

THE STATE OF SOUTH CAROLINA
In the 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)

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S.C. SUPREME COURT

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

v.

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

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QUESTIONS PRESENTED

1. Was it error to allocate an unallocated settlement paid jointly to a husband and wife solely for the purpose of setoff, and to make that allocation based on percentages derived by comparing the separate verdicts where different causes of action and injuries were alleged against the settling and non-settling defendants?
2. Was it error to find that the settling and non-settling parties were joint tortfeasors liable for the same single injury, entitling the non-settling party to setoff of all settlement funds where multiple injuries with different damages were alleged to arise out of separate tortious acts occurring at different times, the settlement was unallocated, and the verdicts did not specify the injuries compensated?

STATEMENT OF THE CASE

This action arises from the negligent treatment of Randall M. Green (“Mr. Green”) after he and his wife, Ann Green (“Mrs. Green”), and their son were involved in a severe car accident on April 17, 2004. Mr. and Mrs. Green (“The Greens”) settled with the at-fault driver’s insurer as well as their own underinsured motorist carrier for injuries sustained in the vehicle accident. Subsequently, the Greens filed a lawsuit on May 30, 2005 against Dr. Wayne Bauerle (“Bauerle”), asserting causes of action for medical malpractice and loss of consortium. Grand Strand Regional Medical Center (“GSRMC”) and the ambulance carrier, 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 the action.

On October 15, 2012, the Greens filed a Fourth Amended Complaint 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 in

exchange for a Covenant Not Execute and Covenant Not To Sue. The settlement was not allocated to specific causes of action or between the two Plaintiffs. The Covenant specified that it was not intended as full compensation for all injuries and damages alleged in that lawsuit or limited to the claims pending therein. It further specified that the payment was expressly paid only on behalf of GSRMC, and “shall in no way” affect any action against any other person. 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. Bauerle made a motion for setoff based on S.C. Code Ann. §15-38-50, which was granted as to the entire amounts paid equally to the Greens by GSRMC and CMR. (R. pp. 21-22).

For the purpose of applying the setoff, the court allocated the **unallocated** settlement funds utilizing its **own formula based on percentages** derived by combining the amounts of the Plaintiffs’ separate verdicts. There was **no factual determination** as to the settling parties’ intentions *or* the reasonableness of not allocating the settlement and paying the funds equally to both Plaintiffs. The trial court denied setoff as to the funds paid to the Greens by MUSC, the at-fault driver, and the Green’s own UIM insurer. (R. pp. 20-22).

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.

FACTS

Following a car accident on April 17, 2004, Mr. Green was transported to Grand Strand GSRMC with a right hip fracture and dislocation, and a laceration on his right arm. He arrived in the Emergency Room (“ER”) at 12:00 p.m. and was noted to be cooperative, awake, alert, making eye contact, communicating with normal speech, exhibiting no confusion, and without any signs of face or head trauma. The ER physician, Dr. Lintz, consulted with the on-call orthopedic surgeon, Dr. Bauerle, over the phone regarding the hip injury. (R. p. 434, ln. 17- p. 435, ln. 1; pp. 343-344; p. 357; p. 359; p. 361; p. 485, lns. 13-21; p. 362).

Due to the alleged negligent care Mr. Green received over the next two hours in the emergency room, he developed further injuries and serious 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 at trial indicated that “[s]o many things had gone awry,” there was no way to determine the cause of his increasing instability. (R. p. 465). Due to the decline in his condition, at 2:00 p.m., Mr. Green was urgently taken from the ER to the Pre-Operative area (“Pre-Op”) where he could be closely monitored and an anesthesiologist was present to control his vital signs and perform immediate resuscitative procedures if his condition worsened. (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). Dr. Lintz then called Bauerle again and told him that he felt Mr. Green needed to be in Pre-Op and there was no time for a CT scan of his hip. (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 stated, “I had no disagreement, I knew exactly what needed to be done, it’s what I did.” (R. p. 291, lns. 15-20)

Mr. Green’s cognitive functioning had also markedly declined by the time he was taken to Pre-Op at 2:00 p.m. (R. pp. 281(c), lns. 8–13; p. 419; pp. 423-424). Of significant note, this decline

in his cognitive status occurred sometime after his arrival at GSRMC and before Dr. Bauerle's involvement. (R. p. 117, lns. 12-15; p. 262, lns. 16-22; p. 314, lns. 21-25; p. 364; p. 419; pp. 423-424; p. 427). He would later be diagnosed with a brain injury at MUSC which interferes with his speech and ability to follow commands. (R. p. 354; p. 372). This and the other injuries suffered during the previous two hours at the hospital, while subject to the settlement with GSRMC, **were not at issue in the trial against Bauerle.** (R. p. 215; pp. 248-250, pp. 349-350; pp. 353-354; p. 419; p. 465; pp. 468-469; pp. 483-484).

When Bauerle arrived at the hospital, he went into Pre-Op and removed Mr. Green for the CT scan of his hip, 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 at trial that he would not have removed him had he been aware of his condition. (R. p. 308, lns. 18-2?) 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, the anesthesiologist who could also perform the emergency procedures necessary to prevent 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).

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). Dr. Lintz immediately paged Dr. Peters from Pre-Op before intubating and attempting to resuscitate Mr. Green himself in the emergency room. (R. pp. 121-123; p. 274; p. 346; p. 465, lns. 12-25). Bauerle was present but 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 evening, and the nurse

receiving him from the ambulance noted that he couldn't wiggle his toes, discovering that he was paralyzed. (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. **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.** (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).

At trial, the judge explained the verdict form to the jury, stating that the first question was whether they find that Bauerle "negligently departed from the standard of care in treating the plaintiff Randall M. Green" and that "**this negligent departure**" proximately caused Mr. Green "**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 verdicts for the Greens in the amount of \$2,300,000.00 for Medical Malpractice and \$550,000.00 for Loss of Consortium. The verdict form indicated that Bauerle deviated from the standard of care and that this deviation caused Mr. Green "injuries," but **did not indicate which "injuries" or "actual damages" were included.** (R. p. 28).

The evidence at trial indicated that just the total *future* medical expenses for 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 or from the hip dislocation. (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 of determining whether the jury included either of these injuries and their resulting damages in the malpractice verdict. Of note, Plaintiffs requested that the verdict form permit the jury to indicate how much was being awarded for different damages. However the trial judge declined, and Bauerle did not object. (R. p. 332).

Following the jury's dismissal, Bauerle filed a motion for setoff, claiming that S.C. Code Ann. §15-38-50 entitled him to setoff all settlement funds paid by GSRMC, CMR, the at-fault driver, the Green's own UIM insurer, and MUSC for funds paid to settle a separate suit arising out of severe complications resulting from a negligently retained sponge. The basis of his motion was that the Greens ". . . sought recovery from all Defendants for the same injury." (R. p. 47). The trial court denied the motion as to the at-fault driver, the Greens' UIM insurer, and MUSC. However, the trial court found that both of the verdicts, the entire unallocated settlement with GSRMC, and the

settlement with CMR would be set off because they were for the same “injury” as the jury “verdict.” (R. pp. 20-21; pp. 45-48). There was no factual analysis or explanation for this finding. The trial court’s order further stated that the settlements and verdicts did not involve different causes of action. (R. pp. 20-21). Of note, the only evidence available to the trial judge as to the content of the settlement with GSRMC was the language of the Covenant itself, as **wrongful conduct and injuries alleged only against the hospital were not at issue in the medical malpractice trial against Bauerle.**

For the sole purpose of providing Bauerle the benefit of setoff, the trial court then found that the *unallocated* settlement with GSRMC belonging *equally* to Mr. and Mrs. Green would be divided between them and apportioned between medical malpractice and loss of consortium. The order expressly stated that there existed no authority permitting it to allocate an unallocated settlement, but found that it “logically follows” it would be permitted based upon this Court’s holding in Rutland v. S.C. Dep’t of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012). Bauerle never requested that the settlement be allocated. There were no allegations, arguments, or findings that the terms of the settlement agreement were unreasonable, fraudulent, or a sham. (R. pp. 18-23; pp. 45-47).

In order to effect the allocation, the court used its own formula which did not involve *any* factual determination regarding the Plaintiffs’ respective damages as required by prior Supreme Court holdings. Rather, the court found that Plaintiffs had received “a combined verdict of \$2.85 million against the Defendants.” The court then determined the percentage of this total amount represented by each Plaintiff’s individual verdict, allocating these respective amounts to each Plaintiff. Accordingly, the trial court reduced Mrs. Green’s equal interest in the \$2,000,000.00 settlement to \$385,694.91. The remaining \$1,614,035.09 was allocated to Mr. Green. (R. p. 22).

Finally, each of the Plaintiffs’ verdicts against Bauerle was then reduced by the newly allocated amounts, reducing Mrs. Green’s verdict to \$159,480.53 and Mr. Green’s verdict to

\$665,789.47. (R. pp. 21-22). Accordingly, the trial court's order rendered the effect of obtaining a verdict against Bauerle far more penalizing to Mrs. Green than it was to the actual tortfeasor. The Court of Appeals affirmed the trial court's rulings *in toto* without analysis.

ARGUMENTS

Respondents-Petitioners respectfully request that this Court review and reverse the Court of Appeals Unpublished Opinion 2016-UP-052 filed February 3, 2016. The Court of Appeals erroneously affirmed the trial court's grant of setoff for the funds paid by GSRMC and CMR, allocating an unallocated settlement between Mr. and Mrs. Green utilizing the relative sizes of their individual verdicts for the purpose of setoff. On both issues addressed, the Court of Appeals' Opinion conflicts with existing precedent and creates novel analyses contrary to established principles of South Carolina jurisprudence. In so ruling, the Court of Appeals relies on an unwarranted expansion of statutory law, and creates precedent contrary to legislative intent, prior case law, and judicial economy.

I. IT WAS ERROR TO ALLOCATE AN UNALLOCATED SETTLEMENT PAID JOINTLY TO A HUSBAND AND WIFE SOLELY FOR THE PURPOSE OF SETOFF, AND TO MAKE THAT ALLOCATION BASED ON PERCENTAGES DERIVED BY COMPARING THE SEPARATE VERDICTS WHERE DIFFERENT CAUSES OF ACTION AND INJURIES WERE ALLEGED AGAINST THE SETTLING AND NON-SETTLING DEFENDANTS.

The trial court and Court of Appeals opinions rely on an unwarranted expansion of S.C. Code Ann. §15-38-50, ignore well settled principles of contract construction, and are in direct conflict with this Court's rulings in Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015) and Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012).¹ There exists no precedent allowing a court to

¹ See also Lowery v. Callahan, 210 S.C. 300, 300, 42 S.E.2d 457, 458 (1947); Bowers v. Dept. of Transp., 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004) (a release is a contract subject to rules of contract construction); see also C.A.N. Enters., Inc. v. S.C. Health & Human Services Fin. Comm'n., 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) ("In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties."); Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976) ("Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions."); Superior Auto. Ins. Co. v. Maners, 261

allocate an **unallocated** settlement amongst multiple Plaintiffs without their consent, particularly one paid jointly to, and mutually agreed upon by, a husband and wife. *See Ex Parte Gov't. Employee's Ins. Co. ("GEICO")*, 373 S.C. 132, 644 S.E.2d 699 (2007); *Marsh v. Marsh*, 313 SC 42, 437 SE 2d 34 (1993); *Preer v. Mims*, 323 S.C. 516, 476 S.E.2d 472 (1996) (loss of consortium is an independent claim, not derivative). Further, there exists no precedent for modifying an unallocated good faith settlement by allocating the agreement based on subsequent individual verdicts for the express purpose of allowing a non-settling tortfeasor the benefit of setoff, particularly where multiple non-identical causes of action arising out of multiple injuries were alleged against the various Defendants. *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408(Ct. App. 2000).

In determining that setoff and allocation of the settlement were mandated, the trial court and Court of Appeals relied on case law interpreting S.C. Code Ann. §15-38-50. With respect to settling tortfeasors, this section provides:

When a release or a covenant not to sue or not to enforce judgment is **given in good faith** to one of two or more persons liable in tort **for the same injury** or the same wrongful death:

(1) it does not discharge any of the other tortfeasors from liability **for the injury** or wrongful death unless its terms so provide, but it reduces **the claim** against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater...

S.C. Code Ann. §15-38-50 (emphasis added).

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 Company*, 414

S.C. 257, 263, 199 S.E.2d 719, 722 (1973) (clear unambiguous language capable of legal construction alone governs contract's force and effect).

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, 218, 479 S.E.2d 35, 45 (1996). This Court has previously recognized that the Uniform Contribution Amongst Tortfeasors 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. While defendants might find cases involving multiple Plaintiffs, causes of actions, and injuries riskier to litigate due to the difficulty of proving their own entitlement to setoff, this is presumably a scenario contemplated by the Legislature in drafting statutory language which serves to protect settling parties acting in good faith. S.C. Code Ann. §15-38-50.

S.C. Code Ann. §15-38-50 contains no language authorizing courts to modify allocated settlements if they are given in good faith, and contains no language indicating that an unallocated settlement should be treated any differently. 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. Further, these cases 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. 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.

The analyses in Rutland and Welch were focused on the amounts allocated to the survival cause of action which is unique because there are **only two elements of damages which can be recovered; a single objective economic loss (past medical expenses) and a single subjective non-economic loss (pain and suffering)**. In Rutland, the evidence clearly demonstrated that the decedent died instantaneously. *All* settlement proceeds which had been allocated to the survival action were re-allocated to the wrongful death action because there was no evidence to support *any* damages for pain and suffering *or* medical expenses. In Welch, there was also no evidence to support *any* value for pain and suffering, however, there were medical expenses. Accordingly, all funds allocated to the survival action in excess of the medical expenses were reallocated to the wrongful death claim. In both of these cases, the reallocation was based on *objective* numbers without any attempt to place a subjective value on non-economic damages. The analyses of the subjective non-economic losses were limited simply to whether or not there was *any* evidence those damages existed.

Here, there were multiple injuries giving rise to causes of action for multiple categories of economic and non-economic damages. However, even an analysis of the objective *economic* damages would not demonstrate that the Plaintiffs would receive a double recovery. For example, just the present value of the *future* medical care totaled \$2,515,218.00, an amount which exceeded the total settlement as well as Mr. Green's verdict. (R. pp. 403-404). Further, the jury was charged that Mr. Green could recover the value of his past medical care and that Mrs. Green could recover for "any expenses incurred in the care and treatment of [Mr. Green]." (R. p. 335, ln. 24- p. 336, ln. 2). Even if it was discernable that the jury awarded past medical expenses to either Plaintiff, the Greens were entitled to jointly accept *settlement* funds intended for this element of damages.² It was manifestly

² According to the life care plan's annual value of the care Mrs. Green provides, she had provided approximately \$1,209,600.00 worth of care as of the date of trial. (R. p. 158, lns. 12-18; p. 385). Further, past medical *bills* were *expressly* not presented to the jury at the trial against Bauerle, and could not be included in the jury verdicts. (R. p. 181). Any award

unjust for the court to modify their settlement agreement based on the relative sizes of their individual verdicts against Bauerle, particularly without any concept of how this element of damages impacted this proportionality.

Furthermore, placing a value on the multiple compensable categories of the extraordinary *non-economic* damages suffered by both Plaintiffs as a result of injuries sustained at the hands of various defendants would be a highly subjective task *even if* the trial judge had heard all the evidence pertaining to injuries and damages resulting from the negligence of the settling defendants. However, this does not negate the necessity of a reasonable factual analysis, nor does it justify simply relying on the jury's determination of the total respective damages *Bauerle* caused each Plaintiff. Riley v. Ford, 414 S.C.185, 777 S.E.2d 824. Mr. and Mrs. Green each carried the burden of proving the elements of their individual and distinct damages at trial, and each was entitled to their verdicts independently of the other. Page v. Crisp, 303 S.C. 117, 119, 399 S.E.2d 161, 162 (Ct. App. 1990). As this Court stated in Riley, "where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset." Id. at 196. This simple principle prohibits the exact circular analysis employed in the present case wherein the relative size of each verdict determined the amount by which it would be reduced.

A. It was error, in the absence of any allegations of fraud or unreasonableness, to allocate an unallocated settlement given in good faith to two or more married Plaintiffs in a case involving multiple claims for injuries.

The trial court and Court of Appeals are in direct conflict with this Court's holding in Riley v. Ford, wherein the Illinois Court of Appeals was quoted favorably as follows;

to either Plaintiff for past medical expenses would be limited to discerning the value of Mrs. Green's services as well as the cost of supplies and medications from the Life Care Plan and economic expert's report.

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. 185, 197, 777 S.E.2d 824, 831 (2015) (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))).

In Riley, this Court ruled that the Court of Appeals had erred in reapportioning the settlement proceeds on the sole basis that the settling parties' allocation did not seem to be *proportionately* reasonable. Here, the courts below allocated the settlement between the parties, altering their agreement and dividing all of the funds so that they correlated *proportionately* with the verdicts. (R. p. 22). In footnote 3 of the Riley opinion, this Court noted that the Court of Appeals' decision included no discussion of why the settling parties' allocation was not reasonably based on the evidence or how it ran afoul of the public policy of preventing a double recovery. Similarly, the trial court and Court of Appeals in the present case failed to even address the issue of whether the settlement agreement was unreasonable, much less provide any discussion as to *why*. (R. pp. 18-23).

As was also noted in the Riley opinion, Bauerle **did not even suggest** that the lack of allocation or the Plaintiffs' decision to share equally in the funds was unreasonable. In fact, distinguishing this case even further from Rutland and Welch, his motion **did not request that the settlement be modified**. His sole basis for the motion was that set off was mandated because "the Plaintiffs sought recovery from all Defendants for the same injury." (R. p. 47). The trial court's reason for allocating the settlement was that Bauerle was entitled to a setoff, and the standard setoff rules could not be applied without modifying the settling parties' agreement to correlate with the verdicts.

(R. pp. 18-23). Accordingly, the settlement was allocated **solely because it was deemed necessary to benefit Bauerle**. “Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify appellate reapportionment for the sole purpose of benefitting [the non-settling defendant].” Riley, 414 S.C. at 197.

In the present case, the trial court’s order, affirmed by the Court of Appeals, referred to Rutland in stating that because “[t]he South Carolina Supreme Court has specifically authorized the equitable *reallocation* of settlements in cases where the settling parties had agreed to a certain allocation between claims,” it therefore “. . . logically follows that a court may make an equitable allocation in a case where the settling parties did not even agree to any particular allocation between the claims.” (R. p. 22). This reasoning parallels the Court of Appeals holding in Riley v. Ford, wherein the court stated that the reallocation “makes sense.” Riley at 190. In overruling the Court of Appeals in that case, this Court addressed that same logic before stating;

Essentially, the court of appeals decided it was within the province of a reviewing court to evaluate the reasonableness of not only the dollar amounts but also the relative percentage of settlement proceeds assigned to each claim.

Riley, 414 S.C. at 191.

Here, there was no assertion that the lack of allocation was a fraud or sham. The trial court did not evaluate the reasonableness of the Plaintiffs’ decision *not* to allocate the funds before modifying their settlement agreement to correlate *proportionally* to the same causes of action as the verdicts. There was no consideration of the fact that, as a matter of law, the settling parties had no *reason* to allocate the settlement as this was not a death case. There was no consideration of the fact that GSRMC negotiated the settlement terms while subject to a separate contractual relationship with Bauerle. There was no deference given to the intentions of the settling parties or potential reasons for which a married couple might choose *not* to allocate a settlement between them. There was **no**

analysis of the compelling evidence supporting Mrs. Green's extraordinary damages which, as set forth in further detail below, would have demonstrated that the couple's decision to share equal joint entitlement to the settlement was *extremely* reasonable.

Specifically, Mrs. Green alone provides Mr. Green's 24-hour care, spending very few hours in the day doing things for herself, including sleeping more than a few hours a night. (R. p. 158, lns. 12-18; p. 187, lns. 15-23). Mrs. Green's unwavering dedication to her husband has required the forfeiture of her previously active social life, and expert testimony indicated that she was "supremely tired" and suffering from anxiety, depression, and caregiver role strain. (R. pp. 159-160). Her children tearfully testified that she has done this at the expense of her own health, refusing to leave his side long enough to receive treatment for a heart condition. (R. pp. 129-133; p. 160; p. 185). For the past twelve years, she has catheterized her husband five to six times a day, requiring her to set an alarm to wake up in the middle of the night. (R. p. 186; p. 187, lns. 2-6). She lives with the knowledge that if she fails to do this even once, he will die. (R. p. 156, ln. 14- p. 157, ln. 5; p. 187, lns. 9-14). She manually evacuates his bowels. (R. p. 152, ln. 14- p. 153, ln. 7; p. 188). She physically lifts him, bathes him, prepares his meals, helps him eat, and takes care of all the household chores. (R. p. 160, lns. 14-19; p. 189). She had not left the house for any length of time in the nine years prior to trial, stating "I can't go far. I don't go far. Time is my enemy now." (R. p. 185, lns. 7-8). She testified that she will continue to provide all of her husband's future care, stating "[h]e would do the same for me and I will do it until I die . . . He has taken care of me all these years, it's my turn and I will do it until I can't." (R. p. 192, lns. 1-9).

The trial judge instructed the jury that Mrs. Green was entitled to recover for any expense "...incurred in the care and treatment of [her] spouse because of illness or bodily harm suffered by the spouse." (R. p. 335, ln. 24- p. 336, ln. 2). According to the life care plan's value of the care she

provides annually, she had provided approximately \$1,209,600.00 worth of care as of the date of trial. (R. p. 385; p. 158, lns. 12-18). The total cost of his *future* home care which she will provide is \$2,584,536.00. (R. p. 385). Accordingly, assuming for a moment that the injuries and causes of action which were included in the settlement with GSRMC *were* identical to those tried and compensated in the awards against Bauerle, it certainly would have been reasonable for the settling parties to allocate \$1,000,000.00 to Mrs. Green for her damages. The Greens would have been within their rights to allocate the *majority* of the funds to Mrs. Green, and it *still* could not be seriously argued that this would be unreasonable based on the facts. By definition, the agreement to share the funds jointly and equally in this case could not be a fraud or sham. (R. p. 158; p. 160; p. 167, pp. 185-187; p. 191-192; pp. 335-336; p. 385; p. 495).

Permitting courts to allocate joint property unequally between a husband and wife without their consent for the purpose of setoff implies that the pecuniary interests of third party tortfeasors conveys upon a trial court the authority to alter an agreement consummated by a married couple and force the division and characterization of their joint property. See Ex Parte Gov't. Employee's Ins. Co. ("GEICO"), 373 S.C. 132, 644 S.E.2d 699 (2007); Marsh v. Marsh, 313 SC 42, 437 SE 2d 34 (1993) (personal injury award acquired during a marriage is marital property). Consistent with this Court's ruling in Riley v. Ford, the Greens were well within their rights to negotiate settlement terms which they felt were most favorable to them, particularly those terms personal to their marriage and potentially impacting future inheritance issues and legal rights between them.³ This is not evidence

³ In Marsh, this Court made clear that the family court is not required to divide all marital property by utilizing the same percentage of division but, rather, may award the entire personal injury award to the injured spouse. Similarly, in holding that personal injury proceeds are marital property, this Court's reasoning emphasized the need for the family court to be able to apportion funds paid for specific types of damages, such as future economic losses or personal losses, to the appropriate spouse. Id. at 36. Therefore, the characterization of settlement funds as consideration for either Mr. Green's damages or Mrs. Green's loss of consortium could have far-reaching implications if they were to divorce.

that the lack of allocation was intended to deprive Bauerle of any benefit to which he would have otherwise been entitled.

B. Even if the court had authority to modify the good faith settlement agreement to allocate unallocated funds paid jointly and equally to the husband and wife, the funds should have been allocated equally between the two Plaintiffs.

Allocating an unallocated settlement between multiple Plaintiffs in order to apply a setoff, particularly in a case involving multiple divisible injuries and causes of action, represents a 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, 414 S.C. 185, 777 S.E.2d 824 (2015) (*quoting In re Wells*, 43 S.C. 477, 21 S.E. 334, 337 (1895)). Therefore, the party seeking setoff must first *request* that the settlement agreement be modified, and “such motions are addressed to the discretion of the court- a discretion which should not be arbitrarily or capriciously exercised.” Oaks at Rivers Edge Prop. Owners Ass’n v. Daniel Island Riverside Developers, Op. No. 2014-0023902 (S.C. Ct. App. filed August 2, 1017) (*quoting Welch v. Epstein*, 342 S.C. at 313, 536 S.E.2d at 425-26). 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. The trial court and Court of Appeals relied on Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012), holding “when a settlement is argued to involve two claims . . . the circuit court must make a factual determination of how to allocate the settlement between the two claims.” *Id.* (*citing Rutland v. SC Dept. of Transportation*, 734 SE 2d 142, 400 S.C. 209 (2012)). However, the Smith court, in citing Rutland for this proposition, failed to recognize that this Court had permitted the reallocation amongst the claims in that case after a factual determination revealed that there was **no**

evidence to support a cause of action to which funds had been allocated. *Id.* (See also Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824). Further, this case is distinct from Smith as that case involved only a single identifiable injury alleged against all defendants; i.e., a specific amount of money that was lost. Even if Smith was applicable to the present facts, the trial court in this case did *not* utilize a “factual determination” as required by the rule for which it and the Court of Appeals cited the Smith opinion.

In order to prevail in an action for loss of consortium, Mrs. Green had to prove Bauerle’s liability for her husband's injuries, *as well as* the damages she sustained as a result of those injuries. Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998); *citing Husband and Wife* § 250 (1995). This Court has previously articulated the unique challenge of proving a loss of consortium claim in stating that

[t]he companionship and society of a [spouse] are not articles of commerce. They cannot be weighed or measured. They are not bought and sold, and no expert is competent to testify to their value. The consideration upon which they are bestowed is not pecuniary....

Cook v. Atlantic Coast Ln. R.R., 196 S.C. 230, 243, 13 S.E.2d 1, 6-7 (1941). In other words, **Mr. and Mrs. Green did not carry identical burdens of proof at trial.** Therefore, the *relative proportional* amounts of their separate jury verdicts should not have been used to determine the scope of their respective rights to the shared settlement funds *or* to their individual verdicts. “Each Litigant was entitled to a verdict based on the law and the evidence.” Page v. Crisp, 303 S.C. 117, 119, 399 S.E.2d 161, 162 (Ct. App. 1990). There was not one scintilla of evidence to indicate that the hospital settlement was for the same injury to Mrs. Green as her jury verdict.

The Court reduced Mrs. Green’s equal interest in the \$2,000,000.00 settlement to a 19.3% share, allocating to her only \$385,694.91 of the funds received as consideration to release *all* of her claims against GSRMC. As there was no way to determine which injury or injuries were included in the verdicts, they cannot be relied on as a fair and accurate representation of her total damages.

Moreover, as the evidence of her extensive damages was not even a factor in the trial court's determination, the resulting amount can't, by definition, be considered bona fide, fair, and just. The arbitrary application of the percentage based upon the comparison of the verdicts did not utilize *any* form of factual determination, take into consideration *any* evidence of Plaintiffs' respective injuries and damages, or give *any* weight to the intentions of the settling parties or the reasonableness of the Plaintiffs' equal entitlement to the settlement funds. (R. pp. 18-23). Even if it was possible to demonstrate that the settlement and verdicts were for the same injuries and causes of action, and even if an allocation was permissible, it would have been simpler and more equitable to allocate it **equally** between the two Plaintiffs. The lack of allocation demonstrates a clear intent to share equal rights to the funds, and any division between the husband and wife should have taken this into consideration.

However, the court used an entirely arbitrary formula which was not based on any equitable considerations or factual determination, and which entirely disregarded the intentions of the settling parties as *expressly* set forth in the terms of their contract. This penalized Mrs. Green more than it benefitted Bauerle by depriving her of her larger bargained-for portion of the settlement before her verdict was even reduced. This had the further inequitable result that the setoff, even if justified, unfairly diminished Mr. Green's verdict. The court's allocation resulted in a setoff that reduces Mr. Green's verdict to \$665,789.47, and Mrs. Green's verdict to \$159,480.53. (R. pp. 18-23). Though Plaintiffs deny that any allocation or setoff should have been applied, a more equitable result would be achieved from application of the settlement to the verdicts in equal amounts as bargained for by the parties, reducing each verdict by \$1,000,000.00. This would result in a judgment for Mr. Green in the amount of \$1,300,000.00, allowing him to retain \$1,000,000.00 of his settlement, for a total recovery **equal to his \$2,300,000.00 verdict**. While it would relieve Bauerle of any payment to Mrs. Green, it would permit her to retain her more valuable bargained-for right to an equal amount of the

settlement. This finding, while still reducing Bauerle's liability by funds paid to settle claims for injuries not asserted against him, would have removed *any* risk of a double recovery.

Plaintiffs deny that the court had authority to allocate an unallocated settlement given in good faith, specifically considering the facts of this case. However, the result of deeming the joint payment equally allocated between the two parties to whom it was paid would have been far more equitable because it would have given *some* deference to the terms of the Plaintiffs' agreed upon settlement. The unfortunate result of the present holding was that the sole party who benefitted from the court's allocation of the settlement is also the *only* wrongdoer who refused to settle, holding him accountable for only 28.9% of the damages which the jury had determined *he* caused⁴.

II. IT WAS ERROR TO FIND THAT THE SETTLING AND NON-SETTLING PARTIES WERE JOINT TORTFEASORS LIABLE FOR THE SAME SINGLE INJURY, ENTITLING THE NON-SETTLING PARTY TO SETOFF OF ALL SETTLEMENT FUNDS, WHERE MULTIPLE INJURIES WERE ALLEGED TO ARISE OUT OF SEPARATE TORTIOUS ACTS OCCURRING AT DIFFERENT TIMES, THE SETTLEMENT WAS UNALLOCATED, AND THE VERDICTS DID NOT SPECIFY THE INJURIES COMPENSATED.

The plain language of S.C. Code Ann. §15-38-50 mandates a setoff where there is a settlement with "one of two or more persons liable in tort for the same injury or the same wrongful death." This statute does not apply to liability which is vicarious rather than direct. S.C. Code Ann. §15-38-20(f); Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 670 (Ct. App. 2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003). Section 15-38-50 constitutes a codification of the equitable principles on which the common law right to setoff is based. Riley v. Ford Motor Company, 414 S.C.185, 195, 777 S.E.2d 824, 830 (2015).

⁴ The jury was instructed that the first question to answer 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** from the standard of care" proximately caused Mr. Green "injuries." (R. p. 336, Ins. 5- 13) (emphasis added). They were charged that "[a]ctual or compensatory damages include compensation for all of the injuries which are naturally the **result of the alleged wrongful conduct.**"(Supp. R. p. 1, Ins. 21 – 22; p. 525) (emphasis added).

“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.’” *Id.* at 196. (quoting Hawkins v. Pathology Assocs. Of Greenville, P.A., 330 S.C. 92, 113, 498 S.E. 2d 395, 407 (Ct. App. 1998)). “[T]he facts at trial, not the allegations of a party's pleading, control liability.” Griffin v. Van Norman, 302 S.C. 520, 526, 397 S.E.2d 378 (Ct. App. 1990); Evans v. Creech, 187 S.C. 371, 197 S.E. 365 (1938) (prayer for relief is not the test of the identity of a cause of action). 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.)

Here, Bauerle’s motion was based on the assertion that he was entitled to setoff pursuant to S.C. Code §15-38-50. The only argument he made in support of his motion was that the “Plaintiffs sought recovery from all Defendants for the same injury.” (R. p. 47). The trial court found that the recovery sought constituted a single injury and set off was therefore statutorily mandated.⁵ (R. pp. 20-21). The trial court further found that the settlement “was intended to and did extinguish all claims against [GSRMC],” before allocating all funds to medical malpractice and loss of consortium (R. pp. 20-21).

⁵ The trial court’s order states that “[i]n accordance with Ellis v. Oliver and Smith v. Widener, the settlements with [GSRMC] and [CMR] shall be set-off because they concerned the same injury as the jury verdict against Dr. Bauerle.” (R. pp. 20-21). However, Smith involved only a single identifiable injury (a specific economic loss). In Ellis, the Court of Appeals incorrectly determined that the term “injury” as used in the statute was broad enough to include all damages arising out of a single death. Ellis v. Oliver, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999). The trial court’s reliance on this case to justify aggregating all claims alleged by both Plaintiffs against all Defendants into a single claim for a single injury clearly conflicts with subsequent holdings. In footnote 1 of the Smith opinion, the Court resolved the inconsistency between Ellis and Rutland by expressly noting that Ellis **incorrectly** found that survival and wrongful death actions involved the same claim for the same injury.

The 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. (explaining [i]f the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle”).)

The trial court and the Court of Appeals’ rulings are in direct conflict with S.C. Code Ann. §15-38-50 and the prior Supreme Court rulings of Riley v. Ford Motor Company, 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), Simmons v. Tuomey Regional Medical Center 341 S.C. 325, 33 S.E.2d 312 (2000), Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999), Rourke v. Selvey, 252 S.C. 25, 164 S.E.2d 909 (1968), and Pendleton v. Columbia Ry. Gas & Elec. Co., 133 S.C. 326, 131 S.E. 265 (1926). Additionally, the rulings are in direct conflict with the prior Court of Appeals holdings in Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), *rev’d on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003), Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) and Collins v. Bison Moving & Storage, 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998). As the entire settlement and both verdicts **did not** compensate the same injury and cause of action, setoff should have been denied as a matter of law. S.C. Code Ann. §15-38-50; Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824; Rutland v. S.C. Dep’t of Transp., 400 S.C. 2019, 734 S.E.2d 142.

First, Plaintiffs did not assert a single cause of action against all Defendants. The language of the settlement agreement is supported by evidence at trial that allegations of negligence against the hospital involved injuries arising at different points in time and out of different conduct than the divisible injuries alleged against Bauerle. The verdicts should not have been reduced by amounts paid to settle claims for these injuries. Moreover, any portion of the settlement proceeds paid to release the

hospital's vicarious liability for injuries arising out of Bauerle's deviation from the standard of care, rather than direct liability for ordinary negligence, would not be subject to setoff under §15-38-50. S.C. Code Ann. §15-38-20(f); Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003) (declining to extend the Act's scope to parties only vicariously liable).

Second, the injuries alleged at trial against Bauerle were distinct injuries as a matter of law. As there was conflicting evidence regarding the proximate cause of individual injuries with distinct damages at trial, there was simply no way to determine which "injuries" were included in the verdicts once the jury had been dismissed. "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). The trial court's finding that setoff was mandated because the entire settlement and the verdicts compensated a single cause of action seeking redress for a single indivisible injury was manifest error.

A. Plaintiffs did not assert the same cause of action against all Defendants.

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) (emphasis added) (citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. at 113, 498 S.E.2d at 407). 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. 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." Riley v. Ford, 414 S.C. at 195, 777 S.E.2d at 830.

- 1. The settlement agreement was not limited to a single injury or cause of action, and encompassed claims not litigated.**

A settlement agreement is a contract and subject to rules of contract construction. Lowery v. Callahan, 210 S.C. 300, 300, 42 S.E.2d 457, 458 (1947). "Parties 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)). In determining the intention of a contract,

... resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument. Extrinsic facts cannot, in such cases, give the instrument a different construction from that imported by its terms.

Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973) (citing 17 Am. Jur. (2d), Contracts, § 241). "Indeed, 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). Here, the trial judge's determination of the injuries and causes of action released in the settlement should have been based solely on the perfectly plain and clear language of the agreement.

The agreement states that \$2,000,000.00 was paid for the release of all past and future liability "on account of any claim for personal injury or negligence or any other claim or claims, actions, or causes of action, including medical expenses" against GSRMC, "by reason of the alleged negligence in Mr. Green's treatment, specifically including but not limited to the [presently pending] lawsuit." (R. p. 518). This language directly contradicts the trial court's finding that the settlement did not involve different causes of action. (R. pp. 20-21). Further, the agreement released all liability for the Greens' "injuries, treatment, and damages" as well as "any future claims for damages of any kind" and "potential claims for death." (R. pp. 519-520). This language directly contradicts the trial court's holding that the settlement was entirely for "the same injury." (R. p. 20). Further, it indicates that the

settlement expressly included all damages for **past medical treatment**, while evidence of past medical bills was **expressly** excluded from the jury's determination. (R. p. 181). Where evidence of damages expressly *included* in a settlement are *excluded* from trial, the non-settling defendant has already benefitted from the settlement and is not entitled to setoff funds paid for damages not included in the verdicts. See Oaks at Rivers Edge Prop. Owners' Ass'n v. Daniel Island Riverside Developers, Op. No. 2014-002390 (S.C. Ct. App. Filed August 2, 2017).

2. The settling Defendant was clearly liable for injuries arising at different points in time and out of different conduct than those alleged against the non-settling Defendant.

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 and 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). “[T]he facts at trial, not the allegations of a party's pleading, control liability.” Griffin v. Van Norman, 302 S.C. 520, 526, 397 S.E.2d 378 (Ct. App. 1990).⁶ 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.

⁶ In footnote 2, the trial court based its finding that the settlement and verdicts were for the same cause of action on its assertion that the same allegations of negligence in the Complaint were alleged against all defendants. (R. pp. 20-21). However, “[a]llegations in a Complaint denied in answer are evidence of nothing.” Griffin v. Van Norman, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 64, 518 S.E.2d 301 (Ct. App. 1999) (pleadings not determinative of whether parties are joint tortfeasors). “[T]he facts at trial, not the allegations of a party's pleading, control liability.” Griffin, 302 S.C. at 526. Further, the Complaint repeatedly referenced multiple “injuries,” and specific allegations of conduct were clearly not intended to be attributed to all Defendants. (R. pp. 32-42). The Negligent Hiring, Supervision, and Training claim, which was dismissed, was **expressly** alleged only against GSRMC. (R. p. 40).

At the medical malpractice trial, the Greens alleged that Bauerle was liable for specific injuries resulting from a spinal cord infarction resulting from a cardiac arrest which was proximately caused by Mr. Green's *location away from Pre-Op*. (R. pp. 199-200, ln. 1; pp. 462-463; p. 474, lns. 5-15). There was evidence as to *additional potential* physiological causes of the cardiac arrest; i.e., a pre-existing heart-wave abnormality, neurogenic shock, and blood loss. (R. pp. 241 – 242; p. 344; p. 441; p. 448). Further, there was evidence that Mr. Green suffered a second arrest at MUSC resulting in exploratory surgery which also failed to reveal a cause. (R. p. 352). Plaintiffs conceded that there were “so many” potential factors, and there was “no way” to determine any one reason for his instability at that point in time. (R. p. 465). **However, the jury verdict against Bauerle was not dependent on a finding as to any other potential causes of the cardiac arrest.**

As set forth below, Bauerle was negligent in removing an **unstable** patient from Pre-Op without first taking the appropriate steps to assess his condition. The defense presented expert testimony that it is better to handle cardiac function and diminished blood volume in the ER because they have more “man power” than the OR. (R. p. 269, ln. 21- p. 270, ln. 2.) Plaintiffs asserted that Mr. Green's vital signs could not be monitored and controlled for about fifteen minutes when he was taken to CT Scan. Dr. Richard Matza testified that “there are critical moments in everything we do and this happened to be one of them.” (R. p. 196, lns. 15-23). Dr. Edd Chariker testified that, in Pre-Op, Bauerle was looking at a man “on the verge of a cardiac arrest” and to send him anywhere other than the operating room was a “dramatic deviation from the standard of care.” (R. p. 459). He further testified that if Mr. Green had remained in Pre-Op, “[w]ith greater than 51% certainty, I would be willing to say that the arrest could have been prevented.” (R. p. 463, lns. 12-19). Harvard Neurologist, Dr. Lee Cranberg, testified that the lethal damage to Mr. Green's spinal cord occurred during the

cardiac arrest sustained after Bauerle “came on the scene and interrupted [the treatment] sequence and sent Mr. Green to CAT scan.” (R. p. 488, Ins. 2-14; p. 490, Ins. 1-8; p. 491, Ins. 8-13).

There is no evidence that any agent of GSRMC contributed to Bauerle’s negligent conduct in removing Mr. Green from Pre-Op, nor were any other individuals named in the lawsuit. (R. p. 199, Ins. 1-11). To the contrary, Dr. Lintz repeatedly documented that he had warned Bauerle he did not think Mr. Green should be taken for another CT Scan, and Bauerle conceded he had made it clear to Dr. Lintz that he was “adamant” he was going to do it anyway. (R. p. 120, Ins. 16-25; p.121, Ins. 13-16; p. 300, Ins. 12-17; p. 471). In opening arguments, Plaintiffs’ counsel argued that the “key to this situation” would be evidence of this exchange between Bauerle and Dr. Lintz. (R. p. 110, Ins. 21-25). In fact, the very reason that Plaintiffs alleged Bauerle’s action constituted a deviation in the standard of care was **because** he did so despite Dr. Lintz’s disagreement and without checking the patient’s vital signs or conferring with the other physicians involved. (R. p. 300; pp. 322-325; p. 471; p. 473, In. 19- p. 473, In. 1). Further, there is no dispute that the other doctors, nurses, and staff appropriately took Mr. Green to Pre-Op in a reasonably timely manner, and the employees of GSRMC did not contribute to the injuries and damages alleged under the medical malpractice cause of action, **a point admitted by Bauerle in his answer to a request to admit.**⁷ See Rule 36(b), SCRCP. (R. pp. 1-2; p. 84; pp. 461-464; pp. 501-502). The case against Bauerle depended on the finding that the cardiac arrest and spinal infarction wouldn’t have occurred if he had remained there. (R. pp. 199, Ins. 15-25; p. 200, In. 1; pp. 280-281; p. 479).

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

⁷ See Rule 36(b), SCRCP. (“Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.”).

Rourke v. Selvey, 252 S.C. 25, 28, 164 S.E.2d 909, 910, (1968) (quoting Pendleton v. Columbia Ry., Gas and Elec. Co., 133 S.C. 326, 331, 131 S.E. 265, 267 (1926)).

The claims against GSRMC and Bauerle clearly involved at least some injuries arising out of different negligent acts and at different points in time. Plaintiffs' expert, Dr. Chariker, testified that all of the negligent conduct alleged directly against GSRMC occurred well before he was taken to Pre-Op, at which time organs and tissues had been injured. By the time Bauerle arrived, Mr. Green was in hemorrhagic shock, his blood was too diluted, he was suffering from severe metabolic derangement from overuse of crystalloids, and "his body was underperfused." (R. p. 151, lns. 13-15; p. 238, lns. 2-11; pp. 459-461; p. 465). The trial record contains evidence that, at some point during his time at GSRMC, he suffered a brain injury which still makes speech difficult, renal failure, and aspiration which resulted in pneumonia requiring bronchoscopy. (R. p. 262, lns. 16-24; p. 343; pp. 352-356; p. 364; p. 419). **None of these injuries were alleged to have resulted from the spinal infarction caused by the cardiac arrest resulting from Mr. Green's location away from Pre-Op.** (R. pp. 483-484).

At the close of evidence, the trial judge explained to the jury that their first question was whether they found that Bauerle "negligently departed from the standard of care" and that "**this negligent departure**" proximately caused Mr. Green "injuries." (R. p. 336, lns. 5-13) (emphasis added). They were further 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). Though Plaintiffs requested that the verdict form allow the jury to indicate what value they awarded for specific damages, the trial judge declined, and Bauerle did not object. (R. p. 337). By reducing the subsequent verdicts by the entire amount of the settlement, the trial court deprived the Greens of all funds paid as consideration for

separate injuries arising out of separate negligent conduct which was not at issue in the medical malpractice trial. Accordingly, the trial court and Court of Appeals rulings are in direct conflict with Riley v. Ford, wherein this Court made clear that setoff only applies to funds paid to settle the same cause of action.

3. The non-settling Defendant is not entitled to a setoff of any settlement funds allocated to medical malpractice.

The trial court found that the settlement “was intended to and did release all claims” against GSRMC before apportioning the entire settlement “between Mr. Green’s claim of medical malpractice and Mrs. Green’s claim for loss of consortium.” (R. pp. 20-21). However, a hospital cannot be held directly liable for medical malpractice, except on the basis of the negligent acts of its agents and servants or under the non-delegable duty doctrine. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) (common law prohibition against the corporate practice of medicine in South Carolina); Simmons v. Tuomey Regional Medical Center 341 S.C. 325, 33 S.E.2d 312 (2000). The trial court and Court of Appeals failed to recognize that, for purposes of the UCATA, causes of action for direct negligence and vicarious liability for medical malpractice are distinct. Any portion of the settlement proceeds paid to release GSRMC’s vicarious liability for medical malpractice, rather than direct liability for ordinary negligence, would not be subject to setoff under §15-38-50. S.C. Code Ann. §15-38-20 (f); Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 670 (Ct. App. 2001), *rev’d on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003) (declining to extend the Act’s scope to parties only vicariously liable).

S.C. Code Ann. §15-38-50 applies to *persons* jointly *liable* in tort for the same injury. At the time of settlement, the negligent supervision, hiring, and training cause of action and vicarious liability claims had been dismissed. (R. p. 1). The only direct negligence allegations against GSRMC under the remaining medical malpractice cause of action asserted the failure to train and supervise

Bauerle, the other agents, and employees as to the signs and symptoms of patients such as Mr. Green, as well as the failure to have or to enforce protocols or policies governing the treatment of patients with conditions similar to Mr. Green's. (R. p. 37; p. 38). "A hospital as an entity cannot practice medicine, diagnose an illness, or establish a course of treatment; however, the hospital may be held vicariously liable for the negligence of its employees." McMillian v. Durant, 312 S.C. 200, 439 S.E.2d 829, 833 (1993) (*citing* 41 C.J.S., Hospitals § 21 (1991)). The 6 year statute of repose for medical malpractice in this case expired on April 17, 2010, and Bauerle was the only individual person ever named in the lawsuit. S.C. Code §15-3-545 (A). (R. p. 3). Moreover, Plaintiffs' expert, Dr. Chariker, conceded that "I don't think it's the responsibility of the hospital to train doctors to be physicians or to be surgeons or to treat shock." (R. p. 476, Ins. 3-10). Finally, Bauerle admitted that GSRMC's employees did not cause or contribute to the injuries and damages alleged in the Third Amended Complaint which only contained the causes of action for medical malpractice and loss of consortium. (R. pp. 1-2; p. 37; p. 84; p. 461; pp. 468-469). Accordingly, GSRMC's potential liability to Plaintiffs for medical malpractice could have only been imputed vicariously as a result of its relationship with Bauerle.⁸

Any portion of the settlement paid to relieve the hospital's vicarious liability for injuries and damages caused by Bauerle's malpractice is not subject to setoff pursuant to §15-38-50. Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 670 (Ct. App. 2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003) (declining to expand the definition of joint tortfeasor under §15-38-50 to include vicariously liable parties); *See also* S.C. Code Ann. §15-38-20 (f). Whether GSRMC's liability for a specific injury was direct or vicarious affects whether there is a right to setoff funds paid to settle that claim because a vicariously liable party is not a joint tortfeasor. Vicarious liability

⁸ The terms of the contractual relationship between Bauerle and GSRMC are not within Plaintiffs' knowledge. Bauerle's precise status as an employee, agent, or independent contractor has not been established.

gives rise to indemnity, not contribution or setoff.

In South Carolina, a master or principal only vicariously liable does not have an aliquot or proportional portion he or she ought to pay, *but rather may shift the entire loss* to the servant or agent actively responsible. . .

Id. at 225.

The holding in Andrade, is supported by the clear language of the UCATA as well as this Court's recent analysis in Smith v. Tiffany, Op. No. 27715 (S.C. filed April 26, 2017). In Tiffany, this Court declined to vary from the provisions of the UCATA, recognizing that

[i]ndeed, 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.

Id. The language of §15-38-50 and other sections of the UCATA make clear that it does not apply to cases involving vicarious liability wherein it could impair rights of indemnity. S.C. Code Ann. §15-38-20(f) states that

[t]his chapter does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity **and not contribution**, and the indemnity obligor is **not entitled to contribution** from the obligee **for any portion of his indemnity obligation**.

(emphasis added). “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). The effect in the present case is that Bauerle remains liable for the entire medical malpractice verdict in which he was **the only actively responsible party**. It is important to note that entitlement to contribution and indemnity is often controlled by contractual terms existing between the settling and non-settling defendants in cases involving vicarious liability. It is not the responsibility of innocent Plaintiffs or the courts to speculate as to the ultimate outcome dictated by the terms of GSRMC and Bauerle's relationship, or to shield them from the consequences of their

decisions. In Tiffany, this Court reiterated its holding in Riley v. Ford, stating that "[i]f the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle." Id. (*quoting Riley* at 197, 777 S.E.2d at 831).

The trial court and Court of Appeals' holding that setoff was permissible, as all allegations and causes of action pled constituted the same "negligence," ignores the holding in Andrade, which makes clear that the *basis* of the party's liability for negligence distinguishes the cause of action for the purpose of setoff. Andrade at 225, 546 S.E.2d at 670. Allocating funds paid by a hospital to a medical malpractice cause of action for the purpose of setoff creates a paradox as the only permissible basis for the existence of such liability is vicarious, **prohibiting setoff as a matter of law**. Even if setoff were permissible in the present case, it could only be permissible as to that *portion* of funds paid to settle claims for injuries arising out of negligent acts for which the hospital was *directly* liable. However, there was no evidence that the hospital in any way contributed to Bauerle's malpractice in removing Mr. Green from Pre-Op, and it certainly couldn't be directly liable for the injuries which the jury found resulted from that act.

B. The injuries alleged against Bauerle were distinct injuries as a matter of law.

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) (emphasis added) (citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998)). When a prior settlement involves compensation for a different injury than the one tried to verdict, there is no setoff as a matter of law. Smith, at 472-473, 724 S.E.2d at 191. 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 (Ct. App. 2012); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); Smalls v. S.C. Dep’t of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Ellis v. Oliver, 335 S.C. 106, 473 S.E.2d 793 (Ct. App. 1999); Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 392 (Ct. App. 1986) (no setoff where damages 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). “Joint and several liability arises only when two or more tortfeasors are responsible for a *single* injury.” Collins v. Bisson Moving and Storage, 332 S.C. 290, 504 S.E.2d 247 (Ct. App. 1998).

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 the settlement and verdict do not encompass the same cause of action providing for identical damages arising out of that injury, setoff *still* does not apply. In the present case, *each one* of the multiple injuries sustained gave rise to distinctive damages. Further, Bauerle could not have been found liable for any injuries occurring prior to his involvement in the case, or for any injuries not alleged at trial to result from the infarction (such as a significantly disabling brain injury). Quite simply, the jury verdicts **could not** include **all** of the injuries the Greens sustained. As there was conflicting evidence of individual causation, it is not possible to show that the verdicts even included all of those injuries alleged at trial.

As the previously cited 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, it is simply impossible to determine that it is the same as

that included in the settlement. Under such circumstances, setoff should be denied. Hawkins, 330 S.C. 92, 498 S.E.2d 392 (no setoff where damages different for single injury and no way to determine what jury included in award).

As previously stated, the trial judge explained the verdict form to the jury, stating that the first question was whether the jury finds that Bauerle “. . . negligently departed from the standard of care in treating the plaintiff Randall M. Green and that **this negligent departure**” proximately caused his “**injuries.**” (R. p. 336, lns. 5-13) (emphasis added). The jury was also 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). The present case involved multiple extensive physical and non-physical injuries, many of which were not the subject of the medical malpractice trial against Bauerle. Further, the jury did not reveal which of the injuries that *were* alleged at trial were included in the verdicts. (R. pp. 28-31).

There was clearly no dispute that there were multiple injuries at issue at trial **as the verdict form itself used the term “injuries.”** (R. p. 28). Accordingly, the trial court and Court of Appeals’ finding that the settlements and verdicts were all for the “same injury” was presumably based on Bauerle’s assertion that Plaintiffs *sought* the same recovery from all Defendants. (R. p. 45). Even if this assertion was true, *seeking* the same recovery in the pleadings does not render multiple injuries a single, indivisible injury, particularly where each injury has distinct damages and is subject to separate proof of causation, giving rise to different causes of action. Evans v. Creech, 187 S.C. 371, 197 S.E. 365 (1938) (prayer for relief is not the test of the identity of a cause of action). The trial court allowed Bauerle to introduce evidence regarding causation as to specific injuries alleged at trial⁹, utilize a

⁹ Bauerle testified that the leg paralysis could have resulted from the dislocated hip placing pressure on the sciatic nerve rather than from the infarction. (R. p. 291, lns. 4-11).

verdict form which allowed the jury to award damages only for the “injuries” they found **he** caused, and then claim *after* trial that *all* damages alleged against *all* defendants arose from a single injury for the purpose of setoff. The Court of Appeals’ opinion did not address these inconsistencies. (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 against Bauerle, 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).

“It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant’s negligence.” Mellen v. Lane, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (2008). Legal 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). 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. Ballou v. Sigma Nu Fraternity, 291 S.C. 140, 147-148, 352 S.E.2d 488, 493 (Ct. App. 1986). Here, the issue of which injuries resulted from Bauerle’s actions was a jury question as **there was conflicting evidence as to the proximate cause of individual injuries which Plaintiffs alleged to have been caused by the spinal infarction.** (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 Harvard neurologist, Dr. Lee Cranberg, testified, 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). He explained that, “[w]hen [the cells and tissues of the spinal cord] die due to insufficient blood supply, that is called an infarct.” (R. p. 481). According to Dr. Cranberg, 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 Dr. Cranberg defined as paralysis of the legs, 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). Accordingly, the fact that Mr. Green suffered a spinal infarction does not mean that *all* of his injuries and damages resulted from that infarction. (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 medical malpractice jury verdict, indicating that the jury did *not* include *all* injuries and damages alleged against Bauerle. (R. p. 389; pp. 481-482).

The trial court’s opinion, affirmed by the Court of Appeals, provides no explanation or support for the finding that the entire settlement and verdicts compensated *only* the paralysis injury. (R. p. 20). Not only does this holding ignore extensive evidence of the other injuries alleged to have resulted from the spinal infarction, it ignores Bauerle’s own testimony that the leg paralysis could have resulted from the dislocated hip. (R. p. 291, lns. 4-11). Further, Bauerle introduced evidence that, following the infarction, Mr. Green was still able to move his legs during transport from GSRMC to MUSC. (R. p. 244). Plaintiffs’ introduced evidence that, on arrival at MUSC, the nurse who received

him via stretcher out of the ambulance noted that he was unable to wiggle his toes. (R. p. 254).¹⁰ The conflicting evidence as to the cause of this one injury creates an inference from which the jury could have determined that Bauerle's negligence did not cause this injury, a distinct possibility considering a comparison of the amount of the jury's verdict with the present value of the future medical costs related to just the paralysis. Specifically, subtracting the future cost of the wheel chair (\$153,867.00) and home modifications required by his immobility (\$55,526.00) from the present value of the total future medical care costs (\$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 infarction. 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 the bladder injury resulted from the spinal infarction. (R. p. 354; pp. 480-481). This injury was supported by evidence of distinctive damages to **both** Plaintiffs. 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 specific economic damages, inclusive of the value of Mrs. Green's care in catheterizing him five to six times a day and the total past and future cost of catheters over the course of 25.65 years totaling \$393,214.50. (R. p. 379). This element of damages

¹⁰ Dr. Cranberg testified that cell death occurs within a few minutes without a blood supply. (R. p. 481).

could be included in the verdicts **only if** the jury found that this injury resulted from the infarction. Even if the trial court and Court of Appeals were correct in assuming that *all* injuries alleged against *all* parties were included in the settlement with GSRMC, **there can be no setoff if this injury was not included in the jury verdicts.** See Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998).

Moreover, there is no evidence as to what injuries were included in the settlement with GSRMC, and the Covenant made clear that it was not limited to the injuries and damages pending in the lawsuit. (R. pp. 518-519). Though Plaintiffs are restricted to the record of a trial in which they were not at issue, Dr. Chariker's testimony made clear that Mr. Green suffered injuries to various organs as a result of lack of oxidation, severe acidosis, and metabolic derangement. (R. p. 465). Given the severe decline in his condition over those two hours, it is abundantly clear that Mr. Green suffered *some* injury or injuries after his arrival at the hospital and prior to Bauerle's involvement. Mr. Green's cognitive status markedly declined during the two hours he was at GSRMC prior to Bauerle even arriving; and he suffered a **brain injury which was severe enough that it interferes significantly with his speech and ability to follow commands.**¹¹ Further evidence as to the severity of the brain injury was not presented at the medical malpractice trial as **Plaintiffs did not allege that it was caused by Bauerle.** (R. p. 238; pp. 343-344; pp. 348-356; p. 362; p. 364; pp. 370-384; p. 419; p. 465; p. 468; pp. 479-498, ln. 13; p. 500).

¹¹On arrival at GSRMC, Mr. Green is noted repeatedly to be awake and alert, with no evidence of confusion. (R. p. 343). Prior to his transfer to Pre-Op, a nurse notes that he was "sleeping on and off[,] awakens to verbal stimuli." (R. p.364). In Pre-Op and before Bauerle arrived, it is noted that he "[f]ollows some commands. [Moving all extremities]. Needing constant reminding to leave IV dressings alone, siderails up. Remains on 10L nonrebreather." (R. p. 419). This is the first evidence in the medical records of a head injury. Upon discharge from MUSC a month later, it is noted that he had a closed head injury which made it difficult for him to follow commands. (R. p. 354). Though Plaintiffs have no way of proving it from the record of a trial wherein the injury was not addressed, Mr. Green still has obvious difficulty and frustration with speaking.

As the verdict form and the instructions to the jury made indisputably clear, there were multiple “injuries” at issue in this case. As there was conflicting evidence regarding the proximate cause of individual injuries with distinct damages at trial, it was the jury’s function to determine whether the Plaintiffs suffered the injuries alleged, as well as for *which* “injuries” Bauerle was liable. There was no basis, in law or equity, for the trial court’s findings that the jury returned a verdict for a single injury or that it “disagrees with Plaintiffs claim that they suffered different injuries.” (R. p. 20). “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). The trial court’s retroactive determination, *after the jury had been dismissed*, that the verdict encompassed a single specific injury was manifest error.

“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.”

Id. at 283, 178 S.E. at 830.

It was Bauerle’s burden to demonstrate that the settlement and verdict compensated the same injury, yet he failed to object to the language of the verdict form or seek clarification as to the content of the verdicts prior to the jury’s dismissal. Riley v. Ford, 414 S.C. 185, 777 S.E. 2d 824 (2015) (*citing 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); *See also Rourk v. Selvey*, 252 S.C. 25, 164 S.E. 2d 909 (1968) (“The 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.”) Without any way of determining which injuries were included in the verdicts or settlements, there was no way to find that they entirely represented compensation for the same cause of action arising out of the same injury, or that setoff was necessary

to prevent a double recovery. Accordingly, setoff should have been denied as a matter of law. 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. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). These principles were succinctly summarized by this Court in Smith v. Tiffany, 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).

CONCLUSION

The language of S.C. Code §15-38-50 expressly sets the parameters of its applicability only to settlements with “persons” who are “liable in tort” for the “same injury or the same wrongful death.” Of significant note, the Legislature chose to use singular language, declining to use the terms “injuries” or “deaths.” Cases finding a defendant entitled to setoff under S.C. Code §15-38-50 have made clear that it grants the courts **no discretion** in applying a setoff in those specific cases that fall within the parameters of the statutory language. In other words, setoff only applies where two or more “persons” are **jointly** liable for a single injury or death and seek only to recover the same damages **arising out of that “same injury” or death** from both the settling and non-settling defendants. 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) (citing Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271-72 (Ct. App. 1999); 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); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). 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. Under such circumstances, *there is no need* for a court to exercise discretion in applying §15-38-50. The wording of section 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.

However, as the present case amply illustrates, mechanical application of the setoff statute in cases involving multiple causes of action arising out of multiple distinct injuries to separate Plaintiffs, as well as vicarious liability, would require courts to invade the province of the jury. As there is no way to determine what was included in the settlements or verdicts, there is no way to determine that setoff was necessary to prevent either Plaintiff from receiving a double recovery. 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).

Further, for the sole purpose of applying setoff, and despite the trial court's admission that there was no authority to do so, the present holding expanded current case law to permit the allocation

of an *unallocated* settlement in a non-death case, ignoring the decision between the husband and wife to share the funds equally, and thereby allocating the funds between the separate and distinct Plaintiffs. Finally, the analysis for *applying* that allocation directly contradicted precedent by relying on a “percentages” analysis based on multiple verdicts to multiple Plaintiffs, without any factual determination or consideration of the settling parties’ intentions. The findings and conclusions by the Court of Appeals in affirming the trial court’s order discourages future settlements and goes against judicial economy. On both issues, the Court of Appeals deviated from binding precedent and created a novel analysis. Plaintiffs therefore respectfully request that this Court reverse the Court of Appeals’ rulings as to the settlements with GSRMC and CMR.

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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.



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THE STATE OF SOUTH CAROLINA
In The 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)

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S.C. SUPREME COURT

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-Petitioners' Brief** 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 November 20, 2017, addressed to his attorneys of record at the addresses below:

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