THE STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

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

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

v.

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

MOTION TO STRIKE RECORD ON APPEAL

The Respondents, Mark Green, as Personal Representative of the Estate of Randall M. Green, and Ann Green, respectfully move this Court to strike the Record On Appeal filed by the Appellants, Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C, on September 11, 2020. The grounds for this Motion, as discussed in further detail in the supporting memorandum filed herewith, are as follows:

1. The Record on Appeal filed and served by the Appellants does not comply with Rule 210 (c), SCACR, as it does not include matter designated by the Respondents under Rule 209, SCACR.

2. The Record on Appeal filed and served by the Appellants does not comply with Rule 210 (g), SCACR, as it does not contain a certification of counsel certifying that it contains "all materials proposed to be included by any of the parties."

Counsel consulted regarding Appellants' intention to omit prior appellate filings from the Record on Appeal and how to proceed procedurally but were unable to reach an agreement.

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September 24, 2020

THE STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

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

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

v.

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

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE RECORD ON APPEAL

The Respondents, Mark Green, as Personal Representative of the Estate of Randall M. Green, and Ann Green, respectfully submit this supporting Memorandum in reference to the contemporaneously filed Motion to Strike the Record On Appeal.

Briefly, this second appeal is based on the trial court's allocation, following remand, of the Respondents' joint pre-trial $2M settlement with another Defendant in order to apply a setoff against a medical malpractice verdict obtained by Randy Green[1] and a loss of consortium verdict obtained by Ann Green in 2013. In the first appeal, the Greens challenged the trial court's original

[1] After waiting fifteen (15) years for justice, Randy Green finally succumbed to his injuries a few days after the remittitur was filed by the Supreme Court in this case. His son, Mark Green, was appointed Personal Representative and the Estate was substituted as a party for the hearing on remand. Therefore, Randy's Estate and his widow, Ann, are now the Respondents for this second appeal.

settlement allocation which was based on the sum of their jury verdicts. The Supreme Court found that this original allocation method was "arbitrary." The Court vacated the trial court's original allocation order and remanded this issue with the directive to consider all of the "relevant circumstances" and to determine "the **amounts** to be set off from the **two verdicts**" (emphasis added). The trial court complied and determined that the joint settlement would be allocated equally between the Greens and that $ 1 M would be set off from each of the two independent verdicts. On this second appeal, the Appellants now ask this Court to reverse the trial court and combine Randy and Ann's two separate verdicts into **one**, apply a **single** setoff in the amount of $2 M, and enter a **single judgment** in favor of both the Estate and Ann.[1] In deciding this Motion, it might facilitate judicial economy to consider that the relief sought by Appellants is inconsistent with the directions on remand. "The mandate of the appellate court is jurisdictional. The trial court has a duty to follow the appellate court's directions." Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 605, 709 S.E.2d 122 (Ct. App. 2011) (on remand, lower tribunal limited to jurisdiction and authority mandated by appellate court).

Before the trial court on remand, both sides raised the issue of the Green's intentions with regard to the settlement as a relevant circumstance. (Ex. 3, p. 2-3; Ex. 5, p.8) The Respondents also primarily asked the court to consider the settlement agreement's terms, the parties' trial testimony, and evidence on the record as to their damages. The Appellants urged the trial court to consider the jury verdicts, a Consent Order entered by the trial court during the appeal releasing undisputed funds which were not subject to setoff, and an argument allegedly made to the Supreme Court that the settlement should be treated as marital property. The designated matter which Appellants omitted from the Record on Appeal is relevant to Appellants' representations and arguments pertaining to the (1) Consent Order (about which Appellants admit in their Reply Brief

two arguments were not raised until their Rule 59(e) motion) and (2) whether the settlement, and thus the verdicts, should be treated as marital property.[2]

Appellants filed their Initial Brief on May 28th after receiving a thirty (30) day extension. Respondents filed their Designation of Matter to be Included in the Record on Appeal with their Initial Brief on June 22nd. Appellants then filed their Reply Brief on July 14th after receiving *another* ten (10) day extension. Pursuant to this Court's Order of August 13th, Appellants were also granted *yet another* thirty (30) day extension of time to prepare and serve the Record on Appeal after advising this Court that the additional time would allow counsel to work out issues and assemble it. This Court's Order set the new deadline as September 11th. On September 10th, counsel for the Appellants first contacted Respondents' counsel via email to advise of his intention to omit appellate filings from the Record on Appeal on the following bases: (1) That there was no need to include prior appellate court filings as the Court of Appeals already has access to these documents and it would only add unnecessarily to the size and cost; and (2) His review had revealed that these filings had not been re-filed with the trial court or otherwise included on its record. On that same day, counsel for the Respondents advised that we would not consent to the omission of these materials as Rule 210 (h) contained no such exception for appellate filings and further reminded counsel that the trial court's attention had been repeatedly directed to these materials. (Exhibit 1).

Nevertheless, on September 11th, Appellants served all parties with an incomplete Record on Appeal omitting many designated appellate filings via an emailed link[3]. Though not required

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[2] In addressing this issue on p. 20 of their Initial Brief filed with this Court, the Appellants' cite to the Respondents' Brief to the Supreme Court though they now wish to omit this properly designated matter from the Record.

[3] Due to the Orders in place as a result of Covid-19, Appellants were not required to copy, bind, or mail the Record. Accordingly, the cost and time necessary to compile the record is dramatically minimized relative to the normal requirements.

until the deadline for filing Final Briefs, Appellants also proceeded to *file* the incomplete Record on Appeal with this Court without seeking leave to omit the designated materials. At no time during the **eighty one (81) days** that had passed since the Respondents' Designation of Matter was filed on June 22nd, did Appellants attempt to object to the inclusion of any designated materials. See Epstein v. Coastal Timber Co., Inc., 393 S.C. 276, 289 n.4, 711 SE 2d 912 (2011)(noting that a timely objection involves filing a motion to strike at the time the material was designated for inclusion in the record).

Both parties consented to and urged the trial court to reference appellate filings on remand, and these materials are clearly properly included in the Record on Appeal for this Court's consideration. Rule 210 (c), SCACR, states that the Record on Appeal shall not include "matter not presented to the lower court." There is no requirement that the materials be *filed* or formally entered into evidence.[4] The reason for this rule is that matters not raised or ruled on by the trial court cannot be considered on Appeal. *See* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 203 (3rd ed. 2016). The Record on Appeal's very purpose is "to inform the Court authoritatively of the legal questions contested below and of the facts pertaining thereto." S.C. State Highway Dep't v. Meredith, 241 S.C. 306, 128 S.E.2d 179 (1962). There is no question that the post-trial procedural history of this case and the arguments raised to the appellate courts were before the trial court, particularly after Appellants' argued that a Consent Order entered by the lower court during the appeal[5] was dispositive of the allocation issue which was still pending

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[4] Even if these records were not deemed "presented" below, this Court has previously held that "[a] court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in its records." Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325, 327 (Ct. App. 1984).

[5] Specific funds became undisputed during the first appeal at the time the Appellants filed their Petition For Rehearing with this Court expressly conceding the issue on February 18, 2016. The Consent Order directing the release of funds being held by the lower court was entered soon thereafter before the case proceeded to the Supreme Court.

appeal. Moreover, the trial court's order expressly recognizes that "the equal allocation issue was subsequently extensively argued before the Supreme Court and is central to the analysis at hand." (Exhibit 8, p. 8).

The properly designated appellate filings which Appellants have unilaterally determined should be excluded from the Record on Appeal are directly relevant to the accuracy of representations made in support of their arguments. For the Court's convenience, a chart is attached of all of the omitted designated matter, why it was before the trial court, and its relevance to this Appeal. Appellants themselves admitted and urged that the trial court could rely on the appellate filings to help identify the proper considerations on remand, and even advised the trial court that they believed it would be impossible to resolve the issues without considering the existence of particular theories under appeal at particular points in time.[6] (Ex. 2, p. 11 lns. 19-25). Appellants' arguments before the trial court *and* this Court rely on several representations about these theories, the accuracy of which can be readily and accurately ascertained from the content of these omitted appellate filings. For example, Appellants' counsel recognized to the trial court that the Supreme Court had not spelled out the relevant circumstances that should have been addressed on remand before stating, "[b]ut, I know that argument was made to the Supreme Court about marital property. It was made by the plaintiffs in that instance. So, clearly, that could be part of the remand." (Ex. 2, p. 20). He further argued how that same argument could be applied to reach a certain result before stating "[s]o, that is a relevant consideration that the Court can consider." (Ex. 2, p. 22). However, Respondents informed the trial court, as well as this Court in their Initial Brief, that the Appellants had made a gross mischaracterization of their argument before the Supreme

[6] Moreover, in their Proposed Order to the trial court, Appellants continued to urge an **express** finding that the post-trial procedural history was appropriate and relevant to consider on remand. (Ex. 6, p.10).

Court. In a filed objection, they also directed the trial court's attention to their Brief before the Supreme Court and it's ready availability to easily determine this factual dispute, even filing written excerpts with page references to facilitate the court's review. (Exhibit 3 and attachments; Exhibit 4). This was necessary because Appellants had repeatedly emphasized the relevance of this argument to guide the analysis on remand. (Exhibit 3, pp. 1, 3, 4, 7; Exhibit 2, pp. 11, 18-20, 22, 28, 45, 47). Unfortunately, this same mischaracterization has persisted in the arguments made to this Court.

The Appellants even cited the Respondents' Brief to the Supreme Court on p. 20 of their Initial Brief to this Court, implicitly admitting that it was before the trial court and properly included in the Record on Appeal. The Respondents thereafter addressed the accuracy of the Appellants' statements on p. 31-32 of *their* Initial Brief to this Court and designated the matter for inclusion on the Record. However, the Appellants have now unilaterally decided that it should be excluded from this Court's review. *See* Rule 210 (h), SCACR. After repeatedly urging the trial court to consider appellate filings, the Appellants cannot now assert that those filings were not before the trial court and excluded from this Court's consideration. A party cannot concede an issue below and then raise it on appeal. See CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 81, 716 SE 2d 877 (Ct. App. 2011): State v. Gilmore, 396 S.C. 72, 84, 719 S.E.2d 688, 694 (Ct. App. 2011) (issue conceded before circuit court cannot be argued on appeal); TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998).

Finally, the Appellants included in the Record on Appeal an Order of the Supreme Court Denying Motion dated May 24, 2018. The arguments contained in the parties' memorandums which gave rise to this Order were directly brought to the trial court's attention. (Exhibit 3, p. 7; Exhibit 4). However, the Appellants also unilaterally determined that the parties' memorandums

would be excluded from the Record on Appeal **after** disputing and speculating as to the basis of this Order in their Reply Brief (pp. 8-9) filed with this Court. This is wildly inappropriate.

Appellants are well aware that the post-trial procedural history and existence of arguments before the appellate courts were before the trial court as it was Appellants' *own* arguments and representations that brought these matters into issue. Enforcement of rules and procedures for compiling the Record on Appeal is necessary to protect the integrity and efficiency of the appellate process. This is implicitly recognized by Rule 260 (a), SCACR, which mandates dismissal of an appeal for failure to comply with the Appellate Court Rules.

This case, including the original action, has been ongoing for fifteen (15) years, including six (6) years under appeal, after which Randy Green sadly passed away. The Order in the remand proceedings was entered one (1) year ago next month. The Appellants' refusal to comply with procedural rules in this *second* appeal after receiving extensions for every single deadline to date has created even further and unnecessary delay, issues, and uncertainty as to how to proceed. The Record on Appeal which was filed and served by the Appellants does not comply with the mandatory language of Rule 210 (c), SCACR, as it does not include matter designated by the Respondents under Rule 209, SCACR. Moreover, it does not comply with Rule 210 (g), SCACR, as the certification of counsel indicates that appellate filings have been omitted and thus does not certify that it contains "all materials proposed to be included by any of the parties." The Respondents cannot comply with Rule 211 (a) and (b) (1) as they cannot now revise the references in their Initial Briefs to indicate where the materials are located in the Record on Appeal.

Accordingly, the Respondents respectfully request that this Court Strike the Record on Appeal filed and served by Appellants on September 11, 2020 and take such other and further action as it deems appropriate. Alternatively, if the Court declines to strike the Record on Appeal,

Respondents request that the Court order Appellants to expeditiously file a Supplemental Record on Appeal and to grant Respondents an additional ten (10) days from the date it is served in order to complete, file, and serve their Final Brief.

Respectfully Submitted,

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September 24, 2020

Attachment 1

Chart of Omitted Materials

Omitted Designated Matter	Matter Raised to the Trial Court	Relevance to the Appeal
Respondents-Petitioners' Brief Filed Nov. 21, 2017	By **Respondents** in Exhibit 3, pp. 3 - 4 & p. 7 indicating that allocation issue was still pending appeal and extensively argued following 2016 Consent Order. Also indicating and listing arguments as to the relevant circumstances the trial court should have considered pertaining to the allocation. By **Respondents** in Attachments to Exhibit 3 listing page references and excerpts of arguments made to the Supreme Court as to what the trial court had failed to consider in the original setoff and allocation Order. By **Appellants** in Exhibit 2, p. 11 lns. 19-25, arguing that it was impossible to resolve the issues without considering the existence of particular theories under appeal at particular points in time By **Appellants** in Exhibit 6, p.10 proposing that court make finding that post-trial procedural history was appropriate and relevant to consider on remand By **Appellants** in Exhibit 2, p. 10 stating that the post-trial procedural history of the case must be considered By **Appellants** in Exhibit 2, p. 18-19, 20, 22, 28, 45 in urging court to consider arguments made by Respondents to the Supreme Court and alleging that this included the argument that the settlement should be treated as marital property.	Relevant to Appellants' representations that Respondents' argued before the Supreme Court that their settlement should be treated as "marital property." Clarifies that this assertion is false. Relevant to identification of "relevant circumstances" argued and on which Supreme Court's Remand Order was based. This Brief is also cited and relied upon by Appellants on p. 20 of their Initial Brief to this Court.
Appellants-Respondents' Petition For Rehearing Filed Feb. 18, 2016	By **Appellants** in Exhibit 6, p.10 proposing that court make finding that post-trial procedural history was appropriate and relevant to consider on remand By **Appellants** in Exhibit 2, p. 10 stating that the post-trial procedural history of the case must be considered By **Appellants** in Exhibit 2, p. 11 lns. 19-25, arguing that it was impossible to resolve the issues without considering the existence of particular theories under appeal at particular points in time By **Appellants** in Exhibit 5, p.3 in representing that funds subject to the April 2016 Consent Order	Relevant due to Appellants' arguments and representations regarding the April 2016 Consent Order. Relevant to Appellants' representations that they did not concede all issues with regard to the funds subject to the April 2016 Consent Order until after Rehearing was denied. Clarifies that this was already expressly conceded.

	were not conceded until after Rehearing was denied. These had been expressly conceded months prior in this Petition.	
Respondents-Appellants' Petition For Rehearing Filed Feb. 22, 2016	By **Appellants** in Exhibit 6, p.10 proposing that court make finding that post-trial procedural history was appropriate and relevant to consider on remand By **Appellants** in Exhibit 6, pp. 9-10 proposing that court rely on finding that allocation issue was not raised until after April 2016 Consent Order By **Appellants** in Exhibit 2, p. 11 in raising the relevance of the timing of the allocation issue and representing that the issue was not raised until after the April 2016 Consent Order By **Respondents** in Exhibit 3, pp. 6-7 indicating that allocation issue was pending appeal at time of April 2016 Consent Order. By **Appellants** in Exhibit 2, p. 10 stating that the post-trial procedural history of the case must be considered. By **Appellants** in Exhibit 2, p. 11 lns. 19-25, arguing that it was impossible to resolve the issues without considering the existence of particular theories under appeal at particular points in time.	Relevant due to Appellants' arguments and representations as to the parties' intentions with regard to the April 2016 Consent Order. Clarifies that the allocation issue was still disputed and pending appeal *after* Appellants' conceded all issues as to these funds as well as *at the time* of the Consent Order.
Respondents-Petitioners' Petition for Certiorari Filed May 16, 2016	By **Respondents** in Exhibit 3, pp. 1 & 7 and Exhibit 4 indicating that allocation issue was still pending appeal and extensively argued following the April 2016 Consent Order. By **Appellants** in Exhibit 6, p.10 proposing that court make finding that post-trial procedural history was appropriate and relevant to consider on remand By **Appellants** in Exhibit 2, p. 10 stating that the post-trial procedural history of the case must be considered By **Appellants** in Exhibit 2, p. 11 lns. 19-25, arguing that it was impossible to resolve the issues without considering the existence of particular theories under appeal at particular points in time	Relevant due to Appellant's arguments and representations regarding the parties' knowledge of pending issues and intentions with regard to the April 2016 Consent Order. Clarifies that allocation issue was still disputed and pending appeal after the 2016 Consent Order.

Petitioners-Respondents' Return to Petition for Certiorari Filed June 21, 2016	By **Respondents** in Exhibit 3, pp. 1 & 7 and Exhibit 4 indicating that allocation issue was still pending appeal at time of the 2016 Consent Order. By **Appellants** in Exhibit 6, p.10 proposing that court make finding that post-trial procedural history was appropriate and relevant to consider on remand By **Appellants** in Exhibit 2, p. 10 stating that the post-trial procedural history of the case must be considered By **Appellants** in Exhibit 2, p. 11 lns. 19-25, arguing that it was impossible to resolve the issues without considering the existence of particular theories under appeal at particular points in time	Relevant to Appellants' knowledge and beliefs as to the parties' intended effect, purpose, and limitations of the April 2016 Consent Order. Clarifies that Appellants did not assert any arguments that the parties intended the Consent Order to be dispositive of the allocation issue until this argument was "discovered" 1 year and 9 months later at the time they filed their Dec. 20, 2017 Motion (see below).
Respondents-Petitioners' Reply to Return to Petition for Certiorari Filed July 1, 2016	By **Respondents** in Exhibit 3, pp. 1 & 7 and Exhibit 4 indicating that allocation issue was still pending appeal and extensively argued following 2016 Consent Order. By **Appellants** in Exhibit 6, p.10 proposing that court make finding that post-trial procedural history was appropriate and relevant to consider on remand By **Appellants** in Exhibit 2, p. 10 stating that the post-trial procedural history of the case must be considered By **Appellants** in Exhibit 2, p. 11 lns. 19-25, arguing that it was impossible to resolve the issues without considering the existence of particular theories under appeal at particular points in time	Relevant due to Appellants' representations and arguments regarding the parties' intentions and beliefs with regard to the April 2016 Consent Order.
Petitioners-Respondents' Motion and Memorandum in Support of Motion to Supplement Appendix, for Leave to Argue Judicial Estoppel, Waiver, and/or Release and to Hold Deadlines in Abeyance dated Dec. 20, 2017	By **Respondents** in Exhibit 3, pp. 1 & 7 and Exhibit 4 indicating that allocation issue was still pending appeal and that S. Crt had already refused to consider Appellants arguments regarding the 2016 Consent Order. By **Appellants** in Exhibit 6, p.10 proposing that court make finding that post-trial procedural history was appropriate and relevant to consider on remand By **Appellants** in Exhibit 2, p. 10 stating that the post-trial procedural history of the case must be considered	Relevant to Appellants' representations that this was simply a Motion to Supplement the Record. Clarifies that this was also a Motion Seeking Leave to make newly discovered "additional" arguments to the Supreme Court and a memorandum with exhibits setting forth detailed substantive arguments regarding the April 2016 Consent Order. Relevant to Appellants' knowledge, beliefs, and intentions

	By **Appellants** in Exhibit 2, p. 11 lns. 19-25, arguing that it was impossible to resolve the issues without considering the existence of particular theories under appeal at particular points in time	at the time of the April 2016 Consent Order. Clarifies that Appellants admitted that they didn't discover "additional arguments" as to the parties' intended effect of the Consent Order until this point, one year and nine months later.
Respondents-Petitioners' Return to Motion to Supplement Appendix, for Leave to Argue Judicial Estoppel, Waiver, and/or Release and to Hold Deadlines in Abeyance dated Jan. 2, 2018	By **Respondents** in Exhibit 3, pp. 1 & 7 and Exhibit 4 indicating that allocation issue was still pending appeal and that S. Crt had already refused to consider Appellants arguments regarding the 2016 Consent Order. By **Appellants** in Exhibit 6, p.10 proposing that court make finding that post-trial procedural history was appropriate and relevant to consider on remand By **Appellants** in Exhibit 2, p. 10 stating that the post-trial procedural history of the case must be considered By **Appellants** in Exhibit 2, p. 11 lns. 19-25, arguing that it was impossible to resolve the issues without considering the existence of particular theories under appeal at particular points in time	Relevant to all parties' knowledge, beliefs, and intentions at the time of the April 2016 Consent Order. Relevant due to Appellant's representations and speculations as to why the Supreme Court refused to consider arguments concerning the 2016 Consent Order.

EXHIBIT 1

Correspondence Between Counsel

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September 10, 2020

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

Dear Cristin:

We are in the processing of preparing the Record on Appeal which is due by September 11, 2020. There is an issue with the Respondents' designations that we need to address.

In their designations filed June 19, 2020, the Respondents included a number of appellate court filings from the first appeal to the Court of Appeals and from the review on certiorari by the Supreme Court. Those items are identified as #17 through #21 and #23 through #25 in the Respondents' designations. It is my plan **not to include** those appellate documents in the Record on Appeal for the following reasons. First and foremost, these are appellate documents and are not part of the Circuit Court record. Rule 210(c), SCACR, states: "The Record shall not, however, include matter which was not presented to the lower court or tribunal." I have reviewed the Circuit Court record, and these appellate documents were never filed or otherwise included as part of that record. Second, to the extent that the parties wish to rely on prior appellate court filings, the Court of Appeals has access to those without including them in the Record on Appeal. Thus, there is no basis in the Appellate Court Rules nor is there a need to include prior appellate court filings in the Record on Appeal. That will only add unnecessarily to the size and cost of the Record on Appeal.

If you disagree with my plan and believe that items #17 through #21 and items #23 through #25 properly may be included in the Record on Appeal, please advise and I will file a motion with the Court of Appeals to resolve that issue. If the Court disagrees with my position, those documents can be then included by way of a supplemental record. Please advise as to your position by close of business today.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/

cc: O. Grady Query, Esquire *(Via Email Only)*
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September 10, 2020

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RE: Mark Green, as Personal Representative of the Estate of Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C.
Civil Action No. : 2011-CP-26-7403
Court of Appeals Tracking No: 2020-000046

Dear Andrew,

I have just received your correspondence which was emailed earlier today and requests a response by the close of business today. This is not adequate time for me to respond to your position that there is no need for the materials at issue to be included in the Record on Appeal. The trial court's attention was repeatedly directed to these appellate filings, and the materials at issue were referenced and excerpts quoted in arguments and filings with the trial court. Moreover, Rule 210 (h), SCACR, states that "the appellate court will not consider any fact that does not appear in the Record On Appeal." For these and other reasons, we do not consent. We insist that all matters designated be included in the Record on Appeal.

With kindest regards, I am

Sincerely,

Cristin Uricchio

cc: O'Grady Query, Esquire (*Via Email Only)*
L. Morgan Martin, Esquire (*Via Email Only)*
John B. McCutcheon, Jr. Esquire (*Via Email Only)*
Lisa A. Thomas, Esquire (*Via Email Only)*

EXHIBIT 2

Pages from Hearing Transcript

court either but the calculation, what should be remaining with the clerk of court pursuant to what was paid into court several years ago, pursuant to Judge Hyman's order, should be $218,164.13, not including any interest that is accrued while on deposit with the clerk of court. And that's -- totals includes $200,000 in principle plus accumulated post-judgment interest at the time that that money was paid into the Court. So, that's the amounts of money at play here, Your Honor.

Now, to answer another one of your questions, Your Honor, I believe very much the procedural history of this case post trial must be taken into consideration and must be considered. I would submit to Your Honor that the defendants, particularly their insurer and the PCF, the Patient's Compensation Fund is implicated as well, have made these partial payments over the years in recognition that the Greens needed these sums and that there were certain amounts of money that were no longer contravert -- in controversy. And that was agreed to by the plaintiffs, and they accepted those sums. So, I think that very much needs to be considered by this Court and that's important based upon the judicial estoppel argument that we have asserted, which shows that the plaintiffs accepted monies to not only satisfy a portion of the judgment in favor of Mr. Green but also the judgment in favor of Mrs. Green.

Part of the problem that we have dealt with in this case, Your Honor, as this went through the appeals process, is the

various theories that were pursued by the plaintiffs changed over time. And they're continuing to still change, unfortunately. The plaintiffs, we submit, did not take the position that this was marital property and that the settlement with Grand Strand should be divided equally and not take that position till much later in the appeals process, and that was after the amount was already accepted to satisfy Ms. Green's judgment. And quite frankly, that was their position all along. They're taking money to satisfy a portion of Ms. Green's judgment is inconsistent with that because their current argument in this court, asking this court to grant an offset of a million dollars to each plaintiff would zero out the judgment in favor of Mrs. Green. She received a judgment, as you indicated, of $550,000. So, obviously, their position all along was that there was a million dollar set off for that. They shouldn't have accepted any money for that, and certainly we shouldn't be penalized for paying that money at their request based upon a consent order that was issued by Judge Hyman. So, I don't see how -- to go back to your original question, I don't see how Your Honor can resolve these issues without considering where we are and what has been done between the parties, by consent, everything is by consent, which is very critical, no judge ordered it, it was all done by consent under the theories that were being pursued at that particular time. And obviously, the JUA and the PCF

memoranda of law that they submitted last week, they are impassionately making the argument that Mrs. Green's claim is worth much, much more than she received. They can't make that claim to this Court as this point. Again, they had the ability to make an additur motion and they didn't do so. So, six years later, they can't try to backdoor that with the setoff issues that they're making. But going back to the point I was getting at, there are really two ways that Your Honor can address this issue and you reach the same conclusion, the same numbers result each way. The first is the way the Court ultimately did it relying on the jury's verdict and the total amount of damages and how the jury assessed both Mr. Green's and Mrs. Green's damages claims.

The second way to approach it, Your Honor, is in essence, what the plaintiff is asking this Court to do. In fact, I notice that in the Supreme Court, they use the argument about marital property and then all of a sudden the words marital property dropped out of their, their memo they submitted last week. But, the gist of their argument is that the two million dollars that was paid by Grand Strand, which incidentally was not allocated within the covenant not to execute. It was not allocated by the parties at all, wasn't allocated 50/50. But, they contend or they certainly contended at the Supreme Court, and I still think that's their contention even though they've tried to avoid now using the words marital property, is that

that $2,000,000 was marital property that was owed jointly by both Mr. Green and Mrs. Green. And if the Court concludes that, and I'm not suggesting that that is the right way or the wrong way to deal with it, but I'm submitting to the Court that if the Court deals with it as marital property, and there is case law to support that and we've cited cases that have indicated that they arise, of course, in the Family Court scenario, but there are a number of cases that talk about judgments in personal injury cases being marital property that ultimately must be equitably dealt with upon divorce.

But my -- what I would submit to the Court is they can't have it both ways. They can't argue that the settlement was marital property but then the judgments were not. The judgments as well are marital property. And so when you look at it as such, Your Honor, and do the math, you come out to the exact same conclusion. The total amount of the judgments was $2,850,000 and the total amount of the setoffs, when you include Carolina Medical Response is $2,025,000. So, when you do the math and subtract that, that leaves a judgment that is, I would submit, identical to the numbers that the Court has already reached, which is a total verdict of -- actually, I didn't type out that math, I probably should have, but it's -- looks to be 700-and -- I think $847,500. Bottom line is, Your Honor, and I'll check my math when I'm finished my argument, but the bottom line is, my point being, the total verdicts are

treated as martial property, and the total settlements are treated as marital property, you come to the same total of judgments as Your Honor had issued back in 2013, minus the $270 math error. So, ---

THE COURT: That wasn't my major in college, that doesn't shock me.

MR. LINDEMANN: With all due respect, Your Honor, that may've been a math error on our part, on our side because we were dealing with percentages when we prepared a proposed order for Your Honor. But, the bottom line is, that's -- to me, that's inconsequential. But, the bottom line is, as I'm getting at, there are two different ways to arrive at the same number. And one of the prevailing circumstances is the Supreme Court, and of course, it would've been helpful for the Supreme Court to spell out what they were referring to as prevailing circumstances that they wanted the parties and the courts to be able to address or the relevant circumstances, excuse me, but they didn't. But, I know that argument was made to the Supreme Court about martial property. It was made by the plaintiffs in that instance. So, clearly, that could be part of the remand. But, as I indicated, if you look at it from a marital property standpoint, there's no reason to treat the settlement as marital property and then the judgments as something different. I mean, that's contrary to existing South Carolina case law that we've cited to the Court.

was $47,500. And that's how the Supreme Court dealt with that issue. So, it's no different and that provides some precedent for Your Honor. This case would present a situation no different. The total verdict should be considered marital property, the settlement should be considered marital property, and you arrive at essentially the same, the same number, minus the math error. So, that is a relevant consideration that the Court can consider.

Now, the plaintiffs are attempting to make the argument that the -- Mr. and Mrs. Green had an agreement among themselves that they would treat these -- the settlement with Grand Strand equally. Mrs. Green has now submitted an affidavit to this Court which was submitted with the memorandum last Wednesday -- and I do want to state for the record that I have some issues and I have an objection to that affidavit because -- and I -- regrettably, Mr. Green recently passed, but that triggers the application of the dead man statute. And I believe that her testimony as to any agreement or any understanding or any discussions or any arrangements that she had with her deceased husband is barred by the dead man statute. And I looked all the exceptions that were not statutorily provided by the dead man statute, since that is a statutory evidentiary provision, but have been provided by the case law over the years, and I do not see any of the exceptions apply. And clearly, she is offering that testimony

what the intent of the parties is. They tried to fix that with this affidavit of Mrs. Green that, again, I submit is a violation of the dead man statute. But, the bottom line is the best evidence that there was no intent by the parties that the $2,000,000 to be shared equally or that there should be a $1,000,000 setoff for each of Mr. Green and Mrs. Green, is the conduct in 2016 which is entirely inconsistent with that. That's what the doctrine of judicial estoppel stands for, Your Honor. We believe that it should be enforced in this particular case. And it certainly, the defendant and their insurer should not be held to their detriment for trying to do the right thing and make these partial payments of the judgments to the Greens so that they would have that money to live with, live on.

So, just to wrap this up and summarize, I think there are two different ways, two different aspects that you can look at in this case, Your Honor, and arrive at what is a fair and equitable setoff. You can look at it based upon the jury's verdicts, which is how the Court looked at it previously, and you can also then factor in the additional circumstances of this martial property argument that it was made before the Supreme Court. And again, the marital property argument, you reach the exact same result, minus the math error. The entire judgments, the entire verdicts are marital property and the settlements are marital property, and you reach the same

additur claim and it is waived. So, they can't backdoor into an additur by their arguments based on the settlement. The jury spoke and there's absolutely no reason for this Court not to apply that $550,000 figure.

Again, I recognize Your Honor's comments about the difficulty with the whole marital property argument. And that is an argument that was made by Plaintiff's counsel at the Supreme Court to try to justify the million-dollar setoff. My whole point to this Court is if you do apply it as marital property, as the plaintiffs have argued in the past, the judgments themselves are marital property. They didn't reject that, that argument. And that may be the simple approach. They said -- looking for a simple approach, that may be the simple approach to resolve this issue, and the math works out the exact same. I actually have it on Page 7 of my memorandum. I struggled with giving you the math earlier, but it was right there in my memo. If you take 2.85 million and subject it to the entire setoff of $2,025,000, that leaves $825,000 in marital property paid jointly to the Greens. And then, they have already received $625,270 and there's $200,000 more of principle being held by the Horry County Clerk of Court. So, the whole case can be resolved by paying that remaining amount to the plaintiffs with the accrued interest from the Court of -- from the clerk of court.

So, that is, if you're looking for a simple way to

without arguing to you here, ask you that you go back and look at the April 16th consent order concerning the disbursal of the money, which refers back to the December of 2014 order granting leave to deposit, which says that no effect on the issues currently under appeal as to the amounts of the verdict are affected by those. So, I just ask you to review those to the extent that you think the judicial estoppel argument is relevant.

Thank you.

THE COURT: All right. Thank you.

BY THE COURT:

THE COURT: All right. Counsel, what I'm -- obviously, I need to consider this further. What I'm gonna do right now is go back and think about this for just a few minutes and see if I determine I need to ask y'all a couple of more questions before I excuse you, rather than trying to chase you down later to try and get those answered. If I don't have anything, then I'll excuse you and then we'll consider what, what you said. I'll just have to say, I don't -- I don't think there are any easy answers here. It, you know, I'm not criticizing the Supreme Court, but if they'd have given any hint as to what the relevant circumstances were, that would've been helpful, but they didn't so we'll just deal with that as it is.

So, if y'all would just kind of hang out for just a --

EXHBIT 3

Plaintiffs' Objections to Defendant's Proposed Order

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

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.

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

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

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.

Respectfully Submitted,

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EXHIBIT 1

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);

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);

"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).

Exhibit 4

Email to Trial Judge Clarifying Statement made in Objections

Gmail by Google

Cristin Uricchio <cristin@uricchiolaw.com>

Case no.2011-CP-26-7403

Cristin Uricchio <cristin@uricchiolaw.com> Thu, Oct 17, 2019 at 12:09 PM
To: "John, Steven H. Law Clerk (Kaitlin Cook)" <SJohnLC@sccourts.org>
Cc: Andrew Lindemann <Andrew@ldh-law.com>, Grady Query <gquery@qlawsc.com>, Morgan Martin <mmartin@lmorganmartin.com>, "jmccutcheon@thompsonlaw.com" <JMcCutcheon@thompsonlaw.com>, Tracey O'Brien <tobrien@qlawsc.com>, Nicholas Brausch <nbrausch@qlawsc.com>

Ms. Cook,

Please find attached the Plaintiffs' proposed Order. I would also like to bring to the Court's attention a mistake made in our objections. We stated that the Defendants' arguments on judicial estoppel and waiver had been made twice before the Supreme Court in opposing certiorari and in a later motion to exclude the equal division argument. These arguments were not initially made in opposing certiorari. They were raised for the first time in the later motion. Certiorari as to the equal division argument was opposed on preservation grounds. My apologies for this mistake. Please let me know if anything further is needed at this time.

Thank you, Cristin Uricchio

[Quoted text hidden]

Plaintiffs' Proposed Order.pdf
2573K

EXHIBIT 5

Defendants' Memorandum on Remand Issues Following Appeal

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."

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

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

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 S228,505.69 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

> 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.

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

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

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.

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,

LINDEMANN, DAVIS & HUGHES, P.A.

BY:_____

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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.

August 21, 2019

EXHIBIT 6

Defendants' Proposed Order

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.	)	
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.,	)	**ORDER FOLLOWING REMAND BY SOUTH CAROLINA SUPREME COURT**
Defendants.	)	

This matter came before this Court upon remand from the South Carolina Supreme Court in accordance with its decision in *Green v. Bauerle*, Mem. Op. 2019-MO-026 (filed May 29, 2019). The purpose of the remand, as explained in more detail below, was for this Court to hold a hearing and to determine how the setoff from a $2 million settlement should be calculated and allocated based upon all relevant circumstances. A hearing was held on August 28, 2019, with all counsel of record present. After a review of the written submissions of the parties, the record presented, and the oral arguments of counsel, this Court allocates the $2 million setoff as addressed below.

BACKGROUND AND PROCEDURAL HISTORY

This medical malpractice action was tried before a jury during the week of September 9, 2013. 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.

At the close of the trial, the Defendants Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C.[1] moved for a setoff 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 ("CMR"). By Order filed October 17, 2013, this Court granted in part and denied in part the Motion for Setoff. This Court allowed for a setoff of the settlements received from Grand Strand and CMR, but this Court denied the setoff for the amounts paid for the release of the at-fault driver and the UIM insurer. This Court 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, this Court equitably allocated the settlements based upon the precise distribution made by the jury in finding the actual damages sustained by the Greens. Thus, as this Court 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.

---

[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."

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 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 setoff 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 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 memorandum opinion that affirmed in part, vacated in part, and remanded. The Supreme Court affirmed the Court of Appeals and this Court on several issues. First, the Supreme Court rejected Dr. Bauerle's claim of a setoff 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 setoff of the $2 million from Grand Strand and $25,000 from CMR (the latter of which was no longer contested). The Supreme Court writes: "we agree with the trial court and the court of appeals that a setoff of the amount paid by Grand Strand was warranted." However, the Supreme Court found issue with the manner by which this Court originally 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 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 provide any further explanation as to what the "entirety of relevant circumstances" may entail.

The Horry County Clerk of Court is currently 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.

ANALYSIS OF ISSUE ON REMAND

As an initial consideration, this Court's original allocation of the $25,000 settlement from CMR is no longer contested. The Supreme Court recognized that "the Greens did not continue their challenge to the trial court's grant of setoff as to the unallocated settlement paid by CMR; therefore, this argument has been abandoned." For that reason, the Court may not and is not reconsidering on remand the original allocation of the $25,000 CMR settlement. That allocation applied a setoff of $20,175.44 to Mr. Green's verdict and a setoff of $4,824.56 to Mrs. Green's verdict.

With respect to the allocation of the $2 million settlement from Grand Strand, the Court recognizes that primary focus of the Greens' arguments on allocation is now moot, specifically that the setoff 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." Therefore, this Court on remand must focus on the appropriate allocation of the Grand Strand setoff between the verdicts for Randall Green and Ann Green.

The Greens argue that the $2 million setoff should be allocated equally between the two verdicts. This would result in Mr. Green's verdict being reduced to $1.3 million and Mrs. 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 originally entered by this Court). The Greens contend that an equal allocation is consistent with the terms of the settlement and the intent of the parties. However, having carefully reviewed the language in the "Covenant Not to Sue and Covenant Not to Prosecute or Execute Judgment" signed by the Greens in consummating their settlement with Grand Strand, this Court finds that the settlement amount 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.

Moreover, the record prior to remand did not include any evidence as to the intent of the parties to the settlement and the intended allocation, if any, of the $2 million, but after remand, the Greens have now submitted the affidavit of Ann Green where she attested as follows: "My husband and I agreed, intended, and did accept the settlement jointly and shared equal rights to the money." Dr. Bauerle objects to that portion of the affidavit pursuant to the South Carolina Dead Man's Statute, S.C. Code Ann. § 19-11-20, which "prohibits any interested person from testifying concerning conversations or transactions with the decedent of the testimony could affect his or her interest." *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903, 909 (1997). As the Supreme Court has explained, "[t]he rule is founded on the principle that it is against public policy to allow a witness thus interested to testify as to such matters when such testimony, if

untrue, cannot be contradicted." *Id.* The Court concludes that Mrs. Green's testimony as to an agreement between her and her deceased husband falls within the Dead Man's Statute and attempts to offer testimony regarding a transaction with the decedent that affects her interests. The appellate courts have recognized a number of exceptions to Dead's Man's statute, but the Court does not identify any applicable exception that would allow for the admissibility of Mrs. Green's statement in her affidavit, and the Greens have not directed this Court to any applicable exception.

Notwithstanding the inadmissibility of Mrs. Green's affidavit, the Greens have argued 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. The Court is aware that that was the crux of the arguments made by the Greens at the Supreme Court. However, the settlement cannot be treated as "marital property," and the verdicts then be treated differently. In other words, if the $2 million settlement is "marital property," then the verdicts themselves are also collectively "marital property," which is supported by the applicable case law on how proceeds of litigation received during marriage are treated. *See*, *Mears v. Mears*, 313 S.C. 42, 437 S.E.2d 34, 36 (1993) (holding "proceeds of a personal injury settlement acquired during the marriage are marital property"). *See also*, *Marsh v. Marsh*, 313 S.C. 42, 437 S.E.2d 34 (1993); *Covington v. Covington*, 306 S.C. 473, 412 S.E.2d 455 (Ct. App. 1991); *Orszula v. Orszula*, 292 S.C. 264, 356 S.E.2d 114 (1987); S.C. Code Ann. § 20-3-630 (defining "marital property").

As Dr. Bauerle has argued, there is also precedent for such a setoff based on trial verdicts in favor of spouses. 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 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. The Greens argue that the *Broome* decision is distinguishable because it is a UIM case, but the Court finds that distinguishing point to be immaterial. Accordingly, the Court finds that it is appropriate to treat the settlements and verdicts as marital property, which is 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 in marital property to be paid jointly to the Greens.

In addition, having heard all of the evidence at trial and in consideration of the jury's verdict, the Court also rejects any contention that the Greens were equally damaged such that it is fair and reasonable to allocate fifty percent of the settlement proceeds to each Plaintiff. As the jury determined and the evidence fully supported, Mr. Green's injuries exceeded the loss of consortium suffered by Mrs. Green. The jury's verdict bears that out and cannot be ignored. It is important to note that the Supreme Court stated that the ratios based on the verdicts "may well be relevant to the ultimate determination of a proper setoff" but are "not necessarily the sole relevant circumstance."[2] As a result, this Court, as one of the relevant considerations, reiterates

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[2] The Court in no way is minimizing Mrs. Green's loss of consortium which was significant. However, the jury has spoken and determined that her loss was fully compensated by the award of $550,000. The Greens have not demonstrated that there were injuries to Mrs. Green that were compensated solely by the Grand Strand settlement that were not also then sought against Dr. Bauerle at trial. *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999) (court rejected similar argument finding that the plaintiff was not prevented from presenting to the jury evidence of the full amount of the decedent's medical bills). Nonetheless, to the extent that Mrs. Green argues that her verdict was insufficient, she had the ability to seek an additur

its earlier findings that the jury's verdict provides a reasonable and fair calculus of the relative values of the Greens' damages claims that may be utilized as one measure by which the $2 million settlement may be allocated between the Greens.[3] Using that rubric, the Court comes to the same result as using the "marital property" rationale as discussed above. The Greens would thus be entitled to a total judgment of $825,270 against Dr. Bauerle with Mr. Green receiving a judgment of $665,789.47, and Mrs. Green receiving a judgment of $159,480.53.[4]

Finally, Dr. Bauerle has identified 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.

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from this Court following the trial, but she did not do so, and as a result, that argument has been waived.

[3] The Court recognizes that the jury's determination of damages for both Randall Green and Ann 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 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).

[4] It appears that the judgment amounts under the two approaches should be identical, but in retrospect, this Court appears to have made a $270 mathematical error in the Greens' favor in its original order, which was also acknowledged by the Supreme Court in a footnote in its memorandum opinion. As indicated, the error is in the Greens' favor, and Dr. Bauerle agrees that that error need not be corrected given that the original sum has already been paid into the Court by the Defendants' insurer pursuant to Rule 67.

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. The Court agrees. Based on a review of that post-trial procedural history, which is appropriate and relevant for this Court to consider in addressing the issues on remand, the Court concludes that the acceptance of funds by Mrs. Green to partially satisfy the judgment entered in her favor is inconsistent with the Greens' current position that Mrs. Green's allocation was $1 million (as intended by the parties to the Grand Strand settlement) and thus no payment of any amount was required to satisfy Mrs. Green's verdict of $550,000. But, by accepting the $64,883.68 and satisfying her judgment in that amount, Mrs. Green took the position previously in this litigation 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. Therefore, the Court finds that the Greens are precluded from taking the position that the Greens' verdicts are each subject to a $1 million setoff.[5]

IT IS, THEREFORE, ORDERED that the Defendants Motion for Setoff is granted with respect to the $2.025 million in settlements received by the Plaintiffs from Grand Strand

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[5] In addition, the Court recognizes that the Greens' post-trial acceptance of funds to satisfy Mrs. Green's verdict is persuasive evidence that the Greens never intended for the $2 million settlement with Grand Strand to be equally allocated.

Regional Medical Center, LLC and Carolinas Medical Response. The Horry County Clerk of Court is directed to enter a judgment in favor of both Plaintiffs jointly in the amount of $825,270.00. The Plaintiffs have already received $625,270.00 for which the judgments have been partially satisfied during the pendency of the cross-appeals. The Clerk of Court is currently holding the sum of $218,164.13, which includes accrued interest on the $200,000 that remains to be paid to the Plaintiffs. The Clerk of Court is directed to remit that sum to the Plaintiffs, together with the interest that has accrued while that sum has been held in trust by the Court pursuant to Rule 67, SCRCP, and once that payment is made, the Plaintiffs shall file a satisfaction fully extinguishing the judgments entered against the Defendants in this litigation.

AND IT IS SO ORDERED.

STEVEN H. JOHN
Presiding Circuit Court Judge
Fifteenth Judicial Circuit

EXHIBIT 7

Supreme Court Remand Order

2011-CP-26-7403

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

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

same injury . . . (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater." (emphasis added)); *Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012) ("[B]efore entering judgment on a jury verdict, the [trial] court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim *for the same injury*." (emphasis added)).

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

C. The Greens' Petition

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

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

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> > (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
> >
> > (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

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

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

D. Conclusion

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

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

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

EXHIBIT 8

Trial Court's Order Following Remand

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

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

FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

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

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

ANALYSIS

"A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (citing Welch v. Epstein, 342 S.C. 279, 312-13, 536 S.E.2d 408, 425 (Ct.App.2000)); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998); Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct.App.1986).

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

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

> **A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant.** This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. **Settlements are not designed to benefit nonsettling third parties.** They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling party is worsened by the terms of a settlement, this is a consequence of the refusal to settle. **A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.**

Riley v. Ford, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015) (quoting Lard v. AM/FM Ohio, 901 N.E.2d 1006 (Ill. App. 2009) (citing Muro v. Abel Freight Lns., 669 N.E.2d 1217 (Ill. App. 1996)) (emphasis added). In determining that it was error to reapportion a good faith settlement to benefit a non-settling defendant, the Court in Riley considered the "totality of the circumstances," which it indicated "particularly" included both the reasonableness of the overall amount paid to the claim and the evidence on the record supporting damages under that claim. Riley, 414 S.C. at 196. These factors are also particularly relevant to the analysis in the present case.

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

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

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

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

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

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

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

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

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

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

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

> [T]he party seeking departure from the application of standard set-off rules bears the burden of proof and must be 'prepared to justify such [reallocation] as fair, bona fide, and just,' particularly where 'there is an executed contract between [the parties] which is not contested between them but which is sought to be invalidated by third parties.'

Riley v. Ford, 414 S.C. 185, 196, 777 S.E.2d 824 (2015) (quoting In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895)). Considering the entirety of the relevant circumstances, allocation of the settlement based upon the amount each jury verdict bore to the whole would be grossly inequitable in this case for several reasons:

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

Second, the Plaintiffs did not carry identical burdens of proof at trial. Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998); Cook v. Atlantic Coast Ln. R.R., 196 S.C. 230, 243, 13 S.E.2d 1 (1941). "Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative." Preer v. Mims, 323 SC 516, 521, 476 SE2d 472, 474 (1996). "Each Litigant was entitled to a verdict based on the law and the evidence." Page v. Crisp, 303 S.C. 117, 119, 399 S.E.2d 161, 162 (Ct. App. 1990). The elements of damages which could have been considered in arriving at the two separate verdicts were not the same, and the setoff should not be calculated based upon the ratio each bore to the whole.

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

Third, this would disregard the settling parties' intentions and contradict the policy concerns which favor the fostering and promotion of settlements. The verdict amounts were unknown and uncertain factors at the time of settlement and thus cannot be relied upon as a complete and accurate reflection of the circumstances and motivations underlying the settling parties' decisions. "Indeed, parties regularly reach compromise settlements for a variety of reasons, including the vagaries and unpredictability of litigation and the desire for finality." Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007).

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

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

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

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

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

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

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

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

_____
Steven H. John
Resident Circuit Court Judge
Fifteenth Judicial Circuit

October ____ 2019
Conway, South Carolina

Horry Common Pleas

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

Case Number: 2011CP2607403

Type: Order/Other

So Ordered

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

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

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

v.

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

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order Re: Operation of the Appellate Courts During the Coronavirus Emergency (Amended May 29, 2020), I do hereby certify that I have served the **Respondents Motion To Strike the Record on Appeal** and the **Memorandum in Support of the Motion to Strike the Record on Appeal** on all counsel of record via email only at the addresses below:

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September 23, 2020

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

RE: Mark Green, as Personal Representative of the Estate of Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D.,P.C.
Civil Action No. : 2011-CP-26-7403
Court of Appeals Tracking No: 2020-000046

Dear Ms. Kitchings,

Please find attached for filing the **Respondents' Motion to Strike the Record on Appeal** and **Memorandum in Support of Motion to Strike the Record on Appeal** in the above-referenced case. By copy of this correspondence, copies are being served on all counsel of record via email only pursuant to Section (g)(3) of the Supreme Court's Order Re: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020). The filing fee will be forthcoming via U.S. mail within 5 days of this correspondence.

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

With kindest regards, I am

Sincerely,

Cristin A. Uricchio

Enclosures

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