APPENDIX

THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2016-000864

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Steven H. John, Circuit Court Judge

Memorandum Opinion No. 2019-MO-026
Heard December 13, 2018 – Filed May 29, 2019

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Andrew F. Lindemann, of Davidson & Lindemann, P.A., of Columbia; and John B. McCutcheon Jr. and Lisa A. Thomas, both of Thompson & Henry, P.A., of Conway, all for Petitioners-Respondents.

O. Grady Query, Elizabeth Brooke Hurt and Michael W. Sautter, all of Query, Sautter, and Associates, L.L.C., of Charleston; and L. Morgan Martin, of the Law Offices of L. Morgan Martin, P.A., of Conway; and Cristin A. Uricchio, of the Uricchio Law Firm, of Charleston, all for Respondents-Petitioners.

JUSTICE JAMES: In this medical malpractice case, jury verdicts were rendered against Wayne B. Bauerle, M.D., and his practice Wayne B. Bauerle, M.D., P.C., (Bauerle) in favor of Randall and Ann Green (the Greens), who were husband and wife. Randall Green received a verdict of $2.3 million and Ann Green received a verdict of $550,000. This appeal arises from the trial court's ruling on Bauerle's post-trial motion to set off settlement payments made by third parties to the Greens. Both Bauerle and the Greens appealed the trial court's ruling. The court of appeals affirmed in an unpublished opinion. *Green v. Bauerle*, Op. No. 2016-UP-052 (S.C. Ct. App. filed Feb. 3, 2016). Both Bauerle and the Greens petitioned for a writ of certiorari, and we granted both petitions.

We hold that under the facts of this case, the jury verdicts are not subject to setoff by the settlements paid by the at-fault driver. We hold the trial court properly found the jury verdicts were subject to setoff with regard to the settlement paid by Grand Strand Medical Center, LLC (Grand Strand). As for the computation of the amounts to be set off from the two verdicts, we remand for further proceedings consistent with this opinion. Therefore, we affirm in part, vacate in part, and remand to the trial court for further proceedings consistent with this opinion.

A. Factual and Procedural Background

The Greens were involved in a two-vehicle accident caused by the negligence of the driver of the other vehicle. The Greens both sustained bodily injury and were transported to Grand Strand in Myrtle Beach. Mr. Green's injuries included a fractured and dislocated right hip and a severe laceration to his right arm that completely transected the muscle, nerves, and two arteries. He went into cardiac arrest while at Grand Strand and is paralyzed from the waist down as a result. At some point after his initial treatment at Grand Strand, Mr. Green was transported to the Medical University of South Carolina (MUSC) in Charleston by Carolina Medical Response (CMR), an ambulance service. The Greens commenced suit against Bauerle, Grand Strand, and CMR, alleging their negligence caused physical harm and injury to Mr. Green and loss of consortium to Mrs. Green.

Prior to trial, the at-fault driver paid $100,000 to Mr. Green and $100,000 to Mrs. Green. The Greens signed separate releases in exchange for these settlements, but neither release is in the record. The Greens settled with CMR for $25,000 before trial; they apparently signed a joint release, but that release is not in the record. It appears this settlement was not allocated between Mr. and Mrs. Green's claims. In addition, the trial court granted Grand Strand's partial motion for summary judgment, dismissing the Greens' causes of action to Grand Strand for negligent hiring, supervision, and training and for vicarious liability for any negligence of its independent contractors or employees, including Bauerle. Before the time expired for the Greens to appeal the trial court's partial grant of summary judgment, Grand Strand and the Greens settled for $2 million. The settlement paid by Grand Strand was not allocated between Mr. and Mrs. Green.

Following trial against Bauerle, a jury awarded Mr. Green $2.3 million for his malpractice claim and awarded Mrs. Green $550,000 for her loss of consortium claim. Bauerle filed a motion to setoff each of the Greens' settlements against the jury verdicts. Without conducting a hearing, the trial court partially granted setoff as to the Greens' settlements with Grand Strand and CMR, finding the Greens' settlements with Grand Strand and CMR "were for the same injury, that being Mr. Green's paralysis and the loss of consortium by Mrs. Green, as was litigated against [ ] Bauerle and for which the jury returned its verdict against [ ] Bauerle." However, the trial court found the Greens' settlements with the at-fault driver involved different injuries than the injuries for which the jury found Bauerle liable; therefore, the trial court denied Bauerle's motion for setoff as to the at-fault driver's settlement payments.

With regard to Grand Strand's and CMR's unallocated settlements, the trial court found it "reasonable, fair, and just to utilize the jury's verdict as to the [Greens'] claims," and as a result, "[applied] the percentage of the total verdict given to each [spouse] by the jury to apportion the settlements between Mr. Green's claim for medical malpractice and Mrs. Green's claim for loss of consortium." The trial court determined that since Mr. Green received 80.7% of the $2.85 million total verdict and Mrs. Green received 19.3% of the total verdict, Grand Strand's and CMR's settlements should be prorated by the same amounts.[1] Consequently, the trial court determined Bauerle is entitled to a setoff of $1,634,210.53 against Mr. Green's

[1] The trial court's calculations apparently contain a minor mathematical error totaling $270, which is irrelevant to this Court's conclusions.

verdict and a setoff of $390,519.47 against Mrs. Green's verdict. The trial court entered judgment for Mr. Green in the amount of $665,789.47 and judgment for Mrs. Green in the amount of $159,480.53.

Bauerle and the Greens both appealed, and the court of appeals affirmed. *Green v. Bauerle*, Op. No. 2016-UP-052 (S.C. Ct. App. filed Feb. 3, 2016). We granted the parties' cross-petitions for writs of certiorari. In his petition, Bauerle argues the court of appeals erred in affirming the trial court's denial of setoff as to the settlement funds paid by the at-fault driver against the jury verdicts.[2] In their petition, the Greens argue the court of appeals erred in (1) affirming the trial court's grant of setoff as to the unallocated settlement paid by Grand Strand and (2) affirming the trial court's allocation of that settlement between the Greens' medical malpractice and loss of consortium claims. In their petition to this Court, the Greens did not continue their challenge to the trial court's grant of setoff as to the unallocated settlement paid by CMR; therefore, this argument has been abandoned. *See Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (providing that the appellants abandoned an issue on appeal where the appellants failed to cite any authority for their proposition and made only conclusory arguments in support thereof).

Based on the record before us and the arguments made by the parties before the trial court, we hold that under the facts of this case, the jury verdicts are not subject to setoff by the settlements paid by the at-fault driver. We hold the trial court properly found the jury verdicts were subject to setoff with regard to the settlement paid by Grand Strand. As for the computation of the amounts to be setoff from the two verdicts, we remand for further proceedings consistent with this opinion.

B. Bauerle's Petition

As to Bauerle's petition, we affirm the court of appeals pursuant to Rule 220(b)(1), SCACR, and the authorities cited herein. Bauerle argues the court of appeals erred in affirming the trial court's denial of setoff as to the settlement funds paid by the at-fault driver against the jury verdicts. Bauerle argued in his first motion to the trial court that set off was required pursuant to section 15-38-50 of the South Carolina Code (2005) ("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

[2] The Greens also settled with their underinsured motorist insurance (UIM). Although Bauerle challenged the trial court's denial of setoff from the UIM settlement funds at the court of appeals, he has abandoned this challenge.

same injury . . . (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." (emphasis added)); *Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012) ("[B]efore entering judgment on a jury verdict, the [trial] court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim *for the same injury*." (emphasis added)).

After the trial court denied this motion, in his motion to alter or amend under Rule 59(e), SCRCP, Bauerle asserted for the first time the applicability of *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). Before the court of appeals, Bauerle argued the applicability of both *Graham* and section 15-38-50. Before this Court, Bauerle argued only the applicability of *Graham*. To be clear, we hold *Graham* does not apply to the facts of this case, and we agree with the trial court that, in this case, setoff pursuant to section 15-38-50 is not warranted because the payments made by the at-fault driver "concerned different injuries than the injury for which the jury found Dr. Bauerle liable."

C. The Greens' Petition

As to the Greens' petition, pursuant to Rule 220(b)(1), SCACR, and the authorities cited herein, we agree with the trial court and the court of appeals that a setoff of the amount paid by Grand Strand was warranted. However, we find the trial court's method of calculating the setoff was arbitrary and therefore vacate that portion of the trial court's order and remand to the trial court for further proceedings.

"[T]here can be only one satisfaction for an injury or wrong." *Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). "[Therefore, 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 Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015) (quoting *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012)). "Allowing this credit prevents an injured person from obtaining a double recovery for the [injury] he sustained." *Rutland*, 400 S.C. at 216, 734 S.E.2d at 145. "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law," under section 15-38-50. *Widener*, 397 S.C. at 472, 724 S.E.2d at 190. Section 15-38-50 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; and
> >
> > (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

This section "grants the [trial] court no discretion . . . in applying a set-off." *Widener*, 397 S.C. at 472, 724 S.E.2d at 190 (quoting *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). In South Carolina, a non-settling defendant's right to setoff also exists under common law, and the "jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties." *Riley*, 414 S.C. at 195, 777 S.E.2d at 830 (quoting *Rookard v. Atlanta & C. Air Line Ry. Co.*, 89 S.C. 371, 376, 71 S.E. 992, 995 (1911)).

The law requires the total amount paid by Grand Strand to be set off from the verdicts; however, we conclude the trial court's determination of the specific amounts to be set off from the verdicts was arbitrary, as the determination was based solely upon the ratios both verdicts bore to the whole. The setoffs should be calculated based upon the entirety of relevant circumstances, not solely upon such a formula. While these ratios may well be relevant to the ultimate determination of a proper setoff, they are not necessarily the sole relevant circumstance. Therefore, we vacate the trial court's order on this particular point and remand this issue to the trial court and direct it to convene a hearing to consider all relevant circumstances. The trial court shall then issue an order setting forth the amounts to be set off from the two verdicts.

D. Conclusion

We **AFFIRM** the court of appeals as to the denial of setoff of settlement funds paid by the at-fault driver. We **AFFIRM** the court of appeals as to the grant of setoff of settlement funds paid by Grand Strand. We **VACATE** the trial court's method of

calculating the setoff, and we **REMAND** to the trial court for further proceedings consistent with this opinion.

BEATTY, C.J., KITTREDGE, HEARN, JJ. and Acting Justice H. Bruce Williams, concur.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Mark Green, as Personal Representative of The Estate of Randall M. Green and Ann Green,	)	Civil Action No.: 2011-CP-26-7403
Plaintiffs,	)	
vs.	)	**ORDER**
Wayne B. Bauerle, MD and Wayne B. Bauerle MD, P.C.,	)	
Defendants.	)	

This matter comes before this Court upon remand for further proceedings consistent with the South Carolina Supreme Court's decision in *Green v. Bauerle*, Mem. Op. 2019-MO-026 (filed May 29, 2019). In this medical malpractice case, jury verdicts were obtained against Wayne B. Bauerle, M.D., and his practice, Wayne B. Bauerle M.D., P.C. ("Bauerle") in favor of Randall M. Green and Ann Green ("the Greens"). This Court granted Bauerle's post-trial motion to set-off a joint settlement which the Greens had entered into with a third party before trial. The Supreme Court affirmed this ruling but vacated the portion of the Order addressing the method used to calculate the setoff. This particular issue was remanded to this Court with instructions to "convene a hearing to consider all relevant circumstances" and to "issue an order setting forth the amounts to be setoff from the two verdicts."

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of injuries sustained by Randall Green ("Mr. Green") following a car accident on April 17, 2004. Mr. Green was transported to Grand Strand Regional Medical Center ("Grand Strand") with a severely lacerated forearm as well as a dislocated and fractured hip. Bauerle was the on-call orthopedic surgeon who was consulted regarding the hip injuries. Over the next few hours, Mr. Green's physical condition deteriorated, and he was taken to the pre-operative area. Thereafter, Bauerle arrived at the hospital and ordered him taken away for an additional hip CT scan. During this time, Mr. Green suffered a cardiac arrest. After being resuscitated and stabilized, he was transported by Carolinas Medical Response ("CMR") to the Medical University of South Carolina ("MUSC").

The Greens subsequently entered into settlements with the at-fault driver's liability carrier,

their own UIM carrier, and MUSC. They filed this action against Bauerle, Grand Strand, and CMR alleging that Mr. Green suffered additional injuries following his arrival at Grand Strand. In addition to medical malpractice and loss of consortium, they asserted a negligent hiring, training, and supervision action against Grand Strand. Prior to trial, they settled with CMR and Grand Strand.

The matter presently before this Court involves the settlement with Grand Strand. This particular settlement involved a single joint payment of $2 million which was not allocated between the Greens. A stipulation of dismissal as to Grand Strand was filed on June 11, 2013 by consent of all parties, including Bauerle.

The medical malpractice trial against Bauerle commenced on September 9, 2013. The jury found that he was negligent and that this negligence had caused injuries to Mr. Green, awarding him $2.3 million. The jury also found for Mrs. Green, awarding her $550,000.00 for loss of consortium. This Court granted Bauerle's post-trial motion to setoff the entire $2 million settlement with Grand Strand against the verdicts. The Supreme Court affirmed this ruling.

In order to calculate and apply the setoff, this Court allocated the settlement based upon the ratios each verdict bore to the whole. The Supreme Court vacated this particular portion of the Order, finding that this determination was arbitrary as it was based solely upon such formula. The allocation issue was remanded to this Court with instructions to "convene a hearing to consider all relevant circumstances" and to "issue an order setting forth the amounts to be setoff from the two verdicts." The Remittitur vacating this Court's prior settlement allocation was filed on June 17, 2019. A few days later, on June 22, 2019, Mr. Green passed away. His son, Mark Green, was appointed Personal Representative on July 29, 2019, and a Consent Order to Substitute the Estate of Randall M. Green for Plaintiff Randall M. Green was entered. Both sides submitted memoranda, and a hearing was held on August 28, 2019.

ANALYSIS

"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) (citing Welch v. Epstein, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (Ct.App.2000)); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998); Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct.App.1986).

During the appeal of this case, the Supreme Court issued its opinion in Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015). This case provides further guidance relevant to the current setoff

analysis and "the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" Riley, 414 S.C. at 196 (citing Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010)). In Riley, the Supreme Court adopted the approach taken by the Illinois Court of Appeals in stating:

> **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, 901 N.E.2d 1006 (Ill. App. 2009) (citing Muro v. Abel Freight Lns., 669 N.E.2d 1217 (Ill. App. 1996)) (emphasis added). In determining that it was error to reapportion a good faith settlement to benefit a non-settling defendant, the Court in Riley considered the "totality of the circumstances," which it indicated "particularly" included both the reasonableness of the overall amount paid to the claim and the evidence on the record supporting damages under that claim. Riley, 414 S.C. at 196. These factors are also particularly relevant to the analysis in the present case.

Consistent with this State's strong public policy favoring the settlement of disputes, the Court in Riley took a very protective stance with regard to the intentions of the parties to a good faith settlement. Id. The courts must determine the intentions of the parties to a settlement as far as possible from the terms of the agreement, and such intentions must be given effect. Pee Dee Stores Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct.App.2009); Pruitt v. S.C. Med. Mal. Liab. Jt. Underwriting Ass'n, 343 S.C. 335, 540 S.E.2d 843 (2001); Mattox v. Cassady, 289 S.C. 57, 344 S.E.2d 620 (Ct. App. 1986); Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 658 S.E.2d 539 (Ct.App.2008). "The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes at the time the contract was entered." Mattox, 289 S.C. at 61. "The court should put itself, as best it can, in the same position occupied by the parties when they made the contract. In doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language." Klutts Resort Realty v. Down'round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20 (1982).

Here, the language of the settlement agreement reflects that the $2 million was paid jointly to the Greens and was not otherwise allocated between them. The Plaintiffs asserted before the Supreme Court as well as this Court that the lack of allocation reflects their intentions to share equal entitlement to the funds. This position is consistent with the Greens' joint acceptance of the settlement, the language of the agreement, evidence on the record as to Mrs. Green's damages and the care she provided, and Mr. Green's trial testimony recognizing his knowledge and beliefs regarding the extent of her damages. The Court agrees with the Plaintiffs and finds that this intention shall be given effect.

The settlement agreement was dated May 31, 2013, just a few months before trial. The trial record reflects that, at the time of settlement, Mrs. Green had been her husband's sole 24-hour caretaker for approximately nine (9) years. Undisputed testimony demonstrated that she had catheterized her husband five to six times a day, requiring her to wake up in the middle of every night. She had lived with the knowledge that if she failed to do this even once, he would die. Every day, she had manually evacuated his bowels, physically lifted him, bathed him, prepared his meals, helped him eat, and taken care of all the household chores. She testified that she couldn't leave the house for any significant length of time, stating "I can't go far. I don't go far. Time is my enemy now." Experts testified that she had given up a very active social life and was "supremely tired" as well as suffering from anxiety, depression, and caregiver role strain.

The Greens had a Life Care Plan prepared in 2011 indicating that she had provided in excess of $1 million worth of care to her husband at the time of the settlement. Moreover, Mr. Green testified that he believed her damages exceeded those supported by the evidence at trial. When asked if the above testimony accurately represented everything she did for him, Mr. Green testified, "In my opinion it is not. I think she omitted an awful lot of it." He further expressed his concern that she had refused to leave his side long enough to receive treatment for a serious health condition. He recognized that she "is sacrificing her life for what is left of mine."

Cases in which settlements were reallocated contrary to the settling parties' intentions involved situations wherein no evidence existed to support the amount allocated to an individual claim. Rutland v. S.C. Dep't Transp., 400 S.C. 2019 (2012) (instant death involved no suffering or medical expenses so any allocation to survival action was clearly unreasonable); Welch v. Epstein, 342 S.C. 279 (Ct. App. 2000) (allocating more than medical expenses to survival action was clearly unreasonable where there was no evidence of suffering). Here, the parties don't dispute either that Mrs. Green sacrificed and suffered extensively or the existence of evidence to

support her claim. Moreover, there is ample evidence to support an allocation of one half of the joint settlement in the amount of $1 million for her damages. The Greens' decision to accept the settlement jointly, and share equal entitlement to the settlement, was reasonable under the facts of this case. Of further note, this was not a death case, and the Greens had no reason to allocate the settlement if they intended equal entitlement to the funds. See also S.C. Code § 62-6-203(c); S.C. Code § 62-6-201(a).

The lack of allocation is not evidence of bad faith. This Court finds that the settlement was entered into in good faith and, as set forth further below, Bauerle has not demonstrated otherwise. *See* Riley, 414 S.C. at 197(Citing In re Wells, 43 S.C. 477, 21 S.E. 334 (1895) (noting that third party seeking to invalidate terms which parties to the contract don't contest bears the burden of proof)). Bauerle has offered no evidence to carry this burden either at the time of trial or at the recent hearing. Rather, he exclusively relies on the assertion that a comparison between the jury verdicts and the prior settlement is the only relevant factor for this court to consider.

The Greens had the right to negotiate terms they felt were most favorable to them, particularly those personal to their marriage and potentially affecting future legal rights and inheritance issues. Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 ("Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties.") The Court further recognizes the inequity in the risk that modification of the agreement could have far-reaching unintended consequences. "[C]ontractual or property rights [are] matters in which predictability and stability are of prime importance." Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974).

Moreover, the settlement agreement in the present case is not being allocated because of fraud or unreasonableness but for the exclusive purpose of applying a setoff. Therefore, the nature of the instrument and the parties' intentions shall be preserved as far as possible so as to do justice between the parties. Allocation of a joint unallocated settlement in a manner inconsistent with the parties' intentions is effectively a re-allocation. The only permissible or equitable basis for reallocating a settlement is fraud or unreasonableness, neither of which are present in this case. Application of the setoff in equal amounts is most consistent with the purpose and terms of the joint settlement. Upon consideration of the relevant circumstances as set forth on the record and the parties' written and oral submissions, this Court finds that application of the joint settlement in equal $1 million dollar amounts to each verdict most effectively preserves the intentions of the settling parties to share equally in the settlement while preventing any risk of a double recovery

in this case. It is also noteworthy that this will eliminate Bauerle's liability to Mrs. Green and provide a total recovery to Mr. Green equal to his verdict.[1]

Upon consideration of additional factors that have been brought to the Court's attention, and examination of the analysis in the context of the Riley opinion, the Court rejects Bauerle's argument that the settlement should once again be allocated based upon the same formula relied on in its prior ruling.

> [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, 196, 777 S.E.2d 824 (2015) (quoting In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895)). Considering the entirety of the relevant circumstances, allocation of the settlement based upon the amount each jury verdict bore to the whole would be grossly inequitable in this case for several reasons:

First, it would divest Mrs. Green of a settlement amount greater than her verdict against Bauerle before depriving her of the majority of her verdict. This would effectively punish her while enlarging a benefit to the non-settling tortfeasor. "Settlements are not designed to benefit nonsettling third parties. . . A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do." Riley, 414 S.C. at 197. This result would be inequitable as well as unnecessary as there is no risk of a double recovery in this case.

Second, the Plaintiffs did not carry identical burdens of proof at trial. Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998); Cook v. Atlantic Coast Ln. R.R., 196 S.C. 230, 243, 13 S.E.2d 1 (1941). "Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative." Preer v. Mims, 323 SC 516, 521, 476 SE2d 472, 474 (1996). "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). The elements of damages which could have been considered in arriving at the two separate verdicts were not the same, and the setoff should not be calculated based upon the ratio each bore to the whole.

[1] A setoff of $20,175.00 for the CMR settlement shall also be applied against Mr. Green's verdict.

Third, this would disregard the settling parties' intentions and contradict the policy concerns which favor the fostering and promotion of settlements. The verdict amounts were unknown and uncertain factors at the time of settlement and thus cannot be relied upon as a complete and accurate reflection of the circumstances and motivations underlying the settling parties' decisions. "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).

Finally, it is noteworthy that the evidence at trial was necessarily limited to those injuries and damages alleged to have resulted from Bauerle's negligence occurring after his arrival at the hospital. While the Supreme Court recognized that the jury verdicts could potentially have some relevance to the analysis at hand, the jury did not hear any evidence as to Grand Strand's negligence or the resulting damages occurring prior to Bauerle's intervention. Moreover, it is impossible to determine what the jury included in its awards. This Court must therefore conclude that the jury's awards do not necessarily reflect the same damages or motivating factors contemplated by the settling parties. See Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998) (no finding that settlement compensated the same damages where it was impossible to determine how the jury calculated awards); See also Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497, 649 S.E.2d 494, 501("Indeed, parties regularly reach compromise settlements for a variety of reasons. . ."); Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (citing In re Wells, 43 S.C. 477, 21 S.E. 334 (1895) (party seeking to depart from standard set-off rules bears burden of proof)); Anderson v. Aetna Cas. & Sur. Co., 175 S.C. 254, 282, 178 S.E. 819, 829 (1934) ("The law rather forbids [the] court assuming to take upon itself the powers, duties, rights, and privileges of a jury.")

The Court further rejects Bauerle's argument that the settlement and verdicts should be collectively treated as marital property. Sexton v. Sexton, 380 S.E.2d 832 (1988) (property is only deemed "marital" if it is "owned as of the date of filing or commencement of marital litigation."); See also S.C. Code Ann. § 20-7-420(2) (Family Courts have exclusive jurisdiction for the settlement of all rights "to the real and personal property of the marriage.")

The Court finally rejects Bauerle's arguments that disbursal of UIM proceeds during the pendency of the appeal prohibits the Plaintiffs' arguments in favor of an equal allocation.[2] In support of this position, he has asserted the doctrines of judicial estoppel and waiver. However, the Plaintiffs have not taken two totally inconsistent positions. Nor is there any evidence that they misrepresented facts or changed their version of events to intentionally mislead the court or gain an advantage. "Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). The doctrine is intended to protect the integrity of the judicial system and the truth-seeking function of the courts. It applies to matters of fact, not legal theories. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). This Court further finds that the Greens did not intend to waive any rights or arguments pending appeal. "Waiver is a voluntary and intentional relinquishment of a known right." Johnson v. Zerbst, 204 U.S. 458, 58 S. Ct. 1019 (1938).

The transaction at issue involved a Court disbursal to the Greens via a single joint check, and the language of the April 2016 Receipt and Satisfaction only releases Bauerle's total liability. Furthermore, the equal allocation issue was subsequently extensively argued before the Supreme Court and is central to the analysis at hand. Finally, the Orders in place at the time of the acceptance of the undisputed UIM funds and Rules 205 and 61, SCACR, prohibit that transaction and agreement from affecting any matters pending appeal, which very clearly include the allocation issue subsequently remanded to this Court for decision. A refusal to consider the proposed allocation method would both inflict gross inequity upon the Plaintiffs and circumvent analysis of the proper issues on remand. The Court finds that the total principal amount of the disbursal shall be deducted from Mr. Green's verdict in order to afford Bauerle credit for the total payment, consistent with the parties' intentions and as suggested to this Court by both sides. To the extent the April 14, 2016 Consent Order is inconsistent with this finding, this was harmless error and shall be disregarded so as to allow substantial justice between the parties. *See* Rules 61 and 205, SCACR.

Application of a $1 million setoff will reduce Mrs. Green's judgment to zero. The calculations with regard to Mr. Green's remaining judgment are as follows:

[2] The Consent Order relevant to this transaction allocates a portion of this payment to Mrs. Green, but the $1 million setoff reduces her verdict to zero.

Jury Verdict	$ 2,300,000.00
Setoff Grand Strand Settlement	$ 1,000,000.00
Setoff CMR Settlement	$ 20,175.00
August 2014 Partial Satisfaction	$ 415,789.47
April 2016 UIM Disbursal	$ 209,480.53
Remaining Judgment	$ 654,555.07
Portion of Judgment Deposited with Court	$ 200,000.00
Pre-Deposit Interest Deposited with Court	$ 18,164.13

IT IS THEREFORE ORDERED that each of the Plaintiff's verdicts shall be reduced by $1 million. The clerk shall release to the Plaintiffs the total amount of $218,164.13 plus any accrued interest. The clerk shall then enter judgment in the amount of $454,555.07 for the Estate of Randall M. Green and $0 for Ann Green.

Steven H. John
Resident Circuit Court Judge
Fifteenth Judicial Circuit

October ____ 2019
Conway, South Carolina

Horry Common Pleas

Case Caption: Randall M Green Estate , plaintiff, et al VS Wayne B MD Bauerle , defendant, et al

Case Number: 2011CP2607403

Type: Order/Other

So Ordered

s/ Steven H. John, Resident Circuit Judge, #129

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Case No.: 2011-CP-26-07403
Mark Green, as Personal Representative of the Estate of Randall M. Green and Ann Green,	)	
Plaintiffs,	)	
v.	)	**ORDER**
Wayne B. Bauerle, MD and Wayne B. Bauerle MD, P.C.,	)	
Defendants.	)	

This matter came before the Court on Defendants' Notice of Motion and Motion to Alter or Amend Order and Supporting Memorandum regarding the Court's Order filed on October 22, 2019.

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits'." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "The motion may in the discretion of the court be determined on briefs filed by the parties without oral argument." SCRCP 59(f).

The Court has considered Defendants' Motion, the Plaintiffs' Reply, and all other matters in the Clerk of Court's file. Defendants fully presented their oral arguments to the Circuit Court prior to the October 22nd Order and now in their Motion to Alter or Amend. The Court finds that oral arguments would not assist it in this matter and that any additional arguments would be redundant and unnecessary. It is therefore

ORDERED that Defendants' Motion to Alter or Amend is denied and the Order of October 22, 2019 is reaffirmed in full.

The Honorable Steven H. John
Resident Judge
Fifteenth Judicial Circuit

December 9, 2019
Conway, South Carolina

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

Mark Green, Personal Representative of the Estate of
Randall M. Green and Ann Green, ... Respondents,

v.

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

NOTICE OF APPEAL

The Appellants Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. appeal the final judgment entered as well as the following orders:

1. Order issued by Circuit Court Judge Steven H. John as filed October 22, 2019; and

2. Order issued by Circuit Court Judge Steven H. John as filed December 11, 2019.

The Appellants' counsel received written notice of entry of the Order filed December 11, 2019, on that same date.

LINDEMANN, DAVIS & HUGHES, P.A.

BY: *s/ Andrew F. Lindemann*
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-and-

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January 9, 2020

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Michael Ellis
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Nicholas J. Brausch
Attorney

Query Sautter & Associates, LLC
Attorneys and Counselors at Law

February 10, 2020

Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C..
Civil Action No. 2011-CP-26-7403
Appellate Case No. 2014-000460

Dear Madam:

Enclosed for filing, please find one original and six (6) copies of the Appendix that goes with the Motion to Certify the Above Captioned Appeal to the South Carolina Supreme Court Pursuant to Rule 204(b) of the SCACR with regard to the above-referenced matter. The Motion to Certify was mailed without the Appendix on February 10, 2020. Please file the original and return the clocked copy to me in the self-addressed, postage prepaid envelope that was enclosed with the February 10, 2020 correspondence for your convenience.

Your attention to this request is greatly appreciated. Should you have any questions, please do not hesitate to contact this office.

With kindest regards, I remain,

Very truly yours,

Amber Sautter
Assistant to O. Grady Query

Enclosures

cc: John B. McCutcheon, Jr., Esquire
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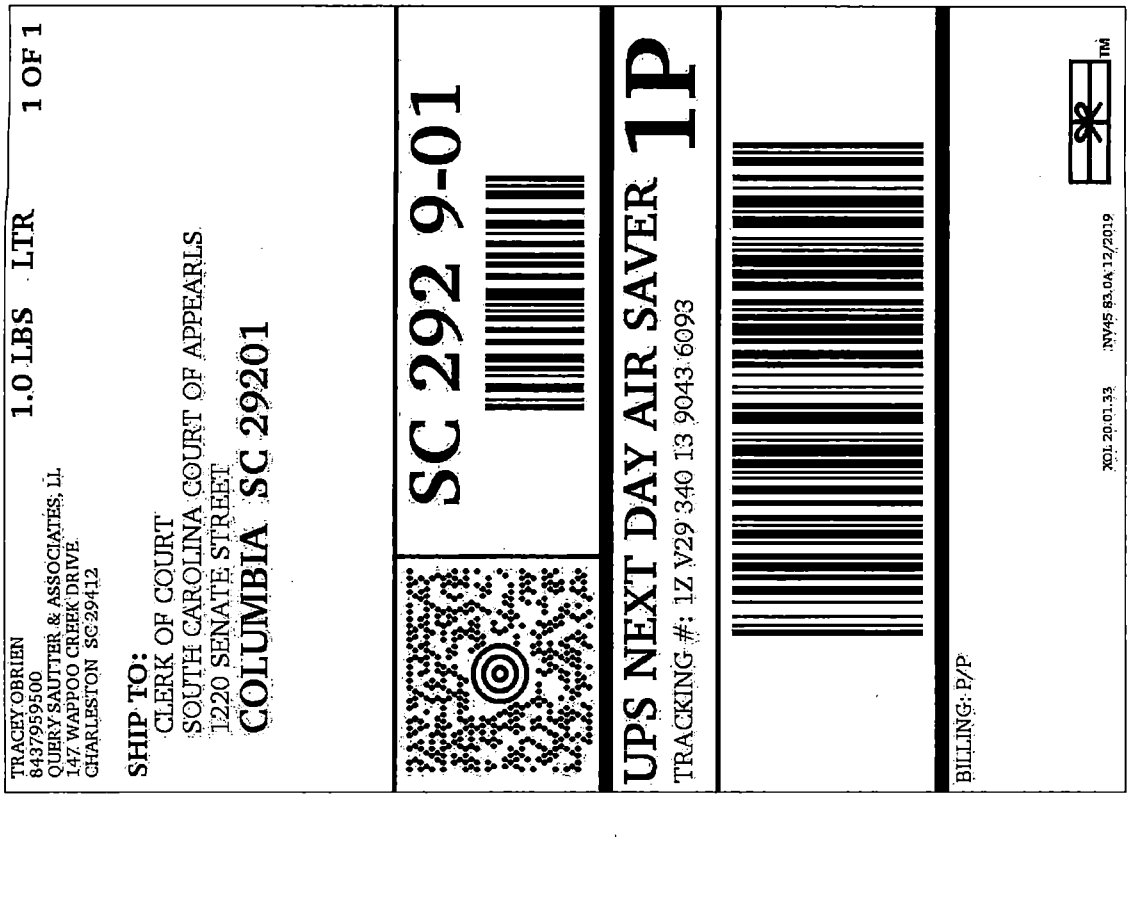

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