

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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Nov 30 2020

SC Court of Appeals

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

v.

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

SUPPLEMENTAL RECORD ON APPEAL

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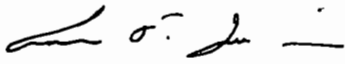
PETITION FOR REHEARING

The Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. petition the South Carolina Court of Appeals for a rehearing in part of the Court's recent decision in *Green v. Bauerle*, Op. No. 2016-UP-052 (S.C. Ct. App. filed February 3, 2016).

The grounds for the Appellants'-Respondents' petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellants'-Respondents' petition for rehearing is based on the Court's decision in *Green v. Bauerle*, Op. No. 2016-UP-052 (S.C. Ct. App. filed February 3, 2016); the supporting memorandum filed herewith; the briefs, Record on Appeal and Supplemental Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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February 18, 2016

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**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

The Appellants-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. (hereafter collectively referred to as "Dr. Bauerle") have petitioned this Court for a rehearing in part of its recent decision in *Green v. Bauerle*, Op. No. 2016-UP-052 (S.C. Ct. App. filed February 3, 2016). Dr. Bauerle respectfully submits that the following points were overlooked or misapprehended by this Court:

In its opinion, this Court concluded that the trial court did not err in denying the set-off for the settlement amounts paid by the at-fault driver and by the Greens' underinsured motorist carrier. Given the Court's citations which is the only analysis provided given the disposition under Rule 220(b), SCACR, Dr. Bauerle understands that the Court must have concluded that the injuries resulting from the alleged malpractice were not the "same injuries" for which the at-fault driver was also liable.

Dr. Bauerle submit that the Court, like the trial court, overlooked the rule of law in *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984), which is not cited in the Court's opinion. In *Graham*, the South Carolina Supreme Court explained that "[t]he general rule is that if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury." *Id.* See also, *Bessinger v. DeLoach*, 230 S.C. 1, 94 S.E.2d 3 (1956); *Fairchild v. South Carolina Department of Transportation*, 385 S.C. 344, 683 S.E.2d 818 (Ct. App. 2009), *aff'd*, 398 S.C. 90, 727 S.E.2d 407 (2012). Accordingly, South Carolina law provides that where the original accident resulted in injuries that required medical care and the medical care as provided results in additional injuries, the original tortfeasor is liable *for all of the injuries* as a matter of law. Under this rule of law, the malpractice committed by the medical providers in treating the original injuries is reasonably

foreseeable as a matter of law, and as a result, the malpractice cannot serve as an intervening act or cause that breaks the causal chain.

This Court, like the trial court, erred in failing to apply the *Graham* rule. As Dr. Bauerle argues, the original tortfeasor, i.e., the at-fault driver who caused the motor vehicle accident that necessitated Randall Green's hospitalization and the medical care rendered by Dr. Bauerle and others, was legally liable in tort for the very "same injuries" on which the jury returned its verdict, specifically the injuries resulting from the malpractice found by the jury.

In their case-in-chief, the Greens presented the expert testimony of Dr. Richard Matza, who like Dr. Bauerle is an orthopaedic surgeon. Mr. Matza testified that Dr. Bauerle "was brought in as an orthopaedic surgeon because of [a] fracture/dislocation of [Mr. Green's] right hip." (R. 194). The fracture/dislocation resulted from motor vehicle accident. Mr. Green also presented at the ER with "a severe laceration to his right forearm that was bleeding profusely." (R. 34-35). Dr. Matza testified that Mr. Green had lost "a sizeable amount of blood" from the right forearm laceration and from the fractured hip. (R. 198, 211-212). That loss of blood "was the cause, the direct cause for [Mr. Green's] decompensation, crashing, arresting and the need to be resuscitated." (R. 198). Further, Dr. Matza opined as follows:

[T]he delay of treatment of the bleeding which led to the arrest, which led to a zero blood pressure for a period of time, at least a half hour to 40 minutes, led to decreased

blood flow or no blood flow to the arteries in the spine and it is through the lack of blood supply to the spine that the ultimate injury to the spine occurred between the mid thoracic region of T6 to T12, somewhere in that area where the artery resides and directly led to the paraplegia or the paralysis of both Mr. Green's lower extremities.

(R. 201). Thus, according to Dr. Matza's testimony and the Greens' theory of liability against Dr. Bauerle, the delay in the surgery to repair the right forearm laceration, as caused by Dr. Bauerle's alleged insistence that a CT scan of the hip be taken, proximately caused Mr. Green's paralysis.

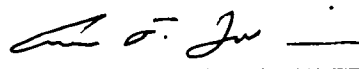
In sum, the Greens' theory of liability makes the paralysis and consequential damages, including Mrs. Green's loss of consortium, a foreseeable and proximate result of the original injury which resulted from the motor vehicle accident. The rule of law as described in *Graham* and later cases applies here. South Carolina law provides that the at-fault driver was liable *for all of the injuries and damages claimed against Dr. Bauerle*, including Ann Green's loss of consortium. In other words, given the rule of law in *Graham*, which this Court did not address, the settlement by the at-fault driver was for the "same injuries" as resulted from the medical malpractice.

Accordingly, Dr. Bauerle respectfully requests that the Court grant a rehearing of this one particular issue and to conclude that Dr. Bauerle is entitled to a set-off for the \$200,000 paid for the at-fault driver in settlement of the motor

vehicle negligence and loss of consortium claims.¹ Mr. and Mrs. Green received \$100,000 each in their settlement with the at-fault driver. Dr. Bauerle requests on rehearing that the Court grant the additional set-off for those amounts.

Respectfully requested,

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February 18, 2016

¹ Dr. Bauerle has abandoned his set-off claim for the \$225,000 received by the Greens from their own underinsured motorist insurer.

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**PETITION FOR REHEARING OF RESPONDENTS-APPELLANTS RANDALL M.
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INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(i), SCACR the Respondents-Appellants Randall M. Green and Ann Green (“the Greens”), respectfully petition this Court for a rehearing of Unpublished Opinion No. 2016-UP-052, filed February 3, 2016. Rehearing is warranted when the Court has overlooked or misapprehended an argument. Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001). The grounds for this motion which the Court overlooked or misapprehended are set forth in detail below.

ARGUMENT

I. Section 15-38-50 does not apply to the facts at hand.

The Trial Court erroneously labeled all of Mr. Green’s injuries as a single injury for “paralysis,” and lumped all of conduct of the various parties into a single “negligence” cause of action.

A. Respondents-Appellants’ Settlement with Grand Strand Regional Medical Center was not for the same cause of action as the verdicts against Bauerle.

In reaching its opinion, this Court relied on Riley v. Ford Motor Co., 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015), “a non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same *cause of action*.” (emphasis added). In the present case, the Greens’ settlement with Grand Strand Regional Medical Center (“GSRMC”) was for a different cause of action than the verdict against Bauerle. The Greens asserted a direct negligence cause of action against GSRMC; whereas, the Greens’ alleged a medical malpractice cause of action against Bauerle.

The direct negligence causes of action asserted against GSRMC were based on the hospital’s failure to implement and enforce policies and procedures. Specifically, the hospital

staff was inconsistent and insufficient in documenting vital statistics, communicating among the trauma team and, failing to have a team leader oversee Mr. Green's course and coordinating his care (R. p. 461, 468-469). As a result of GSRMC's negligence, Mr. Green suffered injuries over a two hour time period prior to Bauerle's arrival at the hospital. The Green's expert, Dr. Chariker, testified that all of the negligent conduct alleged directly against the hospital occurred well before Mr. Green was taken to PreOp and seen by Dr. Bauerle (R. p. 461).

On the other hand, the medical malpractice alleged against Bauerle was only for his unforeseen conduct in negligently removing Mr. Green from PreOp, ultimately causing Mr. Green's paralysis. Based on the test utilized by the Court in Young v. Tide Craft, 270 S.C. 452, 242 S.E.2d 671 (1978), (1) Bauerle's intervening negligence was not a probable consequence of any negligence by GSRMC employees, (2) nor was it a cause that concurred and combined with the negligence of GSRMC. Neither Mr. Green's infarction nor the injuries the jury found to result therefrom would have occurred in natural course in the absence of Bauerle's interruption of Mr. Green's treatment. By his own testimony, Bauerle admitted that he did not know Mr. Green's blood pressure when he ordered him to CT but had he known Mr. Green's vital signs, he would not have sent him to CT. (R. p. 307, lines 6-9; p. 308, lines 18-22). His own expert testified that it is the physician's responsibility to know the condition of a patient before issuing orders. (R. p. 322, line 14-p. 323, line 4). It is common knowledge in the trade that removing a patient from the preoperative waiting room ("Pre-Op") with a blood pressure of 72/56 and with a heart rate of 135 is "far removed from good practice" and a drastic deviation from the standard of care. (R. p. 198, line 7-p. 199, line 11; p. 281, lines 7-15; p. 308, lines 18-22; p. 456, lines 5-10). Based on Bauerle's knowledge and experience, it was highly remote that he would interrupt the treatment of a critically ill patient. Therefore, it cannot be contended that Bauerle's

intervening negligence was a probable consequence of, nor that it combined and concurred with, any wrongdoing on the part of GSRMC. Bauerle's negligent acts in fact caused the cessation of the hospital's treatment and sent the care and treatment of Mr. Green in an entirely different direction. After Bauerle's intervention, the treatment by the hospital was limited to correcting the damage done by Bauerle and then shipping Mr. Green to the Medical University of South Carolina for treatment of his original injuries.

Further, there is no evidence that Mr. Green's paralysis would have occurred absent Bauerle stopping Mr. Green's treatment by removing him from Pre-Op. Dr. Chariker testified that the cardiac arrest was not inevitable; rather, *but for* Bauerle's negligence it would not have occurred and Mr. Green would not be a paraplegic. (R. p. 474, lines 5-15). Since Bauerle's intervening negligence alone proximately caused Mr. Green's spinal infarction and paralysis, it cannot be contended that the Greens' Settlement with GSRMC was for the same injury or cause of action as their verdict against Bauerle.

Further, even if the Court finds the negligence of GSRMC and Bauerle were concurrent causes of Plaintiffs' injuries, Section 15-38-50 does not apply because GSRMC can only be held liable for medical malpractice by virtue of vicarious liability, and vicariously liable parties are not joint tortfeasors. Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003).

B. Respondents-Appellants' Settlement with Grand Strand Regional Medical Center compensated different injuries than the verdicts against Bauerle.

In rendering its opinion, this Court relied on Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998), stating allowing setoff ensures "there can only be one satisfaction for an injury or wrong." In Hawkins, there is clearly

one identifiable injury, that being the decedent's death. Just as there was also only one identifiable injury in Riley v. Ford, Rutland v. S.C. Dep't of Transp., and Smith v. Widener.

The Court overlooked or misapprehended that, in the present case, Mr. Green suffered many different physical injuries as a result of the hospital's negligence. The Greens did not allege that the negligence of the hospital caused the cardiac arrest or resulting injuries. Before Bauerle's arrival, Mr. Green was continually administered IV fluids and was administered morphine despite increasing instability. Dr. Chariker testified that the tissues of his body were not receiving enough oxygen. (R. p. 465). As a result, Mr. Green was alleged to have suffered brain damage as well as injuries to various organs due to lack of oxidation.

Mr. Green also suffered many different injuries as a result of Bauerle's negligence and the resulting spinal infarction including, but not limited to, paralysis (inability to move or feel his legs), loss of sexual functioning, neurogenic bowel, and neurogenic bladder. Further, each of these injuries resulted in different damages.

Clearly, there are many injuries distinct from Mr. Green's inability to walk, which result in very different economic damages, and different levels of loss of enjoyment of life, an element of damages which is so distinct for a paraplegic that it has been held to be a compensable intangible injury in South Carolina as a matter of law. Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969). The Green's settlement with GSRMC was for all of the injuries Mr. Green suffered at the hospital, as a result of their negligent conduct, prior to Bauerle interrupting Mr. Green's care. The jury awarded a verdict against Bauerle for the injuries and damages the jury determined that Bauerle caused. The Court overlooked or misapprehended that, without any evidence as to what injuries were included in the settlement or verdict, it was error to determine that Bauerle was entitled to setoff. Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998)

II. The Court’s Opinion Erroneously Allows for an Allocation of a Settlement Between two Causes of Actions without a Factual Analysis.

In reaching its opinion, this Court relied on Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012) holding “when a settlement is argued to involve two claims . . . the circuit court must make a factual determination of how to allocate the settlement between the two claims.” This Court specifically looked at Smith’s application in Rutland v. S.C. Dep’t of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012), holding the trial court correctly reallocated settlement proceeds - which allocated money specifically to the plaintiff’s pain and suffering – when no evidence supported pain and suffering. The Court misapprehended or overlooked the differences between Rutland and the case at bar.

In Rutland, the negligence of all the defendants was based on the same injury (a death) resulting in the same damages, claimed under the wrongful death and survival causes of action, arising out of the same facts; i.e., that the negligence of all the defendants combined to result in the death of the decedent as a result of her being partially ejected from the side window of the vehicle. Defendant one, GM, was liable as a result of the window being made of the wrong type of glass, and defendant two, SCDOT, was liable in causing the accident that caused the window to break resulting in decedent being partially ejected. The only inference that could be drawn from the evidence in that case was that she would not have been partially ejected if either: (1) the accident had not occurred; or (2) the window was properly constructed and did not break.

Here, the Court overlooked or misapprehended that there was no *factual determination* by the trial court as to how to allocate the claims. The trial court allocated the Greens’ settlement with GSRMC based on a percentages analysis derived from the verdicts rendered for the injuries Bauerle caused. This is inequitable in that at trial, the Greens did not present any evidence as to the injuries caused by GSRMC because the only defendant remaining in the case at that point

was Bauerle. Moreover, the form of the verdict specifically limited the jury to a finding that Bauerle's conduct "caused Plaintiff Randall M. Green's injuries." (R. p. 28 – 31.)

The present case is distinguishable from other setoff cases because it does not involve only one single identifiable economic injury as in Smith, and because it involves an unallocated settlement. Accordingly, the Court overlooked or misapprehended two very important points; (1) "[t]he party seeking departure from the application of standard setoff rules bears the burden of proof"; and (2) the party must demonstrate that the allocation sought is "fair, bona fide, and just." Riley v. Ford, *citing* Lard v. AM/FM Ohio, Inc., 901 N.E.2d 1006, 1018 (Ill.App.2009). Furthermore, the Supreme Court in Riley made clear that, in meeting this burden, the defendant can submit evidence of manipulation of an allocation in order to show bad faith in negotiations; however, advantageous apportioning of the settlement is not *per se* bad faith. Id. In the present case, Bauerle did not request an allocation of the settlement. More importantly, Bauerle did not even allege that the parties' failure to allocate the settlement was in bad faith, or that it was bona fide, fair and just for the court to perform an allocation based on a "percentages" analysis. This is particularly true under facts where such an analysis ensured setoff of the entire amount of the settlement without regard for consideration paid for injuries or causes of action which would not have been included in the verdicts against him.

The Riley opinion did distinguish that the "percentages" analysis was "manifestly without merit" under the circumstances of that case. However, the percentages analysis used was also based on the relative reasonableness of the settling parties' previous allocations. It was not based on the jury verdicts, and it was not based on facts involving different causes of action for different injuries to multiple plaintiffs. In this particular case, the unfortunate result has been that Bauerle has escaped payment for injuries which the jury decided he alone caused, and the Greens

have been deprived of all consideration paid as a result of their good faith willingness to negotiate and settle.

III. The Greens Have Not Been Fully Compensated For Their Injuries.

The Court has consistently held that the purpose of S.C. Code Ann. § 15-38-50 is to prevent a double recovery. Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015). In the case at bar, the Green's entered into a \$2,000,000.00 settlement agreement with GSRMC for damages GSRMC caused the Greens. At the conclusion of trial, the jury awarded a \$2,300,000.00 verdict against Bauerle for injuries he caused Mr. Green, as well as a \$550,000.00 verdict against Bauerle for Mrs. Green's loss of consortium claim.

At trial, the Greens presented expert testimony valuing the total cost of Mr. Green as a result of his paralysis over his life expectancy at \$3,668,176.00 (R. p. 167-168.) The figure presented at trial did not include any monetary amount as compensation for pain and suffering or loss of enjoyment of life. Based on the evidence presented at trial, the sum of Mr. Green's verdict and settlement falls short of fully compensating him for his total economic loss, let alone his pain and suffering and other elements of compensable damages.

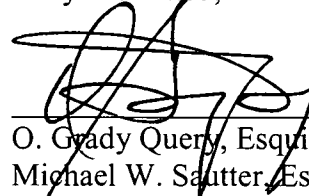
Similarly, the Greens presented expert testimony to establish actual damages to Mrs. Green for her services as sole caretaker in the amount of \$1,209,600.00, as of the date of the trial. (R. p. 167; p. 385). This figure does not include compensation to Mrs. Green for her loss of consortium. Based on the evidence presented at trial, Mrs. Green's loss of consortium verdict falls short of fully compensating her for her losses or even the value of the care and services she has rendered to Mr. Green since the accident, let alone all of the other damages included in her loss of consortium cause of action.

CONCLUSION

WHEREFORE, the Respondents-Appellants, Randall and Ann Green, seek an Order granting Respondents-Appellants a rehearing.

February 18, 2016

Respectfully submitted,



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SC SUPREME COURT

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Op. No. 2016-UP-052
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PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on March 24, 2016.

QUESTIONS PRESENTED

1. Was it error to allocate an unallocated settlement paid jointly to a husband and wife solely for the purpose of setoff, and to make that allocation based on percentages derived by comparing the separate verdicts where different causes of action and injuries were alleged against the settling and non-settling defendants?
2. Was it error to find that the settling and non-settling parties were joint tortfeasors liable for the same single injury, entitling the non-settling party to setoff of all settlement funds where multiple injuries with different damages were alleged to arise out of separate tortious acts occurring at different times, the settlement was unallocated, and the verdicts did not specify the injuries compensated?

STATEMENT OF THE CASE

This action arises from the negligent treatment of Randall M. Green ("Mr. Green") after he and his wife, Ann Green ("Mrs. Green"), and their son were involved in a severe car accident on April 17, 2004. The Greens settled with the at-fault driver's insurer as well as their own underinsured motorist carrier for injuries sustained in the vehicle accident. Subsequently, Randall and Ann Green ("The Greens") filed a lawsuit on May 30, 2005 against Dr. Wayne Bauerle ("Bauerle"), asserting causes of action for medical malpractice and loss of consortium. Grand Strand Regional Medical Center ("GSRMC") and the ambulance carrier, Carolina Medical Response, Inc. ("CMR") were later named as additional parties in 2007. For a nominal payment of \$25,000.00, CMR was released from the action.

On October 15, 2012, the Greens filed a Fourth Amended Complaint asserting a direct negligence claim for Negligent Supervision, Hiring, and Training and specifically

pleading the Non-Delegable Duty doctrine as the basis for GSRMC's vicarious liability for medical malpractice.(R. p. 32-44). On April 18, 2013, summary judgment was granted to GSRMC on both causes of action for vicarious liability and Negligent, Supervision, Hiring, and Training. (R. p. 1-15). The order was not appealed by any of the parties.

Subsequently, the Greens jointly accepted a settlement of \$2,000,000.00 from GSRMC in exchange for a Covenant Not Execute and Covenant Not To Sue. The settlement was not allocated to specific causes of action or between the two Plaintiffs. The Covenant specified that it was not intended as full compensation for all injuries and damages alleged in that lawsuit or limited to the claims pending therein. It further specified that the payment was expressly paid only on behalf of GSRMC, and "shall in no way" affect any action against any other person. On June 11, 2013, a stipulation of dismissal with prejudice as to GSRMC was filed by consent of all parties, including Bauerle. (R. p. 17; pp. 518-522).

The five day medical malpractice trial against Bauerle commenced on September 9, 2013. The jury found that Bauerle's deviation from the standard of care caused Mr. Green "injuries," awarding him \$2,300,000.00. The jury awarded Mrs. Green \$550,000.00 for her loss of consortium in a separate verdict. Bauerle made a motion for setoff based on S.C. Code Ann. § 15-38-50, which was granted as to the entire amounts paid equally to the Greens by GSRMC and CMR. (R. pp. 21-22).

For the purpose of applying the setoff, the court allocated the **unallocated** settlement funds utilizing its **own formula based on percentages** derived by combining the amounts of the Plaintiffs' separate verdicts. There was **no factual determination** as to the settling parties' intentions *or* the reasonableness of not allocating the settlement and paying the funds equally to both Plaintiffs. The trial court denied setoff as to the funds paid

to the Greens by MUSC, the at-fault driver, and the Green's own UIM insurer. (R. pp. 20-22).

The Court of Appeals affirmed the judgment of the circuit court. Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., Op. No. 2016-Up-052 (S.C. Ct. App. filed February 3, 2016). Both parties filed Petitions for Rehearing, which were denied on March 24, 2016. Petitioners seek a writ of certiorari to review that decision.

FACTS

Following a car accident on April 17, 2004, Mr. Green was transported to Grand Strand Regional Medical Center ("GSRMC") with a right hip fracture and dislocation, and a laceration on his right arm. He arrived in the Emergency Room ("ER") at 12:00 p.m. and was noted to be cooperative, awake, alert, making eye contact, communicating with normal speech, exhibiting no confusion, and without any signs of face or head trauma. The ER physician, consulted with the on-call orthopedic surgeon, Dr. Wayne Bauerle, over the phone regarding the hip injury. (R. pp. 434-435; . pp. 343- 344; p. 357; p. 359; p. 361; p. 485, lines 13-21; p. 362).

Due to the alleged negligent care Mr. Green received over the next two hours in the emergency room, he developed further injuries and serious conditions. Expert testimony at trial indicated that "[s]o many things had gone awry," there was no way to determine the cause of his increasing instability. Due the decline in his condition, at 2:00 p.m., Mr. Green was urgently taken from the ER to the pre-operative area ("Pre-Op") where he could be closely monitored and an anesthesiologist was present to control his vital signs and perform immediate resuscitative procedures if his condition worsened. Dr. Lintz then called Dr. Bauerle again and told him that he felt Mr. Green needed to be in Pre-Op and there was no

time for a CT scan of his hip. Bauerle disagreed and was “pretty adamant about getting the CAT scan of the hip first.” At trial, Bauerle stated, “I had no disagreement, I knew exactly what needed to be done, it’s what I did.” (R. p. 291, lines 15-20; p. 345; p. 447, lines 12-25; pp. 457-463; p. 465; p. 471, lines 12-25).

Mr. Green’s cognitive functioning had also markedly declined by the time he was taken to Pre-Op at 2:00 p.m. Of significant note, this decline in his cognitive status occurred sometime after his arrival at GSRMC and before Dr. Bauerle’s involvement. He would later be diagnosed with a brain injury at MUSC which interferes with his speech and ability to follow commands. This and the other injuries suffered during the previous two hours at the hospital, while subject to the settlement with GSRMC, **were not at issue in the trial against Bauerle.** (R. p. 215; pp. 248-250, p. 349-350; p. 364; p. 419; p. 465; p. 468; pp. 483-484).

When Bauerle arrived at the hospital, he went into Pre-Op and removed Mr. Green for the CT scan of his hip, despite vital signs warning that he was on the verge of a cardiac arrest. Bauerle conceded at trial that he would not have removed him had he been aware of his condition. Expert testimony indicated that Bauerle “drastically” deviated from the standard of care in taking a “totally unstable” patient out of Pre-Op where his vital signs were being closely monitored and controlled by Dr. Peters, the anesthesiologist who could also perform the emergency procedures necessary to prevent a cardiac arrest. (R. p. 308, lines 18-22; p. 365; p. 419; p. 456; p. 459, lines 13-15).

While away from Pre-Op for the CT scan, Mr. Green went into cardiac arrest, which was discovered in a “serendipitous fashion” by Dr. Lintz, who “happened” to be passing by. Dr. Lintz immediately paged Dr. Peters from Pre-Op before intubating and attempting to resuscitate Mr. Green himself in the emergency room. According to the resuscitation

record, CPR ceased 26 minutes later. Mr. Green was transferred to MUSC the next day, and the nurse receiving him from the ambulance noted that he couldn't wiggle his toes, discovering that he was paralyzed. He spent the next two months being treated for innumerable serious injuries and conditions, before being discharged to a rehabilitation facility. (R. pp. 197-198; pp. 263-264; p. 346; p. 348- 356; p. 365; p. 419; p. 446; pp. 488-489).

At trial against Bauerle, the Greens alleged that (1) Bauerle deviated from the standard of care in **removing Mr. Green from Pre-Op**; (2) Mr. Green's location away from Pre-Op proximately caused the cardiac arrest; (3) the cardiac arrest proximately caused a spinal cord infarction; and (4) the spinal cord infarction proximately caused several specific injuries. **Each injury alleged to result from Bauerle's tortious act was supported by evidence of distinct damages, and there was conflicting evidence at trial as to whether specific injuries resulted from the infarction.** (R. pp. 128-132; pp. 134-136; pp. 138-141; pp. 144-145; pp. 151-174; p. 176-181; p. 185-192; p. 350; p. 370-390; pp. 483-484; pp. 493- 500).

At trial, the jury returned verdicts for the Greens in the amount of \$2,300,000.00 for Medical Malpractice and \$550,000.00 for Loss of Consortium. The verdict form indicated that Bauerle deviated from the standard of care and that this deviation caused Mr. Green's "injuries," but **did not indicate which "injuries" or "actual damages" were included.** At trial, the total future medical expenses for injuries alleged to have resulted from the infarction exceeded the entire medical malpractice jury verdict, indicating that the jury did **not** find that Baurele's negligence proximately caused all injuries and damages alleged. Further, there was evidence that Mr. Green was urinating "without difficulty" upon discharge from MUSC months later, creating conflicting evidence as to whether the bladder

injury resulted from the spinal infarction as alleged by Plaintiffs. This injury was supported by evidence of distinctive damages to **both** Plaintiffs, inclusive of the value of Mrs. Green's care in catheterizing him five to six times a day and the past and future cost of catheters over the course of 25.65 years totaling \$393,214.50. There is no way of determining whether the jury included this injury and resulting damages in the malpractice verdict. (R. pp. 28-31; p. 263, line 16- p. 264, line 8; p. 336; p. 348;p. 350; p. 379).

Bauerle filed a motion for setoff, claiming that S.C. Code Ann. §15-38-30 entitled him to setoff of all settlement funds paid by GSRMC, CMR, the at-fault driver, the Green's own UIM insurer, and MUSC for funds paid to settle a separate suit arising out of severe complications resulting from a negligently retained sponge. The basis of his motion was that the Greens ". . . sought recovery from all Defendants for the same injury." The trial court denied the motion as to the at-fault driver, the Greens' UIM insurer, and MUSC. However, the trial court found that both of the verdicts, the entire unallocated settlement with GSRMC, and the settlement with CMR would be set off because they were for the same "injury" and the same cause of action as the jury verdict. (R. p. 21; pp. 45-48).

For the sole purpose of providing Bauerle the benefit of setoff, the trial court then found that the *unallocated* settlement with GSRMC belonging *equally* to Mr. and Mrs. Green would be divided between them and apportioned between medical malpractice and loss of consortium. The order expressly stated that there existed no authority permitting it to allocate an unallocated settlement, but found that it "logically follows" it would be permitted based upon this Court's holding in Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012). Bauerle never requested that the settlement be allocated. Further, there were no arguments or findings as to the settling parties' intentions or whether it was unreasonable for the funds to be paid equally to the Greens and *not* be allocated to

specific causes of action. (R. pp. 18-23; pp. 45-47).

In order to effect the allocation, the court used its own formula which did not involve *any* factual determination regarding the Plaintiffs' respective damages as required by prior Supreme Court holdings. Rather, the court found that Plaintiffs had received "a combined verdict of \$2.85 million against the Defendants." The court then determined the percentage of this total amount represented by each Plaintiff's individual verdict, allocating these respective amounts to each Plaintiff. Accordingly, the trial court reduced Mrs. Green's equal interest in the \$2,000,000.00 settlement to \$385,694.91. The remaining \$1,614,035.09 was allocated to Mr. Green.

Finally, each of the Plaintiffs' verdicts against Bauerle was then reduced by the newly allocated amounts, reducing Mrs. Green's verdict to \$159,480.53 and Mr. Green's verdict to \$665,789.47. (R. pp. 21-22). Accordingly, the trial court's order rendered the effect of the verdict against Bauerle far more penalizing to Mrs. Green than it was to the actual tortfeasor. The Court of Appeals affirmed the trial court's rulings *in toto* without analysis.

ARGUMENTS

Pursuant to Rule 242, SCACR, Petitioners respectfully move for a Writ of Certiorari for this Court to review and reverse the Court of Appeals Unpublished Opinion 2016-UP-052 filed February 3, 2016. The Court of Appeals erroneously affirmed the trial court's grant of setoff for the funds paid by Grand Strand Regional Medical Center and Carolina Medical Response, allocating an unallocated settlement between Mr. and Mrs. Green on a percentage basis for the purpose of setoff. On both issues addressed, the Court of Appeals' Opinion conflicts with existing precedent and in the analyses undertaken,

creates novel issues of law for which no precedent exists. In so ruling, the Court of Appeals creates precedent in conflict with judicial economy.

I. IT WAS ERROR TO ALLOCATE AN UNALLOCATED SETTLEMENT PAID JOINTLY TO A HUSBAND AND WIFE SOLELY FOR THE PURPOSE OF SETOFF, AND TO MAKE THAT ALLOCATION BASED ON PERCENTAGES DERIVED BY COMPARING THE SEPARATE VERDICTS WHERE DIFFERENT CAUSES OF ACTION AND INJURIES WERE ALLEGED AGAINST THE SETTLING AND NON-SETTLING DEFENDANTS.

The trial court and Court of Appeals opinions are in direct conflict with this Court's rulings in Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015) and Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012). Specifically, there exists no precedent for allocating an **unallocated** settlement, particularly one paid jointly to a husband and wife. Ex Parte Gov't. Employee's Ins. Co. ("GEICO"), 373 S.C. 132, 644 S.E.2d 699 (2007). Moreover, there exists no precedent for *reallocating* a settlement amongst multiple Plaintiffs in order to allow a non-settling tortfeasor the benefit of setoff, particularly where the causes of action and injuries alleged against the various Defendants were not identical. Ward V. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). In cases permitting reallocation of a settlement, such as Rutland, Epting, and Welch, the reviewing court found *no evidence* to support the settling parties' allocation decision thus rendering it, by definition, a sham.

Here, the trial court's reason for allocating the settlement was that Bauerle was entitled to a setoff. As was also noted in the Riley opinion, Bauerle did not suggest that the lack of allocation and Plaintiffs' decision to share equally in the funds was unreasonable. There was no consideration that, as a matter of law, the parties had *no* reason to allocate the settlement as this was not a death case. Further, the married Plaintiffs intended to use the funds for their joint necessities of living, and compelling evidence of Mrs. Green's

damages renders her equal entitlement to the settlement *extremely* reasonable, and the analysis should have ended there. Moreover, the arbitrary method used to perform the allocation certainly should not have been based on the jury determination of the damages *Bauerle* caused. Riley, *supra*. As this Court stated in Riley v. Ford, “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.

The trial court and Court of Appeals relied on Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct.App.2012), holding “when a settlement is argued to involve two claims . . . the circuit court must make a factual determination of how to allocate the settlement between the two claims.” However, this case is distinct from Smith v. Widener as that case involved only a single identifiable injury alleged against all defendants; i.e., a specific amount of money that was lost, therefore reallocation was not even at issue in that case. Even if that case was applicable to the present facts, the court in the present case did *not* utilize a “factual determination” as required by the rule for which it and the Court of Appeals cited Smith.

Allocating an unallocated settlement between multiple Plaintiffs in order to apply a setoff, particularly in a case involving multiple injuries and causes of action, represents a departure from the standard setoff rules.

[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, 777 S.E.2d 824 (2015)(*quoting* In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895)). Not only did *Bauerle* *not* request an allocation, he certainly did not

meet his burden of proof in justifying such an allocation as bona fide, fair, and just. The Court reduced Mrs. Green's equal interest in the \$2,000,000.00 to a 19.3% share, allocating to her only \$385,694.91 of the funds received as consideration to release her claims against GSRMC. As the evidence of her extensive damages was not even a factor in this determination, the resulting amount can't, by definition, be considered bona fide, fair, and just. 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.

Even if the settlement and verdicts were for the same injuries and causes of action, and even if an allocation was permissible, the court should have allocated it **equally** between the two Plaintiffs. The lack of allocation is clearly evidence that they intended to share the funds equally, and any division between the husband and wife should have taken this into consideration. Permitting courts to allocate joint property unequally between a husband and wife without their consent for the purpose of setoff conflicts with precedent, and implies that the pecuniary interests of third party tortfeasors grants them standing to intervene and force the division of marital property. Ex Parte Gov't. Employee's Ins. Co. ("GEICO"), 373 S.C. 132, 644 S.E.2d 699 (2007).

Based on the facts, the decision to share equally in the funds would be *extremely* reasonable considering the extensive evidence of Mrs. Green's significant damages. Specifically, Mrs. Green alone provides Mr. Green's 24-hour care, spending very few hours in the day doing things for herself, including sleeping more than a few hours a night. For the past twelve years, she has catheterized her husband five to six times a day, requiring

her to set an alarm to wake up in the middle of the night. She lives with the knowledge that if she fails to do this even once, he will die. She manually evacuates his bowels. She physically lifts him, bathes him, prepares his meals, helps him eat, and takes care of all the household chores. She had not left the house for any length of time in the nine years prior to trial. The trial judge instructed the jury that she was entitled to recover for any expense "...incurred in the care and treatment of [her] spouse because of illness or bodily harm suffered by the spouse." According to the value of the care she provides annually, she had provided approximately \$1,209,600.00 worth of care as of the date of trial. The total cost of the future home care *she* will provide to her husband is \$2, 584,536.00. Therefore, it certainly would have been reasonable for the settling parties to allocate \$1,000,000.00 to Mrs. Green for her damages, and, by definition, the agreement to share the funds equally could not be a fraud or sham. (R. p. 158; p. 160; p. 167, pp. 185- 187; p. 191-192; pp. 335-336; p. 385; p. 495).

"Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify appellate reapportionment for the sole purpose of benefitting [the non-settling defendant]." Riley, 414 S.C. at 197. The fact that the lack of allocation was disadvantageous to Bauerle is not a permissible reason to deprive Mrs. Green of the money for which she had contracted based solely on the erroneous finding that he was entitled to have his own liability against her reduced. The trial court and Court of Appeals are in direct conflict with this Court's holding in Riley v. Ford, wherein the Illinois Court of Appeals was quoted favorably as follows;

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. Lard v. AM/FM Ohio, Inc., 901 N.E.2d 1006, 1019 (Ill. App. 2009); *citing* Muro v. Abel Freight Lines, Inc., 669 N.E.2d 1217 (Ill. App. 1996).

Riley v. Ford, 414 S.C. 185, 197, 777 S.E.2d 824 (2015).

Here, the trial court's order, affirmed by the Court of Appeals, referred to Rutland in stating that because "[t]he South Carolina Supreme Court has specifically authorized the equitable *reallocation* of settlements in cases where the settling parties had agreed to a certain allocation between claims," it therefore " . . . logically follows that a court may make an equitable allocation in a case where the settling parties did not even agree to any particular allocation between the claims." (R. p. 22). This reasoning parallels the Court of Appeals holding in Riley v. Ford, wherein the court stated the reallocation "makes sense." Riley at 190. In overruling the Court of Appeals in that case, this Court addressed that same logic before stating;

Essentially, the court of appeals decided it was within the province of a reviewing court to evaluate the reasonableness of not only the dollar amounts but also the relative percentage of settlement proceeds assigned to each claim.

Riley at 191.

In Riley, this Court ruled that the Court of Appeals had erred in reapportioning the settlement proceeds on the sole basis that the settling parties' allocation did not seem to be *proportionately* reasonable. In footnote 3 of the Riley opinion, this Court noted that the Court of Appeals' decision included no discussion of why the settling parties' allocation

was not reasonably based on the evidence or how it ran afoul of the public policy of preventing a double recovery. Similarly, the trial court and Court of Appeals in the present case failed to provide any discussion or findings regarding these issues. (R. p. 21).

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. In doing so, the court relieved Bauerle of his burden of showing that the unallocated settlement was unreasonable. 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.

The court's allocation resulted in a setoff that reduces Mr. Green's verdict to \$665,789.47, and Mrs. Green's verdict to \$159,480.53. Though plaintiffs deny that any allocation or setoff should have been applied, 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. 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 result would have been far more equitable in that it would have balanced the interests of *all* parties. The unfortunate result of the present holding was that the sole party who benefitted from the court's allocation of the settlement is also the *only* wrongdoer who refused to settle.

II. IT WAS ERROR TO FIND THAT THE SETTLING AND NON-SETTLING PARTIES WERE JOINT TORTFEASORS LIABLE FOR THE SAME SINGLE INJURY, ENTITLING THE NON-SETTLING PARTY TO SETOFF OF ALL SETTLEMENT FUNDS, WHERE MULTIPLE INJURIES WERE ALLEGED TO ARISE OUT OF SEPARATE TORTIOUS ACTS OCCURRING AT DIFFERENT TIMES, THE SETTLEMENT WAS UNALLOCATED, AND THE VERDICTS DID NOT SPECIFY THE INJURIES COMPENSATED.

Whether under § 15-38-50 or common law, “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 Company, 414 S.C.185, 195, 777 S.E.2d 824, 830 (2015). A cause of action is a form of redress for an injury or wrong arising out of a single set of facts. Taylor v. Medenica, 324 S.C. 200, 218, 479 S.E.2d 35,45 (1996); Jones v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 456 S.E.2d 429 (Ct.App.1995); Robert Harmon and Bore, Inc. v. Jenkins, 282 S.C. 189, 318 S.E.2d 371 (Ct.App.1984)(distinguishing causes of action in order to prevent a double recovery in the context of election of remedies cases). Where different conduct supports distinct injuries, there is no risk of double recovery, and the Plaintiff may recover under both causes of action. Taylor, 324 S.C. at 218, 479 S.E.2d at 45; Creach v. Sara Lee Corp., 331 S.C. 461, 502 S.E.2d 923 (Ct.App.1998); Jones, 318 S.C. 171, 456 S.E.2d 429 (Ct.App.1995).

The trial court and the Court of Appeals’ rulings are in direct conflict with the prior Supreme Court rulings of Riley v. Ford Motor Company, 414 S.C. 185, 777 S.E.2d 824 (2015), Rutland v. S.C. Dep’t of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012), Simmons v. Tuomey Regional Medical Center 341 S.C. 325, 33 S.E.2d 312 (2000), Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999), Rourke v. Selvey, 252 S.C. 25, 28, 164 S.E.2d 909, 910 (1968), and Pendleton v. Columbia Ry. Gas & Elec. Co., 133 S.C. 326, 331, 131 S.E. 265, 267 (1926). Additionally, the rulings are in direct conflict with the prior Court of Appeals holdings in Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665,

670 (Ct.App.2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003), Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998)) and Collins v. Bison Moving & Storage, 332 S.C. 290, 504 S.E.2d 347 (Ct.App.1998). The hospital was clearly liable for injuries arising at different points in time and out of different conduct than those alleged against Bauerle. Moreover, any portion of the settlement proceeds paid to release GSRMC's vicarious liability for medical malpractice, rather than direct liability for ordinary negligence, would not be subject to setoff under § 15-38-50.

Finally, the injuries alleged against Bauerle were distinct injuries as a matter of law. As there was conflicting evidence regarding the proximate cause of individual injuries with distinct damages at trial, there is simply no way to determine which "injuries" were included in the verdicts. The injuries alleged to have arisen out of the hospital's direct negligence prior to Bauerle's involvement were not the subject of the medical malpractice trial, making it impossible to discern from the evidence what injuries were included in the settlement with the hospital. As it was not possible to determine that the entire settlement and both verdicts *only* compensated the same injuries and respective damages, setoff should have been denied as a matter of law.

A. Plaintiffs did not assert a single cause of action against all Defendants.

In the present case, the Greens alleged that Bauerle was liable for the injuries resulting from a spinal cord infarction resulting from a cardiac arrest which was proximately caused by Mr. Green's *location away from Pre-Op*. There is no evidence that any agent of GSRMC in any way contributed to Bauerle's negligent conduct. To the contrary, the other doctors disagreed with his decision, and Bauerle conceded he made it clear to Dr. Lintz that he was "adamant" he was going to do it anyway. Further, there is no

dispute that the other doctors, nurses, and staff appropriately took Mr. Green to Pre-Op in a timely manner, a point admitted by Bauerle prior to trial. The case against Bauerle depended on the finding that his cardiac arrest and spinal infarction wouldn't have occurred if he had remained there. (R. p. 56; pp. 120-121; pp. 199-200, line 1; pp. 280-281; p. 300, lines 12-17; pp. 461-464; p. 474, lines 5-8; p. 479).

That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tortfeasors, even in the absence of community of design or concert of action, to a liability which is both joint and several, is a proposition recognized and approved in this state and supported by the great weight of authority elsewhere.

Rourke v. Selvey, 252 S.C. 25, 28, 164 S.E.2d 909, 910, (1968)(quoting Pendleton v. Columbia Ry., Gas and Elec. Co., 133 S.C. 326, 331, 131 S.E. 265, 267 (1926).

The claims against GSRMC and Bauerle clearly involved at least some injuries arising out of different negligent acts and at different points in time. Plaintiffs' expert, Dr. Chariker, testified that all of the negligent conduct alleged directly against GSRMC occurred well before he was taken to Pre-Op, at which time organs and tissues had been injured. He was in hemorrhagic shock, his blood was too diluted, he was suffering from severe metabolic derangement from overuse of crystalloids, and "his body was underperfused." At some point during his time at GSRMC, he suffered a brain injury which still makes speech difficult, renal failure, and aspiration which resulted in pneumonia requiring bronchoscopy. **None of these injuries were alleged to have resulted from the spinal infarction which occurred as a result of Mr. Green's location away from Pre-Op at the time he suffered a cardiac arrest.** Accordingly, the trial court and court of appeals rulings are in direct conflict with Riley v. Ford, wherein this Court made clear that setoff only applies to funds paid to settle the same cause of action. (R. p. 151, lines 13-15; p. 238, lines 2-11; pp. 348-356; pp. 459-461; p. 465; p. 465)

Furthermore, S.C. Code Ann. §15-38-50 applies to parties jointly *liable* in tort for the same injury. At the time of settlement, the vicarious liability claims had been dismissed and the only direct negligence allegations against GSRMC under the remaining medical malpractice cause of action asserted the failure to either have protocols or policies governing the treatment of patients with conditions similar to Mr. Green, or in having such policies and failing to ensure they were followed. However, a hospital can't be held liable for medical malpractice, except on the basis of the negligent acts of its agents and servants or under the non-delegable duty doctrine. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999)(common law prohibition against the corporate practice of medicine in South Carolina); Simmons v. Tuomey Regional Medical Center 341 S.C. 325, 33 S.E.2d 312 (2000). Moreover, Plaintiffs' expert, Dr. Chariker, conceded that "I don't think it's the responsibility of the hospital to train doctors to be physicians or to be surgeons or to treat shock." Finally, Bauerle admitted that the employees of GSRMC did not cause or contribute to the injuries and damages alleged in the Third Amended Complaint which only contained the causes of action for medical malpractice and loss of consortium. (R. p. 37; p. 84; p. 461; pp. 468-469; p. 476, lines 8-10).

Any portion of the settlement paid to relieve the hospital's liability for injuries and damages Bauerle caused could only be by virtue of vicarious liability for which there is no right of setoff under §15-38-50. Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 670 (Ct.App.2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003)(declining to expand the definition of joint tortfeasor under §15-38-50 to include vicariously liable parties). Whether GSRMC's liability for a specific injury was direct or vicarious affects whether there is a right to setoff funds paid to settle that claim because a vicariously liable party is not a joint tortfeasor. Vicarious liability gives rise to indemnity, not setoff.

The trial court and Court of Appeals' holding that setoff was permissible, as all allegations and causes of action pled constituted the same "negligence," ignores the holding in Andrade, which makes clear that the *basis* of the party's liability for negligence distinguishes the cause of action for the purpose of setoff. Allocating funds paid by a hospital to a medical malpractice cause of action for the purpose of setoff creates a paradox as the only permissible basis for the existence of such liability is vicarious, prohibiting setoff as a matter of law. Even if setoff were permissible in the present case, it would only be permissible as to that *portion* of funds paid to settle claims for injuries arising out of negligent acts for which the hospital was *directly* liable. However, there was no evidence that the hospital in any way contributed to Bauerle's malpractice in removing Mr. Green from Pre-Op, and it certainly couldn't be directly liable for injuries resulting from that act.

B. Plaintiffs suffered multiple injuries with distinct damages and causation issues, and there is no way to determine if the verdicts compensated the same injuries as the settlement.

The right to setoff only arises under S.C. Code Ann. § 15-38-50 when a prior settlement was "... paid to compensate the same plaintiff on a claim for the same injury." Smith v. Widener, 397 S.C. 468, 472, 724 S.E. 2d 188, 190 (Ct.App.2012)(emphasis added)(citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998)). When a prior settlement involves compensation for a different injury than the one tried to verdict, there is no setoff as a matter of law. Smith, at 472-473, 724 S.E.2d at 191. Cases involving setoff have involved a **single identifiable injury such as a death or identifiable economic loss**, rendering setoff appropriate to prevent a double recovery where the causes of action settled and tried provide for identical damages for that single injury. Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015); Rutland

v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012); Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct.App.2012); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000); Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct.App.2000); Ellis v. Oliver, 335 S.C. 106, 473 S.E.2d 793 (Ct.App.1999); Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 392 (Ct.App. 1986)(no setoff where damages different for single injury and no way to determine what jury included in award); Ward v. Epting, 290 S.C. 547, 352 S.E.2d 867 (Ct.App.1986). “Joint and several liability arises only when two or more tortfeasors are responsible for a *single* injury.” Collins v. Bisson Moving and Storage, Inc. 332 S.C. 290, 504 S.E.2d 247 (Ct.App.1998).

The present case involved multiple extensive physical and non-physical injuries, many of which were not subject to the medical malpractice trial against Bauerle, and the jury did not reveal what injuries were included in the verdicts. There was clearly no dispute that there were multiple injuries at issue at trial **as the verdict form itself used the term “injuries.”** Accordingly, the trial court and Court of Appeals finding that the settlements and verdicts were all for the “same injury” was clearly based on Bauerle’s assertion that Plaintiffs *sought* the same recovery from all Defendants. Even if this assertion were true, *seeking* the same recovery for the same injuries does not render multiple injuries a single, indivisible injury, particularly where each injury has distinct damages and is subject to separate proof of causation, giving rise to different causes of action. The trial court allowed Bauerle to introduce evidence regarding causation as to specific injuries alleged at trial, utilize a verdict form which allowed the jury to award damages only for the “injuries” they found he caused, and then claim *after* trial that *all* damages alleged against *all* defendants arose from a single injury for the purpose of setoff. The Court of Appeals opinions did not address these inconsistencies. (R. pp.28-31; pp. 88-91; p. 291, lines 4-11; p. 336).

As the previously cited case law has made exhaustively clear, the correct analysis regarding the issue of setoff is **whether the settlement compensates the same damages for the same injury giving rise to the same cause of action as the verdicts**. If there is no way to determine what injury or injuries the jury included in the verdicts, it is simply impossible to determine that it is the same as that included in the settlement. Under such circumstances, setoff should be denied. Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 392 (Ct.App. 1986)(no setoff where damages different for single injury and no way to determine what jury included in award).

At trial against Bauerle, Plaintiffs alleged that the spinal infarction of Mr. Green's lower thoracic cord resulted in (1) paralysis of both legs; (2) loss of feeling from his belly button down; (3) loss of use of his bowels; (4) loss of use of his bladder; and (5) loss of sexual functioning. Additionally, Plaintiffs alleged that Mr. Green suffered five fractured ribs as a result of chest compressions performed during the cardiac arrest. Each of these injuries was supported by evidence of distinct damages. Furthermore, loss of enjoyment of life is an element of damages so distinct for a paraplegic that it has been held to be a compensable, intangible injury in South Carolina as a matter of law. Young v. Warr, 252 S.C. 179; 165 S.E.2d 797(1969). (R. pp. 128-132; pp. 134-136; pp. 138-141; pp. 144-145; pp. 151-174; pp. 176-181; pp. 185-192; pp. 370-390; pp. 248-250; pp. 483-484).

"It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence." Mellen v. Lane, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (2008). Legal cause is a question of fact for the jury unless the evidence is susceptible to only one inference. Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962). The issue of proximate cause is a question for the jury if there is a fair difference of opinion as to whose act caused the injury. Ballou v. Sigma Nu Fraternity, 291 S.C. 140, 147-148, 352

S.E.2d 488, 493 (Ct.App.1986). Here, the issue of which injuries resulted from Bauerle's actions was a jury question as there was conflicting evidence as to the proximate cause of individual injuries which Plaintiffs' alleged to have been caused by the spinal infarction. (R. pp. 237- 239; pp. 242-243; p. 250; pp. 276-277; pp. 290-291; pp. 311-312; pp. 316-318; p. 350).

According to Dr. Cranberg, the only testifying neurologist, the degree and duration of an ischemic event determines whether an infarction will occur as well as the extent of damage that is done thereby. Accordingly, the fact that Mr. Green suffered a spinal infarction does not mean that *all* of Mr. Green's injuries and damages resulted from that infarction. Further, the Life Care Plan demonstrated that *just* the future medical expense damages for *just* the paralysis, bowel, and bladder injuries equaled \$3,668,176.00, an amount which *alone* exceeded the medical malpractice jury verdict, indicating that the jury did *not* include *all* injuries and damages alleged against Bauerle. (R. p. 389; pp. 481-482).

Evidence that Mr. Green was urinating "without difficulty" upon discharge from MUSC months later conflicted with evidence that the bladder injury resulted from the spinal infarction. (R. p. 350). Further, this injury was supported by evidence of distinctive damages to **both** Plaintiffs, inclusive of the value of Mrs. Green's care in catheterizing him five to six times a day and the total past and future cost of catheters over the course of 25.65 years totaling \$393,214.50. (R. p. 379). This element of damages could be included in the jury verdicts **only if** the jury found that the bladder injury resulted from the infarction. Even if the trial court and Court of Appeals were correct in assuming that *all* injuries alleged against *all* parties were included in the settlement with GSRMC, **there can be no setoff if this injury was not included in the jury verdicts.** See Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998).

Furthermore, there is no evidence as to what injuries were included in the settlement with GSRMC. Dr. Chariker's testimony made clear that Mr. Green suffered injuries to various organs as a result of lack of oxidation, severe acidosis, and metabolic derangement. Given this severe decline in his condition over those two hours, it is abundantly clear that Mr. Green suffered *some* injury or injuries after his arrival at the hospital and prior to Bauerle's involvement. Mr. Green's cognitive status markedly declined during the two hours he was at GSRMC prior to Bauerle even arriving; and he suffered a **brain injury which was severe enough that it interferes significantly with this speech and ability to follow commands**. Further evidence as to the severity of the brain injury was not presented at the medical malpractice trial as **Plaintiffs did not allege that it was caused by Bauerle**. (R. p. 238; pp. 343-344; pp. 348-356; p. 362; pp. 370-384; p. 419; p. 465; p. 468; pp. 479-498, line 13; p. 500).

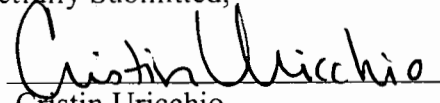
Without any way of determining which injuries were included in the verdicts or settlements, it was error to determine that Bauerle was entitled to setoff. Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015); Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012); Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct.App.2012); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000); Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct.App.2000); Ellis v. Oliver, 335 S.C. 106, 473 S.E.2d 793 (Ct.App.1999); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998).

CONCLUSION

Setoff was not appropriate in this case involving multiple injuries and causes of action, as there is no way to determine what was included in the settlements or verdicts. Accordingly, there is no way to determine that either Plaintiff would receive a double

recovery in the absence of setoff. Further, for the sole purpose of applying setoff, and despite the trial court's admission that there was no authority to do so, the holding expanded current case law to permit the allocation of and *unallocated* settlement a in non-death case without regard for the decision between the husband and wife to share the funds equally. Finally, the analysis for *applying* that allocation directly contradicted precedent by relying on a "percentages" analysis based on multiple verdicts to multiple Plaintiffs, without any factual determination or consideration of the settling parties' intentions. The findings and conclusions by the Court of Appeals in affirming the trial court's order discourages future settlements, goes against judicial economy, and should be reviewed by this Court. On both issues, the Court of Appeals deviated from binding precedent and created a novel analysis. Plaintiffs therefore respectfully request that this Court grant the relief sought herein, inquire further into these matters, and reverse the Court of Appeals.

Respectfully Submitted,



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May 16, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Op. No. 2016-UP-052
(S.C. Ct.App. filed February 3, 2016)

RECEIVED

JUN 21 2016

S.C. 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.

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STATEMENT OF THE CASE

This is an appeal from a medical malpractice action. The Respondents-Petitioners Randall M. Green and Ann Green were involved in a motor vehicle accident on April 17, 2004, when a vehicle crossed the center line and collided with the Greens' vehicle. Randall Green was seriously hurt and was transported to Grand Strand Regional Medical Center where he was initially treated in the Emergency Room for a fracture/dislocation of his right hip and a severe laceration of his right forearm.

During the course of Mr. Green's care in the ER, the Petitioner-Respondent Wayne B. Bauerle, M.D.,¹ the on-call orthopaedic surgeon, was summoned to the ER to treat the fracture/dislocation of his right hip. Dr. Bauerle learned the ER physician had already reduced the hip, but Dr. Bauerle requested a CT scan of the hip to ensure that the reduction was proper and to check for bone fragments that could require immediate surgery. At the time of the CT scan, Mr. Green was in the holding area for the operating room waiting to undergo surgery to repair the laceration of his right forearm. Following the CT scan, Mr. Green went into

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

cardiac arrest and was successfully resuscitated. Mr. Green sustained damage to his spinal cord which resulted in the paralysis of his lower extremities.

The Greens filed this medical malpractice action against Dr. Bauerle and his practice as well as Grand Strand Regional Medical Center, LLC ("Grand Strand") and Carolinas Medical Response, Inc., which was the ambulance provider. The lawsuit included a claim for loss of consortium by Ann Green. Prior to trial, Grand Strand settled all claims with the Greens for \$2 million, and Carolinas Medical Response settled for \$25,000. In addition, Randall Green settled with the at-fault driver for \$100,000, and he received \$150,000 in settlement of his underinsured motorist (UIM) claim. Likewise, with respect to her loss of consortium claim, Mrs. Green received \$100,000 in settlement with the at-fault driver and an additional \$75,000 in settlement of her UIM claim.

The medical malpractice action against Dr. Bauerle and his practice was tried before a jury during the week of September 9, 2013, with Circuit Judge Steven H. John presiding. The jury found for Randall 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. (R. 28-31).

At the close of the trial, Dr. Bauerle moved for a set-off of the amounts paid in settlement on behalf of Grand Strand, Carolinas Medical Response, and the at-fault driver (including the underinsured motorist payments). (R. 45-48, 338-339).

By Order filed October 17, 2013, Judge John granted in part and denied in part the Motion for Set-Off. (R. 18-23). 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. (R. 22).

Dr. Bauerle filed a Rule 59(e) Motion to Alter or Amend Order challenging the denial of the set-off for the settlements received from the at-fault driver and the UIM insurer, and that motion was denied by Order filed February 13, 2014. (R. 24, 100-102). Dr. Bauerle thereafter filed a timely appeal to the South Carolina Court of Appeals, and the Greens filed a cross-appeal.

In an unpublished opinion filed on February 3, 2016, the Court of Appeals affirmed the rulings of Judge John and denied the relief sought by both sides on appeal. Dr. Bauerle filed a petition for rehearing, which was subsequently denied on March 24, 2016. The Greens also filed a petition for rehearing which was denied on the same date.

ARGUMENTS

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. Dr. Bauerle submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is entirely unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion.

Second, the opinion of the Court of Appeals was unpublished and a *per curiam* opinion issued in accordance with Rule 220(b)(1), SCACR, and thus the opinion has no precedential value.

Third, contrary to the Greens' claim, the decision of the Court of Appeals does not conflict with any existing decisions of this Court.

Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance. The *per curiam* opinion has no precedential value, and as a result, the Court of Appeals' decision will have no application to other cases.

Based upon these considerations, there is no need for this Court to review the decision of the Court of Appeals.²

II. The majority of the arguments made by the Greens for the issuance of a writ of certiorari are not preserved for review because they were not raised or ruled upon in the courts below.

Rule 226(d)(2), SCACR, governs the issues that may properly be raised in a petition for writ of certiorari. Rule 226(d)(2) provides that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 226(d)(2), SCACR. Moreover, it is well settled that "[a]n issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari." *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218, 221 (2000). Finally, it is equally well settled that "one cannot present and try his case on one theory and then change his theory on appeal." *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. Ap., 1995).

² As Dr. Bauerle informed the Court of Appeals by motion, he is willing to accept the result by the Court of Appeals and for the Remittitur to be issued. He filed a petition for rehearing in the Court of Appeals as a conditional petition. He has filed a petition for writ of certiorari in this Court for the same reason – to preserve and pursue his issues on appeal only in the event that the Greens filed a petition for certiorari, which they have now done.

In light of these clear preservation rules, the Court is urged to consider whether the Greens' arguments as made in their petition for writ of certiorari are indeed the arguments that were made and ruled on by Judge John at the trial level or were even pursued on appeal to the Court of Appeals. In short, as will be discussed in more detail below, a majority of the arguments that the Greens now pursue have been made for the first time on appeal and, in fact, some for the first time in their petition for rehearing.³ As a result, much of what is now being argued is not properly preserved for judicial review by this Court, which should be a critical consideration in assessing whether a writ of certiorari is indeed warranted.

III. The courts below were correct in equitably allocating the settlements between the medical malpractice claim and the loss of consortium claim.

As a first argument raised in their petition for writ of certiorari, the Greens claim that it was error for the trial court to allocate an unallocated settlement, particularly one paid jointly to a husband and wife. The Greens further argue that the trial court should have concluded that the unallocated settlement was

³ In *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001), the Supreme Court explained that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." 564 S.E.2d at 322. See also, *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same).

reasonable, and there was no basis for "reallocation." Finally, the Greens remarkably argue that Judge John utilized an "arbitrary" method of allocation using his "own formula" which had "no factual basis" and "disregarded the intentions of the settling parties." In short, the Greens conclude that the trial court erred in failing to allocate the \$2 million settlement equally to both of the Greens' claims, which would have resulted in a \$0 judgment for Mrs. Green but a \$1.3 million judgment for Mr. Green.

Most importantly, this argument was never made to or ruled upon by the trial court. The issue was raised for the first time on appeal and specifically in the petition for rehearing.

In the trial court, the Greens argued against any set-off. They never presented any evidence of their "intentions" regarding the unallocated settlement with Grand Strand. They never argued that there should be a \$1 million set-off to each of their claims. That was never raised even as an alternative position. Therefore, not surprisingly, that issue was never ruled upon by Judge John. Moreover, that issue was not raised in the Greens' Rule 59(e) motion. This was admitted to by the Greens where they write: "the trial court and Court of Appeals in the present case failed to provide any discussion or findings regarding these issues." See, Greens' Petition, p. 15. The reason for that – *the courts below did not rule on issues that were never raised*. In fact, the Greens' new theory that

after the set-offs Mr. Green should have a \$1.3 million judgment was never argued even in the petition for rehearing in the Court of Appeals. *It is a new theory pursued for the first time in their petition for writ of certiorari.*

As indicated, in the trial court, the Greens never presented evidence that their intention was to allocate the \$2 million settlement equally between the spouses. The Greens never argued that the \$2 million was joint marital property – which nonetheless makes no difference to an equitable allocation between claims.⁴ The Greens never argued that the non-allocation was reasonable and should have been treated as an equal allocation. Thus, it is entirely disingenuous for the Greens to now argue – for the first time in a petition for writ of certiorari – that Judge John "entirely disregarded the intentions of the settling parties." *See, Greens' Petition*, p. 15.⁵

Nonetheless, even if this Court is willing to overlook the preservation issues and address the merits, the ruling of the trial court, as affirmed by the Court of Appeals, was a correct one. The Greens maintain that Judge John allocated the

⁴ The Greens cite several times to the case of *Ex Parte Government Employee's Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 ((2007)). The relevance or applicability of that case is unclear. That case does not involve any equitable set-off nor any attempt to allocate or reallocate a settlement. It is simply a case where this Court denied an insurer's attempt to intervene in a Family Court matter to determine whether two individuals were common law spouses.

⁵ The Greens also complain at one point that Dr. Bauerle did not request that the settlements be allocated, but Dr. Bauerle was not a party to the prior settlements. *See, Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, 426 (Ct. App. 2000) (the non-settling defendant was not

settlement between Mr. Green's malpractice claim and Mrs. Green's loss of consortium claim without providing a factual analysis. They claim that Judge John's allocation was "arbitrary." This argument, however, simply disregards the fact that Judge John's allocation is based upon the ratio established *by the jury's verdict*. Judge John found that "it is reasonable, fair, and just to utilize the jury's verdict as to the Plaintiffs' claims" so as to provide for an equitable allocation of the settlement amounts. (R. 21). Accordingly, the trial court "appl[ied] the percentage of the total verdict given to each Plaintiff by the jury to apportion the settlements between Mr. Green's claim for medical malpractice and Mrs. Green's claim for loss of consortium." (R. 21).

The Greens, nonetheless, insist that this method of allocation is not supported by the evidence. To the contrary, Judge John based the allocation on the jury's own allocation of total damages awarded. Without dispute, the jury's determination of damages for both Randall Green and Ann Green was based on the evidence. The Greens cannot reasonably argue otherwise.⁶ The jury's verdict after hearing all of the damages evidence sustained by the Greens is most certainly a reasonable method of allocation.

a party to the settlement and is not bound by its terms). Thus, he was not in a position to contest the settlement and seek additional terms to that settlement.

⁶ Under South Carolina law, there is "a presumption ... that the amount awarded by the jury was in response to the measure of damages given by the trial judge." *Turner v. Carey*, 227 S.C. 298, 87 S.E.2d 871, 875 (1955).

The Greens rely on this Court's decision in the case of *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015). However, in that case this Court did not conclude that an allocation of settlement proceeds based on a "percentages" analysis is *per se* invalid or without merit. This Court limited its ruling to the circumstances of that case (i.e., this Court used the language "under these circumstances"), and in fact this Court found the "reapportioning" of the settlement proceeds to have been erroneous only because the settling parties' own allocation between the two claims was "unquestionably reasonable under the facts." 777 S.E.2d at 831. In the present case, unlike in *Riley*, there was no attempt made by the settling parties to allocate the \$2 million settlement between Mr. Green's claim and Mrs. Green's claim, and that makes the decision in *Riley* inapplicable. Here, there was no "reallocation" made by Judge John – despite the Greens attempt to now portray it as such in order to try to make this case fit the circumstances in *Riley*.

In sum, there is no basis for the issuance of a writ of certiorari to address new theories and arguments that were not first made to the trial court, and by the Greens' own admission, were never ruled on by the trial court. These issues – with the exception of the claim that Judge John's allocation was "arbitrary" and not "fact-based" – were never asserted even in the Court of Appeals.

IV. The courts below correctly ruled that the settlement with Grand Strand Regional Medical Center was for the same causes of action and the same injuries as were ultimately recovered against Dr. Bauerle.

As a second argument raised in their petition for writ of certiorari, the Greens argue that the settlement with Grand Strand Regional Medical Center was for different causes of action and different injuries as were ultimately recovered against Dr. Bauerle. These points will be addressed in turn.

The Greens argue that the settlement with Grand Strand was for a different cause of action than that asserted against Dr. Bauerle. The Greens claim that the negligence cause of action against Grand Strand was limited to conduct by the hospital staff occurring before Dr. Bauerle began his care, and hence the settlement with Grand Strand was not related to the negligence claim against Dr. Bauerle. This argument is not preserved for consideration on certiorari because it was made for the first time on rehearing. Importantly, the argument was never made to the trial court nor did the trial court rule on this issue.

However, that argument, even if timely raised, lacks merit based specifically on the pleadings and the settlement documents. The first cause of action alleged in the Fourth Amended Complaint, which is the claim that went to trial, makes *the very same allegations of negligence against all Defendants* including both Grand Strand and Dr. Bauerle. (R. 1-15). There was no attempt to distinguish between Grand Strand and Dr. Bauerle. In addition, the "Covenant Not to Sue and

Covenant Not to Prosecute or Execute Judgment" executed by the Greens in settlement with Grand Strand reflect that the parties settled all claims against the hospital including all direct and vicarious liability claims. (Supp. R. 518-522). Thus, the \$2 million paid by Grand Strand was in settlement of the same negligence claim that ultimately went to trial and on which the jury returned a verdict.

The Greens also argue based on *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), that a party which is vicariously liable cannot be a joint tortfeasor under the UCATA and thus settlements by such a party are not subject to a set-off under Section 15-38-50. That issue, which also was never made in the trial court or ruled upon by Judge John, lacks merit. In *Andrade*, the Court of Appeals ruled that a covenant not to sue given to an agent also extinguishes the liability of a principal, which of course is not the issue in the case at bar. *Andrade* did not involve any issues regarding set-off and certainly does not hold that a settlement by a party which is vicariously liable is not subject to a set-off. Furthermore, that argument applies only to vicarious liability and not to direct liability, which is inconsistent with the Greens' earlier position that Grand Strand was only responsible for its direct negligence and not any vicarious liability. Furthermore, even if the Greens' position is correct, that would apply only to a set-off under Section 15-38-50 and not to an equitable set-off available under the

common law. Therefore, this argument that Grand Strand and Dr. Bauerle were not "joint tortfeasors" under the UCATA is immaterial and does not alter the ultimate result. As the courts below agreed, Dr. Bauerle is entitled to an equitable set-off for the Grand Strand settlement.

In short, the courts below correctly ruled that the settlement paid by Grand Strand was for a negligence cause of action and a loss of consortium cause of action, which are the same causes of action that were pled and tried against Dr. Bauerle.

The Greens also argue that the settlement with Grand Strand compensated them for different injuries than the verdicts awarded at trial against Dr. Bauerle. The Greens again offer a new argument *which was raised for the first time in their petition for rehearing*, which is not allowed. They argue that the settlement with Grand Strand was only for injuries suffered by Mr. Green prior to Dr. Bauerle's participation in his care. The Greens never made this argument to the trial court, and certainly this issue was not addressed by Judge John in his order, and the issue was not included in the Greens' subsequent Rule 59(e) motion in order to obtain a ruling from the trial court

At any rate, the evidence in the record shows that the \$2 million paid in exchange for the Covenants is for "the injuries, treatment, and damages of said Payee as well as any future claims for damages of any kind whatsoever." (R.

519).⁷ Similarly, the verdicts returned by the jury against Dr. Bauerle included all compensable damages as charged by Judge John which the jury concluded had been proven. Those compensable damages awardable to Mr. Green were described in the jury charge as follows:

Actual or compensatory damages include compensation for all of the injuries which are naturally the result of the alleged wrongful conduct if you found wrongful conduct. They include, and I'm giving you categories, I'm not saying that they exist in this case, that's your job and responsibility to decide but these are categories that you can look at to compensate the plaintiff if you think that is the right and the proper thing to do. Past and present and future pain and suffering. Past, present and future medical expenses, doctor bills, hospital bills, rehabilitation expense, transportation expense in connection with the medical treatment, past and present and future loss of enjoyment of life, past and present and future impairment of health or bodily function, past, present and future disability, past and present and future loss of wages or loss of earnings, mental anguish brought about by bodily injury or suffering, depression. Those are all different types of categories.

(R. 334).

In addition, the evidence presented does not support the Green's new theory that any negligent acts or omissions by Grand Strand's employees caused injuries to Mr. Green, including a brain injury or "injuries to various organs," before any

⁷ While the term "Payee" is singular and undefined, the Covenants are given by *both* Randall Green and Ann Green, who are both signatories, and it is clear that "Payee" includes both Greens. Further, the Greens readily admit throughout their brief that Ann Green's claims are extinguished by the settlement with Grand Strand.

care was provided by Dr. Bauerle. The factual record does not support that argument. Frankly, the parties did not address this issue nor present evidence on this issue because the issue was never raised in the trial court.⁸

In sum, the same injuries and the same damages were pled against all Defendants. Moreover, the jury's verdicts at trial included all damages, past, present and future, proven by the Greens, which are no different than the damages included in the settlement with Grand Strand. Accordingly, the decision of the trial court, as affirmed by the Court of Appeals, is correct. There is no basis for further review on certiorari.

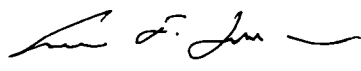
⁸ The Greens appear to argue that they did not present evidence at trial of the injuries caused by Grand Strand. They have not shown, however, that there were damages recovered in the settlement with Grand Strand that were not sought from the jury during the Bauerle trial. The evidence of damages presented at trial, in fact, indicate otherwise – the Greens presented evidence, including a Life Care Plan, that accounted for all of the Mr. Green's injuries and his ultimate medical condition. Nonetheless, even if that were the case, that very argument has been previously rejected. In *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), the plaintiff argued that she had not presented the jury with the medical expenses attributable to the hospital's negligence. The Court in *Ellis* rejected that argument finding that the plaintiff was not prevented from presenting to the jury evidence of the full amount of the decedent's medical bills.

CONCLUSION

Based on the foregoing discussion, Petitioners-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. respectfully request that this Court deny the Greens' petition for writ of certiorari.

Respectfully submitted,

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Columbia, South Carolina

June 15, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

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

JUL 15 2016

S.C. SUPREME COURT

Op. No. 2016-UP-052
(S.C. Ct.App. Filed February 3, 2016)

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

v.

Wayne B. Bauerle, M.D. and
Wayne B. Bauerle, M.D., P.C.,.....Petitioners-Respondents.

RESPONDENTS'-PETITIONERS' REPLY IN SUPPORT OF
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I. THE GREENS PROPERLY PRESERVED THE ARGUMENT THAT IF THE SETTLEMENT ALLOCATION WAS APPROPRIATE, IT SHOULD HAVE BEEN ALLOCATED EQUALLY BETWEEN THE PLAINTIFFS.

In responding to the Greens' Petition for Writ of Certiorari, Bauerle relies on the false assertion that the Greens have never before raised the argument that it would have been more just to allocate the settlement equally between the two Plaintiffs. Specifically, he first states that "*it is a new theory pursued for the first time in their petition for writ of certiorari.*" (Return to Pet. for Writ of Cert., p. 10). Then, he incorrectly states that this position was raised for the first time on appeal in the petition for rehearing. (Return to Pet. for Writ of Cert., p. 9). Not only are these assertions patently false, the suggestion that any allocation should have been equal did not present a separate legal issue; rather, it was made to demonstrate the existence of a more reasonable alternative **in support of the argument** that the trial court's percentages analysis was impermissible, unnecessary, and inequitable.

The Appellate Court Rule regarding certiorari to the Court of Appeals states that "[a] question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 226(d)(2), SCACR. The trial court's method of allocation has been a central issue in controversy raised to the trial court, argued **extensively** by both sides on appeal, and was very clearly raised in the Petitioners' Petition for Rehearing. The lack of any allocation of the settlement between the two Plaintiffs renders their proportionate rights to the funds, by definition, equal. The existence of simpler and more equitable alternative methods of allocation available to the trial court is a subsidiary question incumbent in any analysis of the equity and legality of the novel method which the trial court arbitrarily created.

First, as previously argued by the Greens, it is significant that Bauerle did not request that the trial court allocate the settlement in his Memorandum in Support of Motion for Setoff.

Accordingly, the Greens could not have made arguments regarding the trial court's reasons for making the unilateral decision to perform the allocation, nor could they make arguments against the court's unforeseeable decision to utilize a percentages analysis based on the jury verdicts until *after* the order created these issues. Nevertheless, in their Memorandum in Opposition to Motion For Setoff, the Greens repeatedly argued that setoff was **not** appropriate partially *because* the settlement was paid equally to multiple Plaintiffs in a case involving multiple injuries and causes of action, and that the lack of allocation further prevented any determination that Bauerle was *entitled* to setoff. (R. pp. 49-69). Remarkably, the Plaintiffs' arguments suggesting the absurdity and injustice of such a circular analysis was confirmed shortly thereafter by the Supreme Court in the Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015) opinion, which noted that the *amount* allocated to one claim or the other affects the Defendants' very entitlement to the setoff in the first place.

Second, Bauerle misrepresents that Plaintiffs' did not argue that it would have been more equitable to allocate the settlement equally until their Petition for Writ of Certiorari. (Return to Pet. for Writ of Cert., p. 10). In response to the trial court's order revealing its novel methodology for allocating the settlement, the Greens unequivocally argued that "[t]he settlement should be viewed by the court as belonging to both of the parties. Here, the court applies an ex post facto analysis to grant setoff, using the ratios between the jury verdict for Mr. Green and the jury verdict for Mrs. Green . . ." (R. p. 96). Further, the Greens expressly argued "[i]f the Court determines that [the] allocation between the parties is permitted based on the cases that allowed reallocation between causes of action, the only fair and reasonable way to do so would be to allocate one half of the settlement proceeds to each of the Plaintiffs and then for each of the Plaintiffs' portions of the settlement to be set off against his or her individual verdict." (R. pp. 96-97). In their Appellant

Brief of Respondents-Appellants’, the Greens stated that, in the event that an allocation was appropriate, “[t]he evidence dictates that it should be allocated equally to each cause of action, and equity requires that it be allocated equally between the two Plaintiffs.” (Appellant Br. of Resp’t-Appellant, pp. 42-43). As set forth in the Greens’ Petition for Rehearing, it was *Bauerle*’s burden to demonstrate a bona fide, fair, and just manner of allocation. (Am. J.A., p. 20). Nevertheless, he attempts to shift this burden onto the Plaintiffs, falsely arguing that their suggestion of a far more equitable method has never before been raised despite the previously cited exhaustive evidence to the contrary.

Third, *Bauerle* argues that the Greens only argued against any setoff in the trial court, and “never presented any evidence of their ‘intentions’ regarding the unallocated settlement with Grand Strand.” (Return to Pet. for Writ of Cert., p. 9). However, the Greens initially argued that any allocation would require that the trial court “revise the settlement agreement between Grand Strand and the Plaintiffs,” suggesting that their intentions were to share the funds equally. (R. p. 65). They asserted that the entire settlement was paid to both Plaintiffs and that “[n]either equity or legal precedent would allow this Court to deprive either of the Plaintiffs of their claim to the entire amount of the Settlement proceeds or any portion thereof.” (R. p. 66). The initial arguments to the trial court discussed, at length, that there was insufficient evidence available to permit a fair and equitable allocation and, because it was unclear what the jury included in its awards, there was simply no evidence to support a finding that either Plaintiff would receive a double recovery. Accordingly, not only was there no basis for determining that *Bauerle* was *entitled* to setoff, there was no way to *apply* a setoff under the facts and circumstances of the case. (R. pp. 78-79). Further, following the trial court’s order, the Greens responded in their Rule 59(e) motion that the settlement amount was bargained for in light of disputed legal issues within the summary judgment

ruling regarding the extent of Grand Strand's potential liability under the non-delegable duty doctrine and respondeat superior. (R. p. 98).

Furthermore, Bauerle is also incorrect in his assertion that the "Greens never argued that the \$2 million settlement was joint marital property. . ." (Return to Pet. for Writ of Cert., p. 10). *As further evidence of the inequity of an unequal allocation*, the Greens clearly argued that "[e]ven if the settlement has been allocated entirely between medical malpractice and loss of consortium causes of action, the funds would still be marital property to which each Plaintiff is equally entitled. (Appellant Br. of Resp't-Appellants, p. 43) *citing* Marsh v. Marsh, 313 S.C. 42, 45, 437 S.E.2d 34, 36 (1993) (proceeds of personal injury settlement acquired during marriage are marital property subject to the family court's jurisdiction). The Greens further supported the inequity of an unequal allocation by pointing out that they could have asserted their causes of action in separate lawsuits even if they had divorced after the settlement. (Appellant Br. of Resp't-Appellants, p. 43) *citing* Lawton v. Hamm, No. 06-933, 2006 WL 2622629, at *1 (D.S.C. Sept. 8, 2006)). The case of Ex Parte Government Employee's Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007), which Bauerle claims is inapplicable, was clearly cited in the Petition for Writ of Certiorari to this Court as further support of the trial court's lack of authority to perform the allocation. This case makes clear that the pecuniary interests of a third party is insufficient to grant standing to intervene in a marriage. Here, Bauerle's pecuniary interests are also insufficient to convey authority to the trial court to divide marital funds between the Greens, particularly when that division is based solely on the jury's determination of Bauerle's liability without any consideration for the Greens right to share the property equally.

Of note, this Court issued its ruling in Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015), during the pendency of the appeal of this case after all briefs had been filed and prior to oral

arguments. The Greens submitted the case as a supplemental citation pursuant to Rule 208(b)(8), SCACR, stating that “This Supreme Court opinion is pertinent to Respondents/Appellants’ position that the Trial Court’s allocation of the settlement proceeds among claims based on a percentages analysis is without merit, particularly where the settlement is unquestionably reasonable under the facts.” (Nov. 3rd Correspondence). In response, Bauerle wrote to the Court of Appeals consenting to the Court’s consideration of the Riley case, specifically stating that both sides had relied on that case’s now-overruled opinion in their briefs, though he argued that the Supreme Court opinion now rendered it inapplicable to the facts of the present case. Accordingly, it was conceded that the issues of the permissibility and method of the allocation had been previously raised, argued by both sides, and preserved for review. Implicitly recognizing that the Riley case confirmed the errors in the trial court’s rulings, Bauerle now claims these issues haven’t been preserved.

Furthermore, as set forth above and below, the Greens argued repeatedly that the settlement was paid to both of them equally and that any allocation should be consistent with this clearly conceded point. As set forth in the Petition for Rehearing which was the first opportunity to address this argument in the context of the new Riley opinion, it was not the Plaintiffs’ burden to demonstrate an equitable method of allocation or to justify their reasons for accepting the funds equally. The issue of the impermissibility of the trial court’s method of allocation was more than adequately preserved in the Petition For Rehearing, and Bauerle’s suggestion that Plaintiffs did not reassert their suggestion for an alternative compromise methodology is a remarkable attempt to benefit from his failure to meet his own burden of proof as clearly set forth in Riley.

II. BAUERLE FALSELY REPRESENTS THAT THE DISTINCTION IN HIS OWN CONDUCT AND THAT FORMING THE BASIS OF GSRMC’S LIABILITY WAS FIRST MADE ON REHEARING.

Remarkably, Bauerle claims that the Greens' argument that his conduct was different from that of GSRMC was not raised until their Petition for Rehearing. Once again, this issue has been a central point of contention argued extensively throughout this case. In support of the argument against setoff, the Greens have repeatedly argued that GSRMC's negligence was not based on the same conduct resulting in the same injuries as Bauerle. In short, GSRMC and Bauerle were not joint tortfeasors. Even if it could reasonably be argued that the exact nature and timing of GSRMC's conduct was not the *same exact* issue as whether it was distinguishable from Bauerle's negligent conduct and resulting injuries, it is certainly a *subsidiary* issue absolutely intrinsic to the analysis. "A question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 226(d)(2), SCACR.

The argument that the settling and non-settling defendants engaged in different negligent conduct resulting in different injuries certainly implies that such conduct occurred at different times. In the interest of efficiency in responding to Bauerle's assertion that the Greens have never argued GSRMC's conduct and resulting injuries occurred prior to his own, Petitioners' respectfully direct the Court's attention to the following quotations from previous briefs submitted to both the trial court and Court of Appeals:

- (1) "By way of the Stipulation and Covenant, the only causes of action asserted at trial against Bauerle were for Bauerle's negligence in interrupting Mr. Green's treatment. . . . Therefore, Grand Strand's settlement funds were given to the Plaintiffs in consideration for completely different causes of action than those pursued against Bauerle at trial and for which the jury rendered a verdict." (R. P. 55.)
- (2) "The damages the Plaintiffs sought to recover from Grand Strand negligently failing to implement policies and procedures are different than those the Plaintiffs sought to recover from Bauerle for negligently interrupting treatment to Mr. Green. But for Bauerle's negligence, all of the expert medical testimony admitted at trial was that Grand Strand's administrative negligence could have caused Mr. Green minimal harm from blood loss and enduring low pressure for a prolonged period. Further, the Plaintiffs' experts testified at trial that absent the interruption by

Bauerle, Mr. Green's cardiac arrest was not inevitable. . . The injuries alleged by the Plaintiffs [to be] caused by Grand Strand are separate and apart from those found to have been caused by Bauerle." (R. p. 58).

- (3) "Here, the judgment against Bauerle was [for] the injuries Mr. Green sustained when Bauerle negligently delayed Mr. Green's care. . . At trial, Dr. Chariker testified that the interruption in treatment to Mr. Green's right arm caused by Bauerle's order for [the] CAT Scan 'tipped the scales' and caused Mr. Green's arrest." (R. p. 9).
- (4) "In the pleadings and throughout trial [the Greens] argued that [Bauerle] negligently interrupted the treatment being provided to Mr. Green by [GSRMC] employees, whom Bauerle admitted did not proximately cause or contribute to the injuries and damages sustained by Plaintiffs." (Reply Br. of Resp't. Appellants, p. 1).
- (5) "Based on the test utilized by the Court in Young, (1) Bauerle's intervening negligence was not a probable consequence of any negligence by GSRMC employees, (2) nor was it a cause that concurred and combined with the negligence of GSRMC. (Reply Br. Of Resp't. Appellants, p. 2).
- (6) "Therefore, it cannot be contended that Bauerle's intervening negligence was a probable consequence of nor that it combined and concurred with any wrongdoing on the part of GSRMC. . . Dr. Chariker testified that the cardiac arrest was not inevitable rather, but for Bauerle's negligence it would not have occurred. . ." (Reply Br. Of Resp't. Appellants, p. 3).
- (7) "Accordingly, the trial court's ruling that the Settlements were for a single negligence cause of action failed to consider that neither the *bases* of GSRMC's potential liability, nor the *responsible parties* were uniform across all causes of action." (Appellants' Br. of Resp't. Appellants, p. 26).
- (8) "Not only is there no evidence that GSRMC contributed to Bauerle's decision, directly or vicariously, it is undisputed that Bauerle was "adamant" about delaying Mr. Green's care despite the opposition of at least one other doctor, a doctor who felt strongly enough to repeatedly document Bauerle's persistence in the medical records." (Appellants' Br. of Resp't. Appellants, p. 28)
- (9) "Both Plaintiffs asserted the negligent hiring, training, and supervision cause of action seeking to hold GSRMC directly liable for its employment decisions in the event the individuals involved in Mr. Green's care were classified as employees." (Appellants' Br. of Resp't. Appellants, p. 26-27).
- (10) "At trial, both sides presented evidence that physicians at GSRMC disagreed with Bauerle's decision to remove Mr. Green from the preoperative area . . ." (Appellants' Br. of Resp't. Appellants, p. 28).

(11)“The Covenants involved a single indivisible sum paid to Plaintiffs jointly as compensation for past and future claims against GSRMC, and were not limited to claims named in the lawsuit pending at the time of settlement.” (Appellants’ Br. of Resp’t. Appellants, p. 23).

As further support of the inequity of granting a setoff in this case, the Greens have argued that they are being forced to demonstrate *what* injuries resulted from GSRMC’s negligent conduct, by citing only to the record of a trial against *Bauerle* in which *GSRMC*’s negligence and liability for specific injuries **was not even at issue**. *Bauerle* even concedes this point in his Return to Petitioners’ Petition for Writ of Certiorari, stating “[the] first cause of action alleged in the Fourth Amended Complaint, **which is the claim that went to trial**, makes the very same allegations of negligence against all Defendants including both Grand Strand and Dr. *Bauerle*.” (emphasis added)(Return Pet’rs’ Writ. Cert., p. 13). Of first note, the first cause of action was for medical malpractice, and the allegations against *Bauerle* and GSRMC under this cause of action were absolutely **not** identical as the claim regarding the lack or inadequacy of policies and procedures was clearly **only** alleged against GSRMC. (R. p. 37). Moreover, *Bauerle* has previously admitted that GSRMC did not cause or contribute to the injuries and damages alleged under the medical malpractice cause of action. (R. pp. 83-84). Of second note, the second cause of action, which **did not make it to trial**, was Negligent Supervision, Hiring, and Training, and it was very clearly alleged **only against GSRMC**.

Not only is it manifestly unjust to require the Greens to prove that the injuries and causes of action settled were different from those tried by *using only the transcript of the trial against Bauerle*, but the burden of proving his entitlement to setoff was on *Bauerle* in the first place. This issue only further clarifies the distinction between this case and the other cases involving setoff; that there are **multiple injuries** arising out of **different conduct**. There is simply no way to

conclude that whatever injuries the jury included in its verdicts were identical to those included in the settlement. Nor is it possible to determine that GSRMC settled *entirely* for the same medical malpractice cause of action as the verdicts, where the hospital could not even be held directly liable on this cause of action as a matter of law.

III. PETITIONERS PRESERVED THE ARGUMENT THAT S.C. CODE § 15-38-50 WAS INAPPLICABLE BECAUSE BAUERLE AND GSRMC WERE NOT JOINT TORTFEASORS.

Bauerle next claims that Petitioners did not raise the argument that the UCATA does not apply to vicariously liable parties. Plaintiffs respectfully direct this Court's attention to their Memorandum in Opposition to Motion for Setoff under section III(b) entitled "The settling Defendants and Bauerle are not joint tortfeasors." (R. 62). Of note, the first sentence of this section states "[s]ection 15-38-50 only applies to true joint tortfeasors." (R. p. 62). This argument was also addressed by **both** sides in the appellate briefs, as well as in the Petition for Rehearing of Respondents-Appellants.

In addressing the actual merits of this argument, Bauerle further overlooks the relevance of Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003), stating that "*Andrade* did not involve any issues regarding setoff and certainly does not hold that a settlement by a party which is vicariously liable is not subject to setoff." (Return to Pet. for Writ of Cert., p. 14). The Andrade opinion actually directly cites § 15-38-50, referring to it as a codification of the newer common law rule, holding that the UCATA does not apply to vicariously liable parties. The court makes clear that the UCATA, *as its name implies*, governs **contribution** amongst joint tortfeasors, distinguishing this concept from indemnity existing between the principal and agent in vicarious liability situations. *Id.* at 226. The Andrade court dictates that "[t]hus, the UCATA only applies in situations involving joint

tortfeasors.” *Id.* at 226. Here, any settlement funds allocated to the medical malpractice cause of action could only be for vicarious liability for *Bauerle*’s conduct as the hospital cannot, as a matter of law, be held directly liable for medical malpractice. Nevertheless, *Bauerle* claims entitlement to an *equitable* setoff, which is not at issue. His motion for setoff was based entirely on § 15-38-50, and the trial court’s analysis was also based entirely on this statute, stating “Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors.” (R. p. 20). Remarkably, *Bauerle* claims that “this argument that Grand Strand and Dr. *Bauerle* were ‘not joint tortfeasor[s]’ under the UCATA is immaterial and does not alter the ultimate result. As the courts below agreed, Dr. *Bauerle* is entitled to an equitable setoff for the Grand Strand settlement.” (Return to Pet. for Writ of Cert., p. 15). As an initial response to *Bauerle*’s argument, neither the trial court nor the Court of Appeals have undergone any equitable analysis rather, the setoff was expressly based on the statute. Furthermore, this argument ignores the entire analysis behind the holding in *Andrade* which clearly explains that contribution is only applicable between joint tortfeasors, even expressly stating that the statute was a codification of this common law principal. *Id.* at 223-226. Finally, *Bauerle* concedes in his brief that the settlement with GSRMC encompassed “all direct and vicarious liability claims[,]” conceding that the entire settlement was not paid to settle joint liability. (Return to Pet. for Writ of Cert., p. 14)(emphasis added). As made clear in *Andrade*, any payment by GSRMC to protect itself from liability for *Bauerle*’s negligent conduct would raise issues of *indemnification* rather than *contribution*, and would most likely be governed in large part by the contractual relationship between *Bauerle* and the hospital.

IV. THE GREENS PRESERVED THE ARGUMENT THAT THE SETTLEMENT WITH GSRMC COMPENSATED DIFFERENT INJURIES THAN THE VERDICTS AWARDED AT TRIAL AGAINST BAUERLE.

Bauerle states that “The Greens also argue that the settlement with Grand Strand compensated them for different injuries than the verdicts awarded at trial against Dr. Bauerle. The Greens again offer a new argument *which was raised for the first time in their petition for rehearing*, which is not allowed.” (Return to Pet. for Writ of Cert., p. 15). Respectfully, this statement is a brazen misrepresentation to this Court. That there was no way to determine that the settlement and verdicts compensated the same single injury has been the very foundation of every major issue and argument raised at both the trial and appellate level. The issue of *what* injuries were caused by GSRMC’s conduct is clearly a subsidiary issue probative of the question of whether they were the same injuries resulting from Bauerle’s conduct.

At the trial level, reference must only be made to the trial court’s order which expressly grants setoff based entirely on the holding that there was only one single injury at issue, rejecting Plaintiffs’ arguments that different injuries were suffered. (R. p. 20). Nevertheless, the Greens initially argued in their Memorandum in Opposition to Motion For Setoff under Section II(b), which was entitled “[t]he settlements and judgment are for different injuries,” that the “. . . settlements do not compensate the Plaintiffs for the same injuries as the judgment against Bauerle.” (R. p. 53). The very basis of their argument against setoff was that **Bauerle** “must prove that all of the settling Defendants and Bauerle caused the Plaintiffs to suffer one indivisible injury for which the Settling Defendants and Bauerle settled or litigated under the same cause of action.” (R. p. 57). The Plaintiffs have argued from the start that “[t]he injuries alleged by the Plaintiffs [to be] caused by Grand Strand are separate and apart from those found to have been caused by Bauerle.” (R. p. 58).

In their Rule 59(e) motion, the Plaintiffs asked that the trial court “consider and rule on all arguments set forth in the Plaintiff’s Memorandum Opposing Setoff. . .” (R. p. 93). Further, the

Plaintiffs discussed the holding in Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (2000), arguing that, even though that case only involved a single physical injury, the two causes of action arising out of the death were still considered separate claims compensating different losses. (R. p. 96). In other words, it is imperative that the court consider *what* is being compensated when determining whether two causes of action are distinct, as the purpose of permitting setoff is to prevent a double recovery. Further, the Greens argued that the **existence** and **amount** of Grand Strand's potential liability for each of the various causes of action was "impossible to ascertain from the jury's verdict [against Bauerle]." (R. p. 98). The Greens further argued the inequity of forcing them to defend claims against Grand Strand which were not even at issue in the trial against Bauerle, clearly indicating that they did not seek identical recoveries from the settling and non-settling defendants. (R. p. 97).

In the interest of efficiency, Petitioners respectfully direct this Court's attention to the following example excerpts from the appellate briefs which, in addition to those referenced in the above sections, they unequivocally argued that the trial court erred in holding that the verdicts and settlements compensated the same single injury:

- (1) **"I. THE TRIAL COURT ERRED IN FINDING THAT THE SETTLEMENTS AND VERDICTS INVOLVED A SINGLE INJURY SO THAT S.C. CODE ANN. § 15-38-50 MANDATED SETOFF OF THE ENTIRE AMOUNT OF THE SETTLEMENTS AND THE COURT HAD NO DISCRETION TO DETERMINE THE EQUITIES INVOLVED."** (Appellants' Br. of Resp't. Appellants, pp. 2, 10).
- (2) "Finally, the two verdicts compensated *two different plaintiffs* for their personal injuries. As such, the funds paid by GSRMC did not compensate the *same plaintiff* on the same claim for the same injury as the verdicts rendered against Bauerle; therefore, § 15-38-50 does not mandate setoff." (Appellants' Br. of Resp't. Appellants, p. 19).
- (3) The injuries alleged by the Plaintiffs [to be] caused by Grand Strand are separate and apart from those found to have been caused by Bauerle." (Appellants' Br. of Resp't. Appellants, p. 32).

- (4) “Similarly, in the present case, it is not possible to ascertain what elements of damages were included in the Settlements or verdicts.” (Appellants’ Br. of Resp’t. Appellants, p. 20).
- (5) “If Bauerle had asked the court to employ this [allocation] process, he would have contradicted his assertion, and the trial court’s finding, that the Settlements and verdicts compensated a single, indivisible injury.” (Appellants’ Br. of Resp’t. Appellants, p. 21).
- (6) “There were no findings, evidence, or arguments in support of the proposition that setoff was necessary to prevent Plaintiffs from recovering twice for any of these injuries.” (Appellants’ Br. of Resp’t. Appellants, p. 21).
- (7) “Accordingly, there is no evidence that Dr. Wood’s or Nurse Lustig’s figures were included in the settlements or the verdicts. As in Hawkins, Bauerle cannot establish that the jury awarded either Plaintiff \$2,000,000.00 entirely for a specific economic loss.” (Appellants’ Br. of Resp’t. Appellants, p. 32).
- (8) “The court granted setoff without properly considering whether any evidence supported the existence of a double recovery given the varied and complex injuries and losses involved.” (Appellants’ Br. of Resp’t. Appellants, p. 32).
- (9) “The injuries alleged by the Plaintiffs [to be] caused by Grand Strand are separate and apart from those found to have been caused by Bauerle.” (Appellants’ Br. of Resp’t. Appellants, p. 43).
- (10) “. . . it is impossible to conclude that GSRMC’s settlement and the verdict against Bauerle compensated Mr. Green for the same damages.” (Appellants’ Br. of Resp’t. Appellants, p. 46).
- (11) “Therefore, it cannot be contended that Bauerle’s intervening negligence was a probable consequence of nor that it combined and concurred with any wrongdoing on the part of GSRMC. Further, there is no evidence that Mr. Green’s paralysis and resulting injuries would have occurred absent Bauerle stopping the ongoing treatment by removing Mr. Green from Pre-Op.” (Rpl. Br. Of Resp’t. Appellants. p. 3).
- (12) “Paralysis is not the only injury Mr. Green suffered or claimed and there is no evidence or basis upon which the court could find that the entire \$2,000,000.00 settlement with GSRMC, the settlement with CMR and both verdicts compensated Mr. Green solely for his paralysis. . . It cannot be seriously contended that this case involved only one injury in light of incontrovertible evidence of numerous physical and non-physical injuries suffered.” (Rpl. Br. Of Resp’t. Appellants. pp. 4-5).
- (13) “Moreover, it is not possible to discern what potential elements of damages or physical injuries were included in the jury verdict.” (Rpl. Br. Of Resp’t. Appellants. pp. 6-7).

(14) “. . . the settlements with GSRMC and CMR may have compensated Plaintiffs for some of the same injuries and some of the same causes of action as the verdicts but they also included a myriad of additional injuries and causes of action not included in the verdicts.” (Rpl. Br. Of Resp’t. Appellants. p. 9).

(15) “. . . Bauerle has otherwise failed to establish that the jury awarded Mr. Green \$2,3000,000.00 or Mrs. Green \$550,000.00 for any specific loss or injury.” (Rpl. Br. Of Resp’t. Appellants. p. 9).

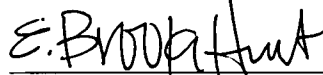
(16) “The verdicts against Bauerle and the settlements with GSRMC and CMR do not compensate Plaintiffs for identical injuries, damages, or causes of action.” (Rpl. Br. Of Resp’t. Appellants. p. 9).

Bauerle asserts that the Greens “have not shown, however, that there were damages recovered in the settlement with Grand Strand that were not sought from the jury during the Bauerle trial.” (Return to Pet. for Writ of Cert., p. 17, fnnt. 8). Further, he argues that they were not prevented from doing so, implying that the Greens should have presented evidence of injuries not at issue in the case against Bauerle. Implicitly recognizing that this argument fails under any theory of law, Bauerle attempts to meet his burden by asserting that the Life Care Plan “accounted for all of Mr. Green’s injuries and his ultimate medical condition.” *Id.* Of first note, this statement represents an admission that there were multiple injuries alleged, in contradiction of the trial court’s finding that there was a single “injury.” Of second note, the Life Care Plan lists, at the top of each page, the injuries included therein, stating “Diagnosis: T6 paraplegia, neurogenic bladder, neurogenic bowel.” (R. pp. 385-390). Clearly, this does not include any damages other than the future medical expenses for these three injuries, nor does it include the damages resulting from the loss of sexual functioning which was also specifically alleged to be caused by the infarction resulting from Bauerle’s conduct. It certainly doesn’t include any injuries not alleged to have resulted from the infarction.

Conclusion

The basis of all arguments at both the trial and appellate levels has been that there is no way to determine what injuries were included in the jury verdicts and no way to determine what injuries and causes of action were encompassed in the settlement with Grand Strand. Further, the evidence clearly demonstrates that there is no risk of a double recovery. Nonetheless, the trial court and Court of Appeals ignored existing precedent, and arbitrarily created a novel analysis with no basis in law or equity in order to reduce the liability for which the jury determined Bauerle was responsible. Contrary to Bauerle's claim that this case does not involve any issue of great public importance or interest, it involves catastrophic injuries requiring future medical care with an estimate cost **far exceeding** the total recovery if the setoff is upheld. Furthermore, the ruling runs afoul of several public policy concerns such as that favoring settlement of disputes. Based on the foregoing and any other reason appearing on the record, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari.

Respectfully Submitted,



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July 1, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Op. No. 2016-UP-052
(S.C. Ct. App. Filed February 3, 2016)

RECEIVED

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S.C. 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.

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QUESTIONS PRESENTED

1. Was it error to allocate an unallocated settlement paid jointly to a husband and wife solely for the purpose of setoff, and to make that allocation based on percentages derived by comparing the separate verdicts where different causes of action and injuries were alleged against the settling and non-settling defendants?
2. Was it error to find that the settling and non-settling parties were joint tortfeasors liable for the same single injury, entitling the non-settling party to setoff of all settlement funds where multiple injuries with different damages were alleged to arise out of separate tortious acts occurring at different times, the settlement was unallocated, and the verdicts did not specify the injuries compensated?

STATEMENT OF THE CASE

This action arises from the negligent treatment of Randall M. Green (“Mr. Green”) after he and his wife, Ann Green (“Mrs. Green”), and their son were involved in a severe car accident on April 17, 2004. Mr. and Mrs. Green (“The Greens”) settled with the at-fault driver’s insurer as well as their own underinsured motorist carrier for injuries sustained in the vehicle accident. Subsequently, the Greens filed a lawsuit on May 30, 2005 against Dr. Wayne Bauerle (“Bauerle”), asserting causes of action for medical malpractice and loss of consortium. Grand Strand Regional Medical Center (“GSRMC”) and the ambulance carrier, Carolina Medical Response, Inc. (“CMR”) were later named as additional parties in 2007. For a nominal payment of \$25,000.00, CMR was released from the action.

On October 15, 2012, the Greens filed a Fourth Amended Complaint asserting a direct negligence claim for Negligent Supervision, Hiring, and Training and specifically pleading the Non-Delegable Duty doctrine as the basis for GSRMC’s vicarious liability for medical malpractice. (R. pp. 32-44). On April 18, 2013, summary judgment was granted to GSRMC on both causes of action for vicarious liability and Negligent Supervision, Hiring, and Training. (R. pp. 1-15). The order was not appealed by any of the parties.

Subsequently, the Greens jointly accepted a settlement of \$2,000,000.00 from GSRMC in

exchange for a Covenant Not Execute and Covenant Not To Sue. The settlement was not allocated to specific causes of action or between the two Plaintiffs. The Covenant specified that it was not intended as full compensation for all injuries and damages alleged in that lawsuit or limited to the claims pending therein. It further specified that the payment was expressly paid only on behalf of GSRMC, and “shall in no way” affect any action against any other person. On June 11, 2013, a stipulation of dismissal with prejudice as to GSRMC was filed by consent of all parties, including Bauerle. (R. p. 17; pp. 518-522).

The five day medical malpractice trial against Bauerle commenced on September 9, 2013. The jury found that Bauerle’s deviation from the standard of care caused Mr. Green “injuries,” awarding him \$2,300,000.00. The jury awarded Mrs. Green \$550,000.00 for her loss of consortium in a separate verdict. Bauerle made a motion for setoff based on S.C. Code Ann. §15-38-50, which was granted as to the entire amounts paid equally to the Greens by GSRMC and CMR. (R. pp. 21-22).

For the purpose of applying the setoff, the court allocated the **unallocated** settlement funds utilizing its **own formula based on percentages** derived by combining the amounts of the Plaintiffs’ separate verdicts. There was **no factual determination** as to the settling parties’ intentions *or* the reasonableness of not allocating the settlement and paying the funds equally to both Plaintiffs. The trial court denied setoff as to the funds paid to the Greens by MUSC, the at-fault driver, and the Green’s own UIM insurer. (R. pp. 20-22).

The Court of Appeals affirmed the judgment of the circuit court. Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., Op. No. 2016-Up-052 (S.C. Ct. App. filed February 3, 2016). Both parties’ Petitions for Rehearing were denied on March 24, 2016. This Court granted both parties’ petitions seeking a writ of certiorari on October 2, 2017.

FACTS

Following a car accident on April 17, 2004, Mr. Green was transported to Grand Strand GSRMC with a right hip fracture and dislocation, and a laceration on his right arm. He arrived in the Emergency Room (“ER”) at 12:00 p.m. and was noted to be cooperative, awake, alert, making eye contact, communicating with normal speech, exhibiting no confusion, and without any signs of face or head trauma. The ER physician, Dr. Lintz, consulted with the on-call orthopedic surgeon, Dr. Bauerle, over the phone regarding the hip injury. (R. p. 434, ln. 17- p. 435, ln. 1; pp. 343-344; p. 357; p. 359; p. 361; p. 485, lns. 13-21; p. 362).

Due to the alleged negligent care Mr. Green received over the next two hours in the emergency room, he developed further injuries and serious conditions. (R. p. 439, ln. 19- p. 440, ln. 6; p. 445, ln. 20- p. 447; pp. 457-463; p. 465; p. 467, ln. 14- p. 470; p. 471). Expert testimony at trial indicated that “[s]o many things had gone awry,” there was no way to determine the cause of his increasing instability. (R. p. 465). Due to the decline in his condition, at 2:00 p.m., Mr. Green was urgently taken from the ER to the Pre-Operative area (“Pre-Op”) where he could be closely monitored and an anesthesiologist was present to control his vital signs and perform immediate resuscitative procedures if his condition worsened. (R. pp. 121-122; p. 195, lns. 6-14; p. 275, lns. 8-11; p. 419; p. 420; pp. 447-448; p. 459; pp. 462-463; p. 471). Dr. Lintz then called Bauerle again and told him that he felt Mr. Green needed to be in Pre-Op and there was no time for a CT scan of his hip. (R. p. 345). Bauerle disagreed and was “pretty adamant about getting the CAT scan of the hip first.” (R. p. 120, lns. 23-25; p. 121, lns. 13-16; p. 470, lns. 18-22; p. 471, lns. 17-24). At trial, Bauerle stated, “I had no disagreement, I knew exactly what needed to be done, it’s what I did.” (R. p. 291, lns. 15-20)

Mr. Green’s cognitive functioning had also markedly declined by the time he was taken to Pre-Op at 2:00 p.m. (R. pp. 281(c), lns. 8-13; p. 419; pp. 423-424). Of significant note, this decline

in his cognitive status occurred sometime after his arrival at GSRMC and before Dr. Bauerle's involvement. (R. p. 117, lns. 12-15; p. 262, lns. 16-22; p. 314, lns. 21-25; p. 364; p. 419; pp. 423-424; p. 427). He would later be diagnosed with a brain injury at MUSC which interferes with his speech and ability to follow commands. (R. p. 354; p. 372). This and the other injuries suffered during the previous two hours at the hospital, while subject to the settlement with GSRMC, **were not at issue in the trial against Bauerle.** (R. p. 215; pp. 248-250, pp. 349-350; pp. 353-354; p. 419; p. 465; pp. 468-469; pp. 483-484).

When Bauerle arrived at the hospital, he went into Pre-Op and removed Mr. Green for the CT scan of his hip, despite vital signs warning that he was on the verge of a cardiac arrest. (R. pp. 199-200; p. 307, lns. 16-18; pp. 364-365; p. 419; p. 456; p. 459; p. 471, lns. 5-11). Bauerle conceded at trial that he would not have removed him had he been aware of his condition. (R. p. 308, lns. 18-2?) Expert testimony indicated that Bauerle "dramatic[ally]" deviated from the standard of care in taking a "totally unstable" patient out of Pre-Op where his vital signs were being closely monitored and controlled by Dr. Peters, the anesthesiologist who could also perform the emergency procedures necessary to prevent a cardiac arrest. (R. p. 196, lns. 15-23; pp 199-200; pp. 274-275; p. 419; p. 456; p. 459, lns. 13-15; p. 463, lns. 12-19; p. 488, lns. 2-14; p. 490, lns. 1-8; p. 491, lns. 8-13).

While away from Pre-Op for the CT scan, Mr. Green went into cardiac arrest, which was discovered in a "serendipitous fashion" by Dr. Lintz, who "happened" to be passing by. (R. p. 121, lns. 1-25; pp. 197-199; p. 464; p. 488, lns. 9-14). Dr. Lintz immediately paged Dr. Peters from Pre-Op before intubating and attempting to resuscitate Mr. Green himself in the emergency room. (R. pp. 121-123; p. 274; p. 346; p. 465, lns. 12-25). Bauerle was present but stated "I don't run code. . . I watched." (R. p. 295, lns. 20-24.) According to the resuscitation record, CPR ceased 26 minutes later. (R. p. 365). Mr. Green was transferred to MUSC in Charleston the following evening, and the nurse

receiving him from the ambulance noted that he couldn't wiggle his toes, discovering that he was paralyzed. (R. p. 254). He spent the next two months being treated for innumerable serious injuries and conditions, before being discharged to a rehabilitation facility. (R. pp. 197-199; pp. 263-264; pp. 352-356; pp. 365-366; p. 419; p. 446; pp. 488-489).

At trial against Bauerle, the Greens alleged that (1) Bauerle deviated from the standard of care in **removing Mr. Green from Pre-Op**; (2) Mr. Green's location away from Pre-Op proximately caused the cardiac arrest; (3) the cardiac arrest proximately caused a spinal cord infarction; and (4) the spinal cord infarction proximately caused several specific injuries. **Each injury alleged to result from Bauerle's tortious act was supported by evidence of distinct damages, and there was conflicting evidence at trial as to whether specific injuries resulted from the infarction.** (R. pp. 128-132; pp. 134-136; pp. 138-141; pp. 144-145; pp. 151-174; pp. 176-181; pp. 185-192; p. 350; pp. 370-390; pp. 483-484; pp. 493-500).

At trial, the judge explained the verdict form to the jury, stating that the first question was whether they find that Bauerle "negligently departed from the standard of care in treating the plaintiff Randall M. Green" and that "**this negligent departure**" proximately caused Mr. Green "**injuries.**" (R. p. 28; p. 336, lns. 5-13) (emphasis added). The jury was charged that potential actual damages "include all compensation for all of the **injuries** which are naturally the result of the alleged wrongful conduct[,] if you found wrongful conduct." (Supp. R. p. 1, lns. 19-23; p. 525) (emphasis added). Thereafter the jury returned verdicts for the Greens in the amount of \$2,300,000.00 for Medical Malpractice and \$550,000.00 for Loss of Consortium. The verdict form indicated that Bauerle deviated from the standard of care and that this deviation caused Mr. Green "injuries," but **did not indicate which "injuries" or "actual damages" were included.** (R. p. 28).

The evidence at trial indicated that just the total *future* medical expenses for injuries alleged

to have resulted from the infarction exceeded the entire medical malpractice jury verdict, indicating that the jury did **not** find that Bauerle's negligence proximately caused all injuries and damages alleged. (R. p. 389; p. 400). Further, there was evidence that Mr. Green was urinating "without difficulty" upon discharge from MUSC months later, creating conflicting evidence as to whether the bladder injury resulted from the spinal infarction as alleged by Plaintiffs. (R. p. 354). This injury was supported by evidence of distinctive damages to **both** Plaintiffs, inclusive of the value of Mrs. Green's care in catheterizing him five to six times a day and the past and future cost of catheters over the course of 25.65 years totaling \$393,214.50. (R. pp. 28-31; pp. 156-157; pp. 158-159; p. 263, ln. 16-p. 264, ln. 8; p. 336; p. 348; p. 350; p. 379). Additionally, there was conflicting evidence as to whether the leg paralysis resulted from the infarction or from the hip dislocation. (R. p. 244; p. 254; p. 291). This injury was also supported by damages distinct from the other injuries alleged such as wheelchair costs (\$153,867.00) and home modifications (\$55,526.00). (R. p. 400). There is no way of determining whether the jury included either of these injuries and their resulting damages in the malpractice verdict. Of note, Plaintiffs requested that the verdict form permit the jury to indicate how much was being awarded for different damages. However the trial judge declined, and Bauerle did not object. (R. p. 332).

Following the jury's dismissal, Bauerle filed a motion for setoff, claiming that S.C. Code Ann. §15-38-50 entitled him to setoff all settlement funds paid by GSRMC, CMR, the at-fault driver, the Green's own UIM insurer, and MUSC for funds paid to settle a separate suit arising out of severe complications resulting from a negligently retained sponge. The basis of his motion was that the Greens ". . . sought recovery from all Defendants for the same injury." (R. p. 47). The trial court denied the motion as to the at-fault driver, the Greens' UIM insurer, and MUSC. However, the trial court found that both of the verdicts, the entire unallocated settlement with GSRMC, and the

settlement with CMR would be set off because they were for the same “injury” as the jury “verdict.” (R. pp. 20-21; pp. 45-48). There was no factual analysis or explanation for this finding. The trial court’s order further stated that the settlements and verdicts did not involve different causes of action. (R. pp. 20-21). Of note, the only evidence available to the trial judge as to the content of the settlement with GSRMC was the language of the Covenant itself, as **wrongful conduct and injuries alleged only against the hospital were not at issue in the medical malpractice trial against Bauerle.**

For the sole purpose of providing Bauerle the benefit of setoff, the trial court then found that the *unallocated* settlement with GSRMC belonging *equally* to Mr. and Mrs. Green would be divided between them and apportioned between medical malpractice and loss of consortium. The order expressly stated that there existed no authority permitting it to allocate an unallocated settlement, but found that it “logically follows” it would be permitted based upon this Court’s holding in Rutland v. S.C. Dep’t of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012). Bauerle never requested that the settlement be allocated. There were no allegations, arguments, or findings that the terms of the settlement agreement were unreasonable, fraudulent, or a sham. (R. pp. 18-23; pp. 45-47).

In order to effect the allocation, the court used its own formula which did not involve *any* factual determination regarding the Plaintiffs’ respective damages as required by prior Supreme Court holdings. Rather, the court found that Plaintiffs had received “a combined verdict of \$2.85 million against the Defendants.” The court then determined the percentage of this total amount represented by each Plaintiff’s individual verdict, allocating these respective amounts to each Plaintiff. Accordingly, the trial court reduced Mrs. Green’s equal interest in the \$2,000,000.00 settlement to \$385,694.91. The remaining \$1,614,035.09 was allocated to Mr. Green. (R. p. 22).

Finally, each of the Plaintiffs’ verdicts against Bauerle was then reduced by the newly allocated amounts, reducing Mrs. Green’s verdict to \$159,480.53 and Mr. Green’s verdict to

\$665,789.47. (R. pp. 21-22). Accordingly, the trial court's order rendered the effect of obtaining a verdict against Bauerle far more penalizing to Mrs. Green than it was to the actual tortfeasor. The Court of Appeals affirmed the trial court's rulings *in toto* without analysis.

ARGUMENTS

Respondents-Petitioners respectfully request that this Court review and reverse the Court of Appeals Unpublished Opinion 2016-UP-052 filed February 3, 2016. The Court of Appeals erroneously affirmed the trial court's grant of setoff for the funds paid by GSRMC and CMR, allocating an unallocated settlement between Mr. and Mrs. Green utilizing the relative sizes of their individual verdicts for the purpose of setoff. On both issues addressed, the Court of Appeals' Opinion conflicts with existing precedent and creates novel analyses contrary to established principles of South Carolina jurisprudence. In so ruling, the Court of Appeals relies on an unwarranted expansion of statutory law, and creates precedent contrary to legislative intent, prior case law, and judicial economy.

I. IT WAS ERROR TO ALLOCATE AN UNALLOCATED SETTLEMENT PAID JOINTLY TO A HUSBAND AND WIFE SOLELY FOR THE PURPOSE OF SETOFF, AND TO MAKE THAT ALLOCATION BASED ON PERCENTAGES DERIVED BY COMPARING THE SEPARATE VERDICTS WHERE DIFFERENT CAUSES OF ACTION AND INJURIES WERE ALLEGED AGAINST THE SETTLING AND NON-SETTLING DEFENDANTS.

The trial court and Court of Appeals opinions rely on an unwarranted expansion of S.C. Code Ann. §15-38-50, ignore well settled principles of contract construction, and are in direct conflict with this Court's rulings in Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015) and Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012).¹ There exists no precedent allowing a court to

¹ See also Lowery v. Callahan, 210 S.C. 300, 300, 42 S.E.2d 457, 458 (1947); Bowers v. Dept. of Transp., 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004) (a release is a contract subject to rules of contract construction); see also C.A.N. Enters., Inc. v. S.C. Health & Human Services Fin. Comm'n., 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) ("In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties."); Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976) ("Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions."); Superior Auto. Ins. Co. v. Maners, 261

allocate an **unallocated** settlement amongst multiple Plaintiffs without their consent, particularly one paid jointly to, and mutually agreed upon by, a husband and wife. See Ex Parte Gov't. Employee's Ins. Co. ("GEICO"), 373 S.C. 132, 644 S.E.2d 699 (2007); Marsh v. Marsh, 313 SC 42, 437 SE 2d 34 (1993); Preer v. Mims, 323 S.C. 516, 476 S.E.2d 472 (1996) (loss of consortium is an independent claim, not derivative). Further, there exists no precedent for modifying an unallocated good faith settlement by allocating the agreement based on subsequent individual verdicts for the express purpose of allowing a non-settling tortfeasor the benefit of setoff, particularly where multiple non-identical causes of action arising out of multiple injuries were alleged against the various Defendants. Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).

In determining that setoff and allocation of the settlement were mandated, the trial court and Court of Appeals relied on case law interpreting S.C. Code Ann. §15-38-50. With respect to settling tortfeasors, this section provides:

When a release or a covenant not to sue or not to enforce judgment is **given in good faith** to one of two or more persons liable in tort **for the same injury** or the same wrongful death:

(1) it does not discharge any of the other tortfeasors from liability **for the injury** or wrongful death unless its terms so provide, but it reduces **the claim** against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater...

S.C. Code Ann. §15-38-50 (emphasis added).

Whether under §15-38-50 or common law, "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); Riley v. Ford Motor Company, 414

S.C. 257, 263, 199 S.E.2d 719, 722 (1973) (clear unambiguous language capable of legal construction alone governs contract's force and effect).

S.C.185, 195, 777 S.E.2d 824, 830 (2015). A cause of action is a form of redress for an injury or wrong arising out of a single set of facts. Taylor v. Medenica, 324 S.C. 200, 218, 479 S.E.2d 35, 45 (1996). This Court has previously recognized that the Uniform Contribution Amongst Tortfeasors Act, which encompasses S.C. Code §15-38-50, “represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's strong public policy favoring the settlement of disputes.” Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010). The plain language of the statute mandates a setoff where there is a settlement and verdict compensating the same damages for the same **injury** or death; i.e., where it is objectively obvious that the plaintiff would otherwise receive two recoveries for the same loss. In cases where it cannot be proven that setoff is necessary to prevent a double recovery, the important public policy in favor of fostering and promoting settlements controls. While defendants might find cases involving multiple Plaintiffs, causes of actions, and injuries riskier to litigate due to the difficulty of proving their own entitlement to setoff, this is presumably a scenario contemplated by the Legislature in drafting statutory language which serves to protect settling parties acting in good faith. S.C. Code Ann. §15-38-50.

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. In cases permitting *reallocation* of a settlement, such as Rutland and Welch, the reviewing court found *no evidence* to support the settling parties' allocation decision thus rendering it, by definition, a sham. Further, these cases involved causes of action arising out of a **single death** for which all Defendants shared liability, and there was no dispute that the settlements and verdicts were limited to damages arising out of that one death. Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 734 S.E.2d 142; Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408.

The analyses in Rutland and Welch were focused on the amounts allocated to the survival cause of action which is unique because there are **only two elements of damages which can be recovered; a single objective economic loss (past medical expenses) and a single subjective non-economic loss (pain and suffering)**. In Rutland, the evidence clearly demonstrated that the decedent died instantaneously. *All* settlement proceeds which had been allocated to the survival action were re-allocated to the wrongful death action because there was no evidence to support *any* damages for pain and suffering *or* medical expenses. In Welch, there was also no evidence to support *any* value for pain and suffering, however, there were medical expenses. Accordingly, all funds allocated to the survival action in excess of the medical expenses were reallocated to the wrongful death claim. In both of these cases, the reallocation was based on *objective* numbers without any attempt to place a subjective value on non-economic damages. The analyses of the subjective non-economic losses were limited simply to whether or not there was *any* evidence those damages existed.

Here, there were multiple injuries giving rise to causes of action for multiple categories of economic and non-economic damages. However, even an analysis of the objective *economic* damages would not demonstrate that the Plaintiffs would receive a double recovery. For example, just the present value of the *future* medical care totaled \$2,515,218.00, an amount which exceeded the total settlement as well as Mr. Green's verdict. (R. pp. 403-404). Further, the jury was charged that Mr. Green could recover the value of his past medical care and that Mrs. Green could recover for "any expenses incurred in the care and treatment of [Mr. Green]." (R. p. 335, ln. 24- p. 336, ln. 2). Even if it was discernable that the jury awarded past medical expenses to either Plaintiff, the Greens were entitled to jointly accept *settlement* funds intended for this element of damages.² It was manifestly

² According to the life care plan's annual value of the care Mrs. Green provides, she had provided approximately \$1,209,600.00 worth of care as of the date of trial. (R. p. 158, lns. 12-18; p. 385). Further, past medical *bills* were *expressly* not presented to the jury at the trial against Bauerle, and could not be included in the jury verdicts. (R. p. 181). Any award

unjust for the court to modify their settlement agreement based on the relative sizes of their individual verdicts against Bauerle, particularly without any concept of how this element of damages impacted this proportionality.

Furthermore, placing a value on the multiple compensable categories of the extraordinary *non-economic* damages suffered by both Plaintiffs as a result of injuries sustained at the hands of various defendants would be a highly subjective task *even if* the trial judge had heard all the evidence pertaining to injuries and damages resulting from the negligence of the settling defendants. However, this does not negate the necessity of a reasonable factual analysis, nor does it justify simply relying on the jury's determination of the total respective damages *Bauerle* caused each Plaintiff. Riley v. Ford, 414 S.C.185, 777 S.E.2d 824. Mr. and Mrs. Green each carried the burden of proving the elements of their individual and distinct damages at trial, and each was entitled to their verdicts independently of the other. Page v. Crisp, 303 S.C. 117, 119, 399 S.E.2d 161, 162 (Ct. App. 1990). 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.

A. It was error, in the absence of any allegations of fraud or unreasonableness, to allocate an unallocated settlement given in good faith to two or more married Plaintiffs in a case involving multiple claims for injuries.

The trial court and Court of Appeals are in direct conflict with this Court's holding in Riley v. Ford, wherein the Illinois Court of Appeals was quoted favorably as follows;

to either Plaintiff for past medical expenses would be limited to discerning the value of Mrs. Green's services as well as the cost of supplies and medications from the Life Care Plan and economic expert's report.

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, Inc., 901 N.E.2d 1006, 1019 (Ill. App. 2009) (*citing* Muro v. Abel Freight Lns., Inc., 669 N.E.2d 1217 (Ill. App. 1996))).

In Riley, this Court ruled that the Court of Appeals had erred in reapportioning the settlement proceeds on the sole basis that the settling parties' allocation did not seem to be *proportionately* reasonable. Here, 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. (R. p. 22). In footnote 3 of the Riley opinion, this Court noted that the Court of Appeals' decision included no discussion of why the settling parties' allocation was not reasonably based on the evidence or how it ran afoul of the public policy of preventing a double recovery. Similarly, the trial court and Court of Appeals in the present case failed to even address the issue of whether the settlement agreement was unreasonable, much less provide any discussion as to *why*. (R. pp. 18-23).

As was also noted in the Riley opinion, Bauerle **did not even suggest** that the lack of allocation or the Plaintiffs' decision to share equally in the funds was unreasonable. In fact, distinguishing this case even further from Rutland and Welch, his motion **did not request that the settlement be modified**. His sole basis for the motion was that set off was mandated because "the Plaintiffs sought recovery from all Defendants for the same injury." (R. p. 47). The trial court's reason for allocating the settlement was that Bauerle was entitled to a setoff, and the standard setoff rules could not be applied without modifying the settling parties' agreement to correlate with the verdicts.

(R. pp. 18-23). Accordingly, the settlement was allocated **solely because it was deemed necessary to benefit Bauerle**. “Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify appellate reapportionment for the sole purpose of benefitting [the non-settling defendant].” Riley, 414 S.C. at 197.

In the present case, the trial court’s order, affirmed by the Court of Appeals, referred to Rutland in stating that because “[t]he South Carolina Supreme Court has specifically authorized the equitable *reallocation* of settlements in cases where the settling parties had agreed to a certain allocation between claims,” it therefore “. . . logically follows that a court may make an equitable allocation in a case where the settling parties did not even agree to any particular allocation between the claims.” (R. p. 22). This reasoning parallels the Court of Appeals holding in Riley v. Ford, wherein the court stated that the reallocation “makes sense.” Riley at 190. In overruling the Court of Appeals in that case, this Court addressed that same logic before stating;

Essentially, the court of appeals decided it was within the province of a reviewing court to evaluate the reasonableness of not only the dollar amounts but also the relative percentage of settlement proceeds assigned to each claim.

Riley, 414 S.C. at 191.

Here, there was no assertion that the lack of allocation was a fraud or sham. The trial court did not evaluate the reasonableness of the Plaintiffs’ decision *not* to allocate the funds before modifying their settlement agreement to correlate *proportionally* to the same causes of action as the verdicts. 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. There was no consideration of the fact that GSRMC negotiated the settlement terms while subject to a separate contractual relationship with Bauerle. 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. 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.

Specifically, Mrs. Green alone provides Mr. Green's 24-hour care, spending very few hours in the day doing things for herself, including sleeping more than a few hours a night. (R. p. 158, lns. 12-18; p. 187, lns. 15-23). Mrs. Green's unwavering dedication to her husband has required the forfeiture of her previously active social life, and expert testimony indicated that she was "supremely tired" and suffering from anxiety, depression, and caregiver role strain. (R. pp. 159-160). Her children tearfully testified that she has done this at the expense of her own health, refusing to leave his side long enough to receive treatment for a heart condition. (R. pp. 129-133; p. 160; p. 185). For the past twelve years, she has catheterized her husband five to six times a day, requiring her to set an alarm to wake up in the middle of the night. (R. p. 186; p. 187, lns. 2-6). She lives with the knowledge that if she fails to do this even once, he will die. (R. p. 156, ln. 14- p. 157, ln. 5; p. 187, lns. 9-14). She manually evacuates his bowels. (R. p. 152, ln. 14- p. 153, ln. 7; p. 188). She physically lifts him, bathes him, prepares his meals, helps him eat, and takes care of all the household chores. (R. p. 160, lns. 14-19; p. 189). She had not left the house for any length of time in the nine years prior to trial, stating "I can't go far. I don't go far. Time is my enemy now." (R. p. 185, lns. 7-8). She testified that she will continue to provide all of her husband's future care, stating "[h]e would do the same for me and I will do it until I die . . . He has taken care of me all these years, it's my turn and I will do it until I can't." (R. p. 192, lns. 1-9).

The trial judge instructed the jury that Mrs. Green was entitled to recover for any expense "...incurred in the care and treatment of [her] spouse because of illness or bodily harm suffered by the spouse." (R. p. 335, ln. 24- p. 336, ln. 2). According to the life care plan's value of the care she

provides annually, she had provided approximately \$1,209,600.00 worth of care as of the date of trial. (R. p. 385; p. 158, lns. 12-18). The total cost of his *future* home care which she will provide is \$2,584,536.00. (R. p. 385). Accordingly, assuming for a moment that the injuries and causes of action which were included in the settlement with GSRMC *were* identical to those tried and compensated in the awards against Bauerle, it certainly would have been reasonable for the settling parties to allocate \$1,000,000.00 to Mrs. Green for her damages. The Greens would have been within their rights to allocate the *majority* of the funds to Mrs. Green, and it *still* could not be seriously argued that this would be unreasonable based on the facts. By definition, the agreement to share the funds jointly and equally in this case could not be a fraud or sham. (R. p. 158; p. 160; p. 167, pp. 185-187; p. 191-192; pp. 335-336; p. 385; p. 495).

Permitting courts to allocate joint property unequally between a husband and wife without their consent for the purpose of setoff implies that the pecuniary interests of third party tortfeasors conveys upon a trial court the authority to alter an agreement consummated by a married couple and force the division and characterization of their joint property. See Ex Parte Gov't. Employee's Ins. Co. ("GEICO"), 373 S.C. 132, 644 S.E.2d 699 (2007); Marsh v. Marsh, 313 SC 42, 437 SE 2d 34 (1993) (personal injury award acquired during a marriage is marital property). Consistent with this Court's ruling in Riley v. Ford, 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.³ This is not evidence

³ In Marsh, this Court made clear that the family court is not required to divide all marital property by utilizing the same percentage of division but, rather, may award the entire personal injury award to the injured spouse. Similarly, in holding that personal injury proceeds are marital property, this Court's reasoning emphasized the need for the family court to be able to apportion funds paid for specific types of damages, such as future economic losses or personal losses, to the appropriate spouse. Id. at 36. Therefore, 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.

that the lack of allocation was intended to deprive Bauerle of any benefit to which he would have otherwise been entitled.

B. Even if the court had authority to modify the good faith settlement agreement to allocate unallocated funds paid jointly and equally to the husband and wife, the funds should have been allocated equally between the two Plaintiffs.

Allocating an unallocated settlement between multiple Plaintiffs in order to apply a setoff, particularly in a case involving multiple divisible injuries and causes of action, represents a departure from the standard setoff rules.

[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, 777 S.E.2d 824 (2015) (*quoting In re Wells*, 43 S.C. 477, 21 S.E. 334, 337 (1895)). Therefore, the party seeking setoff must first *request* that the settlement agreement be modified, and “such motions are addressed to the discretion of the court- a discretion which should not be arbitrarily or capriciously exercised.” Oaks at Rivers Edge Prop. Owners Ass’n v. Daniel Island Riverside Developers, Op. No. 2014-0023902 (S.C. Ct. App. filed August 2, 1017) (*quoting Welch v. Epstein*, 342 S.C. at 313, 536 S.E.2d at 425-26). 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. The trial court and Court of Appeals relied on Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012), holding “when a settlement is argued to involve two claims . . . the circuit court must make a factual determination of how to allocate the settlement between the two claims.” *Id.* (*citing Rutland v. SC Dept. of Transportation*, 734 SE 2d 142, 400 S.C. 209 (2012)). However, the Smith court, in citing Rutland for this proposition, failed to recognize that this Court had permitted the reallocation amongst the claims in that case after a factual determination revealed that there was **no**

evidence to support a cause of action to which funds had been allocated. Id. (See also Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824). Further, this case is distinct from Smith as that case involved only a single identifiable injury alleged against all defendants; i.e., a specific amount of money that was lost. Even if Smith was applicable to the present facts, the trial court in this case did *not* utilize a “factual determination” as required by the rule for which it and the Court of Appeals cited the Smith opinion.

In order to prevail in an action for loss of consortium, Mrs. Green had to prove Bauerle’s liability for her husband's injuries, *as well as* the damages she sustained as a result of those injuries. Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998); *citing Husband and Wife* § 250 (1995). This Court has previously articulated the unique challenge of proving a loss of consortium claim in stating that

[t]he companionship and society of a [spouse] are not articles of commerce. They cannot be weighed or measured. They are not bought and sold, and no expert is competent to testify to their value. The consideration upon which they are bestowed is not pecuniary....

Cook v. Atlantic Coast Ln. R.R., 196 S.C. 230, 243, 13 S.E.2d 1, 6-7 (1941). 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). There was not one scintilla of evidence to indicate that the hospital settlement was for the same injury to Mrs. Green as her jury verdict.

The Court reduced Mrs. Green’s equal interest in the \$2,000,000.00 settlement to a 19.3% share, allocating to her only \$385,694.91 of the funds received as consideration to release *all* of her claims against GSRMC. As there was no way to determine which injury or injuries were included in the verdicts, they cannot be relied on as a fair and accurate representation of her total damages.

Moreover, as the evidence of her extensive damages was not even a factor in the trial court's determination, the resulting amount can't, by definition, be considered bona fide, fair, and just. 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. (R. pp. 18-23). Even if it was possible to demonstrate that the settlement and verdicts were for the same injuries and causes of action, and even if an allocation was permissible, it would have been simpler and more equitable to allocate it **equally** between the two Plaintiffs. 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. 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. The court's allocation resulted in a setoff that reduces Mr. Green's verdict to \$665,789.47, and Mrs. Green's verdict to \$159,480.53. (R. pp. 18-23). Though Plaintiffs deny that any allocation or setoff should have been applied, 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. 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.

Plaintiffs deny that the court had authority to allocate an unallocated settlement given in good faith, specifically considering the facts of this case. 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. The unfortunate result of the present holding was that the sole party who benefitted from the court's allocation of the settlement is also the *only* wrongdoer who refused to settle, holding him accountable for only 28.9% of the damages which the jury had determined *he* caused⁴.

II. IT WAS ERROR TO FIND THAT THE SETTLING AND NON-SETTLING PARTIES WERE JOINT TORTFEASORS LIABLE FOR THE SAME SINGLE INJURY, ENTITLING THE NON-SETTLING PARTY TO SETOFF OF ALL SETTLEMENT FUNDS, WHERE MULTIPLE INJURIES WERE ALLEGED TO ARISE OUT OF SEPARATE TORTIOUS ACTS OCCURRING AT DIFFERENT TIMES, THE SETTLEMENT WAS UNALLOCATED, AND THE VERDICTS DID NOT SPECIFY THE INJURIES COMPENSATED.

The plain language of S.C. Code Ann. §15-38-50 mandates a setoff where there is a settlement with "one of two or more persons liable in tort for the same injury or the same wrongful death." This statute does not apply to liability which is vicarious rather than direct. S.C. Code Ann. §15-38-20(f); Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 670 (Ct. App. 2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003). Section 15-38-50 constitutes a codification of the equitable principles on which the common law right to setoff is based. Riley v. Ford Motor Company, 414 S.C.185, 195, 777 S.E.2d 824, 830 (2015).

⁴ The jury was instructed that the first question to answer was whether they found that Bauerle "...negligently departed from the standard of care in treating the plaintiff Randall M. Green and that **this negligent departure** from the standard of care" proximately caused Mr. Green "injuries." (R. p. 336, lns. 5- 13) (emphasis added). They were charged that "[a]ctual or compensatory damages include compensation for all of the injuries which are naturally the **result of the alleged wrongful conduct.**"(Supp. R. p. 1, lns. 21 – 22; p. 525) (emphasis added).

“Despite a defendant’s entitlement to setoff, whether at common law or under section 15-38-50, any ‘reduction in the judgment must be from a settlement for the same cause of action.’” Id. at 196. (quoting Hawkins v. Pathology Assocs. Of Greenville, P.A., 330 S.C. 92, 113, 498 S.E. 2d 395, 407 (Ct. App. 1998)). “[T]he facts at trial, not the allegations of a party's pleading, control liability.” Griffin v. Van Norman, 302 S.C. 520, 526, 397 S.E.2d 378 (Ct. App. 1990); Evans v. Creech, 187 S.C. 371, 197 S.E. 365 (1938) (prayer for relief is not the test of the identity of a cause of action). Where different conduct supports distinct injuries, there is no risk of double recovery, and the Plaintiff may recover under both causes of action. Taylor v. Medenica, 324 S.C. 200, 218, 479 S.E.2d 35, 45 (1996); Jones v. Winn-Dixie, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995); Creach v. Sara Lee Corp., 331 S.C. 461, 502 S.E.2d 923 (Ct. App. 1998) (distinguishing causes of action in the context of election of remedies cases.)

Here, Bauerle’s motion was based on the assertion that he was entitled to setoff pursuant to S.C. Code §15-38-50. The only argument he made in support of his motion was that the “Plaintiffs sought recovery from all Defendants for the same injury.” (R. p. 47). The trial court found that the recovery sought constituted a single injury and set off was therefore statutorily mandated.⁵ (R. pp. 20-21). The trial court further found that the settlement “was intended to and did extinguish all claims against [GSRMC],” before allocating all funds to medical malpractice and loss of consortium (R. pp. 20-21).

⁵ The trial court’s order states that “[i]n accordance with Ellis v. Oliver and Smith v. Widener, the settlements with [GSRMC] and [CMR] shall be set-off because they concerned the same injury as the jury verdict against Dr. Bauerle.” (R. pp. 20-21). However, Smith involved only a single identifiable injury (a specific economic loss). In Ellis, the Court of Appeals incorrectly determined that the term “injury” as used in the statute was broad enough to include all damages arising out of a single death. Ellis v. Oliver, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999). The trial court’s reliance on this case to justify aggregating all claims alleged by both Plaintiffs against all Defendants into a single claim for a single injury clearly conflicts with subsequent holdings. In footnote 1 of the Smith opinion, the Court resolved the inconsistency between Ellis and Rutland by expressly noting that Ellis **incorrectly** found that survival and wrongful death actions involved the same claim for the same injury.

The General Assembly in the Act struck the balance among competing policy concerns it deemed appropriate. We defer to the policy decisions of the General Assembly. For example, in Riley v. Ford Motor Co., we noted that a nonsettling defendant may not “fashion[] and ultimately extract[] a benefit from the decisions of those who do [settle].”

Smith v. Tiffany, Op. No. 27715 (S.C. filed April 26, 2017) (*quoting Riley v. Ford*, 414 S.C. at 197, 777 S.E.2d at 831. (explaining [i]f the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle”).)

The trial court and the Court of Appeals’ rulings are in direct conflict with S.C. Code Ann. §15-38-50 and the prior Supreme Court rulings of Riley v. Ford Motor Company, 414 S.C. 185, 777 S.E.2d 824 (2015), Rutland v. S.C. Dep’t of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012), Simmons v. Tuomey Regional Medical Center 341 S.C. 325, 33 S.E.2d 312 (2000), Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999), Rourke v. Selvey, 252 S.C. 25, 164 S.E.2d 909 (1968), and Pendleton v. Columbia Ry. Gas & Elec. Co., 133 S.C. 326, 131 S.E. 265 (1926). Additionally, the rulings are in direct conflict with the prior Court of Appeals holdings in Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), *rev’d on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003), Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) and Collins v. Bison Moving & Storage, 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998). As the entire settlement and both verdicts **did not** compensate the same injury and cause of action, setoff should have been denied as a matter of law. S.C. Code Ann. §15-38-50; Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824; Rutland v. S.C. Dep’t of Transp., 400 S.C. 2019, 734 S.E.2d 142.

First, Plaintiffs did not assert a single cause of action against all Defendants. The language of the settlement agreement is supported by evidence at trial that allegations of negligence against the hospital involved injuries arising at different points in time and out of different conduct than the divisible injuries alleged against Bauerle. The verdicts should not have been reduced by amounts paid to settle claims for these injuries. Moreover, any portion of the settlement proceeds paid to release the

hospital's vicarious liability for injuries arising out of Bauerle's deviation from the standard of care, rather than direct liability for ordinary negligence, would not be subject to setoff under §15-38-50. S.C. Code Ann. §15-38-20(f); Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003) (declining to extend the Act's scope to parties only vicariously liable).

Second, the injuries alleged at trial against Bauerle were distinct injuries as a matter of law. As there was conflicting evidence regarding the proximate cause of individual injuries with distinct damages at trial, there was simply no way to determine which "injuries" were included in the verdicts once the jury had been dismissed. "The law rather forbids [the] court assuming to take upon itself the powers, duties, rights, and privileges of a jury." Anderson v. Aetna Cas. & Sur. Co., 175 S.C. 254, 282, 178 S.E. 819, 829 (1934). The trial court's finding that setoff was mandated because the entire settlement and the verdicts compensated a single cause of action seeking redress for a single indivisible injury was manifest error.

A. Plaintiffs did not assert the same cause of action against all Defendants.

The right to setoff only arises under S.C. Code Ann. §15-38-50 when a prior settlement was "... paid to compensate the same plaintiff on a claim for the same injury." Smith v. Widener, 397 S.C. 468, 472, 724 S.E. 2d 188, 190 (Ct. App. 2012) (emphasis added) (citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. at 113, 498 S.E.2d at 407). When a prior settlement involves compensation for a different injury than the one tried to verdict, there is no setoff as a matter of law. Smith, at 472-473, 724 S.E.2d at 191. Whether under §15-38-50 or common law, "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, 414 S.C. at 195, 777 S.E.2d at 830.

- 1. The settlement agreement was not limited to a single injury or cause of action, and encompassed claims not litigated.**

A settlement agreement is a contract and subject to rules of contract construction. Lowery v. Callahan, 210 S.C. 300, 300, 42 S.E.2d 457, 458 (1947). "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976) (*citing* Kable v. Simmons, 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950)). In determining the intention of a contract,

... resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument. Extrinsic facts cannot, in such cases, give the instrument a different construction from that imported by its terms.

Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973) (*citing* 17 Am. Jur. (2d), Contracts, § 241). "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). Here, the trial judge's determination of the injuries and causes of action released in the settlement should have been based solely on the perfectly plain and clear language of the agreement.

The agreement states that \$2,000,000.00 was paid for the release of all past and future liability "on account of any claim for personal injury or negligence or any other claim or claims, actions, or causes of action, including medical expenses" against GSRMC, "by reason of the alleged negligence in Mr. Green's treatment, specifically including but not limited to the [presently pending] lawsuit." (R. p. 518). This language directly contradicts the trial court's finding that the settlement did not involve different causes of action. (R. pp. 20-21). Further, the agreement released all liability for the Greens' "injuries, treatment, and damages" as well as "any future claims for damages of any kind" and "potential claims for death." (R. pp. 519-520). This language directly contradicts the trial court's holding that the settlement was entirely for "the same injury." (R. p. 20). Further, it indicates that the

settlement expressly included all damages for **past medical treatment**, while evidence of past medical bills was **expressly** excluded from the jury's determination. (R. p. 181). Where evidence of damages expressly *included* in a settlement are *excluded* from trial, the non-settling defendant has already benefitted from the settlement and is not entitled to setoff funds paid for damages not included in the verdicts. *See Oaks at Rivers Edge Prop. Owners' Ass'n v. Daniel Island Riverside Developers*, Op. No. 2014-002390 (S.C. Ct. App. Filed August 2, 2017).

2. The settling Defendant was clearly liable for injuries arising at different points in time and out of different conduct than those alleged against the non-settling Defendant.

A cause of action is a form of redress for an injury or wrong arising out of a single set of facts. *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996); *Jones v. Winn-Dixie*, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995); *Robert Harmon and Bore, Inc. v. Jenkins*, 282 S.C. 189, 318 S.E.2d 371 (Ct. App. 1984) (distinguishing causes of action in order to prevent a double recovery in the context of election of remedies cases). "[T]he facts at trial, not the allegations of a party's pleading, control liability." *Griffin v. Van Norman*, 302 S.C. 520, 526, 397 S.E.2d 378 (Ct. App. 1990).⁶ Where different conduct supports distinct injuries, there is no risk of double recovery, and the Plaintiff may recover under both causes of action. *Taylor*, 324 S.C. at 218, 479 S.E.2d at 45; *Creach v. Sara Lee Corp.*, 331 S.C. 461, 502 S.E.2d 923 (Ct. App. 1998); *Jones*, 318 S.C. 171, 456 S.E.2d 429.

⁶ In footnote 2, the trial court based its finding that the settlement and verdicts were for the same cause of action on its assertion that the same allegations of negligence in the Complaint were alleged against all defendants. (R. pp. 20-21). However, "[a]llegations in a Complaint denied in answer are evidence of nothing." *Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64, 518 S.E.2d 301 (Ct. App. 1999) (pleadings not determinative of whether parties are joint tortfeasors). "[T]he facts at trial, not the allegations of a party's pleading, control liability." *Griffin*, 302 S.C. at 526. Further, the Complaint repeatedly referenced multiple "injuries," and specific allegations of conduct were clearly not intended to be attributed to all Defendants. (R. pp. 32-42). The Negligent Hiring, Supervision, and Training claim, which was dismissed, was **expressly** alleged only against GSRMC. (R. p. 40).

At the medical malpractice trial, the Greens alleged that Bauerle was liable for specific injuries resulting from a spinal cord infarction resulting from a cardiac arrest which was proximately caused by Mr. Green's *location away from Pre-Op*. (R. pp. 199-200, ln. 1; pp. 462-463; p. 474, lns. 5-15). There was evidence as to *additional potential* physiological causes of the cardiac arrest; i.e., a pre-existing heart-wave abnormality, neurogenic shock, and blood loss. (R. pp. 241 – 242; p. 344; p. 441; p. 448). Further, there was evidence that Mr. Green suffered a second arrest at MUSC resulting in exploratory surgery which also failed to reveal a cause. (R. p. 352). Plaintiffs conceded that there were “so many” potential factors, and there was “no way” to determine any one reason for his instability at that point in time. (R. p. 465). **However, the jury verdict against Bauerle was not dependent on a finding as to any other potential causes of the cardiac arrest.**

As set forth below, Bauerle was negligent in removing an **unstable** patient from Pre-Op without first taking the appropriate steps to assess his condition. The defense presented expert testimony that it is better to handle cardiac function and diminished blood volume in the ER because they have more “man power” than the OR. (R. p. 269, ln. 21- p. 270, ln. 2.) Plaintiffs asserted that Mr. Green's vital signs could not be monitored and controlled for about fifteen minutes when he was taken to CT Scan. Dr. Richard Matza testified that “there are critical moments in everything we do and this happened to be one of them.” (R. p. 196, lns. 15-23). Dr. Edd Chariker testified that, in Pre-Op, Bauerle was looking at a man “on the verge of a cardiac arrest” and to send him anywhere other than the operating room was a “dramatic deviation from the standard of care.” (R. p. 459). He further testified that if Mr. Green had remained in Pre-Op, “[w]ith greater than 51% certainty, I would be willing to say that the arrest could have been prevented.” (R. p. 463, lns. 12-19). Harvard Neurologist, Dr. Lee Cranberg, testified that the lethal damage to Mr. Green's spinal cord occurred during the

cardiac arrest sustained after Bauerle “came on the scene and interrupted [the treatment] sequence and sent Mr. Green to CAT scan.” (R. p. 488, lns. 2-14; p. 490, lns. 1-8; p. 491, lns. 8-13).

There is no evidence that any agent of GSRMC contributed to Bauerle’s negligent conduct in removing Mr. Green from Pre-Op, nor were any other individuals named in the lawsuit. (R. p. 199, lns. 1-11). To the contrary, Dr. Lintz repeatedly documented that he had warned Bauerle he did not think Mr. Green should be taken for another CT Scan, and Bauerle conceded he had made it clear to Dr. Lintz that he was “adamant” he was going to do it anyway. (R. p. 120, lns. 16-25; p. 121, lns. 13-16; p. 300, lns. 12-17; p. 471). In opening arguments, Plaintiffs’ counsel argued that the “key to this situation” would be evidence of this exchange between Bauerle and Dr. Lintz. (R. p. 110, lns. 21-25). In fact, the very reason that Plaintiffs alleged Bauerle’s action constituted a deviation in the standard of care was **because** he did so despite Dr. Lintz’s disagreement and without checking the patient’s vital signs or conferring with the other physicians involved. (R. p. 300; pp. 322-325; p. 471; p. 473, ln. 19- p. 473, ln. 1). Further, there is no dispute that the other doctors, nurses, and staff appropriately took Mr. Green to Pre-Op in a reasonably timely manner, and the employees of GSRMC did not contribute to the injuries and damages alleged under the medical malpractice cause of action, **a point admitted by Bauerle in his answer to a request to admit.**⁷ See Rule 36(b), SCRCF. (R. pp. 1-2; p. 84; pp. 461-464; pp. 501-502). The case against Bauerle depended on the finding that the cardiac arrest and spinal infarction wouldn’t have occurred if he had remained there. (R. pp. 199, lns. 15-25; p. 200, ln. 1; pp. 280-281; p. 479).

That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tortfeasors, even in the absence of community of design or concert of action, to a liability which is both joint and several, is a proposition recognized and approved in this state and supported by the great weight of authority elsewhere.

⁷ See Rule 36(b), SCRCF. (“Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.”).

Rourke v. Selvey, 252 S.C. 25, 28, 164 S.E.2d 909, 910, (1968) (quoting Pendleton v. Columbia Ry., Gas and Elec. Co., 133 S.C. 326, 331, 131 S.E. 265, 267 (1926).

The claims against GSRMC and Bauerle clearly involved at least some injuries arising out of different negligent acts and at different points in time. Plaintiffs' expert, Dr. Chariker, testified that all of the negligent conduct alleged directly against GSRMC occurred well before he was taken to Pre-Op, at which time organs and tissues had been injured. By the time Bauerle arrived, Mr. Green was in hemorrhagic shock, his blood was too diluted, he was suffering from severe metabolic derangement from overuse of crystalloids, and "his body was underperfused." (R. p. 151, lns. 13-15; p. 238, lns. 2-11; pp. 459-461; p. 465). The trial record contains evidence that, at some point during his time at GSRMC, he suffered a brain injury which still makes speech difficult, renal failure, and aspiration which resulted in pneumonia requiring bronchoscopy. (R. p. 262, lns. 16-24; p. 343; pp. 352-356; p. 364; p. 419). **None of these injuries were alleged to have resulted from the spinal infarction caused by the cardiac arrest resulting from Mr. Green's location away from Pre-Op.** (R. pp. 483-484).

At the close of evidence, the trial judge explained to the jury that their first question was whether they found that Bauerle "negligently departed from the standard of care" and that "**this negligent departure**" proximately caused Mr. Green "injuries." (R. p. 336, lns. 5-13) (emphasis added). They were further charged that potential actual damages "include all compensation for all of the injuries which are naturally the result of the **alleged wrongful conduct if you found wrongful conduct.**" (Supp. R. p. 1, lns. 19 – 23; p. 525) (emphasis added). Though Plaintiffs requested that the verdict form allow the jury to indicate what value they awarded for specific damages, the trial judge declined, and Bauerle did not object. (R. p. 337). By reducing the subsequent verdicts by the entire amount of the settlement, the trial court deprived the Greens of all funds paid as consideration for

separate injuries arising out of separate negligent conduct which was not at issue in the medical malpractice trial. Accordingly, the trial court and Court of Appeals rulings are in direct conflict with Riley v. Ford, wherein this Court made clear that setoff only applies to funds paid to settle the same cause of action.

3. The non-settling Defendant is not entitled to a setoff of any settlement funds allocated to medical malpractice.

The trial court found that the settlement “was intended to and did release all claims” against GSRMC before apportioning the entire settlement “between Mr. Green’s claim of medical malpractice and Mrs. Green’s claim for loss of consortium.” (R. pp. 20-21). However, a hospital cannot be held directly liable for medical malpractice, except on the basis of the negligent acts of its agents and servants or under the non-delegable duty doctrine. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) (common law prohibition against the corporate practice of medicine in South Carolina); Simmons v. Tuomey Regional Medical Center 341 S.C. 325, 33 S.E.2d 312 (2000). The trial court and Court of Appeals failed to recognize that, for purposes of the UCATA, causes of action for direct negligence and vicarious liability for medical malpractice are distinct. Any portion of the settlement proceeds paid to release GSRMC’s vicarious liability for medical malpractice, rather than direct liability for ordinary negligence, would not be subject to setoff under §15-38-50. S.C. Code Ann. §15-38-20 (f); Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 670 (Ct. App. 2001), *rev’d on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003) (declining to extend the Act’s scope to parties only vicariously liable).

S.C. Code Ann. §15-38-50 applies to *persons* jointly *liable* in tort for the same injury. At the time of settlement, the negligent supervision, hiring, and training cause of action and vicarious liability claims had been dismissed. (R. p. 1). The only direct negligence allegations against GSRMC under the remaining medical malpractice cause of action asserted the failure to train and supervise

Bauerle, the other agents, and employees as to the signs and symptoms of patients such as Mr. Green, as well as the failure to have or to enforce protocols or policies governing the treatment of patients with conditions similar to Mr. Green's. (R. p. 37; p. 38). "A hospital as an entity cannot practice medicine, diagnose an illness, or establish a course of treatment; however, the hospital may be held vicariously liable for the negligence of its employees." McMillian v. Durant, 312 S.C. 200, 439 S.E.2d 829, 833 (1993) (*citing* 41 C.J.S., Hospitals § 21 (1991)). The 6 year statute of repose for medical malpractice in this case expired on April 17, 2010, and Bauerle was the only individual person ever named in the lawsuit. S.C. Code §15-3-545 (A). (R. p. 3). Moreover, Plaintiffs' expert, Dr. Chariker, conceded that "I don't think it's the responsibility of the hospital to train doctors to be physicians or to be surgeons or to treat shock." (R. p. 476, Ins. 3-10). Finally, Bauerle admitted that GSRMC's employees did not cause or contribute to the injuries and damages alleged in the Third Amended Complaint which only contained the causes of action for medical malpractice and loss of consortium. (R. pp. 1-2; p. 37; p. 84; p. 461; pp. 468-469). Accordingly, GSRMC's potential liability to Plaintiffs for medical malpractice could have only been imputed vicariously as a result of its relationship with Bauerle.⁸

Any portion of the settlement paid to relieve the hospital's vicarious liability for injuries and damages caused by Bauerle's malpractice is not subject to setoff pursuant to §15-38-50. Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 670 (Ct. App. 2001), *rev'd on other grounds*, 256 S.C. 238, 588 S.E.2d 588 (2003) (declining to expand the definition of joint tortfeasor under §15-38-50 to include vicariously liable parties); *See also* S.C. Code Ann. §15-38-20 (f). Whether GSRMC's liability for a specific injury was direct or vicarious affects whether there is a right to setoff funds paid to settle that claim because a vicariously liable party is not a joint tortfeasor. Vicarious liability

⁸ The terms of the contractual relationship between Bauerle and GSRMC are not within Plaintiffs' knowledge. Bauerle's precise status as an employee, agent, or independent contractor has not been established.

gives rise to indemnity, not contribution or setoff.

In South Carolina, a master or principal only vicariously liable does not have an aliquot or proportional portion he or she ought to pay, *but rather may shift the entire loss* to the servant or agent actively responsible. . .

Id. at 225.

The holding in Andrade, is supported by the clear language of the UCATA as well as this Court's recent analysis in Smith v. Tiffany, Op. No. 27715 (S.C. filed April 26, 2017). In Tiffany, this Court declined to vary from the provisions of the UCATA, recognizing that

[i]ndeed, when the Act is read as a whole, with each section and subsection given effect, it is apparent that the legislature was not solely attempting to protect nonsettling defendants. 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.

Id. The language of §15-38-50 and other sections of the UCATA make clear that it does not apply to cases involving vicarious liability wherein it could impair rights of indemnity. S.C. Code Ann. §15-38-20(f) states that

[t]his chapter does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity **and not contribution**, and the indemnity obligor is **not entitled to contribution** from the obligee **for any portion of his indemnity obligation**.

(emphasis added). “Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning.” Smith v. Tiffany, Op. No. 27715 (S.C. filed April 26, 2017). The effect in the present case is that Bauerle remains liable for the entire medical malpractice verdict in which he was **the only actively responsible party**. It is important to note that entitlement to contribution and indemnity is often controlled by contractual terms existing between the settling and non-settling defendants in cases involving vicarious liability. It is not the responsibility of innocent Plaintiffs or the courts to speculate as to the ultimate outcome dictated by the terms of GSRMC and Bauerle's relationship, or to shield them from the consequences of their

decisions. In Tiffany, this Court reiterated its holding in Riley v. Ford, stating that "[i]f the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle." Id. (*quoting Riley* at 197, 777 S.E.2d at 831).

The trial court and Court of Appeals' holding that setoff was permissible, as all allegations and causes of action pled constituted the same "negligence," ignores the holding in Andrade, which makes clear that the *basis* of the party's liability for negligence distinguishes the cause of action for the purpose of setoff. Andrade at 225, 546 S.E.2d at 670. Allocating funds paid by a hospital to a medical malpractice cause of action for the purpose of setoff creates a paradox as the only permissible basis for the existence of such liability is vicarious, **prohibiting setoff as a matter of law**. Even if setoff were permissible in the present case, it could only be permissible as to that *portion* of funds paid to settle claims for injuries arising out of negligent acts for which the hospital was *directly* liable. However, there was no evidence that the hospital in any way contributed to Bauerle's malpractice in removing Mr. Green from Pre-Op, and it certainly couldn't be directly liable for the injuries which the jury found resulted from that act.

B. The injuries alleged against Bauerle were distinct injuries as a matter of law.

The right to setoff only arises under S.C. Code Ann. §15-38-50 when a prior settlement was "... paid to compensate the same plaintiff on a claim for the same injury." Smith v. Widener, 397 S.C. 468, 472, 724 S.E. 2d 188, 190 (Ct. App. 2012) (emphasis added) (citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998)). When a prior settlement involves compensation for a different injury than the one tried to verdict, there is no setoff as a matter of law. Smith, at 472-473, 724 S.E.2d at 191. Cases involving setoff have involved a **single identifiable injury such as a death or identifiable economic loss**, rendering setoff appropriate to prevent a double recovery where the causes of action settled and tried provide for

identical damages for that “same injury.” Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015); Rutland v. S.C. Dep’t of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012); Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); Smalls v. S.C. Dep’t of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Ellis v. Oliver, 335 S.C. 106, 473 S.E.2d 793 (Ct. App. 1999); Hawkins v. Pathology Assocs. of Greenville, 330 S.C. 92, 498 S.E.2d 392 (Ct. App. 1986) (no setoff where damages different for single injury and no way to determine what jury included in award); Ward v. Epting, 290 S.C. 547, 352 S.E.2d 867 (Ct. App. 1986). “Joint and several liability arises only when two or more tortfeasors are responsible for a *single* injury.” Collins v. Bisson Moving and Storage, 332 S.C. 290, 504 S.E.2d 247 (Ct. App. 1998).

As the holdings in Riley, Rutland, Smith, Welch, Smalls, and Hawkins exhaustively demonstrate, *even where* a case involves only a single indivisible injury such as a death or objective economic loss, if the settlement and verdict do not encompass the same cause of action providing for identical damages arising out of that injury, setoff *still* does not apply. In the present case, *each one* of the multiple injuries sustained gave rise to distinctive damages. Further, Bauerle could not have been found liable for any injuries occurring prior to his involvement in the case, or for any injuries not alleged at trial to result from the infarction (such as a significantly disabling brain injury). Quite simply, the jury verdicts **could not** include **all** of the injuries the Greens sustained. As there was conflicting evidence of individual causation, it is not possible to show that the verdicts even included all of those injuries alleged at trial.

As the previously cited case law has made profoundly clear, the correct analysis regarding the issue of setoff is **whether the settlement compensates the same damages for the same injury giving rise to the same cause of action as the verdicts**. If there is no way to determine what injury or injuries the jury included in the verdicts, it is simply impossible to determine that it is the same as

that included in the settlement. Under such circumstances, setoff should be denied. Hawkins, 330 S.C. 92, 498 S.E.2d 392 (no setoff where damages different for single injury and no way to determine what jury included in award).

As previously stated, the trial judge explained the verdict form to the jury, stating that the first question was whether the jury finds that Bauerle “. . . negligently departed from the standard of care in treating the plaintiff Randall M. Green and that **this negligent departure**” proximately caused his “**injuries.**” (R. p. 336, lns. 5-13) (emphasis added). The jury was also charged that potential actual damages “include all compensation for all of the **injuries** which are naturally the **result of the alleged wrongful conduct[,] if you found wrongful conduct.**” (Supp. R. p. 1, lns.19 – 23; p. 525) (emphasis added). The present case involved multiple extensive physical and non-physical injuries, many of which were not the subject of the medical malpractice trial against Bauerle. Further, the jury did not reveal which of the injuries that *were* alleged at trial were included in the verdicts. (R. pp. 28-31).

There was clearly no dispute that there were multiple injuries at issue at trial **as the verdict form itself used the term “injuries.”** (R. p. 28). Accordingly, the trial court and Court of Appeals’ finding that the settlements and verdicts were all for the “same injury” was presumably based on Bauerle’s assertion that Plaintiffs *sought* the same recovery from all Defendants. (R. p. 45). Even if this assertion was true, *seeking* the same recovery in the pleadings does not render multiple injuries a single, indivisible injury, particularly where each injury has distinct damages and is subject to separate proof of causation, giving rise to different causes of action. Evans v. Creech, 187 S.C. 371, 197 S.E. 365 (1938) (prayer for relief is not the test of the identity of a cause of action). The trial court allowed Bauerle to introduce evidence regarding causation as to specific injuries alleged at trial⁹, utilize a

⁹ Bauerle testified that the leg paralysis could have resulted from the dislocated hip placing pressure on the sciatic nerve rather than from the infarction. (R. p. 291, lns. 4-11).

verdict form which allowed the jury to award damages only for the “injuries” they found **he** caused, and then claim *after* trial that *all* damages alleged against *all* defendants arose from a single injury for the purpose of setoff. The Court of Appeals’ opinion did not address these inconsistencies. (R. pp. 28-31; pp. 88-91; pp. 248-250; pp. 253-254; pp. 258-260; p. 291, lns. 4-11; p. 336).

At trial against Bauerle, Plaintiffs alleged that the spinal infarction of Mr. Green’s lower thoracic cord resulted in (1) paralysis of both legs; (2) loss of feeling from his belly button down; (3) loss of use of his bowels; (4) loss of use of his bladder; and (5) loss of sexual functioning. (R. p. 483, ln. 14- p. 484, lns. 1-17). Additionally, Plaintiffs alleged that Mr. Green suffered five fractured ribs as a result of chest compressions performed during the cardiac arrest. (R. p. 237, lns. 15-24; pp. 248–250). **Each of these injuries was supported by evidence of distinct damages.** (R. pp. 128-132; pp. 134-136; pp. 138-141; pp. 144-145; pp. 151-174; pp. 176-181; pp. 185-192; pp. 370-390; pp. 248-250; pp. 483-484). Furthermore, loss of enjoyment of life is an element of damages so distinct for a paraplegic that it has been held to be a compensable, intangible injury in South Carolina as a matter of law. Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969).

“It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant’s negligence.” Mellen v. Lane, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (2008). Legal cause is a question of fact for the jury unless the evidence is susceptible to only one inference. Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962). The issue of proximate cause is a question for the jury if there is a fair difference of opinion as to whose act caused the injury. Ballou v. Sigma Nu Fraternity, 291 S.C. 140, 147-148, 352 S.E.2d 488, 493 (Ct. App. 1986). Here, the issue of which injuries resulted from Bauerle’s actions was a jury question as **there was conflicting evidence as to the proximate cause of individual injuries which Plaintiffs alleged to have been caused by the spinal infarction.** (R. pp. 237-239; pp. 242-243; p. 248; pp. 250-251; pp. 276-277; p. 291; pp. 311-

312; pp. 316-318; p. 354; pp. 483-484).

As Harvard neurologist, Dr. Lee Cranberg, testified, a reduced blood supply to the spinal cord can render it “not working properly but not so severe as to kill it.” (R. p. 480). He explained that, “[w]hen [the cells and tissues of the spinal cord] die due to insufficient blood supply, that is called an infarct.” (R. p. 481). According to Dr. Cranberg, the degree and duration of an ischemic event determines whether an infarction will occur as well as the extent of damage that is done thereby. (R. pp. 480- 483). Further, paraplegia, which Dr. Cranberg defined as paralysis of the legs, is **not** the only injury which *can* result from an infarction; rather, the specific areas of the spinal cord which are killed determines which body parts and organs are affected. (R. p. 483). Once the nerve cells die, they do not regenerate, and the functions for which they were responsible are permanently lost. (R. p. 482). Accordingly, the fact that Mr. Green suffered a spinal infarction does not mean that *all* of his injuries and damages resulted from that infarction. (R. p. 483). Further, the Life Care Plan demonstrated that *just* the future medical expense damages for *just* the paralysis, bowel, and bladder injuries equaled \$3,668,176.00, an amount which *alone* exceeded the medical malpractice jury verdict, indicating that the jury did *not* include *all* injuries and damages alleged against Bauerle. (R. p. 389; pp. 481-482).

The trial court’s opinion, affirmed by the Court of Appeals, provides no explanation or support for the finding that the entire settlement and verdicts compensated *only* the paralysis injury. (R. p. 20). Not only does this holding ignore extensive evidence of the other injuries alleged to have resulted from the spinal infarction, it ignores Bauerle’s own testimony that the leg paralysis could have resulted from the dislocated hip. (R. p. 291, Ins. 4-11). Further, Bauerle introduced evidence that, following the infarction, Mr. Green was still able to move his legs during transport from GSRMC to MUSC. (R. p. 244). Plaintiffs’ introduced evidence that, on arrival at MUSC, the nurse who received

him via stretcher out of the ambulance noted that he was unable to wiggle his toes. (R. p. 254).¹⁰ The conflicting evidence as to the cause of this one injury creates an inference from which the jury could have determined that Bauerle's negligence did not cause this injury, a distinct possibility considering a comparison of the amount of the jury's verdict with the present value of the future medical costs related to just the paralysis. Specifically, subtracting the future cost of the wheel chair (\$153,867.00) and home modifications required by his immobility (\$55,526.00) from the present value of the total future medical care costs (\$2,515,218.00) equals \$2,305,825.00, an amount very close to the jury's \$2,300,000.00 verdict for Mr. Green. (R. p. 400).

Moreover, the jury could have just as easily found that the bladder injury did not result from the infarction. Dr. Cranberg testified that a severe lack of blood will kill spinal nerves within a few minutes. (R. p. 482, Ins. 7-10). Evidence that Mr. Green was urinating "without difficulty" upon discharge from MUSC **a month later** conflicted with evidence that the bladder injury resulted from the spinal infarction. (R. p. 354; pp. 480-481). This injury was supported by evidence of distinctive damages to **both** Plaintiffs. For example, it has a distinct impact on their ability to leave the house for extended periods or engage in social activities, thus uniquely impacting the consortium damages as well as Mr. Green's loss of enjoyment of life. (R. pp. 185-187). As Mr. Green testified, **as a result of this one injury**, they had to rent a hotel room near the Conway courthouse to use during the day for catheterizations during the weeklong trial, returning home to Marion each evening. (R. p. 227). The bladder injury was also supported by evidence of specific economic damages, inclusive of the value of Mrs. Green's care in catheterizing him five to six times a day and the total past and future cost of catheters over the course of 25.65 years totaling \$393,214.50. (R. p. 379). This element of damages

¹⁰ Dr. Cranberg testified that cell death occurs within a few minutes without a blood supply. (R. p. 481).

could be included in the verdicts **only if** the jury found that this injury resulted from the infarction. Even if the trial court and Court of Appeals were correct in assuming that *all* injuries alleged against *all* parties were included in the settlement with GSRMC, **there can be no setoff if this injury was not included in the jury verdicts.** See Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App. 1998).

Moreover, there is no evidence as to what injuries were included in the settlement with GSRMC, and the Covenant made clear that it was not limited to the injuries and damages pending in the lawsuit. (R. pp. 518-519). Though Plaintiffs are restricted to the record of a trial in which they were not at issue, Dr. Chariker's testimony made clear that Mr. Green suffered injuries to various organs as a result of lack of oxidation, severe acidosis, and metabolic derangement. (R. p. 465). Given the severe decline in his condition over those two hours, it is abundantly clear that Mr. Green suffered *some* injury or injuries after his arrival at the hospital and prior to Bauerle's involvement. Mr. Green's cognitive status markedly declined during the two hours he was at GSRMC prior to Bauerle even arriving; and he suffered a **brain injury which was severe enough that it interferes significantly with his speech and ability to follow commands.**¹¹ Further evidence as to the severity of the brain injury was not presented at the medical malpractice trial as **Plaintiffs did not allege that it was caused by Bauerle.** (R. p. 238; pp. 343-344; pp. 348-356; p. 362; p. 364; pp. 370-384; p. 419; p. 465; p. 468; pp. 479-498, ln. 13; p. 500).

¹¹On arrival at GSRMC, Mr. Green is noted repeatedly to be awake and alert, with no evidence of confusion. (R. p. 343). Prior to his transfer to Pre-Op, a nurse notes that he was "sleeping on and off[,] awakens to verbal stimuli." (R. p.364). In Pre-Op and before Bauerle arrived, it is noted that he "[f]ollows some commands. [Moving all extremities]. Needing constant reminding to leave IV dressings alone, siderails up. Remains on 10L nonrebreather." (R. p. 419). This is the first evidence in the medical records of a head injury. Upon discharge from MUSC a month later, it is noted that he had a closed head injury which made it difficult for him to follow commands. (R. p. 354). Though Plaintiffs have no way of proving it from the record of a trial wherein the injury was not addressed, Mr. Green still has obvious difficulty and frustration with speaking.

As the verdict form and the instructions to the jury made indisputably clear, there were multiple “injuries” at issue in this case. As there was conflicting evidence regarding the proximate cause of individual injuries with distinct damages at trial, it was the jury’s function to determine whether the Plaintiffs suffered the injuries alleged, as well as for *which* “injuries” Bauerle was liable. There was no basis, in law or equity, for the trial court’s findings that the jury returned a verdict for a single injury or that it “disagrees with Plaintiffs claim that they suffered different injuries.” (R. p. 20). “The law rather forbids [the] court assuming to take upon itself the powers, duties, rights, and privileges of a jury.” Anderson v. Aetna Cas. & Sur. Co., 175 S.C. 254, 282, 178 S.E. 819, 829 (1934). The trial court’s retroactive determination, *after the jury had been dismissed*, that the verdict encompassed a single specific injury was manifest error.

“Obviously, the absolute power to change or modify the findings of a jury upon an issue of fact properly submitted to them would, when exercised, amount to the substitution of the trial judge’s findings for the verdict of the jury and to the abrogation in such cases of the right of trial by jury.”

Id. at 283, 178 S.E. at 830.

It was Bauerle’s burden to demonstrate that the settlement and verdict compensated the same injury, yet he failed to object to the language of the verdict form or seek clarification as to the content of the verdicts prior to the jury’s dismissal. Riley v. Ford, 414 S.C. 185, 777 S.E. 2d 824 (2015) (*citing In re Wells*, 43 S.C. 477, 21 S.E. 334, 337 (1895) (party seeking to depart from standard set-off rules bears the burden of proof); *See also Rourk v. Selvey*, 252 S.C. 25, 164 S.E. 2d 909 (1968) (“The defendant’s counsel made no attempt to find out what the jury intended, and their objections come too late. It was [counsel’s] business to clarify and ask for a correction and reformation of the verdict before the jury were [sic] discharged.”) Without any way of determining which injuries were included in the verdicts or settlements, there was no way to find that they entirely represented compensation for the same cause of action arising out of the same injury, or that setoff was necessary

to prevent a double recovery. Accordingly, setoff should have been denied as a matter of law. S.C. Code Ann §15-38-50; Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015); Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012); Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Ellis v. Oliver, 335 S.C. 106, 473 S.E.2d 793 (Ct. App. 1999); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). These principles were succinctly summarized by this Court in Smith v. Tiffany, in stating:

We acknowledge that achieving a more fair apportionment of damages among joint tortfeasors was one of the policy goals underlying the legislature's enactment of the Act. We disagree that fair apportionment was the *only* underlying policy goal. Indeed, when the Act is read as a whole, with each section and subsection given effect, it is apparent that the legislature was not solely attempting to protect nonsettling defendants. 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.

Smith v. Tiffany, Op. No. 27715 (S.C. filed April 26, 2017).

CONCLUSION

The language of S.C. Code §15-38-50 expressly sets the parameters of its applicability only to settlements with “persons” who are “liable in tort” for the “same injury or the same wrongful death.” Of significant note, the Legislature chose to use singular language, declining to use the terms “injuries” or “deaths.” Cases finding a defendant entitled to setoff under S.C. Code §15-38-50 have made clear that it grants the courts **no discretion** in applying a setoff in those specific cases that fall within the parameters of the statutory language. In other words, setoff only applies where two or more “persons” are **jointly** liable for a single injury or death and seek only to recover the same damages **arising out of that “same injury” or death** from both the settling and non-settling defendants. Riley

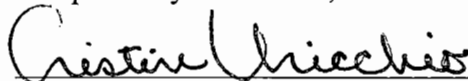
v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015); Rutland v. S.C. Dep't of Transp., 400 S.C. 2019, 734 S.E.2d 142 (2012); Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012) (citing Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271-72 (Ct. App. 1999); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). Where there is **no dispute** that the negligent conduct of all defendants rendered them jointly liable for the **same damages** arising out of the **same single injury**, the recovery sought is identical as a matter of law. Under such circumstances, *there is no need* for a court to exercise discretion in applying §15-38-50. The wording of section 15-38-50 effectively protects against double recoveries only in those situations where there is a **clear risk** of same. Clearly, this fosters and promotes settlements in situations involving multiple Plaintiffs and causes of action, and where multiple defendants share *potential* liability for *some* but not all of the injuries alleged.

However, as the present case amply illustrates, mechanical application of the setoff statute in cases involving multiple causes of action arising out of multiple distinct injuries to separate Plaintiffs, as well as vicarious liability, would require courts to invade the province of the jury. As there is no way to determine what was included in the settlements or verdicts, there is no way to determine that setoff was necessary to prevent either Plaintiff from receiving a double recovery. As the United States Supreme Court has previously recognized, "[t]he law contains no rigid rule against overcompensation [of the plaintiff]. 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).

Further, for the sole purpose of applying setoff, and despite the trial court's admission that there was no authority to do so, the present holding expanded current case law to permit the allocation

of an *unallocated* settlement in a non-death case, ignoring the decision between the husband and wife to share the funds equally, and thereby allocating the funds between the separate and distinct Plaintiffs. Finally, the analysis for *applying* that allocation directly contradicted precedent by relying on a “percentages” analysis based on multiple verdicts to multiple Plaintiffs, without any factual determination or consideration of the settling parties’ intentions. The findings and conclusions by the Court of Appeals in affirming the trial court’s order discourages future settlements and goes against judicial economy. On both issues, the Court of Appeals deviated from binding precedent and created a novel analysis. Plaintiffs therefore respectfully request that this Court reverse the Court of Appeals’ rulings as to the settlements with GSRMC and CMR.

Respectfully Submitted,



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November 20, 2017

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents-Petitioners, Randall M. Green and Ann Green, certifies that the Respondents-Petitioners' Brief complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2016-000864
Op. No. 2016-UP-052
(S.C. Ct. App. filed February 3, 2016)

RECEIVED

DEC 27 2017

S.C. 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.

**MOTION TO FILE SUPPLEMENTAL APPENDIX,
FOR LEAVE TO ARGUE JUDICIAL ESTOPPEL, WAIVER, AND/OR
RELEASE AND TO HOLD DEADLINES IN ABEYANCE**

The Petitioners-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. (hereafter collectively referred to as "Dr. Bauerle"), respectfully move this Court to allow the filing of a Supplemental Appendix to include post-judgment filings as discussed in the supporting memorandum filed herewith. Dr. Bauerle further seeks leave of court to allow him to brief a judicial

estoppel, waiver and/or release argument based on those post-judgment filings as part of his Respondent's Brief. Dr. Bauerle further requests that the briefing deadlines be held in abeyance during the pendency of this motion.

The grounds for this motion are addressed in more detailed in the supporting memorandum filed herewith.

The undersigned counsel for the Petitioners-Respondents was unable to consult with opposing counsel prior to the filing of this motion but will do so expeditiously.

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Columbia, South Carolina

December 20, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2016-000864
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(S.C. Ct. App. filed February 3, 2016)

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DEC 27 2017

S.C. 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.

**MEMORANDUM IN SUPPORT OF
MOTION TO FILE SUPPLEMENTAL APPENDIX,
FOR LEAVE TO ARGUE JUDICIAL ESTOPPEL, WAIVER, AND/OR
RELEASE AND TO HOLD DEADLINES IN ABEYANCE**

The Petitioners-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. (hereafter collectively referred to as "Dr. Bauerle"), has filed a motion with this Court to allow the filing of a Supplemental Appendix to include post-judgment filings as set forth below. Dr. Bauerle further seeks leave of court to allow him to brief a judicial estoppel, waiver and/or release argument based on

those post-judgment filings as part of his Respondent's Brief. Dr. Bauerle further requests that the briefing deadlines be held in abeyance during the pendency of this motion.

Dr. Bauerle seeks leave of court to file a Supplemental Appendix to including the following documents:

1. Receipt and Partial Satisfaction of Judgment dated August 5, 2014
2. Order Granting Leave to Deposition Funds into Court and Releasing Judgment Liens, filed December 11, 2014
3. Consent Order to Partially Release Funds Deposited with Clerk of Court filed April 14, 2016
4. Receipt and Partial Satisfaction of Judgment filed May 6, 2016

A copy of these four documents is attached hereto. Dr. Bauerle submits that these are court records for which judicial notice may be taken.

During the process of drafting the Respondents' Brief of the Petitioners-Respondents, it was recognized that that the Respondents-Petitioners may have released, waived, and/or may otherwise be judicially estopped from making one of the principal arguments in their Petitioners' Brief. The foregoing documents that were entered into the lower court's record after the final judgment was entered establish that the judgments entered for Randall M. Green and Ann Green (hereafter "Greens") has been partially satisfied and released.

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

At the close of the trial, Dr. Bauerle moved for a set-off of the amounts paid in settlement on behalf of other Defendants. 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 two of the other Defendants, 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.

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. The remaining judgments are in the amount of \$250,000.00 in favor of Randall M. Green and in the amount of \$159,480.53 in favor of the Ann Green. The Receipt

and Partial Satisfaction of Judgment executed by the 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, SCRCF.

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.

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, this Court granted both Petitions for Writ of Certiorari.

On November 20, 2017, the Greens filed their Petitioner's Brief. In that brief, one of the positions that the Greens take is that the trial court erred in failing to allocate a \$2 million pre-trial settlement from another defendant equally between Mr. Green and Mrs. Green. Dr. Bauerle has taken the position both in opposition to the Petition for Writ of Certiorari and in his response brief to be filed that that issue is not preserved for appellate review because it was not raised below and most importantly was not raised in the Greens' Petition for Rehearing. According to the Greens' argument, the \$2 million settlement should have been allocated so that there was a \$1 million set-off for both Mr. Green and Mrs. Green. That argument thus means 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 reduced to \$0. Dr. Bauerle disputes that position both on preservation grounds as mentioned and on the merits. Yet, while preparing Dr. Bauerle's appellate brief, it was determined that Dr. Bauerle may also validly argue that the Greens have released and/or waived this position and/or are otherwise judicially estopped to take that position not only because it was not raised in their Petition for Rehearing but also because Mrs. Green, with her husband's signed

consent, accepted \$64,883.68 in April 2016 (which was after the Petitions for Rehearing were denied), 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 taken on appeal whereby if the Court were to adopt the Greens' allocation argument, no payment of any amount was required to satisfy Mrs. Green's verdict of \$550,000.

Based on the foregoing, the Petitioners-Respondents pray for leave of court to file the Supplemental Appendix and to be permitted to raise these arguments in the Respondents' Brief. The Court is also asked for the briefing deadlines to be held in abeyance which will also allow time to consult with opposing counsel and clients regarding this issue.

Respectfully submitted,

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Columbia, South Carolina

December 20, 2017

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CASE NO: 2005-CP-26-2805

Randall M. Green and Ann Green

Plaintiffs,

vs.

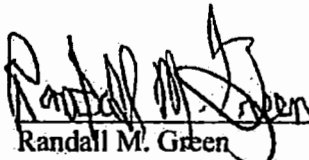
Wayne B. Bauerle, M.D., and Wayne B.
Bauerle, M.D., P.C.,

Defendants.

**RECEIPT AND
PARTIAL SATISFACTION OF
JUDGMENT**

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

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


Randall M. Green


Ann Green

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Randall M. Green and Ann Green,

Plaintiff,

v.

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

Defendants.

Civil Action No. 2011-CP-26-7403

**ORDER GRANTING LEAVE TO
DEPOSIT FUNDS INTO COURT
AND RELEASING JUDGMENT LIENS**

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

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

The Court finds as follows:

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

2. At the close of the trial, the Defendants moved for a set-off of the amounts paid in settlement on behalf of Grand Strand Regional Medical Center, LLC, Carolinas Medical Response, Inc., and the at-fault driver (including the underinsured motorist payments). By Order filed October 17, 2013, Judge John granted in part and denied in part the Motion for Set-Off. Judge John allowed for a set-off of the settlements received from Grand Strand and Carolinas Medical Response, but he denied the set-off for the amounts paid for the release of the at-fault driver and the UIM insurer. Judge John directed the Clerk of Court to enter judgment in the amount of \$665,789.47 in favor of Randall M. Green and to enter judgment in the amount of \$159,480.53 in favor of the Ann Green.

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

4. On August 5, 2014, the insurer for the Defendants made an initial payment of \$415,789.47 in partial satisfaction of the judgment in favor of Randall M. Green. The remaining judgments are in the amount of \$250,000.00 in favor of Randall M. Green and in the amount of \$159,480.53 in favor of the Ann Green. The Receipt and Partial Satisfaction of Judgment executed by the Plaintiffs was filed on August 8, 2014.

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

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

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

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

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

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

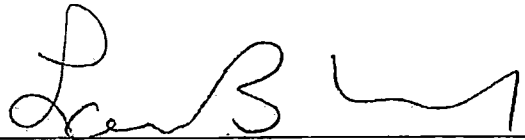
IT IS, THEREFORE, ORDERED that the Defendants deposit as requested with the Court the sum of \$446,669.82. The deposit pursuant to this Order shall be made to the Horry County Clerk of Court.

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

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

IT IS FURTHER ORDERED that the release of the judgment liens has no effect on any issues currently on appeal including the amount of the verdicts to which the Plaintiffs are ultimately entitled, which will be determined by the appellate courts. Further, the release of the judgment liens herein is not to be construed as a release or satisfaction of the judgments. Should the Plaintiffs prevail on appeal, the Defendants and the South Carolina Medical Malpractice Patients' Compensation Fund will be liable for the judgments as determined by the appellate courts.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Larry B. Hyman, Jr.", written over a horizontal line.

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

Conway, South Carolina

December 11, 2014

Randall M. Green, et al

HORRY COUNTY
OFFICE OF CLERK OF COURT
MELANIE HUGGINS
TRUST FUND ACCT.

No 609

Wayne B. Buerle, M.D et al

DATE 12-11- 2014

RECEIVED OF SC Medical Malpractice

Four Hundred forty six thousand six hundred sixty nine & 66/100 \$ 446,669.82

CASE NO. 2011-cp-26-7403

TRUST NO. _____

Melanie Huggins Ward
Clerk of Court for Horry County, S.C.

☐ REGULAR ☐ OPEN I/B ☐ CLOSED I/B

PHOTO COPY SUPPLY

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Randall M. Green and Ann Green,
Plaintiffs,

Civil Action No. 2011-CP-267403

v.

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

CONSENT ORDER TO
PARTIALLY RELEASE FUNDS
DEPOSITED WITH CLERK OF COURT

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

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

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

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

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

IT IS FURTHER ORDERED that, upon receipt of these funds, the Plaintiffs shall execute and file a Partial Satisfaction of Judgment that reflects that the judgment in favor of the Plaintiff Randall Green is partially satisfied by the payment of \$163,622.01 and the judgment in favor of the Plaintiff Ann Green is partially satisfied by the payment of \$64,883.68.

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

AND IT IS SO ORDERED.



Chief Administrative Judge
For the Fifteenth Judicial Circuit

Conway, South Carolina

Dated: 4-13-16

I SO MOVE:



Morgan M. Martin
Counsel for Plaintiffs

I CONSENT:



Andrew F. Lindemann
Counsel for Defendants

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2005-CP-26-2805

Randall M. Green and Ann Green

Plaintiffs,

vs.

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

Defendants.

**RECEIPT AND
PARTIAL SATISFACTION OF
JUDGMENT**

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

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


Randall M. Green


Ann Green

FILED
CLERK OF COURT
2016 MAY -6 AM 8:18
CORDE HUGHES-JOHN

copy

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JAN 03 2018

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Steven H. John, Circuit Court Judge

Op. No. 2016-UP-052
(S.C. Ct. App. Filed February 3, 2016)

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

v.

Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., ... Petitioners-Respondents.

**MEMORANDUM IN OPPOSITION TO MOTION TO FILE SUPPLEMENTAL
APPENDIX, FOR LEAVE TO ARGUE JUDICIAL ESTOPPEL, WAIVER, AND/OR
RELEASE AND TO HOLD DEADLINES IN ABEYANCE**

The Respondents-Petitioners, Randall and Ann Green (“the Greens”), respectfully request that this Court decline to grant Petitioners-Respondents’ (Dr. Bauerle’s) motion to hold the briefing deadlines in abeyance. The basis for Dr. Bauerle’s motion is that he has recognized the existence of additional arguments he would like to make for which there is no support in the existing Appendix. This motion has been made for the purpose of causing further unnecessary delay and cites no authority in support of his request or the novel arguments as required by Rule 240 (c)(2), SCACR. Furthermore, the documents with which Dr. Bauerle wishes to supplement the Appendix do not provide any evidence of facts which would satisfy the elements necessary to apply the doctrine of Judicial Estoppel or the defense of Waiver/Release. The July 2014 order of this Court establishes the following regarding extensions in cases filed under Rule 242, SCACR:

(1) Upon a showing of good cause, a party (or multiple parties if represented by the same counsel) may be granted extensions totaling no more than twenty (20) days during the proceedings before this Court. If multiple extensions are taken within the twenty (20) day cumulative limit, the minimum period that can be requested is five (5) days.

(2) Any extension beyond the twenty (20) days specified in (1) above will be granted only if extraordinary circumstances such as illness or other circumstances beyond the control of the movant warrant the granting of the extension. The parties are warned that the press of other business is not an extraordinary circumstance which will warrant the granting of an extension.

These extensions will generally be granted for no more than ten (10) days.

(2014-07-16-01). This Court has previously granted Dr. Bauerle fifteen (15) consecutive days of additional time to complete briefs in this proceeding. The realization that he could have made additional arguments which are unsupported by the current record does not constitute good cause, much less extraordinary circumstances which would warrant the granting of an extension of additional time. The Greens respectfully request that his motion be denied, or, if the court finds that there is good cause, that the deadline be extended by only five (5) additional days in accordance with the previous order of this Court. The following reasons demonstrate that good cause has not been shown to grant additional time, and that the granting of Dr. Bauerle's motion will result in further unnecessary and unfair delay in resolving this case:

1. Even if Dr. Bauerle was correct in asserting that this Court cannot now allocate the settlement funds equally, it would not prevent the Greens from arguing that the trial court should have. The Greens argued that, only in the event this Court finds Dr. Bauerle was entitled to a setoff and that the arbitrary allocation of their settlement was required and/or appropriate, the method used was erroneous and unjust. Accordingly, their argument that any allocation should have been equal served two purposes: (1) to provide an alternative for consideration in the event this Court finds that a re-allocation must be performed utilizing a different method than the one employed by the trial court **AND** (2) to support the Greens' position that the trial court's chosen method was unjust, erroneous, and unnecessary in light of the existence of a far more equitable solution. The

latter purpose makes the argument relevant, *even if* there was any merit to Dr. Bauerle's position that the later post-judgment disbursal of uncontested proceeds would prevent this Court from now employing the allocation method suggested by the Greens.

2. In Riley v. Ford, this Court made clear that the burden of demonstrating a bona fide, fair, and just alternative methodology rests on Dr. Bauerle as he is the party seeking to depart from the standard setoff rules. Riley, 414 S.C. 185, 777 S.E.2d 824 (2015). This Court additionally made clear that a court may not re-allocate the proceeds of a settlement unless the non-settling defendant demonstrates that the settlement terms were a fraud or sham. Id. However, in his Petition For Rehearing, Dr. Bauerle conceded that he did not meet either of these burdens, stating that he was "not in a position to contest the settlement and seek additional terms to that settlement." (Amended Joint Appendix p. 29). Accordingly, he has taken the position that the court is at liberty to allocate a settlement however it deems appropriate, regardless of whether the non-settling defendant failed to even request or suggest a particular allocation, much less demonstrate that it is bona fide, fair, and just. If this Court were to agree with his position on this issue, it is irrelevant that the Greens presented an alternative option for consideration.

3. In making this motion, Dr. Bauerle seeks to introduce multiple legal issues that have not been previously raised or addressed, which will result in further unnecessary delay. Further, the documents with which he seeks to supplement the existing Appendix do not provide any support for the legal theories which he now seeks to assert. Specifically, he argues that the Greens are judicially estopped from, and have released and/or waived their right, to assert that, if *any* method of allocation was appropriate, the funds should have been divided equally. He bases this assertion on the release of funds deposited with the court in the amount of \$228,505.869 upon abandoning his claim on appeal that he was entitled to a setoff of the Greens' UIM settlements.

a. Waiver and/or Release

Waiver is a voluntary and intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). However, the Receipt and Partial Satisfaction of the Judgments executed by the Greens, which was attached to Dr. Bauerle's motion, did **NOT** allocate the funds to be disbursed by the court or specify how their respective verdicts would be reduced. The Greens accepted the funds jointly and agreed to a partial satisfaction of Bauerle's total liability. The language in the April 14, 2016 consent order which states that the disbursement would reduce Mrs. Green's verdict by \$64,883.68 was added by Dr. Bauerle's counsel without discussion between the parties and had no bearing on the fact that the *entire* amount disbursed by the court was jointly *paid* to the Greens pursuant to the order. It is unclear how Dr. Bauerle's counsel even arrived at this number as it does not correspond to the amount of UIM proceeds received by Mrs. Green. The Receipt and Partial Satisfaction of Judgment executed on April 20, 2016 provides even further evidence that the Greens did not intend to release or waive any rights subject to the pending appeal.

b. Judicial Estoppel

Dr. Bauerle asserts that the Greens' acceptance of these funds renders them judicially estopped from arguing that any allocation, if permissible at all, should have been equal. He asserts that allocating the GSRMC settlement equally would have reduced Mrs. Green's verdict to zero, which is inconsistent with her acceptance of these funds. First, the funds were released by the court jointly, and there is no evidence that Mrs. Green individually accepted any specific portion thereof. Further, in order to prevail on a claim of judicial estoppel, a party must prove the following:

(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the

inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 632 (2004). In South Carolina, the doctrine of judicial estoppel 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). Here, the Greens' assertion that, in the event the trial court even had the authority to allocate the settlement, it should have been allocated equally is **not** an assertion of fact. Judicial Estoppel cannot apply here as there are no allegations that the Greens have misrepresented facts or changed their version of events to 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.") There has been no allegation of an intentional effort to mislead the court.

4. The Receipt and Satisfaction executed by the Greens is evidence of a benefit to Bauerle by reducing his *total* liability, and does not satisfy any *specific* portion of either verdict. In the event this Court finds that the settlement should have been allocated in a manner which reduces Mrs. Green's verdict to zero, the receipt and partial satisfaction will effectively reduce Mr. Green's remaining verdict by the total amount indicated therein. The amounts by which the verdicts should or should not be reduced remains a matter for this Court. The language of the April 2016 Consent Order makes very clear that the court would continue to hold the "remainder of the funds deposited with the Clerk of Court by Defendants in this action until further Order of the Court and **in accordance with the terms and conditions as set forth in the Order Granting Leave to Deposit Funds Into Court and Releasing Judgment Liens filed December 11, 2014.**" The Order Granting Leave to Deposit Funds states that it shall have "no effect on the issues currently on appeal including the amount of the verdicts to which the Plaintiffs are ultimately entitled, which will be determined by the appellate courts." Further, it **EXPRESSLY** states that

“[s]hould the Plaintiffs prevail on appeal, [Dr. Bauerle and his insurers] will be liable for the judgments as determined by the appellate courts.” (Dec. 11, 2014 Order, p. 5).

The April 13, 2016 Consent Order directs that the Clerk of Court “shall release the sum of Two Hundred Twenty-Eight Thousand Five Hundred Five and 69/100 Dollars (\$228,505.69) to the Plaintiffs Randall and Ann Green by delivery of such check to their attorneys of record.” (April 3, 2016 Order, p. 2). In contrast, the language added by Dr. Bauerle’s counsel to the Consent Order does not allocate the actual *payment*, but only indicates the amounts by which their individual judgments will be reduced. This is an issue pending appeal and, pursuant to Rule 205, SCRCP, the trial court did not have jurisdiction to make such a determination. Consistent with this Rule as well as the language of the orders, the court records attached hereto show that the judgments have not been modified by the disbursements, remaining at \$665,789.47 for Mr. Green and \$159,480.53 for Mrs. Green. The issues of whether the verdicts should be reduced and by how much remain before this Court, and as stated in the December 11, 2014 order attached to Dr. Bauerle’s motion, his insurers “will be liable for the judgments as determined by the appellate courts.” Accordingly, the language in the order indicating that Mrs. Green’s verdict would be further reduced by a specific amount was harmless error which has no bearing on the actual nature of the joint payment, and does not prejudice Bauerle in any way. *See* Rule 61, SCRCP.

5. Finally, Dr. Bauerle asserts that he took the position in his response brief to the Greens’ Petition for Certiorari that the issue of whether, if it is determined that *any* allocation was appropriate, the funds should have been allocated equally was not raised below or in the Greens’ Petition for Rehearing. (Memorandum in Support of Motion, p. 5). This is not true. In his Return to Petition for Writ of Certiorari, he stated “[t]he issue was raised for the first time on appeal and specifically in the petition for rehearing.” (Petitioner-Resp’t Rtn.to Pt. For Writ of Cert., p. 9).

In any case, the argument *was* preserved for review, and this Court has already granted certiorari to review this and other issues presented in the Greens' petition. Regarding requests for certiorari to the Court of Appeals, "[a] question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 226(d)(2), SCACR. The trial court's method of allocation has been a central issue in controversy raised to the trial court, argued **extensively** by both sides on appeal, and was very clearly raised in the Petitioners' Petition for Rehearing. The lack of any allocation of the settlement between the two Plaintiffs renders their proportionate rights to the funds equal. The existence of a simpler and more equitable alternative method of allocation is clearly a subsidiary question incumbent in any analysis of the equity and legality of the novel method which the trial court arbitrarily created.

Of note, it is significant that Bauerle did not request that the trial court allocate the settlement. (R. pp. 45-48). Accordingly, the Greens could not have made arguments regarding the trial court's reasons for making the unilateral decision to perform the allocation, nor could they make arguments against the court's unforeseeable decision to utilize a percentages analysis based on the jury verdicts until *after* the order created these issues. Nevertheless, in opposing Bauerle's motion, they repeatedly argued that setoff was not appropriate partially *because* the settlement was paid *equally* to multiple Plaintiffs. (R. pp. 49-69).¹ They clearly argued that "[n]either equity or legal precedent would allow this Court to deprive either of the Plaintiffs of their claim to the entire amount of the Settlement proceeds or any portion thereof." (R. p. 66). Finally, they argued that, not only was there no basis for determining that Bauerle was *entitled* to setoff, there was no way to *apply* one under the facts of the case. (R. pp. 78-79).

¹ Remarkably, the Greens' argument regarding the injustice of such a circular analysis was confirmed shortly thereafter by this Court in the Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015) opinion, which noted that the *amount* allocated to one claim or the other affects the Defendants' very entitlement to the setoff in the first place.

Following the trial court's order, which arbitrarily granted an allocation and created a novel analysis for performing same, the Greens argued in their Rule 59(e) motion that "[t]he settlement should be viewed by the court as belonging to both of the parties. Here, the court applies an ex post facto analysis to grant setoff, using the ratios between the jury verdict for Mr. Green and the jury verdict for Mrs. Green . . ." (R. p. 96). Further, they argued "[i]f the Court determines that [the] allocation between the parties is permitted based on the cases that allowed reallocation between causes of action, the only fair and reasonable way to do so would be to allocate one half of the settlement proceeds to each of the Plaintiffs and then for each of the Plaintiffs' portions of the settlement to be set off against his or her individual verdict." (R. pp. 96-97).

On Appeal, the Greens argued that, in the event that an allocation was appropriate, "[t]he evidence dictates that it should be allocated equally to each cause of action, and equity requires that it be allocated equally between the two Plaintiffs." (Appellant Br. of Resp't-Appellant, pp. 42-43). *As further evidence of the inequity of an unequal allocation*, the Greens further noted on appeal that they could have asserted their causes of action in separate lawsuits even if they had divorced after the settlement. (Appellant Br. of Resp't-Appellants, p. 43).

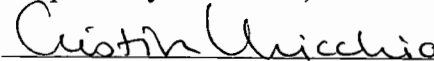
Of note, this Court issued its ruling in Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015), during the pendency of the appeal of this case after all briefs had been filed and prior to oral arguments. The Greens submitted the case as a supplemental citation pursuant to Rule 208(b)(8), SCACR, stating that "[t]his Supreme Court opinion is pertinent to Respondents/Appellants' position that the Trial Court's allocation of the settlement proceeds among claims based on a percentages analysis is without merit, particularly where the settlement is unquestionably reasonable under the facts." (Nov. 3rd Correspondence). Bauerle consented to the consideration of the Riley case, specifically stating that both sides had relied on that case's now-overruled opinion

in their briefs. Accordingly, it was conceded that the issues of the permissibility and method of the allocation had been previously raised, argued by both sides, and preserved for review.

As set forth above, the Greens argued repeatedly below that they were equally entitled to the settlement, and that any allocation should be consistent with this clearly conceded point. As set forth in the Petition for Rehearing which was the first opportunity to address this argument in the context of the new Riley opinion, it was not the Plaintiffs' burden to demonstrate an equitable method of allocation. The issue of the impermissibility of the trial court's method of allocation was more than adequately preserved in the Petition For Rehearing, and Bauerle's suggestion that Plaintiffs did not reassert their suggestion for an alternative compromise methodology is a remarkable attempt to benefit from his admitted failure to meet his own burden of proof.

Based on the foregoing, the Greens respectfully request that this Court deny Dr. Bauerle's motion requesting that the briefing deadlines be held in abeyance and deny his requests for leave to raise additional arguments and supplement the Appendix.

Respectfully Submitted,



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L.Morgan Martin
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Counsel for Respondents-Petitioners

Charleston, South Carolina
January 2, 2018



Horry County Fifteenth Judicial Circuit Public Index



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Switch View

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

Case Number:	2011CP2607403	Court Agency:	Common Pleas	Filed Date:	09/01/2011
Case Type:	Common Pleas	Case Sub Type:	Medical Malpract 220	File Type:	Jury
Status:	Appeal	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Ended by Jury Trial	Disposition Date:	09/16/2013	Disposition Judge:	John, Steven H.
Original Source Doc:		Original Case #:		Restore Reason:	Reopen Case for Rule 40J
Judgment Number:	2011CP2607403	Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

For:	Green, Randall M	Against:	Bauerle, Wayne B MD	Judg. Amount:	\$665,789.47	Judgment Date:	09/16/2013
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	09/16/2013 - 10/18/2013
Notes:	None						

Judgment Details

Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Green, Randall M	Against:	Wayne B Bauerle MD PC	Judg. Amount:	\$665,789.47	Judgment Date:	09/16/2013
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	09/16/2013 - - 10/18/2013
Notes:	None						

Judgment Details

Claims Code		Detail Desc.		Detail Amount		Detail Date	
None							
For:	Green, Ann	Against:	Bauerle, Wayne B MD	Judg. Amount:	\$159,480.53	Judgment Date:	09/16/2013
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	09/16/2013 - 10/18/2013
Notes:	None						

Judgment Details

Claims Code		Detail Desc.			Detail Amount		Detail Date	
None								
For:	Green, Ann	Against:	Wayne B Bauerle MD PC	Judg. Amount:	\$159,480.53	Judgment Date:	09/16/2013	
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	09/16/2013 - 10/18/2013	
Notes:	None							

Judgment Details

Claims Code	Detail Desc.	Detail Amount	Detail Date
None			

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CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Supplemental Record on Appeal contains the appellate court filings from the prior appeal as were designated by Respondents and not any other material.

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November 29, 2020

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellants Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. certifies that the Record on Appeal complies with this Court's October 29, 2020 Order as well as the Supreme Court's Revised Order of April 15, 2014, regarding personal identifiers and sensitive information.

LINDEMANN & DAVIS, P.A.

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November 29, 2020