THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

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

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

v.

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

RESPONDENTS' BRIEF OF RESPONDENTS-PETITIONERS

Cristin Uricchio, SC Bar No. 79044
Uricchio Law Firm
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina, 29412
(843) 795- 9300
Counsel for Respondents-Petitioners

L. Morgan Martin, SC Bar No. 3667
L. Morgan Martin, PA
1121 Third Avenue
Conway, South Carolina, 29526
(843) 248-3177
Counsel for Respondents-Petitioners

O.Grady Query, SC Bar No. 4610
Brooke Hurt, SC Bar No. 100649
Michael W. Sautter, SC Bar No. 4944
Query, Sautter, and Associates
147 Wappoo Creek Drive, Ste. 202
Charleston, South Carolina, 29412
(843) 795-9500
Counsel for Respondents-Petitioners

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(843) 795-9500
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QUESTION PRESENTED

I. IS THE RULE ARTICULATED IN <u>GRAHAM V. WHITAKER</u> RELEVANT OR APPLICABLE TO THE ISSUES AND FACTS OF THIS CASE, AND WAS THE TRIAL COURT CORRECT IN DECLINING TO FIND THAT IT ENTITLED BAUERLE TO A SETOFF OF THE AUTO SETTLEMENTS?

COUNTER-STATEMENT OF THE CASE

On April 17, 2004, Randall and Ann Green ("The Greens"), and their son, Mark Green ("Mark") sustained injuries in a car accident. (R. p. 137). Each family member subsequently entered into separate settlements with the various auto insurers as a result of his or her injuries. **The record in the present case, which arose out of separate injuries *later* sustained by *Mr. Green*, does not contain evidence of any of these settlements between the various family members and the auto insurers.**

On May 30, 2005, the Greens filed the present action against Dr. Wayne Bauerle ("Bauerle"), asserting causes of action for medical malpractice and loss of consortium. This action arose out of separate injuries sustained when Bauerle negligently interrupted and halted the monitoring and treatment being provided to Mr. Green at Grand Strand Regional Medical Center ("GSRMC") for worsening cardiac symptoms while awaiting treatment of non-emergent injuries following the car accident. (R. p. 216, ln. 22- p. 217, ln. 2; p. 441, lns. 6-10; p. 448, lns.1-19; pp. 486-489). As a result of the interruption in his care, Mr. Green suffered a spinal cord infarction which was alleged to have resulted in the complete loss of function in his legs, bowels, bladder, and sexual organs. He suffered no injuries to his spinal cord in the car accident. (R. pp. 483-484). GSRMC and Carolina Medical Response, Inc. ("CMR") were later named as additional parties in 2007. For a nominal payment of $25,000.00, CMR was released from liability for injuries sustained the day following the accident while Mr. Green was in transit from GSRMC to the Medical University of South Carolina ("MUSC"). A separate suit against MUSC was also later

settled as a result of even further injuries sustained from serious infections caused by a contaminated and negligently retained sponge.

On October 15, 2012, the Greens filed a Fourth Amended Complaint in the present action asserting a direct negligence claim for Negligent Supervision, Hiring, and Training and specifically pleading the Non-Delegable Duty doctrine as the basis for GSRMC's vicarious liability for medical malpractice. (R. pp. 32-44). On April 18, 2013, summary judgment was granted to GSRMC on both causes of action for vicarious liability and Negligent, Supervision, Hiring, and Training. (R. pp. 1-15). The order was not appealed by any of the parties. Subsequently, the Greens jointly accepted a settlement of $2,000,000.00 from GSRMC. On June 11, 2013, a stipulation of dismissal with prejudice as to GSRMC was filed by consent of all parties, including Bauerle. (R. p. 17; pp. 518-522). The five day medical malpractice trial against Bauerle commenced on September 9, 2013. The jury found that Bauerle's deviation from the standard of care caused Mr. Green "injuries," awarding him $2,300,000.00. The jury awarded Mrs. Green $550,000.00 for her loss of consortium in a separate verdict. The verdict form did not specify what injuries or damages were included in these awards. (R. pp. 28-31).

Following the jury's dismissal, Bauerle made a motion for setoff based on S.C. Code Ann. §15-38-50, alleging that the medical malpractice and loss of consortium verdicts should be reduced by the settlements with the auto insurers, GSRMC, CMR, and MUSC for Mr. Green's injuries as well as the settlements with the auto insurers for Mrs. Green's injuries. The basis for his motion was that the Greens "sought recovery from all Defendants for the same injury." (R. pp. 45-48).

The trial court declined to grant Bauerle's motion to setoff the Greens' separate settlements with the at-fault driver's insurer and their own UIM insurer for injuries they sustained in the auto accident against the jury verdicts for injuries resulting from Bauerle's medical malpractice, finding that they involved different injuries. Bauerle's motion to setoff the funds paid by MUSC for

injuries resulting from the retained sponge was also denied. Setoff was granted as to the settlements with GSRMC and CMR, which the Greens appealed. Bauerle appealed the denial of setoff as to the settlements with the auto insurers. (R. pp. 21-22). The Court of Appeals affirmed the judgment of the circuit court. Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., Op. No. 2016-Up-052 (S.C. Ct. App. filed February 3, 2016). Both parties' Petitions for Rehearing were denied on March 24, 2016. This Court granted both parties' petitions seeking a writ of certiorari on October 2, 2017.

COUNTER-STATEMENT OF THE FACTS

On April 17, 2004, Mr. Green was driving his truck in which Mrs. Green and their son, Mark, were riding as passengers when they were involved in a car accident. Though the facts surrounding the accident were not at issue in the medical malpractice case, the EMS run report indicated that the Green's truck was t-boned (R. p. 357). The first ambulance to arrive immediately transported *Mrs.* Green to GSRMC in Myrtle Beach. (R. p. 137). The second ambulance to arrive also took both Mr. Green and Mark to GSRMC. (R. p. 137). Mrs. Green remained hospitalized in Myrtle Beach for more than a month as a result of her very serious injuries **which were not at issue in the present case**. (R. p. 138- p. 139, ln. 6). Mark was also seriously injuried. (R. p. 138).

Mr. Green arrived in the ER at GSRMC at 12:00 p.m. and was classified as a stable admission. (R. p. 313, line 20– p. 314, line 6; p. 361). His injuries from the accident included an arm laceration and fractured and dislocated hip. (R. p. 487). He was noted to have "normal sensation," and was cooperative, awake, alert, making eye contact, communicating with normal speech, exhibiting no confusion, and had no signs of face or head trauma. He was not exhibiting any "evidence of spinal cord problems" and "was moving his legs fine" as "noted by multiple clinicians." (R. pp. 343-344; pp. 361-362; pp. 485-486). At that time, his only complaints were pain in his **chest, hip**, and **arm**. (R. p. 343; p. 361).

With regard to the **chest** pain, the ER physician, Dr. Scott Lintz ("Dr. Lintz"), dictated a note at 1:09 p.m. indicating that Mr. Green was experiencing intermittent episodes of hypotension and that an EKG had revealed "ST/T wave abnormalities" without evidence of "acute" ischemia. (R. p. 344). A CT scan of his chest revealed no traumatic injuries from the accident. (R. p. 343).

With regard to the **hip** injury, Dr. Lintz noted at 1:09 p.m. that he had obtained a CT scan of Mr. Green's pelvis and consulted with Bauerle, the on-call orthopedic surgeon, over the phone. (R. pp. 343-345). Dr. Lintz further noted that additional films of Mr. Green's hip would

"eventually" be obtained after Dr. Ralph Cozart completed the arm repair. (R. pp. 343-344). The hip injury was "absolutely not urgent, emergent." (R. p. 216, ln. 22- p. 217, ln. 2).

With regard to the **arm** injury, Dr. Lintz testified that it was "not life threatening," and that blood loss was "[n]ot a major concern." (R. p. 441, lns. 6-10; p. 448, lns.1-19). He further stated, "I remember Mr. Green. He's one of the cases, because I liked the gentleman, that seemed to stand out." (R. p. 432, lns. 3-9). The dictation that Dr. Lintz made at 1:09 p.m. noted that he had contacted Dr. Cozart for a consultation for the arm injury, and that he had already arrived. (R. p.343). Nursing records indicate that Dr. Cozart was examining Mr. Green at 12:55 p.m. (R. p. 363). He testified that Mr. Green appeared stable, and the arteries in his arm were not bleeding, though some small veins were "oozing a little bit." (R. p. 264, lns. 14-17). Dr. Cozart, as well as other experts, explained that an artery contracts and spasms shut when it is cut, "very rarely" bleeding. (R. p. 258; p. 263, lns.11-20; p. 312, lns. 11-18). Experts for both sides testified that there was a six to eight hour window to repair the arm. (R. p. 235, lns. 10-16; p. 462, lns. 11-21).

At some point after arriving in the emergency room, Mr. Green's overall condition had deteriorated, and he had developed further injuries and conditions. (R. p. 439, ln. 19- p. 440, ln. 6; p. 445, ln. 20- p. 447; pp. 457-463; p. 465; p. 467, ln. 14- p. 470; p. 471). Expert testimony indicated that "[s]o many things had gone awry," there was no way to determine any one cause of his increasing instability. (R. p. 465). At 1:52 p.m., it was again noted that his heart was exhibiting ST wave abnormalities. (R. p. 364). At 2:00 p.m., Mr. Green was urgently taken from the ER to the Pre-Operative area ("Pre-Op") where Dr. Peters, an anesthesiologist, was present to monitor and control his vital signs and, if it became necessary, begin immediate resuscitation. (R. pp. 121-122; p. 195, lns. 6–14; p. 275, lns. 8-11; p. 419; p. 420; pp. 447-448; p. 459; pp. 462-463; p. 471).

At 2:05 p.m., Dr. Lintz dictated a note that, prior to sending Mr. Green to Pre-Op, he had already reduced his hip "without difficulty." (R. p. 345). He further noted that he had called

Bauerle a second time and told him that he felt Mr. Green needed to be in Pre-Op, and there was no time for an additional hip CT scan. (R. p. 345). Bauerle disagreed and was "pretty adamant about getting the CAT scan of the hip first." (R. p. 120, lns. 23-25; p. 121, lns. 13-16; p. 470, lns. 18-22; p. 471, lns. 17-24). At trial, Bauerle conceded Dr. Lintz's warning, stating, "*I* had no disagreement, I knew exactly what needed to be done, it's what I did." (R. p. 291, lns. 15-20).

When Bauerle arrived at the hospital, he went into Pre-Op and removed Mr. Green for the CT scan, despite vital signs warning that he was on the verge of a cardiac arrest. (R. pp. 199-200; p. 307, lns. 16-18; pp. 364-365; p. 419; p. 456; p. 459; p. 471, lns. 5-11). Bauerle conceded that he would not have removed him had he been aware of his condition. (R. p. 308, lns. 18-22). Expert testimony indicated that Bauerle "dramatic[ally]" deviated from the standard of care in taking a "totally unstable" patient out of Pre-Op where his vital signs were being closely monitored and controlled by Dr. Peters, who could also perform the resuscitative procedures necessary to prevent and stop a cardiac arrest. (R. p. 196, lns. 15-23; pp 199-200; pp. 274-275; p. 419; p. 456; p. 459, lns. 13-15; p. 463, lns. 12-19; p. 488, lns. 2-14; p. 490, lns. 1-8; p. 491, lns. 8-13). In contrast, Bauerle testified that he does not resuscitate patients as an orthopedic surgeon, and that he had not participated in a resuscitation in twenty years. (R. p. 295).

While away from Pre-Op for the CT scan, Mr. Green went into cardiac arrest, which was discovered in a "serendipitous fashion" by Dr. Lintz, who "happened" to be passing by. (R. p. 121, lns. 1-25; pp. 197-199; p. 464; p. 488, lns. 9-14). He **immediately** paged Dr. Peters from Pre-Op **before** intubating and attempting to perform the resuscitation himself in the ER. (R. pp. 121-123; p. 274; p. 346; p. 465, lns. 12-25). Bauerle stated "I don't run code. . . I watched." (R. p. 295, lns. 20-24.) According to the resuscitation record, CPR ceased 26 minutes later. (R. p. 365). Mr. Green was transferred to MUSC in Charleston the following night. Bauerle introduced evidence that he was moving his legs during transport. (R. p. 244). The nurse receiving him at MUSC from the

ambulance noted that he couldn't wiggle his toes. (R. p. 254). He spent the next two months being treated for innumerable serious injuries and conditions before being discharged to a rehabilitation facility. (R. pp. 197-199; pp. 263-264; pp. 352-356; pp. 365-366; p. 419; p. 446; pp. 488-489).

At trial against Bauerle, the Greens alleged that (1) Bauerle deviated from the standard of care in **removing Mr. Green from Pre-Op**; (2) Mr. Green's location away from Pre-Op proximately caused the cardiac arrest; (3) the cardiac arrest proximately caused a spinal cord infarction; and (4) the spinal cord infarction proximately caused several specific injuries. (R. pp. 463-467; pp. 483-484). **Each injury alleged to result from Bauerle's tortious act was supported by evidence of distinct damages, and there was conflicting evidence at trial as to whether specific injuries resulted from the infarction.** Furthermore, the arm and hip injuries sustained in the accident were not alleged to have resulted from, or to have been aggravated by, Bauerle's negligence. (R. pp. 128-132; pp. 134-136; pp. 138-141; pp. 144-145; pp. 151-174; pp. 176-181; pp. 185-192; p. 350; pp. 370-390; pp. 483-484; pp. 493-500). Harvard Neurologist, Dr. Lee Cranberg, **testified that leg paralysis is <u>not</u> the only injury likely to result from an infarction**, as it depends on which areas are affected. (R. p. 483, lns. 6-9). The cause of *each* injury was dependent on whether the *specific* nerve cells responsible for that *specific* function were killed as a result of a severe lack of blood during the cardiac arrest. (R. pp. 481-484). **The nerve cells die within minutes of receiving a sufficiently tenuous blood supply**. (R. pp. 481-482).

At trial, the judge explained the verdict form to the jury, stating that the first question was whether they found that Bauerle "negligently departed from the standard of care in treating the plaintiff Randall M. Green" and that "**this negligent departure**" proximately caused him "**injuries**." (R. p. 28; p. 336, lns. 5-13) (emphasis added). The jury was charged that potential actual damages "include all compensation for all of the **injuries** which are naturally the result of the alleged wrongful conduct[,] if you found wrongful conduct." (Supp. R. p. 1, lns. 19-23; p. 525)

(emphasis added). Thereafter, the jury returned a $2,300,000.00 verdict for Mr. Green for Medical Malpractice and a $550,000.00 verdict for Mrs. Green for Loss of Consortium. The verdict form indicated that Bauerle's deviation from the standard of care caused Mr. Green "injuries," but **did not indicate which "injuries" or damages were included.** (R. p. 28).

The evidence at trial indicated that just the total *future* medical expenses for three of the injuries alleged to have resulted from the infarction exceeded the entire medical malpractice jury verdict, indicating that the jury did **not** find that Bauerle's negligence proximately caused all injuries and damages alleged. (R. p. 389; p. 400). Further, there was evidence that Mr. Green was urinating "without difficulty" upon discharge from MUSC months later, creating conflicting evidence as to whether the bladder injury resulted from the spinal infarction as alleged by Plaintiffs. (R. p. 354). This injury was supported by evidence of distinctive damages to **both** Plaintiffs, inclusive of the value of Mrs. Green's care in catheterizing him five to six times a day and the past and future cost of catheters over the course of 25.65 years totaling $393,214.50. (R. pp. 28-31; pp. 156-157; pp. 158-159; p. 263, ln. 16- p. 264, ln. 8; p. 336; p. 348; p. 350; p. 379). Additionally, there was conflicting evidence as to whether the leg paralysis resulted from the infarction. (R. p. 244; p. 254; p. 291). This injury was also supported by damages distinct from the other injuries alleged such as wheelchair costs ($153,867.00) and home modifications ($55,526.00). (R. p. 400). There is no way to determine whether the jury included either of these injuries and their damages in the malpractice verdict. Plaintiffs did request that the verdict form permit the jury to indicate how much of the total was awarded for specific damages. However the trial judge declined, and Bauerle did not object. (R. p. 332).

ARGUMENT

I. THE RULE ARTICULATED IN GRAHAM V. WHITAKER IS NOT RELEVANT OR APPLICABLE TO THE ISSUES AND FACTS OF THIS CASE, AND THE TRIAL COURT WAS CORRECT IN FINDING THAT BAUERLE WAS NOT ENTITLED TO A SETOFF OF THE AUTO SETTLEMENTS.

Bauerle's post-trial motion asserted that setoff of the settlements with the other driver's auto insurer was mandated pursuant to S.C. Code Ann. §15-38-50. (R. pp. 45-48). With respect to settling tortfeasors, this section provides:

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

S.C. Code Ann. §15-38-50 (emphasis added). Whether under §15-38-50 or common law, "a non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012); Riley v. Ford Motor Co., 414 S.C.185, 195, 777 S.E.2d 824, 830 (2015). A cause of action is a form of redress for an injury or wrong arising out of a single set of facts. Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996); Jones v. Winn-Dixie, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995); Robert Harmon & Bore, Inc. v. Jenkins, 282 S.C. 189, 318 S.E.2d 371 (Ct. App. 1984) (distinguishing causes of action in order to prevent a double recovery in the context of election of remedies cases). The facts at trial, not allegations in the pleadings, control liability. Griffin v. Van Norman, 302 S.C. 520, 526, 397 S.E.2d 378 (Ct. App. 1990). Where different conduct supports distinct injuries, there is no risk of double recovery, and the Plaintiff may recover under both causes of action. Taylor, 324 S.C. at 218, 479 S.E.2d at 45; Creach v. Sara Lee Corp., 331 S.C. 461, 502

S.E.2d 923 (Ct. App. 1998); Jones, 318 S.C. 171, 456 S.E.2d 429.

This Court has previously recognized that the South Carolina Contribution Amongst Tortfeasors Act ("the Act"), which encompasses S.C. Code §15-38-50, "represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's strong public policy favoring the settlement of disputes." Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010). The plain language of the statute mandates a setoff where there is a settlement and verdict compensating the same damages for the same **injury** or death; i.e., where it is objectively obvious that the plaintiff would otherwise receive two recoveries for the same loss.

In cases where it cannot be proven that setoff is necessary to prevent a double recovery, the important public policy in favor of fostering and promoting settlements controls. In determining the effect of a settlement agreement, "[p]arties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976) (*citing* Kable v. Simmons, 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950); Lowery v. Callahan, 210 S.C. 300, 300, 42 S.E.2d 457, 458 (1947) (settlement agreements subject to rules of contract construction). The Legislature did not include any language in S.C. Code Ann. §15-38-50 which authorizes courts to modify settlement agreements given in good faith, and *certainly* does not authorize courts to impose liability on a settling tortfeasor for specific injuries without ***any*** consideration of the terms of the agreement or the injuries and causes of action compensated therein. Consistent with these well-established principles, this Court recently held that

> [t]he General Assembly in the Act struck the balance among competing policy concerns it deemed appropriate. We defer to the policy decisions of the General Assembly. For example, in Riley v. Ford Motor Co., we noted that a nonsettling defendant may not "fashion and ultimately extract a benefit from the decisions of those who do [settle]."

Smith v. Tiffany, Op. No. 27715 (S.C. filed April 26, 2017) (*quoting* Riley v. Ford, 414 S.C. at 197, 777 S.E.2d at 831 ("If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle.").

The rule in Graham v. Whitaker, on which Bauerle relies, references the foreseeability of a physician's negligence in aggravating an injury for which a prior tortfeasor is *liable*. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984); *See* Machin v. Carus Corp., 419 S.C. 527, 542, 799 S.E.2d 468 (2017) (citing Snyder v. LTG Lufttechnische GmnH, 955 S.W.2d 252, 256 n.6 (Tenn. 1997) (Foreseeability, or legal cause, "concerns a determination of whether legal liability should be imposed **where cause in fact has been established**.") (emphasis added). In other words, this rule addresses whether the original tortfeasor may be relieved of liability by virtue of the defense of intervening third party negligence. Graham, 282 S.C. 393, 321 S.E.2d 40. This is **not** relevant to whether, in the present case, the settlement with the other driver's insurer compensated the same causes of action arising out of the same injury as the verdicts against Bauerle. Id. To apply the rule, as Bauerle's argument suggests, as a means for a court to impose liability on a **non-party** for **all** injuries and damages sustained would usurp the jury's role as fact finder. Further, applying the rule in this way would not further *either* of the policy concerns which the Legislature sought to balance in drafting the Act. Specifically, imposing liability on a non-party for the purpose of setoff, particularly without any deference to whether or not compensation was actually paid for an injury or cause of action, is **not** a logical means by which to prevent a double recovery of those damages. Nor would this foster or promote settlement of disputes. This Court recently emphasized the significance of these principles in stating:

> We acknowledge that achieving a more fair apportionment of damages among joint tortfeasors was one of the policy goals underlying the legislature's enactment of the Act. We disagree that fair apportionment was the *only* underlying policy goal. Indeed, when the Act is read as a whole, with each section and subsection given effect, it is apparent that the legislature was not solely attempting to protect nonsettling defendants.

> Rather, the legislature was attempting to strike a fair balance for all involved-plaintiffs and defendants-and to do so in a way that promotes and fosters settlements.

Smith v. Tiffany, Op. No. 27715 (S.C. filed April 26, 2017).

In the present case, Bauerle has not presented any evidence that the settlement agreements with the other driver's insurer compensated the same injuries and causes of action as the verdicts against him. ***First***, there is absolutely **no** basis for the argument that the verdict against Bauerle for damages arising out of *Mr.* Green's bodily injuries should be reduced by a settlement compensating *Mrs.* Green for her own serious bodily injuries. ***Second***, it is undisputed that the car accident involved injuries and potential causes of action which were not alleged against Bauerle, and his motion for setoff was based solely on S.C. Code Ann. § 15-38-50. This statute has only been applied in cases involving a single indivisible injury. It grants the courts no discretion to determine the equities involved in its application or to manufacture terms to a settlement agreement in order to bring it within the statute's scope. ***Third***, the trial court and Court of Appeals did not err in declining to arbitrarily allocate good faith settlement agreements involving injuries and causes of action which were **not** alleged in the medical malpractice case. ***Fourth***, even if the rule in Graham could be extended to impose liability on the at-fault driver for all injuries alleged against Bauerle, there is no way of determining what injuries and damages were included in the jury verdicts. ***Finally***, even if the rule in Graham was relevant to the issue of setoff, it still is not dispositive of the other driver's liability for any specific injuries or causes of action.

A. The verdicts cannot be setoff by any part of Mrs. Green's settlement.

Bauerle cites absolutely no evidence or basis for his assertion that Mrs. Green's settlement for the other driver's per person liability limits compensated her losses arising out of Mr. Green's bodily injuries. In Graham v. Whitaker, the very case on which Bauerle relies to assert he is entitled to setoff in the amount of Mrs. Green's settlement, this Court stated:

> It is well settled in South Carolina that one spouse's cause of action for medical expenses and loss of consortium resulting from the negligent injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgement in favor of one defendant in one action is not a bar to the other action.

Graham v. Whitaker, 282 S.C. 393, 397, 321 S.E.2d 40 (1984). Mrs. Green's consortium damages arising out of her *husband's* injuries is an entirely different cause of action from claims arising out of her *own* bodily injuries. Moreover, her claims are also distinct from ***both*** her husband's claims arising out of his *own* injuries ***as well as*** his claims for loss of consortium arising out of *her* bodily injuries. It is well settled that a settlement for one cause of action cannot be used to reduce a verdict for an entirely different cause of action. Rutland, 400 S.C. at 216, 734 S.E.2d at 145 (2012); Riley, 414 S.C. at 195, 777 S.E.2d at 830 (2015).

Further, it is well recognized in South Carolina that loss of consortium damages arising out of a spouse's bodily injury is a *personal* injury, not a separate *bodily* injury. Accordingly, loss of consortium damages are subject to the *per person* bodily injury limits applicable to the injured spouse under an automobile insurance policy. As this Court has explained:

> Consequential damages, such as loss of consortium, medical and hospital expenses, etc., are generally held not to constitute `bodily injuries' within the meaning of automobile liability policies limiting liability to a stated amount for `bodily injuries' to one person. No recovery can be had for such damages therefore if the insurer has paid the full amount of the limitation fixed by the policy to the person injured. . .

Sheffield v. American Indemnity Co., 245 S. C. 389, 395, 140 SE 2d 787 (1965). Loss of consortium cannot be recovered under an automobile policy by the spouse of an injured person to whom the full per person policy limits have been paid.

As a matter of law, Mrs. Green's settlement with the automobile insurer for the $100,000.00 per person liability limits involved her own bodily injuries, and did *not* involve any consortium damages arising out of Mr. Green's bodily injuries.

> [I]t has been held that these different types of injuries cannot be split up in order to

> bring the claim within the higher policy limits; they are regarded as essentially injuries to one person, so that the lower policy limits applicable to injuries sustained by any one person would govern."

Id. at 395. Bauerle's assertion as to what was compensated in Mrs. Green's settlement does not reference the settlement agreement or the insurance policy, and does not provide *any* basis for asserting that either deviated from this rule. "The rule of strict construction does not authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists." Stewart v. State Farm Mut. Auto. Ins., 341 S.C. 143, 151, 533 SE 2d 597 (Ct. App. 2000).

Mrs. Green remained hospitalized in Myrtle Beach for **more than a month** as a result of her own injuries, **which were not at issue in the present case**. (R. p. 138- p. 139, ln. 6). In fact, she was **initially more seriously injured** than Mr. Green as a result of the accident itself. The paramedics were *all* working on Mrs. Green as noted by the second ambulance to arrive and find Mr. Green and Mark unattended. (R. p. 359). Her daughters *both* relocated to Myrtle Beach to be near *Mrs.* Green during her hospitalization, despite the condition of Mr. Green and Mark, both of whom remained in Charleston. (R. p. 138, ln. 25-p. 139, ln. 6). In order to equitably allocate or re-allocate her settlement amongst her injuries and damages, assuming this would be appropriate under *any* theory of law, the court would have to hear evidence of her damages. *See* Riley v. Ford Motor Co., 414 S.C.185, 195, 777 S.E.2d 824, 830 (2015). Bauerle cannot simply rely on his own assertion that he caused "the most severe of the injuries" to her husband to demonstrate that he is entitled to *any* part, much less the "vast majority" of her settlement. (Petr. Resp't. Br. 11). He has failed to meet his burden of proving that her settlement involved *any* of her husband's injuries, much less those contained within the jury verdicts against him. *See* In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895) (party seeking to depart from standard set-off rules bears the burden of proof). It is profoundly clear that Bauerle is **not** entitled to setoff for **any** portion of Mrs. Green's

$100,000.00 settlement with the auto insurer.

B. <u>S.C. Code Ann. § 15-38-50 only applies when a settlement and verdict compensate the same injury and cause(s) of action, and it is undisputed that the accident involved injuries not alleged at trial</u>.

It is undisputed that the car accident involved injuries and potential causes of action which were not alleged against Bauerle, and his motion for setoff was based solely on § 15-38-50. This statute has only been applied in cases involving a single indivisible injury and grants the courts no discretion to determine the equities involved in its application or to manufacture terms to a settlement agreement in order to bring it within the statute's scope. Bauerle argues that the alleged foreseeability of his own negligence renders the other driver liable for *all* of the injuries alleged against him at trial. Even if there was any merit to this assertion, it is not dispositive of whether the settlement and verdict were actually "for the same injury." Further, there is no evidence as to what causes of action were settled with the auto insurer. There can be no setoff for funds paid to settle a different cause of action.

i. § 15-38-50 only applies where the settlement and verdict compensate the same injury.

S.C. Code Ann. §15-38-50 applies where there is a settlement with "one of two or more persons liable in tort **<u>for the same injury</u>** or **<u>the same wrongful death</u>**." (emphasis added). Of significant note, the Legislature declined to include the term "injuries," choosing instead to use only singular language. "Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning." <u>Smith v. Tiffany</u>, Op. No. 27715 (S.C. filed April 26, 2017). Therefore, the right to setoff only arises under §15-38-50 when a prior settlement was ". . . paid to compensate the same plaintiff on a claim for the same injury." <u>Smith v. Widener</u>, 397 S.C. 468, 472, 724 S.E. 2d 188, 190 (Ct. App. 2012) (citing <u>Hawkins v. Pathology Assocs.</u>, 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.

Where there is **no dispute** that the negligent conduct of all defendants rendered them jointly liable for the **same damages** arising out of the **same single injury,** the recovery sought is identical as a matter of law. "Joint and several liability arises only when two or more tortfeasors are responsible for a *single* injury." Collins v. Bisson Moving & Storage, 332 S.C. 290, 504 S.E.2d 247 (Ct. App. 1998). Under such circumstances, *there is no need* for a court to exercise discretion in applying §15-38-50. "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." Ellis v. Oliver, 335 S.C. 106, 113, 473 S.E.2d 793 (Ct. App. 1999); Oaks at Rivers Edge Prop. Ownrs. Ass'n v. Daniel Islnd. Riverside Dvlprs., Op. No. 2014-0023902 (S.C. Ct. App. filed August 2, 1017); Huck v. Oakland Wings, Op. No. 5500 (S.C. Ct. App. Filed July 19, 2017); Smith v. Widener, 397 S.C. at 472, 724 S.E. 2d at 190.

The wording of § 15-38-50 effectively protects against double recoveries only in those situations where there is a **clear risk** of same. Clearly, this fosters and promotes settlements in situations involving multiple Plaintiffs and causes of action, and where multiple defendants share *potential* liability for *some* but not all of the injuries alleged. Cases involving setoff have involved a **single identifiable injury such as a death or identifiable economic loss**, rendering setoff appropriate to prevent a double recovery where the causes of action settled and tried provide for identical damages for that "same injury." Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015); Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012); Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188; 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, 335 S.C. 106, 473 S.E.2d 793; Hawkins, 330 S.C. 92, 498 S.E.2d 392 (setoff denied where damages were different

for single injury and no way to determine what jury included in award); Ward v. Epting, 290 S.C. 547, 352 S.E.2d 867 (Ct. App. 1986).

It is important to note that Bauerle's motion, and the trial court and Court of Appeals' holdings, only addressed a *statutory* setoff pursuant to § 15-38-50. There were no equitable arguments or findings regarding his entitlement to setoff the settlements with the auto insurers, and he never asserted that the settlements should be allocated by the trial court amongst all of the injuries and potential causes of action. (R. pp. 18-23; pp. 45-48; pp. 100-101). The sole basis of his motion was that his right to setoff was mandated by § 15-38-50 because the Plaintiffs "sought recovery from all Defendants for the same injury." (R. p. 47). "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." Oaks at Rivers Edge Prop. Ownrs. Ass'n v. Daniel Islnd. Riverside Dvlprs., Op. No. 2014-0023902 (S.C. Ct. App. filed August 2, 1017) (quoting Smith v. Widener, 397 S.C. at 472, 724 S.E.2d at 190 (citing Ellis, 335 S.C. 106, 515 S.E.2d 268). Bauerle *now* seeks to argue both that "all of the injuries and damages" sustained constitute "the same injury," and that the case law governing set-off "does not require that *all* of the injuries must be the same." (Petr. Resp't. Br. 8, 9, 10). Accordingly, he argues that the trial judge "should have engaged in an equitable allocation process." (Petr. Resp't. Br. 9). However, the previously cited case law makes it very clear that § 15-38-50 does not grant courts the discretion to make equitable determinations in its application. Moreover, Bauerle never *requested* any factual or equitable determinations in support of his demand for a statutory setoff as this would conflict with his assertion that only a single injury and cause of action were at issue.

Bauerle now argues that setoff applies even where the settlement and verdict involve different injuries, basing this assertion on language previously used by this Court to describe the policy rationale underlying the courts' equitable jurisdiction to apply a setoff at common law. Specifically, he relies on this Court's explanation that "[th]e reason for allowing such a credit is to

prevent an injured person from obtaining a second recovery of **that part of the amount of damages** sustained which has already been paid to him." Truesdale v. S.C. Hwy. Dep't, 264 S.C. 221, 213 S.E.2d 740 (1975) (emphasis added). However, this language simply refers to the established principle that, whether under common law or § 15-38-50, the reduction only applies to funds paid to settle the same cause of action; i.e., the same damages. Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015). In other words, where multiple causes of action arise out of a single injury, setoff is mandated under § 15-38-50. However, the reduction may only be in the amount paid to settle the same cause of action. For example, a wrongful death verdict cannot be reduced by a settlement for a survival cause of action as these two claims involve compensation for different damages arising out of the same death. Accordingly, as stated above, statutory setoff cases involve either economic losses where damages for the injury are objectively identifiable, or death cases where the settlement must be allocated between survival and wrongful death causes of action and approved by a court.

There is clearly no precedent for a retroactive determination by a court as to not only what injuries and causes of action *could* have been involved in a settlement with a *non-party*, but also as to what portion of the settlement should be apportioned to specific *injuries* for which a wide range of subjective non-economic damages are recoverable. This simply cannot be done, particularly where the settling tortfeasor was clearly alleged to be liable for injuries and damages which were not litigated and for which there is little or no evidence on the record. Accordingly, § 15-38-50 **only applies where there is no dispute that it compensates the same indivisible injury and damages as the verdict**. In contrast, this is a question for the jury if there is a fair difference of opinion as to whose act caused an injury. Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962); Ballou v. Sigma Nu Fraternity, 291 S.C. 140, 147-148, 352 S.E.2d 488, 493 (Ct. App. 1986). Here, the hip and arm injury were clearly caused by the accident but not alleged

against Bauerle. There is also some evidence of other injuries not alleged at trial, including a pancreatic injury resulting in diabetes, hearing loss, renal failure, pneumonia, and a serious brain injury. (R. p. 262, lns. 16-24; p. 343; pp. 352-356; p. 364; p. 419; pp. 499-500).

In any case, Bauerle's reliance on Truesdale, Smalls v. S.C. Dept. of Educ., and Chester v. S.C. Dept. of Public Safety to argue that setoff is mandated pursuant to §15-38-50 where different injuries are involved is misplaced because those cases (1) all involved a single death, **not** multiple injuries; and (2) all involved governmental entities to which the Act does not apply pursuant to S.C. Code Ann. § 15-38-65.[1] Additionally, Bauerle relies on Huck v. Oakland Wings, LLC, Op. No. 550 (S.C. Ct. App. 2017) as further support that setoff is mandated even where a settlement and verdict involve different injuries, relying once again on a reference to the policy rationale articulated in Truesdale. However, the Court of Appeals remanded that case to the trial court to "look at the settlement agreement and determine if the [non-settling Defendant] was entitled to a setoff." Id. Of note, the non-settling Defendant's motion in Huck alleged that the terms of the settlement agreement were a sham designed to avoid a setoff, requesting that the trial court thus perform an equitable re-allocation. Such an allegation or request for relief was never made to the trial court in the present case. Here, it is undisputed that the accident caused injuries which were not alleged against Bauerle. Accordingly, the settlements and verdicts involve claims for different injuries, and setoff was correctly denied pursuant to § 15-38-50.

ii. The verdicts can only be reduced by funds paid to settle the same cause of action.

Without any evidence of what causes of action were settled, Bauerle cannot rely on the alleged foreseeability of his own conduct to impose the full theoretical extent of the other driver's potential liability. Even if this was permissible, this argument relies on the assumption that *all*

[1] Further, Truesdale pre-dated the 1988 enactment of the Act.

injuries and causes of action for which the other driver *could* have been held liable were compensated in the settlement. Bauerle relies on this assumption in arguing that the settlements "extinguished all tort liability for that original tortfeasor and thus settled claims for those same injuries." (Petr. Resp't. Br. 6). In short, Bauerle asserts that the extinguishment of a tortfeasor's liability in a settlement automatically indicates that compensation was paid for any injury or cause of action for which that tortfeasor could have faced *theoretical* liability, regardless of the facts, attendant circumstances, terms of the agreement, or whether the settling parties even *contemplated* a particular theory of recovery. "A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do." Riley, 414 S.C. at 197, 777 S.E.2d at 831 (*quoting* Lard v. AM/FM Ohio, Inc., 901 N.E.2d 1006, 1019 (Ill. App. 2009) (*citing* Muro v. Abel Freight Lns., Inc., 669 N.E.2d 1217 (Ill. App. 1996)).

The possibility that a plaintiff will have to later defend a settling tortfeasor against a non-settling defendant in order to retain funds paid to settle *different* causes of action would have a stifling effect on settlements. This ignores the common-sense principle that "[i]ndeed, parties regularly reach compromise settlements for a variety of reasons, including the vagaries and unpredictability of litigation and the desire for finality." Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). Further, it would violate plaintiffs' right to choose who they sue, forcing them to defend settling tortfeasors in order to retain even a *single* recovery for causes of action not alleged against a non-settling defendant.

Even assuming that the rule in Graham could supplant our State's well-established rules of contract construction and procedural requirements for imposing tort liability, Bauerle's argument rests on the assumption that a settlement must, in the likely absence of terms limiting the scope of liability released, automatically be construed to provide compensation for *all* injuries and causes of action for which the settling tortfeasor could potentially be held liable. A cause of action for

negligent infliction of emotional distress ("bystander liability") seeks damages which are distinct from those recoverable by the injured family member under ordinary negligence. Kinard v. Augusta Sash & Door, 286 S.C. 579, 336 S.E.2d 465 (1985). More specifically, bystander liability claims compensate emotional trauma severe enough to manifest physical symptoms as a result of witnessing serious injury to someone of close relation, a scenario which could theoretically apply in the present case to each family member in the accident. Plaintiffs clearly did not seek to recover such damages from Bauerle, and thus there can be no setoff from funds paid to settle this cause of action. Riley, 414 S.C. 185, 777 S.E.2d 824. It cannot seriously be argued that the trial court had jurisdiction under *any* theory of law to *arbitrarily* allocate the Greens' settlements, particularly without any evidence of their terms, amongst all causes of action and injuries potentially recoverable against the other driver based solely on the record of a trial in which they were not at issue. This would force the Plaintiffs to defend claims they settled more than a decade ago and did **not** bring before the court.

C. **The trial court could not apportion settlement funds amongst potential causes of action and injuries, particularly those which were not even at issue in the present case.**

Bauerle's only argument presented to the trial court was that he was entitled to a *statutory* setoff pursuant to § 15-38-50 as the settlements and verdicts were entirely for the same injury. (R. pp. 45-48; pp. 100-101). This statute contains no language granting courts the discretion to determine the equities involved or to modify "good faith" settlements to bring them within its scope. "Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning." Smith v. Tiffany, Op. No. 27715 (S.C. filed April 26, 2017). Further, Bauerle never made a motion for alternative *equitable* relief, nor did he argue to the trial court that *any* of the settlements be allocated amongst the Greens' different injuries. *See* Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (if trial court does not

explicitly rule on an argument raised, and appellant makes no Rule 59(e) motion for a ruling, the appellate court may not address the issue).

Conceding that the settlement with the auto insurer involved injuries which were not at issue in the trial against him, Bauerle now seeks to assert that the trial court was "required to exercise its equitable authority" and "should have, at the very least, made an equitable determination" as to what portion of the settlements with the at-fault driver were paid for the "same injury" as the verdicts against him. However, such motions are "addressed to the discretion of the court—a discretion which [should not be] arbitrarily or capriciously exercised[.]" Rookard v. Atlanta & Charlotte Air Line Ry., 89 S.C. 371, 376, 71 S.E. 992, 995 (1911); Oaks at Rivers Edge Prop. Owners Ass'n v. Daniel Islnd. Riverside Dvlprs., Op. No. 2014-0023902 (S.C. Ct. App. filed August 2, 1017) (citing Welch v. Epstein, 342 S.C. at 313, 536 S.E.2d at 425). Accordingly, the trial court wasn't *permitted* to arbitrarily allocate the settlement. *Even if* Bauerle had made such a motion, the trial judge was still not "***required*** to exercise its equitable authority" and apportion a settlement involving injuries and damages which had not even been brought before the court.

In cases permitting *reallocation* of a settlement, such as Rutland and Welch, the reviewing court found *no evidence* to support the settling parties' allocation decision thus rendering it, by definition, a sham.[2] Here, Bauerle did not rely on the terms of the settlement in seeking a determination of what was compensated therein. Accordingly, he has never alleged that it was a fraud or sham. Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 734 S.E.2d 142; Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408. However, *even if* it was appropriate for the trial court to arbitrarily grant equitable relief, there is no theory of law or equity that permits a court to retroactively modify

[2] Further distinguishing this case from those in which settlements were modified to permit setoff, Rutland and Welch involved causes of action arising out of a **single death** for which all Defendants shared liability, and there was no dispute that the settlements and verdicts were limited to damages arising out of that one death.

multiple settlement agreements for which there is no evidence of their terms, and which indisputably (1) involve non-parties to the case; (2) compensate injuries not claimed in the case; and (3) involve multiple potential causes of action seeking damages not claimed and defenses not litigated. Such action by a court would represent a **drastic** departure from the standard setoff rules.

> [T]he party seeking departure from the application of standard set-off rules bears the burden of proof and must be 'prepared to justify such [reallocation] as fair, bona fide, and just,' particularly where 'there is an executed contract between [the parties] which is not contested between them but which is sought to be invalidated by third parties.

Riley v. Ford Motor Co., 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015) (quoting In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895).

Not only did Bauerle ***not*** request an allocation, he certainly did not meet his burden of proof in justifying such allocation as bona fide, fair, and just. There is clearly no way for a court to perform an equitable allocation of a settlement without evidence of the claims contained therein. Implicitly recognizing this, Bauerle now argues that "[c]learly, the loss of consortium is related to the spinal paralysis; there is no evidence that the loss of consortium damages as claimed by Ann Green resulted from the original injuries sustained in the accident." (Petr. Resp't. Br. 11). However, there is no evidence supporting damages arising out of the injuries Mrs. Green sustained in the accident **because her physical injuries were not at issue**. This argument represents an attempt to impose a burden onto Mrs. Green to present evidence of claims not made in order to retain compensation received for her own injuries. Such a result would not only deprive her of her verdict against Bauerle, it would deprive her of compensation for damages which were **in no way related** to those claimed in the case against him. Further, imposition of such a burden on plaintiffs would manifestly hinder judicial economy by prolonging and complicating litigation.

Bauerle further claims that the trial judge should have determined the "proportion" of the settlement attributed to each of the injuries sustained. He asserts, without citing any evidence, that

the "vast majority" of Mr. Green's settlement with the auto insurer was paid for the same injuries included in the jury verdict. He bases this assumption on the assertion that the injuries the jury found he caused were "the most severe of the injuries." (Petr. Resp't. Br. 11). In short, he argues that the more severe the injuries he caused, the larger the relief to which he is entitled. There is no justice to be found in this assertion.

Furthermore, the entire $100,000.00 would not even provide full compensation for the arm and hip injuries as supported by evidence incidentally existing in the record of this case. Mr. Green has **permanently lost most of the function in his hand** from the arm injury and **still cannot even make a fist.** (R. p. 221, lns. 16-17). Both the arm and hip injuries required **multiple radiological studies and surgeries.** (R. pp. 352-356). Moreover, surgery to repair the hip resulted in a negligently retained sponge and severe infection. The complications from this injury were severe enough that MUSC paid Mr. Green **an additional $160,000.00**. (R. p. 508). Therefore, assuming the rule in Graham applies as Bauerle argues, the total damages arising from the hip injury exceeded the entire $100,000.00 settlement with the auto insurer. Further, the amount paid for the hip in the auto settlement would have presumably been contemplated and used by MUSC to negotiate a reduced settlement amount. Accordingly, a reduced apportionment of funds to the hip injury at this juncture would inevitably deprive Plaintiffs of compensation paid for this injury in order to reduce Bauerle's liability for entirely different injuries.

As the facts and issues of this case illustrate, setoff cannot be applied by operation of law where multiple acts of negligence resulted in multiple distinct injuries and damages. Even if there was *some* overlap in potential liability for *some* injuries and damages, the record of this case cannot seriously be argued to constitute a complete and accurate reference from which to apportion damages amongst claims not litigated therein. Every other tortfeasor and defendant involved in the extraordinary series of negligent acts and injuries that befell the Greens chose to settle the claims

against them. In so doing, they were able to negotiate in light of the difficult issues arising from the complicated nature of the case, thus mitigating the risk from which Bauerle now seeks relief. It is not the burden of this Court or the catastrophically injured Plaintiffs to unravel these issues and modify the settlements in order to shield him from the jury's full determination of *his* liability.

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling party is worsened by the terms of a settlement, this is a consequence of the refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Riley v. Ford, 414 S.C. at 197, 777 S.E.2d at 831 (*quoting* Lard v. AM/FM Ohio, Inc., 901 N.E.2d 1006, 1019 (Ill. App. 2009) (*citing* Muro v. Abel Freight Lns., 669 N.E.2d 1217 (Ill. App. 1996)).

D. Even if *Graham v. Whitaker* could be used to extend liability to the other driver for all injuries alleged at trial, there is no way of determining what injuries the jury included in the verdicts.

The 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) (citing Hawkins v. Pathology Assocs., 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 v. Widener, 397 S.C. at 472-473. "Despite a defendant's entitlement to setoff, whether at common law or under section 15-38-50, any 'reduction in the judgment must be from a settlement for the same cause of action.'" Riley v. Ford Motor Co., 414 S.C.185, 196, 777 S.E.2d 824, 830 (2015) (quoting Hawkins, 330 S.C. at 113, 498 S.E. 2d at 407). "[T]he facts at trial, not the allegations in a pleading, control liability." Griffin v. Van Norman, 302 S.C. 520, 526, 397 S.E.2d 378 (Ct. App. 1990). Where different conduct supports distinct injuries, there is no risk of

double recovery, and the Plaintiff may recover under both causes of action. Taylor v. Medenica, 324 S.C. 200, 218, 479 S.E.2d 35, 45 (1996); Jones v. Winn-Dixie, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995); Creach v. Sara Lee Corp., 331 S.C. 461, 502 S.E.2d 923 (Ct. App. 1998) (distinguishing causes of action in the context of election of remedies cases).

Even if the rule addressed in Graham could be used to extend automatic liability to the other driver for all of the injuries and causes of action alleged against Bauerle, and, even if this was relevant to whether they were all *compensated* in the auto settlements, Bauerle still could not demonstrate which injuries were included in the *verdicts*. Therefore, he cannot demonstrate that setoff is necessary to prevent the Greens from recovering twice for any injury. More specifically, Bauerle introduced evidence regarding causation as to specific injuries alleged at trial[3], and the verdict form allowed the jury to award damages only for the "injuries" they found **he** caused.[4] He cannot claim *after* trial that *all* damages alleged against him constituted the same single injury for the purpose of setoff. Moreover, Bauerle did **not** seek clarification as to the content of the verdict prior to the jury's dismissal, and he did **not** object when the court declined Plaintiffs' request to allow the jury to specify how much was awarded for specific damages. (R. p. 332). He cannot now shift this self-inflicted burden onto Plaintiffs and the Court. *See* In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895) (party seeking departure from standard set-off rules bears burden of proof). "The

[3] Bauerle testified that the leg paralysis could have resulted from the dislocated hip placing pressure on the sciatic nerve, and did not indicate how long it would take the injury to manifest. (R. p. 291, lns. 4-11). He also introduced evidence that Mr. Green was still able move his legs the night following the cardiac arrest. (R. p. 244). There was also evidence that the bladder injury was not caused by the infarction as Mr. Green was urinating without difficulty over a month later. (R. p. 354). Dr. Cranberg testified that nerve cells die within a few minutes of a severe enough lack of blood supply. (R. p. 481).

[4] Explaining the verdict form to the jury, the judge stated that the first question was whether Bauerle "negligently departed from the standard of care in treating the plaintiff Randall M. Green and that **this negligent departure**" proximately caused him "**injuries.**" (R. p. 336, lns. 5-13) (emphasis added).They were charged that potential damages compensated "all of the **injuries** which are naturally the **result of the alleged wrongful conduct if you found wrongful conduct**." (Supp. R. p. 1, lns.19 – 23; p. 525) (emphasis added). The verdict form did not reveal *which* injuries and damages were included. (R. pp. 28-31).

defendant's counsel made no attempt to find out what the jury intended, and their objections come too late. It was [counsel's] business to clarify and ask for a correction and reformation of the verdict before the jury were [sic] discharged." Rourk v. Selvey, 252 S.C. 25, 164 S.E. 2d 909 (1968). (R. pp. 28-31; pp. 88-91; pp. 248-250; pp. 253-254; pp. 258-260; p. 291, lns. 4-11; p. 336).

At trial, Plaintiffs alleged that the spinal infarction of Mr. Green's lower thoracic cord resulted in (1) paralysis of both legs; (2) loss of feeling from his belly button down; (3) loss of use of his bowels; (4) loss of use of his bladder; and (5) loss of sexual functioning. (R. p. 483, ln. 14-p. 484, lns. 1-17). Additionally, Plaintiffs alleged that Mr. Green suffered five fractured ribs as a result of chest compressions performed during the cardiac arrest. (R. p. 237, lns. 15-24; pp. 248–250). **Each of these injuries was supported by evidence of distinct damages.** (R. pp. 128-132; pp. 134-136; pp. 138-141; pp. 144-145; pp. 151-174; pp. 176-181; pp. 185-192; pp. 370-390; pp. 248-250; pp. 483-484). Furthermore, loss of enjoyment of life is an element of damages so distinct for a paraplegic that it has been held to be a compensable, intangible injury in South Carolina as a matter of law. Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969).

The issue of proximate cause is a question for the jury if there is a fair difference of opinion as to whose act caused the injury. Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962); Ballou v. Sigma Nu Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986). **Here, there was conflicting evidence regarding causation as to specific individual injuries which Plaintiffs alleged were caused by the spinal infarction.** The issue of which injuries resulted from Bauerle's actions was clearly a question for the jury, not the court. (R. pp. 237-239; pp. 242-243; p. 248; pp. 250-251; pp. 276-277; p. 291; pp. 311-312; pp. 316-318; p. 354; pp. 483-484).

As Dr. Cranberg, the only testifying Neurologist, explained, a reduced blood supply to the spinal cord can render it "not working properly but not so severe as to kill it." (R. p. 480). However, he testified that nerve cells die within **a few minutes** of receiving a severe enough lack of blood

supply, such as during a cardiac arrest. (R. p. 481; p. 484). Further, "[w]hen the cells and tissues of the spinal cord die due to insufficient blood supply, that is called an infarct." (R. p. 481). The degree and duration of an ischemic event determines whether an infarction will occur as well as the extent of damage that is done thereby. (R. pp. 480- 483). Further, paraplegia, which he defined as paralysis of the legs[5], is **not** the only injury which *can* result from an infarction; rather, **the specific areas of the spinal cord which are killed determines which body parts and organs are affected**. (R. p. 483). Once the nerve cells die, they do not regenerate, and the functions for which they were responsible are permanently lost. (R. p. 482). **There was <u>no testimony</u> that a spinal infarction will always result in the loss of bowel, bladder, sexual, *and* leg function, or that any of these injuries cannot occur alone.** Further, Dr. Cranberg based his testimony as to what injuries he believed were caused by the cardiac arrest on *when* those injuries manifested. (R. p. 384). Therefore, the fact that parts of Mr. Green's spine suffered an infarction does not mean that *all* of his injuries and damages resulted from the cardiac arrest at GSRMC. (R. p. 483). Further, the Life Care Plan demonstrated that *just* the future medical expense damages for *just* the paralysis, bowel, and bladder injuries equaled $3,668,176.00, an amount which *alone* exceeded the verdict, indicating that the jury did *not* include *all* injuries and damages alleged. (R. p. 389; pp. 481-482).

Bauerle claims that the other driver "was legally liable in tort for the very 'same injuries' on which the jury returned its verdict, specifically the **injuries** resulting from the malpractice." (Petr. Resp't. Br. 6) (emphasis added). This assertion assumes that the injuries alleged against Bauerle were indivisible, ignoring his own testimony that the leg paralysis could have resulted from the dislocated hip. (R. p. 291, lns. 4-11). Further, he introduced evidence that, following the

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[5] Though Bauerle refers to all of the injuries alleged to have resulted from the infarction as "spinal paralysis," there was absolutely no expert testimony presented to contradict Dr. Cranberg's definition of paraplegia as "paralysis of the legs." Nor was there any evidence to contradict his testimony that the different functions which were lost depended on the section of the spinal cord that died.

arrest, Mr. Green was still able to move his legs during transport from GSRMC to MUSC. (R. p. 244).[6] This creates an inference from which the jury could have determined that Bauerle's negligence did not cause the leg paralysis, excluding this injury and its specific damages from the verdict. This is a distinct possibility considering a comparison of the amount of the verdict with the present value of the future expenses for the leg paralysis. Specifically, subtracting future costs for the wheel chair ($153,867.00) and the home modifications required by his immobility ($55,526.00) from the present value of total future medical expenses ($2,515,218.00) equals $2,305,825.00, an amount very close to the jury's $2,300,000.00 verdict for Mr. Green. (R. p. 400). Moreover, the jury could have just as easily found that the bladder injury did not result from the cardiac arrest. Dr. Cranberg testified that a severe lack of blood will kill spinal nerves within a few minutes. (R. p. 482, lns. 7-10). Evidence that Mr. Green was urinating "without difficulty" upon discharge from MUSC **a month later** conflicted with evidence that this injury resulted from the cardiac arrest. (R. p. 354; pp. 480-481). This injury was supported by evidence of distinctive damages to **both** Plaintiffs.[7] For example, the total past and future cost of catheters over the course of 25.65 years totaled $393,214.50. (R. p. 379). This element of damages could be included in the verdicts **only if** the jury found that this injury resulted from the infarction. Assuming for a moment that there was merit in the argument that the settlement with the other driver can be deemed an admission of liability for *all* injuries alleged at trial by virtue of Bauerle's status as a physician,

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[6] Dr. Cranberg testified that cell death occurs within a few minutes without a blood supply. (R. p. 481).

[7] For example, it has a distinct impact on their ability to leave the house for extended periods or engage in social activities, thus uniquely impacting the consortium damages as well as Mr. Green's loss of enjoyment of life. (R. pp. 185-187). As Mr. Green testified, **as a result of this one injury**, they had to rent a hotel room near the Conway courthouse to use during the day for catheterizations during the weeklong trial, returning home to Marion each evening. (R. p. 227). The bladder injury was also supported by evidence of further economic damages, inclusive of the value of Mrs. Green's care in catheterizing him five to six times a day.

there can be no setoff if this injury was not included in the jury verdicts. *See* Hawkins v. Pathology Assocs., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998).

As the verdict form and the instructions to the jury made indisputably clear, it was **their** function to determine whether the Plaintiffs suffered the injuries and damages alleged, as well as for *which* "injuries" and damages Bauerle was liable. There is no legal basis for the assertion that the verdict contains *all* of the "very same injuries" for which the other driver could have *potentially* been held liable.

> Obviously, the absolute power to change or modify the findings of a jury upon an issue of fact properly submitted to them would, when exercised, amount to the substitution of the trial judge's findings for the verdict of the jury and to the abrogation in such cases of the right of trial by jury.

Anderson v. Aetna Cas. & Sur. Co., 175 S.C. 254, 283, 178 S.E. 819, 830 (1934).

The general rule articulated in Graham is **not** applicable to the issues or facts of this case. *Even if* it could be extended to permit a retroactive allocation of the settlement funds to "all injuries and damages claimed against Dr. Bauerle," any injuries sustained prior to his interruption in Mr. Green's care could **not** be included in the verdicts. Moreover, without any way of determining *which* of the injuries alleged were included in the verdicts, there was no way to find that they entirely represented compensation for the same cause of action arising out of the same injury as the settlements with the auto insurer, or that setoff was necessary to prevent a double recovery. Accordingly, setoff was correctly denied. S.C. Code Ann § 15-38-50; Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015); Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012); 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., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998).

E. Even if it was relevant to the issue of setoff, the rule in *Graham v. Whitaker* is not dispositive of the other driver's liability for any specific injuries or causes of action.

In Graham v. Whitaker, the plaintiff fell and suffered a broken hip as a result of the negligence of her ophthalmologist. As a result of the negligent repair of the hip fracture by a surgeon of her choice, she suffered an aggravation of the original injury, necessitating a second surgery to replace the entire hip. Her ophthalmologist asserted that the negligent repair of the hip was an intervening act which broke the causal link, relieving him of liability as a matter of law. Therefore, he argued that the issue of proximate cause should not have been submitted to the jury. This Court stated that "the intervening negligence of a third person will not **excuse** the original wrongdoer if such intervention ought to have been foreseen in the exercise of due care." Graham v. Whitaker, 282 S.C. 393, 399, 321 S.E.2d 40 (1984) (emphasis added) (*citing* Matthews v. Porter, 239 S.C. 620, 124 S.E. (2d) 321 (1962)). This Court further held that intervening negligence could not be used to determine proximate cause as matter of law because of the "**general rule**" that rendered the negligent repair of the hip foreseeable. Therefore, the negligent repair of the original injury did not automatically "excuse" the ophthalmologist's negligence, and "[t]here was no error in submitting the issue of proximate cause to the jury." Graham, 282 S.C. at 399.

This Court did **not** find in Graham that the foreseeability of the negligent hip repair rendered the ophthalmologist *automatically liable* for all of the injuries as a matter of law, nor was it dispositive of whether his negligence proximately caused the original injury. Bauerle's argument is flawed because the failure of a single defense which the other driver *could* have theoretically asserted does not satisfy the burden of proof incumbent on a plaintiff in order to demonstrate liability. As this Court stated, it was "not at liberty to pass upon the veracity of the witnesses and determine this case according to what we think is the weight of the evidence." Id. at 399.

Similarly, in Bessinger v. DeLoach, the Plaintiff was injured by a dentist and later treated by a physician against whom she had made no complaint. The trial court entered a directed verdict in favor of the dentist. In reversing the trial court, this Court noted that the dentist had alleged that the physician had aggravated the original injury. Consistent with the holding in Graham, and relying on the same rule, this Court stated, "[I]f this should become an issue, it would be for the jury." Bessinger v. DeLoach, 230 S.C. 1, 5, 94 S.E.2d 3 (1956).

This Court, in both Graham and Bessinger, made very clear that the issue of liability with regard to the original tortfeasor was still a jury question if more than one inference could be drawn from the evidence. The general rule referenced in those cases does not supplant the need to prove the remaining elements of the cause of action. Negligence requires proof of **both** causation in fact **and** legal cause. Young v. Tidecraft, 270 S.C. 452, 462, 242 S.E.2d 671, 675 (1978). Bauerle's assertion that foreseeability is the only element requisite to a finding of liability ignores these and other fundamental tort principles. Recently, this Court emphasized that distinguishing between cause in fact and legal cause "is not merely an exercise in semantics." Machin v. Carus Corp., 419 S.C. 527, 542, 799 S.E.2d 468 (2017) (*quoting* Snyder v. LTG Lufttechnische GmnH, 955 S.W.2d 252, 256 n.6 (Tenn. 1997). This Court quoted the Tennessee Supreme Court as follows:

> The terms are not interchangeable. Although both cause in fact and proximate, or legal, cause are elements of negligence that the plaintiff must prove, they are very different concepts. Cause in fact refers to the cause and effect relationship between the defendant's tortious conduct and the plaintiff's injury or loss. Thus, cause in fact deals with the "but for" consequences of an act. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct. In contrast, proximate cause, or legal cause, concerns a determination of whether legal liability should be imposed **where cause in fact has been established**. Proximate or legal cause is a policy decision made by the legislature or the courts to **deny** liability for otherwise actionable conduct based on considerations of logic, common sense, policy, [and] precedent. . . .

Machin, 419 S.C. at 542 (*quoting* Snyder v. LTG Lufttechnische GmnH, 955 S.W.2d at 256 n.6. (emphasis added).

An original wrongdoer is **insulated from liability** where an intervening negligent act *and* the injury resulting therefrom should not have been reasonably foreseen or anticipated in light of the attendant circumstances. Oliver v. S.C. Dep't of Hwys. & Public Transp., 309 S.C. 313, 422 S.E.2d 128 (1992). The rule on which Bauerle relies cannot be used to *impose* automatic liability as a matter of law. Proximate cause is a question of fact for the jury unless the evidence is susceptible to only one inference. Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962).

Without evidence of the injuries and causes of action compensated in the settlements with the other driver, there is no way to determine that they were intended to release liability for the cardiac arrest, spinal infarction, or any other specific injuries. The assertion that the existence of a settlement is sufficient to impose liability for all subsequent injuries and damages inflicted by a physician, regardless of the attendant facts and circumstances, is inconsistent with the policy reasons for allowing setoff as well as basic tort principles, logic, and common sense. Imposition of liability in this manner does nothing to further the policy interest of preventing a double recovery. To the contrary, it would entirely exclude from the setoff analysis the issue of whether a plaintiff has actually received compensation for a specific loss.

i. There was conflicting evidence as to additional causes of the cardiac arrest, spinal infarction, and resulting injuries, and the other driver's negligence has not been established as a cause in fact of those injuries.

In order to hold the at-fault driver liable for the injuries alleged against Bauerle, it must be shown that the cardiac arrest, spinal infarction, and resulting injuries would not have occurred "but for" the at-fault driver's negligence. Machin v. Carus, 419 S.C. 527, 799 S.E.2d 468. However, there was **extensive** conflicting evidence presented by both sides as to the physiological cause of the cardiac arrest. The evidence infers that the cardiac arrest could have occurred regardless of the accident, or that it was a potential contributing cause of the accident. These issues were not

litigated, and the fact that the auto insurer accepted at least partial liability for *some* injury or injuries sustained in the accident is not dispositive of its liability for the cardiac arrest or resulting injuries. More importantly, without evidence of the settlement agreement, there is simply no evidence that there was *any* compensation paid for these injuries.

Bauerle relies on Dr. Matza's testimony as dispositive of the issue of whether the cardiac arrest constituted an aggravation of an accident-related injury. Specifically, he argues that "according to Dr. Matza's testimony and the Greens' theory of liability against Dr. Bauerle, the delay in 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." (Petr. Resp't. Br. 8). In other words, he relies on **one of the theories asserted** by the Greens at trial; i.e., that the CT scan delayed surgery to repair the arm, and the additional blood loss sustained during those ten minutes caused the cardiac arrest. (R. p. 365). However, in extensively quoting Dr. Matza, who was the Greens' *orthopedic* expert, Bauerle failed to recognize the existence of extensive conflicting evidence as to whether Mr. Green sustained *any* significant blood loss at all. Bauerle further omitted the following testimony by Dr. Matza:

> Q And, Doctor, if I understand you correctly, is it the fact that he interrupted the treatment sequence or delayed repair of the arm?
>
> A Yes. It did two things. It put the patient in jeopardy of not being monitored, his vital signs not being monitored, his vital signs not being monitored while he was in the CAT scan room and in transit on the way back, so you really had no way of controlling his vital signs. And it certainly did cause a delay in stopping the bleeding.

(R. p. 199, lns. 12-22).

The only finding implicit in the jury's verdict was that Mr. Green's removal from Pre-Op proximately caused the cardiac arrest and spinal infarction. There were two theories presented in support of this finding, either of which could have sustained the verdict; (1) that this delayed the surgery to repair the arm laceration, resulting in continued blood loss and a cardiac arrest; and/or

(2) that this interrupted ongoing monitoring by those who were thus far controlling his vital signs and who could provide immediate resuscitation and prevent the arrest, regardless of its physiological cause. The second theory was supported by the Green's *cardio thoracic* expert, Dr. Edd Chariker, who testified that, with more than 51% certainty, Dr. Peters, the anesthesiologist who was paged to the ER and was able to reverse the cardiac arrest after it had begun, would have been able to prevent it altogether if Mr. Green had remained in Pre-Op under his care.[8] (P. 463; p. 295, ln. 1-3). This theory was further supported by evidence that Mr. Green had been experiencing episodes of chest pain, cardiac arrhythmia and hypotension throughout the previous two hours, during which time his vital signs were monitored and timely interventions had thus far prevented his heart from stopping. (R. p. 344; p. 458, lns. 6-18). Bauerle presented expert testimony contradicting the second theory, asserting that it is better to handle cardiac function in the ER because they have more "man power" than the OR. (R. p. 269, ln. 21- p. 270, ln. 2). It would be disingenuous to deny that this issue was disputed.

The *second* theory was vitally important to the Green's case as there was **extensive** conflicting evidence as to whether Mr. Green had *any* significant bleeding in the prior two hours. In relying entirely on Dr. Matza's opinion that Mr. Green had lost a "sizeable amount of blood," Bauerle failed to reveal the expressly stated basis for that opinion, much less the conflicting expert and witness testimony *he* introduced to contradict that basis. More specifically, Dr. Matza testified that he based his estimation of the amount of blood lost on a comparison of the blood count taken when Mr. Green first arrived at the hospital with that taken at the time of the arrest, indicating that it had dropped by 24 points. Accordingly, Dr. Matza stated that "if you take that difference of 24 points, you're talking about eight units of blood that was lost. That is a sizeable amount of blood.

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[8] Bauerle conceded that Dr. Peters wasn't present in the ER and unable to participate in the code until "further into the resuscitation process." (R. p. 294, ln. 23 – p. 295, ln. 5).

So, that was the cause." (R. pp. 197-198). However, Bauerle introduced testimony that there was a clot in the tube of blood taken at the time of the arrest, so that it was not an accurate measure of how much, if any, blood had been lost. (R. p. 255). Plaintiffs' expert, Dr. Chariker, conceded that this was true. (R. p. 460, ln.4). Dr. Lintz stated in the medical records regarding the blood count that "the lab was unsure if this was normal as there was a clot in the tube." (R. p. 122, lns. 19-20). Dr. Nicholson, the on-call trauma surgeon, testified that

> There was no active blood loss on the clinical exam. In reviewing all the studies, I did not see any source of blood loss in the chest, abdomen, or pelvis. There was a small amount of blood in the socket where the femoral head had been displaced from the socket in the hip but there was no intra-abdominal blood and **there was no sign of any external blood loss.**

(R. p. 233, lns. 13-20) (emphasis added).

The *second* theory was also vital to the Green's case because it would be difficult to prove that the CT scan delayed the arm surgery, or that any delay caused enough blood loss to stop Mr. Green's heart. As his vital signs were not being monitored while he was in CT, there was no documentation in the records as to whether there was any bleeding, and no way to prove the delay resulted in *any* blood loss. Dr. Lintz's notes indicate that he could not observe any gross bleeding from the arm during the code. (R. p. 122, ln. 25- p. 123, ln. 1). Moreover, Dr. Matza testified that the "vital signs have to be stable before you do any procedures on people," and it is elementary that "you don't perform procedures on people that aren't stable." (R. p. 198, lns. 18-22). Dr. Cozart confirmed that anesthesia would have further depressed heart function. (R. p. 268, ln. 24). As the crux of the Green's case against Bauerle was that Mr. Green was **not** stable when he was removed from Pre-Op, this created a significant issue with the *first* theory as it inferred that the arm surgery would not have occurred anyway during the time he was away for the CT scan. Further, Dr. Cozart testified that he called the operating team right at 2:00 p.m., at the same time Mr. Green was being taken *to* Pre-Op, and that it "usually" takes thirty minutes for everyone to arrive. (R. p. 266, lns.

7-25). Dr. Cozart was not in Pre-Op and opined that he was probably still putting on his scrubs when Bauerle arrived at 2:15 p.m. (R. p. 279, lns. 10-21; p. 419). Mr. Green's heart stopped sometime prior to 2:25 p.m., at which time he was placed back on a heart monitor which revealed no pulse. (R. p. 365).

The question of why Mr. Green suffered a cardiac arrest remains unanswered, and there was no consensus amongst the doctors treating him or the experts who studied his case. (R. pp. 241–242; p. 344; p. 441; p. 448). He was having chest pain and abnormal EKGs on arrival at GSRMC, and neither the details of *how* the car accident occurred, nor the reasons for payments made by Mr. Green's own insurer, were in evidence in this case.[9] (R. pp. 343-344). Additionally, he suffered a second arrest at MUSC resulting in exploratory surgery which also failed to reveal a cause. (R. p. 352). Dr. Nicholson, one of Mr. Green's treating doctors, testified that, "[o]rdinarily if you go into shock and if you lose blood, your pulse rate will go up. In this particular case, his pulse went down." (R. p. 241, lns. 3-5). He added that, based on "[a]ll the studies he had on admission, there was no sign of any significant internal blood loss." (R. p. 242, lns. 7-9). Dr. Chariker conceded that there were "so many" potential factors, and that there was "no way" to determine any one reason for his instability. (R. p. 465).

While Plaintiffs theorized that massive blood loss from the arm caused the cardiac arrest, **every single fact witness examined on this issue testified to the contrary**, including Dr. Cozart,

[9] The paramedics noted that the Greens' truck was t-boned. (R. p. 357). As an illustration of the inequity of determining liability as a matter of law, the record of the trial against Bauerle contains no evidence has to what issues or defenses were settled or asserted by the other driver. Thus, Plaintiffs can't prove the existence of claims that Mr. Green's actions also contributed the accident, creating an inference that a medical emergency was a potential cause. The paramedics indicated that his chief complaint at the scene was severe abdominal pain, a commonly known symptom of a heart attack. (R. p. 357). This pain had moved into his chest prior to his arrival at GSRMC, and studies indicated no internal injuries. (R. p. 361). An abnormal EKG and elevated liver enzymes on arrival in the ER, as well as the notation that there was no "acute" heart ischemia and that Mr. Green had admitted to smoking and drinking alcohol regularly provides *some* evidence inferring that the cardiac issue existed prior to the accident. (R. p. 119).

the surgeon who operated on it.[10] In fact, he testified that he had seen accidents where people had entire legs cut off that were not bleeding. (R. p. 284, lns. 20-24). Further, evidence that there was a clot in the tube created an inference that expert testimony on the amount of blood lost was based on unreliable lab results. If more than one reasonable inference can be drawn from the evidence, it is a question for the jury, not a matter of law for the court. Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962). Despite Bauerle's assertion that the rule in Graham can be extended to determine the liability of a non-party to the suit *thirteen* years after the alleged tort, there remains unanswered questions of fact for which there is conflicting evidence and unproven elements of causation. "The law rather forbids [the] court assuming to take upon itself the powers, duties, rights, and privileges of a jury." Anderson v. Aetna Cas. & Sur. Co., 175 S.C. 254, 282, 178 S.E. 819, 829 (1934). To extend the rule, as Bauerle suggests, to impose automatic liability on a non-party for *all* injuries sustained, would constitute an egregious violation of the non-party's rights inherent in, and protected by, the procedural requirements and processes forming the very foundation of our justice system. Further, it would deprive the Plaintiffs of compensation received from a collateral source, forcing them to defend and litigate issues which have long been amicably resolved, violating their well-established right to choose their Defendant.

ii. Even if the other driver's negligence had been established as a cause in fact of the cardiac arrest, spinal infarction, and resulting injuries, Bauerle's intervention in Mr. Green's care and the resulting injuries were not foreseeable.

In Graham, this Court stated,

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[10] Dr. Nicholson stated, "I didn't see any bleeding." (R. p. 252, ln. 8). Dr. Lintz testified that blood loss was "[n]ot a major concern," and that arterial bleeding is "pretty hard to miss." (R. p. 441, lns. 6-10, 20-21; p. 448, lns.1-19). Dr. Cozart testified that the arteries in his arm were not bleeding, though some small veins that were "oozing a little bit." (R. p. 264, lns. 14-17). He, as well as other experts, explained that an artery contracts and spasms shut when it is cut, "very rarely" bleeding. (R. p. 258; p. 263, lns.11-20; p. 312, lns. 11-18). Experts for **both** sides testified that there was a six to eight hour window to repair the arm. (R. p. 235, lns. 10-16; p. 462, lns. 11-21).

> It has been held in South Carolina that the negligence of an **attending** physician is reasonably foreseeable. 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.

Graham v. Whitaker, 282 S.C. 393, 399, 321 S.E.2d 40 (1984) (emphasis added). Here, Bauerle's conduct was not foreseeable pursuant to the "general" rule in Graham which he seeks to apply as a bright-line test of liability. Even assuming for a moment that the driver's liability for all injuries alleged against Bauerle *had* been established, the rule on which Bauerle relies very clearly pertains to the negligent aggravation of an injury in the treatment of that injury. This is *generally* a reasonably foreseeable occurrence as recognized by our courts. However, it is not reasonably foreseeable that a non-treating physician will *unilaterally* intervene in a case and stop life-saving treatment and monitoring being carried out by the patient's actual attending physicians, particularly against their protest, inflicting *additional* new and catastrophic injuries.

> The test by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent conduct of another is whether the intervening **act** *and* **the injury** resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them **in light of the attendant circumstances.**

Bishop v. S.C. Dept. of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78 (1998) (*citing* Oliver v. S.C. Dep't of Hwys. & Public Transp., 309 S.C. 313, 422 S.E.2d 128 (1992); Locklear v. Southeastern Stages, 193 S.C. 309, 8 S.E.2d 321 (1940)).

The "general" rule in Graham is not applicable to the attendant facts and circumstances of the present case. In other words, Bauerle was not negligent in his *treatment* of any injury for which the Plaintiffs had selected him, and, in fact, *no one* selected him to treat *any injury* at the time he intervened. Rather, he was negligent in *stopping* the treatment of an extremely unstable patient in order to *evaluate* whether it would even be appropriate for him to provide supplemental *non-emergent* treatment. (R. p. 217, lns. 1-2). In doing so, he caused catastrophic injuries, which were **not** mere aggravations of the non-emergent hip and arm injuries. This is **not** a scenario described

by the rule in Graham, and **not** a scenario which could have been reasonably foreseen or anticipated.

Specifically, the hip had two injuries: a fracture and dislocation. As for the fracture, Bauerle testified that Mr. Green would need surgery to repair it, but that he "would not have" performed that surgery. (R. p. 301, ln. 19). In fact, he testified that "nobody at the hospital, period, did that type of surgery." (R. p. 301, lns. 22-23). As for the dislocation, the hip had already been reduced "without difficulty" by Dr. Lintz. Bauerle testified that the CT scan was performed to see if there were small fragments in the hip joint that could potentially result in an "increased incidence of developing arthritis." (R. p. 305, lns.15-16). Even if there were fragments in the hip, it was "absolutely not urgent, emergent." (R. p. 217, lns. 1-2).

> The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm." Restatement (Second) of Torts § 435(2) (1965).

Young v. Tidecraft, 270 S.C. 452, 465, 242 S.E.2d 671 (1978).

It is highly extraordinary that, as a stable admission with non-life-threatening injuries, Mr. Green would suffer a cardiac arrest hours later, leaving him with life-altering catastrophic injuries. It was undisputed that there was a six to eight hour window to repair the arm, and multiple experts explained that, with an arm injury such as his, the arteries "very rarely" bleed. (R. p. 235, lns. 10-16; p. 258; p. 263, lns.11-20; p. 312, lns. 11-18; p. 462, lns. 11-21). Bauerle conceded that, once the hip was reduced, there was no orthopedic emergency, and that the worst case *potential* scenario was an increased chance of developing arthritis. (R. 302, lns. 18-22).

Further, it was highly extraordinary that a non-treating physician would make a decision to halt a treatment course "without even seeing the patient," ignore an attending physician's warning, *and* remove the patient from another's care without even checking the medical chart or

vital signs. Bauerle conceded that you "obviously" could not monitor blood pressure while a patient was in CT scan. (R. p. 297, lns. 1-4). He clearly appreciated the dangerous nature of his conduct, and public policy requires that the nature of a tortfeasor's wrongdoing be considered in analyzing the extent of his or her liability. *See* 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. Tidecraft, 270 S.C. 452, 242 S.E.2d 671 (1978). In Young v. Tidecraft, this Court determined that the original tortfeasor was not liable for the consequences of a third party's conduct where the third party was aware that his conduct was "inherently dangerous" and "not advisable." Id. at 460-461, 242 S.E.2d at 676. Accordingly, the third party's actions were "highly improbable," thus constituting the sole proximate cause of the resulting death as a matter of law. Id. at 460-461, 242 S.E.2d at 675.

Here, experts for both sides testified that it is the responsibility of the physician to know the condition of a patient before issuing orders. (R. pp. 307-308; p. 322; p. 345; p. 471, lns. 5-11). Bauerle conceded that he was aware of the danger involved in interrupting the treatment of a patient in Mr. Green's condition as his own report indicated that he had him "urgently" sent over to CT scan. (R. p. 341). He further admitted that he would not have done so if he had been aware of his vital signs. (R. p. 308, lns. 18-22). Nursing notes indicate that, at 2:15 p.m., Mr. Green had a heart rate of 135 and blood pressure of 72/56, and that **Bauerle was at bedside.** (R. p. 365; p.216, lns. 6-21). "[N]egligent conduct with full realization of the danger may properly be considered highly extraordinary." Id. at 465 (citing 13 Cal. Rptr. at 525, 362 P. (2d) at 349).

Bauerle's **own** expert conceded that there was "no question" that he should have looked at the patient's medical chart and vital signs. (R. p.323). Bauerle testified that "you are stable until

somebody tells me otherwise," but he conceded Dr. Lintz's warning, stating that "[h]e knew I was adamant about getting the CAT scan." (R. p. 293, lns. 13-20; p. 300, lns. 12-13). He further stated, "*I* had no disagreement. I knew exactly what needed to be done. It's what I did." (R. p. 291, lns. 19-20). Despite being warned, Bauerle testified that he *still* did **not** check the medical chart *or* look up at the vital signs monitor before issuing that order. (R. p. 307). Further, he conceded that he did **not** speak to Drs. Lintz or Nicholson after he arrived. (R. p. 308, lns. 6-17). Dr. Cozart testified that he did **not** speak to Bauerle, he was **not** in Pre-Op when Bauerle arrived, and he did **not** know about the CT scan until later (R. p. 279; p. 321). Expert testimony indicated that

> [t]here were two possibilities. Either Dr. Bauerle looked at those vital signs and sent the patient to CT, which would be negligence; or either he didn't look at the vital signs and sent the patient to CT. That would be negligence. So, it's simply a dilemma.

(R. p. 471, lns. 5-11). Dr. Chariker further pointed out that he knew Mr. Green was unstable based on his vital signs as well as "any number of things" and "an overall impression of having seen thousands of patients who are unstable." (R. p. 460, lns. 5-7). Similar to the facts in Tidecraft, Bauerle realized the "inherently dangerous" nature of his decision but still drastically deviated from the standard of care. (R. p. 456, lns 4-10).

Also similar to the facts in Tidecraft, it is common knowledge in the trade that removing a patient from Pre-Op without knowing his condition is not advisable. Bauerle conceded that he was "adamant" before he even arrived at the hospital, and expert testimony pointed out that this was "a decision being made without even seeing the patient." (R. p. 470, lns. 21-22). In fact, Bauerle's **own** expert testified that the old surgical adage "never argue with the doctor looking at the patient" was applicable to the exchange with Dr. Lintz. (R. p. 324, lns. 20-25). Dr. Chariker testified that

> [w]ith those vital signs, we are basically looking at a man who is on the verge of a cardiac arrest, and to send him anywhere other than the operating room, I think was a **dramatic** deviation from the standard of care.

(R. p. 459, lns. 459) (emphasis added). Bauerle *and* his own experts conceded that a patient in Mr. Green's condition should not have been removed from Pre-Op. (R. p. 281, lns. 3-7; p. 365; p. 323). "This is not a case where ignorance on the part of the intervening third party led to the creation of a highly dangerous condition, but one where the risk was unleashed with full realization of the dangerous consequences." Id. at 465.

Finally, this Court found in Tidecraft that the only reasonable inference to be drawn from the evidence was that the death would not have occurred in the natural course as a result of the original tortfeasor's negligence. Similarly, Dr. Chariker testified that, but for Bauerle's negligence, the cardiac arrest would not have occurred, and the jury's verdict was dependent on this finding. Further, neither the treating doctors nor the experts who reviewed the case could agree on any *additional* reasons as to *why* it occurred, and, in light of conflicting theories and evidence, Plaintiffs conceded there were too many factors to possibly determine any one cause. Therefore, it cannot seriously be contended that *either* Bauerle's actions *or* the cardiac arrest was a foreseeable consequence of the other driver's negligence. (R. p. 199; p. 308; pp. 324-325; p. 456; pp. 459-460; p. 474).

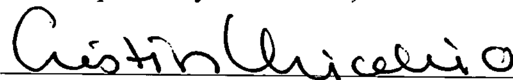
CONCLUSION

As the holdings in Riley, Rutland, Smith, Welch, Smalls, and Hawkins exhaustively demonstrate, *even where* a case involves only a single indivisible injury such as a death or objective economic loss, if a settlement and verdict do not compensate the same damages arising out of the same injury, setoff does not apply. In the present case, *Mrs.* Green's settlement could not involve any of *Mr.* Green's injuries as a matter of law. Further, each one of *Mr.* Green's injuries gave rise to distinctive damages, and it is undisputed that the auto accident resulted in injuries **not** included in the jury verdicts. Without any evidence of what injuries and causes of action were actually compensated in the settlements with the auto insurer, there is no way to demonstrate a risk of

double recovery. In the absence of any allegations that it was a fraud or sham, there is no merit in the argument that the trial court should have arbitrarily manufactured settlement terms allocating the funds amongst *all* of the Greens' injuries and damages, including those not at issue in the medical malpractice trial. Moreover, the verdicts **could not** include **all** of the injuries the Greens sustained. As there was conflicting evidence of individual causation, it isn't even possible to show that they included all of the injuries *alleged.*

As the case law has made profoundly clear, the correct analysis regarding the issue of setoff is **whether the settlement compensates the same damages for the same injury giving rise to the same cause of action as the verdicts.** If there is no way to determine what injury or injuries the jury included in the verdicts, and no evidence of the terms of the settlement agreement, it is simply impossible to determine that they compensate "the same injury" or "the same cause of action." Under such circumstances, there is no identifiable risk of a double recovery. Therefore, setoff should be denied. As the United States Supreme Court has previously recognized, "[t]he law contains no rigid rule against overcompensation [of the plaintiff]. Several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation." McDermott, Inc. v. AmClyde, 511 U.S. 202, 219 (1994). Accordingly, Respondents-Petitioners respectfully request that this Court affirm the trial court and Court of Appeals' holdings denying setoff as to the settlements with the auto insurer.

Respectfully Submitted,



Cristin Uricchio
S.C. Bar No. 79044
Uricchio Law Firm
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412

O.Grady Query
S.C. Bar No. 4610

Elizabeth Brooke Hurt
S.C. Bar No. 100649
Michael W. Sautter
S.C. Bar No. 4944
Query, Sautter, & Associates
147 Wappoo Creek Drive, Suite 202
Charleston, SC 29412

L.Morgan Martin
S.C. Bar No. 3667
L. Morgan Martin, P.A.
1121 Third Avenue
Conway, South Carolina 29526

Counsel for Respondents-Petitioners

Charleston, South Carolina
December 15, 2017

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents-Petitioners, Randall M. Green and Ann Green, certifies that the Respondents-Petitioners' Brief complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

Cristin Uricchio, SC Bar No. 79044
Uricchio Law Firm
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412
(843) 795-9300
Counsel for Respondents-Petitioners

O.Grady Query, SC Bar No. 4610
Elizabeth Brooke Hurt, SC Bar No. 100649
Michael W. Sautter, SC Bar No. 4944
Query, Sautter, and Associates
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina, 29412
(843) 795-9500
Counsel for Respondents-Petitioners

L. Morgan Martin, SC Bar No. 3667
L. Morgan Martin, PA
1121 Third Avenue
Conway, South Carolina, 29526
(843) 248-3177
Counsel for Respondents-Petitioners

Charleston, South Carolina
December 15, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2016-UP-052 (S.C. Ct. App. filed Feb. 3, 2016)

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

v.

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

CERTIFICATE OF SERVICE

I do hereby certify that I have served the **Respondents' Brief of Respondents-Petitioners** on Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. by depositing a true copy in the United States Mail, with first class postage prepaid, on December 15, 2017, addressed to his attorneys of record at the addresses below:

Andrew F. Lindeman
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202

John B. McCutcheon, Jr., Esquire
Lisa A. Thomas, Esquire
Post Office Box 1740
Conway, South Carolina 29528

Date: 12/15/17

Cristin Chiacchio