RECEIVED
DEC 2 9 20[illegible]

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.

RESPONDENTS' BRIEF OF RESPONDENTS/APPELLANTS

O. Grady Query, Esquire
Michael W. Sautter, Esquire
Michèle Patrão Forsythe, Esquire
Elizabeth Brooke Hurt, Esquire
Query Sautter Forsythe, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29412
(843) 795-9500

Cristin A. Uricchio, Esquire
Uricchio Law Firm
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412
(843) 795-9300

L. Morgan Martin, Esquire
L. Morgan Martin, PA
1121 Third Avenue
Conway, South Carolina 29526
(843) 248-3177
Attorneys for Respondents/Appellants

TABLE OF CONTENTS

Table of Authorities i

Statement of Issues on Appeal 1

Statement of Case 2

Facts 6

Argument 10

I. APPELLANTS-RESPONDENTS SHOULD NOT BE ENTITLED TO A SETOFF, UNDER SECTION 15-38-50(1), IN THE AMOUNT OF THE SETTLEMENTS PAID TO THE GREENS BY THE AT-FAULT DRIVER AND THE UNDERINSURED MOTORIST CARRIER BECAUSE THE SETTLEMENTS AND VERDICTS COMPENSATED THE GREENS FOR DIFFERENT INJURIES UNDER DIFFERENT CAUSES OF ACTION. 10

Conclusion 43

TABLE OF AUTHORITIES

CASES

Bardsley v. GEICO,
405 S.C. 68, 747 S.E.2d 436 (2013) 11

Citizens & S. National Bank of South Carolina v. Gregory,
320 S.C. 90, 463 S.E.2d 317 (1995) 10, 11

Collins v. Bisson Moving and Storage,
332 S.C. 290, 504 S.E.2d 347 (Ct.App.1998) 12

Davis v. Tripp,
338 S.C. 226, 525 S.E.2d 528 (Ct. App. 1999) 41

Ellis v. Oliver,
335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999) 26, 27, 33

Estate of Rattenni v. Graïnder,
298 S.C. 276, 379 S.E.2d 890 (1989) 10, 11

Farmers Mercantile Company v. Seaboard Air Line Railway,
102 S.C. 348, 86 S.E. 678 (1915) 10

Graham v. Whitaker,
282 S.C. 393, 321 S.E.2d 40 (1984) 14, 15, 16, 17, 18, 19, 20, 21, 22, 28, 42

Gossett v. Burnett,
251 S.C. 548, 164 S.E.2d 578 (1968) 23

Hanselmann v. McCardle,
275 S.C. 46, 267 S.E.2d 531 (1980) 21

Hawkins v. Pathology Associates of Greenville, P.A.,
330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) 13, 26, 33, 34, 36, 37, 40

Matthews v. Porter,
239 S.C. 620, 124 S.E.2d 321 (1962) 21

Mellen v. Lane,
377 S.C. 261, 659 S.E.2d 236 (2008) 22

Mount v. Sea Pines Company,
337 S.C. 355, 523 S.E.2d 464 (Ct. App. 1999) 10

Pustaver v. Gooden,

350 S.C. 409, 566 S.E.2d 199 (Ct. App. 2002) 10

Riley v. Ford Motor Company,
Op. No. 5195 (S.C.Ct.App. filed Feb. 5, 2014) 26, 27, 34

Rourk v. Selvey,
252 S.C. 25, 164 S.E.2d 909 (1968) 12

Rutland v. South Carolina Department of Transportation,
390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010) 26, 27, 34, 36, 37

Shepard v. South Carolina Dep't of Correc.,
299 S.C. 370, 385 S.E.2d 35 (Ct. App 1989) 21

Smalls v. South Carolina Department of Education,
339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000) 26

Smith v. Widener,
397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012) 13, 27, 33, 34, 35, 37, 40

State Farm Mutual Auto Insurance Company v. Ramsey,
295 S.C. 349, S.E.2d 477 (Ct. App. 1988) 36

Ward v. Epting,
290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) 26

Welch v. Epstein,
342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) 26, 27, 34

Young v. Tidecraft,
270 S.C. 452, 462, 242 S.E.2d 671, 675 (1978) 22, 24, 25, 26

Young v. Warr,
252 S.C. 179, 165 S.E.2d 797 (1969) 10, 40

STATUTES

S.C. Code Ann. § 15-38-50 .... 11, 13, 27, 33, 34, 35, 42

S.C. Code Ann. § 15-75-20 (1969) 41

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF TORTS Section 440 21
W. Keeton et al., Prosser & Keeton on the Law of Torts (5th ed. 1984) 23
F.P. Hubbard and R.L. Felix, The South Carolina Law of Torts (3d. ed. 2004) 21, 23

STATEMENT OF ISSUES ON APPEAL

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

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, the Order Denying Plaintiffs Motion to Alter or Amend Order Granting Partial Set-Off dated February 13, 2014, and the Order denying Defendant's Motion to Alter or Amend Order Granting Partial Set-off filed February 13, 2014. (R. pp. 1-15, 25).

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") after Plaintiffs were injured in an automobile accident. (R. p. 117, lines 7-9).

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 their Amended Answer to Defendant GSRMC's Request to Admit, Bauerle admitted, "[t]he employees of Grand Strand Regional Medical Center did not proximally 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 while obtaining treatment after leaving GSRMC, which gave rise to distinct and different injuries and causes of action. 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. issued an Order Granting Defendant Grand Strand Regional Medical Center, LLC's Motion for Partial Summary Judgment ("Summary Judgment Order"). (R. pp. 1-15). 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. 1). 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 ("Covenants"), 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 GSRMC ("Stipulation"), 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 medical malpractice cause of action and a $550,000.00 verdict on Mrs. Green's loss of consortium cause of action. (R. pp. 29, 31). The verdict forms did not specify which damages were included or how the jury calculated the awards.

Subsequently, Bauerle filed a Motion and Memorandum of Law in Support of Defendants Bauerle and Strand Orthopaedic Consultants, LLC'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. p. 4). 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. (R. pp. 100-101). 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. p. 506).

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 they were involved in a serious accident. 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 13-p. 137, line 7). Mr. Green suffered multiple injuries including, but not limited to, a right forearm laceration, a right hip fracture and dislocation, and a closed head injury. (R. p. 485, lines 13-21). Additionally, he complained of sharp abdominal pain. (R. pp. 357).

When Mr. Green arrived at the hospital around 12:00 p.m., emergency room ("ER") physician, Dr. Scott Lintz, and GSRMC nursing staff assessed him. (R. p. 361; 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). 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 2-24). He was complaining of pain in his chest, arm, and hip. (R. p. 343). An EKG revealed some "non-specific" heart rhythm "abnormalities." (R. p. 344).

Dr. Lintz then contacted the hand surgeon on-call for the ER, Dr. Ralph Cozart, and the on-call orthopedic surgeon, Dr. Wayne Bauerle. (R. p. 434, line 17-p. 435, line 1). There is conflicting testimony as to whether the arm was bleeding during this time. (R. p. 234, lines 5-17; p. 264, lines 8-17; p. 312, line 8-p. 313, line 11; p. 441, line 22-p. 442, line 7). Approximately one hour after Mr. Green arrived at GSRMC, Dr. Cozart evaluated Mr. Green's right forearm laceration and determined that Mr. Green needed surgery. (R. p. 265, line 7-p. 267, line 3). Dr. Cozart testified that the arm was not bleeding when he examined it, and that the surgery was intended to re-establish blood

flow to the hand and could be performed within a four to six hour window. (R. p. 268, lines 2-4; p. 264, lines 8-17).

Dr. Lintz re-located Mr. Green's dislocated hip in the ER, noting that the patient was alert and felt improvement in his discomfort, before sending him from the ER to the Pre-Operative area ("Pre-Op") in preparation for surgery on his right arm. (R. p. 345; 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). Bauerle ordered Mr. Green to be taken 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 made that decision 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). Plaintiffs' expert,

vascular and cardiothoracic surgeon, Dr. Edd Chariker, testified that Bauerle "drastically" deviated from the standard of care by sending Mr. Green to CT Scan 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 acetabulum (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 hip repair was done at MUSC.

When Mr. Green left CT, rather than being taken back to Pre-Op for surgery, he was taken back to the ER to await the results of his CT Scan. (R. p. 473, lines 3-18). When Mr. Green was placed back on a heart monitor, it was discovered that his blood pressure and pulse were zero. (p. 197, line 5-p. 198, line 6; p. 365). Dr. Matza explained that "his blood pressure gave out and he arrested, which means his heart stopped." (R. p. 197, line 5-p. 198, line 6). Dr. Lintz paged Dr. Peters, the anesthesiologist who had been with Mr. Green in Pre-Op, before intubating and attempting to resuscitate Mr. Green himself. (R. p. 419; p. 346; p. 446, lines 19-23). According to the resuscitation record, CPR ceased 26 minutes later. (R. p. 365; 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). 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's cardiac arrest lasted, Plaintiffs' expert, Dr. Cranberg, testified 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 own expert, Dr. Charles Dorn Smith, testified that once Mr. Green

suffered a cardiac arrest, minutes and maybe even seconds could make the difference in Mr. Green's 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," concluding that "the spinal cord infarct and the various disabilities... were suffered during that arrest." (R. p. 484, lines 2-17).

The following day, Mr. Green was transported to MUSC in Charleston by EMS carrier, CMR. The nurse receiving 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. p. 417). According to trauma surgeon Dr. Norcross at MUSC, the cause of Mr. Green's paraplegia was a spinal cord infarction, stating "Mr. Green had an arrest at GSRMC, which almost certainly was the cause of the infarction of the spinal cord." (R. p. 449, lines 11-14). "It was our impression at the time and we can't find any other explanation for it." (R. p. 451, line 20-p.452, line 4).

Dr. Chariker testified that but for Mr. Green going to CT, the cardiac arrest would not have occurred. (R. p. 474, lines 5-8). Dr. Cranberg testified to a reasonable degree of medical certainty that the most probable cause of Mr. Green's paraplegia, loss of feeling from the belly button down, and various other injuries was the infarction suffered during the cardiac arrest. (R. p. 484, lines 2-17). Dr. Chariker testified that, in his opinion, Mr. Green is a paraplegic today as a direct result of deviations in the standard of care by Bauerle. (R. p. 479; lines 10-14).

ARGUMENT

I. THE COLLATERAL SOURCE RULE PROHIBITS SETOFF OF THE AMOUNT PAID BY THE AUTO INSURERS.

In his Initial Appellant Brief, Bauerle asserts that he is "entitled to a set-off for all of the amounts paid in settlement of the motor vehicle negligence and loss of consortium claims, including the amounts paid in settlement of the UIM claims." (Appellant's Initial Br., p. 10). However, South Carolina courts have long recognized the collateral source rule, which prohibits a wrongdoer from benefitting from compensation paid to an injured party by a source wholly independent from the wrongdoer. Young v. Warr, 252 S.C. 179, 165 S.E. 2d. 797 (1969); Farmers Mercantile Co. v. Seaboard Air Line Railway, 102 S.C. 348, 86 S.E. 678 (1915). A source is wholly independent of the wrongdoer when the wrongdoer has not contributed to it and when payments to the injured party were not made on behalf of the wrongdoer. Citizens & S. Nat'l Bank of S.C. v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995); Mount v. Sea Pines Co., 337 S.C. 355, 357, 523 S.E.2d 464, 465 (Ct.App.1999). This rule clearly applies to underinsured motorist ("UIM") proceeds. Estate of Rattenni v. Grainger, 298 S.C. 276, 379 S.E.2d 890 (1989); Pustaver v. Gooden, 350 S.C. 409, 414, 566 S.E.2d 199, 201-202 (Ct.App.2002). This rule applies, even if it results in the injured party recovering twice for the same loss. Rattenni, 778, 379 S.E.2d at 890. The policy rationale behind the collateral source rule is the premise that:

> reducing recovery by the amount of the benefits received by the plaintiff would grant a windfall to the defendant by allowing a credit for the reasonable value of those benefits. Such credit would result in the benefits being effectively directed to the tortfeasor and from the intended party - the injured plaintiff. If there is a windfall, it is considered more just that

> the injured person profit rather than grant the wrongdoer relief from full responsibility for the wrongdoing.

Bardsley v. GEICO, 405 S.C. 68, 78, 747 S.E.2d 436 (2013) (*quoting* 22 Am. Jur. 2d *Damages* § 392) (citations omitted).

Here, Bauerle seeks to reduce the amount of damages owed to the injured Plaintiffs by the amount of the underinsured benefits they received from their own UIM insurer. However, the South Carolina Supreme Court has repeatedly recognized that UIM benefits are a collateral source, wholly independent of the wrongdoer. Bardsley, at 81, 747 S.E.2d at 442 (citing Rattenni v. Grainger, at 278, 379 S.E.2d at 890).

In Estate of Rattenni, the Court made clear that an at-fault driver could not setoff the amount of UIM benefits received by an injured plaintiff from her own policy for which she paid the premiums. 298 S.C. at 277, 379 S.E.2d at 889. Similarly, Bauerle is a wrongdoer who did not contribute to the premium payments for the Green's UIM policy, and the benefits paid were not made on his behalf, or for his benefit. As Bauerle is a wrongdoer to whom the collateral source rule applies, and the Green's UIM insurer is by law a collateral source, the verdicts against Bauerle are not affected by any payment of UIM benefits to the injured Plaintiffs. Furthermore, as a matter of law, a UIM insurer is not a wrongdoer or tortfeasor pursuant to payment of UIM benefits. Bardsley v. GEICO, at 80, 379 S.E.2d at 442. Accordingly, the Green's UIM insurer could not be "liable in tort" to the Green's pursuant to § 15-38-50, and setoff of those payments is not mandated.

While it is well settled that payment from a joint tortfeasor does not qualify as a collateral source, Citizens & S. Nat'l Bank v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), in this case, the at-fault driver and Bauerle are not joint tortfeasors. In order to qualify as a joint tortfeasor exempted from the rule, the parties must be jointly and

severally liable in tort. Collins v. Bisson Moving & Storage, 332 S.C. 290, 306, 504 S.E.2d 347 (Ct.App.1998). Joint and several liability only arises when the tortfeasors are liable in tort for causing the same injury. Id.

> That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, even in the absence of community of design or concert of action, to a liability which is both joint and several, is a proposition recognized and approved in this state and supported by the great weight of authority elsewhere.

Id. (citing Rourk v. Selvey, 252 S.C. 25, 28, 164 S.E.2d 909, 910 (1968)).

The trial court found that the Settlements and verdicts involved different injuries. The evidence supports this finding and shouldn't be disturbed since the trial judge was in the best position to weigh the evidence as presented. Accordingly, there is no basis for a determination that Bauerle and the at-fault driver are jointly and severally liable in tort for any of the same injuries, and Bauerle is not entitled to benefit from payments made to the injured Plaintiffs from a source wholly independent from himself.

II. BAUERLE IS NOT ENTITLED TO SETOFF THE AUTO INSURERS' SETTLEMENTS BECAUSE THEY DID NOT INVOLVE THE SAME INJURIES AS THE JURY VERDICTS.

In his Initial Appellant Brief, Bauerle alleges that he 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." (Appellant's Initial Br., p. 10). In support of his position Bauerle alleges that "the paralysis and consequential damages, including Mrs. Green's loss of consortium, [are] a foreseeable and proximate result of the original injury which resulted from the motor vehicle accident," entitling him to a reduction of the verdicts in the total amount of the Settlements. (Appellants' Initial Br. p. 10). However, the trial court correctly found that Bauerle was not entitled to setoff

pursuant to S.C. Code Ann. § 15-38-50 because the Settlements with the auto insurers involved different injuries than the jury verdicts.

In 1988, the Uniform Contribution Among Tortfeasors Act ("UCATA") codified a tortfeasor's right to setoff in S.C. Code Ann. § 15-38-50, which Bauerle asserted as the basis for his motion. 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 (Supp.1998) (emphasis added).

Pursuant to this section, when one of two tortfeasors jointly liable in tort settles with an injured plaintiff, a verdict involving the same injury against the non-settling tortfeasor will be reduced by the amount paid in settlement for that same injury. "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, 473, 724 S.E.2d 188, 190 (Ct.App.2012) (emphasis added) (citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 406-07 (Ct.App.1998)). However, "[w]hen a prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law." Smith, at 474, 724 S.E.2d at 191.

In support of his argument, Bauerle relies on a misapplication of the rule articulated in Graham v. Whitaker, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984) ("The general rule is that if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury."). He asserts that Mr. Green's "paralysis and consequential damages including Mrs. Green's loss of consortium, were a foreseeable and proximate result of the original injury which resulted from the motor vehicle accident," rendering the at-fault driver liable "for all of the injuries and damages claimed against Dr. Bauerle, including Mrs. Green's loss of consortium." (Appellant's Initial Br. p. 10). Bauerle misinterprets the rule in Graham, to extend liability to the at-fault driver for the "additional injuries" caused by his own malpractice, asserting that he and the at-fault driver are thus "liable in tort for the same injury." (Appellant's Initial Br. p. 8-10).

Bauerle is not entitled to setoff the amount paid by the auto insurers for several reasons. ***First***, the facts of this case do not meet the elements of the rule articulated in Graham. ***Second***, the rule in Graham is not dispositive of whether the at-fault driver's negligence was a proximate cause of the injuries included in the verdict against Bauerle. ***Third***, there is no basis for concluding that the Settlements with the auto insurers were for the same injuries as the verdicts against Bauerle. ***Fourth***, it cannot be concluded that the cardiac arrest and spinal infarction were caused by blood loss from a specific injury. ***Finally***, there is no way for the Court to determine that the auto Settlements compensated the "same injury" as the verdicts because there is no evidence of what injuries were included in the Settlements or verdicts.

A. The facts of this case do not meet the elements of the rule articulated in *Graham v. Whitaker*.

In Graham, the plaintiff suffered a broken hip as a result of the negligence of her ophthalmologist and his employees. As a result of the surgery to repair her hip fracture, she suffered further serious injuries and complications, necessitating a second surgery to replace her entire hip. Recognizing that the majority of her injuries occurred during the surgery to fix the initial injury, the Court found that the negligence of the physician performing that surgery was reasonably foreseeable. Accordingly, it was not an intervening cause, which would have broken the chain of causation. The Supreme Court stated, "[t]he general rule is that if an **injured person** uses ordinary care in selecting a physician for **treatment of his injury**, the law regards the **aggravation of the injury** resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury." Graham v. Whitaker, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984) (emphasis added).

The general rule articulated in Graham is not applicable to the present case. As further set forth below, Bauerle's assertion that the paralysis resulted from the forearm injury fails to provide the necessary causal link because (1) Mr. Green's paralysis did not constitute an "aggravation of the [forearm] injury" but rather a distinct injury to an entirely different body system; (2) Plaintiffs did not select Bauerle to treat Mr. Green, and no one selected him to treat *any* injury at that point in time; and (3) there was no evidence that Bauerle aggravated the hip injury for which he was consulted. Accordingly, Bauerle's interruption in Mr. Green's treatment *was* an intervening act sufficient to break the chain of causation. However, the causal link between the injuries sustained in the accident and the spinal infarction and associated injuries has not been established.

1. *Mr. Green's paralysis did not constitute an "aggravation of the [forearm] injury" but rather was a distinct injury to an entirely different body system.*

In Graham v. Whitaker, the original injury to the plaintiff's hip was worsened by a subsequent surgery performed by a surgeon selected by the plaintiff to repair the original injury. As such, the rule in Graham considers an *aggravation* of the original injury as a part of the immediate and *direct* damages caused by that *same* injury. The rule cannot be applied to hold that an *additional* injury to an entirely *different* body system than the original injury is a part of the "immediate and direct" damages of the original injury. Additionally, the rule articulated in Graham does not state that it is foreseeable that a physician will interrupt and intervene in the treatment of the original injury, causing additional and more severe injuries to otherwise healthy body parts.

Here, Mr. Green's injuries following the car accident included, but were not limited to, a forearm laceration, a fractured and dislocated hip, and a closed head injury. (R. p. 349; p. 485, line 13-21). During her emotional testimony, Mrs. Green stated, "[m]y son and I came home with our injuries, and he should have too. He had a hurt hip and hand. At least he could walk, I have no doubt in my mind." (R. p. 191, lines 7-10). Expert testimony at trial confirmed that there was no evidence of damage to the spinal cord as a result of the accident or prior to Bauerle's interruption in Mr. Green's care. (R. p. 479, lines 7-22). Dr. Lee Cranberg testified, that there was no traumatic damage to the spinal cord in the accident. The reason Mr. Green has a spinal cord that is not working is because of the infarct that occurred during the arrest. His spinal cord was fine up until that arrest. (R. p. 487, lines 20-p. 488, line 5). At the conclusion of the trial, the jury found that Mr. Green's spinal injury was a direct and proximate result of Bauerle's

malpractice. Accordingly, Mr. Green's paralysis was not an aggravation of an existing injury, rather a new injury caused by Bauerle's interruption.

2. *The injured Plaintiffs did not select Bauerle, and no one selected him to treat the forearm injury, blood loss, or cardiac issues.*

The rule articulated in Graham v. Whitaker requires that an injured person use "ordinary care" in selecting a physician "for treatment of his injury." 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984). In order to satisfy this portion of the test, Bauerle asserts "no one has taken the position that Dr. Bauerle was not properly selected to tend to Mr. Green's orthopaedic care." (Appellant's Initial Br. p. 9). However, since neither injured Plaintiff selected Bauerle for treatment of his injuries, the test fails regardless of whether Bauerle was negligently selected by a third party or intervened on his own. Furthermore, there existed a factual issue at trial as to whether Bauerle consulted with any of the other involved physicians before he interrupted and redirected Mr. Green's treatment course. (R. p. 468, line 18-p. 469, line 3; p. 473, line 19-p. 474, line 1). Dr. Cozart, the plastic surgeon who was preparing to perform surgery on Mr. Green's forearm testified that he did not speak to Bauerle, and Bauerle testified that he did not recall speaking to the trauma surgeon, Dr. Nicholson. (R. p. 279, lines 5-22; p. 308, lines 8-17; p. 320, line 19-p. 321, line 10).

Not only did Plaintiffs not select Bauerle, no one selected him to treat the forearm injury, blood loss, spinal injuries, or cardiac issues. In fact, Bauerle testified that he does not resuscitate patients, stating, "I stay away. That is not what I do as an orthopaedic surgeon." (R. p. 295, lines 5-24). Finally, Bauerle was not selected by anyone to provide treatment for any injury at the time he removed Mr. Green from Pre-Op. Rather, he deliberately ignored Dr. Lintz's warning and unilaterally interrupted the treatment of an

injury for which he was not consulted, and that he was "adamant" about delaying. (R. p. 300, lines 9-17). The rule in Graham was certainly not intended to permit a reduction of a verdict against a physician whom the injured person has never met, particularly where that physician interrupted the patient's treatment course over the objection of the *treating* physician and without consulting the other physicians involved in the care at that time.

3. The medical malpractice cause of action was not based on evidence that Bauerle further injured or "aggravated" the hip injury for which he had been consulted.

There was no evidence that blood loss from the hip contributed to the cardiac arrest. Bauerle mischaracterizes Dr. Matza's testimony to support his position that Mr. Green's paralysis is part of the consequential damages from the injuries sustained in the accident. Specifically he asserts, "Dr. Matza testified that Mr. Green had lost a 'sizeable amount of blood' from the right forearm laceration and from the fractured hip." (Appellant's Initial Br. p. 9). While Dr. Matza stated that, although the hip fracture would have bled based on his experience, he testified that there is no way of documenting how much blood Mr. Green lost in that hip, and did not testify that such bleeding was continuing at the time Bauerle intervened. (R. p. 212, line 23-p. 213, line 9). Furthermore, Dr. George Nicholson, testifying on behalf of Bauerle, indicated that his review of the radiology studies indicated only a small amount of blood in Mr. Green's hip socket. (R. p. 233, lines 10-20). Additionally, Dr. Matza testified that the reason Mr. Green was in Pre-Op when Bauerle arrived and removed him was because of the forearm laceration, not the hip injury. (R. p. 195, lines 6-14).

Dr. Matza stated that the bleeding from the forearm was the cause of Mr. Green's low blood pressure, and that the *arm* had been bleeding for about two and half hours at

the time Bauerle interrupted the treatment thereof. (R. p. 195, lines 15-24). He testified that Mr. Green had a normal hematocrit of 41 at the time he arrived at the hospital but, that at the time of the cardiac arrest it had dropped to 17, and that Mr. Green "actually suffocated." (R. p. 197, line 17-p. 198, line 6). Dr. Matza's opinion was that the blood loss that occurred during this time was the cause of the cardiac arrest, but he did not testify that the hip bled during this period. (R. p. 197, line 17-p.198, line 6; p. 257, lines 15-24). In fact, he explained that the hip fracture would have stopped bleeding once the pressure in the tissue surrounding it equalized with the pressure inside the bleeding vessels, but did not indicate how long this would have taken. (R. p. 212, lines 15-22). Dr. Matza did not testify that bleeding from the hip contributed to the "sizeable amount," or approximately eight units, of blood lost from the time of arrival at the hospital until the time of the cardiac arrest. (R. p. 197, line 17-p. 198, line 6). Accordingly, there is no evidence that the hip injury that Bauerle was consulted to treat caused sufficient blood loss to cause further injury, much less a cardiac arrest, spinal cord infarction, or paralysis.

B. The rule in *Graham v. Whitaker* is not dispositive of whether the at-fault driver's negligence was a proximate cause of the injuries included in the verdict against Bauerle.

Bauerle asks this Court to make a determination that the at-fault driver was liable for "all of the injuries and damages alleged against Dr. Bauerle" because Bauerle's negligence was foreseeable and thus not an intervening act. (Appellant's Initial Br. p. 10). His argument that the original tortfeasor is liable for "all of the injuries" where the original injury required treatment and "the medical care as provided resulted in additional injuries" does not refute the trial court's finding that the Settlements compensated different injuries than the verdicts. (Appellant's Initial Br. p. 8-9). Yet Bauerle asserts

"[i]n 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", suggesting that the rule in Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984), can be extended to find that the at-fault driver was also liable for these "additional injuries," bypassing the basic requirement of proving proximate causation. Bauerle's proposition ignores the fact component of the intervening negligence pursuant to which the trial judge determined that there were different injuries not subject to setoff.

Bauerle misapplies the rule in Graham by confusing the purpose it served in that case. In Graham, the Supreme Court references the rule cited by Bauerle in response to the original tortfeasor's affirmative defense of intervening third-party negligence. The Court held that the negligence of a third party physician was foreseeable, thus it was not presumptively an intervening act sufficient to break the chain of causation and relieve the original tortfeasor from liability. Graham, 282 S.C. at 399, 321 S.E.2d at 44. The Court further held that the issue of proximate causation with regard to the original tortfeasor was still a jury question because the evidence was susceptible to more than one interpretation. Id. 282 S.C. at 400, 321 S.E.2d at 44. Accordingly, the Court did not apply the rule in a manner to impose liability on the at-fault driver "for all injuries and damages claimed against Dr. Bauerle, including Mrs. Green's loss of consortium." (Appellant's Initial Br. p. 10). The holding made very clear that proximate cause remained a jury question and accordingly the failure of the defense of third party intervening negligence was not utilized as a basis for *imposing* liability for any injury. Id. This rule does not become the test of proximate causation; therefore, it cannot be used in the present case to determine whether the at-fault driver's negligence, as the original tortfeasor, was a

proximate cause of any of the injuries alleged in the medical malpractice trial against Bauerle, the second tortfeasor, because Bauerle's negligence may still be factually determined to be an intervening cause even though it is foreseeable.

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

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

To apply the rule as Bauerle suggests, as a means to extend liability to the at-fault driver "for all injuries and damages claimed against Dr. Bauerle, including Mrs. Green's loss of consortium", would fundamentally change the causation analysis underlying our current tort system. (Appellant's Initial Br., p. 10). Additionally, ignoring the *analytical* context in which the rule has been applied and repurposing it as a *test* for establishing proximate causation fails to consider the extent of Bauerle's liability for the injuries caused by his intervention. Graham does not answer the question of whether or not medical negligence is an intervening cause, but rather stands for the proposition that absent a finding that the medical negligence does constitute an intervening cause, the medical negligence is foreseeable and relates back to the original tortfeasor.

Liability can only exist if negligence is a proximate cause of the injury. Hanselmann v. McCardle, 275 S.C. 46, 48-49, 267 S.E.2d 531, 533 (1980). Graham cannot be used to prove proximate cause. There have been no findings or admissions that

the at-fault driver's negligence proximately caused Mr. Green's cardiac arrest, spinal infarction, or associated injuries, rather it was the interruption in treatment.

"It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence." Mellen v. Lane, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (2008). Proximate cause requires proof of both causation in fact and legal cause. Young v. Tide Craft, 270 S.C. 452, 462, 242 S.E.2d 671, 675 (1978). Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Id. Legal cause is proved by establishing foreseeability. Mellen, at 278, 659 S.E.2d at 245. However, foreseeability is clearly not the only element requisite to a finding of liability for an injury. "Legal cause is ordinarily a question of fact for the jury." Id. at 279, 659 S.E.2d at 246. "Only when the evidence is susceptible to only one inference does it become a matter of law for the court." Id. Even if Bauerle's negligence was foreseeable under the rule articulated in Graham v. Whitaker, the trial court could not conclude that the at-fault driver's negligence proximately caused the cardiac arrest, which caused the spinal infarction that caused the injuries alleged to have resulted therefrom. Clearly there is more than one reasonable inference that can be drawn from evidence that a car accident occurred, or from evidence that the at-fault driver accepted liability for one or more injury sustained in that accident. As set forth in further detail below, there is evidence that Mr. Green had heart abnormalities on arrival at the hospital and there was conflicting evidence as to what caused the cardiac arrest. Additionally, the jury did not find that any injuries sustained in the accident caused the cardiac arrest, or that it would not have occurred but for the accident. (R. p. 28).

In the present case, the trial judge heard all of the evidence regarding the injuries Plaintiffs sustained as well as the nature of Bauerle's conduct. At this juncture the trial judge was the judge of the facts and the law as to setoff and he correctly found that "[b]ecause [the] settlements involved different injuries, this Court rules that those settlements are not subject to setoff." (R. p. 4). Clearly, he was in this best position to make this determination having heard all the evidence and having assessed the credibility of the witnesses. Bauerle did not request that the trial judge make any further findings of fact, nor did he object when the trial judge declined to utilize a verdict form suggested by Plaintiffs that permitted the jury to indicate what damages were included in the awards. (R. p. 332, lines 15-23; pp. 429-430). Additionally, the paralysis and catastrophic injuries Mr. Green suffered as a result of Bauerle's interruption cannot reasonably be interpreted as a continuation of damages arising out of his hip injury, which could have led to arthritis if left untreated. (R. p. 304, line 21-p. 305, line 2). There is no evidence upon which the trial court could conclude that the injuries resulting from Bauerle's interference in Mr. Green's care were a foreseeable consequence of the at-fault driver's negligence.

The suggestion that the purely analytical concept of foreseeability could be repurposed as a purely mechanical test of causation to determine for what damages someone can justifiably be held liable ignores the jury's role as the fact finder as well as the policy reasons for imposing the burden of proximate cause. Hubbard & Felix, supra, at 150, 156 (citing W. Keeton, et al., Prosser & Keeton on the Law of Torts 297-300 (5th ed. 1984)). Specifically, public policy requires that the nature of a tortfeasor's wrongdoing be considered in analyzing the extent of his or her liability. Hubbard & Felix, supra, at 156; *see also* Gossett v. Burnett, 251 S.C. 548, 164 S.E.2d 578 (1968)

(Littlejohn, J., concurring). Recognizing this common sense principle, South Carolina courts have considered the nature of the subsequent negligence in creating an exception to the general rule that an original wrongdoer remains liable for an injury resulting from the foreseeable acts of a third party. Young v. Tide Craft, 270 S.C. 452, 242 S.E.2d 671 (1978).

In Young v. Tide Craft, the decedent took his boat to a repairman for rewiring. The repairman did not have sufficient cable to repair the system so he spliced in a portion of new cable to replace the frayed portion, the failure of the splice resulted in the decedent's fatal accident. He admitted that his repair rendered the boat "operable" but "dangerous." Id. at 460, 242 S.E.2d at 674.The Court stated "Tide Craft cannot be held liable since the intervening acts of [the repairman] constitute, as a matter of law, the sole proximate cause of the disengagement of the steering wheel." Id. at 460-61, 242 S.E.2d at 675. The opinion noted that the only reasonable inference to be drawn from the evidence was that the repairman's negligent repair was not foreseeable because he knew that splicing was "inherently dangerous" and "not advisable." Id. at 264, 242 S.E.2d at 676. The Court found that there was a high improbability that a repair would be effected in such a manner as it was common knowledge in the trade that splicing was unsafe and far removed from good practice; therefore, the repairman's actions were deemed "highly remote." Id. at 264-65, 242 S.E.2d at 676. After considering the remoteness of the possibility that the repair would be conducted in such a manner as well as the repairman's awareness of the danger, the Court concluded that "it cannot be seriously contended that [the repairman's] actions were a probable consequence on the part of Tide Craft." Id. at 465, 242 S.E.2d at 677.

Similarly, Bauerle knew the danger involved in interrupting the treatment of a patient in Mr. Green's unstable condition. (R. p. 308, lines 18-22). He was negligent, not in his treatment of any injury, but in removing an unstable patient from the care of other physicians without first checking the vital signs. (R. p. 307, lines 6-9). Additionally, he made this decision despite Dr. Lintz's warning that Mr. Green was not stable enough for a CT scan. (R. p. 345). By his own testimony, Bauerle admitted that he did not know Mr. Green's blood pressure when he ordered him to CT. (R. p. 308, line 23-p.309, line 1). He testified that had he known Mr. Green's vital signs, he would not have sent him to CT. (R. p. 308, lines 18-22). His own expert testified that it is the responsibility of a physician to know the condition of a patient before issuing orders. (R. p. 322, lines 14-23).

As in Tide Craft, Bauerle clearly realized the "inherently dangerous" nature of his decision. It is common knowledge in the trade that removing a patient from Pre-Op with a blood pressure of 72/56 and with a heart rate of 135 is "far removed from good practice." (R. p. 199, lines 1-11; p. 308, lines 18-22; p. 459, line 11-p. 460, line 7). Expert testimony was presented at trial indicating that this was a drastic deviation from the standard of care. (R. p. 456, lines 5-10). Additionally, Bauerle had been warned of Mr. Green's condition by Dr. Lintz, and Dr. Smith's testimony confirmed the old surgical adage "never argue with the doctor looking at the patient." (R. p. 324, line 20-p.325, line 25). Therefore, the likelihood of Bauerle's conduct was "highly remote," and it cannot be seriously contended that his actions were a probable consequence of the at-fault driver's negligence. The Court in Tide Craft further found that the only reasonable inference to be drawn from the evidence was that the manufacturer's defects would have only caused an inability to manipulate the steering stick; death would not have occurred in the natural

course as a result. Tide Craft, at 465-66, 242 S.E.2d at 677. Here, Dr. Chariker testified that the cardiac arrest was not inevitable; rather but for Bauerle's negligence, it would not have occurred and Mr. Green would not have been rendered a paraplegic. (R. p. 474, lines 5-8). Bauerle's interruption in Mr. Green's treatment was inherently dangerous, not advisable, and highly improbable that a physician would interrupt Mr. Green's treatment because it was common knowledge among the testifying physicians that removal of an unstable patient from Pre-Op was unsafe and far removed from good practice.

C. There is no basis for concluding that the Settlements with the auto insurers were for the same injuries as the verdicts against Bauerle.

South Carolina Cases involving setoff wherein the courts have either reallocated settlement proceeds between causes of action or determined what injuries were involved in a settlement in order to determine whether setoff was appropriate involve facts where a lawsuit has been filed against the settling party so it is clear what claims the plaintiffs alleged against that party. See, e.g., Riley v. Ford, Op. No. 5195 (S.C.Ct.App. Filed Feb. 5, 2014); Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct.App.2012); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000); Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct.App.2000); Ellis v. Oliver, 335 S.C. 106, 473 S.E.2d 793 (Ct.App.1999); Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998); Ward v. Epting, 290 S.C. 547, 352 S.E.2d 867 (Ct.App.1986). Of note, in Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 212, 734 S.E.2d 142, 143 (2012), a setoff *was* granted to reduce the amount of a jury verdict by the amount paid by an automobile insurer for an at-fault driver against whom no lawsuit was apparently filed. However, that settlement had been previously allocated almost entirely to a wrongful death cause of action and approved by the trial court. Id. at 217, 734 S.E.2d at 145-46. Accordingly, it

was clear which injuries that settlement included, and those funds were not reallocated. The Court did permit a reallocation of the settlement proceeds paid by another defendant against whom a lawsuit *had* been filed. Id.

Distinguishing this case from the majority of the cases permitting setoff is the fact that it does not involve a wrongful death or survival cause of action, where specific damages recoverable for a single bodily injury, i.e. a death, are at issue. See, e.g., Riley v. Ford, Rutland v. S.C. Dep't of Transp., Ellis v. Oliver and Welch v. Epstein (citations omitted). This case involved multiple extensive physical injuries that resulted in additional damages and injuries recoverable against the at-fault driver under various causes of action that were never asserted and thus remain indeterminable. The facts do not involve a single injury represented by a clearly definable economic loss recoverable under known causes of action settled or tried as in Smith v. Widener. Accordingly, there was no supporting evidence or deductions from which the trial court could logically determine what specific injuries were or could have been included in the Settlements. Furthermore, the sheer number of injuries alleged in this case makes it impossible to determine what was included in the verdicts, and Bauerle did not object when the trial judge declined to utilize a verdict form specifying same. (R. p. 332, lines 15-23).

In order to apply a setoff, the court would first have to determine what injuries were included in the Settlements, which were paid to multiple Plaintiffs who sustained multiple physical and non-physical injuries, none of which were subject to the litigation against Bauerle. In order to determine the applicability of § 15-38-50, the court would then need to determine whether any of those same injuries were included in the jury verdicts and, if so, how the jury calculated those awards. While the Settlements might

be sufficient to establish the driver was at a least partially liable for causing the accident, there is no basis for finding him liable for any specific injuries without any evidence that they were included in the Settlements. Furthermore, there were multiple extensive physical and non-physical injuries alleged to have resulted from the spinal cord infarction aside from Mr. Green's paralysis, and the jury did not reveal which injuries were encompassed in either award. (R. p. 28-31).

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

Bauerle's assertion that Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984), extends liability for "all of the injuries and damages claimed against Dr. Bauerle, including Mrs. Green's loss of consortium," partially depends on a finding that blood loss from the forearm and hip injuries caused the cardiac arrest which caused the spinal cord infarction and paralysis. (Appellant's Initial Br. p. 10). While both parties presented theories as to the specific cause, i.e. whether Bauerle's negligence caused a delay in treatment for blood loss or a delay in treatment of a cardiac event stemming from a pre-existing condition, the jury verdicts were not dependent on making that determination. Rather, the verdicts merely depended on the finding that his interruption of the treatment was negligent and that it caused injury. (R. p. 28).

The only findings necessary to sustain the medical malpractice verdict against Bauerle were that (1) Mr. Green was unstable at the time Bauerle removed him from Pre-Op; (2) such removal was a deviation from the standard of care; and (3) the removal from Pre-Op proximately caused the spinal cord infarction. (R. p. 456, lines 5-16; p. 460, lines 14-24). Additionally, the verdict could be sustained by findings that (1) Mr. Green was

unstable at the time he was returned to the ER; (2) the decision to send an unstable patient to CT at that point, rather than back to Pre-Op, was a deviation from the standard of care; and (3) this deviation proximately caused the spinal cord infarction. (R. p. 216, line 6-p. 218, line 22). As set forth below, such findings are not dependent on the *cause* of the instability or cardiac arrest. Rather, the *response* to, and *duration* of, the arrest are critical as to whether a spinal cord infarction will occur as well as the extent of damage that is done. (R. p. 480, line 14-p.482, line 21).

Bauerle testified that when he arrived at GSRMC just before 2:00 p.m., he went straight to Pre-Op, where he saw Mr. Green for the first time. (R. p. 292, lines 1-5; p. 299, lines 11-13). Dr. Peters, the anesthesiologist who would later be paged to the ER to emergently insert arterial lines necessary to resuscitate Mr. Green, was already present in Pre-Op at that time. (R. pp. 346, 365, 419). Despite clear signs that Mr. Green was unstable, Bauerle ordered him removed from Pre-Op and taken back to the ER, and then for a CT scan. (R. p. 419; p. 309, lines 2-23). Plaintiffs alleged that Mr. Green exhibited signs of distress at this point and should not have been removed from Pre-Op, particularly after Dr. Lintz's protest and without further examination or inquiry into his condition.

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 for the CT scan 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 6-15). Plaintiffs' expert, vascular and cardiothoracic surgeon, Dr. Edd Chariker, testified that Bauerle "drastically" deviated from the standard of care by sending Mr.

Green to CT Scan when his vital signs indicated that he was "totally unstable." (R. p. 456, lines 5-16). Plaintiffs' expert, orthopaedic surgeon Dr. Matza, testified that "there are critical moments in everything we do and this happened to be one of them." (R. p. 196, lines 15-23). Dr. Cozart, who was called by Bauerle, conceded that Mr. Green's vital signs in the ER were not stable and that he would have deferred a CT scan on an unstable patient. (R. p. 280, lines 8-15; p. 281, lines 3-10).

Dr. Chariker testified that he believed blood loss had "a great deal" to do with the cardiac arrest, however, the *location* away from Pre-Op at the *time* of the arrest was the critical causative factor. (R. p. 462, line 22- p. 464, lines 2-17; p. 479, lines 7-22). He explained that Bauerle diverted Mr. Green away from Dr. Peters who would have probably prevented the arrest by properly resuscitating him based on his eventual response to the code. (R. p. 346; p. 463, lines 4-25). Bauerle conceded that Dr. Peters wasn't present in the ER to assist until "further into the resuscitation process." (R. p. 294, line 8-p. 295, line 4). Dr. Matza testified, "you don't perform procedures on people who aren't stable," and "you need to stabilize them first." (R. p. 198, lines 7-25). Dr. Matza further testified that Bauerle deviated from the standard of care in not making himself aware of Mr. Green's vital signs or communicating with the other doctors before ordering a CT Scan. (R. p. 199, lines 1-11). According to Dr. Matza, Mr. Green's vitals were not being monitored when he was taken to CT, and there was "no way" to control them during this time. (R. p. 199, line 12-p. 200, line 1). He stated that, if Mr. Green had remained in Pre-Op, his vitals signs could have been monitored and controlled, and his bleeding stopped. (R. p. 199, line 12-p. 200, line 1). Bauerle conceded that vital signs can not be monitored while in CT. (R. p. 297, lines 104). Dr. Chariker testified that, if Mr.

Green had been in Pre-Op or the OR, " . . . with greater than 51 percent certainty, I would be willing to say the arrest could have been prevented." (R. p. 463, lines 12-19). In other words, it doesn't matter *why* Mr. Green's heart stopped. The only finding critical to prove proximate cause is that either it would not have stopped, or it would not have stopped for as long, but for Bauerle removing Mr. Green from Pre-Op.

Accordingly, Bauerle deviated from the standard of care in removing an unstable patient from an area where he was being closely monitored by people who could, and eventually did, resuscitate him in a timely manner. (R. p. 295, lines 10-24). 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). When asked if Mr. Green was paralyzed solely as a result of Bauerle's malpractice, Dr. Chariker stated, "I think there were other factors involved, certainly, but I think that that one decision was the thing that probably tipped the scale." (R. p. 479, lines 15-22).

Regardless of whether Bauerle *caused* the arrest or *prolonged* the amount of time the spine was deprived of blood, the jury found that he deviated from the standard of care, and that his deviation proximately caused Mr. Green damages in the amount of $2,300,000.00 and Mrs. Green damages in the amount of $550,000.00. (R. pp. 88-91). The jury did not determine the cause of the cardiac arrest or specify what damages or injuries were included in those verdicts. According to Dr. Cranberg, the *degree* and *duration* of an ischemic event determines whether an infarction will occur as well as the extent of the damage done thereby. (R. p. 481, line 4-p.482, line 21). Accordingly, the injuries resulting from the infarction would have depended on the amount of time the jury

believed Bauerle's negligence prolonged Mr. Green's arrest, whether it be the entire duration or a portion thereof.

Bauerle asserts that Plaintiffs' theory, that blood loss from the arm caused Mr. Green's cardiac arrest, is sufficient to establish the at-fault driver's liability for the spinal cord infarction and resulting paralysis. However, the *cause* of the arrest is not requisite to establish the elements of medical malpractice, and there was no finding that the cardiac arrest resulted from blood loss or from an injury for which the at-fault driver was liable. The jury could have believed testimony by Bauerle's experts that neurogenic shock caused the cardiac arrest, and still found that (1) Bauerle deviated from the standard of care because Mr. Green was exhibiting signs of instability when he was sent to CT; (2) a cardiac arrest, or a spinal infarction, is a foreseeable consequence of this deviation; and (3) either the cardiac arrest would not have occurred, the spinal cord infarction would not have occurred, or all of the additional injuries alleged to have resulted from that infarction would not have occurred if Bauerle had not issued that order.

Both parties presented theories as to the causes of Mr. Green's instability and subsequent cardiac arrest at trial; however, these issues were not dispositive of whether Bauerle deviated from the standard of care, whether that deviation caused the spinal cord infarction, or what injuries resulted from that infarction. (R. p. 210, lines 5-8; p. 237, lines 1-17; p. 238, lines 3-17; p. 270, lines 18-22; p. 277, lines 3-11; p. 284, lines 3-22; p. 315, lines 7-22; p. 317, line 21-p. 318, line 15; p. 460, lines 14-24; p. 462, lines 2-16). Dr. Chariker testified that, so many things went "awry," that it is hard to determine that one thing was caused Mr. Green's instability at the time Bauerle sent him to CT. (R. p. 465, lines 9-20). Furthermore, the jury could have discounted theories asserted by both parties

as to the cause of the arrest, and determined that it was unrelated to injuries sustained in the accident, as supported by evidence that the EKG on admission showed Mr. Green's heart exhibited "non specific ST/T wave abnormalities with no evidence of acute ischemia." (R. p. 344). Additionally, Dr. Matza testified that there was "no way" to determine if the cardiac arrest was inevitable. (R. p. 215, lines 2-6). Finally, Bauerle's argument, that blood loss from the arm caused the cardiac arrest which caused the spinal cord infarction, directly conflicts with his position at trial that there was no bleeding from the arm.

E. There is no way for the Court to determine the auto Settlements encompassed the "same injury" as the jury verdicts against Bauerle because no evidence exists as to what injuries were encompassed by the Settlements or the verdicts.

A right to setoff only arises under S.C.Code Ann. § 15-38-50 when a prior settlement was " . . . paid to compensate the same plaintiff on a claim for the **same injury**." Smith v. Widener, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct.App.2012) (emphasis added) (citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998)). When a prior settlement involves compensation for a different injury than the one tried to verdict, there is no setoff as a matter of law. Smith, at 472-473, 724 S.E.2d at 191. In Hawkins, the Court of Appeals overturned a trial court's setoff of a Georgia wrongful death lawsuit against a jury verdict in a South Carolina wrongful death case. Despite the fact that both causes of action arose out of the same death, the Court noted that the economic value compensable under each was the only mutual element of damages correlating to the same injury, i.e., a pecuniary loss; accordingly, the term "injury" was not so broad as to encompass all damages arising out of the same death. Id. at 114-15, 498 S.E.2d at 191. With the exception of Ellis v.

Oliver, 335 S.C. 106, 473 S.E.2d 793 (Ct.App.1999), which was distinguished as inconsistent with other holdings in Smith v. Widener, 397 S.C. at 481 n. 1, 397 S.E.2d at 195 n.1, courts applying the same analysis have repeatedly refused to interpret all damages arising out of a physical injury to be part of that same injury. See, e.g., Rutland v. S.C. Dep't. of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012); Riley v. Ford, Op. No. 5195 (S.C.Ct.App. filed Feb. 5, 2014); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). Furthermore, as made clear in Smith v. Widener, 397 S.C. at 481 n. 1, 397 S.E.2d at 195 n. 1, § 15-38-50 intends the term injury to apply equally to *non-physical* losses or invasions of interest.

Here, Mr. Green suffered innumerable *physical* injuries, distinct from his paralysis, as a result of his spinal cord infarction. (R. pp. 494-498). Clearly, multiple physical injuries are distinct injuries as intended by § 15-38-50 in light of case law distinguishing *non-physical* personal injuries from the *physical* injury out of which they arise. *See* Hawkins, 330 S.C. at 113-115, 498 S.E.2d at 407. Additionally, each Plaintiff suffered such non-physical personal injuries as a result of each physical injury Mr. Green sustained. Consistent with the trial court's finding that the Settlements with the auto insurers "do not concern the same injury" as the verdicts in the medical malpractice trial, many of the injuries alleged to have resulted from the spinal infarction did not even exist at that time. (R. p. 222, line 17-p. 223, line 3, p. 226, lines 6-24). Not only has Bauerle not offered any evidence to support a contrary finding, he rests on the assertion that the foreseeability of his own conduct imposes liability on the at-fault driver for *all* injuries. However, the issue of whether he is entitled to setoff does not depend on for what injuries the at-fault driver *could* have been liable. Rather, the issue before this Court is whether

the Settlements with the auto insurer involved the same injuries as the verdicts. S.C.Code Ann. § 15-38-50 *construed in* Smith, 397 S.C. at 472, 724 S.E.2d at 190.

South Carolina Courts do not interpret § 15-38-50 to define all damages "naturally flowing" from an original injury to be a single, indivisible injury. Smith, 397 S.C. at 472, 472 S.E.2d 190. There is no way for the court to determine that the auto Settlements encompassed the "same injury" as the jury verdicts against Bauerle because no evidence exists as to what injuries were encompassed by either the Settlements or the verdicts. However, even if the forearm and hip injuries *were* included in the Settlements, they are still distinct injuries from the spinal infarction and the innumerable other physical and non-physical injuries that resulted therefrom. Even if it were possible to define accident-related injuries from the transcript of the medical malpractice trial, in which they were not at issue, it is not possible to discern with any level of accuracy which settlement payment could have included them. Accordingly, the trial court was correct in finding that the Settlements with the auto insurers involved different injuries than the verdicts and in denying setoff in these amounts.

In a lawsuit against the at-fault driver, Plaintiffs could have asserted other causes of action in addition to, or in lieu of, ordinary negligence. For example, they could have asserted bystander liability claims seeking damages arising out of witnessing serious bodily injury being inflicted on his or her spouse and child. (R. p. 136, line 13-p. 137, line 14). Expert testimony at trial as to Mr. Green's elevated heart rate being possibly caused by stress, as well as expert testimony regarding Mrs. Green's emotional and physical state provide *some* evidence of the physical manifestation of emotional distress necessary to prevail on such claims. (R. p. 323, lines 2-12). Accordingly, such claims

would, as a matter of law, seek different elements of damages for distinct injuries, neither of which were alleged in the medical malpractice suit against Bauerle. State Farm Mut. Auto. Ins. Co. v. Ramsey, 295 S.C. 349, 353, 368 S.E.2d 477, 479 (Ct.App.1988).

Per the analysis in Hawkins, 330 S.C. at 113-14, 498 S.E.2d at 407, causes of action providing for different elements of damages are distinct for purposes of setoff. A cause of action for bystander liability permits recovery of damages resulting from the emotional trauma of witnessing serious injuries being inflicted on someone of close relation, as distinct from the various elements recoverable under medical malpractice and loss of consortium. Accordingly, an equitable setoff would be equally as inapplicable as a statutory setoff in this case because such remedy is only permitted where a settlement is for the same cause of action. See Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012).

Plaintiffs suffered many injuries as a result of the accident, which do not include the spinal infarction and resulting injuries. Furthermore, Bauerle has presented no evidence that any of the Settlements with the auto insurers compensated Plaintiffs for injuries resulting from the spinal infarction, or that those Settlements involved the same injuries, or causes of action, as the verdicts. However, Bauerle asserts entitlement to setoff the entire amount of the Settlements, essentially requesting that this Court take away consideration paid for all of the Green's other injuries. In order to avoid such an outcome in granting the relief Bauerle requests, the Court would first have to determine what injuries were compensated in those Settlements and allocate the funds among each of the injuries and to each Plaintiff. As setoff only applies to funds compensating the same injury, the Court would then have to determine what injuries were encompassed in

the verdicts without any evidence of how the jury calculated those awards. Smith, 397 S.C. at 474, 724 S.E.2d at 192. Furthermore, even if an equitable, rather than purely statutory, setoff was appropriate, the Court would first have to determine what causes of action were settled, despite no lawsuit having been pursued against the at-fault driver, and whether they were identical in order to permit a setoff from the verdicts. See Hawkins, 330 S.C. at 113-115, 498 S.E.2d at 407; see also Rutland, 400 S.C. at 216, 734 S.E.2d at 145. This would be an impossible task without any basis in law or equity.

1. Plaintiff Randall Green suffered serious injuries distinct and separate from those suffered as a result of Bauerle's malpractice.

Prior to his arrival at GSRMC, Mr. Green suffered multiple serious injuries that were separate and distinct from the spinal cord injury, which did not exist until after Bauerle's intervention. (R. p. 21; p. 248, lines 6-24; p. 453, line 7-13). To this day, Mr. Green has limited use of his right hand, and cannot even make a fist. (R. p. 221, lines 12-17). He sustained a serious head injury, which required speech therapy and made it difficult for him to follow commands during physical therapy and examinations at MUSC. (R. pp. 346, 353). He fractured five ribs; which Bauerle's witness asserts was caused by the accident and Plaintiffs alleges were caused by chest compressions performed during the arrest. (R. p. 248, line 21-p. 249 line 9; p. 238, lines 3-17). Mr. Green complained of sharp abdominal pain at the accident scene and underwent exploratory surgery at MUSC that revealed fluid around his kidneys and in his abdomen. (R. pp. 357, 352-353). Defendant's expert, Dr. Smith, testified that Mr. Green had "multiple injuries" which "primarily" included the arm laceration, hip injuries, and "general thoracic trauma." (R. p. 331, lines 14-25). Dr. Cranberg testified that, upon arrival at GSRMC, Mr. Green's "two main problems" were a lacerated forearm and a

fractured hip. (R. p. 485, lines 13-21). When Mr. Green left GSRMC, he still had the lacerated arm and the fractured hip but "he had a new additional problem, which was an infarct of his spinal cord." (R. p. 487, lines 7-18). Not only did the spinal cord infarction constitute a separate and distinct injury, Dr. Cranberg's testimony clearly indicates that the arm and hip injuries were not the only injuries Mr. Green had on arrival at the hospital, though they were his "main problems" at that time. Furthermore, Mr. Green's treating physician, Dr. Garner, testified that his diabetes could have been caused by *either* a pancreatic injury *or* the spinal infarction, but that his high blood pressure was not related to the spinal injury. (R. p. 497, line 21-p.498, line 13; p. 500, lines 2-10). Accordingly, the record clearly indicates the existence of additional injuries after the automobile accident, which are separate and distinct from the spinal cord infarction, hip injuries, and forearm injuries.

Mr. Green suffered many injuries in addition to paralysis as a result of Bauerle's malpractice and there is no evidence as to whether any of these injuries were included in the jury verdict. Dr. Cranberg testified that paralysis is the loss of function in both legs, and is *one* injury that can be sustained as a result of a spinal cord infarction. (R. p. 482, line 22-p. 483, line 5). He further testified as to other injuries that are likely suffered as a result of a spinal infarction, all of which Mr. Green suffered. (R. p. 483, line 6-p. 484, line 1).

In addition to being unable to *move* his legs, Mr. Green cannot feel them, resulting in ulcers and infections on the bottoms of his feet as well as pressure sores, abscesses, and infections on multiple areas of his body. (R. p. 493, lines 17-25; p. 495, line 12-p.496, line 13). According to his family physician, Dr. Garner, Mr. Green is at

increased risk of developing pneumonia and has suffered repeated infections and urinary tract infections, which are a "real problem" for him. (R. p. 494, line 13-p. 495, line 11; p. 497, line 21-p.498, line 13). His bladder and bowels no longer function. (R. p. 494, line 13-p.495, line 11). He was diagnosed with renal failure and he remains at an increased risk of same. (R. p. 497, line 23-p.498, line 9). He has sustained bone loss. (R. p. 165, lines 14-20). He has circulatory issues, which sporadically cause a rapid heartbeat and result in cold intolerance and a persistent feeling of being cold, and injury to his gastrointestinal system causes abdominal discomfort and acid reflux. (R. p. 154, line 12-p. 155, line 10). He has lost sexual function. (R. p. 153, lines 8-13). Mr. Green's general health has been compromised affecting **every single body system except for his lungs** and he has been hospitalized multiple times for life threatening symptoms of, illnesses resulting from, and bodily responses to, his various injuries. (R. pp. 370-384). He suffers back pain from sitting in his wheelchair and persistent muscle spasms in his lower extremities. (R. p. 151, lines 10-18). He cannot feel when his bladder has become too full, which can happen after four to six hours, causing severe headaches and life-threatening heart irregularities. He lives with the terrifying knowledge that, if Mrs. Green does not catheterize him in time, a condition called osteodysplasia can result in cardiac arrest and death. (R. p. 156, line 9-p. 157, line 8). Obviously, he is depressed. (R. p. 163, line 19-p. 164, line 1). He has fallen out of his wheelchair and suffered another broken hip, requiring surgery and a five-day hospitalization. (R. p. 226, lines 6-24).

Evidence was presented at trial in support of each of the numerous physical injuries above as well as the further economic and non-economic injuries and losses resulting therefrom. Expert testimony at trial indicated that Mr. Green has a greater than

50 percent chance of incurring future medical expenses for all of the above referenced *physical* injuries, an amount which *alone* exceeds the entire medical malpractice jury verdict. (R. p. 169, line 6-p. 170, line 3; p. 415). In addition to, and as a result of, his physical injuries, Mr. Green has clearly sustained extensive pain and suffering, mental and emotional distress, disfigurement, loss of earning capacity, lost wages, and loss of enjoyment of life as a result of his spinal infarction. (R. pp. 391-404). *See* Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969) (finding that paraplegic's loss of social and business activities is compensable intangible injury). Not only is there no evidence that Mr. Green has received any compensation for any of these injuries, most of them *didn't even exist* at the time of the Settlements with the auto insurers. (R. pp. 370-395). Furthermore, there is clearly no way to determine if any, all, or some of these innumerable injuries and losses were included in the jury verdicts. (R. p. 28-31). Finally, injuries sustained in the accident, are distinct from those claimed against Bauerle. As Plaintiffs counsel informed the jury during opening arguments, all three passengers sustained injuries in the accident, "[b]ut this case is about medical injuries, we're not going into the other injuries." (R. p. 109, lines 5-17). "When a 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, 473, 724 S.E.2d 188, 191 (Ct.App.2012) (citing Hawkins v. Pathology Assocs. of Greenville, 330 S.C. at 114-15, 498 S.E.2d at 407 (Ct.App.1998)). Accordingly, Bauerle is not entitled to setoff the amount received from the auto insurers.

Even if the court were to determine that the Settlements with the at-fault driver could be allocated to specific injuries, it is well settled that every possible cause of action

and every injury would have to be allocated some portion of each Settlement as consideration for the covenant, and Bauerle would not be entitled to set off consideration paid for injuries that are different from those included in the verdict.

2. ***Plaintiff Ann Green suffered several serious injuries in the car accident, which are separate and distinct from her loss of consortium suffered as a result of Bauerle's malpractice.***

South Carolina Code § 15-75-20 (1969) provides that under a loss of consortium claim, "[a]ny 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." Loss of consortium includes the loss of services as well as the loss of society and companionship. Davis v. Tripp, 338 S.C. 226, 238, 525 S.E.2d 528, 534 (Ct.App.1999). Ann Green's loss of consortium verdict involves injuries that are separate and distinct from her own physical injuries compensated by the auto settlements.

Testimony at trial provided evidence that Ann Green endured a lengthy hospitalization for severe physical injuries *she* sustained in the accident. (R. p. 137, lines 8-25). While Mrs. Green's loss of consortium verdict compensated her for *some* of the damages which she had suffered as a result of her husband's injuries arising out of the spinal infarction, payments she received from the auto insurers involved the personal injuries *she* sustained as a result of her own bodily injuries. These injuries include bystander liability claims arising out of witnessing serious injuries to her husband and child. (R. p. 136, line 13-p. 137, line 14). Bauerle is not entitled to benefit from any payments intended to compensate Mrs. Green for the extensive physical and mental pain and suffering, scarring and disfigurement, economic losses, and loss of enjoyment of life which she suffered as a result of her own physical injuries. Furthermore, *Mr. Green's* loss

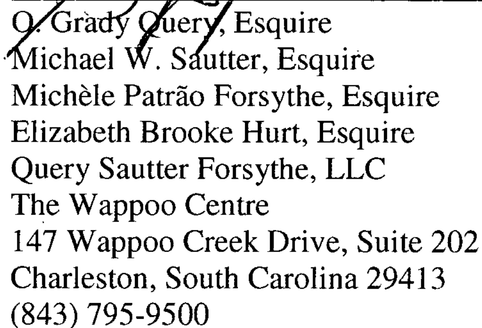
of consortium suffered as a result of his wife's extensive injuries was not an element of damages recoverable in the tort action against Bauerle, and is not subject to setoff. The unallocated settlement has created a Gregorian Knot which cannot be untangled at this stage of the proceedings. Bauerle should have objected at the time of the stipulation of GSRMC's dismissal and required Plaintiffs to allocate the settlement, and he should have also asked that the jury specify the injuries for which they rendered a verdict.

In conclusion, the rule on which Bauerle relies does not establish that any of the Plaintiffs' *separate* Settlements with the auto insurers involved *any* of the same injuries as the *separate* jury verdicts rendered in their favor. Bauerle presented no evidence as to which, or whose, injuries were encompassed in the Settlements with the at-fault driver or the Green's own auto-insurer. Nor did he allege that the cardiac arrest, infarction, or injuries alleged to have occurred from the infarction were included in the Settlements. Finally, Bauerle's argument assumes, not only that the forearm laceration and hip injuries were included in those Settlements, but that the cardiac arrest resulted from blood loss from one or both of those injuries, a position in direct conflict with the position he asserted at trial. However, there has been no such finding, and the jury's verdict was not dependent on same. There was no evidence to support a finding that any injury compensated in the Settlements was included in either of the jury verdicts, and the trial court was correct in finding that they involved different injuries not subject to setoff pursuant to § 15-38-50.

CONCLUSION

The rule articulated in Graham v. Whitaker is inapplicable in analyzing a defendant's entitlement to setoff, as the purpose of that rule is to continue the responsibility of the initial wrongdoer for a physician's aggravation of an injury for which the original tortfeasor is liable. In contrast, setoff is not appropriate unless a settlement with a jointly liable tortfeasor compensates the *same injury* as a verdict rendered on the same cause of action. The trial court did not err in denying setoff to Bauerle for the amount paid to Plaintiffs by the at-fault driver and the Green's UIM carrier. Plaintiffs respectfully request that this Court affirm the portion of the Setoff Order issued by the Honorable Steven H. John denying setoff to Bauerle in the amount of the Settlements paid to Plaintiffs by the auto insurers for the reasons set forth above and for any ground appearing on the record as provided by Rule 220(c) SCACR.

Respectfully submitted,



O. Grady Query, Esquire
Michael W. Sautter, Esquire
Michèle Patrão Forsythe, Esquire
Elizabeth Brooke Hurt, Esquire
Query Sautter Forsythe, LLC
The Wappoo Centre
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29413
(843) 795-9500

Cristin A. Uricchio, Esquire
Uricchio Law Firm
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412
(843) 795-9300

L. Morgan Martin, Esquire
L. Morgan Martin, PA
1121 Third Avenue
Conway, South Carolina 29526
(843) 248-3177

Charleston, South Carolina
December 2, 2014

Counsel for Respondents/Appellants

(3)

RECEIVED
DEC 29 2014
SC Court of Appeals

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.

E. Brooks Hurt

O. Grady Query, Esquire
Michael W. Sautter, Esquire
Michèle Patrão Forsythe, Esquire
Elizabeth Brooks Hurt, Esquire
Query Sautter Forsythe, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29412
(843) 795-9500

L. Morgan Martin, Esquire
L. Morgan Martin, PA
1121 Third Avenue
Conway, South Carolina 29526
(843) 248-3177

Cristin Uricchio, Esquire
Uricchio Law Firm
The Wappoo Centre
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412
(843) 795-9300
Counsel for Respondents/Appellants

Charleston, South Carolina
December 18, 2014

RECEIVED
DEC 29 2014
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned Counsel for Respondents/Appellants, Randall M. Green and An[illegible], 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.

O. Grady Query, Esquire
Michael W. Sautter, Esquire
Michèle Patrão Forsythe, Esquire
Elizabeth Brooks Hurt, Esquire
Query Sautter Forsythe, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29412
(843) 795-9500

L. Morgan Martin, Esquire
L. Morgan Martin, PA
1121 Third Avenue
Conway, South Carolina 29526
(843) 248-3177

Cristin Uricchio, Esquire
Uricchio Law Firm
The Wappoo Centre
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412
(843) 795-9300
Counsel for Respondents/Appellants

Charleston, South Carolina

December 18, 2014