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.

RECORD ON APPEAL - VOLUME I

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Certificate of Counsel

Certificate of Compliance

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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,

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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

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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).

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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

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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

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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.

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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.")

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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

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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

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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

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2011CP2607403

FILED
HORRY COUNTY

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY 2013 OCT 17 AM 10: 35) FIFTEENTH JUDICIAL CIRCUIT
) CASE NO: 2005-CP-26-2805

MELANIE HUGGINS-WARD
CLERK OF COURT

Randall M. Green and Ann Green)
)
Plaintiffs,) **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS WAYNE B. BAUERLE, MD, AND WAYNE B. BAUERLE, MD, PC'S MOTION FOR SET OFF**
)
vs.)
)
Wayne B. Bauerle, M.D., and Wayne B. Bauerle, M.D., P.C.,)
)
Defendants.)

FACTS

This medical malpractice case was tried before a jury during the week of September 9, 2013, with the Honorable Steven H. John presiding. The jury found for Randall M. Green, under a medical malpractice theory, in the amount of $2.3 million and Ann Green, under a loss of consortium theory, in the amount of $550,000.

Prior to trial, Defendant Grand Strand Regional Medical Center, LLC ("Grand Strand") settled with the Plaintiffs for $2 million. The ambulance company, Carolinas Medical Response, Inc., settled with the Plaintiffs for $25,000.00. In addition, Mr. Green settled with the at-fault driver for $100,000.00, and he received $150,000.00 in settlement of his underinsured motorist claim. Likewise, Mrs. Green received $100,000.00 in settlement with the at-fault driver and an additional $75,000.00 in settlement of her underinsured motorist claim. Finally, the Medical University of South Carolina (MUSC) settled with the Plaintiffs for $160,000 for medical negligence stemming from allegations that a sponge was left in Mr. Green's leg by staff at MUSC.

1 of 6

Following the trial, the Defendants moved to off set the verdict with the amounts paid in settlement on behalf of Grand Strand, Carolinas Medical Response, the at-fault driver (including the underinsured motorist payments), and MUSC.

For the below reasons, the Defendants' Motion for Set Off is granted in part and denied in part. The Court grants a set-off for the amounts paid in settlement on behalf of Grand Strand and Carolina Medical Response, and denies a set-off for the amounts paid in settlement on behalf of the Medical University of South Carolina and the at-fault driver including the underinsured motorist payments.

LAW AND ANALYSIS

I. SET-OFF

"When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater." S.C. Code Ann. § 15-38-50.

"A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." Hawkins v. Pathology Associates of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 406 (Ct. App. 1998) (citing Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967); Vaughn v. City of Anderson, 300 S.C. 55, 386 S.E.2d 297 (Ct. App. 1989). "Therefore, before entering judgment on a jury verdict, the 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." Smith v. Widener, 397 S.C. 468,

471-72, 724 S.E.2d 188, 190 (Ct. App. 2012) (citing Hawkins v. Pathology Associates of Greenville, PA, 330 S.C. 92, 113, 498 S.E.2d 395, 406 (Ct. App. 1998)). "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." Smith, 397 S.C. at 472, 724 S.E.2d at 190 (citing Ellis v. Oliver, 335 S.C. 106, 113, 515 S.E.2d 268, 271-72 (Ct. App. 1999)). "Therefore, a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1)." Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012).

In Ellis v. Oliver, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), the Court of Appeals explained that "[a]pplication of the settlement credit was statutorily mandated in this case. Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." Ellis, 335 S.C. at 113, 515 S.E.2d at 272.

In the case at bar, this Court finds that the Plaintiffs' settlements with Grand Strand and Carolinas Medical Response were for the same injury, that being Mr. Green's paralysis and the loss of consortium by Mrs. Green, as was litigated against Dr. Bauerle and for which the jury returned its verdict against Dr. Bauerle.[1] The Court disagrees with the Plaintiffs' claim that they suffered different injuries. Likewise, the Court rejects the Plaintiffs' argument that their settlements were for different causes of action.[2] In accordance with Ellis v. Oliver and Smith v.

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

[2] In opposing the Defendants' Motion for Set Off, the Plaintiffs argue that their settlement with Grand Strand and the verdict against Dr. Bauerle resulted from different causes of action. This Court disagrees. In making this argument, the Plaintiffs cite to the Order filed May 1, 2013, where Judge Larry Hyman granted partial summary judgment to Grand Strand on the causes of action for vicarious liability and negligent hiring, supervision and training. Nonetheless, Judge Hyman did not dismiss the Plaintiffs' negligence cause of action which was the

Widener, supra, the settlements from Grand Strand and Carolinas Medical Response shall be set-off because they concerned the same injury as the jury verdict against Dr. Bauerle.

However, the Court further concludes that the settlements on behalf of the at-fault driver (including the underinsured motorist payments) and MUSC concerned different injuries than the injury for which the jury found Dr. Bauerle liable. Specifically, the settlement with MUSC concerned an injury to Mr. Green's leg, which the Court finds to be a separate injury from Mr. Green's paralysis. In addition, the Court finds that the settlement with the at-fault driver concerning events occurring prior to Mr. Green's paralysis do not concern the same injury. Because those settlements involved different injuries, this Court rules those settlements are not subject to a set-off.

II. APPORTIONMENT OF THE SET-OFF

At trial, the jury found for Randall M. Green in the amount of $2.3 million and Ann Green in the amount of $550,000. Grand Strand settled with the Plaintiffs for $2 million and Carolinas Medical Response settled for $25,000 prior to trial. Those settlements did not provide for a specific allocation of the settlement amounts between Mr. Green and Mrs. Green. In making an equitable allocation of those settlement amounts between Mr. Green and Mrs. Green, the Court finds that it is reasonable, fair, and just to utilize the jury's verdict as to the Plaintiffs' claims. As a result, this Court will apply the percentage of the total verdict given to each Plaintiff by the jury to apportion the settlements between Mr. Green's claim for medical malpractice and Mrs. Green's claim for loss of consortium.

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first cause of action in the Fourth Amended Complaint where the very same allegations of negligence were alleged against all Defendants including Grand Strand and Dr. Bauerle. Moreover, the settlement with Grand Strand occurred before any appeal rights were extinguished. The Plaintiffs still had the right until thirty days after final judgment was entered to appeal the grant of partial summary judgment by Judge Hyman, and the Plaintiffs' settlement with Grand Strand was intended to and did extinguish all claims against Grand Strand.

The South Carolina Supreme Court has specifically authorized the equitable *reallocation* of settlements in cases where the settling parties had agreed to a certain allocation between claims. See e.g., Rutland v. South Carolina Department of Transportation, 400 S.C. 209, 734 S.E.2d 142 (2012). Therefore, it logically follows that a court may make an equitable *allocation* in a case where the settling parties did not even agree to any particular allocation between claims.

In the case at bar, the 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 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.

The total amount to be set off is $1,634,210.53 for Mr. Green's medical malpractice claim and $390,519.47 for Mrs. Green's loss of consortium claim. Therefore, after applying these set-offs, the judgment against Defendants shall be reduced to $665,789.47 for Mr. Green and $159,480.53 for Mrs. Green. It is therefore

ORDERED that the Defendants' Motion for Set Off is granted in part and denied in part as set forth above. The Clerk of Court is directed to enter judgment in the amount of $665,789.47 in favor of the Plaintiff Randall M. Green against the Defendants and to enter judgment in the amount of $159,480.53 in favor of the Plaintiff Ann Green against the Defendants.

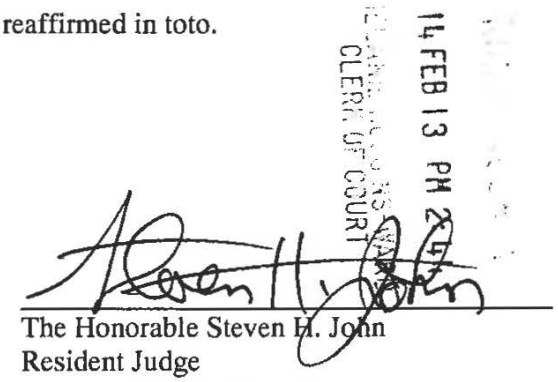
STEVEN H. JOHN
Resident Circuit Court Judge
Fifteenth Judicial Circuit

October 16, 2013
Conway, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
RANDALL M. GREEN AND ANN GREEN,	)	C/A # 2011-CP-26-7403
	)	
Plaintiff,	)	
	)	**ORDER DENYING DEFENDANT'S MOTION TO ALTER OR AMEND ORDER GRANTING PARTIAL SET-OFF**
v.	)	
	)	
WAYNE B. BAUERLE, MD, and WAYNE B. BAUERLE, MD, PC,	)	
	)	
Defendants.	)	
	)	

This matter came before the Court on Defendant's Motion dated November 7, 2013, to Alter or Amend the Court's Order Granting Partial Set-Off. The Court has considered Defendant's Motion and all other matters in the Clerk of Court's file. The Court believes it addressed the matters in its previous Order. 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 Defendant's Motion to Alter or Amend the Court's Order Granting Partial Set-Off is denied and the previous Order is reaffirmed in toto.



The Honorable Steven H. John
Resident Judge
Fifteenth Judicial Circuit

February 13, 2014
Conway, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
RANDALL M. GREEN AND ANN GREEN,	)	C/A # 2011-CP-26-7403
Plaintiff,	)	
v.	)	**ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND ORDER GRANTING PARTIAL SET-OFF**
WAYNE B. BAUERLE, MD, and WAYNE B. BAUERLE, MD, PC,	)	
Defendants.	)	

This matter came before the Court on Plaintiff's Motion dated October 25, 2013, to Alter or Amend the Court's Order Granting Partial Set-Off. The Court has considered Plaintiff's Motion and all other matters in the Clerk of Court's file. 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 Plaintiff's Motion to Alter or Amend the Court's Order Granting Partial Set-Off is denied and the previous Order is reaffirmed in toto.

FILED
2014 FEB 13 PM 2:44
CLERK OF COURT

The Honorable Steven H. John
Resident Judge
Fifteenth Judicial Circuit

February 13, 2014
Conway, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY	)	
Randall M. Green and Ann Green,	)	
	)	Civil Action No. 2011-CP-26-7403
Plaintiff,	)	
	)	
v.	)	**ORDER GRANTING LEAVE TO DEPOSIT FUNDS INTO COURT AND RELEASING JUDGMENT LIENS**
	)	
Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C.,	)	
	)	
Defendants.	)	
	)	

HORRY COUNTY
2014 DEC 11 PM 1:13
CLERK OF COURT
WARD

This matter is before this Court on the motion of the Defendants Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., pursuant to Rule 67, SCRCP, seeking leave of court to allow the Defendants to deposit a sum equal to the judgments entered plus accrued interest (subject to a reduction for the amount already paid) with the Court during the pendency of the appeal and cross-appeal which have been filed by the parties with the South Carolina Court of Appeals. The Defendants further seek an Order declaring that, upon the deposit of the sum of $409,480.53, plus accrued interest, with the Horry County Clerk of Court, the judgment liens established as a matter of law by the judgments entered in this action are released with respect to any real property owned by the Defendants in Horry County, South Carolina.

The Plaintiffs opposed the Defendants' motion. A hearing was held on December 10, 2014. Counsel for all parties appeared. After a review of the Defendants' motion and the arguments of counsel, this Court grants the Defendants' motion in accordance with Rule 67, SCRCP.

The Court finds as follows:

1. This medical malpractice action was tried before a jury during the week of September 9, 2013, with Circuit Judge Steven H. John presiding. The jury found for Randall M. Green in the amount of $2.3 million on his medical negligence claim and for Ann Green in the amount of $550,000 on her loss of consortium claim. Judgments in those amounts was initially entered on September 16, 2013.

2. At the close of the trial, the Defendants moved for a set-off of the amounts paid in settlement on behalf of Grand Strand Regional Medical Center, LLC, Carolinas Medical Response, Inc., and the at-fault driver (including the underinsured motorist payments). 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 Carolinas Medical Response, but he denied the set-off for the amounts paid for the release of the at-fault driver and the UIM insurer. Judge John directed the Clerk of Court to enter judgment in the amount of $665,789.47 in favor of Randall M. Green and to enter judgment in the amount of $159,480.53 in favor of the Ann Green.

3. On October 11, 2013, the Defendants filed a Notice of Appeal with the South Carolina Court of Appeals. The Plaintiffs subsequently filed a Notice of Cross-Appeal.

4. On August 5, 2014, the insurer for the Defendants made an initial payment of $415,789.47 in partial satisfaction of the judgment in favor of Randall M. Green. The remaining judgments are 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 Plaintiffs was filed on August 8, 2014.

5. The accrued post-judgment interest through December 10, 2014, which is the date of the hearing, totals $37,189.29. Accordingly, the total of the judgments, plus accrued interest, is $446,669.82.

6. At the hearing, the Defendants' counsel was in possession of a check totaling $446,669.82 as issued by the South Carolina Medical Malpractice Patients' Compensation Fund.

The Defendants seek to deposit the sum of $446,669.82 with the Court in accordance with Rule 67, SCRCP, during the pendency of the appeal. Rule 67 authorizes a party to deposit the sum of a judgment into the court with leave of court. The South Carolina appellate courts have upheld the application of Rule 67, SCRCP, and have concluded that Rule 67 serves a beneficial purpose. *See*, *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995); *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998); *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000). Specifically, in *Russo*, *supra*, the Supreme Court reasoned that "[s]uch a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal." *Russo*, 454 S.E.2d at 896. Similarly, the Court of Appeals has explained that the "[p]ayment of a judgment into court is deemed to be a payment of money for the use of the person entitled thereto and stops the running of judgment interest." *South Carolina Department of Transportation v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822, 828-829 (Ct. App. 1999).

Based on the foregoing, this Court finds that the deposit of $446,669.82, pursuant to Rule 67, SCRCP, is appropriate. As the Supreme Court has held, public policy favors having the judgment debtor pay the judgment sum into court which ensures that funds are available to pay the existing judgment once the appeal process is complete. The Court finds that there is no basis

for the Court to disallow the use of Rule 67 in this case. As a result, the Court grants the Defendants' motion.

In addition, the Court is advised that the Defendant Wayne B. Bauerle, M.D. is attempting to sell some real property that is presently encumbered by the judgment liens resulting as a matter of law from the judgments entered in this litigation. The Defendants seek the release of the judgment liens for properties owned by the Defendants within Horry County. The Court finds that the requested relief is appropriate upon the Defendants making the deposit of $446,669.82 with the Clerk of Court. The amount of funds necessary to fully satisfy the judgments will then be available to the Plaintiffs after the pending appeal, if the Plaintiffs are successful in upholding those judgments. Therefore, the Plaintiffs do not require the protection of the judgment liens in order to obtain satisfaction of those judgments. Accordingly, this Court hereby orders the Defendants to make immediate tender of the check in the amount of $446,669.82 to the Horry County Clerk of Court, and the Court further hereby releases the judgment liens thereby removing those judgment liens as an encumbrance upon the Defendants' properties located in Horry County.

IT IS, THEREFORE, ORDERED that the Defendants deposit as requested with the Court the sum of $446,669.82. The deposit pursuant to this Order shall be made to the Horry County Clerk of Court.

IT IS FURTHER ORDERED that the Horry County Clerk of Court shall deposit the funds with any bank or financial institution authorized to receive public funds, in an interest bearing account, and the funds, including interest earned thereon, shall be withdrawn only upon further order of this Court after notice to all parties.

IT IS FURTHER ORDERED that the judgment liens established as a matter of law by the judgments entered in this action are hereby released with respect to any real property owned by the Defendants in Horry County, South Carolina.

IT IS FURTHER ORDERED 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. Further, the release of the judgment liens herein is not to be construed as a release or satisfaction of the judgments. Should the Plaintiffs prevail on appeal, the Defendants and the South Carolina Medical Malpractice Patients' Compensation Fund will be liable for the judgments as determined by the appellate courts.

AND IT IS SO ORDERED.

LARRY B. HYMAN, JR.
Chief Administrative Judge,
Fifteenth Judicial Circuit

Conway, South Carolina

December 11, 2014

STATE OF SOUTH CAROLINA **COUNTY OF HORRY**	)	**IN THE COURT OF COMMON PLEAS**
Randall M. Green and Ann Green, Plaintiffs, v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., Defendants.	)	Civil Action No. 2011-CP-26-7403 **CONSENT ORDER TO PARTIALLY RELEASE FUNDS DEPOSITED WITH CLERK OF COURT**

FILED
HORRY COUNTY
2016 APR 14 PM 4:18
PLANIE HUGGINS-WARL
CLERK OF COURT

In accordance with the Order Granting Leave to Deposit Funds Into Court and Releasing Judgment Liens filed December 11, 2014, the Defendants deposited the sum of $446,669.82 in the above-referenced matter with the Horry County Clerk of Court pursuant to Rule 67, SCRCP. Following an unpublished decision by the South Carolina Court of Appeals entered on February 3, 2016 in *Green v. Bauerle*, Op. No. 2016-UP-052, and the subsequent denial of the Petitions for Rehearing by the Court of Appeals, the sum of $228,505.69 deposited with the Clerk of Court is no longer contested.

The Order Granting Leave to Deposit Funds Into Court and Releasing Judgment Liens filed December 11, 2014, provides that these funds "shall be withdrawn only upon further order of this Court after notice to all parties." The Plaintiffs have moved for an Order directing that the the sum of $228,505.69 be paid by the Clerk of Court to the Plaintiffs Randall Green and Ann Green. The Defendants consent to this motion.

NOW, THEREFORE, upon motion of Plaintiffs and with the consent of Defendants, it is hereby **ORDERED ADJUDGED AND DECREED** that the Horry County Clerk of Court shall release the sum of Two Hundred Twenty-Eight Thousand Five Hundred Five and 69/100

Dollars ($228,505.69) to the Plaintiffs Randall and Ann Green by delivery of such check to their attorneys of record.

IT IS FURTHER ORDERED that, upon receipt of these funds, the Plaintiffs shall execute and file a Partial Satisfaction of Judgment that reflects 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.

IT IS FURTHER ORDERED that the Horry County Clerk of Court shall continue to hold the remainder of the funds deposited with the Clerk of Court by Defendants in this action until further Order of the Court and in accordance with the terms and conditions as set forth in the Order Granting Leave to Deposit Funds Into Court and Releasing Judgment Liens filed December 11, 2014.

AND IT IS SO ORDERED.

Chief Administrative Judge
For the Fifteenth Judicial Circuit

Conway, South Carolina

Dated: 4-13-16

I SO MOVE:

Morgan M. Martin
Counsel for Plaintiffs

I CONSENT:

Andrew F. Lindemann
Counsel for Defendants

The Supreme Court of South Carolina

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
Lower Court Case No. 2011-CP-26-07403

ORDER

Based on the vote of the Court, the petitions for writs of certiorari are granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

FOR THE COURT

BY _____
CLERK

Few, J., not participating

Columbia, South Carolina
October 2, 2017

cc:
Andrew F. Lindemann, Esquire
John B. McCutcheon, Jr., Esquire
Lisa Arlene Thomas, Esquire

O. Grady Query, Esquire
L. Morgan Martin, Esquire
Cristin Ann Uricchio, Esquire
Elizabeth Brooke Hurt, Esquire
The Honorable Melanie Huggins-Ward
The Honorable Jenny Abbott Kitchings

The Supreme Court of South Carolina

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

v.

Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D.,
P.C., Petitioner/Respondent.

Appellate Case No. 2016-000864

ORDER

Petitioner/Respondent moves to supplement the appendix, for leave to argue judicial estoppel, waiver, and/or release, and to hold deadlines in abeyance. Respondents/Petitioners oppose the motion. The motion is denied.

John W. Kittredge A.C.J.
FOR THE COURT
(Beatty, C.J. and Few, J., not participating)

Columbia, South Carolina

May 24, 2018

cc: Andrew F. Lindemann, Esquire
John B. McCutcheon, Jr., Esquire
Lisa Arlene Thomas, Esquire
O. Grady Query, Esquire
L. Morgan Martin, Esquire
Cristin Ann Uricchio, Esquire
Elizabeth Brooke Hurt, Esquire
The Honorable Melanie Huggins-Ward

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

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 and Acting Justice H. Bruce Williams, concur.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Randall M. Green and Ann Green,	)	Docket No.: 2011-CP-26-7403
	)	
Plaintiffs,	)	**CONSENT ORDER TO SUBSTITUTE ESTATE OF RANDALL M. GREEN FOR PLAINTIFF RANDALL M. GREEN**
vs.	)	
	)	
Wayne B. Bauerle, MD, and Wayne B. Bauerle, MD, PC,	)	
	)	
Defendants.	)	

IT APPEARING that Plaintiff Randall M. Green passed away on June 22, 2019.

IT APPEARING that Mark Green was appointed Personal Representative of the Estate of Randall M Green on July 29, 2019, in the Probate Court for the county of Marion, state of South Carolina in 2019-ES-33-147. (A copy of the Certificate of Appointment is attached hereto as **Exhibit** 1.)

IT APPEARING that by the Estate of Randall M. Green by his personal representative is a proper party Plaintiff in this action.

NOW THEREFORE on Motion of Plaintiffs and with the Consent of Counsel for Defendant,

IT IS HEREBY ORDERED that Estate of Randall M. Green by his personal representative is hereby substituted for Randall M. Green as a Plaintiff in this action.

AND IT IS SO ORDERED!

_____
Steven H. John
Presiding Judge of the Fifteenth Judicial Circuit

This _____ day of August, 2019
Conway, South Carolina

ELECTRONICALLY FILED - 2019 Aug 28 4:18 PM - HORRY - COMMON PLEAS - CASE#2011CP2607403

ELECTRONICALLY FILED - 2019 Aug 28 4:18 PM - HORRY - COMMON PLEAS - CASE#2011CP2607403

WE SO MOVE:

QUERY SAUTTER & ASSOCIATES, LLC

O. Grady Query, Esquire
147 Wappoo Creek Drive, Suite 202
Charleston, SC 29412
Cristin Uricchio, Esquire
Uricchio Law Firm
147 Wappoo Creek Drive, Suite 205
Charleston, SC 29412

L. Morgan Martin, Esquire
1121 Third Avenue
Conway, SC 29526
Charleston, SC

Attorneys for the Plaintiffs

WE CONSENT

John B. McCutcheon, Jr.
Lisa A. Thomas
Thompson & Henry, PA
Post Office Box 1740
Conway, South Carolina 29528

Attorneys for Defendant

Dated: _____

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served the foregoing document upon the following by depositing a copy of same in the United States Mail, with sufficient postage attached thereto and addressed as follows:

ELECTRONICALLY FILED - 2019 Aug 28 4:18 PM - HORRY - COMMON PLEAS - CASE#2011CP2607403

Andrew F. Lindemann
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202

John B. McCutcheon, Jr.
Lisa A. Thomas
Thompson & Henry, PA
Post Office Box 1740
Conway, South Carolina 29528

Dated: _____

_____

ELECTRONICALLY FILED - 2019 Aug 28 4:18 PM - HORRY - COMMON PLEAS - CASE#2011CP2607403

Horry Common Pleas

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

Case Number: 2011CP2607403

Type: Order/Consent Order

Resident Circuit Court Judge, 15th Judicial Circuit

s/Benjamin H. Culbertson, Judge Code 2148

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-26-07403

RANDALL M. GREEN, AND ANN GREEN

PLAINTIFF(S)

WAYNE B. BAUERLE, M. D. AND WAYNE B. BAUERLE, M. D. PC

DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

FILED
HORRY COUNT
2013 SEP 16 AM 8:03
JULIE HUSSWARD
CLERK OF COURT

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : WE THE JURY, FIND FOR THE PLAINTIFF, RANDALL M. GREEN IN THE AMOUNT OF $2,300,000.00 ACTUAL DAMAGES. WE FIND FOR THE PLAINTIFF, ANN GREEN IN THE AMOUNT OF $550,000.00 ACTUAL DAMAGES AS TO LOSS OF CONSORTIUM.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
RANDALL M. GREEN	WAYNE B. BAUERLE, MD AND WAYNE B. BAUERLE, MD PC	$2,300,000.00
ANN GREEN	WAYNE B. BAUERLE, MD AND WAYNE B. BAURLE MD, PC	$550,000.00
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge | Judge Code: 129 | Date: 9/13/13

For Clerk of Court Office Use Only

This judgment was entered on the 16th day of Sept, 20 13 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
M. MORGAN MARTIN	JOHN B. MCCUTCHEON
O. GRADY QUERY	LISA ARLENE THOMAS

Melanie Huggins-Ward
CLERK OF COURT

Court Reporter: HENRY YOUNG

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2011-CP-26-07403

RANDALL M. GREEN and ANN GREEN,

Plaintiffs,

v.

WAYNE B. BAUERLE, M.D. and WAYNE B. BAEURLE, M.D., PC,

Defendants.

VERDICT FORM

Instructions: Mark the appropriate response to the following questions. Each response must be unanimous.

1. DO YOU FIND THAT DEFENDANTS WAYNE B. BAEURLE, M.D. AND WAYNE B. BAEURLE, M.D., PC NEGLIGENTLY DEPARTED FROM THE STANDARD OF CARE IN TREATING PLAINTIFF RANDALL M. GREEN AND THAT THIS NEGLIGENT DEPARTURE FROM THE STANDARD OF CARE PROXIMATELY CAUSED PLAINTIFF RANDALL M. GREEN'S INJURIES?

✓ YES: IF YES, GO TO QUESTION 2.

____ NO: IF YOU ANSWER NO, STOP AND DELIBERATE NO FURTHER.

FILED
HORRY COUNTY
2013 SEP 16 AM 8:04
[illegible]
CLERK OF COURT

NOTE: If you answered "Yes" to Question 1, please continue to Page 2 for a determination of damages. If you answered "No" to Question 1, please stop deliberating and notify the Bailiff.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2011-CP-26-07403

RANDALL M. GREEN and ANN GREEN,

Plaintiffs,

v.

WAYNE B. BAUERLE, M.D. and WAYNE B. BAEURLE, M.D., PC,

Defendants.

VERDICT FORM

2. PLEASE STATE THE TOTAL AMOUNT OF DAMAGES, IF ANY, SUSTAINED BY PLAINTIFF RANDALL M. GREEN

$ 2,300,000.00 Actual Damages
Two Million, three hundred thousand dollars and 00/100

OR

_____ For the Defendants.

FOREPERSON

September 13, 2013
Conway, South Carolina

NOTE: If you awarded actual damages, please continue to Question 3 on Page 3. If you did not award actual damages, please stop deliberating and notify the Bailiff.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2011-CP-26-07403

RANDALL M. GREEN and ANN GREEN,

Plaintiffs,

v.

WAYNE B. BAUERLE, M.D. and WAYNE B. BAEURLE, M.D., PC,

Defendants.

VERDICT FORM

3. DO YOU FIND THAT DEFENDANTS WAYNE B. BAUERLE, M.D. AND WAYNE B. BAEURLE, M.D., PC WERE NEGLIGENT AND THAT SUCH NEGLIGENCE PROXIMATELY CAUSED THE PLAINTIFF ANN GREEN'S LOSS OF CONSORTIUM?

√ YES: IF YES, GO TO QUESTION 4.

____ NO: IF YOU ANSWER NO, STOP AND DELIBERATE NO FURTHER.

NOTE: If you answered "Yes" to Question 3, please continue to Page 4 for a determination of damages. If you answered "No" to Question 3, please stop deliberating and notify the Bailiff.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2011-CP-26-07403

RANDALL M. GREEN and ANN GREEN,

Plaintiffs,

v.

WAYNE B. BAUERLE, M.D. and WAYNE B. BAEURLE, M.D., PC,

Defendants.

VERDICT FORM

4. PLEASE STATE THE TOTAL AMOUNT OF ACTUAL DAMAGES, IF ANY, SUSTAINED BY PLAINTIFF ANN GREEN.

$ 550,000.00 Actual Damages
Five hundred fifty thousand and 00/100

OR

_____ For the Defendants.

FOREPERSON

September 13, 2013
Conway, South Carolina

NOTE: Please notify the Bailiff when deliberations are complete.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CASE NO. 11-CP-26-7403
)	
Randall M. Green and Ann Green,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
Wayne B. Bauerle, M.D., Wayne B.)	**FOURTH AMENDED COMPLAINT**
Bauerle, M.D., PC, Grand Strand)	
Regional Medical Center, LLC and)	
Carolinas Medical Response, Inc.,)	
)	
Defendants,)	
)	

HORRY COUNTY
12 OCT 15 AM 11:20
MELANIE HUGGINS-WARD
CLERK OF COURT

The Plaintiffs, by and through counsel, complaining of and against these Defendants, allege as follows:

JURISDICTION AND VENUE

1. Plaintiffs Randall M. Green and Ann Green ("Plaintiffs") are citizens and residents of the County of Marion, State of South Carolina.

2. Plaintiffs, Randall M. Green and Ann Green are lawfully married.

3. Defendant Wayne B. Bauerle, MD, ("Bauerle") is a physician licensed and practicing in Horry County, South Carolina, and is upon information and belief, a citizen and resident of Horry County, in the state of South Carolina. At all times relevant to this Complaint Defendant Bauerle was acting within the course and scope of his employment or agency with Wayne B. Bauerle, M.D., P.C. and Grand Strand Regional Medical Center, LLC. Defendant Bauerle can be served by agreement through his counsel, John B. McCutcheon, Esquire, Thompson & Henry, P.A., 1300 Second Avenue, Third Floor, P. O. Box 174, Conway, South Carolina 29528.

4. Defendant Wayne B. Bauerle, M.D., P.C. ("Bauerle PC") is a medical office

organized and existing pursuant to the laws of the State of South Carolina operating as a medical care practice. At all times relevant to this Complaint, Defendant Bauerle was acting within the course and scope of his employment or agency with Bauerle, P.C. Defendant Bauerle, P.C. can be served by agreement through its counsel, John B. McCutcheon, Esquire, Thompson & Henry, P.A., 1300 Second Avenue, Third Floor, P.O. Box 174, Conway, South Carolina 29528.

5. Defendant Grand Strand Regional Medical Center LLC ("Grand Strand") is a limited liability corporation located in Horry County, South Carolina and provides, for profit, medical and emergency health care services to the general public. Said Defendant hospital through its agents and employees, was and is professionally knowledgeable about triage and evaluation and treatment of trauma patients. Defendant Grand Strand contacted various physicians in special areas of practice to treat the Plaintiff, without the knowledge or consent of the Plaintiff. Defendant Grand Strand had a non-delegable duty to render appropriate care. Defendant Bauerle was the apparent agent of Defendant Grand Strand. Defendant Grand Strand held itself out to the public by offering to provide services. At all times relevant to this Complaint, Defendant Bauerle was acting within the course and scope of his employment or agency with Grand Strand Regional Medical Center, LLC. The Defendant, Grand Strand can be served by agreement through its counsel, Weldon Johnson, Barnes, Alford, Stork & Johnson, LLP, 1613 Main Street, Columbia, South Carolina 29202.

6. The Defendants at all relevant times herein were responsible for the care, health, safety, and well being of Plaintiff Randall Green. The Defendant Grand Strand at all times relevant herein provided Emergency Room physicians, nurses and employees for the care of patients who presented at the Emergency Room. That at all times complained of herein all of the above-named Defendants did have a doctor-patient and/or health care provider-patient relationship with the

Plaintiff, Randall Green.

7. This Court has jurisdiction over the matters and the parties hereto. This action concerns claims for medical negligence, among other things, that occurred over the course of treatment by each and all Defendants, all of which took place in Horry County, State of South Carolina.

8. At all times complained of herein, Defendant Wayne B. Bauerle, M.D., was a licensed physician engaged in the practice of his specialty profession in the State of South Carolina, and still holds himself out today to the public as an Orthopaedic Surgeon and as a competent and skillful physician capable of properly and skillfully assessing, treating, and caring for patients, performing operations, diagnosing medical conditions, and otherwise providing competent and careful healthcare services. At all time pertinent hereto the Defendant Bauerle, was acting the scope and course of his employment and agency on behalf of the Defendants Bauerle, P.C. and Grand Strand.

FACTS

9. The Plaintiffs repeat and reallege all of the foregoing paragraphs and all subsequent paragraphs as if each were set forth herein verbatim.

10. On or around April 17, 2004, Mr. and Mrs. Green were seriously injured in an automobile collision when another driver crossed the center line and struck their vehicle, virtually head-on.

11. Plaintiffs were taken emergently to Grand Strand Regional Medical Center in Myrtle Beach, Horry County, South Carolina where Mr. and Mrs. Green were initially seen and evaluated by emergency room physicians and hospital staff.

12. Mr. Green was assessed as having a severe laceration to his right forearm that was

bleeding profusely.

13. As this condition was determined to be urgent, Grand Strand provided care by contacting and calling to the hospital a surgeon or sugeons for the continued care of his serious condition.

14. Physicians at Grand Strand Regional Medical Center also paged Dr. Bauerle to tend to Mr. Green for a hip injury. After two calls, Dr. Bauerle arrived at the hospital.

15. As Mr. Green was being prepped for imminent surgery on his bleeding forearm wound, Defendant Bauerle insisted that Mr. Green be taken for a second CT scan of his injured hip. Despite disagreement with another treating physician, and despite the urgent condition of Mr. Green's forearm wound, Grand Strand, as well as its agents, employees, nurses and physicians, failed to stop Dr. Bauerle.

16. At or about the time of his movement to the prep room for the operating room, morphine was administered to Mr. Green for pain pursuant to orders by on e of the emergency room physicians.

17. During the time that it took Mr. Green to have the CT done, Mr. Green's bleeding continued and his blood pressure dropped markedly.

18. Grand Strand nurses and staff caring for Mr. Green during this time failed to properly monitor and to notify a physician of Mr. Green's dangerously low blood pressure and failed to take measures to correct Mr. Green's blood pressure or continuous forearm bleeding.

19. When Mr. Green returned from the radiological studies he "coded" from significant loss of blood from his forearm injury. He was resuscitated and underwent surgery to stop the oozing of blood from his arm.

20. Following this blood loss, Mr. Green became unable to move his extremities. Mr. Green was then transferred to The Medical University of South Carolina for further care. Mr. Green remains paralyzed from just above the waist down.

FIRST CAUSE OF ACTION: PROFESSIONAL NEGLIGENCE/ MEDICAL MALPRACTICE

21. The Plaintiffs repeat and reallege all of the foregoing paragraphs and all subsequent paragraphs as if each were set forth herein verbatim.

22. At all relevant times herein, Defendants owed a duty to provide proper and appropriate medical care to Mr. Green in accordance with the prevailing professional standards of care in the community but failed to do so in the following manners:

a. In failing to properly care and treat Mr. Green;

b. In failing to recognize the signs and symptoms of a traumatic injury with significant blood loss in Mr. Green;

c. In failing to order the appropriate procedures to properly diagnose and treat Mr. Green's condition and symptoms;

d. In repeatedly failing to conduct adequate monitoring of his vital signs while in the pre-operative and radiological areas;

e. In failing to properly monitor, as well as to adequately communicate Mr. Green's declining vital signs to the appropriate medical care givers so that adequate treatment could be initiated to control his blood loss, preventing further decline of his condition;

f. In delaying proper and necessary medical treatment;

g. In failing to maintain proper training, education and expertise to exercise

appropriate judgment and skill in the treatment of Mr. Green;

h. In failing to have appropriate policies, procedures, and protocols to ensure that patients with conditions similar to Mr. Green are treated in an appropriate manner, or in having such policies, procedures, and protocols, and failing to ensure such were carried out and followed;

i. In administering morphine to a Plaintiff with arterial bleeding or the potential for arterial bleeding before closing the arteries;

j. In failing to comprehend the impending danger to the Plaintiff by overriding another physicians orders and causing delay in the treatment of the Plaintiff;

k. In failing to recognize the risks, hazards and dangers of the delay of treatment of the Plaintiff's bleeding forearm;

l. In failing to permit, or in the alternative, in delaying the proper and appropriate medical and surgical procedures to avoid further foreseeable injury to the Plaintiff;

m. In failing to follow generally accepted medical, surgical, diagnostic and hospital standards, practices and procedures;

n. In failing to use the due degree of care and caution that reasonably prudent healthcare providers and medical practitioners would have used under the circumstances then and there prevailing and attendant;

o. In failing to understand and appreciate, to comprehend and to interpret the medical significance of medical information and data present and available concerning the medical status and condition of the Plaintiff before, during

and after the Defendant's intentional, reckless and unnecessary delay of the Plaintiff's treatment;

p. In unnecessarily creating a medical emergency and in so creating this emergency causing serious and debilitating and permanent injury to the Plaintiff;

q. In negligently and recklessly failing to properly monitor, examine, assess and interpret Mr. Green and his medical condition and symptoms prior to causing the unnecessary delay in the treatment and earlier mandated surgical repair of the Plaintiff;

r. In failing to adequately train and supervise Dr. Bauerle and other agents and employees as to the obvious signs and symptoms of a traumatic bleeding injury;

s. In failing to do those things a properly trained medical staff would have done under the same or similar conditions regarding the examination, assessment, diagnosis, performance and consultations with other professionals;

t. In failing to coordinate or require communication between various agents and employees; and

u. In failing to adequately and minimally understand the basic medical tenets and standards for the "triage" or assessing of injured patients.

23. The Defendants did undertake the duty to render medical care to Mr. Green in accordance with the prevailing professional standards of care in the community.

24. Notwithstanding said undertaking, while Mr. Green was under the care of Defendants,

said Defendants departed from prevailing professional standards of care and treatment of Mr. Green and breached their duty to Mr. Green.

25. The Defendants had a duty to provide the type and level of care required for Mr. Green and failed to intervene when that was not done despite Defendants' obligations to do so.

26. Defendant Bauerle's negligent and reckless actions, complained of herein are attributed to Defendants Wayne B. Bauerle, M.D., PC and Grand Strand Medical Center, LLC.

27. Defendants' negligent and reckless actions were not in keeping with proper and appropriate standards of medical care and treatment but were negligent, careless, reckless, willful and wanton and did indeed cause injury to Mr. Green.

28. Had Defendants not acted recklessly and negligently as they did, Mr. Green would not have suffered an infarct, vascular injury and insult to his spinal cord.

29. Additionally, the bleeding, of which Dr. Bauerle halted the timely repair, also caused Mr. Green to be deprived of significant amounts of blood-carrying oxygen and his neurologic processes have been injured as well by Defendant Bauerle's negligent and reckless actions.

30. Mr. Green was fifty-five (55) years of age the time of this tragedy. He can no longer work, earn a living or support his wife and family as he did prior to this injury and he is now confined to a wheelchair and is adjusting badly. His prospects for any significant recovery are slim at best and diminishing rapidly. In all likelihood, he will never walk again.

31. The conduct of all the Defendants as set forth above were the proximate cause of the Plaintiff's debilitating and permanent injuries and pain and suffering and of actual damages of the Plaintiff, including medical expenses, pecuniary and economic loss, permanent disability and mental shock and pain.

SECOND CAUSE OF ACTION: VICARIOUS LIABILITY

32. The Plaintiffs repeat and reallege all of the above paragraphs and all subsequent paragraphs as if each were set forth herein verbatim.

33. Plaintiffs were transported emergently to Grand Strand Regional Medical Center and looked to that facility to provide them with adequate care. Plaintiffs relied on the Defendant Grand Strand Regional Medical Center to provide them with caregivers who were competent and skilled in treating trauma patients. The Defendant Grand Strand held itself out to the public as offering Emergency Room hospital services.

34. A person in similar circumstances would have reasonably believed that Dr. Bauerle and other physicians involved in providing care were hospital employees.

35. The duty of Defendant Grand Strand was non-delegable and Defendant Grand Strand is responsible for the acts of those to whom it entrusted the care of Mr. Green.

36. As a result of the herein referenced acts Mr. Green continues to suffer conscious pain and suffering, loss of enjoyment of life, medical and hospital expenses, loss of wages, mental anguish, emotional distress, personal injuries and trauma requiring hospitalization and treatment.

37. As a direct and proximate result of the Defendants' failures, breaches, and violations, Mr. Green suffered injuries and damages, for which Plaintiffs are entitled to recover.

THIRD CAUSE OF ACTION: NEGLIGENT HIRING, SUPERVISION AND TRAINING
(As To Grand Strand)

38. The Plaintiffs repeat and reallege all of the above paragraphs and all subsequent paragraphs as if each were set forth herein verbatim.

39. Defendant Grand Strand negligently hired, supervised and/or trained nurses, contracted with physicians, and provided care by other health care professional to patients, including

Mr. Green.

40. Defendant Bauerle treated Plaintiff as a result of a contractual relationship with Defendant Grand Strand and was at all times acting in a capacity of apparent agency or was performing a non-delegable duty for Defendant Grand Strand.

41. Defendant Grand Strand negligently entrusted nurses, physicians and other health care professionals working in its facility to properly care for patients, including Mr. Green, which created an unreasonable risk of harm to patients.

42. Defendant Grand Strand knew or should have known that its acts created an undue risk of harm to patients, including Mr. Green.

43. As such, Defendant Grand Strand has direct liability for the negligent acts of these nurses, physicians and other health care professionals.

44. As a direct and proximate result of Defendant Grand Strand's negligence, Mr. Green suffered injuries and damages, for which Plaintiffs are entitled to recover.

FOURTH CAUSE OF ACTION-VICARIOUS LIABILITY
(As To Wayne B. Bauerle, M.D., PC)

45. The Plaintiffs repeat and reallege all of the above paragraphs and all subsequent paragraphs as if each were set forth herein verbatim.

46. At all times pertinent hereto, the Defendant Wayne B. Bauerle, M.D., was acting as the agent or employee of the Defendant Wayne B. Bauerle, M.D., PC, and was acting in the course and scope of his employment.

FIFTH CAUSE OF ACTION: LOSS OF CONSORTIUM

47. The Plaintiffs repeat and reallege all of the above paragraphs and all subsequent paragraphs as if each were set forth herein verbatim.

48. Randall M. Green and Ann Green are husband and wife.

49. Ann Green has been deprived of the comfort, companionship and consortium of her husband and is entitled to recover for these damages caused by Defendants' negligence.

50. Ann Green has incurred expenses as a direct result of the Defendants' negligence which directly and proximately caused her husband to become disabled.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants jointly and/or severally, for the following:

a. Actual damages for Plaintiffs' reasonable and necessary charges for items, including but not limited to, medical care and treatment including doctors' fees, hospital services, supplies, medicine, and loss of income;

b. Damages related to Plaintiffs' conscious suffering, emotional pain and torment;

c. Damages related to the loss of Plaintiff's companionship, comfort, society, support and guidance, all both past and future, suffered by Plaintiff Ann Green;

d. Punitive damages;

e. Costs of this action;

f. Attorney's fees;

g. Such other and further relief as this Court may deem just and proper.

Signatures on following page

QUERY SAUTTER PRICE & FORSYTHE, LLC

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Facsimile: 843-762-1500

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Attorneys for the Plaintiffs

Dated: 10/15/12
Conway, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS
Randall M. Green and Ann Green, Plaintiffs, v. Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC, and Grand Strand Regional Medical Center, LLC, Defendants.	Docket No.: 2011-CP-26-7403 **STIPULATION OF DISMISSAL WITH PREJUDICE AS TO GRAND STRAND REGIONAL MEDICAL CENTER ONLY**

Pursuant to the provisions of South Carolina Rule of Civil Procedure 41, the parties hereby stipulate that this action is dismissed with prejudice as to the Defendant, Grand Strand Regional Medical Center, LLC only.

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see attached

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Attorney for Wayne B. Bauerle, MD and Wayne B. Bauerle, MD, PC

HORRY COUNTY
13 JUN 11 PM 1:55
MELANIE HUGGINS WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS
Randall M. Green and Ann Green, Plaintiffs, v. Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC, and Grand Strand Regional Medical Center, LLC, Defendants.	Docket No.: 2011-CP-26-7403 **STIPULATION OF DISMISSAL WITH PREJUDICE AS TO GRAND STRAND REGIONAL MEDICAL CENTER ONLY**

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HORRY COUNTY
13 JUN 11 PM 1:05
MELANIE HIGGINS-WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS
Randall M. Green and Ann Green, Plaintiffs, v. Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC, and Grand Strand Regional Medical Center, LLC, Defendants.	Docket No.: 2011-CP-26-7403 **COVENANT NOT TO SUE AND COVENANT NOT TO PROSECUTE OR EXECUTE JUDGMENT**

On April 17, 2004, Randall Green was a patient in the Emergency Room at Grand Strand Regional Medical Center as a result of a motor vehicle accident. It is alleged a delay in treatment caused further permanent injury to the Plaintiff.

An action has been instituted in the Court of Common Pleas for Horry County against Wayne Baurle, MD, Wayne Bauerle, MD, PC, and Grand Strand Regional Medical Center, LLC with the allegations of negligence and damage set forth in the Fourth Amended Complaint.

Randall M. Green and Ann Green, for and in consideration of a lump sum payment of Two Million and 00/100 ($2,000,000.00) Dollars, paid on behalf of Grand Strand Regional Medical Center, LLC (hereinafter known as "Payer"), receipt whereof is hereby acknowledged, do hereby irrevocably bind themselves at no time or place to commence or prosecute any action or suit, or execute on any judgment on account of any claim for personal injury or negligence or any other claim or claims, actions or causes of action, including medical expenses, against the Payer, by reason of the alleged negligence in Mr. Green's treatment, specifically including but not limited to the lawsuit presently

pending in the Court of Common Pleas for Horry County, Civil Action number 2011-CP-26-7403.

It is further expressly agreed and covenanted that this instrument may be pleaded as a defense and as a bar of any action or proceeding or judgment have been or that may be brought, instituted or taken by the undersigned, the heirs or beneficiaries at law of Randall Green or on his behalf against Grand Strand Regional Medical Center, LLC, and that this instrument shall forever be a complete bar to the commencement or prosecution of any action or proceeding or judgment whatever against the Payer, on account of the injuries, treatment and damages of the said Payee as well as any future claims for damages of any kind whatsoever.

It is further agreed and understood that the payment of the consideration herein mentioned shall in no way bar or affect any action against any person other than the Payer arising out of the incident hereinbefore mentioned, that the consideration herein expressed is paid solely for this Covenant Not to Sue and Covenant not to Prosecute or Execute Judgment against the Payer and that the right to sue other persons including Wayne B. Bauerle, MD and Wayne B. Bauerle, MD, PC are hereby expressly reserved.

It is further agreed and understood that the payment of the Two Million and 00/100 Dollars ($2,000,000.00) to the Payee is not and shall not be construed to be full compensation for the injuries or damages of the Payee or heirs at law or beneficiaries as set forth or could have been set forth in the Fourth Amended Complaint. Any liability or responsibility on the part of Grand Strand Regional Medical Center, LLC is expressly denied and disputed, but the money is paid and received solely as consideration for this Covenant on behalf of Grand Strand Regional Medical Center, LLC on account of the

treatment allegedly resulting in the alleged damages, known or unknown, to Randall Green, his heirs at law or beneficiaries.

The undersigned agrees to indemnify and hold the Payer harmless from any and all claims, if any, which have been or may hereinafter be made by any private insurance company, Medicare, Medicaid, or any branch of the United States Government by way of subrogation or otherwise for medical, drug, hospital or other services afforded Randall Green in connection with this alleged negligent and improper treatment and care. The undersigned agree that any such claims or liens will be satisfied out of the proceeds of the settlement.

CONFIDENTIALITY

The parties mutually agree that neither they nor their attorneys nor representatives shall reveal to anyone, other than as may be mutually agreed to in writing or required by a Court of law, any of the terms of this Covenant and Agreement, or any of the amounts, numbers, terms or conditions of any sums payable to Payee as set forth.

NATURE OF PAYMENTS

All sums set forth in this Covenant constitute damages on account of personal injuries in a case involving physical injury and potential claims for death arising from the accident, casualty or event stated in Paragraph 1 of this agreement.

REPRESENTATION BY PAYEE

Payee states that they have carefully read this agreement in its entirety, has conferred with their attorneys, and know and understand the contents of this Agreement. Payee further understands and acknowledges that this Agreement has been negotiated by the parties through their respective counsel. Payee represents that they are not relying on

the advice of these Defendant, Payer, or anyone associated with these Defendant or Payer concerning the legal or tax consequences of this agreement, nor is this Agreement contingent upon any favorable tax determination. Accordingly, Payee hereby Covenants not to Sue, further Prosecute this action or Execute any Judgment and agrees to hold harmless Payer, its counsel from any claim of any kind which Payee may assert because of any unforeseen consequences of this Covenant Not to Sue or Prosecute or Execute.

ADDITIONAL DOCUMENTS

All parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to give full effect to the basic terms and intent of this Agreement.

ENTIRE AGREEMENT

This Covenant Not to Sue or Prosecute or Execute contains the entire agreement between Payee and Payer on behalf of this Defendant pertaining to the matter set forth and shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns and beneficiaries of each.

GOVERNING LAW

This Covenant Not to Sue shall be construed and interpreted in accordance with the law of the State of South Carolina.

IN WITNESS WHEREOF, the undersigned has hereunto set their hands and seal this 31st day of May 2013.

WITNESSES:

E. Brooke Hunt

Randall Green

WITNESSES:

Ann Green

We, the undersigned attorneys for the Payee, hereby certify that the contents, meanings and effects of the foregoing Covenant Not to Sue or Prosecute or Execute have been carefully and fully explained to them by us and we have recommended that they execute this Covenant Not to Sue or Prosecute or Execute for the consideration herein expressed.

O. Grady Query, Esquire

Cristin Uricchio, Esquire

L. Morgan Martin, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO: 2005-CP-26-2805
Randall M. Green and Ann Green	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	**MEMORANDUM OF LAW IN SUPPORT OF**
Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC and Strand Orthopaedic Consultants, LLC, Grand Strand Regional Medical Center, LLC and Carolinas Medical Response, Inc.	)	**DEFENDANTS WAYNE B. BAUERLE, MD, WAYNE B. BAUERLE, MD, PC AND STRAND ORTHOPAEDIC CONSULTANTS, LLC'S MOTION FOR SET OFF**
Defendants.	)	

HORRY COUNTY
13 SEP 23 PM 2:55
MELANIE HUGGINS-MOORE
CLERK OF COURT

FACTS

This case was tried before a jury during the week of September 9, 2013, with the Honorable Steven H. John presiding. The jury found for Randall M. Green in the amount of $2.3 million and Ann Green in the amount of $550,000.

Prior to trial, the Defendants Grand Strand Regional Medical Center, LLC , Carolinas Medical Response, Inc., and the at-fault driver settled with the Plaintiffs in an amount unknown to the undersigned.

Furthermore, the Medical University of South Carolina settled with the Plaintiffs in a separate suit, Case No. 2007-CP-10-5374, for $160,000.00 for alleged medical malpractice.

Following the trial, defense counsel moved to off set the verdict with the amount paid by the Defendants Grand Strand Regional Medical Center, LLC, Carolinas Medical Response, Inc., and the at-fault driver who settled prior to trial, as well as the amount paid by MUSC, who subsequently settled with the Plaintiff.

For the below reasons, the Defendants' Motion for Set Off should be granted.

LAW AND ANALYSIS

"When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater...." S.C. Code Ann. 15-38-50.

"A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." Hawkins v. Pathology Associates of Greenville, PA, 330 S.C. 92, 113 (Ct.App. 1998) (citing Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967); Vaughn v. City of Anderson, 300 S.C. 55, 386 S.E.2d 297 (Ct.App. 1989).

"Therefore, before entering judgment on a jury verdict, the 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." Smith v. Widener, 397 S.C. 468, 472-73 (Ct.App. 2012) (citing Hawkins v. Pathology Associates of Greenville, PA, 330 S.C. 92, 113 (Ct.App. 1998)). "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." Id. at 473 (citing Ellis v. Oliver, 335 S.C. 106, 113 (Ct.App. 1999)).

"Therefore, a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1)." Smith v. Widener, 397 S.C. 468, 473 (Ct.App. 2012).

"Application of the settlement credit was statutorily mandated in this case. Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release

has been executed in good faith between a plaintiff and one of several joint tortfeasors." Ellis v. Oliver, 335 S.C. 106, 113 (Ct.App. 1999).

"Rule 8(c) does not list set-off as an affirmative defense which must be pled in order to be pursued at trial." Id. at 342.

Pursuant to South Carolina Code Section 15-38-50, this Court should off set the jury verdict with the amount paid by the settling Defendants. In fact, the Court of Appeals for South Carolina held that the verdict must be off set by the amount paid by settling defendants if the settlement was for the same injury to the Plaintiff. Smith v. Widener, 397 S.C. 468, 472-73 (Ct.App. 2012).

In this case, the Plaintiffs sought to recover from all of the Defendants for the same injury to the Plaintiffs. The Plaintiffs alleged that the Defendants committed medical malpractice while treating Plaintiff Randall Green following an automobile accident. The at-fault driver injured the Plaintiff causing him to seek treatment from the Defendant doctors and hospital. The Plaintiffs alleged that Plaintiff Randall Green became a paraplegic due to the Defendants' alleged medical negligence.

The Plaintiffs further alleged in a separate suit that employees or agents of the Medical University of South Carolina committed medical negligence in their treatment of the Plaintiff. Mr. Green would not have sought treatment at MUSC if he did not sustain injuries in the automobile accident and then damages following the alleged medical malpractice of Dr. Bauerle and the employees and agents of Grand Strand Regional Medical Center.

Because the Plaintiffs sought recovery from all Defendants for the same injury, this Court should set off the amount paid by the settling Defendants from the jury verdict.

CONCLUSION

For the foregoing reasons, the Defendants Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC and Strand Orthopaedic Consultants, LLC's Motion for Set Off should be granted.

JOHN B. McCUTCHEON, JR.
LISA A. THOMAS
S. ASHLEY GWIN
Attorneys for the Defendants

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P.O. Box 1740
(843) 248-5741

September 23, 2013

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS Docket No.: 2011-CP-26-7403
Randall M. Green and Ann Green, Plaintiffs, v. Wayne B. Bauerle, MD, and Wayne B. Bauerle, MD, PC, Defendants.	)	**PLAINTIFFS' MOTION AND SUPPORTING MEMORANGUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SETOFF**

NOW COME the Plaintiffs, Randall M. Green and Ann Green ("Plaintiffs"), by and through their undersigned counsel of record, and hereby submit their Motion and Memorandum in Opposition to Defendants' Motion for Set-off from the judgment rendered by this Honorable Court on September 13, 2013.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of the negligent treatment of Plaintiff Randall M. Green ("Mr. Green") by various medical providers, including Defendants Wayne B. Bauerle, MD and Wayne B. Bauerle, MD, PC (collectively "Bauerle"), for injuries Mr. Green suffered in an automobile accident on April 17, 2004 in Horry County. On December 7, 2004, Mr. Green settled with the at-fault driver, for One Hundred Thousand ($100,000.00) Dollars under the liability policy and he received One Hundred Fifty Thousand ($150,000.00) Dollars in under insured motorist coverage. Mrs. Green received One Hundred Thousand ($100,000.00) Dollars under the at-fault driver's liability policy and Seventy-Five Thousand ($75,000.00) Dollars in under insured motorist coverage. Subsequently, the Plaintiffs filed one suit against Defendants Bauerle, Grand Strand Regional Medical Center ("Grand Strand"), and Carolinas Medical Response, Inc. ("CMR") for medical negligence and loss of consortium. A separate suit was filed against the Medical University of

South Carolina ("MUSC") for damages arising from a sponge negligently left in Mr. Green's leg as a result of treatment rendered at MUSC, which resulted in distinct and different causes of action. The Plaintiffs eventually settled with all of the parties except Bauerle, thereby releasing the settling parties from liability. On February 14, 2010, the Plaintiffs settled with the ambulance carrier, CMR, for Twenty-Five Thousand ($25,000.00) Dollars. On February 3, 2010, the Plaintiffs settled with MUSC for One Hundred Sixty Thousand ($160,000.00) Dollars.

Grand Strand filled a Motion for Partial Summary Judgment dismissing the Plaintiffs' causes of action as to Grand Strand for Vicarious Liability and Negligent Hiring, Supervision, and Training. The Honorable Larry B. Hyman, Jr. granted Defendant Grand Strand's Motion for Partial Summary Judgment on April 18, 2013, dismissing all causes of action for which Grand Strand could be held vicariously liable for the actions of Bauerle. Subsequently, on May 31, 2013, Grand Strand settled with the Plaintiffs. (Stipulation and Covenant Not to Sue, Attached as Sealed **Exhibit A**). Bauerle did not appeal this Order or file a motion for reconsideration, therefore they now should not be able to avail themselves of the set-off from the stricken causes of action, which is the law of the case. Moreover, Bauerle stipulated to the dismissal of Grand Strand without requiring the Plaintiffs to allocate the proceeds of the Settlement.

The above-captioned trial was heard by this Honorable Court on September 11, 2013. At the end of the trial the jury found in favor of the Plaintiffs and returned a verdict of Two Million Three Hundred Thousand ($2,300,000.00) Dollars in actual damages for Mr. Green's medical negligence claim and Five Hundred Fifty Thousand ($550,000.00) Dollars actual damages for Mrs. Green's loss of consortium claim. Bauerle now seeks to set-off the settlement proceeds obtained by the Plaintiffs from the at-fault driver, Grand Strand, Carolinas Medical Response and the Medical University of South Carolina (collectively referred to as "Settling Defendants") from the verdicts

rendered on September 13, 2013. For the reasons set forth below, Bauerle's Motion should be denied.

ARGUMENT

I. APPLYING SET-OFF CONSTITUTES AN UNDUE TAKING.

Medical Malpractice and Loss of Consortium are separate causes of action involving separate plaintiffs. Hiott v. Contracting Servs., 276 S.C. 632, 281 S.E.2d 224 (1981)(In South Carolina, loss of consortium is an independent action, not derivative.); See S.C.Code Ann. § 15-75-20(1976) ("Any person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse.") The Settlement Agreement entered into by the Plaintiffs and Grand Strand did not specify how the Settlement funds are to be allocated between each of the Plaintiffs or their individual causes of action. There exists no authority pursuant to which this Court may determine the relative rights of the parties to the unallocated settlement proceeds as between Plaintiff Randall M. Green for his Medical Negligence claim and Plaintiff Ann Green for her Loss of Consortium claim. Each of the parties has 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. An allocation or reallocation by the court would necessarily deprive one plaintiff or the other of an existing property right and to do so would constitute a denial of due process and a denial of equal protection under the law in violation of not only the South Carolina Constitution, but the Constitution of the United States of America. The Court has no way to determine the relative rights of the parties to the settlement proceeds, and therefore, may not set-off against either.

Both the Covenant Not to Sue and the Stipulation of Dismissal are silent as to the proportionate ownership of either party. (Attached as **Exhibit A**). Bauerle entered into the Stipulation of Dismissal without objection to the silence of any apportionment between the two individual Plaintiffs. This Court has no jurisdiction to apportion or divide the settlement between the two Plaintiffs at this juncture. 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, in both instances without any adjudication of their respective rights.

II. SET-OFF IS NOT REQUIRED UNDER SECTION 15-38-50.

The Defendants, Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C ("Bauerle"), seek to set-off the amount of the Plaintiffs' settlement with the at-fault driver, Grand Strand, CMR and MUSC against the judgment entered by this Court against Bauerle on September 13, 2013. Set-off is not required under the statute because Section 15-38-50 requires that the reduction of a judgment from a settlement must be for the same injury arising under the same cause of action.

South Carolina Code Section 15-38-50 provides that a release or covenant not to sue executed in good faith to one of two or more persons liable in tort for the same injury "reduces the claim against the others to the extent of any amount stipulated by the release or covenant". However, the reduction in the judgment must be from a settlement for the same cause of action. Rutland v. S.C. Dep't of Transp., 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), cert. granted, (Oct. 19, 2011); Welch v. Epstein, 342 S.C. 279, at 313, 536 S.E.2d at 425 (2000). The supreme court explained, "[t]he reason for allowing such a credit is to prevent an injured person from

obtaining a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong." Truesdale v. South Carolina Highway Dept., 264 S.C. 221, 213 S.E.2d 740 (1975).

Here, Bauerle is not entitled to set-off from prior settlements with the at-fault driver, Grand Strand, CMR or MUSC for two reasons. First, the Plaintiffs' settlements do not arise out of the same cause of action as the judgment against Bauerle. Further, the Plaintiffs' settlements do not compensate the Plaintiffs for the same injuries as the judgment against Bauerle.

A. The settlement with Grand Strand and the judgment against Bauerle resulted from entirely and distinctly different causes of action.

Section 15-38-50 provides that a release or covenant not to sue executed in good faith to one of two or more persons liable in tort for the same injury "reduces the claim against the others to the extent of any amount stipulated by the release or covenant". However, the reduction in the judgment must be from a settlement for the same cause of action. Rutland v. S.C. Dep't of Transp., 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), cert. granted, (Oct. 19, 2011).

1. Grand Strand Regional Medical Center

The settlement with Grand Strand and the verdict against Bauerle resulted from entirely and distinctly different causes of action, and therefore Bauerle, the only non-settling defendant, should not be entitled to set-off the amount of the Settling Defendants' settlements from his judgment. The Plaintiffs Fourth Amended Complaint asserted four causes of action: Professional Negligence/Medical Malpractice, Vicarious Liability, Negligent Hiring, Training, and Supervision, and Loss of Consortium. The Complaint would make Grand Strand liable for the negligence of its employees, agents, and independent contractors under theories of vicarious liability and the nondelegable duty doctrine. By Order dated April 18, 2013, the Honorable Larry

B. Hyman granted Grand Strand's Motion for Partial Summary Judgment ("Order"). In so doing, Judge Hyman dismissed the Plaintiffs' causes of action against Grand Strand for Vicarious Liability and Negligent Hiring, Supervision, and Training. That Order provided:

> Grand Strand cannot be held vicariously liable for the acts or omissions of its independent contractor physicians-or any of its other independent contractors or employees for that matter-because both the statute of limitations and the statute of repose have expired as to Grand Strand's independent contractors and employees, none of whom have been named in any of the five versions of the Complaint.

(Order for Summ. J., 3, April 18, 2013). Judge Hyman's Order further provided: "Grand Strand is entitled as a matter of law for judgment as to vicarious liability." Id. at 7. Further, Judge Hyman specifically held that Grand Strand could not be held responsible for the acts of negligence or recklessness on the part of Bauerle, based on the nondelegable duty doctrine of vicarious liability stating "[t]hus because none of the first four iterations of the Complaint put Grand Strand on sufficient notice of a nondelegable duty claim, the relation back doctrine does not apply to that claim". Id. at 13-14. Judge Hyman concludes:

> IT IS, THEREFORE, ORDERED that Grand Strand's Motion for Partial Summary Judgment is GRANTED. Judgment shall be entered in Grand Strand's favor on the Fourth Amended Complaint's causes of action for vicarious liability and negligent hiring, supervision, and training.

Id. at 15. Bauerle, did not oppose nor seek to modify in any manner, Judge Hyman's Order, nor has Bauerle sought reconsideration, appealed from the order, nor objected to the Order in any matter whatsoever. A ruling on an issue which disposes of the underlying cause of action is a judgment on the merits. Foran v. USAA Cas. Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). If a ruling is adverse to a party, it is incumbent upon that party to appeal the ruling or be bound by it as the law of the case. Charleston Lumber v. Miller Housing, 338 S.C. 171, 525 SE 2d 869 (2000); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (unappealed ruling is law of the case).

Therefore, the only causes of action that remained as to Grand Strand after Judge Hyman's Order were Mrs. Green's Loss of Consortium claim and Mr. Green's Negligence claim alleging Grand Strand's direct negligence in the following particulars:

a. In failing to have appropriate policies, procedures, and protocols to ensure that patients with conditions similar to Mr. Green are treated in an appropriate manner, or in having such policies, procedures, and protocols, and failing to ensure such were carried out and followed; and
b. In failing to coordinate or require communication between various agents and employees

(Fourth Am. Compl., ¶ 22).

On the other hand, causes of action remained against Bauerle for Mrs. Green's Loss of Consortium Claim and Mr. Green's Medical Negligence claims. Since Grand Strand's liability for Bauerle's conduct could only be by virtue of vicarious liability, dismissing that cause of action dismissed Grand Strand's liability for Bauerle's actions. Similarly, Grand Strand's negligence in failing to implement policies and procedures cannot be imputed to Bauerle.

Shortly after Judge Hyman's Order, Grand Strand settled with the Plaintiffs in consideration of a Covenant Not to Sue. By way of the Stipulation and Covenant, the only causes of action asserted at trial against Bauerle were for Bauerle's negligence in interrupting Mr. Green's treatment and causing Mrs. Green loss of consortium. (Attached as **Exhibit A**). Therefore, Grand Strand's settlement funds were given to the Plaintiffs in consideration for completely different causes of action than those pursued against Bauerle at trial and for which the jury rendered a verdict against Bauerle. When Judge Hyman granted summary judgment on the Plaintiffs' vicarious liability claim and negligent hiring, supervision, and training, any right of Bauerle to assert the privilege of set-off to prevent double recovery under the same cause of action was eradicated. Bauerle should not now be allowed to claim a set-off necessarily based upon the causes of action stricken by Judge Hyman's Order when Bauerle stood by and did nothing to oppose the rulings in

that Order. In fact, pursuant to Question One of the Defendant Grand Strand's Request to Admit, Bauerle amended his answer on March 4, 2008 to admit that:

> The employees of Grand Strand Regional Medical Center did not proximately cause or contribute to the injuries and damages alleged to have been sustained by Plaintiffs in the Third Amended Complaint.

(Def.'s Bauerle Am. Answer to Def. Grand Strands Req. to Admit, 2, March 4, 2008, Attached as **Exhibit B**).

2. <u>At-Fault Driver</u>

The Plaintiffs sued the at-fault driver for negligently operating his vehicle and in doing so causing the Plaintiffs to suffer injuries, including a lacerated arm and fractured and dislocated hip. There is no cause of action against Bauerle that alleges improper operation of a motor vehicle.

3. <u>Carolina's Medical Response</u>

The Plaintiffs sued CMR alleging that CMR was negligent in handling and transporting Mr. Green The negligence of CMR is completely separate from that alleged against Bauerle and this negligence caused Mr. Green to suffer further damages and is alleged to have occurred after the paralysis found to have been caused by the negligence of Bauerle.

4. <u>The Medical University of South Carolina</u>

The Plaintiffs sued MUSC for negligently leaving surgical sponges in Mr. Green's leg, causing him to develop MRSA, infection, and extreme pain. MUSC's negligence is alleged to have occurred subsequent to the conclusion of the treatment by Bauerle, alleging facts that give rise to a separate cause of action in a separate lawsuit in Charleston County.

B. The settlements and judgment are for different injuries.

When a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to set-off arises by operation of law. <u>Smith v. Widener</u>, 397 S.C.

468, 724 S.E.2d 188 (Ct. App. 2012) (*citing* Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271-72 (Ct. App. 1999)). Likewise, when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no set-off as a matter of law. Smith at 473; (*citing* Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. at 114-15, 498 S.E.2d at 407) (holding that Georgia and South Carolina wrongful death actions involve different injuries and therefore are separate claims with no right of set-off).

Under South Carolina Code § 15-38-50, a non-settling defendant is entitled to a reduction in the verdict rendered against him by the amount of his co-defendants' settlement funds, "[h]owever, the reduction in the judgment must be from a settlement for the same cause of action." Welch, 342 S.C. 279, at 313, 536 S.E.2d at 425 (2000). In other words, in order for Bauerle to recover set-off from the Settling Defendants' settlement funds, he must prove that all of the Settling Defendants and Bauerle caused the Plaintiffs to suffer one indivisible injury for which the Settling Defendants and Bauerle settled or litigated under the same cause of action.

Here, the judgment against Bauerle was the injuries Mr. Green sustained when Bauerle negligently delayed Mr. Green's care. That delay caused Mr. Green to suffer cardiac arrest and subsequently become paralyzed. Mr. Green's injuries in the case at bar were confined to his paraplegia and the effect of his paraplegia on his life and on his wife through her loss of consortium claim. At trial, Dr. Chariker testified that the interruption in treatment to Mr. Green's right arm caused by Bauerle's order for CAT Scan "tipped the scales" and caused Mr. Green's arrest. Therefore, the sole injuries for which the Plaintiffs recovered from Bauerle are the result of Mr. Green's paralysis caused by Bauerle.

1. Grand Strand Regional Medical Center

The damages the Plaintiffs sought to recover from Grand Strand negligently failing to implement policies and procedures are different than those the Plaintiffs sought to recover from Bauerle for negligently interrupting treatment to Mr. Green. But for Bauerle's negligence, all of the expert medical testimony admitted at trial was that Grand Strand's administrative negligence would have caused Mr. Green minimal harm from blood loss and enduring low blood pressure for a prolonged period. Further, the Plaintiffs' experts testified at trial that absent the interruption by Bauerle, Mr. Green's cardiac arrest was not inevitable. However, all of the Plaintiffs' experts, as well as Bauerle's expert Dr. Smith, testified that even if Mr. Green suffered cardiac arrest in the operating room, and it occurred in the operating room instead of during the delay in the CAT Scan, he could have been resuscitated more quickly, given the assistance of the anesthesiologist who was present. Therefore, it would have been more probable than not that Mr. Green's arrest would not have caused him to become paralyzed, rather he would have only endured minimal damages from blood loss. The injuries alleged by the Plaintiffs caused by Grand Strand are separate and apart from those found to have been caused by Bauerle. Further, in the case at bar, no medical expenses incurred by the Plaintiffs while at Grand Strand were claimed as damages.

2. At-Fault Driver

Here, Bauerle overlooks the lawsuit filed against the at-fault driver alleging negligence in operating his vehicle and the fact that the Plaintiffs alleged different injuries from the at-fault driver's negligence than the negligence of Bauerle. The at-fault driver drove his vehicle in such a negligent way that he hit the vehicle in which Mr. Green was traveling head-on. This wreck caused Mr. Green to fracture and dislocate his right hip and suffer a severe laceration on his right forearm. Mr. Green's settlement with the at-fault driver was for these bodily injuries in addition to the

damage to Mr. Green's car. But for Bauerle's negligence, medical testimony indicated that Mr. Green would have left Grand Strand with only these two injuries. These injuries are completely separate than Mr. Green's paralysis caused by Bauerle, and it is even clearer that these are different causes of action. All of the causes of action against the at-fault driver alleging negligence in operation of a motor vehicle. Therefore, it cannot be said that this settlement and Bauerle's verdict are for the same injuries to the Plaintiffs nor do the injuries arise under the same cause of action.

3. **Carolina's Medical Response**

Carolina's Medical Response ("CMR") is the EMS provider who carried Mr. Green from Grand Strand to MUSC on April 18, 2004. The Plaintiffs filed suit against CMR alleging that CMR was negligent in handling and transporting Mr. Green, and that this negligence caused Mr. Green to suffer further injury than he endured as a result of Bauerle's treatment. Mr. Green was already paralyzed when CMR picked him up, so the injuries the Plaintiffs sought to recover from CMR were separate and apart from those the Plaintiffs recovered from GSRMC. The negligence of CMR is completely separate from that alleged against Bauerle.

4. **The Medical University of South Carolina**

Here again, the Defendant overlooks the lawsuit filed against MUSC alleging MUSC negligently rendered care to Mr. Green while at MUSC. While at Grand Strand, Mr. Green only had temporary surgery performed on his forearm laceration. It was not until Mr. Green was transferred to MUSC, on April 18, 2004, that he underwent surgery to repair his post column acetabular fracture and remove bone fragments from his hip joint. After this surgery, while still at MUSC, several surgical wound vac sponges were inserted in Mr. Green's hip wound and negligently left inside Mr. Green's leg. As a result of this negligence by MUSC, Mr. Green developed a severe infection in his leg, slow healing sores, and MRSA. But for MUSC's negligence, Mr. Green would not have developed an infection, sores, or MRSA. It was for this

negligence that the Plaintiffs sued and eventually settled with MUSC, whereas Bauerle's negligence resulted in Mr. Green becoming paralyzed before he was transferred to MUSC. Additionally, in the case at bar, the Plaintiffs did not claim any medical expenses or damages involving MUSC. Therefore, the Plaintiff's settlement with MUSC was for completely different injuries than those recovered in the judgment against Bauerle.

Therefore, since the Plaintiffs recovered under different causes of action, for different injuries, set-off is not require under §15-38-50.

III. SET-OFF IS CONTRARY TO THE LEGISLATIVE INTENT OF §15-38-50

The court's primary concern in interpreting a statute is to ascertain and effectuate legislative intent. State v. Four Video Slot Machs., 317 S.C. 397, 453 S.E.2d 896 (1995); Spartanburg County Dep't of Soc. Servs. v. Little, 309 S.C. 122, 420 S.E.2d 499 (1992). "A statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Spartanburg, 309 S.C. at 125, 420 S.E.2d at 501.

A. There is no risk of the Plaintiffs recovering twice if set-off is not granted.

Under South Carolina law, a settlement or covenant not to sue with one tortfeasor does not discharge any other tortfeasor unless its terms so provide or the plaintiff has received full compensation. S.C.Code Ann. § 15-38-50(1). The South Carolina Supreme Court explained, "[t]he reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong." Truesdale v. South Carolina Highway Dept., 264 S.C. 221, 213 S.E.2d 740 (1975).

Mr. Green's damages as proven by evidence admitted at trial were so grave that even adding the settlement and the jury verdict together cannot reasonably compensate the Plaintiffs for the

damages they suffered, so there is no danger of the Plaintiffs receiving a double recovery. Furthermore, the trial judge has the inherent equitable jurisdiction and discretion to make a determination of the adequacy of the combined verdict and settlement and apply set-off only where he believes double recovery exists. In the case at hand, given the amount of the verdicts rendered by the jury for both Mr. Green and Mrs. Green, which combined were less than Mr. Green's total financial loss alone, and which appeared to allow nothing for his non-pecuniary damages, there is no double recovery. The Plaintiffs' damages have not been satisfied, and there should be no set-off.

1. Randall M. Green's damages are not satisfied.

Following the Plaintiffs' five-day trial against Bauerle, the jury deliberated for over eight hours before returning a verdict in favor of Mr. Green. Specifically the jury found that Bauerle negligently departed from the standard of care in his treatment of Mr. Green, and that his negligence proximately caused Mr. Green damages in the amount of Two Million Three Hundred Thousand ($2,300,000.00) Dollars.

The total damages awarded by the jury was still less than the total financial loss testified to by Plaintiffs' Economic Loss Expert, Dr. Oliver Wood. Dr. Wood testified that Mr. Green's total financial loss was Three Million Six Thousand Seven Hundred Ninety-One ($3,006,791.00) Dollars, not including the cost of potential complications of his condition. (Plaintiffs' Trial Exhibit 15, Chart 7; Chart 9.) In fact, in the nine years since Mr. Green became paralyzed, he has experienced many of the potential complications listed Mr. Wood's Chart and is at an increased risk of developing additional complications because of his paraplegia, as testified to by the Plaintiffs' expert Nurse Sarah Lustig. Bauerle did not challenge the expert qualification of Nurse Lustig or Dr. Wood and did not provide any evidence to the contrary.

The verdict rendered for Mr. Green was less than his total financial loss. The trial judge charged the jury that damages for which the Plaintiffs are entitled include pain and suffering, loss of enjoyment of life, and mental distress; however, the jury verdict for did not allow the jury to indicate upon which elements of damages the verdict was based. Therefore, it cannot be said that the Two Million Three Hundred Thousand ($2,300,000.00) Dollar verdict satisfied Mr. Green's damages caused by Bauerle's negligence. For the above-mentioned reasons, set-off is not necessary to prevent a double recovery.

2. Ann Green's Damages have not been satisfied.

The Plaintiffs make the same argument on behalf of Mrs. Green and the jury's Five Hundred Fifty Thousand ($550,000.00) Dollar Loss of Consortium verdict. At trial Mrs. Green offered compelling testimony concerning her relentless devotion to Mr. Green since the day he returned home nine years ago. Mrs. Green testified that from that day forward, she dedicated her life to keeping her husband alive and that she will continue to do so until the day she dies.

Further, Mrs. Green offered testimony that Mr. Green's most intimate marital relations have been damaged since she can no longer sleep in the same bed as Mr. Green or even hold him for fear of complicating his medical condition. Bauerle's negligence caused Mrs. Green to give up her life, in order to save her husband's life. Her Five Hundred Fifty Thousand ($550,000.00) Dollar Loss of Consortium verdict can hardly be said to account for Mrs. Green's total damages.

B. The Settling Defendants and Bauerle are not joint tortfeasors.

Section 15-38-50 only applies to true joint tortfeasors. In Atkinson v. Orkin Exterminating Co. Inc., 604 S.E.2d 385 (2004), the plaintiffs sued Terminix and Orkin for structural damages to their home caused by termite infestation. Terminix settled with the plaintiffs and subsequently a judgment was rendered against Orkin. The supreme court reversed the trial court's award of set-

off to Orkin because it determined that Orkin and Terminix were not joint tortfeasors, since the duties that the two defendants owed the plaintiffs were based upon independent, unrelated contracts, not a common duty of care. Id. at 172. Further, the court held that there was no indication that the claims against the settling defendant constituted a contributing factor to the non-settling defendant's negligence, and therefore, the proceeds from the settlement was a collateral source, and could not be set-off. Id.

Similarly, here it cannot be determined that the parties were joint tortfeasors. In fact, in his Response to Plaintiffs' Request to Admit, Bauerle specifically admits that Grand Strand did not proximately cause or contribute to the Plaintiffs' injuries. (Defendant Bauerle Amended Answer to Defendant Grand Strand Request to Admit, 2, March 4, 2008, **Exhibit B**). Bauerle cannot now be allowed to abandon his own admission.

C. Equitable indemnification does not allow set-off.

The principles of equitable indemnification bode against applying a set-off in this situation. Under equitable indemnification, the cost of settling a case is recoverable

> (1) if the settlement is bona fide, with no fraud or collusion by the parties; (2) if, in the circumstances, the decision to settle is a reasonable means of protecting the innocent party's interest; and (3) if the amount of the settlement is reasonable in light of the third party's estimated damages and the risk and extent of defendant's exposure if the case is tried.

Vermeet Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).

Here, the third element does not apply because the jury clearly indicated that Bauerle's negligence proximately caused the Plaintiffs paralysis. Clearly, under the present facts, to grant a set-off would effectively result in equitable indemnification for the party at greatest fault.

IV. IF THIS COURT DETERMINES SET-OFF IS REQUIRED UNDER § 15-38-50, THE PARTIES' SETTLEMENTS CANNOT BE EQUITABLY REALLOCATED BETWEEN MEDICAL NEGLIGENCE AND LOSS OF CONSORTIUM.

When a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to set-off arises by operation of law. Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012) (*quoting* Ellis v. Oliver, 335 S.C. at 112-113, 515 S.E.2d at 271-72 (Ct.App. 1999)). Likewise, when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no set-off as a matter of law. Smith, 397 S.C. at 473 (*quoting* Hawkins, 330 S.C. at 114-15, 498 S.E.2d at 407(Ct. App. 1998)). On the other hand, when a settlement is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make a factual determination of how to allocate the settlement between the two claims. Smith, 397 S.C. at 473. "The 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." Rutland v. S.C. Dep't of Transp., 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), cert. granted, (Oct. 19, 2011).

If this Court determines that a right to set-off exists, then equity requires that the amount of the settlement funds determined to be set-off by the Court in its discretion, provide justice between the parties. A defendant is only entitled to set-off from a settlement involving injuries sustained by that same plaintiff arising from the same cause of action. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). Further, it is undisputed that Medical Negligence and Loss of Consortium are separate causes of action involving separate plaintiffs and that the damages or injury for Medical Negligence and Loss of Consortium are different as a matter of law. See Graham v. Whitaker, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984) ("It is well settled in South Carolina that one spouse's cause of action for medical expenses and loss of consortium resulting from negligent

injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action.") The Plaintiffs have further set forth, here and above, their arguments that the causes of action against the Settling Defendants and Bauerle are different. The Plaintiffs' Covenant Not to Sue with Grand Strand states that Grand Strand's settlement funds were given in consideration of Plaintiffs' Covenant, but does not indicate how the settlement funds are to be allocated between the Plaintiffs' causes of actions, nor does it specify the amount allocated to either of the two Plaintiffs. (Attached as **Exhibit A**). Thus the Court would be required to revise the settlement agreement between Grand Strand and the Plaintiffs. Although this Court has the authority to reallocate settlement funds for the same injury when equity requires, it would be fundamentally unjust to do so in this circumstance for two reasons. First, the precedent in South Carolina case law appears to limit the authority to do so. Second, equity is not served by doing so.

A. There is no binding case law in South Carolina mandating reallocation of settlements.

Here, binding and enforceable releases have been executed in good faith between the Plaintiffs and the Settling Defendants. None of the Settling Defendants' releases with the Plaintiffs state how the settlement funds are to be allocated between the Plaintiffs or their causes of action, therefore, the Court cannot determine how the settlement funds should be allocated. Welch v. Epstein, 342 S.C. 279, at 313, 536 S.E.2d at 425, reiterates that "the reduction in the [plaintiff's] judgment must be from a settlement for the same causes of action", but permits reallocation between different cause of action despite allocation set forth in a pretrial settlement agreement with a different tortfeasor. Id.

In the case at bar, the Plaintiff, Randall Green, settled with Grand Strand on the causes of action that remained after Judge Hyman's Order and the Plaintiff, Ann Green, settled with Grand Strand

on her cause of action for Loss of Consortium. Even assuming arguendo that the Court would be justified in the reallocation of damages for the different causes of action between the settling and non-settling tortfeasors, there is absolutely no authority pursuant to which the Court can allocate the settlement proceeds between the individual Plaintiffs where no such allocation is provided for in the settlement agreement. Neither equity nor legal precedent would allow this Court to deprive either of the Plaintiffs of their claim to the entire amount of the Settlement proceeds or any portion thereof.

Justice Pleicones, in his dissent in Rutland, argues that Welch should be overruled to the extent that it grants authority for the reallocation of settlement proceeds. 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), cert. granted, (Oct. 19, 2011). The majority did not specifically disagree with Justice Pleicones and it appears that the majority kept the door open to overruling Welch in the future. The majority acknowledged Justice Pleicones dissent and made a point to note that Petitioner Rutland did not ask the court to overrule Welch, nor did he petition to argue against precedent as required by Rule 217, SCACR. Rutland, 390 S.C. at 85-86, 700 S.E.2d at 455, fn.4.

Therefore, the majority wrote, "[w]e decline, as we must, to entertain arguments not presented to us." Id. at 86; (*citing* Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984)), quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

B. The allocation of settlement funds must yield to fairness and justice.

The 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. Welch, 342 S.C. at 313, 536 S.E.2d at 425; (*citing* Smalls v. South Carolina Dep't of Education, 339 S.C. 208, 528 S.E.2d

682 (Ct.App.2000)). A set-off is not necessarily founded upon any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction of the court and should be exercised so as to do justice between the parties. Welch, 342 S.C. at 313, 536 S.E.2d at 425; (*citing* Rookard v. Atlanta & Charlotte Air Line Ry., 89 S.C. 371, 71 S.E. 992 (1911)). Therefore, such motions are addressed to the discretion of the court—a discretion which should not be arbitrarily or capriciously exercised. When two different causes of action are involved, the allocation of settlement funds between two causes of action must yield to fairness and justice. Welch, 342 S.C. 279, at 313, 536 S.E.2d at 425.

Here, even if the Court determines that set-off applies, there is no way for the court to determine how the settlement funds should be allocated between causes of action or between the individual plaintiffs. As discussed above, it is undisputed that Medical Negligence and Loss of Consortium are separate causes of action involving separate plaintiffs. See Graham v. Whitaker, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984).

In Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998), the South Carolina Court of Appeals overturned the trial court's award of set-off of a settlement in a Georgia wrongful death lawsuit against a jury verdict in a South Carolina wrongful death case. In determining whether to allow set-off, the case turned on the fact that the only common element of damages between the two statutes is the award of economic value for the deceased's life expectancy. While the court recognized that "it is almost universally held that there can be only one satisfaction for an injury or wrong", the court reasoned that the Georgia and South Carolina wrongful death statutes do not compensate a plaintiff for the same elements of damage; therefore, suits under both statutes do not constitute the same cause of action. Id. at 113-114.

Additionally, the court noted that at trial neither party requested that the jury specify the amount it awarded for each element of damages, therefore, there was not enough evidence to indicate set-off was necessary to prevent the plaintiff from double recovery. Id. at 114.

Similarly, in the present case, the Plaintiffs both received separate and distinct injuries for which they brought separate and distinct causes of action under which they could recover different damages. We do not know how the jury allocated the Plaintiffs' damages within those separate causes of action. To resolve this matter, the Plaintiffs requested that the Court use a jury verdict form that listed 20 different types of compensatory damages to which the jury could find that the Plaintiffs were entitled under each cause of action, and would have allowed the jury to indicate the amounts awarded for those various elements of damages. Bauerle objected and, although the Court charged the jury with the elements of damages, the Court declined to use the Plaintiffs' verdict form. Since the Court is now unable to determine how the jury intended to allocate its actual damages and Bauerle made no attempt to allow the jury to do so, he cannot, now, allege that the jury's verdict is for the same element of damages as any of the earlier settlements. See Gasque v. Voyager Life Ins. Co. of S.C., 288 S.C. 629, 344 S.E. (2d) 182 (Ct. App. 1986) (Failure to object to the charge at trial waives any alleged error in the charge). To reallocate the settlement funds now would not yield to fairness and justice.

C. The reallocation of settlement agreements is contrary to public policy.

First, the renegotiation of settlement agreements discourages a plaintiff from settling. Second, it does not allow the plaintiff to choose whom to sue.

1. Reallocation discourages plaintiffs from settling.

It has long been held that public policy favors settlement. See Hensley v. Alcon Labs., Inc., 277 F.3d 535, 540 (4th Cir. 2002) (recognizing the value settlements generally bring by "providing

an orderly and peaceful resolution of controversies"). Applying §15-38-50 so that courts can relocate settlement funds, it is foreseeable that a plaintiff's recovery as to one defendant will be inequitably reduced by his recovery against another defendant. This scenario was confronted by the United States Supreme Court in McDermott, Inc. v. AmClyde, 511 U.S. 202, 212-21 (1994). There, the Supreme Court discussed possible inequities of setting off a judgment by the full amount of a settlement rather than requiring a non-settling defendant to pay its proportionate share of damages.

The expansion of this statute to allow equitable reallocation so that settlement proceeds from a defendant for one cause of action can be applied to his co-defendants jury, provides further disincentive for defendants to enter into reasonable, good faith settlement negotiations.

The statute was eventually amended in 2005, several months after the facts of this case took place, in attempt to remedy this situation. At that time South Carolina modified its joint and several liability laws to reflect the concept of comparative negligence.

2. Reallocation violates the Plaintiffs' right to choose his defendant.

The right to set-off is founded in equity. Revising a settlement agreement between a plaintiff and another tortfeasor requires a plaintiff to defend to the court the viability of a claim she has not made. In his dissent from the majority in Rutland v. S.C. Dep't of Transp., 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), cert. granted, (Oct. 19, 2011), Justice Pleicones argues that this violates the established principle that the plaintiff may choose her defendant. See Chester v. S.C. Dept. of Public Safety, 388 S.C. 343, 345-46, 698 S.E.2d 559, 560 (2010) (refusing to find the "firmly entrenched common law principle" of plaintiff's sole right to choose her defendant abrogated by the Torts Claims Act even when the result was to make a non-settling defendant liable for a greater share of the damages).

Here, if reallocation is allowed, the court stands to say the only way the Plaintiffs' could have avoided reallocation would have been to argue to the jury the Plaintiffs' claims against the Settling Defendants. The Plaintiffs would have then had to show how their settlements with the Settling Defendants were for separate causes of action as those against Bauerle than those for which the Plaintiffs sought to recover from Bauerle. As noted above, this would be fundamentally unfair and would only serve to confuse the jury by mentioning irrelevant issues and facts.

V. IN THE ALTERNATIVE, IF THE COURT FINDS THAT THE SETTLEMENT WITH GRAND STRAND WAS NOT FOR A SEPARATE NEGLIGENCE CAUSE OF ACTION, THEN THE ONLY CAUSE OF ACTION EXISTING AT THE TIME OF SETTLEMENT AGAINST GRAND STRAND WAS FOR LOSS OF CONSORTIUM AND ANY SET-OFF SHOULD ONLY APPLY TO REDUCE THE VERDICT FOR THAT CLAIM.

The purpose of the set-off doctrine is to prevent a plaintiff from a windfall or double recovery. Hawkins v. Pathology Assocs., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). Under certain circumstances, funds already received by the plaintiff are offset against that owed by the defendant. See id.

In 1988, the UCATA codified a tortfeasor's right to set-off in S.C. Code Ann. § 15-38-50, which the Defendants cite as the basis for their motion. With respect to settling tortfeasors, this section provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater...

S.C. Code Ann. § 15-38-50 [emphasis added]. South Carolina courts interpreting this statute have held that, when a prior settlement involves compensation for the same injury for which the

jury awarded damages, the right to set-off arises by operation of law. Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271-72 (Ct.App. 1999). However, when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no set-off as a matter of law. Smith v. Widener, 397 S.C. 468, 724 SE 2d 188 (Ct.App. 2012); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998)(holding that Georgia and South Carolina wrongful death actions involve different injuries and therefore are separate claims with no right of set-off).

Where set-off applies, the verdict is only reduced by the amount of settlement funds "...paid to compensate the **same plaintiff** on a claim for the **same injury**." Id. at 472 (emphasis added); (*citing* Hawkins, 330 S.C. 92, 498 S.E.2d 395).

A. The Medical Malpractice verdict in favor of Randall Green is not subject to the set-off provision of S.C. Code Ann. § 15-38-50 as Grand Strand Regional Medical Center was not, and could not be, "liable in tort" to Plaintiff Randall Green as of the date of settlement.

An order is considered a judgment on the merits when it is a determination of a matter forming the whole or part of a cause of action. Ex parte capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006). A ruling on an issue which disposes of the underlying cause of action is a judgment on the merits. Foran v. USAA Cas. Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). If a ruling is adverse to a party, it is incumbent upon that party to appeal the ruling or be bound by it as the law of the case. Charleston Lumber v. Miller Housing, 338 S.C. 171, 525 SE 2d 869 (2000); ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997)(unappealed ruling is law of the case); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.")

1. The Order expressly absolved Grand Strand from liability arising out of the causes of action for Vicarious Liability and Negligent Supervision, Hiring, and/or Training.

Here, the Fourth Amended Complaint asserted four causes of action: Professional Negligence/Medical Malpractice, Vicarious Liability, Negligent Hiring, Training, and Supervision, and Loss of Consortium. By Order dated April 18, 2013 and filed May 1, 2013, The Honorable Larry B. Hyman, Jr. granted partial summary judgment to Grand Strand Regional Medical Center on the Vicarious Liability and Negligent Hiring, Training, and Supervision causes of action.

The Order stated that "[b]ecause the plaintiffs are barred by the statute of limitations and the statute of repose from asserting a direct cause of action for medical malpractice against Grand Strand's independent contractors and employees, Grand Strand cannot be held vicariously liable for their acts or omissions. (Order, p. 3). Judge Hyman further ruled that "...no potential liability exists to flow through to Grand Strand." (Order, p. 7). Accordingly, Grand Strand had a substantive right to be free from liability for any Professional Negligence or Medical Malpractice of its staff, nurses, and doctors.

Additionally, the Order found that the hospital could not be held liable for Negligent Hiring, Training, and Supervision without allegations that Grand Strand had some knowledge that a specific employee created an undue risk of harm to the public. Nor could Grand Strand be held separately liable for Negligent Supervision as there were no allegations that any specific employee or independent contractor acted outside the scope of their employment or intentionally caused harm to the Plaintiffs. After finding that there were no facts from which Grand Strand could be charged with a duty to exercise due care in hiring, training, and/or supervising its employees, Judge Hyman held that Grand Strand was entitled to judgment as a matter of law on

this cause of action as well. Accordingly, the Plaintiffs' only potential remaining causes of action were for Professional Negligence/Medical Malpractice and Loss of Consortium.

2. The Order also extinguished the Medical Malpractice Cause of Action as to Grand Strand.

In Simmons v. Tuomey Regional Medical Center, the Supreme Court provided a basis for holding a hospital liable for medical malpractice after recognizing a duty to provide competent services to the public. 341 S.C. 325, 33 S.E.2d 312 (2000). In providing this basis for liability, the Court recognized that hospitals do exert control over the practice of medicine and should be held accountable under certain circumstances for the malpractice of its independent contractor physicians. Id. However, the Simmons Court did not go so far as to impose an absolute duty on hospitals, nor did it create a new cause of action. It simply created an additional basis for holding a hospital liable for malpractice outside of traditional agency principles. Osborne v. Adams, 550 SE 2d 319 (S.C. 2001) (Simmons II did not create a new cause of action or abolish any existing immunity, but merely recognized a new remedy to vindicate existing rights.) This would not have been necessary if the hospital as an entity could be held directly liable for medical malpractice for the negligent failure to supervise or train the medical practitioners providing care within its facilities in the absence of specific facts giving rise to such a duty.

Here, the Professional Negligence/Medical Malpractice Cause of Action was supported by allegations applicable to Grand Strand based on vicarious liability for the actions of the physicians and nurses, and based on direct negligence in failing to properly train, supervise, or hire its agents and employees. Judge Hyman's Order found that Grand Strand was free from liability for any malpractice committed by employees or agents not named in the Complaint, as well as for any malpractice committed by physicians classified as independent contractors under

the non-delegable duty doctrine. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (dismissal of an action on statute of limitations grounds is a judgment on the merits.) Accordingly, the only basis for which Grand Strand could be held liable for Medical Malpractice would be based on a theory of direct negligence arising out of its own acts or omissions.

As the hospital as an entity cannot, as a matter of law, be held directly liable for medical malpractice, the only remaining basis for direct negligence is contained in allegations pled in support of this cause action and address the hospital's own conduct in failing to implement and enforce appropriate policies and procedures. Accordingly, if this court finds that such allegations do not constitute a separate negligence cause of action against Grand Strand, then there was no existing liability to Randall Green at the time of settlement. Ex parte capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006)(An order is considered a judgment on the merits when it is a determination of a matter forming the whole or part of a cause of action.); Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996); Sharpe v. South Carolina Dep't of Mental Health, 292 S.C. 11, 16, 354 S.E.2d 778, 781 (Ct.App. 1987) (Bell, J., concurring) (Whether the law recognizes a particular duty is a matter of law for the court. If there is no duty, then the defendant is entitled to a judgment as a matter of law.)

Finally, the Defendant's memorandum in support of their motion for set-off concedes that any medical negligence asserted against the hospital was based on vicarious liability for the actions of its employees and agents. Defendants' Memorandum in Support of Motion, p. 3)("Mr. Green would not have sought treatment at MUSC if he did not sustain injuries in the automobile accident and then damages following the alleged medical malpractice of Dr. Bauerle and the employees and agents of Grand Strand Regional Medical Center.") Judge Hyman's Order expressly stated that no potential liability existed to flow through to Grand Strand for the medical

malpractice of its employees or independent contractors. Accordingly, the only remaining cause of action still pending against Grand Strand as of the date of settlement was for Ann Green's Loss of Consortium, which was based on a general negligence claim.

3. As of the date of settlement, Grand Strand had a substantive right to be free from liability to Plaintiff Randall Green.

"A statute of repose creates a substantive right in those protected to be **free from liability** after a legislatively determined period of time." Capco of Summerville v. JH GAYLE CONST., 368 S.C. 137, 132, 628 S.E.2d 38 (2006)(emphasis added); (*citing* Langley v. Pierce, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993)). Once the time limit has expired under a statute of repose**, liability no longer exists** and is not tolled for any reason. Id. at 404, 438 S.E.2d at 243; Florence County School District No. 2 v. Interkal, Inc., 348 S.C. 446, 559 S.E.2d 866 (Ct.App.2002)(finding that the thirteen year statute of repose applicable to actions to recover damages for improvements to real property was applicable to bar claims for contribution under the Uniform Contribution Among Joint Tortfeasors Act)(emphasis added).

On May 10, 2013, the Plaintiffs entered into a settlement with Grand Strand and a stipulation of Dismissal signed on behalf of all parties, including Bauerle, was filed on June 11, 2013. At the time of this settlement, the tort claims against Grand Strand for Medical Malpractice, Vicarious Liability based on the Non-Delegable Duty Doctrine, and Negligent Supervising, Hiring, and Training had been extinguished by summary judgment. This unappealed judgment on the merits remains the law of the case. Additionally, no additional claims could be asserted, or reasserted, due to the expiration of the Statute of Repose. Accordingly, Grand Strand could no longer be held liable in tort for Randall Green's injuries, and there was no common liability between the hospital and Dr. Bauerle to be reduced by the

settlement. As such, the plain language of S.C. Code Ann. § 15-38-50 does not mandate an offset against the medical malpractice verdict rendered in Randall Green's favor.

B. S.C. Code Ann. §15-38-50 does not mandate a set-off in the present case as Randall Green and Ann Green suffered different injuries represented by different verdicts which can only be reduced by settlement funds allocated to their respective claims.

Set-off under § 15-38-50 applies when two or more persons are liable for the "same injury" or "same wrongful death." In Ellis, the South Carolina Court of Appeals interpreted the term "injury" broadly enough to include all damages, including those attributable to both survival and wrongful death causes of action, which result from the same negligence of the responsible parties. Ellis v. Oliver, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (1999). Ellis arguably expanded the common law limitation for set-off. However, more recently, the Court of Appeals in Smith v. Widener, noted that its previous holding in Ellis was inconsistent with prior and subsequent case law holding that survival and wrongful death actions were different claims for different injuries. 397 S.C. 468, 471, 724 S.E.2d 188 (Ct. App. 2012) (see footnote 1). The South Carolina Supreme Court most recently addressed the issue in Rutland v. S.C. Dep't of Transp., stating, "[a] non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." 390 S.C. at 85-86, 700 S.E.2d 451 (Ct. App. 2010), cert. granted, (Oct. 19, 2011).

Accordingly, courts may still consider the similarity between the cause of action for which the party seeks set-off and the cause of action previously settled. For instance, in Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998), the court of appeals overturned a trial court's set-off of a Georgia wrongful death lawsuit against a jury verdict in a South Carolina wrongful death case. In doing so, the court did not mention the UCATA and concluded that the only common element of damages between the South Carolina

and Georgia Wrongful Death Statutes was the award for the economic value of the deceased's life expectancy. As a result, set-off was not necessary to prevent double recovery. Id. 330 S.C. at 114-115, 498 S.E.2d at 407.

1. Ann Green and Randall Green suffered different injuries for which they received separate verdicts on their respective claims.

In Welch v. Epstein, the Court of Appeals held that a judge's reallocation of a settlement between the survival and wrongful death actions was in compliance with §15-38-50 because it provided for but one complete satisfaction of the decedent's injury. The Defendant requested that the settlement be reallocated as it had applied the majority of the funds to the survival action, with only a small amount applied to the wrongful death action. In affirming the trial court's reallocation of most of the settlement proceeds to the wrongful death action, the Court of Appeals considered that there was no evidence that the decedent had endured any conscious pain and suffering or mental anguish, so that the only amount recoverable under the survival cause of action was the amount of his medical bills. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).

However, the Welch court noted that a wrongful death action included different elements of damages, inclusive of future pecuniary loss to the family to which an economic expert had testified at trial. Additionally, the court noted that damages recoverable in the wrongful death action were distinct in that they reimbursed the beneficiaries for mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship; and deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. Accordingly, the settlement amounts reallocated to the survival and wrongful death actions were set-off against their respective verdicts. In doing so, the Court distinguished the two causes of action, both arising out of the

same physical injury to the decedent, as distinct claims for different injuries under S.C. Code §15-38-50. Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); see also Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395(Ct. App. 1998)(holding that Georgia and South Carolina wrongful death actions involve different injuries and therefore are separate claims with no right of set-off).

The present case involved distinct claims for different injuries suffered by two different Plaintiffs, each arising out of the same physical injury, for which two separate verdicts were rendered. It is undisputed that Medical Negligence and Loss of Consortium are separate causes of action involving separate plaintiffs and that the damages or injury for Medical Negligence and Loss of Consortium are different as a matter of law. See Graham v. Whitaker, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984) ("It is well settled in South Carolina that one spouse's cause of action for medical expenses and loss of consortium resulting from negligent injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action.") The injuries and damages sustained by Ann and Randall Green were distinct and separate. Each party brought distinct causes of action for which different damages were recoverable, reflecting the individual nature of their respective injuries and loss. Accordingly, § 15-38-50 does not mandate a set-off, and a reduction of the Plaintiffs' verdicts would be inequitable.

Furthermore, the Defendant did not request that the settlement proceeds be reallocated, which would be necessary, although impossible, in the present case unless the entire settlement was allocated to Mrs. Green's Loss of Consortium claim.

C. There is no evidence that a set-off is necessary to prevent a double recovery, as there was no allocation of settlement proceeds and there is no way to allocate the damages included in the verdicts.

Under S.C.Code Ann. § 15-38-50(1), the 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.**" Smith v. Widener, 397 S.C. 468, 471, 724 S.E.2d 188 (Ct. App. 2012)(emphasis added); (*citing* Hawkins, 330 S.C. at 113, 498 S.E.2d at 406-07). In applying the statutory set-off where a settlement arguably involved two claims, only one of which was tried to verdict, the court must make a factual determination of how to allocate the settlement between the claims. Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012). The verdict is reduced only by that portion of the settlement allocated to compensate the **same** plaintiff for the **same** injury. Id.

Distinguishing this case from Welch, the settlement in the present case was not allocated between the different claims, and there is no way to determine which portion of the damages awarded to each by the jury overlapped with that settlement. In Welch, the court was able to ascertain an exact amount to allocate to the survival action, as the only amount recoverable was for the medical bills, the exact amount awarded by the jury.

The non-settling defendant, Bauerle, failed to insist upon allocation of the settlements to the different Plaintiffs or the different causes of action or different injuries and in fact executed a stipulation of dismissal as to the Settling Defendants, thereby waiving any right to complain that the settlement was not allocated.

D. If the Court finds that the settlement should be reallocated, it should be reallocated in its entirety to the Loss of Consortium claim and operate only to reduce Ann Green's verdict for same.

The settlement should be allocated, if at all, entirely to Ann Green on the Loss of Consortium cause of action, as Grand Strand arguably remained liable to her as of the date of settlement under a theory of general negligence. Whereas Judge Hyman's Order granting partial

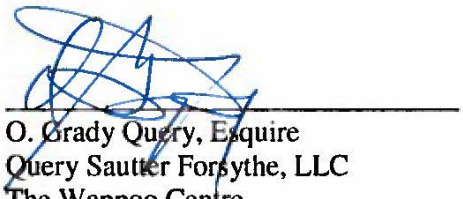
summary judgment eliminated the remaining claims of Randall Green. That Order remains the law of this case. Of note, the verdict form, consistent with the Complaint as well as the arguments set forth above, indicated that Randall Green's damages depended on the medical malpractice cause of action while Ann Green's damages for Loss of Consortium depended on a general negligence claim. (Verdict Form, Sept.13, 2013, Attached as **Exhibit C**). As there was no allocation of settlement proceeds between the Plaintiffs' separate claims, any set-off must be as to Mrs. Green's claim for loss of consortium.

In the present case, Ann and Randall Green both received separate and distinct injuries for which they brought separate and distinct causes of action under which they could recover different damages. There is no way to decipher which portion of the settlement should be allocated to their different injuries in order to apply a set-off against the corresponding portion of their respective verdicts. Furthermore, the Plaintiffs presented expert testimony at trial as to economic damages exceeding both the amount of the settlement and verdicts rendered. Accordingly, as in Hawkins, there is no evidence that either Plaintiff will receive a double recovery for their injuries.

CONCLUSION

For the foregoing reasons, the Defendants Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC's Motion for Set-Off should be dismissed.

(Signature follows on the next page.)



O. Grady Query, Esquire
Query Sautter Forsythe, LLC
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September 30, 2013
Charleston, SC

EXHIBIT

B

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CASE NO: 2005-CP-26-2805
Randall M. Green and Ann Green)	
)	
Plaintiffs,)	
)	
vs.)	**AMENDED**
)	**ANSWER TO**
Wayne B. Bauerle, MD, Wayne B.)	**DEFENDANT GRAND STRAND**
Bauerle, MD, PC and Strand Orthopaedic)	**REGIONAL MEDICAL CENTER**
Consultants, LLC, Grand Strand Regional)	**REQUEST TO ADMIT**
Medical Center, LLC and Carolinas Medical)	
Response, Inc.)	
)	
Defendants.)	

TO: THE DEFENDANT, GRAND STRAND REGIONAL MEDICAL CENTER, LLC AND ITS ATTORNEY, WELDON R. JOHNSON, ESQUIRE

The Defendant, Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC and Strand Orthopaedic Consultants, LLC, answering Defendant, Grand Strand Regional Medical Center's Request to Admit, would state as follows:

I. RESERVATION OF RIGHTS

1. The Defendant, Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC and Strand Orthopaedic Consultants, LLC, specifically reserves and does not waive any rights to pursue and be heard on any and all defenses set forth in its Answer to the Complaint.

2. The Defendant, Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC and Strand Orthopaedic Consultants, LLC, specifically reserves and does not waive any objections which may be appropriate to Request to Admit.

3. The Defendant, Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC and Strand Orthopaedic Consultants, LLC, specifically reserves and does not waive any objections which may

be otherwise available to it and further states that no response should be deemed as an admission of relevancy, materiality or admissibility of any response or document produced. It further reserves the right to amend or supplement its response, if appropriate.

II. GENERAL OBJECTION

1. The Defendant, Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC and Strand Orthopaedic Consultants, LLC object to responding to any Interrogatory or Request for Production that seeks information which constitutes confidential attorney-client communication or which falls within the scope of Rule 26(b) or which exceeds the scope of discovery otherwise provided by the South Carolina Rules of Civil Procedure or by statute or common law.

III. RESPONSES

1. The employees of Grand Strand Regional Medical Center did not proximately cause or contribute to the injuries and damages alleged to have been sustained by Plaintiffs in the Third Amended Complaint.

ANSWER: Admit.

JOHN B. McCUTCHEON, JR.
LISA A. THOMAS
Attorneys for Wayne B. Bauerle, MD, Wayne B. Bauerle, MD, PC and Strand Orthopaedic Consultants, LLC

McCUTCHEON, McCUTCHEON & BAXTER, PA
208 Elm Street
Conway, SC 29526
P. O. Box 1003
(843)248-7225

March 4, 2008

EXHIBIT

C

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-26-07403

RANDALL M. GREEN, AND ANN GREEN

PLAINTIFF(S)

WAYNE B. BAUERLE, M. D. AND WAYNE B. BAUERLE, M. D. PC

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

FILED
HORRY COUNT
2013 SEP 16 AM 8:03
MELANIE WISWARD
CLERK OF COURT

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : WE THE JURY, FIND FOR THE PLAINTIFF, RANDALL M. GREEN IN THE AMOUNT OF $2,300,000.00 ACTUAL DAMAGES. WE FIND FOR THE PLAINTIFF, ANN GREEN IN THE AMOUNT OF $550,000.00 ACTUAL DAMAGES AS TO LOSS OF CONSORTIUM.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
RANDALL M. GREEN	WAYNE B. BAUERLE, MD AND WAYNE B. BAUERLE, MD PC	$2,300,000.00
ANN GREEN	WAYNE B. BAUERLE, MD AND WAYNE B. BAURLE MD, PC	$550,000.00
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge | Judge Code: 129 | Date: 9/13/13

For Clerk of Court Office Use Only

This judgment was entered on the 16th day of Sept, 20 13 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
M. MORGAN MARTIN	JOHN B. MCCUTCHEON
O. GRADY QUERY	LISA ARLENE THOMAS

Melanie Huggins-Ward
CLERK OF COURT

Court Reporter: HENRY YOUNG

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2011-CP-26-07403

RANDALL M. GREEN and ANN GREEN,

Plaintiffs,

v.

WAYNE B. BAUERLE, M.D. and WAYNE B. BAEURLE, M.D., PC,

Defendants.

VERDICT FORM

Instructions: Mark the appropriate response to the following questions. Each response must be unanimous.

1. DO YOU FIND THAT DEFENDANTS WAYNE B. BAEURLE, M.D. AND WAYNE B. BAEURLE, M.D., PC NEGLIGENTLY DEPARTED FROM THE STANDARD OF CARE IN TREATING PLAINTIFF RANDALL M. GREEN AND THAT THIS NEGLIGENT DEPARTURE FROM THE STANDARD OF CARE PROXIMATELY CAUSED PLAINTIFF RANDALL M. GREEN'S INJURIES?

✓ YES: IF YES, GO TO QUESTION 2.

____ NO: IF YOU ANSWER NO, STOP AND DELIBERATE NO FURTHER.

FILED
HORRY COUNTY
2013 SEP 16 AM 8:04
[illegible]
CLERK OF COURT

NOTE: If you answered "Yes" to Question 1, please continue to Page 2 for a determination of damages. If you answered "No" to Question 1, please stop deliberating and notify the Bailiff.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2011-CP-26-07403

RANDALL M. GREEN and ANN GREEN,

Plaintiffs,

v.

WAYNE B. BAUERLE, M.D. and WAYNE B. BAEURLE, M.D., PC,

Defendants.

VERDICT FORM

2. PLEASE STATE THE TOTAL AMOUNT OF DAMAGES, IF ANY, SUSTAINED BY PLAINTIFF RANDALL M. GREEN

$ 2,300,000.00 Actual Damages
Two Million, three hundred thousand dollars and 00/100

OR

_____ For the Defendants.

FOREPERSON

September 13, 2013
Conway, South Carolina

NOTE: If you awarded actual damages, please continue to Question 3 on Page 3. If you did not award actual damages, please stop deliberating and notify the Bailiff.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2011-CP-26-07403

RANDALL M. GREEN and ANN GREEN,

Plaintiffs,

v.

WAYNE B. BAUERLE, M.D. and WAYNE B. BAEURLE, M.D., PC,

Defendants.

VERDICT FORM

3. DO YOU FIND THAT DEFENDANTS WAYNE B. BAUERLE, M.D. AND WAYNE B. BAEURLE, M.D., PC WERE NEGLIGENT AND THAT SUCH NEGLIGENCE PROXIMATELY CAUSED THE PLAINTIFF ANN GREEN'S LOSS OF CONSORTIUM?

√ YES: IF YES, GO TO QUESTION 4.

_____ NO: IF YOU ANSWER NO, STOP AND DELIBERATE NO FURTHER.

NOTE: If you answered "Yes" to Question 3, please continue to Page 4 for a determination of damages. If you answered "No" to Question 3, please stop deliberating and notify the Bailiff.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
2011-CP-26-07403

RANDALL M. GREEN and ANN GREEN,

Plaintiffs,

v.

WAYNE B. BAUERLE, M.D. and WAYNE B. BAEURLE, M.D., PC,

Defendants.

VERDICT FORM

4. PLEASE STATE THE TOTAL AMOUNT OF ACTUAL DAMAGES, IF ANY, SUSTAINED BY PLAINTIFF ANN GREEN.

$ 550,000.00
Five hundred fifty thousand and 00/100 Actual Damages

OR

_____ For the Defendants.

FOREPERSON

September 13, 2013
Conway, South Carolina

NOTE: Please notify the Bailiff when deliberations are complete.

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS Docket No.: 2011-CP-26-7403
Randall M. Green and Ann Green, Plaintiffs, v. Wayne B. Bauerle, MD, and Wayne B. Bauerle, MD, PC, Defendants.	)	**PLAINTIFFS' MOTION TO ALTER OR AMEND ORDER GRANTING PARTIAL SET - OFF**

13 OCT 30 PM 2:25
CLERK OF COURT

Pursuant to Rule 59(e) S.C.R.C.P. the Plaintiffs, Randall M. Green and Ann Green ("Plaintiffs"), by and through their undersigned counsel of record, hereby submit their Motion to Alter or Amend the Order, dated October 17, 2013, (Attached as **Exhibit A)** granting partial set off to the Defendants.

PROCEDURAL HISTORY

This Honorable Court presided over the above-captioned jury trial September 9-13, 2013. At the end of the trial, the jury found for Mr. Green, under a medical malpractice cause of action, in the amount of $2.3 million and Mrs. Green, under a loss of consortium cause of action, in the amount of $550,000. Following the verdict, the record reflects the Defendants, Wayne B. Bauerle, MD and Wayne B. Bauerle, MD, PC (collectively "Bauerle"), verbally requested that the verdict be set off by all sums paid to the Plaintiffs by settling defendants following the Plaintiff's automobile accident on April 17, 2004. The record further reflects that the Plaintiffs objected to any set off and the Honorable Judge John requested that the parties submit written memoranda to the Court in support of their positions.

Pursuant to the Court's instructions, the Defendants filed a written memorandum in support of their Motion for Set Off and the Plaintiffs filed their memorandum in opposition. By

Order dated October 17, 2013, this Court partially granted Bauerle's Motion for Set Off as to Carolina Medical Response ("CMR") and Grand Strand Regional Medical Center ("Grand Strand") and, in so doing, set off the settlement proceeds obtained by the Plaintiffs from the verdict rendered on September 13, 2013, in the same proportion or ratio as the jury verdicts to the Plaintiffs in the case at bar.

RELIEF REQUESTED

The Plaintiffs respectfully move that this Court alter or amend the Order Granting Partial Set Off, as the Court misinterpreted and misapplied the relevant case law, improperly allocated the Plaintiffs' settlements with CMR and Grand Strand, and misapplied the Plaintiffs' settlements with CMR and Grand Strand against the jury verdicts rendered in the case at bar. The Plaintiffs request that this Court consider and rule on all arguments set forth in the Plaintiff's Memorandum Opposing Set Off in addition to the argument further set forth herein. For the foregoing reasons, the Order Granting Partial Set Off should be altered and amended to deny set off from the jury verdicts rendered to each Plaintiff.

ARGUMENT

I. It was an error of law for the trial court to interpret Section 15-38-50 by strict adherence to Ellis without applying the principles set forth in Rutland and Welch.

This honorable court misconstrued the prevailing case law pertaining to set off by applying *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (1999), in the Order allowing partial set off. *Ellis* is a 1999 South Carolina Court of Appeals case. More recently, the South Carolina Supreme Court addressed the issue of set off by interpreting section 15-38-50 to allow a set off only where the reduction in the judgment is from a settlement for the same cause of

action. *Rutland v. S.C. Dep't of Transp.*, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), cert. granted, (Oct. 19, 2011) (*citing Welch v. Epstein*, 342 S.C. 279, at 313, 536 S.E.2d at 425 (2000)).

Here, the Plaintiffs' settlement with Grand Strand was for a different cause of action than the Plaintiffs' recovery from Bauerle. The Plaintiffs' Fourth Amended Complaint alleges specific acts and omissions on the part of Grand Strand, Bauerle, and Grand Strand's employees and independent contractors giving rise to a cause of action for Medical Malpractice. However, on April 18, 2013, the character of the case was dramatically altered when the Honorable Larry B. Hyman issued an Order Granting Partial Summary Judgment ("Order") striking all causes of action against Grand Strand founded in vicarious liability or non-delegable duty in addition to all causes of action alleging negligent hiring, supervision, and training on the part of Grand Strand. The only causes of action against Grand Strand not extinguished by the Order were Mrs. Green's Loss of Consortium claim and Mr. Green's *general negligence* claim for

> failing to have appropriate policies, procedures, and protocols to ensure that patients with conditions similar to Mr. Green are treated in an appropriate manner, or in having such policies, procedures, and protocols, and failing to ensure such were carried out and followed. (Fourth Am. Compl., ¶ 22).

Thus, the only remaining cause of action against Grand Strand other than the loss of consortium claim of Ann Green, is purely an administrative function that could not involve Bauerle, who was at all times in private practice. A hospital, as an entity, cannot be held directly liable for medical malpractice as a matter of law.[1] Therefore, there are absolutely no overlapping negligence claims between Bauerle and Grand Strand.

---

[1] In *Simmons v. Tuomey Regional Medical Center*, the Supreme Court provided a basis for holding a hospital liable for medical malpractice after recognizing a duty to provide competent services to the public. 341 S.C. 325, 33 S.E.2d 312 (2000). However, the *Simmons* Court did not go so far as to impose an absolute duty on hospitals, nor did it create a new cause of action. It simply created an additional basis for holding a hospital liable for malpractice outside of traditional agency principles. *Osborne v. Adams*, 550 SE 2d 319 (S.C. 2001).

The causes of action imputing Bauerle's negligence to Grand Strand were never restored, nor did the Plaintiffs, or Bauerle make any attempt to restore them; therefore, Judge Hyman's Order was the law of the case at the time the Plaintiffs entered into a settlement agreement with Grand Strand on May 31, 2013. Now, over five months later, it would be unjust to allow Bauerle to claim entitlement to set off from proceeds that Grand Strand paid to extinguish its own negligence, negligence that cannot be imputed to Bauerle under any theory of the law of this case. Therefore, since Section 15-38-50 only allows set off for settlements received for the same cause of action and here, the Plaintiffs' settlement with Grand Strand was for a patently different cause of action than the Plaintiffs' recovery from Bauerle there is no basis under the law of this case for set off.

II. The Plaintiffs' settlements with Carolina Medical Response and Grand Strand Regional Medical Center were improperly allocated.

A. The Court incorrectly relied on Rutland.

The Court incorrectly applied the holding in *Rutland v. South Carolina Department of Transportation*, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), *cert. granted*, (Oct. 19, 2011). In *Rutland*, the South Carolina Supreme Court affirmed the decision of the trial court to equitably *reallocate* settlement funds between two causes of action where the parties had already agreed to the allocation of the settlement funds. The Order of the Court misinterprets *Rutland* to mean, this Court has the authority to equitably *allocate* previously unallocated settlement funds between two causes of action, one of which existed at the time of settlement and one of which did not. While this Court may have authority to *reallocate* a settlement between two or more existing causes of action in order to render justice between the parties, there is no precedent for the *allocation* of unallocated settlement funds for a cause of action that did not exist at the time of settlement.

South Carolina allocation cases have relied upon distinctions between causes of action and have looked to evidence supporting individual causes of action. In *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (2000), the Court of Appeals allowed the trial court to reallocate previously allocated settlement funds between a wrongful death action and a survival action. The court noted that wrongful death included different elements of damages, inclusive of future pecuniary loss to the family to which an economic expert had testified at trial. Additionally, the court held that damages recoverable in the wrongful death action were distinct in that they reimbursed the beneficiaries for mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship; and deprivation of the use and comfort of the intestate's society. Accordingly, the settlement amounts reallocated to the survival and wrongful death actions were set off against their respective verdicts. In doing so, the Court distinguished the two causes of action, both arising out of the same physical injury to the decedent, as distinct claims for different injuries under S.C. Code Ann. §15-38-50.

Alternatively the one cause of action against both Grand Strand and Bauerle clearly not affected by the Order of Judge Hyman is Plaintiff Ann Green's Loss of Consortium claim. Should this Court continue to find that set off is required, the only set off that should be allowed is against her Loss of Consortium claim since settlement and verdict would be based upon the same cause of action.

In the case at bar, ample evidence was presented during the trial to support the damages awarded to each of the Plaintiffs. The settlement should be viewed by the court as belonging to both of the parties. Here, the Court applies an ex post facto analysis to grant set off, using the ratios between the jury verdict for Mr. Green and the jury verdict for Mrs. Green in this case to allocate the settlement as between the parties. If the Court determines that allocation between the

parties is permitted based on the cases that allowed reallocation between causes of action, the only fair and reasonable way to do so would be to allocate one half of the settlement proceeds to each of the Plaintiffs and then for each of the Plaintiffs' portions of the settlement to be set off against his or her individual verdict. Clearly this would more justly address Mr. Green's horrendous injury and his need for life care while still compensating Mrs. Green for her Loss of Consortium claim.

B. Rutland Dissent.

Justice Pleicones writes the dissent in Rutland, in which he argues that the court did not have the authority to reallocate the plaintiff's settlement with the settling defendants and allowing the court to do so violates well established public policy. *Rutland v. South Carolina Department of Transportation, op. No.: 27185.* Similarly, for the same reasons laid out by Justice Pleicones, here the Court did not have the authority to allocate the Plaintiffs' settlement with Grand Strand and Carolinas Medical Response.

First, Justice Pleicones writes equity is not served by reallocating a binding settlement agreement because doing so requires the plaintiff to defend to the court the viability of claims they haven't made and such practice violates the settled rule that plaintiffs may choose their defendants. *Chester v. S.C. Department of Public Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010). Similarly, the Court's revision of the Plaintiffs' settlement agreement with Grand Strand and Carolinas Medical Response is inequitable because to do so requires the Plaintiffs, first, to defend to the Court the continuing viability of Vicarious Liability and Negligent Hiring, Training, and Supervision claims against Grand Strand, which were struck from the Complaint by Judge Hyman's Order which became the law case.

Second, Justice Pleicones argues granting the court authority to allocate a settlement agreement inequitably reduces the plaintiff's recovery against at-fault defendants. *See McDermott, Inc. v. AmClyde, 511 U.S. 202, 212-21 (1994).* Likewise, here, it is impossible to ascertain from the jury's verdict in this case, whether a jury would have found Grand Strand liable for causes of action against them and the amount of the verdict the jury would have returned against Grand Strand.

Third, Justice Pleicones finds fault with the court's ex post facto analysis used to grant set off because such analysis benefits from hindsight and disregards a variety of legitimate bases for the parties ex ante decisions. *See McDermott, supra.* For example, the Parties to the settlement agreement were able to bargain on the settlement amount in light of the unsettled law regarding Plaintiffs' claims against Grand Strand, regarding non-delegable duty and vicarious liability for contracting physicians even though those causes of action had been stricken by the Order of Judge Hyman.

Lastly, Judge Pleicones argues that the law contains no rigid rule against overcompensation of the plaintiffs. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, at 219 (1994). Several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation. Further, the unfortunate result of allocation in this case, where there is no suggestion of fraud or other wrongdoing by the Plaintiffs, is to discourage the Plaintiffs from settling and encourage joint tortfeasors to litigate, contrary to our strong public policy favoring settlement. *See Chester*, 388 S.C. at 346, 698 S.E.2d at 560. Here, to allow Bauerle a set off in the amount of the Plaintiffs' settlements with Grand Strand and Carolinas Medical Response significantly reduces the amount Bauerle must pay the Plaintiffs, substantially benefiting Bauerle and substantially harming the Plaintiffs. This

result will discourage plaintiffs from settling in the future because it will appear just as advantageous for plaintiffs to take the gamble of litigation.

CONCLUSION

For the foregoing reasons, the order of the court should rescind the order granting partial set off and deny in full the motion for set off.

Respectfully Submitted,

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13 OCT 30 PM 2:25
CLERK OF COURT

October 25, 2013
Charleston, SC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a copy of the foregoing document upon the following attorneys for the Defendants by placing a copy of same in the United States Mail with sufficient postage attached thereto and addressed as follows:

John B. McCutcheon, Jr., Esquire
Lisa A. Thomas, Esquire
Thompson & Henry, PA
P.O. Box 1740
Conway, SC 29528

Dated: 10.25.13

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	
	)	
Randall M. Green and Ann Green,	)	
	)	Civil Action No. 2011-CP-26-7403
Plaintiff,	)	
	)	
v.	)	
	)	**NOTICE OF MOTION AND MOTION TO ALTER OR AMEND ORDER**
Wayne B. Bauerle, MD, and Wayne B. Bauerle, MD, PC,	)	
	)	
Defendants.	)	
	)	

HORRY COUNTY
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MELANIE HUGGINS-WARD
CLERK OF COURT

TO: THE HONORABLE STEVEN H. JOHN

O. GRADY QUERY, ESQUIRE, L. MORGAN MARTIN, ESQUIRE, AND CRISTIN A. URICCHIO, ESQUIRE, COUNSEL FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendants Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., will move before the Honorable Steven H. John at the Horry County Judicial Center, Conway, South Carolina, at such time and place as may be set by the Court, for an for an Order pursuant to Rule 59(e), SCRCP, altering or amending the Order Granting in Part and Denying in Part Defendants' Motion for Set-Off filed October 17, 2013. Counsel for the Defendants received a filed copy of the Order from the Clerk of Court on October 29, 2013.

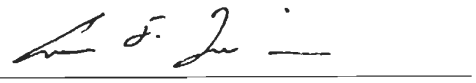
The Defendants' motion is based on the following:

1. In the Order filed October 17, 2013, the Court ruled that the settlement on behalf of the at-fault driver (including the underinsured motorist payments) is not subject to a set-off. In arguing their entitlement to that set-off, the Defendants pointed out that the Plaintiffs had alleged that Dr. Bauerle committed medical malpractice while treating Randall M. Green

following the automobile accident with the at-fault driver. The Defendants argued that the at-fault driver's actions thus caused Mr. Green to seek medical care and treatment from Dr. Bauerle, and as a result, the at-fault driver was legally responsible for the injuries resulting from the medical malpractice found by the jury. South Carolina law provides that "the negligence of an attending physician is reasonably foreseeable" and that "[t]he general rule is that if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury." *Graham v. Whitaker*, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984). *See also*, *Bessinger v. DeLoach*, 230 S.C. 1, 94 S.E.2d 3 (1956). Based on the rule from *Graham* and *Bessinger*, the Defendants submit that they are entitled to a set-off for the settlements made on behalf of the at-fault driver (including the underinsured motorist payments). In the Order filed October 17, 2013, the Court did not rule on this particular issue. The Defendants respectfully request that the Court issue a ruling on that particular issue.

The Defendants' motion is based upon the pleadings filed in this case, the rules of court, and such other matters as may be properly presented to the Court at the time of the hearing.

DAVIDSON & LINDEMANN, P.A.

BY: 

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Counsel for Defendants

Columbia, South Carolina

November 7, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO: 2005-CP-26-2805
Randall M. Green and Ann Green	)	
	)	
Plaintiffs,	)	
	)	**RECEIPT AND**
vs.	)	**PARTIAL SATISFACTION OF**
	)	**JUDGMENT**
Wayne B. Bauerle, M.D., and Wayne B. Bauerle, M.D., P.C.,	)	
	)	
Defendants.	)	
	)	

The undersigned Plaintiffs do hereby acknowledge the receipt of the sum of Four Hundred Thousand and 00/100 Dollars ($400,000.00) from the South Carolina Medical Malpractice Liability Joint Underwriting Association (as created by S.C. Code Ann. §38-79-120, "JUA"), and Fifteen Thousand Seven Hundred Eighty Nine and 47/100 ($15,789.47) plus interest on the Judgment in the amount of Twenty Six Thousand Five Hundred Ninety Three and 41/100 ($26,593.41) by the The South Carolina Medical Malpractice Patients' Compensation Fund (as created by S.C. Code Ann. § 38-79-420, "PCF") on behalf of defendants Wayne B. Bauerle, M.D., and Wayne B. Bauerle, M.D., P.C. to be applied against the judgment entered herein by the Jury.

ENTERED AND AGREED UPON this 5th day of August, 2014.

Randall M. Green

Ann Green

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO: 2005-CP-26-2805
Randall M. Green and Ann Green	)	
	)	
Plaintiffs,	)	
	)	**RECEIPT AND**
vs.	)	**PARTIAL SATISFACTION OF**
	)	**JUDGMENT**
Wayne B. Bauerle, M.D., and Wayne B. Bauerle, M.D., P.C.,	)	
	)	
Defendants.	)	
	)	

The undersigned Plaintiffs do hereby acknowledge the receipt of the sum of Two Hundred Twenty-Eight Thousand Five Hundred Five and 69/100 Dollars ($228,505.69) from the South Carolina Medical Malpractice Liability Joint Underwriting Association (as created by S.C. CODE ANN. §38-79-120 "JUA"), on behalf of defendants Wayne B. Bauerle, M.D., and Wayne B. Bauerle, M.D., P.C. to be applied against the judgment entered herein and hereby release the Defendant to the extent of the funds represented hereby.

ENTERED AND AGREED UPON this 20 day of April, 2016.

Randall M. Green

Ann Green

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JILL-ANNE HUGGINS-WARK
CLERK OF COURT

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Randall M. Green and Ann Green,	)	
	)	Civil Action No.: 2011-CP-26-7403
Plaintiffs,	)	
vs.	)	**PLAINTIFFS' SUMMARY ARGUMENT**
	)	
Wayne B. Bauerle, MD and Wayne B. Bauerle MD, PC	)	
	)	
Defendants.	)	

Plaintiffs, Randy and Ann Green hereby submit this "Summary Argument" and "Plaintiffs' Memorandum of Law," which is incorporated by reference herein and provides citations and details of facts and law. Plaintiffs settled with Grand Strand Regional Medical Center ("GSRMC") for a single joint payment of $2M prior to trial against Dr. Wayne Bauerle. They alleged Bauerle caused a cardiac arrest which caused several of Randy's numerous injuries. The jury returned separate verdicts of $2.3M for Randy and $550K for Ann. To calculate a setoff, this Court allocated the joint settlement based on the proportionate ratios between the two verdicts. The Supreme Court vacated the Order's method of calculating the setoff, finding it was arbitrary and remanded this issue, directing this Court to "convene a hearing to consider all relevant circumstances." The Remittur vacating the prior allocation was filed June 17, 2019. Randy passed away June 22, 2019.

The Plaintiffs assert that the verdicts should have been reduced by equal amounts because (1) This is consistent with the settlement terms and their intentions to receive and own the funds equally, both of which must be given effect; (2) The settlement can't be modified because it can't be shown to be an unreasonable fraud or sham *nor* could it have caused a double recovery; and (3) The verdicts are an arbitrary and impermissible method to apply a setoff as it is impossible to determine which injuries they included, and the method gave Ann's verdict a grossly unjust effect.

The Supreme Court recently reversed a lower court's modification of a settlement to apply a setoff. It is error to reapportion proceeds just because the court doesn't view the terms as "proportionately reasonable" or just to benefit a non-settling defendant. Non-settling defendants who ask the court to invalidate settlement terms must prove an amount is so unreasonable as to be a fraud or sham *and* would result in an unfair double recovery. Plaintiffs have the right to apportion proceeds to their benefit regardless of adverse consequences to other defendants. "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 (2015).

First, the contract in this case provided for a **joint** settlement which the Greens intended to, and did, receive and own equally. Their intentions must be given effect and are determined by the agreement's terms, their situation and purpose at the time, surrounding circumstances, testimony, and subsequent acts. It is indisputable that the settlement provided equal consideration to each Plaintiff. The payment was via a single joint check and jointly kept in both their names. By statute,

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absent clear and convincing evidence otherwise, they are legally presumed to have intended (1) to own the money jointly with right of survivorship and (2) to each own one half of the money during their lifetimes. This case is unusual in that Ann also suffered extraordinary and horrific damages. She spent 15 years providing all of her husband's intense 24-hour skilled care. Randy's testimony recognized the enormity of her sacrifice. A factor at settlement was that Ann had *already* provided over $1.2M in care and agreed to continue doing so. She kept her promise all day every day for the rest of Randy's life. Any setoff should be consistent with their agreement.

Second, the setoff statute doesn't authorize modification of good faith settlements, and the case law prohibits it. A court may *consider* modification where the non-settling defendant has met its burden of proving the settlement terms were so objectively unreasonable as to be a fraud or sham and that it would result in a double recovery. The "unreasonable" threshold has only been met where there is no evidence to reasonably support the "dollar amount" apportioned to an individual claim. It is reversible error to base this on whether the court considers the *ratios* of amounts allocated between claims to be "proportionately reasonable." Here, it is indisputable that there is ample evidence of Ann's extensive damages *and* objective reasonable support for the $1M amount. Also, not only is it the simplest, most objective method, it is clearly impossible that a double recovery would result from applying equal $1M setoffs to each verdict. This would leave Bauerle with no liability to Ann. It would allow Randy a total recovery equal to his $2.3M verdict. As set forth below, this wouldn't result in a *single* full recovery, much less a *double* one.

Third, the prior allocation based on the proportionate ratio between the verdicts was arrived at without sufficient information or benefit of the clarification given in the Riley decision. It was thus found to be arbitrary and impermissible. The damages included in the verdicts and settlement *couldn't* match exactly. Further, it was undisputed that multiple divisible injuries were alleged. There is no way to know which injuries were included in the verdicts, and Bauerle didn't seek to clarify their content prior to the jury's dismissal. He testified that the leg paralysis could have resulted from nerve damage from a dislocated hip and introduced evidence that Randy's legs were working fine more than a day after the cardiac arrest. There was evidence that Randy's bladder was still working *months* later. Ann's damages from the bladder injury were particularly severe. Its exclusion from the verdicts would significantly alter the relative ratios between them.

Finally, the prior allocation was grossly unjust to Ann, effectively penalizing her for obtaining a verdict. It deprived her of more than $600K in settlement funds *before* depriving her of most of her $550K verdict. It also unfairly reduced Randy's verdict. This was *solely* to benefit Bauerle, the non-settling defendant who, as Justice Hearn opined at oral arguments, was arguably the most culpable party in a series of horrific acts of negligence.[1] Randy and Ann did not carry identical burdens of proof at trial, and each was entitled to their verdict independently of the other.

[1] Thus, she questioned the equity of the *size* of the benefit he received under the prior method.

Respectfully Submitted,

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Counsel for the Plaintiffs

Charleston, South Carolina
August 20, 2019

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	
Randall M. Green and Ann Green,	)	
	)	Civil Action No. 2011-CP-26-7403
Plaintiffs,	)	
	)	
v.	)	
	)	
Wayne B. Bauerle, M.D., Wayne B. Bauerle, M.D., P.C., Strand Orthopaedic Consultants, LLC, Grand Strand Regional Medical Center, LLC, and Carolinas Medical Response, Inc.,	)	**DEFENDANTS' MEMORANDUM OF LAW ON REMAND ISSUES FOLLOWING APPEAL**
	)	
Defendants.	)	
_____	)	

The Defendants Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. submit the following memorandum of law to address the issues remanded by the South Carolina Supreme Court:[1]

BACKGROUND AND PROCEDURAL HISTORY

This medical malpractice action was tried before a jury during the week of September 9, 2013, with Circuit Court Judge Steven H. John presiding. The jury found for Randall M. Green in the amount of $2.3 million on his medical negligence claim and for Ann Green in the amount of $550,000 on her loss of consortium claim. Judgments in those amounts was initially entered on September 16, 2013.

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

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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 Regional Medical Center, LLC ("Grand Strand") and $25,000 from Carolinas Medical Response, Inc. 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 Carolinas Medical Response, but he denied the set-off for the amounts paid for the release of the at-fault driver and the UIM insurer. Judge John directed the Clerk of Court to enter judgment in the amount of $665,789.47 in favor of Randall M. Green and to enter judgment in the amount of $159,480.53 in favor of the Ann Green.

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.

On October 11, 2013, Dr. Bauerle filed a Notice of Appeal with the South Carolina Court of Appeals. 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

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controversy given the issues raised on appeal by both the Greens and Dr. Bauerle. The remaining judgments were 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, the Court of Appeals issued an unpublished opinion affirming the rulings of the trial court and denied 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 set-off issue with respect to the $225,000 received by the Greens from the UIM carrier. 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, which totals $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 Plaintiffs' 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

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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."

On April 20, 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 the Court of Appeals 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 Carolinas Medical Response (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." 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." 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

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> 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.

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

The Horry County Clerk of Court should still be holding the remaining $218,164.13 of the amount paid into court (plus accrued interest), which includes $100,000 of the original judgment for Mr. Green and $100,000 of the original judgment for Mrs. Green. Although the $200,000 setoff is no longer at issue, this amount cannot be released to the Greens until a final decision on the Grand Strand allocation is reached for reasons discussed below.

ANALYSIS OF ISSUE ON REMAND

Based on the Greens' briefs filed in the Court of Appeals and Supreme Court, the main focus of their arguments on allocation is now moot, specifically that the set-off of the Grand Strand settlement was not proper because the settlement and verdict were for different injuries or damages. The Supreme Court has rejected those arguments and ruled that "the law requires the *total* amount paid by Grand Strand to be set off from the verdicts." (Emphasis added).

The Greens' primary argument as to the manner of allocation is that the Greens' settlement with Grand Strand is "marital property" and, as a result, there either should be no allocation or otherwise the allocation of the $2 million should be equal. The Greens take this position because that will result in Mr. Green's verdict being reduced to $1.3 million and Mrs.

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Green's verdict being zeroed out. The net result to the Greens would be $1.3 million rather than the $825,270 (which is the total of the judgments as currently entered by the trial court).

To the extent the Greens claim that the $2 million should have been allocated equally, there is no evidence that that was the intent of the parties to the Grand Strand settlement. The settlement was not allocated between the Greens by agreement. In other words, there is no language in the Covenant executed by the Greens in favor of Grand Strand that suggests that any allocation was contemplated or bargained for. From an equitable standpoint, this Court should reject any contention that the Greens were equally damaged such that it is fair and reasonable to allocate 50% of the settlement proceeds to each. Mr. Green's injuries, of course, 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." Consequently, there is no sound basis for this Court on remand to conclude that a fair allocation is 50-50.

As indicated, the Greens have primarily argued that the $2 million settlement should be treated as "marital property" and thus should be allocated equally or not at all. However, the settlement cannot be treated as "marital property" and the verdicts be treated differently. In other words, if the $2 million settlement is "marital property," then the verdicts themselves are also collectively "marital property." *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"). In that case, the

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total of the judgments ($2.85 million) should be subject to the entire setoff ($2.025 million) which leaves the total recovery of $825,000 in marital property to be paid jointly to the Greens. Not counting post-judgment interest, the Greens have already received $625,270 of the judgments while the Horry County Clerk of Court is holding $200,000 more.

There is precedent for this approach. In *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995), 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 set-off 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 that the $50,000 set-off could be applied to the total verdicts for both husband and wife, leaving a judgment for both spouses of $47,500.

There is an additional reason why this Court on remand should also reject the Greens' current position that the $2 million settlement should be equally apportioned as $1 million to each verdict. As indicated, that argument would mean that the original $2.3 million judgment in favor of Mr. Green would be reduced to $1.3 million, and the original $550,000 judgment in favor of Mrs. Green would be reduce to $0. However, given the procedural history as outlined above, Dr. Bauerle submits that the Greens have released and/or waived this position and are otherwise judicially estopped to take that position because Mrs. Green, with her husband's signed consent, already accepted $64,883.68 in April 2016 (which was after the Petitions for Rehearing were denied in the Court of Appeals), and they partially satisfied/released Dr. Bauerle in that amount on April 20, 2016. That acceptance of funds by Mrs. Green is inconsistent with the

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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 her judgment in that amount, Mrs. Green took the position that her judgment was not fully satisfied by the Grand Strand settlement. That position is subject to the doctrine of judicial estoppel which "precludes a party from adopting a position in conflict with one previously taken in the same or related litigation." *Quinn v. Sharon Corp.*, 343 S.C. 411, 540 S.E.2d 474, 475 (Ct. App. 2000). "The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts." *Id*. It is, therefore, well settled that "[w]hen a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." 540 S.E.2d at 475-76. At the very least, the Greens' post-trial acceptance of funds to satisfy Mrs. Green's verdict should be persuasive evidence -- if not an actual waiver or estoppel -- that the Greens never intended for the $2 million settlement with Grand Strand to be equally allocated.

Nonetheless, if the Court were to agree with the Greens' current position that the Mrs. Green's judgment was zeroed out by the set-off of the $2 million Grand Strand settlement, then Mrs. Green has already been paid $64,883.68 that was not owed. The Court should use its equitable authority to require a re-payment of that amount or order a transfer of that amount from Mrs. Green to Mr. Green to satisfy a portion of Mr. Green's judgment. Dr. Bauerle and his insurer acted in good faith to partially satisfy the judgments during the pendency of the appeal and should not be placed in the detrimental position of overpaying on Mrs. Green's judgment because of a change in positions taken by the Greens subsequent thereto.

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CONCLUSION

Based on the foregoing discussion, the Bauerle Defendants respectfully request that the Court apply the Supreme Court's direction that "the total amount paid by Grand Strand to be set off from the verdicts," and under the facts and law of this case, that will result in a total recovery of $825,000 from the Bauerle Defendants.

Respectfully submitted,

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August 21, 2019

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
Randall M. Green and Ann Green,	)	
	)	Civil Action No.: 2011-CP-26-7403
Plaintiffs,	)	
vs.	)	**PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED ORDER**
	)	
Wayne B. Bauerle, MD and Wayne B. Bauerle MD, PC	)	
	)	
Defendants.	)	

Plaintiffs, The Estate of Randall M. Green and Ann Green, hereby object to the Defendants' proposed "Order Following Remand By South Carolina Supreme Court."

SUMMARY OF OBJECTIONS

The proposed Order **grossly** misrepresents the very arguments on which the Supreme Court's Remand Order was based and **refuses to even consider evidence regarding the "relevant circumstances" addressed in those arguments** which are further set forth below and in the attached Exhibit and in the briefs readily available to this Court. The proposed Order further assumes findings and reasons for those findings which the Supreme Court did **not** state in its Order, ignores explicit instructions given in that Order, and relies on a misinterpretation of a case with no bearing on the issues before this Court. Additionally, the proposed Order entirely disregards the recent holding in Riley v. Ford and **ignores the very strict threshold** clearly stated in that case which must be met before a court can disregard the intentions of the settling parties and modify a prior settlement contract without the parties' consent. The proposed Order not only refuses to consider **any** evidence submitted by the Plaintiffs or statutes which mandate a rebuttable presumption consistent with their position, it strongly construes the language of the Plaintiffs' contract in favor of the Defendants and inserts contractual terms **directly** contradicting their stated intentions.

Finally, the proposed Order seeks to exclude the Greens' argument in favor of an equal division of the settlement based on the doctrines of judicial estoppel and waiver. Plaintiffs have not had the opportunity to brief this issue before this Court. Defendants have made these arguments **twice** to the Supreme Court in opposing certiorari on the issue and in a motion to exclude the arguments. **Both** times, the Supreme Court **rejected** the arguments. Not only are the elements for either doctrine not met in this case, the Orders in place at the time of the transaction and Rules 205 and 61 very clearly prohibit that transaction from affecting any matters pending appeal. Defendants' assertion that the parties believed this was intended to waive their first and most primary argument on appeal is disingenuous and borders on absurd. The equal allocation argument was the Greens' only argument on the allocation issue to the Supreme Court, and more than half of their brief was dedicated **solely** to this exact issue. Moreover, this was the **very** issue

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subsequently remanded to this Court for decision. The failure to consider any evidence submitted by the Greens on this issue would effectively circumvent the very analysis this Court has been tasked with on remand.

OBJECTIONS

The Plaintiffs strongly object to the proposed Order on the following grounds;

1. **Plaintiffs object to the proposed Order on the grounds that it states that the Supreme Court found that the settlements and verdicts were for the same injuries and damages.** The Supreme Court's Order does **not** state this or make any such finding. The finding that the entire settlement with Grand Strand is subject to setoff is not the same as a finding that the verdicts and settlements compensated the exact same injuries and damages. This Court should not speculate or make presumptions in favor of the Defendants as to unstated bases or reasons for this ruling.

2. **Plaintiffs object to the proposed Order on the grounds that it directly conflicts with the explicit instructions given by the Supreme Court. Plaintiffs object to the proposed Order on the grounds that it completely ignores the intentions of the settling parties in violation of the most basic rules of contract construction, prior Supreme Court rulings, and this State's strong public policy in favor of fostering and promoting settlement of disputes.** The proposed Order clearly creates additional terms which **substantially** alter the rights of the parties to the contract. Further, it is grossly inequitable and violates basic legal rights in order to enlarge a benefit to a tortfeasor who inflicted horrific injuries. Not only does it advance a position that condones retroactive judicial modification of good faith settlements based solely upon subsequent jury verdicts but it also penalizes innocent parties for obtaining a verdict and does so on the basis of comparing that verdict's size to the verdict obtained by a different Plaintiff. Settling parties would face such unpredictability and uncertainty that it would have an **absolutely** stifling effect on settlements in this State if the proposed Order is entered and upheld on Appeal. "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)."

> **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)(emphasis added)(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)).

The proposed Order unjustly deprives Ann Green of vested interests and property rights as well as disturbs settled transactions and expectations. Further, the proposed Order refuses to consider *any* testimony as to the settling parties' intentions, while strongly construing the contractual language in favor of the non-settling tortfeasor, **directly** contradicting the Supreme Court's strongly worded opinion in Riley v. Ford. It is far more penalizing to the horrifically injured Plaintiffs than to the actual tortfeasor. It divests Ann Green of settlement proceeds in an amount even greater than her verdict against Bauerle **and** deprives her of the majority of her verdict.

In remanding the allocation issue, the Supreme Court ***expressly*** stated:

> 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 the relevant circumstances, **not solely upon such a formula.**

However, the proposed Order submitted by Defendants seeks to allocate a settlement based solely **upon this exact same formula**. This is also in direct conflict with the findings in Riley v. Ford. Moreover, it is error to evaluate the reasonableness of a settlement allocation based upon the **"relative percentage of settlement proceeds assigned to each claim."** Riley, 414 S.C. at 191.

This Court previously lamented, as repeated in the proposed Order, that the Supreme Court offered no guidance as to the "relevant circumstances" that were to be considered. However, such guidance can be found within the extensive arguments upon which the decision to remand this issue was based. Further, the Riley opinion sets forth in no uncertain terms the circumstances under which a court may and may not alter a settlement agreement as well as takes a very protective stance with regard to the settling parties' decisions and intentions. The Greens argued that *many* other factors *should* have been considered, particularly their intentions regarding the settlement. These arguments are very clearly set forth in their Respondents-Petitioners' Brief. For the Court's convenience, relevant excerpts containing more detail from the Greens' arguments with page references are attached as "Exhibit 1."

Briefly, the circumstances which the Greens argued that this Court had failed to consider primarily include the following: (1) The intentions of the settling parties or the reasonableness of their decision not to allocate the settlement or otherwise divide it unequally; (2) The reasonableness of allocating a 1M dollar amount to Mrs. Green; (3) That there was no legal basis for disregarding the settling parties' intentions or modifying the settlement to correlate with the jury verdicts; (4) The inequity of modifying an unallocated settlement to divide it unequally under the facts; (5) That the equal division could not result in a double recovery; and (6) The intentions of the Legislature and whether retroactive judicial modification of a settlement is permissible.

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3. **Plaintiffs object to the proposed Order on the grounds that it grossly misrepresents the nature and content of the arguments upon which the Remand Order was based.** These arguments did **not** assert that the settlement at issue should be treated as "marital property" as extensively stated throughout the proposed Order and as repeatedly misrepresented by Defendants' counsel. To the contrary, the allocation arguments were based almost exclusively on the Riley v. Ford opinion and extensively addressed numerous circumstances this Court failed to consider pursuant to that opinion. Further, the briefs containing these significantly relevant arguments are easily accessible and readily available to this Court.

Further emphasizing the significance of the arguments made to the Supreme Court in providing guidance regarding the "relevant circumstances" which must be considered, Defendants' counsel has repeatedly directed this Court's attention away from the Greens' actual arguments and *grossly* misrepresented the nature of their "primary" argument. The proposed Order finds that the Greens argued that their settlement with Grand Strand was "marital property," further finding that it was the "crux" of their arguments. (Proposed Order, p. 7). **However, this is patently false.** The Greens' respectfully direct this Court's attention to (1) their brief filed with the Supreme Court; (2) their pre-hearing memoranda filed with this Court, and (3) their counsel's statements at oral arguments that factors relevant to the division of marital property was not being argued.

As a first aside, property is only deemed "marital" if it is "owned as of the date of filing or commencement of marital litigation." Sexton v. Sexton, 380 S.E.2d 832 (1988). Further, S.C. Code Ann. § 20-7-420(2) grants the Family Courts exclusive jurisdiction for the settlement of all rights "to the real and personal property of the marriage." Nevertheless, the proposed Order repeatedly asserts that it is appropriate to treat the settlements and verdicts as such which, incidentally, would divest this Court of jurisdiction to divide it. Marital Property was mentioned a **single** time on page 21 of their brief, as explained in a footnote, to illustrate that an unequal allocation could effect a future family court division *if* they were to divorce. This side point was made to demonstrate further inequity in a potential far reaching consequence.

Of note, the Supreme Court has remanded this issue for determination of the proper amounts to be setoff from each verdict. The contract is not to be modified on the basis of fraud or unreasonableness but simply for the technical necessity of applying a setoff. Therefore, the nature of the instrument as written and the parties' intentions should be preserved as far as possible and modification *only* performed to the most limited extent necessary to carry out the task at hand. Your Honor recognized at the hearing that South Carolina was not a "50/50" state, raising concern that the consideration of the issues in the context of marital property and family law principles might cloud the analysis at hand. Plaintiffs respectfully request that this Court reconsider the relevance of this position as moot.

4. **The Plaintiffs object to the proposed Order's exclusion of Ann Green's testimony as to her intentions as well as her husband's intentions regarding the settlement**. The primary grounds for this objection are that: (1) The rule is inapplicable to this case; (2) Several exceptions to the rule are applicable to the present case; and (3) Application of the rule to the facts of this case would create a manifest injustice "Undoubtedly, applying the Dead Man's Statute to exclude

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testimony is disfavored." Brooks v. Kay, 339 S.C. 479, 487, 530 S.E.2d 120 (2000). "Because this statute is an exception to the general rule of witness competency, it requires a restrictive reading on which the party requesting its muzzling effect bears the burden." Hanahan v. Simpson, 326 S.C. 140, 151, 485 S.E.2d 903 (1997). "If the legislature is unwilling to repeal the statute, then the courts should continue to give the statute the narrowest possible application, as in probate cases, for example, where the substantive aspect of the rule would clearly predominate." Id. at 152 Quoting 28 S.C.L.Rev. 481, 500-501 Citing 3 Weinstein § 601.03, at 601-20.

> The Dead Man's Statute has been sharply criticized in recent years—Professor McCormick calls it a "blind and brainless" technique which, in seeking to avoid injustice on one side, ignores the equal possibility of creating injustice to the other. It has also been disparaged by numerous other commentators. In response to such criticisms, the courts of this state have strictly construed the rule and endeavored to limit its applicability to cases which clearly fall within its intended scope.

Id. at 152.

Where testimony in violation of the Statute is cumulative, its admission provides no grounds for reversal on appeal. *See* McBeth v. Bishop, 278 S.C. 443, 298 S.E.2d 441 (1982). First, there is no arguable basis for excluding Ann Green's testimony as to her own intentions under the Statute, and it is crucial to a fair determination of this case. Her testimony is merely cumulative to the position already taken by Randy Green before the courts in this case while living, to the joint and equal settlement contract he executed years prior to his death, and to his actions in accepting and maintaining the funds jointly with his wife. Even if this Court determines that it is appropriate and just to "muzzle" her as to conversations with her husband regarding the reasons and intentions underlying their joint decisions, it is not appropriate or just to prevent her from providing evidence to this Court regarding her **own** intentions.

In order for the Statute to apply, it must also be offered *against* the party prosecuting or defending the action as the personal representative. Suttles v. Wood, 280 S.C. 272, 312 S.E.2d 574 (Ct. App. 1984). Its application is limited to protecting estates of deceased persons from fraudulent claims as these are the situations which the Statute was designed to prevent. Burns v. Caughman, 255 S.C. 199, 178 S.E.2d 151 (1970). While living, Randy Green has already taken the position before this Court, the Court of Appeals, and the Supreme Court that the settlement should be allocated equally between him and his wife. The Estate and Ann Green are represented by the same counsel in this action and have not taken adverse positions on this issue. This is not a scenario the rule was designed to prevent, and there is absolutely no risk that Ann Green is attempting to make a fraudulent claim against her deceased husband's Estate. To the contrary, she is arguing that she be allowed to retain a vested interest in order to grant a *larger* setoff against her jury verdict. The Statute will not exclude witness testimony that is against their own interest. Brooks v. Kay, *supra*; Hanahan v. Simpson, Supra.

The Defendants have opened the door to this testimony by seeking to have the court reinstate it's prior holding which modified a settlement agreement consummated by the deceased. In so doing, they have taken the position that the Greens did not intend the settlement to be joint and equal, and it should therefore not be allocated equally between them. This directly places the

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parties' intentions in issue. The Statute does not exclude testimony under such circumstances, and it would be grossly inequitable to hold otherwise. Id. Pursuant to Riley v. Ford and the very crux of the arguments on which the Supreme Court based its decision to remand this issue, the intentions of the settling parties is an extremely significant issue central to a proper analysis of how their settlement contract should be modified *in order to apply a setoff*. **Of note, the contract is not to be modified on the basis of fraud or unreasonableness but simply for the technical necessity of applying a setoff.** Therefore, the intentions of the settling parties is not only a relevant circumstance, it is *crucial* to a proper finding in this case.

5. **The Plaintiffs object to the Proposed Order's reliance on Broome v. Watts as precedent in support of reliance on jury verdicts to retroactively modify a prior settlement.** They further object on the grounds that this case is inapplicable to these facts as it involves no allocation issue, and is only relevant to the total amount of damages that can legally be recovered pursuant to contractual terms and the statutory definition of UIM coverage under this State's automobile insurance laws.

The proposed Order's reliance on Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995) to support the allocation based upon a comparison of the separate and independent jury verdicts is misplaced. That case does **not even address** any issues related to a court's allocation or re-allocation of a settlement. Broome involved an unallocated settlement with a defendant paid to a husband and wife which was setoff from the verdict against **that same defendant**. The settlement was paid by the auto liability carrier and the verdict was paid by the underinsured carrier. The setoff was mandated by our laws governing **auto insurance** which make clear that underinsured coverage exists solely to pay those damages sustained in excess of the liability coverage. S.C. Code Ann. § 38-77-160. Under our automobile insurance laws, a loss of consortium claim is subject to the same per person bodily injury limits as the physically injured spouse. Accordingly, the total of the two spouses' verdicts could not exceed the total per person bodily injury limits set by the insurance contract. The court's consideration of the sum of the two verdicts was ***only*** considered because of the limitations and definitions set forth in an insurance contract and laws governing automobile insurance. It is entirely irrelevant to the issues before this Court.

There is **no precedent or support** for retroactive judicial modification of a prior settlement based upon a comparison of subsequent jury verdicts obtained by two separate Plaintiffs against another Defendant, and such a finding would be a gross violation of the Plaintiffs' most basic legal, contractual, property, and constitutional rights. Further, such a holding would constitute a grievous insult to this State's strong and clear public policy in favor of promoting and fostering the settlement of disputes.

6. **The Plaintiffs object to the proposed Order's reliance on the doctrine of Judicial Estoppel and Waiver to preclude proper analysis of the relevant circumstances and avoid reconsideration of the Court's prior position. There is absolutely no evidence that the horrifically injured innocent Plaintiffs intended to mislead the Court or voluntarily relinquish any rights.** The Orders in place at the time of the acceptance of the undisputed UIM funds and Rules 205 and 61 prohibit that transaction and agreement from affecting any matters

pending appeal, which very clearly included the allocation issue subsequently remanded to this Court for decision. Defendants' assertion of such position is disingenuous at best and has **already been rejected twice by the Supreme Court** in granting certiorari on this issue as well as when relied upon in a motion seeking to prohibit arguments in favor of equal division of the settlement. For this Court to accept such a position would inflict further gross inequity upon the Greens and circumvent analysis of the proper issues on remand.

Further, in order to prevail on a claim of judicial estoppel, a party must prove, in addition to other elements, that two totally inconsistent position have been taken as part of an intentional effort to mislead the court. Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). The doctrine only applies only to matters of fact, not conclusions of law. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). There is absolutely no evidence or basis for asserting that the Greens misrepresented facts or changed their version of events to intentionally mislead the court or gain an advantage. *See* Bailey, 327 S.C. at 252, 489 S.E.2d at 477 ("When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.")

"Waiver is a voluntary and intentional relinquishment of a known right." Johnson v. Zerbst, 204 U.S. 458, 58 S. Ct. 1019 (1938). Plaintiffs strongly object to the proposed Order's attempts to consider the transaction at issue to be "persuasive evidence" that the Greens did not intend for the settlement to be shared equally. Evidence of the parties' intentions with regard to this transaction is further demonstrated by the fact that the payment was made 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, this issue was subsequently **extensively** argued on appeal and ultimately remanded to this Court for consideration.

THEREFORE, the Plaintiffs respectfully request that this Court reject the Defendants' Proposed Order and consider issues raised by the above Objections.

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EXHIBIT 1

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Exhibit 1: Relevant Circumstances Argued Prior To Remand To Require Consideration By Trial Court

1. **The intentions of the settling parties or the reasonableness of their decision not to allocate the settlement or otherwise divide it unequally:**

"[The trial court] failed to even address the issue of whether the settlement agreement was unreasonable, much less provide any discussion as to *why.*" (Brief, p. 18);

"The trial court did not evaluate the reasonableness of the Plaintiffs' decision *not* to allocate the funds. . ." (Brief, p. 19);

"The arbitrary application of the percentage based upon the comparison of the verdicts did not utilize ***any*** form of factual determination, take into consideration ***any*** evidence of Plaintiffs' respective injuries and damages, or give *any* weight to the intentions of the settling parties or the reasonableness of the Plaintiffs' equal entitlement to the settlement funds." (Brief p. 24);

"The lack of allocation demonstrates a clear intent to share equal rights to the funds, and any division between the husband and wife should have taken this into consideration. However, the court used an entirely arbitrary formula which was not based on any equitable considerations or factual determination, and which entirely disregarded the intentions of the settling parties as ***expressly*** set forth in the terms of their contract." (Brief p. 24);

"There was no deference given to the intentions of the settling parties or potential reasons for which a married couple might choose *not* to allocate a settlement between them." (Brief p. 19);

"There was no consideration of the fact that, as a matter of law, the settling parties had no *reason* to allocate the settlement as this was not a death case." (Brief p. 19);

"'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)." (Brief p. 29);

2. **The reasonableness of allocating a 1M <u>dollar amount</u> to Mrs. Green.**

"The courts below allocated the settlement between the parties, altering their agreement and dividing all of the funds so that they correlated *proportionately* with the verdicts." (Brief, p. 18);

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The court failed to consider the $1,209,600.00 in care Ann had provided and that "it certainly would have been reasonable for the settling parties to allocate $1,000,000.00 to Mrs. Green for her damages." (Brief p. 21);

"There was **no analysis** of the compelling evidence supporting Mrs. Green's extraordinary damages which, as set forth in further detail below, would have demonstrated that the couple's decision to share equal joint entitlement to the settlement was *extremely* reasonable." (Brief, p. 18-19);

3. **Whether there was a legal basis for disregarding the settling parties' intentions or modifying the settlement to correlate with the jury verdicts.**

"Bauerle did not even suggest that the lack of allocation or the Plaintiffs' decision to share equally in the funds was unreasonable. In fact . . . his motion did not request that the settlement be modified." (Brief p. 19);

"Not only did Bauerle ***not*** request an allocation, he certainly did not meet his burden of proof in justifying such allocation as bona fide, fair, and just." (Brief, p. 22);

"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." (Brief p. 21);

"In other words**, Mr. and Mrs. Green did not carry identical burdens of proof at trial.** Therefore, the *relative proportional* amounts of their separate jury verdicts should not have been used to determine the scope of their respective rights to the shared settlement funds *or* to their individual verdicts. 'Each Litigant was entitled to a verdict based on the law and the evidence." Page v. Crisp, 303 S.C. 117, 119, 399 S.E.2d 161, 162 (Ct. App. 1990).'" (Brief p. 24).

"As this Court stated in Riley, "where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset." Id. at 196. This simple principle prohibits the exact circular analysis employed in the present case wherein the relative size of each verdict determined the amount by which it would be reduced." (Brief p .17).

4. **The inequity of modifying the settlement to divide it unequally under the facts.**

"There was no consideration of the fact that GSRMC negotiated the settlement terms while subject to a separate contractual relationship with Bauerle." (Brief, p. 19);

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"This penalized Mrs. Green more than it benefitted Bauerle by depriving her of her larger bargained-for portion of the settlement before her verdict was even reduced. This had the further inequitable result that the setoff, even if justified, unfairly diminished Mr. Green's verdict." (Brief, p. 24);

"It would have been simpler and more equitable to allocate it **equally** between the two Plaintiffs." (Brief p. 24);

"A more equitable result would be achieved from application of the settlement to the verdicts in equal amounts as bargained for by the parties, reducing each verdict by $1,000,000.00." (Brief, p. 24);

"The Greens were well within their rights to negotiate settlement terms which they felt were most favorable to them, particularly those terms personal to their marriage and potentially impacting future inheritance issues and legal rights between them." (Brief p. 21);

"The characterization of settlement funds as consideration for either Mr. Green's damages or Mrs. Green's loss of consortium could have far-reaching implications if they were to divorce." (Brief p. 21, ftnt. 3);

"However, the result of deeming the joint payment equally allocated between the two parties to whom it was paid would have been far more equitable because it would have given *some* deference to the terms of the Plaintiffs' agreed upon settlement." (Brief p. 25).

"Several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation." McDermott, Inc. v. AmClyde, 511 U.S. 202, 219 (1994)."

5. **That the equal division could <u>not</u> result in a double recovery.**

"This would result in a judgment for Mr. Green in the amount of $1,300,000.00, allowing him to retain $1,000,000.00 of his settlement, for a total recovery **equal to his $2,300,000.00 verdict**. While it would relieve Bauerle of any payment to Mrs. Green, it would permit her to retain her more valuable bargained-for right to an equal amount of the settlement. This finding, while still reducing Bauerle's liability by funds paid to settle claims for injuries not asserted against him, would have removed *any* risk of a double recovery." (Brief, p. 24).

6. **The intentions of the Legislature and whether retroactive judicial modification of a settlement is permissible.**

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

"Rather, the legislature was attempting to strike a fair balance for all involved-plaintiffs and defendants-and to do so in a way that promotes and fosters settlements." (Brief, p. 45).

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF HORRY	)	
Mark Green, as Personal Representative of the Estate of Randall M. Green and Ann Green,	)	Civil Action No. 2011-CP-26-7403
Plaintiffs,	)	
v.	)	**NOTICE OF MOTION AND MOTION TO ALTER OR AMEND ORDER AND SUPPORTING MEMORANDUM**
Wayne B. Bauerle, M.D., Wayne B. Bauerle, M.D., P.C., Strand Orthopaedic Consultants, LLC, Grand Strand Regional Medical Center, LLC, and Carolinas Medical Response, Inc.,	)	
Defendants.	)	

TO: THE HONORABLE STEVEN H. JOHN

O. GRADY QUERY, L. MORGAN MARTIN, AND CRISTIN URICCHIO, COUNSEL FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendants Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C (collectively referred to as "Dr. Bauerle") will move before the Honorable Steven H. John, at such time and place as may be set by the Court, for an Order, pursuant to Rule 59(e), SCRCP, reconsidering, altering and/or amending the Order filed October 22, 2019. The Defendants' counsel received written notice of entry of the Order on October 22, 2019.

The Defendants' motion is based on the following:

1. The Court is respectfully requested to reconsider that there is no evidence in the record that the intentions of the Greens were to share equally the $2 million settlement from Grand

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Strand Regional Medical Center, LLC ("Grand Strand"). The Court writes that "[t]he Plaintiff 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). However, 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). The Plaintiffs attempted to present an affidavit of Ann Green, to which the Defendants objected. In the email directing Plaintiffs' counsel to prepare a proposed order dated October 10, 2019, the 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." *See*, October 10, 2019 Email (attached). The Order does not specifically include this ruling nor does it mention or rely on the Ann Green affidavit. However, the Court also fails to recognize that, absent that 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. Specifically, the 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 the Rule 205, SCACR, as this Court states. The record reflects that on April 14,

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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 Plaintiffs' 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." That is substantial evidence showing that the Greens never intended for the $2 million settlement with Grand Strand to be equally allocated.

Yet, this 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 should be, with all due respect, reconsidered by the Court. First, that evidence is in the form of a consent order meaning it was entered with the consent of the Greens. A consent order is not different than a stipulation; the party is bound by the representations, legal and factual, contained in a consent 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. This Court has 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." The Court is respectfully asked to reconsider that ruling and to give effect to the April 16, 2016 Consent Order which demonstrates the actual intentions of the Greens.

In short, this Court's entire Order is premised on the notion that the Greens intended to share or 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.

2. The Court has also respectfully 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 Court has erred in concluding that such an allocation prevents the risk of a double recovery. In fact, such an allocation leads to a double recovery. The jury awarded Mrs. Green $550,000 as her consortium damages; yet, with this Court's ruling, Ann Green achieved a result of in excess of $1 million as her recovery -- close to twice the jury's determination. So, with all due respect, the Court is incorrect in finding that "there is no risk of a double recovery in this case." (Order, p. 6). Indeed, this Court's Order results in a double recovery for Mrs. Green -- a substantial windfall.

The Plaintiffs' argument, as adopted by this 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 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 Court's jury

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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). This 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 the Order, the Court recites a summary of that evidence including the Life Care Plan that was presented to the Court. 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 at trial against Dr. Bauerle*. To suggest otherwise is pure speculation. The Court, nonetheless, adopts 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 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 short 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.

On this point, the 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."

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(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 filed in the Court of Appeals and Supreme Court, the main focus of their arguments on allocation is now resolved, specifically that the set-off of the Grand Strand settlement was not proper because the settlement and verdict were for different injuries or different damages. The Supreme Court has rejected those arguments and ruled that "the law requires the *total* amount paid by Grand Strand to be set off from the verdicts." (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 the Court of Appeals. 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. The 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 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 Plaintiffs does not only create a risk of a double recovery for Mrs. Green, it makes that double recovery a reality. The Court is respectfully urged to reconsider its rulings in that regard.

3. The Court has also disregarded the argument made by the Plaintiffs in the appeals process that their settlement with Grand Strand is or should be treated as "marital property" and, as a result, the allocation of the $2 million should be equal. Yet, as the Defendants have 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

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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 Court erred in rejecting this authority.

Moreover, the Court failed to rely on, let alone even cite or discuss, the existing precedent for such a setoff based on personal injury and consortium trial verdicts in favor of spouses. Specifically, the Court fails to mention the Supreme Court's decision in *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995), and indeed has made no attempt to even distinguish that decision. The scenario presented in that case is virtually the same as in the case at bar. 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 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 property, which is also consistent with the Greens' position that the proceeds of the litigation against Dr. Bauerle were intended to be shared equally. Using the framework from *Broome*, the total of the judgments ($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. The Court is asked on reconsideration to consider and apply the precedent established by the Supreme Court's decision in *Broome*.

The Defendants' motion is based upon the pleadings filed in this case; the Order filed October 22, 2019; the Defendant's Memorandum of Law on Remand Issues After Appeal, filed August 21, 2019; the proposed order submitted by the Defendants; the rules of court; and such other matters as may be properly presented to the Court.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: *s/ Andrew F. Lindemann*

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-and-

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

November 1, 2019

ORAL ARGUMENT REQUESTED

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From: John, Steven H. Law Clerk (Kaitlin Cook)
To: Cristin Uricchio; Andrew Lindemann; Grady Query; Morgan Martin; jmccutcheon@thompsonlaw.com
Cc: Tracey O"Brien; nbrausch18@gmail.com
Subject: RE: Case no.2011-CP-26-7403
Date: Thursday, October 10, 2019 1:35:15 PM

Dear Ms. Uricchio,

Thank you for submitting Plaintiffs' Objections to the Defendants' Proposed Order. Judge John has now requested that you submit a proposed order; however, 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. If you have any questions, please let me know. Thank you for your continued cooperation.

Sincerely,

Kaitlin L. Cook

Law Clerk to the Honorable Steven H. John
Resident Circuit Court Judge, Fifteenth Judicial Circuit
Chief Administrative Judge, Court of General Sessions
1301 2nd Avenue
Conway, SC 29526
Phone: (843) 915-6697
Fax: (843) 915-5859
sjohnlc@sccourts.org

From: Cristin Uricchio <cristin@uricchiolaw.com>
Sent: Thursday, October 10, 2019 12:11 PM
To: John, Steven H. Law Clerk (Kaitlin Cook) <SJohnLC@sccourts.org>; Andrew Lindemann <Andrew@ldh-law.com>; Grady Query <gquery@qlawsc.com>; Morgan Martin <mmartin@lmorganmartin.com>; jmccutcheon@thompsonlaw.com
Cc: Tracey O'Brien <tobrien@qlawsc.com>; nbrausch18@gmail.com
Subject: Case no.2011-CP-26-7403

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Judge John:

Please find attached Plaintiffs Objections to the Defendants' Proposed Order. Please advise if you need anything further.

--
Thank You,

Cristin Uricchio

Uricchio Law Firm, LLC

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
Randall M. Green and Ann Green, Plaintiffs, vs.	)	Civil Action No.: 2011-CP-26-7403
Wayne B. Bauerle, MD and Wayne B. Bauerle MD, PC Defendants.	)	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO ALTER OR AMEND ORDER**

Plaintiffs, The Estate of Randall M. Green and Ann Green, hereby submit the following memorandum in opposition to Defendants' Motion to Alter or Amend Order.

The Supreme Court has already expressly found that this Court may not rely solely on the jury verdicts and, in doing so, also refused to consider Defendants' arguments regarding the Consent Order and disbursal of undisputed funds. This Court was absolutely correct *both* in refusing to do so *and* in considering all of the facts and relevant circumstances as well as the underlying arguments on which the Remand Order was based. This Court's Order extensively details and references **ample** evidence supporting the findings regarding *not only* the Greens' intentions and the reasonableness thereof, but also the further finding that equal division of the joint settlement was the most equitable method under the relevant circumstances of this case.

Notably, the Supreme Court remanded this issue for determination of the proper amounts to be setoff from each verdict. The contract was **not** to be modified based upon any allegations of fraud or unreasonableness but simply for the technical necessity of applying a setoff. This Court was well within its discretion in determining that an equal division was the most equitable method. This preserved both the nature of the instrument as well as the parties' intentions and modified the contract only to the extent necessary to carry out the task at hand.

The Defendants' argument that Mrs. Green has received a double recovery grossly misapplies and perverts that very policy which permits a reduction of a *verdict* by the amount of a *settlement*. They instead argue that the maximum amount a Plaintiff may recover in a *settlement* may be reduced by a future unknown *verdict*, asserting that a "windfall" occurs where the Plaintiff has negotiated a settlement larger than the subsequent verdict. This would obliterate one of the strongest motivating factors for parties considering settlement as it would no longer afford any protection against the unpredictability and uncertainty of litigation. The Defendants' proposed reversal of the setoff rule is illogical, impermissible, and actually urges this Court to deprive Ann Green of a settlement amount even larger than her verdict *before* depriving her of

the majority of her verdict. Further, this would also directly conflict with the Supreme Court's Remand Order as well as ignore its very strongly worded opinion in Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015) wherein the Supreme court reminds us that settling parties may be motivated by many considerations in arriving at a settlement, many of which might be unknown to a jury who hears only admissible evidence that relates to a defendant during trial.

The Defendants urge this Court to disregard all of the other relevant circumstances and determine the Greens' intentions based only on unrelated and isolated language in an April 2016 Consent Order directing the Clerk to release undisputed funds in the total amount of their prior UIM settlements. The entirely separate settlements with the UIM insurer occurred **many** years before the trial of this case and involved **different** injuries inflicted by a non-party at-fault driver. As held by this Court, the funds **were not subject to setoff**, and their disbursal **had nothing to do** with the allocation and setoff of the Grand Strand settlement. The language in the 2016 Consent Order on which the Defendants rely doesn't even reflect the individual amounts actually paid or allocated in these settlements, but was calculated based simply on the amounts still owing under each Plaintiffs' judgment pursuant to the previous allocation order **which has since been vacated**.

That language directing that the Clerk's disbursal of a single joint and equal payment reduce each Plaintiffs' verdict by specific amounts is **certainly** not credible evidence of the Plaintiffs' intentions at the time of Grand Strand settlement **three years prior**. Courts must determine the parties' intentions **at the time** the contract was entered and must do so as far as possible from the **terms of the agreement**. Nevertheless, Defendants urge this Court to disregard not only the language of the agreement but also extensive evidence of all of the other relevant circumstances, including Plaintiffs' damages and knowledge and beliefs thereof at the time.

This Court was absolutely correct in finding that the Consent Order directing disbursal of undisputed funds was not convincing evidence of the Greens' intentions regarding the Grand Strand settlement. As also noted in this Court's Order, the allocation issue was central to the pending appeal, and prior Orders referenced in the Consent Order made clear that the transaction **was not intended to impact any pending issues**, particularly **"the amount of the verdicts to which the Plaintiffs are ultimately entitled."** (December 11, 2014 Order Granting Leave to Deposit Funds Into Court). To assert that the Consent Order approving the disbursal of *already undisputed* funds was either intended as a final disposition of the entirely unrelated allocation issue *or* constitutes evidence of the Plaintiffs' intentions with regard to that unrelated issue is nonsensical. Moreover, if the Consent Order had been intended to impact this pending issue, it would have been submitted it to the appellate court, not the trial court, for approval pursuant to Rules 261(b) and 205, SCACR.

Further, the Defendants' assertion that this Court has overruled or disregarded another judge's ruling and thus must disregard the Supreme Court's explicit instructions in order to comply with contradictory language contained in the Consent Order are new issues which were not raised prior to judgment and cannot be asserted for the first time in a Rule 59(e) motion.

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First, this Court did **not** impermissibly overrule or disregard another judge's ruling. This Court complied with the Defendants' own request, and thus consent, regarding an *agreement* only sanctioned by this Court. This ruling was consistent with the stated limitations of the Consent Order itself and crucial to the analysis ordered by the Supreme Court. Second, courts may modify consent orders where the parties consent, to protect important underlying public policy concerns, or it is necessary to effect substantial justice between the parties. All of these situations are present in this case. To disregard *all* of the evidence and relevant circumstances argued before the Supreme Court and consider only isolated and conflicting language contained in the Consent Order, which the Supreme Court has itself already refused to consider, would circumvent the very analysis this Court was tasked with on remand as well as violate Rule 61, SCRCP. This court has, in fact, already ruled that the settlements from the at-fault driver and the associated UIM settlements were not subject to setoff and that ruling was sustained by the Supreme Court. The sole purpose of the Consent Order was to permit the release of funds by the Clerk of Court for this circuit.

Curiously, Defendants continue to attempt to drastically alter the Greens' arguments, asserting that, because they are claiming that the settlement was marital property, this Court must treat the verdicts as such. Plaintiffs have repeatedly pointed out that this was not an argument made to the Supreme Court or this Court and have referenced the memorandums and oral arguments of counsel to demonstrate this fact. Even if this was an argument before this Court, it would be incorrect and *still* would not alter the analysis or the result. This Court has already ruled on the issue of whether the verdicts and settlement should be treated as marital property or combined to rely solely on the exact same formula as prohibited by the Supreme Court. In rejecting these assertions, this Court based its analysis and findings on very clear supporting case law and considered extensive evidence of all of the relevant circumstances at the time of settlement.

1. This Court's Order extensively details and references ample evidence supporting the findings regarding *not only* the Greens' intentions and the reasonableness thereof, *but also* the further finding that equal division of the joint settlement was the most equitable and just method of applying a setoff under the facts of this case.

An additional sustaining ground presented to the trial court and leading to the same result as its ruling is a basis for affirmance. Colonial Life & Accident Ins. Co. v. S.C. Tax Comm'n., 233 S.C. 129, 103 S.E. (2d) 908 (1958). The Defendants inaccurately assert that this Court relied solely on the arguments of counsel as the only evidence of the Greens' intentions. However, this Court's Order very clearly details how and why the Greens' position was amply supported by evidence such as (1) the language of the agreement and the joint nature of the settlement; (2) overwhelming evidence regarding Mrs. Green's damages, and (3) Mr. Green's testimony as to his knowledge and beliefs regarding his wife's suffering and sacrifice. After carefully detailing all of the relevant circumstances taken into consideration, this Court was absolutely correct and well within its discretion in finding that (1) An equal division was the most equitable method of

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applying a setoff under the facts; (2) An equal division most closely preserved the joint nature of the unallocated good-faith settlement and the intentions of the settling parties; and (3) There was ample evidence on the record to reasonably support the payment of $1 million to Mrs. Green for her damages. Moreover, this Court expressly and clearly stated the bases for rejecting every one of Defendants' arguments that it should once again rely solely on the exact same formula which the Supreme Court found to be arbitrary and thus expressly prohibited.

2. The Supreme Court has already found that reliance on ratios derived from the jury verdicts would be arbitrary, and this Court was absolutely correct *both* in refusing to do so *and* in considering all of the facts and relevant circumstances.

The Defendants grossly misapply the rule against double recovery, arguing that it should be applied backwards to reduce a *settlement* based solely upon a later verdict. The Supreme Court has already found this to be an inadequate analysis of the relevant circumstances. Further, it profoundly conflicts with this State's strong public policy favoring the settlement of disputes. Not only does Defendants' argument advance a position that would require retroactive judicial modification of good faith settlements based solely upon subsequent jury verdicts, but it also penalizes innocent parties for obtaining a verdict, and does so on the basis of comparing that verdict's size to the verdict obtained by a different Plaintiff. The Defendants' position would result in settling parties facing such unpredictability and uncertainty that it would have an absolutely stifling effect on settlements in this State. "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)."

Moreover, the Supreme Court has already made it abundantly clear that courts may not modify good faith settlements in order to benefit a non-settling Defendant. They ***certainly*** may not modify good faith settlements to effectively punish a Plaintiff for subsequently obtaining a verdict smaller than their settlement. Defendants argue that Mrs. Green received too much money in her settlement, a "windfall," despite *themselves* benefitting from her settlement to such an extent that they have *no* liability to her. They have no standing to do so, and to accept such a position would effectively obliterate *very* powerful motivating factors for parties considering settlement.

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. . . . 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).

Acceptance of Defendants' position would unjustly deprive Ann Green of vested interests and property rights as well as disturb settled transactions and expectations. This would also

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constitute a refusal to consider *any* testimony as to the settling parties' intentions, while strongly construing the contractual language in favor of the non-settling tortfeasor, **directly** contradicting the Supreme Court's strongly worded opinion in Riley v. Ford. It would be far more penalizing to the horrifically injured Plaintiffs than to the actual tortfeasor and would divest Ann Green of settlement proceeds in an amount even greater than her verdict **before** depriving her of the majority of her verdict.

In remanding the allocation issue, the Supreme Court stated:

> 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 the relevant circumstances, not solely upon such a formula.

However, the Defendants ask this Court to allocate the settlement based solely upon this exact same formula. This assertion also directly conflicts with the ruling in Riley v. Ford as it is error to evaluate the reasonableness of a settlement based upon the "relative percentage of settlement proceeds assigned to each claim." Riley, 414 S.C. at 191.

This Court's Order correctly rejected Defendants' contention that this Court should disregard all of the "relevant circumstances" raised in the extensive arguments upon which the decision to remand this issue was based. This Court's ruling is in compliance with the Supreme Court's Order as well as the Riley opinion which sets forth in no uncertain terms the circumstances under which a court may and may not alter a settlement agreement as well as requires a very protective stance with regard to the decisions and intentions of settling parties.

3. The April 2016 Consent Order directing the Clerk to release undisputed funds in the amount of a separate settlement with Plaintiffs' UIM insurer for *different injuries* inflicted by an at-fault driver, a non-party to this case, is not credible evidence of the Plaintiffs' intentions at the time of the Grand Strand settlement as had been previously held by this Court.

The Defendants argue that this Court has "rejected the only real evidence of the Greens' intentions" in refusing to find that language contained in the April 2016 Consent Order disbursing funds from this Court during the appeal was convincing evidence regarding their intentions as to the Grand Strand settlement. To the contrary, "[t]he 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 v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620 (Ct. App. 1986) (emphasis added); See also Klutts Resort Realty v. Down'round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20 (1982) ("This Court should put itself, as best it can, in the same position occupied by the parties **when they made the contract.**") The Consent Order directing the Clerk to disburse undisputed funds not subject to setoff or allocation was entered during the appeal and while the equal division issue was actively in dispute. The language on which Defendants rely was calculated based simply on the amounts still owing

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under each Plaintiff's judgment at the time pursuant to the subsequently vacated allocation order and is utterly irrelevant to the Greens' intentions regarding the Grand Strand settlement **three years prior**.

Moreover, 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). This is **precisely** what this Court did in correctly rejecting Defendants' assertion that the language of the contract itself is irrelevant to an analysis of its very meaning and the parties' intentions.

This Court correctly found that the language of the Consent Order entered during the appeal was **not** convincing evidence of the Greens' intentions regarding the prior pre-trial Grand Strand settlement. In so doing, this Court's Order set forth the applicable law and well-reasoned findings based upon the following extensive contrary evidence: (1) Consistent with the language of the Consent Order, the transaction involved a Court disbursal to the Greens via a single joint check; (2) The language of the April 2016 Receipt and Satisfaction only released Bauerle's *total* liability and did not divide this release between the two verdicts; (3) Subsequent to the transaction and entry of the Consent Order, the equal allocation issue was extensively argued before the Supreme Court and was central to the analysis ordered on remand[1]; and (4) The Orders in place at the time of the acceptance of the undisputed UIM **funds and referenced in the Consent Order itself,** consistent with Rule 205, SCACR, and Rule 61, SCRCP, prohibited that transaction and agreement from affecting any matters pending appeal or the **"amount of the verdicts to which the Plaintiffs are ultimately entitled."** An equal division was the *only* alternative allocation method argued throughout the trial and appellate process. It is disingenuous to assert that the disbursal of undisputed funds was intended as a contrary final disposition of the unrelated pending allocation issue.

4. The Defendants' assertions that this Court has disregarded another judge's ruling and is bound to comply with contradictory language contained in the Consent Order are new issues which were not raised prior to judgment and cannot be asserted for the first time in a Rule 59(e) motion. This Court has already ruled that the automobile insurance settlements were not subject to set off, and the Supreme Court agreed.

The Defendants' arguments to this Court regarding this Court disbursal of the UIM funds were limited to the following issues: (1) It demonstrated that the Greens' had voluntarily

[1] Plaintiffs also brought to this Court's attention that the Defendants did not raise the waiver or estoppel arguments in opposing certiorari on the equal allocation issue, raising it only after discovering the existence of such "additional arguments" much later in the briefing process. This serves as further evidence that the parties did not intend the UIM transaction to act as a settlement or resolution of the equal allocation issue at the time the Consent Order was entered. Defendants' suggestion otherwise is disingenuous. The Supreme Court expressly denied the Defendants' motion arguing that the Consent Order should exclude arguments in favor of an equal allocation, and this Court correctly made a consistent finding.

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waived their right to argue that the Grand Strand settlement should be divided equally; (2) It judicially estopped the Greens from arguing that the Grand Strand settlement should be divided equally; and (3) It should be considered persuasive evidence that the Greens did not intend the Grand Strand settlement to be divided equally. The Supreme Court as well as this Court correctly rejected these arguments, with the Supreme Court expressly refusing to even consider them. However, the Defendants did not argue to this Court *either* that the Consent Order was entitled to preclusive effect *or* that the Consent Order constituted a ruling on a disputed issue by another circuit judge. Not only are both of these assertions absolutely incorrect under the facts of this case, but a party cannot use a Rule 59(e) to present to this Court an issue which the party could have raise prior to judgment but did not. C.A.H. v. L.H. 315 S.C. 389, 434 S.E.2d 268, 270 (1993); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (1990); Anderson Memorial Hospital, Inc. v. Hagen, 313 S.C. 497, 443 S.E.2d 399, 400 (Ct. App. 1994). Nevertheless, these arguments will be addressed below.

5. **This Court did not impermissibly disregard another judge's ruling. This Court complied with the Defendants' own suggestion and consent regarding an *agreement* sanctioned by this Court and specifically stating that it was subject to a prior ruling that no provision therein would affect the pending setoff and allocation issues. This Court in fact considered, and ruled on, this issue on Defendant's Motion for Set Off at the conclusion of this trial, and that ruling was never overturned.**

The express language of the Consent Order states that this Court would continue to hold the "remainder of the funds deposited with the Clerk of Court by Defendants in this action until further Order of this Court and in accordance with the terms and conditions as set forth in the Order Granting Leave to Deposit Funds Into Court and Releasing Judgment Liens filed December 11, 2014." The December 11, 2014 Order states that the deposited funds shall have **"no effect on the issues currently on appeal including the amount of the verdicts to which the Plaintiffs are ultimately entitled** . . ." (December 2014 Order). Further, it expressly states that **"[s]hould the Plaintiffs prevail on appeal, [Dr. Bauerle and his insurers] will be liable for the judgments as determined by the appellate courts."** Therefore, the Consent Order **clearly** contemplated that the language on which the Defendants rely could likely be nullified, vacated, or modified by the pending appeal. It certainly was **not** intended to preclude any pending issues or arguments. Further, the April 2016 Consent Order directs that the Clerk "shall release the sum of Two Hundred Twenty-Eight Thousand Five Hundred Five and 69/100 Dollars ($228,505.69) to the Plaintiffs Randall and Ann Green by delivery of such check to their attorneys of record." This language expressly directs a single joint payment to the Greens and reflects the **actual nature** of the transaction and the joint benefit conferred. This Court correctly decided this issue.

> **[A]consent order is an agreement of the parties, under the sanction of the Court, and is to be interpreted as an agreement.** It can be rescinded by mutual consent in a subsequent court action. It cannot, however, be set aside in part so

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> that one party is absolved from the duty imposed by it, while the same party retains the benefit it confers. Thus, in a case like this one, where the final order in one case is the basis for the final order in a related case, this Court may, if justice requires it, relieve a party of the consent order in the related case if the other consent order has been vacated.

Johnson v. Johnson, 310 S.C. 44, 46-47, 425 SE 2d 46 (Ct. App.1992) (emphasis added) (internal citations omitted).

First, contrary to Defendants' assertion, the terms of the Consent Order were not based on another judge's ruling on a disputed issue but constituted an agreement between the parties which was only sanctioned by this Court. Even so, circuit judges *may* set aside or modify the orders of another "when the right to do so has been reserved to the succeeding judge, or when it is allowed by rule of court or statute." Nixon Grocery Co., v. Spann, 108 S.C. 329, 94 S.E. 531, 534 (emphasis added). Even if the language at issue did represent another judge's ruling on a disputed issue, which it did not, all of these exceptions are very clearly present in this case.

Moreover, the Consent Order does not make any ruling as to the Grand Strand settlement. It is incongruous to argue that the formula reflected in the Consent Order governs the analysis, particularly where the Supreme Court has already rejected that argument, vacated the order setting forth the very formula urged by the Defendants, and ordered this Court to consider the other circumstances present in the case.

Second, the **Defendants consented to and urged this Court to disregard the allocation language** in order to permit them full credit for their payment in the event this Court found that the Grand Strand settlement should be divided equally. Now that this Court has made this very finding, the Defendants argue that it did not have authority to do so, asserting that a court disbursal of undisputed funds governs the unrelated allocation issue remanded to this Court for analysis. However, **the Supreme Court has already rejected this exact position** in denying Defendants' motion arguing that the Consent Order precluded this Court's consideration of all of the relevant circumstances and evidence presented by the Greens in support of the equal division argument.

Notably, contrary to Defendants' repeated representations, the funds being held by this Court in the amount of the UIM settlement were undisputed *prior* to Rehearing being denied as demonstrated by Defendants' own Petition for Rehearing filed February 18, 2016 wherein they expressly and voluntarily conceded this issue. The funds were *already undisputed*. There was no bargained-for benefit underlying their decision *not* to object to this Court's disbursal of the undisputed funds, and it certainly did not represent a concession by the Greens regarding the separate and ongoing equal allocation issue. The relevant circumstances and express language of the Consent Order make it very apparent that neither the Defendants *nor* the Plaintiffs intended or believed that the unrelated disbursal would have *any* impact on the pending allocation issue.

Third, *consent* orders are not subject to absolutely preclusive effect as Defendants represent and may be modified by consent, where justice requires, or if the terms conflict with public policy. Johns v. Johns, 309 S.C. 199, 203, 420 SE 2d 856 (Ct. App. 1992) (finding in

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consent order not enforceable where conflicted with public policy and substantial justice) Citing 47 Am. Jur. (2d) Judgments § 1090 (1969). Raby Const., LLP v. Orr, 358 S.C. 10, 24 ftnt. 3, 594 SE 2d 478 (2004) ("even consent judgments are subject to attack under particular circumstances.") "The public policy underlying res judicata may have to yield to other public policies, even in consent orders." Johns v. Johns, 309 S.C. 199, 203, 420 SE 2d 856 (Ct. App. 1992). Here, this Court's finding that the additional language was harmless error and should be disregarded so as to effect substantial justice between the parties should be conclusive. It was not only suggested and consented to by **both** sides but was also required by the Consent Order's own language, the analysis before this Court on remand, this State's strong public policy favoring the settlement of disputes, *and* Rule 61, SCRCP.

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to this court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 61, SCRCP.

The funds disbursed pursuant to the Consent Order were not subject to setoff *or* allocation, and language releasing Defendants' liability was clearly intended to simply ensure credit for the total payment. The language directing that the single joint payment reduce each verdict by specific amounts was calculated based simply on the amounts still owing under each Plaintiffs' judgment pursuant to the previous allocation order **which has since been vacated**. It was entirely unrelated to the analysis remanded to this Court.

As was clearly recognized by the language of the Consent Order and prior Orders it referenced, the trial court did not have jurisdiction to make a determination impacting the allocation issue pending appeal. Nevertheless, the Consent Order did not represent a court ruling on this or any other disputed issues, and it is remarkable to assert that it constituted a preclusive determination of the allocation issue on remand. This Court's ruling on this issue was necessary to comply with the Supreme Court's Order, consistent with the arguments on which the remand was based, and compliant with the clear intentions of the Consent Order itself. It is truly remarkable to argue that this ruling was impermissible, particularly as it was also for the benefit of the Defendants, suggested by them, and did not prejudice them in any conceivable way.

6. This Court has already correctly ruled that the verdicts should not be treated as marital property.

The Defendants continue to argue that the verdicts should be treated as marital property, apparently attempting to urge that they be combined and treated as a single verdict and the same exact formula be used in direct contradiction of the Supreme Court's Order. This Court's Order set forth very clear case law expressly prohibiting this. First, property is only deemed "marital" if

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it is "owned as of the date of filing or commencement of marital litigation." Sexton v. Sexton, 380 S.E.2d 832 (1988). Further, S.C. Code Ann. § 20-7-420(2) grants the Family Courts exclusive jurisdiction for the settlement of all rights "to the real and personal property of the marriage." As Mr. Green has passed away, divorce litigation will obviously never be commenced, and neither the settlement nor verdicts can ever be deemed marital. Nevertheless, the Defendants repeatedly assert that it is appropriate to treat them as such which, incidentally, would divest this Court of jurisdiction to divide it.

7. Broome v. Watts is completely inapplicable to the issues in this case, and this Court already correctly ruled that the verdicts should not be combined and treated as marital property.

"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). This Court has already correctly ruled on the issue of whether the verdicts and settlement should be treated as marital property or combined to rely solely on the exact same formula as prohibited by the Supreme Court.

Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995) involves no allocation issue, and is only relevant to the total amount of damages that can legally be recovered pursuant to contractual terms and the statutory definition of UIM coverage under this State's automobile insurance laws. Broome involved an unallocated settlement with a defendant paid to a husband and wife which was setoff from the verdict against **that same defendant**. Pursuant to our automobile insurance laws, the total insurance recovery from the two spouses' verdicts could not exceed the total per person bodily injury limits set by the insurance contract. Therefore, the sum of the two verdicts was ***only*** considered because of the limitations and definitions set forth in an insurance contract and the laws governing automobile insurance.

Broome v. Watts is entirely irrelevant to the issues before this Court, and this Court was absolutely correct in refusing to apply it to the present facts. There is no precedent or support for retroactive judicial modification of a prior settlement based upon a comparison of subsequent jury verdicts, and such a holding would constitute a grievous insult to this State's strong and clear public policy in favor of promoting and fostering the settlement of disputes.

THEREFORE, the Plaintiffs respectfully request that the Defendants' Motion to Alter or Amend Order be denied.

Respectfully Submitted,

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All right. So, ladies and gentlemen, this young lady is going to play the part of Dr. Cranberg. These are the questions that were posed or asked of Dr. Cranberg and these are his answers, you will take that as the testimony under oath of Dr. Lee D. Cranberg.

Mr. McCutcheon, is there any objection?

MR. McCUTCHEON: No, sir, Your Honor.

THE COURT: You may proceed, sir.

MR. SAUTTER: Thank you, Your Honor.

(The direct examination of the deposition of Dr. Lee D. Cranberg is being read to the jury).

MR. SAUTTER: Your Honor and Mr. McCutcheon, at this time I would offer Dr. Cranberg as an expert in the field of neurology.

MR. McCUTCHEON: I don't have any objection.

THE COURT: All right. He's offering him --

MR. SAUTTER: As an expert.

THE COURT: He is qualified, then, to give his opinions in the field of neurology.

You may proceed.

MR. SAUTTER: Thank you, Your Honor.

MR. SAUTTER: Your Honor, I move this document as plaintiff's Exhibit Number 1 which is

(Reconvened 9:00 a.m., September 10, 2013).

THE COURT: Okay. Is the plaintiff ready for the jury to come in?

MR. MARTIN: Yes.

THE COURT: And the defense?

MR. McCUTCHEON: Yes, sir.

THE COURT: All right, ask the jury to come, in, please, ma'am.

MR. MARTIN: While they are coming in we have delivered the original Cranberg deposition transcript to the clerk.

THE COURT: Good. Are you going to start off with another deposition?

MR. MARTIN: The video deposition of Dr. Lintz.

THE COURT: All right. And you all already have the video qued up?

MR. MARTIN: We do. I think we're ready to go on that.

THE COURT: Very good.

(The jury returned to the courtroom).

THE COURT: Good morning, ladies and gentlemen. I want to tell you, just so you know, if you happen to see one or more parties coming in and out of the courtroom, that I have given

THE COURT: All right, let's just take a very short break, then we'll come back, all right?

Thank you.

(Recessed at 10:43 a.m.).

(Resumed at 10:54 a.m.).

THE COURT: All right, ask the jury to come in, please.

(The jury returned to the courtroom).

THE COURT: Mr. Martin?

MR. MARTIN: May it please the Court, with the Court's permission I will publish the medical records that were dictated by Dr. Lintz. The first dictation is 1:09.

THE COURT: Mr. Martin, could you maybe use that microphone, if you don't mind, turn it toward you, that would be great.

MR. MARTIN: Patient, Randall Green.

Can you hear me?

Date 4/17/2004, Scott Rintz, post motor vehicle crash, HVI, the patient is a 54 year old while male who was the unrestrained driver of the vehicle which was apparently struck on the front side of the vehicle. The car was laid on its side, patient denies any loss of consciousness, he was brought in on a long spinal board and cervical

collar and placed to room 12. History of the accident was obtained from the officer. The patient complained of pain in his right arm along with his right lower chest and right hip. Primary survey reveals initial blood pressure to be in the 80, 90 systolic, he had strong peripherial pulses with the exception of the right wrist, which the pulse was only noted by Doppler. The patient denies any neck pain, denies any headache. He denies any blurred vision.

Meds. Only aspirin, no known allergies, PPH none. Physical examination. Primary survey reveals him to be awake and alert, he had no evidence of confusion, he had no evidence of any face or scalp trauma, his nose is symetric, heart regular, lungs clear throughout, abdomen soft and completely non tender. The patient has no pelvic tenderness until I asked him to straight leg raise which causes pain to the right femoral region. The patient has strong lorsalis pedis and posterior tibular pulses. He has normal sensation. The patient has normal left upper extremity.

Evaluation of his right arm reveals a significant wound to the right proximal forearm. The ulnar surface of the forearm reveals a

significant wound, probably down to the bone. It is at least six to seven centimeters in length and deep, most likely to the bone. There is chronic oozing of blood. There is no foreign body noted and the wound appears very clean. A sterile pressure dressing was applied over the wound. The patient could not flex his digits. A stat xray of the forearm was performed which revealed no obvious fracture. A portable C-spine, a chest and pelvis xray was performed which revealed probable fracture of the right acetabulum. A CT scan of his chest and pelvis was performed which revealed he has most likely a acetabular fracture with a hematoma. I contacted Dr. Erickson for evaluation of the patient's wounds. He stated he does not operates below the elbow for vascular injuries. Dr. Cozart was contacted and he has arrived in the ER. The patient was given tetanus shot for prophylactic. He will be going to the operating room. I discussed the case with Dr. Bauerle who would eventually like reconstructive CAT scan of the patient's, of the patient's acetabulum. The patient will need a complete C-spine when he has post-op. He denied any neck pain and he was rolled, with no mid or lower back pain. The

patient was able to flex his right hand -- strike that.

The patient was able to flex his right elbow normally. The patient was given a bolus of normal saline and his pressure came up over 100 systolic. The patient had intermittent episode of hypertension. His labs revealed white count of 13 with a normal HTH. His cardiac enzymes are normal, his cardiacs are normal and his liver function tests are mildly elevated. The patient did admit to drinking alcohol, smoking cigarettes on a regular basis. EKG reveals a normal sinus rhythm at 87 beats per minute, he has non specific ST/T wave abnormalities with no evidence of acute ischemia. The patient will be admitted most likely to Dr. Nicholson, trauma surgeon, who is in the ER. Critical care time spent with the patient was well over an hour and a half.

Again, this is dictated 1:09 and transcribed at 2:13 on April the 17th, electronically signed by Dr. Scott Lintz. That is Exhibit Number 2.

Exhibit Number 3, again, is an ER report dictated by Scott Lintz at 2:05, 2:05 that day, again regarding Randall Green. Same date of birth, this is addendum. The radiologist confirmed a

posterior hip dislocation. Prior to the patient going to the operating room for his forearm injury he was given four milligrams of morphine and one milligram of Bursa 4. The hip was reduced without difficulty. There was a significant clunk heard in the hip. The patient had improvement of his discomfort. He had a persistent strong femoral pulse and a dorsalis pedis pulse. He moves his toes normally, there is no color discrepencies between the two extremities. However, prior to the sedation the patient't neck was palpated by myself and Dr. Nicholson. He denies any midline bony neck pain. Portable lateral xrays of the neck and swallowers' view of his neck reviewed no malalignment or obvious fracture. The collar was then removed. Dr. Bauerle was contacted concerning, Dr. Bauerle was contacted regarding the patient's hip injury a second time. He had asked for reconstructive views, however due to the patient's injury to his right forearm requiring surgical intervention I felt that it was better warranted, than holding up the patient, to get the hip CAT scan. When I notified Dr. Bauerle he was pretty adamant about getting the CAT scan of the hip first. Dr. Bauerle has come in and the patient

is currently in CAT scan. Dr. Bauerle will follow up with the CAT scan and make sure there are no fragments in the hip injury itself, hip joint itself. Dr. Cozart will be repairing the forearm injury. The patient continued to have Dopplerable pulse in his right radial area, received sedation for hip closed relocation. Dictated 2:05 on April 17.

Exhibit Number 4, again an addendum report by Dr. Scott Lintz which is dictated at 3:31 on that same date. The patient is a 54 year old male who was waiting to go to the operating room pending results of the xray of his right hip. Again Dr. Bauerle was adamant the patient getting those prior to going to the operating room to make sure his hip is reduced. While waiting for the results of the CAT scan reading from the radiologist I walked by the room and noted the patient started to become bradycardic. His heart rate went from 60 to 50 to 40. The patient had just completed, had just complained of some difficulty breathing. He had escalated bronchial sound bilaterally. The patient had only been given four milligram of morphine and one milligram of Versa. He had minimal response to the sternal rub. We checked his pulse and could

not palpate it. For this reason the patient was intubated with an endotracheal tube with 22 centimeters at the hip, CPR was initiated. We gave him a milligram of Atropine and a milligram of EPI 4. The patient's heart rate increased to over 100 in a wide complex fashion. I had paged anesthesia just prior to intubating the patient. The patient had a Dopplerable pulse over femoral artery. Dr. Cozart, Dr. Nicholson and Dr. Bauerle were present at some time during this initial code. The patient appeared to be very pale on repeat exam. CPR was performed for under a minute, the patient was bagged with 100 percent oxygen prior to intubation, Dr. Peters performed a right IJ central line, blood which was called for arrived from the blood bank and the patient was transfused four units of bagged red blood cells. We did repeat an H and H which revealed a hemoglobin of 5.5 and platletes of five. The lab was unsure if this was normal as there was a clot in the tube. This was ordered prior to the patient getting the blood. The patient had already received the three liters of normal saline. Dr. Cozart began operating on the patient's forearm in the ED to stop the oozing from the patient's forearm injury. There was no gross bleeding when

he started, that I could observe. A left arterial line was performed by Dr. Peters with varying increase in blood pressure in the 50's to the 60's. The patient had a second episode of bradycardia and hypotension and was given another milligram of Atropine and Epinephrine. The patient was started on EPI and Levophed drip. The patient's son-in-law was outside the room and I intermittently discussed the event with him. I ordered two units of platletes for him. The patient's blood pressure had increased to over 100 systolic.

Procedures. Endotracheal intubation. Critical care of the patient was over an hour. Again on the top of what I had performed before, I also contacted the hospitalists services for medical consults and called the echo tech for a stat echocardiogram after discussing the case with Dr. Trask. The patient's hypotension and bradycardia appears to be the most likely, appears to be most likely due to anemia and volume loss. The patient I believe is improving due to at least 3.5 to four liters of normal saline and the packed red blood cells. Incidently, the CAT scan of the right hip did reveal some small fragments in the right hip but the hip reduction was successful.

MR. QUERY: That's fine, Your Honor, I have no problem with that.

THE COURT: Very good.

All right, you may proceed.

MR. QUERY: Thank you, Your Honor.

This is the deposition of Dr. Douglas E. Norcross, given on October 28, 2009, at 3:00 p.m., at the Medical University of South Carolina. Page five, line 20.

(The deposition of Dr. Douglas Norcross is being read to the jury).

THE COURT: All right, very good. Is that the end of that deposition, then?

MR. QUERY: Your Honor, with regard to that deposition, we have a stipulation.

THE COURT: All right.

MR. QUERY: And I would publish that with the Court's permission.

THE COURT: Is that correct, Mr. McCutcheon?

MR. McCUTCHEON: Yes, sir.

THE COURT: All right, very good. Go ahead.

MR. QUERY: Come now the parties herein named by and through their undersigned counsel of record who hereby stipulate and agree that Dr. Norcross' affidavit dated July, 2013, is sufficient to show

THE COURT: Do you all have the original?

Ladies and gentlemen, I know I said it the last time, but depositions continue to be the sworn testimony of that particular witness, taken at a different point in time, most likely to accomodate them in their practice, but it is the testimony of all those witnesses under oath regarding the particular matter.

All right, sir, you may proceed.

(The deposition of Dr. Ed Price Chariker is being read to the jury).

MR. McCUTCHEON: Your Honor, just for purposes of the record and clarification, this was a discovery deposition.

THE COURT: All right, sir.

MR. McCUTCHEON: Taken by Miss Thomas, so just for the record.

MR. MARTIN: That's correct.

THE COURT: All right, very good.

Go ahead.

(Continued reading of the deposition of Dr. Ed. Chariker).

(Q And when you get those documents back, I will specifically go back to them, but sitting here right now do you have any

after being first duly sworn, testified as follows:

THE CLERK: Please state your name for the court reporter.

THE WITNESS: Annette Slate, S-l-a-t-e.

THE COURT: Ma'am, you're going to have to speak up, now, because everybody is going to need to hear you, so you need to speak directly into that microphone. Speak up, please.

You may proceed, Mr. Martin.

DIRECT EXAMINATION BY MR. MARTIN:

Q Annette, give us your full name.

A Annette Slate.

Q Okay. Where do you live?

A Conway.

Q And what kind of work do you do?

A I'm a pharmacist at Conway Medical Center.

Q How long have you been doing that?

A Three and a half years.

Q Married?

A Yes, sir.

Q Children?

A One.

Q One, okay, all right. How are you related to Randy and Ann Green?

A They are my mom and dad.

Q And there have been some discussions in the court about them going down to a birthday party on the 17th of April, 2004. Would that have been to your house?
A We were going to the park in Little River for Samantha's birthday, my daughter.
Q Whose birthday?
A Samantha, my daughter's birthday.
Q All right. How old was she?
A Six.
Q And who was going?
A Me and my husband and Samantha. Daddy and and my brother Mark and my mom were driving from Marion to meet us, dad had gone to Sam's the night before to get everything for the barbecue.
Q All right. Let me ask you to speak up just a little bit because you are a little difficult to hear from where I am, okay?
So, your daddy --
A Daddy had gone to Sam's the night before to get everything for the barbecue, we were going to picnic, we had never done that before.
Q Obviously there was an automobile accident and you never got to the party that day?
A No, sir.

Q Did you have a chance to go down to Grand Strand Hospital?
A Yes.
Q And if you would, tell us what you observed when you got there.
A We followed the ambulance to the hospital. The EMT told us to go in through the front doors so we could admit my parents, to get them, their information in the system. After about 15 minutes we were allowed to go back in the ER, it was very quite back there, and dad was in a curtained off area right in the middle and my brother was to the right of him, they were working on my brother, a nurse was in with my dad.
Q All right. And did you have an opportunity yourself to see your dad?
A Yes.
Q And that was there in the ER?
A Yes, sir.
Q Okay. What did you observe?
A He was very, very pale, complaining of pain. The nurse walked out after she had elevated his head with a pillow. He kept getting grayer and grayer and he said, "It really hurts," and his arm fell to the right of bed he was sitting on and it

was pooling blood, it was blood just pouring out of his arm onto the floor, so I ran and got the nurse because she had left. My ex-husband, my husband at the time, went around to the side of dad just to kind of look and see what was going on and the doctor came in. He was, he just came in --

Q Do you know which doctor we're talking about or just a doctor?

A It was a doctor. He was in shorts, flipflops and a T-shirt.

Q And what happened then?

A He told, asked us to leave and we actually walked right outside the curtained off area, there were two chairs sitting there so we actually sat down in those chairs and we could see the blood still pooling on the floor and it just, it kept getting bigger and bigger and at that point Bill did not want me to see that anymore because of course I was getting more upset about it, I was in shock and everything, so we went and talked with my brother who was being worked on at the time but they let us talk to him, too.

Q Did you, after that, did you see your dad anymore that day?

A We were able to go back into the curtained

off area just for a minute or two. He was just gray, he looked like death, that's the only way I can describe it.

Q When you say you went back into the curtained off area, was that shortly after you had left?

A Yes, sir.

Q Okay. And then we know your dad went to the, left the ER room at some point in time and went to the operating room area. Did you see your dad anymore after he left the emergency room there?

A Hours later. My sister had driven from Atlanta and we were able to go back and see him for just a short period of time. He couldn't talk or anything, he had been intubated, but my sister broke down so, you know, we had to leave.

Q Do you know approximately what time of the day that was?

A It was that night, it was between 7:00 and 8:00 that night.

Q It was that night?

A It was right before they took my brother and airlifted him to MUSC.

Q And your dad was taken to MUSC the next day, is that accurate?

A The next night, yes, sir.

Q Okay. Where did you grow up?
A Marion, South Carolina.
Q Did you grow up there on the same street your mom and dad are on now?
A Bubba Road, yes, sir.
Q Bubba Road?
A Yes.
Q If you would, tell us a little bit about your dad prior to this paraplegia that he suffers from.
A Good, he was a man's man, he worked for himself and my mom stayed home with us and we had gardens in the summertime, we planted everything and he always thought that at least one of us would go into business with him because he was logging at the time and cruising timber and so he taught us how to drive tractors and, you know, skidders and everything else, but it didn't turn out that way. But he has always been hands on as far as the granddaughters, there is two, my sister has a daughter and I have a daughter, and he has always been very hands on, the backbone of the family, I can say that.
Q What kind of work did he do?
A He cruised timber, he walked tracts of land, people would contact him, he would give them a

price.
Q You didn't want to be in the timber business?
A No, sir, not after high school.
Q Okay. How about your mama, how was she in their relationship before he suffered this paraplegia? Tell us a little bit about that.
A Everything was good. They, we all had, we had a good happy home, she would faint at the sight of blood but now she's hard as nails. I always tell her she needs an angel award because of what all she has come through the last nine years. She would faint at the sight of blood but now she's my dad's fulltime caregiver, she does everything for him, caths, everything.
Q Does she have any hired help to help with your dad?
A No, sir, she does everything for my dad.
Q Has she ever had any hired help over the past nine years?
A No, sir.
Q From your vantage point what does taking care of your dad entail for her?
A Getting up first thing in the morning, cath my dad and --
Q Doing what, now?

A She will cath my dad.
Q Catherization so he can empty his bladder?
A Yes, sir. And then she has a cup of coffee, she runs errands for him if he need supplies. She has to run to Sam's a lot so she can buy in bulk. She makes lunch, then about 12:00 or 12:30, 1:00 o'clock, just depends on, you know, dad's system, she has to cath him again.

Then the afternoon she's either on the road again running more errands or she's, she's normally at home, she doesn't like to run that much, she doesn't like to be away from dad, she's afraid that if he falls out of his chair there is going to be nobody there. Just if he had an emergency he would have a hard time getting somebody there.

Then about 5:30, 6:00 o'clock she caths him again, cooks dinner, and usually about 8:00 o'clock she'll go to sleep, she will set her alarm for 11:00, 11:30 and she wakes up again, caths my dad again and then goes back to bed.

Q Do they live in a neighborhood or otherwise?
A No, sir, they live in the country, there is no one near them.
Q And is that the same home they lived in at the time of his paraplegia?

A Yes, sir.
Q How long had they been in that home at that time, if you recall?
A Twenty some years. My dad built it from the ground up, it was still a work in progress.
Q When you were a child?
A Yes, sir. We all helped but my dad did everything but the fireplace. He built the whole thing.
Tell me a little bit about your dad's ability or how his ability to participate in the life of your child and his other grandchildren changed.
A He hasn't been able to do pretty much anything as far as travel to recitals, to games where my daughter plays in the band. He hasn't been hands on like he was.
Q How was he hands on before, what kind of things would he do?
A He would go and pick up my niece from daycare. He couldn't do that for my daughter because of course I lived in Little River, an hour and a half away. But, you know, anytime papa, that is what they call him, anytime they needed something from papa he was there for them. He was just hands on, you know, and to this day, I mean,

he does what he can for them but as far as like anything pertaining to him having to leave the house, he does not. If we want to see him we take the girls to Marion.

Q Is there a time through the day he has to be catherized?

A It's the same time every day, so if we want to take my mom out to lunch or have dinner, you know, just to have some time with my mom one of us will try and stay at the house with dad and we'll take my mom over to Florence, which is about 25 minutes from Marion, but she's constantly on terror watch, it is like we've got to get back.

As far as coming to my house in Conway, she has only been twice in the last nine years. She's never seen my sister's house because she lived in Marietta, Georgia up until three months ago but my sister is here now.

Has he been on vacation in the last nine years?

A No, sir, not at all.

Q To your knowledge has she spent the night away from your dad in the last nine years?

A No, sir.

Q Has she been on vacation?

A No, sir, not at all.

MR. MARTIN: One minute.

That's all the questions I have.

THE COURT: Cross examination?

MR. McCUTCHEON: We have no questions.

THE COURT: All right, ma'am, you may step down.

(Witness excuse).

THE COURT: Next witness, please.

MR. QUERY: Call Mark Green, please.

JONATHAN MARK GREEN,
after being first duly sworn, testified as follows:
THE CLERK: State your name for the Court and spell your last.
THE WITNESS: Jonathan Mark Green, Green is G-r-e-e-n.
THE COURT: All right.
MR. QUERY: Thank you, Your Honor.
DIRECT EXAMINATION BY MR. QUERY:
Q Mark, what is your relationship to Randy Green?
A He's my father.
Q And were you here for most of your sister's testimony?
A A good portion of it there at the end.
Q All right. I only say that, I just didn't want to go over the same thing too much, but you grew up over there on Bubba Lane, too?
A Yes, sir.
Q Bubba Road, I guess?
A Bubba Road. We moved there when I was two years old and we, mom and dad have lived there ever since and that's been home.
Q Okay. Tell us a little bit about growing up there as being the only son.

A Well, with dad, dad has done just about every job in the book. Officially he has been a logger and a timber buyer, timber cruiser. In the process of logging, you know, he has done everything from mechanic work, welding, you name it, across the board, that is what dad does, did and continued to do up until he was unable to.

My grandfather was a carpenter and in dad's younger years he was a carpenter as well, he specialized in cabintry making and I did hear my sister say he did build the house that we live in currently, they live in currently, from the ground, up. Again, I believe the fireplace is the only thing he did not directly have a hand on.

Q During the time you were growing up there did you spend much time with your dad?

A Of course. Dad worked a full-time job and it sometimes was late for him coming home simply from working all day long and so if a piece of equipment tore up or anything like that he would be there trying to get it fixed for the next day to where they could continue to work.

Q When you all did have time just to yourself, the two of you, did you all play video games and watch television much time?

A No, sir, there wasn't a lot of that. Dad was more of a fishing and hunting and being outdoors type. He did not like being inside and I think he hated it when it rained and he had to be inside, but there was always something going on that we needed to work on or fix or repair, what not, and you know, as a little kid I helped him with as much of that as I could and looking back on it right now I see as a kid I was more getting in the way than anything else but those were, those were the memories that I kind of look back on now and say, you know, I really appreciate that.

Q Now, on that day in April of 2004 --

A Yes, sir.

Q -- you were with your dad?

A Yes, sir.

Q And you and your mom and dad were headed to your sister's?

A My sister's house in Little River, South Carolina at the time for my niece's birthday party.

Q And you all were involved in an accident?

A Yes, sir.

Q You were hurt in that accident as well, we have already heard, I think?

A Yes, sir. I broke both my legs. The left

Q And then did you complete your treatment there then at MUSC and your therapy at MUSC therapy facility?
A Yes, sir.
Q How long did that go on?
A It was about a week in the actual hospital and then three weeks subsequent in the rehab facility.
Q And was your father subsequently moved down to MUSC as well?
A Yes, sir. The day following the accident he came down to MUSC. I believe he was in the intensive care unit, which was a different wing or floor from where I was at, as I understand it.
Q Did there come a time then when you saw him in the hospital?
A I think I saw him twice in the hospital while I was there or in the therapy hospital, what they call the TCU.
Q Where did you go from the hospital? When you were released from the hospital where did you go?
A I stayed with my father's brother, my Uncle Mike who lives on James Island in Charleston, South Carolina, very close to MUSC. I wanted to be as near my father as I possibly could. My sisters at

the time were back here in Myrtle Beach in this area to where they could keep an eye on my mother and keep up with her prognosis and treatment from the hospital and I kind of felt, even as limited as I was, at least an obligation to be as close to my father as I could at the time.

Q What was his condition then?

A It was pretty poor when I was first released or when I was --

Q I mean specifically was he paralyzed at that time?

A Yes, sir.

Q And did there come a time later on that you learned that he was going to be released from MUSC as well?

A Yes, sir. I think it was about a month in the actual hospital, then he was in the TCU, which is their rehab facility, for several months, I don't know the exact timing.

Q And did you come back then to Bubba Road?

A Yes, sir. I came back, we had a good bit of work to do on the house to try to get it ready for dad to come home in the shape he was in. He was in the wheelchair. Again, at that time I spent about three months in a wheelchair myself, so I think the

big biggest help since I was not able to swing a hammer or anything like that but I was able to get around in the chair and see what --

Q You were a test case?

A Right. Where dad would be able to go and what he would be able to do in the house.

Q Tell us very briefly what you all had to do with the house.

A The big thing was flooring. All the carpet had to come out, it just wasn't feasible with a wheelchair. There were a few places in the floor, at this time a 30 year old house, a few soft spots in the floor, the master bathroom was gutted and remodeled to where a wheelchair could get in there, tile shower basically instead of a tub situation. Everything that was involved in that, pedestal sink that he could actually get up to in a wheelchair. Let's see.

Q Did you have to do anything so that he could get into the house?

A Yes, sir. A wheelchair ramp was built.

Q Who built that?

A All the work that was done was done by my three uncles. I mentioned my father's brother Michael who lives in Charleston here, and my

do but the important things were always taken care of.

Q And was he there for your stuff at school?

A Absolutely, absolutely. He was there for any awards ceremonies and, you know, graduation of course and one of my best memories is mom and dad and they even got grandma up there for my graduation at Clemson. Unfortunately it rained and they were outside but they were there. And for them, you know, them traveling, that was a big deal and it really meant a lot to me.

Q Did the family take vacations together?

A Mom and dad have always been kind of home bodies but they would travel as much as they could but they tried to limit themselves to, you know, trips to the beach, you know, that sort of thing.

Q But the family did that together?

A Yes.

MR. QUERY: Thank you, Mark. Please answer any questions that counsel may have.

THE COURT: Cross-examination.

MS. THOMAS: Thank you, Your Honor.

CROSS EXAMINATION BY MS. THOMAS:

Q Good afternoon. You told us earlier that you were in the accident with your parents?

A Yes.
Q Did he teach you all how to fish?
A Yes.
Q Well, I'm sure working on the house and those chores that we heard Mark talk about, you didn't get dragged into any of that, did you?
A Yes, we all did. I helped dad shingle the house several times, it was hot work. We enjoyed it, enjoyed when school started, if that makes any sense.
Q Of course then there came the time in April of 2004 when there was the accident and the hospitalization and after that your dad was paralyzed?
A Right.
Q And so tell us a little bit about how things changed.
A It changed dramatically. They are not as happy as they used to be, there is a lot of stress involved, mom worries a lot, she has aged the last nine years twice what she should have. It's just not the same.
Q Does your dad have to have care 24 hours a day?
A 24 hours a day.

Q And who all takes care of that?
A Mom does.
Q How about the medical things that we have heard about that he has to have, be catherized how many times a day?
A Anywhere from four to five.
Q Who does that?
A Mom does.
Q And who prepares the meals there at the house?
A Mom does.
Q Cleans the house?
A Mom does.
Q Can your dad bathe by himself?
A No.
Q Who does that?
A Mom does.
Q Can he get out of bed by himself?
A He can use, he participates and uses a transfer board from the bed onto the wheelchair.
Q By himself?
A No.
Q Who helps him?
A Mom does.
Q Her day is pretty full?

A Yes.

MR. QUERY: Thank you, Lynn. I appreciate you being here. Please answer any questions counsel may have.

THE COURT: Cross-examination.

MS. THOMAS: No questions, Your Honor.

THE COURT: All right, you may step down, ma'am.

(Witness excused).

THE COURT: All right, next witness, please, gentlemen.

MR. QUERY: Your Honor, we have a couple little set-up things, if it would not be inappropriate for us to have five minutes or so?

THE COURT: All right, very good.

All right, ladies and gentlemen, go to your jury room and in about five minutes or so we'll come back out.

MR. QUERY: Thank you.

THE COURT: Everyone else remain seated while the jury retires.

(Jury excused from the courtroom).

THE COURT: All right, gentlemen, counsel, we'll be at ease for about five minutes or so. Thank you.

All right, Mr. Court Reporter, if you want to mark this so we'll know what it is.

(Life Care Plan marked as Plaintiff's Exhibit Number 13 for Identification).

THE COURT: All right, it has been marked now for identification as Plaintiff's Exhibit 13, the life care plan, and as I understand it, so I'm clear about this, counsel, this is the same document that Dr. Cranberg is talking about on page 31 of his deposition. Correct?

MR. SAUTTER: Yes, sir.

THE COURT: All right, and it is your intention to use the documents he reviewed with your witness, and who is your witness, by the way?

MR. SAUTTER: My witness is Nurse Sarah Lustig of Lustig Consulting.

THE COURT: All right.

MR. SAUTTER: L-u-s-t-i-g.

THE COURT: Very good. That is, assuming a couple things, that she is properly qualified to give her opinion in this particular area, I am going to allow it. I do find there is sufficient medical testimony to support the life care plan based upon first the entirety of the deposition of Dr. Cranberg, but certainly in particular his

answers to the questions that start on page 29, 30, 31, in addition to his other testimony, and in addition to the testimony of the other medical experts that have testified in this matter without objection, I do find there is sufficient evidence and testimony in the record to support the entry of the life care plan.

Now, Mr. McCutcheon, if you have an objection to a particular point or a particular issue about the life care plan I will be glad for you to raise that but in general the Court finds there is more than sufficient testimony in the record to support the presentation of the life care plan.

MR. McCUTCHEON: I understand, Your Honor, and I'm not arguing with Your Honor, but simply for protection of the record in this case --

THE COURT: Yes, sir.

MR. McCUTCHEON: We would most respectfully take exception to His Honor's ruling and go further by saying this guy never testified to a reasonable degree of medical certainty, as is the test in every other opinion of a medical expert that these things were medically necessary.

THE COURT: Well, let me, Mr. McCutcheon, you are raising a point but Dr. Cranberg's testimony is

already in evidence, not objected to, it was not objected to under any standard, that it wasn't to a reasonable degree of medical certainty or anything, his testimony was in the record without objection, so it's in evidence.

MR. McCUTCHEON: I understand that, Your Honor.

THE COURT: To raise the issue now, it's too late, if you're saying his opinions are not to a reasonable degree of medical certainty.

MR. McCUTCHEON: Your Honor, I disagree with Your Honor simply because we didn't object to what he says doesn't mean that we waive our objection to raise that point at a later time. I disagree with Your Honor.

THE COURT: You allowed him to testify and allowed his testimony to come in and did not bring to the Court's attention any objections you had to his testimony whatsoever.

MR. McCUTCHEON: I understand that, Your Honor. I don't believe that was my duty.

THE COURT: Well, I believe it was your duty and obligation at the time it was being received to bring that to the Court's attention. Now you are telling me, I want to be clear about this, you want

the entirety of the testimony of Dr. Cranberg struck because it's not to a reasonable degree of medical certainty?

MR. McCUTCHEON: No, sir, I'm not asking --

THE COURT: Then I don't understand what you're saying.

MR. McCUTCHEON: What I'm saying, Your Honor, is his testimony is what his testimony is, he said it was consistent with, there is nothing wrong with that question and answer. It just doesn't meet the test down the line for somebody else to base their opinion on and that is the the reason for my objection. I don't think, I know where Your Honor is coming from, I simply do not agree that that amounted to a waiver to raise it at the time that this young lady is getting ready to testify.

THE COURT: Well, again, I'm not saying that my ruling is strictly upon Dr. Cranberg, all right, I'm telling you that all the testimony presented by all the medical experts here already have testified to the, what can reasonably be interpreted by the jury as permanency of the injuries to plaintiff Mr. Green, and based upon that I do find that it is proper regarding this life care plan.

Now, if you have some objections as to

specific things that she says or specific items you want to raise objection to I will leave that to you, Mr. McCutcheon, otherwise I'm going to let it in.

MR. McCUTCHEON: Thank you, Your Honor, just note our exception.

MR. SAUTTER: Your Honor, I know they train us not to say anything when a motion has been not turned down but I would point out on pages 18 and 19 of Dr. Cranberg's deposition I did ask him, "If I'm asking you about opinions would you please provide the opinions to a reasonable degree of medical certainty," which he said he would and actually referred to the question before that, and said that was to a reasonable degree of medical certainty.

Then on page 19 I asked Dr. Cranberg, "If I ask you a question as to the cause of Mr. Green's spinal cord infarct and the damages that you laid out will you provide the most probable cause," and his answer was yes.

So, I certainly respect Mr. McCutcheon's objection but I think I covered it, Judge.

THE COURT: All right, very good. Thank you. All right, let me give the court reporter the

original deposition back.

Ask the jury to come in.

(Life care plan marked as Plaintiff's Exhibit 13 and received in evidence).

(The jury returned to the courtroom).

THE COURT: Gentlemen, here, you're going to need these plaintiff's exhibits, if you want to collect it

All right, counsel, next witness, please.

MR. SAUTTER: Thank you, Your Honor. I would like to call Nurse Sara Lustig to the witness stand, please.

THE COURT: Please come around and be sworn, ma'am.

SARAH LUSTIG,
after being first duly sworn, testified as follows:
THE COURT: Have a seat and state your name, please.

THE WITNESS: Sarah Lustig, L-u-s-t-i-g.
DIRECT EXAMINATION BY MR. SAUTTER:
Q All right, Nurse Lustig, where are you employed?
A Currently employed at Lustig Consulting, LLC.
Q What does Lustig Consulting do?
A Lustig Consulting offers forensic evaluation and life care planning.
Q What does forensic mean?
A Litigation.
Q That is what we're here on today?
A Yes, expert testimony, yes.
Q Do you maintain any licensure with the State of South Carolina?
A I do.
Q What is that?
A Registered Nurse under the State Board of Nursing in South Carolina.
Q And will you please share with the jury your work experience, your work history after graduation

from nursing school?
A Following graduation from Clemson Nursing School I worked at Roper Hospital in Charleston, South Carolina for eight years at the bedside in rehabilitation, musculoskeletal and neurological, mostly all the floors at Roper Hospital as a bedside nurse. And I was called a float nurse, meaning I wore a beeper and anytime a floor needed me due to acuity or a patient's specific needs in critical times they would call me to help and assist that floor.

So, after about eight years of bedside nursing, I had already started Lustig Consulting business, moonlighting on the side, and finally by 2008 I was able to go full-time with my business.
Q Are you a member of any professional associations?
A Yes.
Q What are they?
A Quite a few. I'm a member of the American Association of Legal Nurse Consulting, the American Association of Nurse Life Care Planning, the American Nurses Association of South Carolina, American Nurses Association, the International Association of Rehabilitation Professionals. Also

within that group a subsection just for the International Academy of Life Care Planners, and a few other sorts of small groups, organizations that are life care planners around the nation that network together.

Q All right. And in your work you work with severely injured persons such as Mr. Green?

A I do.

Q And are you certified as a life care planner?

A Yes. I actually hold two certifications. One is specific to rehabilitation and the other certification is specific to nursing, both certifications provide the same service but both, each one is, I guess, a background of the expert aspect we have versus nursing but I hold both.

Q Okay. I'm handing you a document and I would ask that you identify it, please?

A Okay. This is my c.v. as of August, 2013, I update it monthly.

Q Is a c.v. like a resume'?

A It is.

Q Can you look at it and make sure it's accurate, and if it's not accurate or doesn't appear to be accurate please tell me now.

A Well, it is accurate. Yes, this is actually

the most up to date.
Q Okay.
MR. SAUTTER: Your Honor, I would offer miss Miss Lustig's c.v. in evidence as the plaintiff's next exhibit.
THE COURT: All right.
Mr. McCutcheon do you wish to voir dire the witness?
MR. McCUTCHEON: I don't wish to voir dire, if Your Honor please. I don't think the introduction of the c.v. is proper, she can testify as to what her qualificatios are, I object to the introduction of the c.v. into evidence as an exhibit.
THE COURT: All right. Well, we'll get to that in just a second. Do you wish to challenge the offer by the plaintiff regarding her proposed field of expertise?
MR. McCUTCHEON: No, sir.
THE COURT: All right, very good. First I'm going to qualify her to give her opinions and I will allow over the objection of defense the introduction of the curriculum vitae, c.v., resume'. What exhibits would that be, please?
All right, Plaintiff's Exhibit 14 is in

evidence over objection of the defendant.

(Witness' c.v. marked and received in evidence as Plaintiff's Exhibit 14).

THE COURT: All right, you may proceed.

MR. SAUTTER: Thank you, Your Honor.

BY MR. SAUTTER:

Q Now, the first thing, you understand you have been qualified as an expert in this case?

A Yes.

Q Do you understand that as an expert all of your opinions have to be to a reasonable degree of nursing or life care certainty? Is that your understanding?

A Yes, sir.

Q And will you give your opinions or any opinions you offer in this case in response to my questions or Mr. McCutcheon's questions, will you provide those opinions to a reasonable degree of nursing and or nursing life care certainty?

A Yes, sir.

Q Okay. And the other part of that, the test is that if you provide any opinions in this case your opinions have to be to the most probable standard. Do you understand that?

A Yes, I do.

Q And will you do that?
A Yes.
Q All right. Tell the jury a little bit about what life care planning is.
A Life care planning is an evolving dynamic document. It includes categories of future care that someone like Mr. Green needs for the rest of his life, and a life care plan will break out categories into like medical supplies, transportation, diagnostic, physical therapy, medications and future evaluations, surgical care, and a life care plan, life care planner, based on our experience, background, knowledge, skill, education, along with reviewing medical records, speaking or relying on testimony regarding future care, also interviewing the patient and assessing that patient's specific needs, all of that comes together into a document called a life care plan and, I'm sorry, a life care plan projects the items, the frequency and the cost per item.
Q Items such as in the plan we're talking about in this case, what do the items include?
A In this particular case we have routine medical care in the form of physician's visit, evaluations, physical therapy, occupational

therapy, therapeutic modalities, diagnostic, home care, lab work, medications, medical supplies, durable medical equipment, aids for independent living, home modification, case management and home care attendant needs.

Q Is transportation in there, too?

A Yes.

Q Okay. Does it take a lot of work to verify or prepare a life care plan?

A It does.

Q And what did you do in this case to verify the plan?

A To verify this plan I have met with Mr. Green at his home, I have assessed the medical records, I assessed the life care plan offering future medical needs, associated costs, researching costs per item and relied on medical testimony for future medical foundation for supplies and care. So, in doing all that, that is verifying future care relating to in this case Mr. Green.

Q Okay. Now, did you actually initially prepare the life care plan for Mr. Green that is right before you today?

A No.

Q Who did?

A Peggy Neilson. She also is a Registered Nurse, Certified Nurse Life Care Planner and she lives in Charleston, South Carolina.
Q Did you verify the plan?
A I did.
Q Did you verify that plan with Mr. Green's doctors?
A Via medical testimony.
Q And which doctors did you use to verify the plan?
A Well, most of the medical foundation is found in the medical records that support his diagnosis and ongoing needs, and I also reviewed the life care plan that was based on medical opinions that authorized and endorsed the life care plan going forward.
Q And do you believe that plan is accurate?
A Yes, I do.
Q Is the plan subject to change?
A Sure.
Q All right.
A I would like to say as we sit here today I don't see any changes that are necessary to this life care plan.
Q All right, what --

MR. McCUTCHEON: Your Honor, excuse me, Your Honor, just a minute. We would object to her using someone else's life care plan.

MR. SAUTTER: I can clear that up, Your Honor.

THE COURT: All right, go ahead.

BY MR. SAUTTER:

Q Is that something that is typically relied on by experts such as yourself who review life care plans, as to their accuracy and things of that nature do you review other people's life care plans?

A Yes. I work for both plaintiff and defense attorneys. Plaintiffs attorneys are hired by the injured party, defense attorneys are defending, in this type case, damages to an injured person, but I work for both attorneys and so I'm hired by plaintiff attorneys to author life care plans or review old life care plans or I'm asked by the defendant to author a life care plan or review an older life care plans, so I do both and it is a nationwide accepted standard in my scope or field of practice.

Q And do you have an opinion to a reasonable degree of nursing and life care planning certainty

as to the accuracy and the verification of the plan that is before you today?

A I wouldn't be sitting here if I didn't believe in this plan.

MR. McCUTCHEON: Your Honor, I object.

THE COURT: All right. I will allow the testimony over the objection of the defense. You may proceed.

MR. SAUTTER: Thank you, Your Honor.

BY MR. SAUTTER:

Q Now, what are the major components, do you understand, tell me what Mr. Green's current medical condition is based upon your review.

A Mr. Green's current medical condition by the naked eye is he is wheelchair bound and dependent on wheelchair access to his home, life in the community. Mr. Green suffers from a spinal cord injury and has numbness from the waist, down. He has bilateral extremity weakness, dysfunction, and Mr. Green relies on a caretaker to provide his activities of daily living and community entry.

Q Now, you said Mr. Green was paralyzed but I have a medical illustration I would like to have you talk to the jury about.

MR. McCUTCHEON: Could I see it, please?

We have no objection, Your Honor.
THE COURT: Very good.
BY MR. SAUTTER:
Q Nurse Lustig, come down here.
THE COURT: Do you wish the witness to step down?
MR. SAUTTER: Yes, sir, please, I'm sorry. May the witness step down?
THE COURT: You may do so, ma'am. Make sure you speak, get closer to the microphone on the jury box there, on the frame.
THE WITNESS: Okay.
THE COURT: The microphone, speak up, get next to that.
THE WITNESS: Do you want me to stand here or over there?
THE COURT: Whichever the jury can hear. The jury wants you to speak to the box so everybody can hear you.
THE WITNESS: Okay.
BY MR. SAUTTER:
Q Go ahead and describe -- do you believe that illustration is accurate as to Mr. Green's injuries and requirements for healthcare?
A Yes. This document here is nicely done, it

illustrates the level at which the spinal cord was injured, and below this level, T6 to T12, all these, the rest of the body from this level down is affected by spinal cord injury, all your systems are affected in this case except pulmonary but most all the other systems are affected because of immobility. When someone has a spinal cord injury they can't move and that causes a lot of other symptoms, dysfunction.

Q Is it just the fact he can't move his legs, or are there other systems of the body that are affected by Mr. Green's injury?

A Yes. I mean, with this type injury below T6 the lungs are spared, so his lungs probably will be not affected by this injury, but he has difficulty bending at the waist, he has muscle spasm into the lower extremities, pain in his back from sitting in the chair, redness.

Q Redness there you are pointing to?

A This right here would indicate to me pressure. You're sitting in a chair for a long time, it gets red. So this is, I'm not sure if this indicates pain but I assume that is a pressure point. So, his skin integrity, any skin that is touching the wheelchair surface is at risk for

breakdown, so going down, we have, we're getting lower into the GI tract here, which a patient --

Q What Is the GI tract?

A The GI trct is what holds our digestive system. So, your digestion starts in the mouth and ends in the end of the bowel. So, his GI, the entire tract except from the mouth down, right above the esophagus is affected because he is immobile, which means that his GI trct slows down.

So, whenever you have static, non movement, it slows everything in your body down, so he has decreased digestion and he has a nerveless bowel.

Q What is that?

A That means he doesn't have any nerves communicating to his bowels to initiate a bowel movement, which is nice to have one every day. In this case he can't control that, so he has to have someone to physically examine him and pull the stool out because he can't do it himself.

Also I'm going down farther, getting to this bladder, the bladder, you have nerves in your bladder, he can't stand up and urinate, he doesn't have control, so somebody has to stick a catheter, a little tube, and it drains the urine from his bladder.

Q What is your understanding of who has been providing that service to Mr. Green?
A His wife.
So, going down farther, talking about fecal impaction, anytime you digitally disimpact someone, they also lose that spinchter control and so there is some accidents in between the bowel regimen.
So, he has sexual dysfunction, the inability to initiate, maintain an erection, and that all has to do with nerve damage in this area here. All these yellow marks, lines are nerves stemming from the spinal cord, all these are affected, okay, from the level T6, down.
The ulcer means skin breakdown, so see the redness here, he has had some contact with the wheelchair. Wearing shoes or even having too tight a sock on, that can actually irritate the skin. The reason he has a decreased skin integrity is because he's immobile, he doesn't move blood around his system and that skin is constantly under pressure, against any pressure point, as I said, socks, shoes, bed, wheelchair.
And then we have increased risk of secondary accident.
Q What does that mean?

A Mr. Green tries to be independent as much as possible and in doing so that makes increased risk of falling. If he reaches a little bit too far and he is not in an appropriate wheelchair he can fall out of the wheelchair and break a bone.

Anytime he's being transferred from wheelchair to chair or chair to wheelchair or wheelchair to bed, or vice versa, anytime there is transfer with caregiver support he is at a fall risk just by nature of his disability and having no movement in his lower extremities he cannot support himself.

Acid reflux. Again, if you're sittng in a chair and slumped over and eating and drinking, if you're slumped over you get acid reflux, that happens during meals.

Abdominal discomfort. Again that is just from being slumped over in a chair, sitting at 90 degrees, try to recline a little bit, but that causes abdominal discomfort.

Intolerance to cold. So, when you're mobile and ambulating, walking, blood circulates through your body. If you have ever been cold and you jump in place for a long time, that is what you're doing, you're trying to increase that blood flow to your body. And because he is immobile he cannot do

that. His legs are constantly cold, so he needs to wear fleece lined clothes, stockings, to keep his legs warm. So, he does have temperature intolerance.

He occasionally has rapid heartbeat -- this has to do with positioning. If you have ever been in bed and you're laying down, you stand up too fast, what happens, you get dizzy. Also he has occasional rapid heartbeat. That is just trying to get his body's blood pumping at a normal pace.

And of course he requires a power wheelchair.

Q Let's talk about that. Is it important that Mr. Green have the appropriate wheelchair?

A Yes, it is. For for any paralyzed patient you have limited upper body strength and obviously at a high risk of fall. At this T6 it is standard to have customized wheelchair. The patient lives in their chair, the chair becomes part of their identity, it keeps them safe, so it is extremely important for them to have a comfortable wheelchair.

Also, one thing I don't see on here is --

Q Do you know, without having to look at your notes, what the expected cost of the appropriate wheelchair for Mr. Green is?

A Well, wheelchairs of this type are 35 to 45 thousand dollars.
Q And do they have to be replaced?
A Yes.
Q Why would it have to be replaced?
A Wheelchair parts break down, they are made of electronics and bolts and screws, rubber wheels, batteries that don't live forever, any type of electronic devices over a period of time. It makes more sense to replace than than to try to fix it.
Q Is it covered in the life care plan?
A Yes. So, I think we have gone over what is on this chart.
Q While you're still up there, are there specific housing requirements for Mr. Green that aren't covered in the life care plan?
A Mr. Green lives in an uneven terrain out in the country. Because he lives in his wheelchair, he needs pavement, something protecting him from the elements of weather, so if he leaves his home and tries to get into his van, which is not covered by a garage, there is no protection for him.
Q Does the life care plan allow for housing requirements of Mr. Green?
A Yes. When he was discharged from, discharged

to go home, the home was accommodated.
Q Who did that?
A I believe Mark and friends of the family.
Q All right.
A So, also there is only one, there is two entrances to the house. One entrance, if there was a fire he can't escape from the back, there is no ramp, so that would need to be added.
Q Are those items addressed in the plan?
A Yes. So, one of the most important things to consider for this type of patient, T6 or below, is osteodysplasia.
Q What is that?
A That is is a very life threatening condition and patients at that level of spinal injury have the problem and it is, it is their response to an illness or injury, so let me explain. If you have a full bladder after being in court for six hours, everybody here, you know you have a full bladder and you know you're getting ready to get up and go, most of you can hold back until you find a bathroom. After four to six hours sitting here Mr. Green having a full bladder and if that bladder is not emptied on time his body doesn't say you can go in half an hour, you can wait that time. His body

doesn't say that. It starts to adjust to osteodysplasia. That causes leak, there is heart irregularity, severe headaches. It is life threatening and if not taken care of it can cause cardiac arrest and death.

Q Because of his condition he is at risk for developing that syndrome, correct?

A Yes.

Q First of all how does Mr. Green address that risk and how do you address it in your life care plan?

A So, it is indicated in the record, he has been educated about it since day one, since his accident, the life care plan, if implemented appropriately and the caregiver supports it, because he cannot empty his bowels, because he's not emptying his bladder, that if they are not taken care of appropriately the response is he could die because of the injury to the osteodysplasia. So, in the plan the plan provides safety measures, if implementy appropriately we should prevent that from happening.

Q But I mean, what is the frequency of safety measures required by the plan for someone, how many times a day should he empty his bowels?

A His level of care, he cannot remove fecal matter, 24/7.
Q 24 hours, seven days a week?
A Yes.
THE COURT: Counsel, are you done with the exhibit, or are you still working on the exhibit?
MR. SAUTTER: I believe we're done with it. Your Honor, may the witness come back to the witness stand?
THE COURT: Go ahead, ma'am.
BY MR. SAUTTER:
Q So, is it your testimony to a reasonable degree of nursing and life care certainty that Mr. Green most probably requires care 24 hours a day seven days a week?
A Yes.
Q And who has been providing that care?
A His wife Mrs. Green.
Q Are you able to give an opinion as to the quality of the care that she provides?
A I think she's doing a great job.
Q Are you able to give an opinion to a reasonable degree of nursing certainty and life care planning as to how long a spouse will be able to provide that care?

A You know, I think she's doing a great job but I also know that Mrs. Green is supremely tired and didn't know she would be providing basically certified nursing aid caregiving skills which it takes a lot of effort and work and organization and coordination and facilitation of care and she's doing a very good job. She's been trained by nurses, doctors, physical therapists to provide the care that she has chosen at this point to give to her husband. I think that Mrs. Green also is suffering from depression and anxiety and has lost her husband as he was prior to this accident and I think that she has caregiver role strain.

Q What is caregiver role strain? First of all is that recognized in your field of expertise and what is it?

A Registered Nurses are able to diagnose the human response to illness and injury. Nurses do not provide medical diagnoses, we do not refer patients for surgery, we do not prescribe treatment, but as nurses we treat the patient's human response to illness and injury and we do that at bedside and we are the doctors' eyes and ears.

What we do as nurses, we provide care plans at the bedside, we assist, diagnose, plan,

implement, identify outcomes, re-evaluate the patient's response to our caregiving and then we make, we hope that what we're doing is working because of a positive outcome. So, nurses, that is what nurses do, so what I just said was a diagnosis and nursing diagnosis and it is in the life care plan and it's caregiver role strain.

What that means is that Mrs. Green's social life has been affected tremendously, she's given up her friends and previous active life. I don't mean she gave them up completely. What I mean is she is not getting out of the house and getting with her friends like she was.

Physically Mrs. Green is caring for her husband, she's physically lifting him, washing him, assisting him with meals, hygiene, eating, meal prep, cleaning. So, this is a fulltime job. Again, she's doing a great job but this is not what she had planned on doing.

Q And you talked about catherization to help Mr. Green urinate. Do you have, do you have any information of how many times each day Mrs. Green has to do that?

A At least six times a day.

Q And is it safe for Mr. Green to do that?

A No.
Q Why not?
A Because Mr. Green is in a wheelchair, he has upper body weakness and immobility, fine motor skills are blurred and he has an enlarged prostate, so when you are inserting a catheter it is very difficult to bypass the prostate safely. He actually uses a specialized catheter to do that but it is very difficult for him to even hold the catheter and get it in and get it out safely.
Q Can you, can you reuse those catheters or are they just a one time use?
A These are one time use, they are disposable.
Q And does the life care plan consider, is that part of the medical supplies that are necessary?
A Yes.
Q And is that in the life care plan?
A It is.
Q Now, are you saying that Mrs. Green has to stay up all night every night to look after and care for her husband?
A No, but Mrs. Green also is very vigilant, as if women have children or if women have cousins that are children or any children that are around, you have to remain vigilant and I'm not saying Mr.

Green is a child, I'm just saying that it is that mentality that you are maybe sleeping but you know that in a second's time if there is someone that calls out for help then you are alert and oriented and ready to provide assistance.

Q And you said it applies to children. Does it also apply to like a sick spouse and things of that nature?

A Of course.

Q The life care plan that you have right here that has been --

A Right here, this one?

Q Okay. I'm handing you a document that has been previously marked as Plaintiff's Exhibit Number 13 for identification only and would ask you review that one more time.

A Yes.

Q And in your opinion to a reasonable degree of nursing and life care planning certainty is that an accurate plan to meet the needs of Mr. Randy Green?

A Yes, it is.

MR. SAUTTER: Your Honor, I would move that into evidence as the plaintiff's next exhibit.

THE COURT: Mr. McCutcheon?

MR. McCUTCHEON: Your Honor, we would object

to the introduction of the actual document itself upon the grounds that these individuals can testify as to what the damages are, the same holds true with the economist in this case, that is tantamount to, that is their testimony, Your Honor, that would be tantamount of introducing a deposition of a witness and sending it to the jury, and we don't think that the law in the state of South Carolina provides that.

In addition, there are two, there is an item in this one additionally --

THE COURT: Well, let's deal with them one at a time. First, I do believe it is proper to go into evidence in this case. In general I do not believe it is testimony, it's documentation as to a plan for the plaintiff, as suggested by the plaintiff. I'm going to allow it into evidence on that ground over your objection.

Now, you have objection to particular items in the plan?

MS. THOMAS: Yes, Your Honor.

THE COURT: All right, Madam Forelady, take the jury to the jury room, please. Thank you.

(Jury excused from the courtroom).

THE COURT: All right, ma'am, I will hear

from you. Just point to the page and the particular item that you have objection to.

MS. THOMAS: Your Honor, if I can look at what he has offered to Your Honor, I may not have any objection.

THE COURT: Yes, ma'am. Here it is right here.

MS. THOMAS: What we were given has some additional attachments.

THE COURT: How about you look at that, tell me if there is anything I need to look at.

MR. McCUTCHEON: Judge, we don't have any objection to this. It doesn't have the things in the one they provided.

THE COURT: Okay. So, as to Plaintiff's 13 as proposed by the plaintiff, there is no objection to that document?

MR. McCUTCHEON: Subject to our previous objection.

THE COURT: Okay. But you were talking about individualized items, particular items, you don't have that objection?

MR. McCUTCHEON: And at some point in time if we could ask that, if we could get a copy of this one.

THE COURT: All right. Counsel, you all, I will allow you to secure the original from the court reporter for the purposes of copying that at a later time.

Hand that back to her.

Do you want to ask the jury to come back in?

(The jury returned to the courtroom).

THE COURT: All right. I'm going to allow Plaintiff's 13 in evidence over the objection of the defense.

You may proceed, sir.

MR. SAUTTER: Thank you, Your Honor.

BY MR. SAUTTER:

Q Nurse Lustig, how many pages is that exhibit?

A Twenty pages.

Q How many different items are covered in there, thousands?

A No.

Q Hundreds?

A No.

Q Okay. Tell the jury what the life care plan requires, maybe talk about the general items and the frequency and the cost of those items instead of just, you know, every particular cathether and things of that nature.

A Okay. So, when we talk about a life care plan we are talking about the elements that make up that plan, so elements can also mean items, so under routine medical care he will, Mr. Green will see multiple medical providers annually, and those doctors are primary care providers, urologists and a podiatrist.

So, do you want me to --

Q How much, just cut right to the chaff, how much, is there an amount on the life care plan for that kind of medical care you just described?

A Yes. The primary care provider would be $81 a visit, the urologist would be $133, and the podiatrist would be $133.

Q All right. And does that continue as long as Mr. Green lives?

A Yes.

Q And is that number projected out over his life expectancy, to your knowledge?

A Yes.

Q Okay.

A Then we have specialty medical services and evaluations. We have a gastrointerologist evaluation three times over his life for GI tract problems and that would be at a rate of $133.

Neurologist would be three times evaluation over his lifetime and it would be $133.

Pulmonologist, two evaluations over his life, at $133.

Cardiologist would be two times over his life, at $133.

Orthopedic three times over his life, at $133.

Physical therapy is four evaluations over his life at $131. And occupational therapy evaluations would be provided four times over his life.

Q What is occupational therapy, Nurse?

A Well, this is actually an evaluation for PT and evaluation for OT. An evaluation by physical therapists is a meet and greet, they review the diagnoses, they assess the patients's functional status and ability to perform everyday activities otherwise known as activities of daily living, maintaining hygiene, et cetera, getting dressed in the morning, and that is occupational.

Physical would be is he physically strong enough to do it and if he is not what modalities can be implemented during physical therapy he is receiving to increase that function.

Q You talked about activities of daily living.

What is that?
A It's the activities that we do day to day, getting up in the morning, brush your teeth, get dressed, or take a shower first, get dressed, prepare your breakfast, feed yourself, put your dishes in the sink, get in your car, off to work, or doing whatever you're doing.
Q Is that really what the model of a life care plan is, to address Mr. Green's ability to do the activities of daily living?
A Yes.
Q All right. What are the some of the other categories of items needed in the life care plan?
A Physical therapy sessions where he is actually going and following up with the evaluation as is set forth. Over his life time he has been given 30 sessions. For occupational therapy sessions he has been given 30 over his life.
Psychological counseling, he gets 20 sessions over his life and that would be for when he's tired of living with the disability and he is getting down on himself, which he does, it is rare but he does. The winter months are harder for him, he can't get out in the garden, it is cold, the cold affects his body, temperature, muscles, joints, he

hurts more.
Q It would limit him more in the winter months?
A In the winter months he might get in a more depressive state. Also we have allotted 20, excuse me, 10 sessions of psychological counseling for Mrs. Green and/or her twin daughters or her son and/or the two grandchildren.
Q Is this a family tragedy?
A Yes, obviously.
Q Okay.
A Diagnostics -- I didn't know how much, the physical therapy sessions, each session is $253, each occupational therapy session is $244, psychological counseling, probably 30, 45 minutes, is $140, and family counseling is $159 per session.
Diagnostics. There are quite a few. The only disagnostics testing that are annually is the urological studies and that would be to assess his nerves in his bladder and his urether status, prostate status and to assess urinary tract infections and to prevent septic shock, and that would be annually at $71.
Other diagnostics are xrays of the spine five times over his life at $316.
MRI of the spine thoracic and lumbar spine,

five times at $2,804.

The xrays of the upper extremities are three times over his life, at $134.

Nerve conduction studies are three times over his life, at $1,899 each.

The abdominal ultra sound is five times over his life, that would be looking at his GI tract inside his belly, that is $510.

The MRI of the lateral hip two times over his life, at $3,244.

Ultra sound of the lower bilateral extremities to look for blood clots is $760, and that is three times over his life.

And then lastly the bone scan, that is one time over his life, at $251. The bone scan is to look for osteoperosis and bone loss.

Q Is that something that Mr. Green is at risk for due to his condition?

A Anybody who is immobile and is not bearing weight is losing bone minerals.

Q All right. And what are the other major elements of the life care plan?

A I'm sorry, there is more. Lab work annually and that is more, you know, your complete metabolic panel, look at your electrolytes and blood,

potasium, glucose, looking at your urine, analysis of the urine, CMP is $123, your analysis is $121.

The medication he takes, I believe he takes all these monthly except for one. He takes Motrin monthly. When I say monthly, he takes, let's say a prescription a month and you get a certain amount of pills to treat that symptom. So, he gets Motrin. The annual cost of Motrin is $144.

Zantac, he gets six prescriptions a year, the annual cost is $150.

Aspirin, he takes monthly and the annual cost is $72.

Metformin is monthly forever, and that is for diabetes and which is secondary to his spinal cord injury, that is $480 annually.

Lisinopril is for regulating his blood pleasure and he takes it monthly, he is prescribed monthly and annual cost is $168.

Simvastatin, prescribed monthly and the cost is $432, that is for cholesterol.

The Fluticosone Propionate is basically nasal spray, he takes that, gets it monthly and it is annually $720.

The Tramadol is for pain and inflammation and muscle spasm, he takes that, he gets it prescribed

monthly and annually, that's $576.

All the medical supplies are for his urine, his bowel, his hospital bed at home, mattress, gel covers, protective pads for incontinance, which means your bladder is leaking urine or your bowel is leaking fecal matter, includes transfer medical equipment, transfer swings, transfer boards, transfer belt, all this is for safety to prevent him from falling.

And other supplies would be like hose to increase the blood flow in his legs, keep the legs warm, prevent clots, and some other supplies, cleaning supplies, so all the cleaning supplies.

I can tell you how much all that's worth. Over his lifetime is $435,000. So, I don't know if you want me to break that out individually, it is a pretty lengthy list.

Q I would like to hit the highlights. You talked about a wheelchair?

A Yes. There is only a few more elements, so the wheelchair, the wheelchair over his lifetime, this is replacing a chair every seven years and it is a custom chair that meets his specific needs, maintaining that wheelchair over his lifetime is $198,451.

Then we go into transportation, he needs a proper vehicle, van that can transfer him safely and his caregiver and providing, accomodating his van over his life time is $105,447.

So, what is left is his home and this is the most important part of life care plans. This is, he has life threatening symptoms and to prevent him from experiencing life threatening illnesses and responses to his injuries and preventing him from getting to the ER and being hospitalized and enduring life saving measures we need him to have home attendant care in the form of certified nurse assistants and/or Mrs. Green who has been trained and I feel who's certainly been qualified and has done a good job, because he's only had a couple ER visits.

Q And over the lifetime of Mr. Green what is the amounts required for the home healthcare?

A So, annually to have someone in the home caring for his needs in the event the support system which I believe, in the event that fails, in order to prevent the life threatening responses to this injury, it will require spending $134,400 a year to have someone in the house to care for him.

Now, having a CNA, certified nursing

assistant in the house, because they are neurogenic bowel and bladder, distributing medication, they are doing some highly skilled nursing care and so a Registered Nurse would need to come into the home and assess the CNA providing that care and maybe, you know, every month or every couple months the nurse comes in, and we have that in the plan annually to have a nurse oversee the care, at $1,200 a year for the rest of his life.

The only thing, we talked about this, the only thing left is housing, paving his driveway, making sure he has a ramp in the back yard, making sure he has a cover over the van where he enters and exits the van, redoing his bathroom so it is caregiver compliant. That cost, that allowance is $24,000 -- no, I take that back. That, let me take that back. The ramp would be $4,000 and that would be three ramps over the life expectancy of this patient because ramps fail, they break, they rust out.

The bathroom renovation to make it accomodate his needs and make it accessible for a caregiver to be in there with him is $16,000. The annual maintenance or repairs to that accomodation is $1,250 a year.

And we also have an alarm system for the house. That would be a one time fee at $3,749.

The only other thing is, and this is the last thing, a case manager would come into the house in the event the support system fails, Mrs. Green, a case manager would come in and coordinate, facilitate, ensure the house is fitting and meeting Mr. Green's needs to protect his life, and that would be annually to pay a case manager to oversee everything that we have discussed, all the elements in the plan, is $4,800 a year.

Q And I might have missed it but I didn't, I didn't think I heard you, you gave a figure on the amount necessary for home healthcare over the expected life expectancy of Mr. Green?

A So, the attendant care service is $15 an hour and over the lifetime, annually, I guess, 24/7, 24 hours a day, seven days a week, that comes out to annually $134,400.

Q How about over his expected life expectancy?

A That comes out to, I'm reading my total here, $2,584,536.

Q And what is the total cost of the life care plan over the life expectancy of Mr. Green, if you have that there?

A Prior to Dr. Woods testifying, he's the economist that will look at my numbers, that is, the total lifetime cost is $3,668,176.

MR. SAUTTER: Your Honor, that's all I have of this witness.

THE COURT: Cross-examination.

MS. THOMAS: Thank you.

If it please the Court?

THE COURT: Yes, ma'am.

CROSS EXAMINATION BY MS. THOMAS:

Q Miss Lustig, when you first took the stand and talked about this poster that we have here, it contains a list of a lot of horrible things that could happen to a person with the injuries that Mr. Green has. Is that true?

A Sure, yes.

Q And in fact Mr. Green has lived with these injuries for nine years now, hasn't he?

A Yes.

Q And thankfully all of these horrible things have not happened to Mr. Green, have they?

A No, they haven't.

Q And in fact you used the big word and correct me if I don't say it right, osteodysplasia, is that right?

A Yes, close enough. We also call it AD.
Q That sounds great,
A Okay.
Q That has not happened to Mr. Green, has it?
A As far as I know not yet.
Q And it might not?
A That's right.
Q And in fact you have testified earlier that this life care plan is a fluid document?
A Yes.
Q That means that things can change?
A Yes.
Q Things can become necessary, things may never be necessary?
A No, I don't agree with that.
Q Miss Lustig, does every person with the injuries that Mr. Green has require everything that is on this list?
A Every patient is like a snowflake, so I would say that a life care plan is built based on the patient's diagnosis and their response to that illness or injury and everybody is different.
Q Certainly. In fact there is not a CNA living in the home assisting with Mr. Green presently, is there?

A Correct.
Q And there is not a case manager who is coordinating his care, the Green family has been able to do that, have they not?
A That is true, yes.
Q And in fact the family has even modified the home for Mr. Green?
A Yes, they have rigged it out.
Q Do you know how much it cost for them to modify the home?
MR. SAUTTER: Your Honor, I have an objection as to relevancy.
THE COURT: I appreciate that. I believe it is areas that were covered on direct, I will allow it.
You may proceed, ma'am.
MR. SAUTTER: Thank you, Your Honor.
BY MS. THOMAS:
Q Your life care plan provides a modification of the home, is that right?
A Yes.
Q In fact that modification has already been done?
A No.
Q No modification has been done to his home?

A It has been rigged, it has not been modified to my likeness.
Q But he functions within that home, does he not?
A Not properly.
Q Do you know how much money it would cost to modify his home?
A No, I don't.
Q And presumably that is something you could find out, you could certainly see what the cost of manpower was, what the cost of materials was to modify his home, couldn't you?
A Sure, but that doesn't mean that it is done properly.
Q But you didn't get that information, did you?
A I don't need that information.
Q And in fact we have heard some testimony that the family has a vehicle with which they can transport Mr. Green, is that correct?
A Yes.
Q Do you know how much they paid for that vehicle?
A No, I do not know how much they purchased it for. I know it was purchased used, it was purchased in 2004, it was a 2000 Ford and I believe

the son Mark testified earlier, I think he described the van.
Q Certainly. They could certainly purchase another new or used vehicle, couldn't they?
A Yes.
Q And in looking at your plan, you have projected therapeutic modalities and projected monies?
A To a reasonable degree of nursing certainty, this is a foreseeable item in the future based on the disability and diagnosis of Mr. Green.
Q It means a guess, doesn't it?
A I'm sorry?
Q It means a guess, doesn't it?
A No, this is not guesswork, this is all based on science.
Q Excuse me, projected monies in the future, doesn't it?
A Yes, to a reasonable degree of nursing certainty based on my experience, training knowledge, education, skill, medical foundation found in the records, treating providers, my assessment as a Registered Nurse of Mr. Green.
Q But projected also means it may not come to past?

A Projected in this plan is to a reasonable degree of nursing certainty, greater than 50 percent it's going to happen, probable.
Q In every case, in every patient or patients that has the injuries Mr. Green has?
A I'm not here to testify about another patient, I'm here to testify what Mr. Green needs to a reasonable degree of medical certainty as provided in this plan.
Q Let's talk about another section of your plan called diagnostics. I think you went through every item in that list and those include things such as xrays, MRI, ultrasound. Nurse Lustig, these are all things that have to be ordered by a doctor, correct?
A Yes. Nurses do not prescribe diagnostics, medication, surgery, we provide nursing diagnoses.
Q So, in order for him to need these things a doctor is going to have to say at some point in the future that he needs to have these studies done, correct?
A Ultimately the doctors make that decision.
Q And in the medical records that you have reviewed so far no doctor has said he needs all these things to happen?

A No doctor in medical notes that I have ever seen in my experience, I have read thousands and thousands of medical records, do physicians ever say this patient will need an x-ray every three years for the rest of their life. The time that a physician says that is when a Registered Nurse like myself or a rehab consultant with the certifications and licenses that we hold, we collaborate with treatment providers based on the medical foundation in the record and based on assessing the patient, then we collaborate with that medical provider to project life long care. That is life care planning, doctors don't do life care planning.

Q But we do have nine years of medical records, we know what he has had, don't we?

A Yes.

Q And the same goes for the section of your plan called lab work. There again, nurses don't order lab work, do they?

A Right. As I said before, we do not order or prescribe diagnostics, surgeries or medication.

Q Or surgery?

A Or surgery. I may have said that.

Q So, there again, whether or not that is

needed in the future will depend on the doctor saying that he needs the particular lab work?
A Ultimately a physician makes that decision.
Q And the same is true for medications, is it not?
A Yes, same answer.
Q So, actually this plan is very fluid, isn't it?
A I don't know what you mean. It is a dynamic evolving document and right now as it sits the life care plan is being implemented and it is to a reasonable degree of medical, I mean nursing certainty.
Q But I believe you stated earlier that some things may be necessary, some things may not be necessary in the future, is that true?
A No. I believe that everything in this life care plan is foreseeable based on his disability and diagnosis, and his life care plan was drafted after collaborating with his providers.
Q Miss Lustig, you put in this plan every potential bad thing that can happen to Mr. Green, certainly we all hope it does not, but that is what you did when you drafted this plan, isn't that correct?

A I'm sorry, you're talking about Mrs. Green?
Q Mr. Green?
A Could you repeat the question?
Q Certainly. In formulating this life care plan you have put in and assigned a value to potentially every bad thing medically that can happen to Mr. Green, haven't you?
A No. I really don't understand your question. These are medical items. I'm not projectng bad things that will happen, I'm projectng a plan that if implemented it will prevent complications, so I may just be misunderstanding your question. The life care plan doesn't have some items in this plan, this plan is a conservative plan, in my opinion. I don't think, there are not even hospitalizations in this plan for Mr. Green, so I did not project every bad thing that can happen, because I believe any hospitalization is bad unless you're having a healthy baby in a hospital, but I didn't project hospitalizations for Mr. Green and I consider that bad.
Q Now, certainly no physician has stated that Mr. Green needs a live in provider such as a CNA, have they?
A Actually they have.

Q Does he have a live in provider?
A No -- well, actually he does, Mrs. Green.
Q Correct.
A Yes.
Q A professional CNA, no doctor has prescribed that?
A They have but currently Mrs. Green provides that care 24 hours a day, seven days a week.
Q Which medical provider has prescribed for Mr. Green a live in provider?
A I believe Dr. Garner, his primary care provider.
Q Is that according to medical records that you have reviewed?
A Yes.
Q And certainly no one has prescribed a case manager, have they?
A No.
MS. THOMAS: Thank you.
THE WITNESS: Thank you.
THE COURT: Redirect?
MR. SAUTTER: No questions, Your Honor.
THE COURT: You may step down, ma'am.
Do you wish this witness to be excused?
MR. SAUTTER: We do, Your Honor.