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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2011-CP-26-7403

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

v.

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

RESPONDENTS' BRIEF OF APPELLANTS/RESPONDENTS

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STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

ARGUMENTS

The Greens present numerous arguments challenging the decision of Circuit Court Judge Steven John to grant a set-off of the settlement amounts paid by Grand Strand and Carolinas Medical Response. The Greens' analysis in their Appellant's Brief is rambling, convoluted, often repetitive, and flawed in numerous respects. In order to address those arguments in a coherent and organized manner, Dr. Bauerle will address the following points: (1) whether Judge John erred in granting a set-off under Section 15-38-50; (2) whether the settlements compensated the Greens for the same injury; (3) whether the settlements were for the same causes of action as litigated against Dr. Bauerle; and (4) whether Judge John erred in equitably allocating the settlements between the medical malpractice claim and the loss of consortium claim. Those issues will be addressed in turn below.

I. The trial court was correct in applying Section 15-38-50 and in concluding that the set-off of the settlement amounts received by the Greens was mandatory and by operation of law.

The Greens contend that Judge John erred in concluding that Section 15-38-50 mandated a set-off of the settlement amounts paid by Grand Strand and Carolinas Medical Response. Section 15-38-50(1) 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 ... 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(1). (Emphasis added). In applying Section 15-38-50(1), Judge John found that "the Plaintiffs' settlements with Grand Strand and Carolinas Medical Response were for the same injury, that being Mr. Green's paralysis and the loss of consortium by Mrs. Green, as was litigated against Dr. Bauerle and for which the jury returned its verdict against Dr. Bauerle." (R. 20).

As an initial challenge to the set-off granted by Judge John, the Greens argue that a statutory set-off under Section 15-38-50 was not mandated for the simple reason that the Greens were multiple plaintiffs asserting different causes of action. Randall Green sued for medical malpractice, and Ann Green sued for loss of consortium. The Greens further maintain that Judge John "combined" the medical malpractice and consortium claims and treated them as "a single claim for a single injury." *See*, Greens' Appellants' Brief, p. 15. The Greens' reasoning is flawed in several significant respects.

First, the Greens' reading of Judge John's order is incorrect. Judge John did not "combine" the medical malpractice and consortium claims nor did he treat the causes of action as "a single claim for a single injury." Judge John recognized that the Greens had pursued both medical malpractice and consortium claims at the trial

against Dr. Bauerle and that those claims had been pled and settled against Grand Strand and Carolinas Medical Response. However, he "reject[ed] the Plaintiffs' argument that their settlements were for different causes of action." (R. 20). He likewise rejected the argument that they sought "different damages" against the settling parties. (R. 20).[2]

Second, given the unique nature of a loss of consortium claim, Judge John was correct in concluding that Mr. Green's malpractice claim and Mrs. Green's consortium claim arise from the same injury, that being Mr. Green's physical injury. While South Carolina law recognizes that loss of consortium is an independent action, it is equally well settled that "a loss of consortium claim cannot arise if no tort is committed against the impaired spouse." *Creighton v. Coligny Plaza Limited Partnership*, 334 S.C. 96, 512 S.E.2d 510, 523 (Ct. App. 1999). "In order to prevail in an action for loss of consortium, a plaintiff must prove the defendant's liability for the spouse's injuries, as well as damages to the plaintiff *resulting from the spouse's injury.*" *Id.* (Emphasis added). Therefore, it is the impaired spouse's injury that gives rise to any liability for loss of consortium. In this case, it was the injury to Mr. Green -- specifically his cardiac arrest and

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[2] These latter two issues are addressed in Sections II and III below.

ensuing paralysis -- that resulted in his damages for medical malpractice and also resulted in Mrs. Green's damages for loss of consortium.[3]

Third, the fact that the settlements with Grand Strand and Carolinas Medical Response were with two plaintiffs, husband and wife, does not prohibit a statutory set-off under Section 15-38-50. Likewise, the fact that the verdicts against Dr. Bauerle were in favor of husband and wife plaintiffs does not prohibit a statutory set-off under Section 15-38-50.

Fourth, the fact that the Greens brought separate causes of action for medical malpractice and loss of consortium does not prohibit a statutory set-off under Section 15-38-50. There is substantial case law where the courts have applied a statutory set-off to the separate and related causes of action for wrongful death and survival. *See e.g.*, *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). There is no basis for treating the separate and related causes of action of medical malpractice and loss of consortium any differently.

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[3] In their Appellant's Brief, the Greens write: "[T]he medical malpractice verdict awarded to Mr. Green and the loss of consortium verdict awarded to Mrs. Green are different claims for different injuries as a matter of law." *See*, Greens' Appellant's Brief, p. 17. That is not correct. They are different claims for different *damages*, but they both arise out of the same injury to the impaired spouse. Later in their brief, the Greens write: "[M]edical malpractice and loss of consortium require a different burden of proof, different elements of proof, provide different damages to compensate very distinct injuries, and require different verdicts and judgments." *See*, Greens' Appellant's Brief, p. 30. The Green cite to *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984), for this proposition of law. But *Graham* does not say this. There frankly is no different burden of proof or elements of proof. Nor do the damages arise from "different injuries." In fact, the actual quote from *Graham* states that a loss of consortium

In order to fully understand the flaws in the Greens' reasoning, it is instructive to briefly review the history of set-off under South Carolina law. Section 15-38-50 is part of the South Carolina's Uniform Contribution Among Tortfeasors Act (UCATA) which was enacted by the General Assembly in 1988. Prior to 1988, however, South Carolina courts allowed for a set-off for amounts paid in settlement by settling tortfeasors. In *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967), the South Carolina Supreme Court recognized that "one tortfeasor is entitled to credit for the amount paid by another tortfeasor for a covenant not to sue." 156 S.E.2d at 761. The Supreme Court later explained that "[t]he reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong." *Truesdale v. South Carolina Highway Dept.*, 264 S.C. 221, 213 S.E.2d 740 (1975).

After 1988 and the adoption of the UCATA, including Section 15-38-50, the first case that actually applied the statutory set-off was *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999). In *Ellis*, the plaintiff brought survival and wrongful death claims alleging medical malpractice against Dr. Oliver. The jury returned a verdict in the plaintiff's favor on both claims, awarding $411,102 for the

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claim "result[s] from negligent injuries to the other spouse." 321 S.E.2d at 43. To reiterate, it is the impaired spouse's injury that gives rise to the loss of consortium claim and damages.

survival action and $288,898 for the wrongful death action. The plaintiff had previously received a settlement of $140,000 from a hospital defendant. Dr. Oliver sought a set-off of the settlement by the hospital, which was granted by the trial court. In affirming the trial court, this Court explained that "[a]pplication of the settlement credit was statutorily mandated in this case. Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." 515 S.E.2d at 272.

Earlier, in 1998, this Court decided the case of *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). Although Section 15-38-50 had been adopted and was applicable given that the cause of action arose after the statute's effective date, this Court in *Hawkins* made no mention of a statutory set-off. To the contrary, the *Hawkins* Court noted that the rule on set-off "is not founded on any statute or fixed rule of court." 498 S.E.2d at 406. Moreover, instead of focusing on the "same injury" as in Section 15-38-50, this Court determined that "the reduction in the judgment must be from a settlement for the same cause of action." 498 S.E.2d at 407, *citing Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986). This Court then proceeded to deny a set-off for a settlement from a Georgia wrongful death action upon determining that a Georgia wrongful death action is not the same as a South Carolina wrongful

death action. Therefore, *Hawkins* does not control the application of a statutory set-off under Section 15-38-50.

That is where the Greens err in their analysis. Citing *Hawkins*, the Greens write: "South Carolina courts interpreting this statute [Section 15-38-50] have held that the statutory set-off is applied only when a prior settlement has already provided compensation to the plaintiff on the same claim for the same injury for which the plaintiff later receives a verdict against another tortfeasor." *See*, Greens' Appellant's Brief, p. 12. As noted above, *Hawkins* did not address nor even cite Section 15-38-50. *Hawkins* certainly did not "interpret" Section 15-38-50.

A proper reading of Section 15-38-50 must focus on the "injury" and whether the settling party and the non-settling party are "liable in tort for the same injury." *See*, S.C. Code Ann. § 15-38-50(1). The existence of the same or different causes of action is immaterial. This distinction is well illustrated by the recent case of *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012). In that case, this Court explained that "when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law." 724 S.E.2d at 191. Moreover, "when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law." *Id.* In *Smith*, the plaintiff had asserted causes of action for civil conspiracy, conversion, slander and negligence against the settling party (CitiStreet) and causes of action for civil conspiracy, conversion, slander and

fraud against the non-settling defendants who later sought a statutory set-off. Despite the non-overlap of causes of action in part, this Court found that "the injury [plaintiff] alleged she suffered as a result of tortious conduct of all defendants was the same" and as a result "the trial court was required to grant the request for a set-off [under Section 15-38-50]." 724 S.E.2d at 190.[4]

Moreover, the Greens are also incorrect in their attempt to equate "same injury" as used in Section 15-38-50 with "same damages." In *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), the plaintiff claimed that Section 15-38-50 was inapplicable because the measure of damages in wrongful death and survival claims differ. While acknowledging that the measure of damages differs, this Court explained that the plaintiff "confuses the concept of damages with the meaning of the word injury, as used in the statute." 515 S.E.2d at 272. This Court found that "injury" has a broad construction to include all damages "which result from the joint negligence of the various responsible parties." *Id.* Thus, the "injury" is not synonymous with "damages" but is inclusive of all elements of damages resulting from a particular harm. This conclusion was echoed in *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012), where this Court

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[4] Similarly, in *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008), this Court affirmed a statutory set-off under Section 15-38-50 that had been granted by the trial court. In that case, the plaintiff Vortex argued that "the settlement with Ware [a settling defendant] was based on different causes of action than those is prevailed on against CSMG and the injury caused by CSMG was not the same as that caused by Ware." 662 S.E.2d at 451. This Court rejected those arguments and upheld the set-off.

explained that "when a plaintiff seeks actual and punitive damages in the same claim, both types of damages arise out of the same injury." 724 S.E.2d at 191. The *Smith* Court recognized that damages are awarded for an injury. *Id.* Thus, the same injury may give rise to different elements of damages, including in the present case the damages sought and recovered by Mr. Green in his medical malpractice action and the loss of consortium damages sought and recovered by Mrs. Green in her related consortium action. They are all damages arising from the same injury.

In sum, the Greens' rambling and convoluted argument that Section 15-38-50 is inapplicable fails. Even though this action involves different but related causes of action brought by husband and wife plaintiffs, Judge John was correct to apply Section 15-38-50 and to conclude that the set-off was by operation of law.

II. The trial court was correct in ruling that the Greens' settlement with Grand Strand Regional Medical Center was not for different injuries or damages than the verdicts returned at trial against Dr. Wayne Bauerle.

The Greens also contend that the settlement with Grand Strand compensated them for different injuries than the verdicts awarded at trial against Dr. Bauerle. Judge John was correct in rejecting that argument.[5]

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[5] Note that the Greens do not challenge the set-off for the settlement with Carolinas Medical Response.

Citing to the "Covenant Not to Sue and Covenant Not to Prosecute or Execute Judgment" ("Covenants") executed by the Greens in favor of Grand Strand, the Greens suggest that they released claims for different damages than what was litigated at the Bauerle trial. There is no factual basis for that argument. The $2 million paid in exchange for the Covenants is for "the injuries, treatment, and damages of said Payee as well as any future claims for damages of any kind whatsoever." (R. 505). While the term "Payee" is singular and undefined, the Covenants are given by *both* Randall Green and Ann Green, who are both signatories, and it is clear that "Payee" includes both Greens. Further, the Greens readily admit throughout their brief that Ann Green's claims are extinguished by the settlement with Grand Strand.

In comparison, the verdicts returned by the jury against Dr. Bauerle included all compensable damages as charged by Judge John which the jury concluded had been proven. Those compensable damages awardable to Mr. Green were described in the jury charge as follows:

> Actual or compensatory damages include compensation for all of the injuries which are naturally the result of the alleged wrongful conduct if you found wrongful conduct. They include, and I'm giving you categories, I'm not saying that they exist in this case, that's your job and responsibility to decide but these are categories that you can look at to compensate the plaintiff if you think that is the right and the proper thing to do. Past and present and future pain and suffering. Past, present and future medical expenses, doctor bills, hospital bills, rehabilitation expense, transportation expense in

> connection with the medical treatment, past and present and future loss of enjoyment of life, past and present and future impairment of health or bodily function, past, present and future disability, past and present and future loss of wages or loss of earnings, mental anguish brought about by bodily injury or suffering, depression. Those are all different types of categories.

(R. 334). Judge John also charged the damages recoverable for loss of consortium. (R. 335-336).

The Greens cannot show that their settlement with Grand Strand was for different injuries, let alone different damages. The same injury and the same damages were pled against all Defendants. Moreover, the jury's verdicts at trial included all damages, past, present and future, proven by the Greens, which are no different than the damages included in the settlement with Grand Strand.[6]

The Greens nonetheless argue that the $2 million was paid by Grand Strand in exchange for a hold harmless and indemnification agreement. The only indemnity provision is for the costs of "medical, drug, hospital or other services" as paid by "any private insurance company, Medicare, Medicaid, or any branch of the United States Government." (R. 505). This is no more than protection for Grand Strand from any medical liens that may have existed. The Greens, in fact, agreed

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[6] The Greens have not shown that there were elements of damages recovered in the settlement that were not sought from the jury during the Bauerle trial. Nonetheless, even if that were the case, this Court has previously rejected that very argument. In *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), the plaintiff argued that she had not presented the jury with the medical expenses attributable to the hospital's negligence. This Court rejected that argument finding that the plaintiff was not prevented from presenting to the jury evidence of the full amount of the decedent's medical bills.

that "any such claims or liens will be satisfied out of the proceeds of settlement." (R. 505). Contrary to the representation by the Greens, this does not represent the "assumption of liability" by the Greens which has a value that is not subject to a set-off. The Greens have, in essence, agreed to satisfy medical liens for medical expenses that *they* – not Grand Strand – owed to private insurers or the federal government.

In sum, Judge John was correct in ruling that the settlement with Grand Strand was not for different injuries or damages than the verdicts returned at trial against Dr. Bauerle.

III. The trial court was correct in ruling that the Greens' settlement with Grand Strand Regional Medical Center was not for different causes of action than those litigated against Dr. Wayne Bauerle at trial.

The Greens further contend that the settlement with Grand Strand was for different causes of action than those litigated against Dr. Bauerle at trial. Judge John was also correct in rejecting that argument.[7]

The Greens' argument is convoluted and depends primarily on an interlocutory order granting partial summary judgment prior to the settlement

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[7] The Greens appear to concede that Ann Green's loss of consortium claim that was settled by Grand Strand was the same loss of consortium claim that was tried against Dr. Bauerle. Therefore, Dr. Bauerle is entitled to a set-off for Grand Strand's settlement of the loss of consortium claim.

reached with Grand Strand. Specifically, by Order filed May 1, 2013, Judge Larry Hyman granted partial summary judgment to Grand Strand on the causes of action for vicarious liability and negligent hiring, supervision and training. Nonetheless, Judge Hyman did not dismiss the Greens' negligence cause of action which was the first cause of action alleged in the Fourth Amended Complaint where the very same allegations of negligence were alleged against all Defendants including Grand Strand and Dr. Bauerle. (R. 1-15).

The Greens also go to great lengths in an attempt to portray the Hospital's liability as limited to vicarious liability for the malpractice of Dr. Bauerle. Clearly, the first cause of action, which is the only claim (other than Mrs. Green's loss of consortium claim) that survived the partial summary judgment, is not pled as a vicarious liability claim. Instead, Grand Strand was sued for its direct negligence. (R. 36-39).

Further, applying the Greens' own reasoning, Grand Strand had been granted summary judgment on the vicarious liability claims based upon the expiration of the statute of limitations and statute of repose. Judge Hyman ruled as follows: "Grand Strand cannot be held vicariously liable for the acts or omissions of its independent contractor physicians – or any other independent contractors or employees for that matter – because both the statute of limitations and the statute of repose have expired as to Grand Strand's independent contractors and employees, none of whom have been named in any of the five versions of the

Complaint." (R. 3). To the extent that this ruling was correct, that would be inclusive of any vicarious liability claim attributable to the malpractice of Dr. Bauerle. Judge Hyman recognized that none of Grand Strand's independent contractors had been named as a party-defendant in any version of the Complaint. (R. 3). Implicit in that ruling is that Dr. Bauerle, who was named as a party-defendant, was not an independent contractor for whom Grand Strand could be vicariously liable. Hence, there was no vicarious liability claim pending, even one for Dr. Bauerle's conduct.

Nonetheless, the Greens are also mistaken in their suggestion that a set-off cannot be granted for monies paid in settlement by a party who is vicariously liable. As a procedural point, this argument was not raised in the trial court and cannot be asserted for the first time on appeal. The Greens never argued below that Grand Strand and Dr. Bauerle were not "joint tortfeasors." In addition, this issue was not addressed by Judge John in his order, and the issue was not included in the Greens' subsequent Rule 59(e) motion in order to obtain a ruling from the trial court.[8] Thus, the issue is not preserved for appellate review.

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[8] The Supreme Court and this Court have repeatedly explained that an appellant cannot raise an issue on appeal that was not first raised to *and* decided by the lower court. In *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), *citing I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d

On its merits as well, the argument fails. The Greens rely on this Court's decision in *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), which was never cited to nor addressed by Judge John. The Greens argue that *Andrade* stands for the proposition that a party which is vicariously liable cannot be a joint tortfeasor under the UCATA and thus settlements by such a party are not subject to a set-off under Section 15-38-50. In actuality, in *Andrade*, this Court ruled that a covenant not to sue given to an agent also extinguishes the liability of a principal, which of course is not the issue in the case at bar. *Andrade* did not involve any issues regarding set-off and certainly does not hold that a settlement by a party which is vicariously liable is not subject to a set-off.

At any rate, even after the partial summary judgment was granted by Judge Hyman, Grand Strand remained liable for its direct negligence as pled in the first cause of action.[9] Thus, Grand Strand continued to have liability exposure, which is further evidenced by Grand Strand's willingness to settle for $2 million. That was

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716, 724 (2000). "It is well settled that an appellate court cannot address an issue unless it was raised to, *and ruled upon by,* the trial court." *Id.* (Emphasis in original).

[9] In their Rule 59(e) motion, the Greens acknowledged that, even after the partial summary judgment was granted, Grand Strand remained liable for the negligent failure to have "appropriate policies, procedures and protocols" in place. (R. 94). Dr. Bauerle submits that the remaining liability of Grand Strand was more extensive, but the Greens acknowledge some liability remained. The Greens then argue that there is no "overlapping negligence claims between Dr. Bauerle and Grand Strand." (R. 94). Even if that were true, it would not prohibit a set-off. As discussed at length above, such cases as *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012), have held that overlapping causes of action are unnecessary. What is required is that the "same injury" is alleged to have resulted from the tortious conduct of both the settling and non-settling parties. In the case at bar, that condition is met, and the set-off was proper.

not a gift to the Greens; it is fair to conclude that Grand Strand acknowledged that it continued to have substantial liability. Moreover, a review of the Covenants reflects that Grand Strand settled *all claims* with the Greens and not just the claims that remained after the partial summary judgment was granted. That would be inclusive of all direct and vicarious liability claims, including the negligent hiring and supervision claims.

As a corollary to that point, the settlement with Grand Strand occurred before any appeal rights were extinguished. The Greens still had the right until thirty days *after final judgment* was entered to appeal the grant of partial summary judgment by Judge Hyman,[10] and as stated above, the Greens' settlement with Grand Strand was intended to and did extinguish all claims, direct and vicarious, against Grand Strand.

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[10] The Greens contend that the appeal rights were extinguished by the time the Covenants were executed by the Greens because the thirty days had passed from the filing of Judge Hyman's Order. That is not only incorrect, it is also legally immaterial. The Covenants are undated, but according to the Greens' brief, they were executed on May 31, 2013. *See*, Greens' Appellant's Brief, p. 18. Judge Hyman's Order was filed May 1, 2013, and the deadline to file an *interlocutory* appeal would run thirty days from the date of receipt of written entry of that order. Clearly, those thirty days had not elapsed by May 31, 2013. Nonetheless, it is undisputed that Judge Hyman's Order granted only partial summary judgment, and Grand Strand remained a party-defendant after the entry of that order. Therefore, like the appellant in *Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990), the Greens were entitled "under § 14-3-330(1), to wait until final judgment to appeal the summary judgment ruling against [them]." 393 S.E.2d at 179. Thus, the Green retained the right to appeal until thirty days after final judgment. At the time that the Covenants were executed, no appeal rights had been extinguished.

In sum, Judge John was correct in ruling that the settlement with Grand Strand was not for different causes of action than those litigated against Dr. Bauerle at trial.

IV. The trial court was correct in equitably allocating the settlements between the medical malpractice claim and the loss of consortium claim.

Lastly, the Greens contend that Judge John erred in allocating the settlements between the medical malpractice claim and the loss of consortium claim. Judge John recognized that the settlements between the Greens and Grand Strand and Carolinas Medical Response did not provide for a specific allocation of the settlement amounts between the medical malpractice and loss of consortium claims. Consequently, there was no allocation for the trial court to review and/or apply to effectuate the set-off. Thus, it became necessary for the trial court to determine an equitable allocation between the Greens' claims.

The Greens, however, contend that Judge John lacked the authority to allocate the settlements because the set-off was statutorily mandated under Section 15-38-50. They further argue that the trial court's allocation based upon the ratio established by the jury's verdict was inappropriate or otherwise unfair. Each of these issues will be addressed in turn.

South Carolina law recognizes that a trial court possesses "jurisdiction to set off one judgment against another [which] is equitable in nature and should be

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

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

528 S.E.2d at 688-689.

Nonetheless, the Greens argue that Judge John lacked the authority to allocate the settlements because the set-off was statutorily mandated under Section 15-38-50. There is no case law holding that a court cannot exercise its equitable authority to allocate settlement amounts where the set-off is required under Section 15-38-50. The Greens have certainly cited no such authority. To the contrary, in *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), this Court found that the set-off complied with Section 15-38-50. This Court also affirmed the trial court's equitable reallocation of the $450,000 settlement between the survival action and the wrongful death action. Thus, a set-off under Section 15-38-50 did

not preclude the exercise of equitable authority to reallocate the settlement to effect "fairness and justice." 536 S.E.2d at 426.

The Greens also maintain that Judge John did not have the equitable authority to allocate what were previously unallocated settlement proceeds. The Greens appear to claim that a court has the authority to reallocate settlement proceeds differently than the parties to the settlement had allocated them; however, if the parties fail to allocate at all between two claims, then the court is powerless. Quite frankly, that is illogical.[11] As Judge John recognized, the South Carolina appellate courts have repeatedly authorized the equitable *reallocation* of settlements. *See*, *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); *Rutland v. South Carolina Dept. of Transportation*, 400 S.C. 209, 734 S.E.2d 142 (2012); *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (Ct. App. 2014). Therefore, as Judge John concluded, "it logically follows that a court may make an

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[11] That argument was rejected by the Supreme Court in a related context. In *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995), the Supreme Court addressed whether an underinsured motorist carrier was entitled to a set-off for the amount of the liability insurer's settlement with the plaintiffs. In *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), this Court relied on *Broome* and called it "[a] similar but not exact situation" as the entitlement of a set-off under Section 15-38-50. In *Broome*, the plaintiffs "argued[d] that because the settlement agreement did not provide for allocation of the damages award as between Mr. and Mrs. Broome, the set-off was improper." 461 S.E.2d at 49, n.4. The Supreme Court found that argument to be "without merit" and further explained that "[t]he lack of any allocation cannot be used to recover more than § 37-77-160 permits." *Id.*

equitable *allocation* in a case where the settling parties did not even agree to any particular allocation between them." (R. 22). (Emphasis in original).[12]

In arguing against the equitable allocation of previously unallocated settlement proceeds, the Greens rely primarily on the dissents in *Smith* and *Rutland*. Those arguments, however, have been previously rejected by the majority and do not require revisiting. Moreover, this case does not involve the revision of a prior settlement because the parties to the settlement -- the Greens and Grand Strand -- did not make any allocation between the malpractice claim and the loss of consortium claim; there is no revision or reallocation. Also, unlike in *Riley* or *Rutland*, both claims settled by Grand Strand were actually tried to a jury against Dr. Bauerle. Thus, there is not an allocation between one claim that was tried against the non-settling defendant and one claim that was not.[13] Further, as

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[12] The Greens' reliance on this Court's decision in *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999), is misplaced. That case involved a claim for contribution by a wood chipper retailer against the manufacturer. The retailer sought contribution for its settlement of a loss of consortium claim that had never been brought by the spouse against the retailer. However, the retailer settled the loss of consortium in an unallocated settlement with the injured husband and his wife. This Court did not allow the contribution action to proceed in the absence of an allocated settlement because the Court was unable to "determine whether [retailer] paid more than its pro rata share of liability to [the spouse]." 518 S.E.2d at 311. Unlike *Vermeer*, this case does not involve a contribution action or a determination whether one tortfeasor has paid more than its pro rata share of the common liability. Consequently, the Greens' suggestion that Judge John should have considered whether Dr. Bauerle has paid more than his pro rata share is absurd. Dr. Bauerle is not seeking contribution from Grand Strand; he is seeking the set-off mandated under Section 15-38-50.

[13] In *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (Ct. App. 2014), the plaintiff settled both the survival action and the wrongful death action with one defendant before trial. Then, at trial, the plaintiff withdrew the survival claim and the jury returned a verdict only on the wrongful death claim. Similarly, in *Rutland v. South Carolina Dept. of Transportation,*

discussed below, the fairness of the allocation by Judge John cannot be reasonably challenged because he used the jury's determination of the value of the Greens' claims to establish the allocation. That was eminently fair, just and reasonable. Additionally, the suggestion that Dr. Bauerle unfairly benefits from the settlements in not sound because, in accordance with Section 15-38-50, Dr. Bauerle is barred by operation of law from seeking contribution from the settling defendants. The trade-off for extinguishing the settling defendants' exposure to a contribution action is the non-settling defendant's entitlement to a set-off. Finally, the Greens complain that Dr. Bauerle did not request that the settlements be allocated, but Dr. Bauerle was not a party to those settlements. *See*, *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, 426 (Ct. App. 2000) (the non-settling defendant was not a party to the settlement and is not bound by its terms).

Finally, the Greens argue that the Judge John's allocation based upon the ratio established by the jury's verdict was in error. Judge John found that "it is reasonable, fair, and just to utilize the jury's verdict as to the Plaintiffs' claims" so as to provide for an equitable allocation of the settlement amounts. (R. 21). Accordingly, the trial court "appl[ied] the percentage of the total verdict given to

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400 S.C. 209, 734 S.E.2d 142 (2012), the plaintiff settled with two defendants and allocated the settlement proceeds between the survival action and the wrongful death action. The plaintiff then proceeded to trial against SCDOT only on the wrongful death claim.

each Plaintiff by the jury to apportion the settlements between Mr. Green's claim for medical malpractice and Mrs. Green's claim for loss of consortium." (R. 21).

Remarkably, the Greens argue that this method of allocation is not supported by the evidence. To the contrary, Judge John based the allocation on the jury's own allocation of total damages awarded. Without dispute, the jury's determination of damages for both Randall Green and Ann Green was based on the evidence. The Greens cannot argue otherwise. They did not seek an additur or otherwise challenge the jury's verdicts as insufficient or improper. Under South Carolina law, "[j]uries are presumed and bound to follow the instructions of the trial judge." *Buff v. South Carolina Dept. of Transportation*, 342 S.C. 416, 537 S.E.2d 279, 284, n.4 (2000). In addition, there is "a presumption ... that the amount awarded by the jury was in response to the measure of damages given by the trial judge." *Turner v. Carey*, 227 S.C. 298, 87 S.E.2d 871, 875 (1955). The Greens have not appealed any of Judge John's instructions on damages. They have now shown that he failed to charge some element of damages. Likewise, there are no elements of damages that were specifically excluded in or not covered by the Covenants executed by the Greens in favor of Grand Strand. Therefore, it is inappropriate for the Greens to now argue on appeal that the jury's verdicts did not fully compensate them for the medical malpractice and the loss of consortium claims. It is also incorrect for the Greens to take the position that the allocation based on the verdicts is unsupported by evidence.

Lastly, the Greens argue that there is no evidence that a set-off is necessary to prevent a double recovery. The Greens' total damages are established by the jury's verdicts for the reasons cited above. If the Greens receive the jury's verdict in addition to the settlement amounts from Grand Strand and Carolinas Medical Response, then that will constitute a windfall or double recovery. Those verdicts alone are sufficient evidence that a windfall will result. Consequently, the equitable allocation as determined by Judge John is required to prevent that windfall.

In sum, the equitable allocation of the settlement proceeds between two claims is permitted even when the set-off is mandatory under Section 15-38-50. Here, Judge John's reliance on the percentage of the total verdict given to each of the Greens by the jury to apportion the settlements between Mr. Green's claim for medical malpractice and Mrs. Green's claim for loss of consortium was fair, just, and reasonable. The equitable allocation should therefore be affirmed.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. respectfully request that the Court affirm the Order Granting in Part and Denying in Part the Motion for Set Off as issued by Circuit Judge Steven H. John, filed October 17, 2013, to the extent he granted a set-off for the settlement amounts paid by Grand Strand Regional Medical Center, LLC and Carolinas Medical Response, Inc.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF COMPLIANCE

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

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