault driver, including the amounts received by the Greens from the underinsured motorist insurer.

Judge John found that "the Plaintiffs' settlements with Grand Strand and Carolinas Medical Response were for the same injury, that being Mr. Green's paralysis and the loss of consortium by Mrs. Green, as was litigated against Dr. Bauerle and for which the jury returned its verdict against Dr. Bauerle." (R. 21). Yet, Judge John also ruled that "the settlements on behalf of the at-fault driver (including the underinsured motorist payments) ... concerned different injuries than the injury for which the jury found Dr. Bauerle liable." (R. 21). More specifically, he found that "the settlement with the at-fault driver concerning events occurring prior to Mr. Green's paralysis do not concern the same injury." (R. 21).

Dr. Bauerle believes that the trial court was correct in granting a set-off for the amounts paid in settlement by Grand Strand and Carolinas Medical Response.

He submits, however, that the same reasoning applies equally to the settlements paid by the at-fault driver and the UIM insurer. Judge John erred in concluding that the proceeds paid in settlement of the motor vehicle negligence and loss of consortium claims were for a "different injury."

In their Fourth Amended Complaint, the Greens allege that Dr. Bauerle committed medical malpractice while treating Mr. Green following the April 17, 2004 motor vehicle accident with the at-fault driver. (R. 32-43). The at-fault driver's actions thus caused Mr. Green to seek medical care and treatment immediately following the accident, including the orthopaedic care from Dr. Bauerle, and as a result, the at-fault driver was legally liable for the injuries resulting from the medical malpractice found by the jury.

South Carolina law clearly holds that "the negligence of an attending physician is reasonably foreseeable" and that "[t]he general rule is that if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury." *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40, 44 (1984). *See also, Bessinger v. DeLoach*, 230 S.C. 1, 94 S.E.2d 3 (1956); *Fairchild v. South Carolina Department of Transportation*, 385 S.C. 344, 683 S.E.2d 818 (Ct. App. 2009), *aff'd*, 398 S.C. 90, 727 S.E.2d 407 (2012). Consequently, where the original accident resulted in injuries that required medical care and the medical

care as provided resulted in additional injuries, the original tortfeasor is clearly liable under South Carolina law *for all of the injuries*. In short, Judge John committed an error of law in concluding that the injuries resulting from the alleged malpractice were not the "same injuries" for which the at-fault driver was also liable.

In their case-in-chief, the Greens presented the expert testimony of Dr. Richard Matza, who like Dr. Bauerle is an orthopaedic surgeon. Mr. Matza testified that Dr. Bauerle "was brought in as an orthopaedic surgeon because of [a] fracture/dislocation of [Mr. Green's] right hip." (R. 194). The fracture/dislocation resulted from motor vehicle accident. No one has taken the position that Dr. Bauerle was not properly selected to tend to Mr. Green's orthopaedic care following the accident. In fact, Dr. Matza described Dr. Bauerle as "an excellent orthopaedic surgeon." (R. 213).

Mr. Green also presented at the ER with "a severe laceration to his right forearm that was bleeding profusely." (R. 34-35). Dr. Matza testified that Mr. Green had lost "a sizeable amount of blood" from the right forearm laceration and from the fractured hip. (R. 198, 211-212). That loss of blood "was the cause, the direct cause for [Mr. Green's] decompensation, crashing, arresting and the need to be resuscitated." (R. 198). Further, Dr. Matza opined as follows:

> [T]he delay of treatment of the bleeding which led to the arrest, which led to a zero blood pressure for a period of time, at least a half hour to 40 minutes, led to decreased

> blood flow or no blood flow to the arteries in the spine and it is through the lack of blood supply to the spine that the ultimate injury to the spine occurred between the mid thoracic region of T6 to T12, somewhere in that area where the artery resides and directly led to the paraplegia or the paralysis of both Mr. Green's lower extremities.

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

In sum, the Greens' theory of liability makes the paralysis and consequential damages, including Mrs. Green's loss of consortium, a foreseeable and proximate result of the original injury which resulted from the motor vehicle accident. The rule of law as described in *Graham* and later cases applies here. Without question, South Carolina law provides that the at-fault driver was liable *for all of the injuries and damages claimed against Dr. Bauerle*, including Mrs. Green's loss of consortium.

In effect, Dr. Bauerle and the at-fault driver are "liable in tort for the same injury." S.C. Code Ann. § 15-38-50. As a result, Dr. Bauerle is entitled to a set-off for all amounts paid in settlement of the motor vehicle negligence and loss of consortium claims, including the amounts paid in settlement of the UIM claims. Mr. Green settled with the at-fault driver for $100,000, and he received $150,000

in settlement of his UIM claim. Mrs. Green received $100,000 in settlement with the at-fault driver and an additional $75,000 in settlement of her UIM claim.

Consequently, Dr. Bauerle is entitled to an additional set-off of $250,000 from Mr. Green's verdict, which should reduce his judgment to $415,789.47. Likewise, Dr. Bauerle is entitled to an additional set-off of $175,000 from Mrs. Green's verdict, which should reduce her judgment to zero dollars. Judge John erred in denying these additional setoffs.

## CONCLUSION

Based on the foregoing discussion and analysis, the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. respectfully request that the Court reverse in part the Order Granting in Part and Denying in Part the Motion for Set Off as issued by Circuit Judge Steven H. John, filed October 17, 2013. The Court is requested to remand with direction that the Appellants-Respondents be granted additional set-offs as follows: (1) an additional set-off of $250,000 thereby reducing the judgment in favor of Randall M. Green to $415,789.47, and (2) an additional set-off of $175,000 thereby reducing the judgment in favor of Ann Green to zero dollars.

Respectfully submitted,

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Columbia, South Carolina

November 20, 2014

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# CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. certifies that the Final Appellant's Brief of Appellants-Respondents complies with Rule 211(b), SCACR.

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Columbia, South Carolina

November 20, 2014

## CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. certifies that the Final Appellant's Brief of Appellants-Respondents complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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