THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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SC Court of Appeals

Appellate Case No. 2020-000046
Case No. 2011-CP-26-7403

Mark Green, as 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.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in finding that Randall Green and Ann Green intended that the $2 million settlement with Grand Strand Regional Medical Center be allocated equally between them where the only "evidence" cited by the Court are arguments of counsel and the Court erroneously rejected the competent, probative evidence that did not support that finding?

II. Did the Circuit Court err in determining that the loss of consortium damages sustained by Ann Greer exceeded the jury's verdict and that the Greens' proposed allocation did not therefore result in a double recovery?

III. Did the Circuit Court err in failing to treat the verdicts and settlement proceeds as marital or joint property, as previously argued by the Greens, and in failing to apply the setoff as dictated by Supreme Court precedent under similar circumstances?

STATEMENT OF THE CASE

This is an appeal from a medical malpractice action. Randall M. Green and Ann Green 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 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 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. ("CMR"), 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 CMR settled for $25,000.[2]

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 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. Judgment in those amounts was initially entered on September 16, 2013.

At the close of the trial, Dr. Bauerle moved for a set-off of the amounts paid in settlement on behalf of other Defendants, including $2 million from Grand Strand and $25,000 from CMR. By Order filed October 17, 2013, Judge John granted in part and denied in part the Motion for Set-Off. Judge John allowed for a set-off of the settlements received from Grand Strand and CMR, but he denied the set-off for the amounts paid for the release of the at-fault driver and the UIM

[2] Randall Green also 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.

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.

The $2.025 million in settlements was unallocated by the Greens and the settling Defendants. As a result, Judge John equitably allocated the settlements based upon the precise distribution made by the jury in finding the actual damages sustained by the Greens. Thus, as Judge John reasoned:

> [T]he jury found for Mr. and Mrs. Green for a combined verdict of $2.85 million against the Defendants. The jury awarded Mr. Green $2.3 million of the total $2.85 million verdict, or 80.70% of the total verdict. The jury awarded Mrs. Green $550,000 or 19.30% of the total verdict. Using that very allocation, this Court rules that the $2 million settlement with Grand Strand shall off set the verdict for Mr. Green in the amount of $1,614,035.09 and the verdict for Mrs. Green in the amount of $385,694.91. Likewise, the settlement between Plaintiffs and Carolinas Medical Response shall off set the verdict for Mr. Green in the amount of $20,175.44 and the verdict for Mrs. Green in the amount of $4,824.56.

(Order).

On October 11, 2013, Dr. Bauerle filed a Notice of Appeal with this Court. The Greens subsequently filed a Notice of Cross-Appeal.

On August 5, 2014, the insurer for Dr. Bauerle made an initial payment of $415,789.47 in partial satisfaction of the judgment in favor of Randall M. Green. This sum was not in controversy given the issues raised on appeal by both the

Greens and Dr. Bauerle. The remaining judgment was in the amount of $250,000.00 in favor of Randall M. Green and in the amount of $159,480.53 in favor of the Ann Green. The Receipt and Partial Satisfaction of Judgment executed by the Greens was filed on August 8, 2014.

On December 10, 2014, a hearing was held on a Motion for Leave of Court to Deposit Funds into Court before Circuit Court Judge Larry Hyman. By Order filed December 11, 2014, Judge Hyman allowed for the sum of $446,669.82 to be paid into the court pursuant to Rule 67, SCRCP, which included $409,480.53 (which was the remainder of the judgment principal) plus $37,189.29 in accrued post-judgment interest through December 10, 2014.

On February 3, 2016, this Court issued an unpublished opinion affirming the rulings of the trial court and denying the relief sought by both sides on appeal. Dr. Bauerle and the Greens filed petitions for rehearing, which were subsequently denied on March 24, 2016.

At that point, Dr. Bauerle conceded on the setoff issue with respect to the $225,000 received by the Greens from the UIM insurer. As a result, the only amount of the monies paid into court that remained in controversy was the $200,000 received in settlement from the at-fault driver, plus interest on that amount totaling $218,164.13. The insurer for Dr. Bauerle then agreed to release $228,505.69 of the amount paid into court because the UIM money was no longer

in controversy. Accordingly, on April 14, 2016, a Consent Order to Partially Release Funds Deposited with Clerk of Court was signed and filed by Circuit Court Judge Larry Hyman. That Consent Order was based on the Greens' motion "for an Order directing that the sum of $228,505.69 be paid by the Clerk of Court to the Plaintiffs Randall Green and Ann Green." That Consent Order further provided that "the judgment in favor of the Plaintiff Randall Green is partially satisfied by the payment of $163,622.01 and the judgment in favor of the Plaintiff Ann Green is partially satisfied by the payment of $64,883.68." (Consent Order). On May 6, 2016, the Greens filed a Receipt and Partial Satisfaction of Judgment in the amount of $228,505.69 consistent with the Consent Order.

On April 25, 2016, Dr. Bauerle filed a Petition for Writ of Certiorari. On or about May 16, 2016, the Greens filed a Petition for Writ of Certiorari after receiving an extension. On October 2, 2017, the Supreme Court granted both Petitions for Writ of Certiorari.

On May 29, 2019, the Supreme Court issued an unpublished opinion that affirmed in part, vacated in part, and remanded. The Supreme Court affirmed this Court and the Circuit Court on several issues. First, the Supreme Court rejected Dr. Bauerle's claim of a set-off for the $200,000 paid to the Greens by the auto liability insurer on behalf of the at-fault driver whose accident set in motion Mr. Green's hospital treatment. Second, the Supreme Court upheld Dr. Bauerle's

entitlement to a set-off of the $2 million from Grand Strand and $25,000 from CMR (the latter of which was no longer contested). The Supreme Court writes: "we agree with the trial court and the court of appeals that a setoff of the amount paid by Grand Strand was warranted." *Green v. Bauerle*, 2016 WL 2289678, *3 (S.C. 2019). However, the Supreme Court found issue with the manner by which the trial court allocated the $2 million settlement (which was unallocated by the parties to the settlement) between Mr. Green and Mrs. Green. The Supreme Court found "the trial court's method of calculating the setoff was arbitrary" and for that reason the Court "vacate[s] that portion of the trial court's order and remand[s] to the trial court for further proceedings." *Id.* On this point, the Supreme Court wrote as follows:

> 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.

Id. The Supreme Court did not offer any explanation as to what the "entirety of relevant circumstances" may be.[3]

After remand,[4] both sides submitted legal memoranda, and Judge John held a hearing as directed by the Supreme Court on August 28, 2019. Judge John issued an Order on October 22, 2019, in which he ruled that "each of the Plaintiff's [sic] verdicts shall be reduced by $1 million." (Order, p. 9). Accordingly, he ruled that "[a]pplication of a $1 million setoff will reduce Mrs. Green's judgment to zero." (Order, p. 8). Additionally, Judge John ruled that Mr. Green's verdict was reduced by $1 million from the Grand Strand settlement and $20,175 from the CMR settlement. (Order, p. 9).

Dr. Bauerle subsequently filed a Motion to Alter or Amend Order, which was summarily denied by an Order filed December 11, 2019. (Order).

Dr. Bauerle thereafter filed a timely appeal to this Court. The Greens filed a motion seeking certification of this appeal to the Supreme Court pursuant to Rule 204(b), SCACR, but that motion was denied.

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[3] As mentioned, the Supreme Court also recognized that "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." *Green*, 2016 WL 2289678 at *2. That allocation applied a setoff of $20,175.44 to Mr. Green's verdict and a setoff of $4,824.56 to Mrs. Green's verdict.

[4] By Consent Order filed August 28, 2019, Mark Green, as Personal Representative of the Estate of Randall M. Green, was substituted as a Plaintiff for Randall Green who had died on June 22, 2019. (Consent Order).

STANDARD OF REVIEW

In this case, the South Carolina Supreme Court recognized that a non-settling defendant's right to a setoff arises by operation of law under S.C. Code Ann. § 15-38-50 as well as by common law. *Green v. Bauerle*, 2016 WL 2289678, *3 (S.C. 2019). The Supreme Court explained that S.C. Code Ann. § 15-38-50 "grants the [trial] court no discretion ... in applying a set-off." *Id.*, *citing Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188, 190 (Ct. App. 2012). The Supreme Court also ruled that "[i]n 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." *Id.*

On appeal, this Court "reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 683 S.E.2d 803, 807 (Ct. App. 2009). Thus, rulings as to the setoff arising by operation of law under S.C. Code Ann. § 15-38-50 are reviewed *de novo*. Likewise, in matters of equity, all factual findings and legal conclusions are reviewed *de novo*. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348, 352 (Ct. App. 2011). "[T]he appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." *Doe v. South Carolina Medical Malpractice Liability Joint Underwriting Assn.*, 347 S.C. 642, 557 S.E.2d 670, 672 (2001).

ARGUMENTS

I. The Circuit Court erred in finding that Randall Green and Ann Green intended that the $2 million settlement with Grand Strand Regional Medical Center be allocated equally between them where the only "evidence" cited by the Court were arguments of counsel and the Court erroneously rejected the competent, probative evidence that did not support that finding.

On remand, the Greens argued that the $2 million settlement from Grand Strand should be allocated equally between them. They claim that an equal allocation is consistent with the terms of the settlement and the intent of the parties. However, the settlement was not allocated between the Greens by agreement. In other words, there is no language in the "Covenant Not to Sue and Covenant Not to Prosecute or Execute Judgment," as executed by the Greens in favor of Grand Strand, that suggests that any allocation was contemplated or bargained for. Nonetheless, the Circuit Court found that the Greens intended an equal allocation because "[t]he Plaintiffs asserted before the Supreme Court as well as this Court that the lack of allocation reflects their intention to share equal entitlement to the funds." (Order, p. 4). In so ruling, the Circuit Court disregarded the complete absence of admissible, competent evidence in the record showing that the intentions of the Greens were to share equally the $2 million settlement.

The only "evidence" of the Greens' intent to allocate the settlement equally is the arguments of counsel. Clearly, that was in error as the assertions or arguments

of counsel are not evidence. *See*, *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E.2d 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered"); *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are ... not evidence"); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986).

Additionally, in obvious recognition that there was no evidence of any intent to allocate the settlement equally, the Greens attempted after remand to present an affidavit of Ann Green, to which Dr. Bauerle objected. In the email directing the Greens' counsel to prepare a proposed order dated October 10, 2019, the Circuit Court stated as follows: "the proposed order cannot rely on the Affidavit of Ann Green. The Court will not consider the affidavit of Ann Green because counsel for the plaintiff never requested, nor received the Court's permission to supplement the record. Moreover, no opportunity was given to opposing counsel to submit any rebuttal affidavit, nor could they cross-examine the affidavit as to the contents of the affidavit." (October 10, 2019 Email). That ruling has not been appealed and is the law of the case.

Clearly, absent the Ann Green affidavit which was properly excluded, there is no *evidence* in the record that reflects the intent of the Greens to allocate the $2 million settlement equally. Instead, the intentions of the Greens to that effect are shown only in the legal arguments of counsel, which are obviously not evidence.

Importantly, the record does include circumstantial (if not direct) evidence of the intentions of the Greens, but that evidence supports Dr. Bauerle's position. On April 14, 2016, which was after the Petitions for Rehearing were denied in the Court of Appeals, a Consent Order to Partially Release Funds Deposited with Clerk of Court was signed and filed by Circuit Court Judge Larry Hyman. That Consent Order was based on the Greens' motion "for an Order directing that the sum of $228,505.69 be paid by the Clerk of Court to the Plaintiffs Randall Green and Ann Green." (Consent Order, p. 1). That Consent Order further provided that "the judgment in favor of the Plaintiff Randall Green is partially satisfied by the payment of $163,622.01 and the judgment in favor of the Plaintiff Ann Green is partially satisfied by the payment of $64,883.68." (Consent Order, p. 2).

Thus, Mrs. Green, with her husband's consent, accepted $64,883.68, and they partially satisfied/released Dr. Bauerle in that amount on April 20, 2016. The acceptance of funds by Mrs. Green to partially satisfy the judgment entered in her favor is inconsistent with the Greens' current position that Mrs. Green's allocation was $1 million (as intended by the parties to the Grand Strand settlement) and thus no payment of any amount was required to satisfy Mrs. Green's verdict of $550,000. But, by accepting the $64,883.68 and satisfying Mrs. Green's judgment in that amount, the Greens acknowledged that her judgment was not fully satisfied

by the Grand Strand settlement. That is clearly evidence demonstrating that the Greens never intended to allocate the $2 million equally.

Specifically, the Circuit Court should have given substantial weight to the Greens' post-trial acceptance of funds to satisfy Mrs. Green's verdict. That evidence is not contrary to Rule 205, SCACR, as the Circuit Court suggests.[5] Instead, it is substantial evidence showing that the Greens never intended for the $2 million settlement with Grand Strand to be equally allocated.[6]

Yet, the Circuit Court discounts that evidence by concluding that the April 14, 2016 Consent Order is "harmless error" and "should be disregarded." There are several errors with that ruling.

That evidence is in the form of a consent order meaning it was entered with the consent of the Greens. A consent order is no different than a stipulation; the party is bound by the representations, legal and factual, contained in a consent

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[5] Rule 205, SCACR, provides: "Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Rule 205, SCACR. During the pendency of the appeal, the Circuit Court had jurisdiction to enter orders allowing for the partial satisfaction of the judgment and the disbursement of funds paid into the court pursuant to Rule 67. The Greens have not argued, nor did the Circuit Court find, that the orders entered during the pendency of appeal are null and void for lack of jurisdiction. The Greens accepted the funds paid for Dr. Bauerle in partial satisfaction of the judgment, and the position taken relative thereto is probative evidence of their intent.

[6] The Circuit Court also erred in characterizing the April 2016 payment as "the disbursal of UIM proceeds." (Order, p. 8). The payment was not "UIM proceeds" and was not made by the UIM insurer. Instead, it was a payment made by Dr. Bauerle's insurer in partial satisfaction of *both* the medical malpractice verdict for Mr. Green and the loss of consortium verdict for Mrs. Green. Clearly, the Circuit Court did not recognize the import or purpose of the April 2016 payment or what it conveys in terms of relevant evidence of the Greens' intentions.

order, and those representations are not subject to appeal or collateral attack. *See*, *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E. 358, 363 (1999); *Wilson v. All*, 86 S.C. 586, 68 S.E.2d 824 (1910) (court will not entertain appeal from an order issued with parties' consent); *Calcutt v. Calcutt*, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984). Instead, like a written stipulation, the consent order represents the law of the case and is entitled to *preclusive effect*. This is especially true given that the Consent Order in this case was issued by Judge Hyman, and it is well settled that one circuit court judge cannot overrule or disregard another circuit court judge's rulings. *See*, *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81, 88 (2008) (acknowledging the rule that one circuit judge may not overrule a prior decision or set aside the order of another circuit judge).

However, that is precisely what has occurred in this case. The Circuit Court rejected the only real evidence of the Greens' intentions by concluding that the Consent Order issued by Judge Hyman *and expressly agreed to by the Greens* constitutes "harmless error" and "should be disregarded."

In short, the Circuit Court's Order is premised on the notion that the Greens intended to allocate the $2 million settlement equally. However, there is absolutely *no evidence* to support that central premise. The only evidence -- established by a consent order -- indicates conclusively that the Greens did not intend for that allocation.

II. The Circuit Court erred in determining that the loss of consortium damages sustained by Ann Greer exceeded the jury's verdict and that the Greens' proposed allocation did not therefore result in a double recovery.

The Circuit Court has also erred in its conclusion that Ann Green sustained damages in excess of what the jury determined, thereby justifying her receipt of $1 million of the Grand Strand settlement as compensation for her consortium claim. Likewise, the Circuit Court erred in concluding that such an allocation prevents the risk of a double recovery. In fact, such an allocation leads to just that -- a double recovery. The jury awarded Mrs. Green $550,000 as her consortium damages; yet, with the Circuit Court's ruling, Ann Green achieved a result of in excess of $1 million as her recovery -- close to twice the jury's determination. Clearly, the Circuit Court was incorrect in finding that "there is no risk of a double recovery in this case." (Order, p. 6). Indeed, the Circuit Court's decision results in a double recovery for Mrs. Green -- a substantial windfall.

The Greens' argument, as adopted by the Circuit Court, is based on the fallacy that the jury's determination of damages was wrong and is not entitled to preclusive effect. However, the jury has spoken and determined that Mrs. Green's loss of consortium was *fully* compensated by the award of $550,000. The jury's determination of damages sustained by Mrs. Green was based on the evidence. The Greens cannot reasonably argue otherwise. They did not seek an additur or

otherwise challenge the jury's verdicts as insufficient or improper, nor did they challenge the Circuit Court's jury instructions on damages that were allowable under the evidence as presented. 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 Circuit Court's rulings, however, disregard that presumption.

Most importantly, the Greens have not even remotely demonstrated that there was loss of consortium damages for Mrs. Green that were compensated solely by the Grand Strand settlement that were not also then sought from the jury at trial. The evidence of damages presented at trial, in fact, indicates otherwise – the Greens presented evidence of all of Mrs. Green's damages. In its Order, the Circuit Court recites a summary of that evidence that was presented to the jury, and the record demonstrates that numerous witnesses, lay and expert, testified to Mrs. Green's loss of consortium. On remand, the Greens have not pointed to any loss of consortium damages to Mrs. Green that were caused by Grand Strand alone and that were *not then also presented to the jury at the trial against Dr. Bauerle*. To suggest otherwise is pure speculation. The Circuit Court, nonetheless, adopted the

Greens' flawed reasoning and writes "the jury did not hear any evidence as to Grand Strand's negligence or the resulting damages occurring prior to Bauerle's intervention." (Order, p. 7). There is, however, no evidence to support that assertion, and nonetheless, it is truly remarkable to argue (let alone to conclude by a preponderance of the evidence) that Mrs. Green sustained any *loss of consortium* in the very brief period of time between the admission of Mr. Green to Grand Strand and the care rendered by Dr. Bauerle. That is an unsupported and false premise. In fact, the evidence reflects that, during that time period in the emergency room, Mrs. Green herself was a patient being treated for the personal injuries she sustained in the same accident.

On this point, the Circuit Court further writes: "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." (Order, p. 7). This ruling is erroneous in two key respects. First, it disregards and fails to faithfully apply the Supreme Court's ruling which is now the law of the case. Based on the Greens' briefs previously filed in this Court and in the Supreme Court, the main focus of their arguments on allocation was *fully resolved* by the first appeal, specifically that the setoff of the Grand Strand settlement was not proper because the settlement and verdict were for different injuries or different damages. The Supreme Court

rejected those arguments and ruled that "the law requires the *total* amount paid by Grand Strand to be set off from the verdicts." *Green*, 2016 WL 2289678 at *4. (Emphasis added). Second, even if the Supreme Court had not already rejected that premise in this very case, that same argument has been previously rejected by this Court. 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 in *Ellis* 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.

In short, the Circuit Court's analysis is flawed, not supported by any competent evidence in the record, and in key respects is contrary to the Supreme Court's decision. The allocation urged by the Greens does not only create a risk of a double recovery for Mrs. Green, it makes that double recovery a reality.

Moreover, from an equitable standpoint, this Court should reject any notion that the Greens were equally damaged such that it is fair and reasonable to allocate 50% of the Grand Strand settlement proceeds to each. As the record reflects, Mr. Green's injuries far exceeded the loss of consortium suffered by Mrs. Green. The jury's verdict bears that out and should not be ignored. It is important to note that the Supreme Court indicated the ratios based on the verdicts "may well be relevant to the ultimate determination of a proper setoff" but are "not necessarily the sole

relevant circumstance." *Green*, 2016 WL 2289678 at *4. Consequently, there was no sound basis for the Circuit Court to otherwise conclude that a fair allocation is 50-50.

III. The Circuit Court erred in failing to treat the verdicts and settlement proceeds as marital or joint property, as previously argued by the Greens, and in failing to apply the setoff as dictated by Supreme Court precedent under similar circumstances.

The Circuit Court also erred in disregarding the position originally taken by the Greens post-trial and on appeal that their settlement with Grand Strand is or should be treated as "marital property" and, for that reason, the allocation of the $2 million should be equal. As Dr. Bauerle has pointed out, if the $2 million settlement is "marital property," then the verdicts themselves are also collectively "marital property," which is supported by the applicable case law on how proceeds of litigation received during marriage are treated. *See*, *Mears v. Mears*, 313 S.C. 42, 437 S.E.2d 34, 36 (1993) (holding "proceeds of a personal injury settlement acquired during the marriage are marital property"). *See also*, *Marsh v. Marsh*, 313 S.C. 42, 437 S.E.2d 34 (1993); *Covington v. Covington*, 306 S.C. 473, 412 S.E.2d 455 (Ct. App. 1991); *Orszula v. Orszula*, 292 S.C. 264, 356 S.E.2d 114 (1987); S.C. Code Ann. § 20-3-630 (defining "marital property"). The Circuit Court erred in rejecting this authority.

The Greens now dispute taking that position, but the record clearly

demonstrates otherwise. For instance, in their Appellants' Brief to this Court in the first appeal, the Greens, citing the *Marsh* case on marital property, wrote: "The evidence dictates that it should be allocated equally to each cause of action, and equity requires that it be allocated equally between the two Plaintiffs. Even if the Settlement has been allocated entirely between the medical malpractice and loss of consortium causes of action, the funds would still be marital property to which each Plaintiff is equally entitled." *See*, Greens' Court of Appeals Appellant's Brief, pp. 42-43. Later, in their brief to the Supreme Court, the Greens cited *Marsh* again, arguing: "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*, Greens' Supreme Court Brief, p. 21.

As demonstrated, the Greens clearly have taken the position that the Grand Strand settlement was "marital property" and "joint property."[7] Thus, the Court

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[7] In fact, in their original memorandum of law opposing Dr. Bauerle's Motion for Setoff, the Greens argued that they each had "an undeniable property right in an undisclosed and unallocated portion of the settlement proceeds. Essentially Ann Green owns a portion of every cent of that settlement and Randall Green owns a portion of every cent." (Pl. Opp. Mem., p. 3). As they further wrote, "a set-off of any part of the verdict in favor of Randall Green would deprive Ann Green of her ownership right to the proceeds of the settlement and conversely, the set-off of any portion of Ann Green's verdict would deprive Randall Green of his ownership of a portion of the settlement proceeds." (Pl. Opp. Mem., p. 4).

should treat both the verdicts and the settlement as marital or joint property consistent with existing law. Under that approach, the total of the verdicts ($2.85 million) would be subject to the entire setoff ($2.025 million) which leaves the total recovery of $825,000 in marital or joint property to be paid jointly to the Greens.[8]

As Dr. Bauerle has pointed out, there is precedent for this approach given the Supreme Court's decision in *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995). Inexplicably, the Circuit Court failed to rely on, let alone even cite or discuss, the *Broome* decision which actually addresses how to apply a setoff where there are personal injury and consortium trial verdicts in favor of spouses. In *Broome*, a husband and wife settled a personal injury claim and consortium claim with the at-fault driver and received an unallocated sum of $50,000. The husband and wife then made an underinsured motorist (UIM) claim, and the Supreme Court addressed whether the UIM carrier was entitled to a setoff for the $50,000. The claims were tried to a jury verdict, as occurred in this case. The husband received a verdict of $90,000 on his personal injury claim and the wife a verdict of $7,500 (after an additur) on her loss of consortium claim. The Supreme Court explained

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[8] The Circuit Court made a $270 mathematical error in the Greens' favor in its original order, which was also acknowledged by the Supreme Court in a footnote in its memorandum opinion. *Green*, 2016 WL 2289678 at *2, n.1. As indicated, the error is in the Greens' favor, and Dr. Bauerle agreed that that error need not be corrected given that the original sum had already been paid into the Court by the insurer pursuant to Rule 67. Thus, Dr. Bauerle agrees that the total to be paid jointly to the Greens is $825,270.00.

that the $50,000 setoff could be applied to the total verdicts for both husband and wife, leaving a judgment for both spouses of $47,500.

Thus, consistent with *Broome*, it is appropriate to treat the settlements and verdicts as marital or joint property. As indicated, using the framework from *Broome*, the total of the judgment ($2.85 million) should be subject to the entire setoff ($2.025 million) which leaves the total recovery of $825,000 to be paid jointly to the Greens. On appeal, this Court is requested to apply the precedent established by the Supreme Court's decision in *Broome* which the Circuit Court without explanation chose to disregard.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. respectfully request that the Court reverse the Orders on appeal and direct on remand that judgment be entered in favor of both Respondents jointly in the amount of $825,270.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: _____

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-and-

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

May 26, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2020-000046
Case No. 2011-CP-26-7403

RECEIVED
MAY 28 2020
SC Court of Appeals

Mark Green, as 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.

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Appellants, does hereby certify that service of the **Initial Brief of Appellants** and **Appellants' Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 26th day of May 2020:

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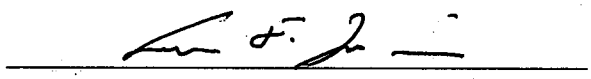

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May 26, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
MAY 28 2020
SC Court of Appeals

RE: Mark Green, Personal Representative of the Estate of Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C.
Court of Appeals Tracking Number: 2020-000046
Civil Action Number: 2011-CP-26-7403
Claim Number: CB053262M
Our File Number: 22.9301

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy each of the **Initial Brief of Appellants** and **Appellants' Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope. By copy of this letter, I am serving copies on all counsel of record.

If you have any questions, please advise. Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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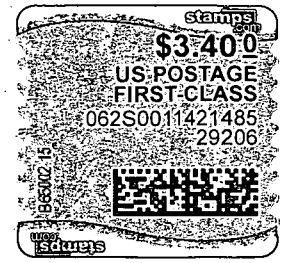

First Class Mail

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Columbia, South Carolina 29260

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The Honorable Jenny Abbott Kitchings
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