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

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 REPLY BRIEF OF APPELLANTS

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S.C. Code Ann. § 15-38-50.

STANDARD OF REVIEW

The parties disagree as to the applicable standard of review. The Respondents Mark Green, as Personal Representative of the Estate of Randall M. Green, and Ann Green argue that the standard of review is abuse of discretion. The Appellants Wayne B. Bauerle, M.D. and his practice, on the other hand, maintain that the standard of review is de novo.

In pressing the abuse of discretion standard of review, the Greens point to a single case, *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), where this Court wrote that motions for set-off "are addressed to the discretion of the court." 536 S.E.2d at 426. Yet, immediately prior to that statement, this Court explained that "[t]he trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties. A setoff is not necessarily founded upon any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction of the court." 536 S.E.2d at 425. Thereafter, the review of the trial court's decision was clearly made applying a de novo standard, which of course was proper. It is undisputed that matters of equity, including factual findings, are reviewed under a de novo standard. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715

S.E.2d 348, 352 (Ct. App. 2011). And, that is precisely what this Court applied in *Welch*.

Unlike in *Welch*, this case also involves a defendant's right to a setoff that arises by operation of law under S.C. Code Ann. § 15-38-50, as was recognized by the Supreme Court in its decision. *See, Green v. Bauerle*, 2016 WL 2289678, *3 (S.C. 2019) ("[t]his section 'grants the [trial] court no discretion … in applying a set-off"). If the trial court is granted "no discretion," the standard of review is naturally not an abuse of discretion standard. Thus, the standard of review for a statutory setoff under S.C. Code Ann. § 15-38-50 is de novo.

In still arguing otherwise, the Greens point to the Supreme Court's ruling that "the trial court's determination of the specific amounts to be set off from the verdicts was arbitrary." *Green*, 2016 WL 2289678 at *4. Relying on the word "arbitrary," the Greens conclude incorrectly that a determination of arbitrariness is subject to an abuse of discretion standard of review. However, our appellate courts have typically looked at arbitrary or capricious action as presenting an issue of law. *See e.g., Chemical Leaman Tank Lines, In*c. v. *South Carolina Public Service Commission,* 258 S.C. 518, 189 S.E.2d 296, 298 (1972). Again, a de novo standard would be applicable.

Finally, the Greens place undue reliance on the case of *Pruitt v. South Carolina Medical Malpractice Joint Underwriting Assn.*, 343 S.C. 335, 540 S.E.2d

843 (2001), in suggesting that an "any evidence" standard applies to the Circuit Court's factual findings. That ignores the fact that findings of fact in an equitable matter -- including an equitable setoff as at issue here -- are subject to a de novo standard, and "the 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). Nonetheless, the Greens misread *Pruitt*. They are incorrect in characterizing the issue in *Pruitt* as a determination of the "intentions" of the contracting parties in entering the settlement agreement. Instead, the issue in *Pruitt* was whether the plaintiffs' acceptance of an opt-out from the annuity company long after the settlement was agreed to waived their right to continue to receive monthly payments due under the settlement agreement. The waiver question presented an issue of fact in an action at law, and thus, the "any evidence" standard was deemed to apply.

Significantly, in *Pruitt*, the Supreme Court never made a finding that the settlement agreement was ambiguous. It is initially "a question of law for the court [to determine] whether the language of a contract is ambiguous." *Callawassie Island Members Club v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 669 (2018). Only if the contract is ambiguous is a question of fact presented such that parol evidence may be admitted. Thus, a fair reading of *Pruitt* does not support the application of

the "any evidence" standard even as to issues related to the interpretation of the settlement agreement.

At any rate, in the case at bar, there has never been any allegation or claim that the "Covenant Not to Sue and Covenant Not to Prosecute or Execute Judgment," as executed by the Greens in favor of Grand Strand Regional Medical Center, is ambiguous. Thus, the trial court's interpretation of that agreement raises only a question of law, to which the standard of review is *de novo*.

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.

Like the Circuit Court did, the Greens disregard the complete absence of admissible, competent evidence in the record showing that the intentions of the Greens was to share equally the $2 million settlement received from Grand Strand Regional Medical Center. Remarkably, the Greens offer promises throughout their brief of "extensively detailed evidence" and "all the evidence of the Greens' intentions," but in reality, they have actually pointed to no such evidence.

The "Covenant Not to Sue and Covenant Not to Prosecute or Execute Judgment" does not provide for an allocation between the settling parties. The Greens point to no evidence that an allocation was contemplated or bargained for. The lack of an allocation in the agreement, however, does not render the Covenant to be ambiguous and susceptible of multiple interpretations. In fact, the Circuit Court never made a finding that the Covenant was ambiguous on its face or was reasonably susceptible of more than one interpretation. This Court's analysis in the case of *Abu-Shawareb v. South Carolina State University*, 364 S.C. 356, 613 S.E.2d 757 (Ct. App. 2005), is instructive:

> Because the release does not specifically include his bailment claim, Abu–Shawareb argues it is ambiguous, requiring the trial court to look at parol evidence to determine the parties' intentions. Although the release is broad, it is not ambiguous. *See, Jordan v. Sec. Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) (holding silence alone does not create an ambiguity). Ambiguity is created only when a release is inconsistent on its face or is reasonably susceptible of more than one interpretation.

613 S.E.2d at 760. The silence of the Covenant did not render it ambiguous, thereby requiring parol evidence. As indicated, the Greens never argued the Covenant was ambiguous nor did the Circuit Court make that finding.

The Greens, nonetheless, argue that the intent to equally allocated the $2 million is shown by the language of the agreement. The agreement contains no allocation, nor any indication that an allocation was even contemplated by the parties. A suggestion to the contrary is pure speculation, and speculation is not evidence. *See, Gordon v. Busbee*, 397 S.C. 119, 723 S.E.2d 822, 831 (Ct. App. 2012).

Despite the Greens' unsupported protestations to the contrary, the Circuit Court cited only to the arguments of counsel as the supporting "evidence": "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." (Order, p. 4). But, it is well established that argument by counsel is not evidence nor is it a

substitute for evidence. *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are ... not evidence").[1]

The Greens also point to the evidence of Ann Green's damages, but that evidence does not support a finding that the Greens intended an equal allocation of the $2 million settlement. Also, the Greens contend that Mr. Green's trial testimony regarding his wife's damages is evidence of an intent to equally allocate the $2 million settlement. But again, Mr. Green's acknowledgement of Mrs. Green's consortium claim does not show his intent that the $2 million settlement was to be allocated equally between them. The Greens even argue that "[p]lacing oneself in Randy's position, it is difficult to imagine he intended to accept a larger portion of the settlement proceeds than Ann." *See*, Respondent's Brief, p. 18. Again, that is pure speculation and not competent or admissible evidence.

Remarkably, the one piece of evidence that *does show the Greens' intent* was rejected by the Circuit Court and derided and mischaracterized by the Greens. On April 14, 2016, which was after the Petitions for Rehearing in the first appeal were denied in this Court, the Greens accepted funds from Dr. Bauerle and his

[1] In a footnote, the Greens cite to *Pruitt v. South Carolina Medical Malpractice Joint Underwriting Assn.*, 343 S.C. 335, 540 S.E.2d 843 (2001), as an example of a case where the Supreme Court considered statements made by counsel as evidence. The evidence in *Pruitt*, however, was not the arguments made by counsel during an oral argument in court or in a brief. The evidence was a pre-lawsuit letter from the lawyer to the defendant advising that his clients were not waiving their rights to settlement proceeds by accepting the opt-out from the annuity company. That letter was literally evidence; the oral or written arguments by counsel in the present case are not evidence.

insurer to satisfy a portion of Ann Green's verdict. Mrs. Green, with her husband's consent, accepted $64,883.68, and they partially satisfied/released Dr. Bauerle in that amount. 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 and *indeed did not allocate* the $2 million equally.

In an attempt to defeat this compelling evidence, the Greens offer a number of flawed arguments. First, they argue that the Supreme Court "expressly excluded" that evidence. That is false. The Record on Appeal in the first appeal was filed on November 11, 2014. When the record was assembled, the Consent Order filed April 14, 2016, was not in existence. After the Supreme Court granted a writ of certiorari, Dr. Bauerle filed a motion seeking to supplement the record to include the Consent Order, and that motion was summarily denied. Thus, the Supreme Court did not address the merits of that post-settlement evidence and certainly did not "expressly exclude" or rule that such evidence is not properly

subject to consideration on remand. The Supreme Court likely did not allow for evidence to be considered on appeal that had not been available to the trial judge when he ruled.

Next, the Greens argue that the Consent Order "makes clear that the parties intended to preclude the transaction from having any impact on the pending allocation issues." *See*, Respondents' Brief, p. 22. That again is false. The Greens point to the language in the Consent Order filed April 14, 2016, which required the Horry County Clerk of Court to hold the remaining funds on deposit "in accordance with the terms and conditions as set forth in the Order Granting Leave to Deposition Funds Into Court and Releasing Judgment Liens filed December 11, 2014." (Consent Order II, p. 2). That language does not preclude the Consent Order from being admitted into evidence to demonstrate the Greens had not allocated the $2 million equally.

The Greens also attempt to rely on language from the earlier Consent Order which confirmed only that "the release of the judgment liens has no effect on any issues currently on appeal including the amount of the verdicts to which the Plaintiffs are ultimately entitled, which will be determined by the appellate courts." (Consent Order I, p. 5). That language, which addresses only the release of the judgment liens, likewise is not "an expressly agreed-upon prohibition" on the use

of the Consent Order entered two years later when the Greens deliberately accepted monies to satisfy a portion of Ann Green's judgment.

The Greens also now falsely argue that the Circuit Court found that evidence from the Consent Order filed April 14, 2016, was "utterly irrelevant to the Greens' intentions at the time of the Grand Strand settlement three years prior." *See*, Respondent's Brief, p. 23. That was never a ruling. The word "irrelevant" appears nowhere in the order. Instead, the Circuit Court found only that the Consent Order is "harmless error" and "should be disregarded."[2] The Circuit Court never held the evidence was irrelevant or otherwise inadmissible. In fact, the Greens never even objected to consideration of the Consent Order during the Circuit Court hearing on remand. It is erroneous to argue, at any rate, that the evidence in 2016 is irrelevant to the Greens' intent. That evidence shows not only the intent not to allocate the $2 million equally, but it also shows that they actually had not equally allocated the

[2] In response to the Circuit Court's ruling that the April 14, 2016 Consent Order is "harmless error" and "should be disregarded," Dr. Bauerle countered that (1) the Consent Order represents the law of the case and is entitled to preclusive effect and (2) that one circuit court judge cannot overrule an order of another circuit court judge. The Greens insist that these arguments were not made until Dr. Bauerle's Rule 59(e) motion and are therefore not preserved. That is very disingenuous. Neither at the hearing nor in prior submissions had the Greens objected to the court's consideration of the Consent Order. Certainly, the Greens had not argued that the Consent Order is "harmless error" and "should be disregarded," as the court ultimately ruled. As a result, it was not possible for Dr. Bauerle to anticipate the court's ruling and thus make those arguments prior to the order being issued. It was only after the Circuit Court made its rulings that the arguments became necessary to make. That is an entirely appropriate use of Rule 59(e), and those issues should be deemed preserved for appeal. *See, Pelican Building Centers v. Dutton*, 311 S.C. 56, 427 S.E.2d 673, 675 (1993) (stating that although the appellant learned for the first time upon receiving the order on a post-trial motion that the respondent would be granted certain additional relief, the appellant must move under Rule 59(e) to alter or amend the judgment to "preserve the record for appeal").

$2 million by December 2016, because their actions at that time indicated otherwise by seeking to satisfy a portion of Mrs. Green's judgment.

In sum, the Circuit Court's Order is premised on the notion that the Greens intended to allocate the $2 million settlement equally. Despite their conclusory statements and speculation, the Greens have still shown no such evidence of that intent. The only evidence -- established by a consent order -- indicates conclusively that the Greens did not intend for an equal allocation and, in practice, did not act in December 2016, consistently with the equal allocation they now claim.

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

The Circuit Court ruled 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 ruled that such an equal allocation prevents the risk of a double recovery while, in reality, the court's rulings actually allow Ann Green to receive a double recovery.

In their response brief, the Greens obfuscate and deflect, but they never address these issues. While they continue to maintain that Ann Green's damages were greater than the $550,000 returned by the jury, they cannot point to any specific evidence of her damages that was not presented to the jury. More importantly, they have also not shown that they are not bound by the jury's determination of the value of their damages or can somehow collaterally attack or avoid the verdicts.

Moreover, the Greens make no attempt to support the Circuit Court's erroneous ruling that "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). As Dr. Bauerle argued in his opening brief, there is no evidence to suggest that Mrs. Green sustained any loss of consortium during the very brief period of time between the admission of Mr. Green to Grand Strand and the care rendered by Dr. Bauerle. During that interval, the evidence shows that Mrs. Green herself was being treated in the emergency room for injuries she sustained in the motor vehicle accident. Thus, she did not sustain any loss of consortium that was attributable to Grand Strand alone. The Greens do not and cannot refute that.

Finally, the Greens claim that a comparison of the Greens' jury verdicts "directly defies" the Supreme Court's decision. *See*, Respondent's Brief, p. 13. That is not accurate. The Supreme Court explicitly stated that 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. Therefore, proper weight should have been given to the jury's determination of damages sustained by the Greens in assessing the amounts to be set off from the verdicts. The Circuit Court erred in rejecting that component of the analysis.

In sum, the Circuit Court erred in determining that the loss of consortium damages sustained by Ann Green exceeded the jury's verdict and that the Greens' proposed allocation did not therefore result in a double recovery. Those factors weigh strongly against the equal allocation adopted by the Circuit Court.

CONCLUSION

Based on the foregoing analysis, the Appellants Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. respectfully renew their 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,

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BY: *s/ Andrew F. Lindemann*

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July 13, 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

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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

Pursuant to Section (g)(3) of the Supreme Court's Order Re: Operation of the Trial Courts During the Coronavirus Emergency (As Amended May 29, 2020), the undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the, does hereby certify that service of the **Initial Reply 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 email only this the 13th day of July 2020:

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July 13, 2020

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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 Reply Brief of Appellants** and **Appellants' Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. By copy of this letter, I am serving copies on all counsel of record via email only pursuant to Section (g)(3) of the Supreme Court's Order Re: Operation of the Trial Courts During the Coronavirus Emergency (As Amended May 29, 2020).

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

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

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Enclosures

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