THE STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

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

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

v.

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

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. Was there evidence to support the trial court's finding as to Randy and Ann Green's intentions with regard to the Grand Strand settlement agreement and the further finding that the 2016 Consent Order was not persuasive evidence of contrary intentions?

II. Was there evidence to reasonably support the trial court's findings that the allocation of $1M to Ann Green was reasonable under the facts, consistent with the parties' intentions under the settlement agreement, and would not lead to a double recovery?

III. Was the trial court correct in declining to treat the Medical Malpractice and Loss of Consortium jury verdicts as either a single joint verdict or as marital property and in declining to treat the Grand Strand settlement as marital, rather than joint, property?

FACTS AND PROCEDURAL BACKGROUND

Randy and Ann Green were injured in a car accident on April 17, 2004. Thereafter, Randy was taken to Grand Strand Regional Medical Center ("GSRMC") with hip injuries and an arm laceration. He was stable, alert, and talkative with no signs of head injury. (R. 396, lns. 13-21; 426-431). The ER doctor, Dr. Lintz, called the on-call orthopedic surgeon, Dr. Bauerle about the hip injuries. (R. 404-405; 412-413). Two hours later, Randy had developed more injuries and serious conditions. (R. 368-374; 376; 378-383; 406-410). He was **urgently** taken to the Pre-Operative area ("Pre-Op") (R. 304; 338, lns. 8-13; 370; 373-374; 382; 410-411; 412-416; 430-435; 471-473). Lintz called Bauerle again to tell him Randy had to go to Pre-Op and that there was no time for a hip CT. He noted Bauerle was "pretty adamant about getting the CAT scan of the hip first."(R. 179, lns. 23-25; 180, lns. 13-14). Bauerle testified about their disagreement stating, "*I* had no disagreement, I knew exactly what needed to be done, it's what I did." [1] (R. 339, lns. 15-20).

When Bauerle arrived, he took Randy out of Pre-Op for the CT *despite* Lintz's protest and *despite* vital signs warning he was on the verge of a cardiac arrest. (R. 367; 381; 415-416; 471). Experts testified it was a "dramatic" deviation from the standard of care to take a "totally unstable" patient out of Pre-Op where his vital signs were being closely monitored and controlled by an anesthesiologist (Dr. Peters) who could prevent and stop a cardiac arrest. (R. 305-307; 337-338; 367-370; 374; 399; 401-402). Bauerle conceded he wouldn't have removed Randy if he had been aware of his condition (R. 341). His own expert agreed he should have looked at Randy's vital signs and chart, and stated that a doctor shouldn't issue orders without being aware of a patient's condition *or* argue with the doctor looking at the patient. (R. 342-344).

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[1] At oral arguments before the Supreme Court, Justice Hearn questioned the equity of the size of the benefit given to Bauerle by the previous setoff calculation as he was "arguably the most culpable party" in a series of multiple "horrific" acts of negligence.

While away from Pre-Op, Randy's heart stopped. This was discovered by Lintz, who "happened" to be passing by. (R. 375). He first paged Dr. Peters, who had to run over to the ER from Pre-Op. While waiting for Dr. Peters to arrive and insert arterial lines, Lintz intubated Randy and began CPR. Randy's other treating surgeons ran in and began operating in the middle of the ER. (R. 180-182). Bauerle was present but stated "I don't run code. . . I watched." (R. 340, lns. 22-24). They struggled to get his heart beating for 26 minutes. (R. 415-416; 430-435). He was transferred to MUSC in Charleston the following night and spent months there being treated for many injuries before being discharged to a rehab facility. (R. 335-336; 417-425).

Randy and Ann Green filed a medical malpractice and loss of consortium lawsuit against Bauerle on May 30, 2005. GSRMC was added two years later and settled with the Greens for a single joint payment of $2M in May 2013. (R. 62-66). A stipulation of dismissal was filed by consent of all. (R. 60-61). The joint settlement was paid equally to the Greens via a single joint check and didn't otherwise allocate the funds. (R. 2; 3; 33; 62-66; App. 11-12). They maintained the funds jointly in both of their names and used it for their joint expenses. (App. 11-12). At the time of settlement, they were aware that Ann had provided $1,209,600.00 worth of skilled care and that she intended to continue. (R. 232; 246-248; 451; 466; App. 11-12). She became trained and qualified to do this. (R. 232; 246-248).

Bauerle refused to settle. The five day trial began September 9, 2013. The Greens presented evidence that (1) Bauerle was negligent in removing Randy from Pre-Op; (2) His removal from Pre-Op caused the cardiac arrest; and (3) The cardiac arrest caused infarction (death) of specific spinal nerve cells causing loss of leg, bowel, bladder, and sexual function. (R. 370; 374; 394-395; 397-399). Each injury was supported by evidence of distinct damages. There was conflicting evidence as to whether some injuries resulted from the cardiac arrest. (*Id.* (R. 185-194; 196-204; 223-234; 239-258; 263-266; 275; 277; 283; 289; 292; 299-303; 332-334; 339, lns. 4-11; 370; 374; 394-395; 397-399; 419; 423; 436-470).

The jury awarded Randy a verdict of $2.3M for Medical Malpractice and Ann a verdict of $550K for Loss of Consortium. The verdict forms indicated that Bauerle's negligence caused "injuries," but didn't say which injuries or damages were included. (R. 44-47). Bauerle made a motion for setoff pursuant to S.C. Code Ann. § 15-38-50. (R. 67). The trial court denied Bauerle's motion to setoff the amounts received many years prior by the Greens from the automobile insurers which involved different injuries including Ann's own serious injuries. (R. 1-2; 13; 32-33). In order to apply a setoff of the joint Grand Strand settlement, the trial court allocated it based on percentages derived by combining the amounts of the separate verdicts.

Both parties appealed. After the Court of Appeals affirmed the trial court as to the automobile settlements, Bauerle conceded in his Petition for Rehearing that he was not entitled to setoff amounts received by the Greens from their own UIM insurer. (Supp. R. 7, ftnt. 1). A Consent Order was filed directing 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 Green by delivery of such check to their attorneys of record" and directing that the Plaintiffs file a "Partial Satisfaction of Judgment" reflecting the amounts still owing pursuant to the disputed allocation ruling. (R. 26). A joint payment of $228,505.69 was issued, and the subsequent Receipt and Partial Satisfaction reflected only this amount. (R. 126). The Supreme Court affirmed the Court of Appeals' finding that Bauerle was not entitled to a setoff from the automobile liability insurers. (R. 34).

As to the Grand Strand settlement, the Supreme Court vacated the trial court's method of calculating the setoff, finding that it was "arbitrary" and that the "setoffs should be calculated based upon the entirety of the "relevant circumstances," not solely upon such a formula." (R. 36). On remand, the trial court was directed to "convene a hearing to consider all relevant circumstances." (R. 36). The Remittur vacating the prior settlement allocation was filed on June 17, 2019. Randy passed away a few days later on June 22, 2019. His son, Mark Green, was

appointed Personal Representative on July 29th, and a Consent Order to Substitute the Estate of Randall M. Green for Plaintiff Randall M. Green was entered. (R. 38).

After both sides submitted memoranda, a hearing was held on August 28, 2019. The trial court issued a nine (9) page Order on October 22, 2019 applying a $1 million dollar setoff against each Plaintiff's verdict and setting forth a detailed analysis of the relevant circumstances and supporting evidence. (R. 1-10). Bauerle's Motion to Alter or Amend Order was denied on December 11, 2019. (R. 11-12). He subsequently filed this appeal seeking reversal of the trial court's Orders and a directive on remand to combine the Greens' separate jury verdicts and enter a joint judgment in the amount of $825,270.00. (Appellants' Br., p. 23).

STANDARD OF REVIEW

Appellate review of the reasonableness of a trial court's allocation of a settlement for the purpose of setoff have employed an abuse of discretion standard of review. Rutland v. SC Dept. of Transp., 400 S.C. 209, 216, 734 SE 2d 142 (2012) ("[w]e therefore agree with the court of appeals that the trial court acted within its discretion by reallocating the settlement funds to the wrongful death claim.") Motions for setoff "are addressed to the discretion of the court—a discretion which should not be arbitrarily or capriciously exercised." Welch v. Epstein, 342 S.C. 279,313, 536 SE 2d 408 (Ct. App. 2000).

> An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

State v. Allen, 370 S.C. 88, 94, 634 SE 2d 653 (2006) (citing Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); S.E.C. v. The Street Com, 273 F.3d 222, 229 n. 6 (2d Cir. 2001)).

Here, the Supreme Court found that the trial court's previous allocation of the settlement based upon the jury verdicts was "arbitrary." This constituted an abuse of discretion because it did not fall within the "range of permissible decisions applicable" in this case. Allen, supra. There was simply no precedent for modifying a settlement based upon the jury verdicts in the extensive case law governing the application of setoffs. Therefore, this issue was remanded for the trial court to consider the "relevant" circumstances and "issue an order setting forth the amounts to be set off from the two verdicts." (R. 36-37).

A settlement by a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant." S.C. Code Ann. § 15-38-50(1) (2005). "[T]he allocation of settlement proceeds between various causes of action impacts the amount a non-

settling defendant may be entitled to offset." Riley v. Ford, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015). Thus, the *amounts* of the setoffs in this case were determined by the respective amounts to which each Plaintiff was entitled under the settlement agreement. The trial court, consistent with the relevant circumstances and case law raised in the arguments on which the Supreme Court's decision to remand was based, made findings as to the Green's intentions with regard to the settlement agreement, noted the existence of extensive evidence to support the dollar amounts reflected thereby, and applied the setoff in a manner consistent with its terms. Bauerle disputes the trial court's findings as to these intentions, asserting that there is no evidence to support them and that they are contradicted by evidence contained in a Consent Order entered during the appeal as well as the jury verdicts. [2]

The Supreme Court has made clear that appellate review of a trial court's findings as to the Plaintiffs' intentions with regard to a settlement agreement are subject to the "any evidence" standard. Pruitt v. S.C. Med. Mal. Liab. Jt. Underwriting Ass'n, 343 S.C. 335, 540 S.E.2d 843 (2001). In Pruitt, the Supreme Court found that the language of the agreement, statements made by counsel, and the Plaintiffs' subsequent conduct constituted evidence sufficient to support the trial court's rulings as to the Plaintiffs' intentions. Id.; *See also* Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) ("In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be **without evidence which reasonably supports the judge's findings**. The rule is the same

[2] Bauerle is also seeking review of the trial court's construction of the agreement, urging that it should be reversed based upon a comparison of the ratios between the two jury verdicts, an analysis expressly prohibited by the Supreme Court in both this case as well as in Riley. It is not "within the province of a reviewing court" to evaluate the reasonableness of "the relative percentage of settlement proceeds assigned to each claim." Riley at 191. It is not usually "appropriate for an appellate court to re-evaluate [an] agreed-upon, and court approved, settlement allocation." Id. at 191-192. This has rarely been upheld only where **no evidence** existed to support any dollar amount being allocated to a specific claim, rendering it a fraud or sham. See Rutland, and Welch. Such an allegation has never been made in this case.

whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action.") (citing Chapman v. Allstate Ins. Co., 263 S.C. 565, 211 S.E. (2d) 876 (1974)). In Riley, the Supreme Court found that the Court of Appeals erred in disturbing a settlement allocation approved by the trial court as evidence existed to reasonably support it. Riley, supra.

ARGUMENT

"A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (citing Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000)); Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct.App.1998); Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct.App.1986). Notably, in reference to the application of a setoff, S.C. Code §15-38-50 does **not** authorize modification of good faith settlements and protects against a double recovery by mandating that a verdict be reduced "to the extent of any amount stipulated by the release or the covenant." S.C. Code Ann. § 15-38-50(1) (2005). The court must determine the intentions of the parties to a settlement agreement as far as possible from the terms, and such intentions must be given effect. Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 658 S.E.2d 539 (Ct.App.2008). "The courts in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes at the time the contract was entered." Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620 (Ct. App. 1986). "The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses; and subsequent acts are relevant to show whether a contract was intended." Caulder v. Knox, 251 S.C. 337, 345, 162 S.E.2d 262 (1968).

The Supreme Court has made it abundantly clear that courts may not modify a good faith settlement for the sole purpose of benefitting a non-settling defendant.

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

Riley v. Ford, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015) (quoting Lard v. AM/FM Ohio, 901 N.E.2d 1006 (Ill. App. 2009)(citing Muro v. Abel Freight Lns., 669 N.E.2d 1217 (Ill. App. 1996)).

In Riley the Supreme Court reversed the Court of Appeals' modification of a settlement performed in order to apply a setoff. The Court held that it is error to reapportion proceeds just because the allocation is not "proportionately reasonable" or solely to benefit a non-settling defendant. Moreover, the holding clarified that non-settling defendants who ask the court to invalidate settlement terms must prove an amount is so unreasonable as to demonstrate a fraudulent or bad faith intent to obtain an unfair double recovery. Riley at 196-197 (quoting Lard, 901 N.E.2d 1006, 1018 ("Although the manipulation of an allocation can be evidence of bad faith in a settlement negotiation, it is not per se bad faith to engage in the advantageous apportioning of a settlement.")) Consistent with the Riley opinion, courts have only found that this threshold was met in very few cases where *no evidence* existed to support the dollar amount apportioned to an individual claim. Rutland v. S.C. Dep't of Transp, 400 S.C. 2019, 734 S.E.2d 142 (instant death involved no suffering or medical expenses so any allocation to survival action was clearly unreasonable); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (no evidence of suffering so allocating more than medical expenses to survival action was clearly unreasonable).

> [T]he party seeking departure from the application of standard set-off rules bears the burden of proof . . . 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, 414 S.C. 185, 196-197 (quoting In re Wells, 43 S.C. 477, 21 S.E. 334, 337 (1895)).

Bauerle's arguments on appeal ignore extensive relevant case law on construction of settlement agreements and application of setoffs, threatening to improperly divert the analysis. The equal allocation argument was the Greens' only argument regarding *application* of the setoff

made to the Supreme Court, and the majority of their brief was dedicated solely to this issue. (Supp. R. 90-102). They argued that the trial court had failed to consider case law and circumstances relevant to the proper analysis including: (1) The intentions of the settling parties and the reasonableness thereof; (2) Evidence supporting an allocation of a $1M dollar amount to Ann; (3) That there was no legal basis for disregarding the settling parties' intentions or modifying the settlement to correlate with the jury verdicts; (4) The inequity of modifying an unallocated settlement to divide it unequally under the facts; (5) That the equal division could not result in a double recovery; and (6) The intentions of the Legislature and whether retroactive judicial modification of a settlement is permissible. (Supp. R. 78-125).

The Supreme Court agreed, vacating the prior allocation ruling based on the jury verdict formula and directing the trial court to "convene a hearing to consider all relevant circumstances." (R. 36). In remanding the allocation issue, the Court further stated:

> We conclude the trial court's determination of the specific amounts to be set off from the verdicts was arbitrary, as the determination was based solely upon the ratios both verdicts bore to the whole. The setoffs should be calculated based upon the entirety of the relevant circumstances, not solely upon such a formula.

Id. Obviously, the very arguments on which the decision to remand was based guide the boundaries of the "relevant circumstances" properly included in the analysis. Not only did the trial court find that the evidence weighed overwhelming in favor of the Green's stated intentions to share equal entitlement to the settlement, it further found that these intentions as well as the dollar amounts resulting therefrom were both extremely reasonable under the facts. (R. 4-6). Therefore, the settlement agreement was made in good faith, and the setoffs were appropriately applied consistent with the parties' intended terms. (R. 5). The trial court was **well** within its discretion. However, on appeal, Bauerle once again attempts to deflect the analysis away from the relevant case law as well as the evidence and circumstances raised in the arguments which the Supreme Court actually considered.

First, Bauerle grossly misrepresents that the trial court relied solely on the arguments of counsel to determine the Greens' intentions as to their Grand Strand settlement, ignoring the extensively detailed evidence set forth in the Order below.[3] (R. 4). The trial court properly considered all of the circumstances and evidence relevant to the issues addressed in the arguments underlying the Remand Order and correctly determined the intended settlement terms and the reasonableness thereof before applying the setoff in the manner dictated by S.C. Code Ann. § 15-38-50 and relevant tort case law.

However, Bauerle attempts to focus the analysis on an isolated sentence in a 2016 Consent Order directing the release of undisputed funds in the total amount of an UIM payout made *many* years prior for *different* bodily injuries inflicted on both Randy *and* Ann in the car accident caused by a *non-party* to this case. (R. 33-35). He claims this sentence, which simply references amounts still owed under each judgment pursuant to the now-vacated original allocation ruling, "conclusively" outweighed all of the other evidence of the Greens' intentions with regard to the Grand Strand settlement in the malpractice case. However, the language of the 2016 Consent Order makes clear that the Greens and Bauerle agreed that the transaction would not impact any pending issues. (R. 25; 26-27). Both sides suggested that, under the current allocation ruling, the sentence which credited the disbursal against both verdicts should be disregarded so that the entire amount would be credited against Randy's verdict in order to afford Bauerle full credit therefor. (R. 137). The trial court agreed after also reviewing the other evidence surrounding the transaction and finding that this was what the parties had intended. (R. 8). Now, Bauerle incorrectly asserts that the Consent Order was entitled to preclusive effect and that the *entire* Order has been impermissibly "overruled." These last two issues were not

[3] Further, the Court in Pruitt considered representations made by counsel as to his clients' intentions under a settlement agreement in upholding a lower court decision under the "any evidence" standard. Pruitt, 343 S.C. 335, 540 S.E.2d 843

preserved for appeal and, notably, the Supreme Court has already refused to even consider any arguments regarding the 2016 Consent Order. (R. 30; Supp. R. 126-133).

Second, Bauerle argues that the trial court should have abandoned its own analysis of the evidence altogether and once again relied solely on a comparison of the two jury verdicts to find that Randy's injuries "far exceeded the loss of consortium." (Appellants' Br., p. 18). Of note, Riley makes clear that it is not "within the province of a reviewing court" to evaluate the reasonableness of "the relative percentage of settlement proceeds assigned to each claim." Riley at 191. Furthermore, the Riley opinion indicates that it is unlikely to be "appropriate for an appellate court to re-evaluate [an] agreed-upon, and court approved, settlement allocation" as Bauerle has asked this Court to do. Id. at 191-192. As in Riley, the trial-court approved allocation is supported by ample evidence and is unquestionably reasonable under the facts of this case. Therefore, Bauerle's attempt to have it invalidated on appeal "based on a 'percentages' analysis is "manifestly without merit." Riley at 197-198. Nevertheless, Bauerle urges that a comparison of the Greens' jury verdicts governs the analysis of their respective rights to their Grand Strand settlement proceeds in order to circularly determine their rights to their jury verdicts. This *directly* defies the Supreme Court's Order in this case and has no support in our jurisprudence.

By definition, the trial court's application of the setoff prevented a double recovery because each Plaintiff's verdict was reduced by the $1 M settlement amount apportioned to their claim. See S.C. Ann. § 15-38-50. Incidentally, this afforded Randy a total recovery equal to his $2.3 M verdict and eliminated all of Bauerle's liability to Ann. (R. 6; 9). However, Bauerle claims that Ann will receive a "windfall" if she is allowed to retain any settlement funds exceeding her jury award against *him*. (Appellants' Br., p. 15). This directly inverts the very definition of a double recovery and the language of § 15-38-50. A settlement allocation has never been deemed to be unreasonable, fraudulent, or a sham on the basis that it exceeded a later jury

verdict against a non-settling party. This is nonsensical, contravenes public policy, and Riley expressly forbids "appellate reapportionment" just to make it more advantageous to a non-settling defendant. Riley at 197.

Finally, Bauerle curiously continues to assert that the Grand Strand settlement should be treated as marital property, relying on the false assumptions that this classification (1) is legally tenable in the absence of a pending divorce and (2) would somehow justify this Court combining the separate, independent jury verdicts into a single judgment in favor of both Ann and the Estate. This is clearly prohibited under South Carolina law and directly violates the Supreme Court's directive that the trial court issue an order "setting forth the **amounts** to be set off from the **two verdicts**." (R. 36) (emphasis added). Further, the Greens did not argue to the Supreme Court or subsequently to the trial court that the settlement funds should be treated as marital property, and this issue obviously could not be a "relevant circumstance" considered in arriving at the decision to remand. (R. 127-129; 504, lns. 17-18; 512, lns. 20-21; 513, lns. 14-24; Supp. R. 78-125; App. 1-9). The classification of property as "marital" is only relevant and permissible in a divorce proceeding, and its division would be subject to a *completely* different analysis. Bauerle relies entirely on inapplicable case law addressing "marital property," arguing that the verdicts must be treated as such because they must be given the same classification as the settlement. However, the settlement in this case was correctly classified as "joint" property rather than "marital."

Moreover, parties can *absolutely* choose to treat a settlement as "joint" despite the fact that the jury verdicts are separate and independent *as a matter of law*. The purported impropriety of the apportionment indicated by that joint classification is "insufficient to justify appellate reapportionment" to benefit Bauerle. Riley, at 197. A core principle serving to encourage settlement is that parties gain a "position of control and acquire[] leverage" which "is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to

it." Riley at 197. Finally, the lone case which Baurele claims as precedent for combining the separate, independent jury verdicts into one judgment makes **no** such finding *and* is entirely irrelevant to these facts. Broome does not involve allocation *or* setoff in a tort case pursuant to common law or the S.C. Contribution Among Tortfeasors Act, addressing **only** insurance policy limits and statutory definitions to determine the correct application of this State's automobile insurance laws. Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995).

Bauerle asks this Court to reverse the trial court, directing it to enter a single judgment in favor of Ann and the Estate based upon the sum of their two verdicts. However, this is prohibited under extensive South Carolina law making clear that loss of consortium is a separate, independent claim. Apportionment of the settlement based solely on a comparison of the relative sizes of the jury verdicts would entirely disregard the intentions of the settling parties in violation of the most basic rules of contract construction, prior Supreme Court rulings, and this State's strong public policy in favor of fostering and promoting settlement of disputes. Not only would this also **directly** conflict with the **explicit instructions** in the Supreme Court's Remand Order, it would ignore its strongly worded opinion in Riley. "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." Riley at 197.

I. THE TRIAL COURT'S ORDER CLEARLY SETS FORTH SUBSTANTIAL EVIDENCE IN SUPPORT OF THE FINDING AS TO RANDY AND ANN GREEN'S INTENTIONS WITH REGARD TO THE GRAND STRAND SETTLEMENT AS WELL AS THE FURTHER FINDING THAT THE 2016 CONSENT ORDER DID NOT CONSTITUTE SUFFICIENT PERSUASIVE EVIDENCE TO THE CONTRARY.

"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."

Riley, 414 S.C. at 197, 777 S.E.2d at 831 (quoting Lard, 901 N.E.2d 1006 (citing Muro, 669 N.E.2d 1217)). The courts must determine the intentions of the parties as far as possible from the terms of a settlement agreement, and such intentions must be given effect. Pee Dee Stores Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009); Pruitt, 343 S.C. 335, 540 S.E.2d 843; Mattox, 289 S.C. 57, 344 S.E.2d 620. "The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes at the time the contract was entered." Mattox, 289 S.C. at 61. "The court should put itself, as best it can, in the same position occupied by the parties when they made the contract. In doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language." Klutts Resort Realty v. Down'round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20 (1977).

A. The trial court's finding that Randy and Ann Green intended to share equal rights to the settlement is reasonably supported by the evidence.

Bauerle inaccurately asserts that the trial court relied solely on the arguments of counsel as the only evidence of the Greens' intentions with regard to the Grand Strand settlement.[4] To the contrary, the Court's Order painstakingly sets forth in great detail how and why the Greens' position that they intended to share equal entitlement to the settlement was amply supported by evidence such as (1) the language of the agreement and the joint nature of the settlement; (2)

[4] The rule against relying on arguments of counsel is only applicable to assertions of disputed facts not supported by other evidence. See McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing **only** in argument of counsel will not be considered.") (emphasis added); Gilmore v. Ivey, 290 S.C. 53, 348 S.E. (2d) 180 (Ct. App. 1986) (court properly disregarded statements of counsel as to content of depositions not otherwise entered into evidence); Johnson v. Life Insurance Co. of Georgia, 227 S.C. 351, 369, 88 S.E. (2d) 260 ("Control of the arguments of counsel rests in the discretion of the trial judge, and considerable latitude is generally allowed in the matter of drawing and arguing inferences and deductions from the evidence."); Edwards v. Lawton, 244 S.C. 276, 278, 136 S.E.2d 708 (1964) ("Like statements of counsel in oral argument, they should have reasonable foundation in the evidence or in inferences fairly arguable from the evidence.")

overwhelming evidence regarding Mrs. Green's damages, and (3) Mr. Green's testimony as to his knowledge and beliefs regarding his wife's suffering and sacrifice. [5] (R. 4-5).

It is undisputed that the Grand Strand settlement agreement involved a single joint payment to both of the Greens and did not otherwise allocate the funds unequally. (R. 2; 4; 62; App. 11). The trial court found that the language of the contract provided that they would be equally entitled to the funds, and that this was persuasive evidence of their intentions in this regard. (R. 4). Courts must determine the intentions of the parties as far as possible from the terms of a settlement agreement, and such intentions must be given effect. Pruitt, 343 S.C. 335, 540 S.E.2d 843 (2001); Pee Dee Stores Inc., 381 S.C. 234, 672 S.E.2d 799; Mattox, 289 S.C. 57, 344 S.E.2d 620.

Additionally, ample evidence of the tragic circumstances impacting every moment of both of the Greens' lives at the time of the Grand Strand settlement further supports their intentions to share equally in the settlement funds. As noted by the trial court, the settlement agreement was entered into on May 31, 2013 which was just before the trial against Bauerle. (R. 62). Evidence on the trial record extensively detailing Ann's suffering during the previous nine (9) years painted a vivid picture of the Greens' daily life and their knowledge and beliefs regarding their own experiences as well as that of each other at the time of settlement. "The court should put itself, as best it can, in the same position occupied by the parties when they made the contract. In

[5] Ann Green, who was present at the hearing, executed an affidavit which was filed with the Greens' legal memoranda. It set forth her intentions and consistent discussions with her husband regarding their settlement decisions and stated that they had held the funds jointly and shared equal rights and access thereto. (App. 11-12). Relying on the Dead Man's Statute, Bauerle objected to the Court's reliance on any part of the affidavit, including Ann Green's testimony as to her own intentions, as it contained testimony regarding a conversation with her very recently deceased husband confirming the position he took before the Courts while living. The Court declined to rule on whether the affidavit was admissible under the Dead Man's Statute, but indicated that it would not rely on it because Bauerle did not have the opportunity to cross-examine Mrs. Green at the hearing or to submit a rebuttal affidavit. Nevertheless, it was a moot point because the Court found that there was ample evidence on the record to support the Greens' position regarding their intentions.

doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language." Klutts, 268 S.C. at 89, 232 S.E.2d 20.

This case is unique in that it involves **extraordinary** consortium damages relative to those of the physically injured spouse. From the day Randy came home in 2004 until his death in 2019, Ann alone provided his 24-hour care, spending very few hours a day doing things for herself or sleeping more than a few hours at a time. (R. 231; 284-294). She had done all of this for nine (9) years at the time of the GSRMC settlement.[6] She was forced to give up a very active social life, and experts testified that she was "supremely tired" and suffering from anxiety, depression, and caregiver role strain. (R. 232-235). Experts testified that this was a "family tragedy," and that Ann needed psychological treatment as a result. (R. 242). Her children tearfully testified that she refused to leave Randy's side long enough to receive treatment for a heart condition. (R. 191-195; 203-204; 233; 283; 330, lns. 15-20).

For fifteen (15) years, Ann catheterized her husband five to six times a day, requiring her to set an alarm to wake up at midnight *every night*. (R. 289; 291-292). She was forced to live with the knowledge that if she failed to do this even once, he would die. (R. 229-230; 292). She manually evacuated his bowels. (R. 224-225; 299). She physically lifted him, bathed him, prepared his meals, helped him eat, and took care of all the household chores. (R. 233, lns. 14-19; 300). She couldn't leave the house for any length of time, stating "I can't go far. I don't go far. Time is my enemy now." (R. 283, lns. 7-8). She testified that she intended to provide all his 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. 303, lns. 1-9).

Placing oneself in Randy's position, it is difficult to imagine he intended to accept a larger portion of the settlement proceeds than Ann. His uncontroverted testimony at trial

[6] The settlement agreement was entered into a few months before trial.

confirmed his belief that her life was sacrificed for his. (R. 330, lns. 22-23). This is consistent with his decision to execute a settlement agreement which provided his wife with an equal interest in the proceeds. It is indisputable that the Greens were aware at the time of settlement that Ann had "lost her husband as he was," that her life was now solely dedicated to his care, and that she had sustained **immense** damages. (R. 231-233; 292; 330). See Sullivan v. Davis, 317 S.C. 462, 454 S.E.2d 907 (Ct.App.1995) (wife entitled to consortium damages where her schedule was disrupted and he was dependent on her to bathe him, dress him, and care for his colostomy); Davis v. Tripp, 525 S.E.2d 528 (Ct. App. 1999) (wife entitled to consortium damages where her schedule was disrupted and she had to wait on him hand and foot for months). At trial, Randy expressly recognized this, testifying that Ann "is sacrificing her life for what is left of mine." (R. 330, lns. 22-23). He further testified that she had a serious health condition that "she won't go get fixed because she won't leave me." (R. 330, lns. 19-20). **He testified that he believed her damages exceeded those supported by the evidence at trial**. When asked if the testimony regarding her daily routine accurately represented everything she did for him, Randy testified, "In my opinion it is not. I think she omitted an awful lot of it." (R. 330, lns. 10-11).

The Greens' Life Care Plan also provides evidence of the intentions underlying the decision to negotiate a settlement which provided them an equal interest in the $2 million proceeds. This was prepared in 2011, prior to the Grand Strand settlement, and reflects the monetary value of the care Ann had been providing. (R. 436; 451). Accordingly, at the time of settlement, the Greens knew that Ann had provided more than $1M worth of skilled care which she intended and agreed to continue. (R. 165, lns. 12-18; 248-249; 303; 451; 463; 466; App. 11-12). Experts testified that this "was a fulltime job" and that she was providing "nursing and caregiving skills which [take] a lot of effort and work and organization and coordination and facilitation of care . . . She [was] trained by nurses, doctors, [and] physical therapists to provide the care. . ." (R. 232-233; 246-249). Moreover, this required her to live in a constant state of

hypervigilance which was defined as a "mentality that you are maybe sleeping but you know that in a second's time[,] if there is someone that calls out for help then you are alert and oriented and ready to provide assistance." (R. 234-235).

There is extensive evidence supporting the trial court's findings regarding the Greens' intentions to share equally in the settlement funds at that time of that agreement. Moreover, the trial court judge personally witnessed Ann and Randy's interactions in the court room during the weeklong trial, including those not witnessed by the jury. He witnessed Ann's constant state of hypervigilance and acute awareness of Randy's overwhelming health needs. He witnessed the intensity and urgency as Ann repeatedly wheeled her husband out of the courtroom during the daily proceedings in order to catheterize him in a nearby hotel room rented solely for this task. (R. 322). He witnessed Randy's emotional testimony regarding his wife's damages. He saw the pained expressions on Ann's face as her children testified and heard the exhaustion, fear, and desperation in her voice. He was aware of technical, procedural, and factual details not presented to the jury as well as the case's complexity and the existence of factors likely impacting settlement decisions amongst various parties. (R. 7). As the trial judge, Judge John was in the best position to place himself in the Greens' position at the time of settlement and weigh the evidence of their intentions as to the Grand Strand settlement. "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs., 266 S.C. 81, 221 S.E.2d.

B. The trial court correctly found that the 2016 Consent Order was not persuasive evidence of the Greens' intentions with regard to the Grand Strand settlement.

The funds disbursed pursuant to the 2016 Consent Order were not subject to setoff *or* allocation, and the amount was based on insurance proceeds paid many years prior to trial by a non-party for different injuries. (R. 33-35). The amount released was entirely unrelated to the

remanded allocation and setoff analysis and utterly irrelevant to the Greens' intentions regarding the pre-trial Grand Strand settlement. Bauerle's arguments regarding the 2016 Consent Order were even expressly excluded from the Supreme Court's analysis and thus were obviously not contemplated as part of the "relevant circumstances" intended for consideration on remand. (R. 30; Supp. R. 126-154). [7]

Immediately following the 2013 trial, the trial court denied Bauerle's post-trial motion for setoff in the total amount the Greens had received in settlements with the automobile liability and UIM insurers. Pursuant to an Order Granting Leave to Deposit Funds and Release Judgment Liens, dated December 2014, this amount with interest was deposited with the court in order to release judgment liens which were encumbering Bauerle's unrelated sale of property. (R. 21-25). The Order to Deposit states it would 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.**" (R. 25). It also stated that, if the Greens prevailed in the pending appeal, Bauerle would be "**liable for the judgments as determined by the Appellate Courts.**" (R. 25).

During the pendency of the appeal, Bauerle abandoned his argument that he was entitled to a setoff in the amount received by the Greens in a settlement with their own UIM insurer many years prior. (R. 34, ftnt. 2; Supp. R. 7, ftnt.1). The parties entered into the 2016 Consent Order which states that that **"sum of $228,505.69 deposited with the Clerk of Court is no longer contested"** and that **"[t]he Plaintiffs have moved 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. The Defendants consent to this motion."** (R. 26). The Consent Order directs that the

[7] Order of the Supreme Court dated May 24, 2018; Return to Motion to Supplement Appendix, for Leave to Argue Judicial Estoppel, Waiver, and/or Release and to Hold Deadlines in Abeyance dated January 2, 2018; Motion and Memorandum in Support of Motion to Supplement Appendix, for Leave to Argue Judicial Estoppel, Waiver, and/or Release and to Hold Deadlines in Abeyance dated December 20, 2017

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."** (R. 26-27). This language clearly reflects the parties' intentions and the very purpose of the Consent Order, which was that this *single sum* be released by the Court. The Consent Order further states that it would be enforced "**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,**" which, as set forth above, makes clear that the parties intended to preclude the transaction from having any impact on the pending allocation issues. (R. 27). "The contract must be interpreted in the light of the whole agreement in such a way as to carry out the intentions of the parties." Torrington Co. v. Aetna Cas. & Surety Co., 264 S.C. 636, 643, 216 SE 2d 547 (1975).

Bauerle relies on a single sentence containing language which, incidentally, was nullified by the Supreme Court's Order vacating the trial court's previous allocation method, arguing that it supplants **all** of the other evidence as to the Greens' intentions regarding their earlier pre-trial Grand Strand settlement. In quoting the language at issue in his brief, Bauerle repeatedly omits the first half of the sentence which clarifies that the Consent Order itself did not release or satisfy any portion of the judgments. (R. 27). Rather, it directs ***only that a Partial Satisfaction be filed*** reflecting specific amounts based solely upon the amount still remaining under Ann's judgment at that time pursuant to the original allocation ruling.[8] This would have ensured that Bauerle received the proper credit for the entire disbursal by applying it to both verdicts *had* the trial court's prior allocation ruling withstood appeal. It did not. Even though the sentence contradicts the very nature and stated purpose of the Consent Order as a whole, Bauerle now relies on it as evidence that the Greens never intended to share their previous Grand Strand settlement equally.

[8] The May 6, 2016 Partial Receipt and Satisfaction that was filed jointly released the total sum disbursed, and does not reference the specific amounts reflected in the Consent Order.

Quite frankly, the assertion of this argument is disillusioning, particularly in light of an expressly agreed-upon prohibition against it. It seeks to transform the good faith acceptance of undisputed funds into a concession of a disputed issue on which the Greens subsequently and ultimately prevailed before the Supreme Court as well as the trial court on remand.

As suggested by Bauerle himself, the Court disregarded the isolated sentence in the 2016 Consent Order in order to apply it in a manner which (1) was consistent with the parties' intentions to disburse the undisputed amount without impacting arguments and issues pending appeal and (2) benefitted **Bauerle** by affording him credit for the entire disbursal pursuant to the revised allocation ruling. (R. 8; 137). In opposing the trial court's ruling, Bauerle does not appear to go so far as to suggest that the Greens ***intended*** their pre-trial Grand Strand settlement to be allocated in accordance with any future jury verdicts which would have been a completely unknown and unpredictable factor at that time. However, he offers no evidence of any specific alternative to an equal intention because, quite simply, none exists. The trial court correctly found that the language on which Bauerle relies is utterly irrelevant to the Greens' intentions at the time of the Grand Strand settlement **three years prior**. (R. 7). See Mattox, 289 S.C. at 61 ("The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes **at the time the contract was entered**.") (emphasis added); see also Klutts., 268 S.C. at 89 ("Th[e] Court should put itself, as best it can, in the same position occupied by the parties **when they made the contract.**") (emphasis added).

The trial court's Order further details the following evidence that the Consent Order wasn't intended to impact any allocation issues and, even if relevant, was not persuasive contrary evidence with regard to the Grand Strand settlement: (1) Consistent with the language of the Consent Order, the transaction involved a Court disbursal to the Greens via a single joint check; (2) The language of the April 2016 Receipt and Satisfaction only released the *total amount disbursed* and did not divide it between the two verdicts; (3) Subsequent to the transaction and

entry of the Consent Order, the equal allocation issue was extensively argued before the Supreme Court and was central to the analysis ordered on remand[9]; and (4) The Orders in place at the time of the acceptance of the undisputed UIM **funds and referenced in the Consent Order itself,** consistent with Rule 205, SCACR, and Rule 61, SCRCP, prohibited that transaction and agreement from affecting any matters pending appeal or the **"amount of the verdicts to which the Plaintiffs are ultimately entitled."** (R. 8; 21-25; 26-27; 126; 144-145; Supp. R. 90-102).

Finally, prior to the trial court's ruling, Bauerle did not argue *either* (1) that the Consent Order was entitled to preclusive effect in application of the setoff *or* (2) that disregarding a sentence to provide him full credit for his payment would "overrule" another circuit judge. (R. 8; 11-12; 136-137; 144-145). Not only are both of these post-ruling assertions incorrect under the facts and inconsistent with his prior position, but a party cannot use a Rule 59(e) to present an issue which could have been raised prior to judgment. C.A.H. v. L.H. 315 S.C. 389, 434 S.E.2d 268, 270 (1993); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (1990); Anderson Memorial Hospital, Inc. v. Hagen, 313 S.C. 497, 443 S.E.2d 399, 400 (Ct. App. 1994). These issues are not preserved, but will be addressed. (R. 11-12; 136-137; 144-145; 167-168).

Of note, the trial court found that it would disregard the language in the sentence on which Bauerle relies as "harmless error" only to the extent it prevented him from receiving full credit for the 2016 disbursal in applying the setoff pursuant to its prior findings. (R. 8). This was done with the consent of all parties in the interest of fairness *to* Bauerle. (R. 8; 137). **After** the trial court weighed the evidence as to the parties' intentions and made this very ruling, Bauerle

[9] Plaintiffs also brought to the trial court's attention that Bauerle did not raise the 2016 Consent Order in his arguments in opposing certiorari on the equal allocation issue, raising it only after discovering the existence of such "additional arguments" much later in the briefing process. This serves as further evidence that the parties did not intend the UIM transaction to act as a settlement or resolution of the equal allocation issue at the time the Consent Order was entered. Defendants' suggestion otherwise is disingenuous. The Supreme Court expressly denied the Defendants' motion arguing that the Consent Order was relevant to the analysis and the trial court correctly made a consistent finding. (R. 8; 30; 139; 144-145; Supp. R. 126-154).

now asserts that the Consent Order was entitled to preclusive effect and that the *entire* Order has been impermissibly "overruled."

> . . . a consent order is an agreement of the parties, under the sanction of the Court, and is to be interpreted as an agreement. It can be rescinded by mutual consent in a subsequent court action. . . Thus, in a case like this one, where the final order in one case is the basis for the final order in a related case, this Court may, if justice requires it, relieve a party of the consent order in the related case if the other consent order has been vacated.

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

Bauerle's argument fails to recognize that a Consent Order constitutes an agreement between the parties. The language at issue did not represent another judge's ruling on a disputed issue. Even so, circuit judges may set aside or modify the orders of another "when the right to do so has been reserved to the succeeding judge, or when it is allowed by rule of court or statute." Nixon Grocery Co., v. Spann, 108 S.C. 329, 94 S.E. 531, 534 (1917). Further, consent orders may be modified by consent, where justice requires, or if the terms conflict with public policy. Johns v. Johns, 309 S.C. 199, 203, 420 SE 2d 856 (Ct. App. 1992) (finding in consent order not enforceable where conflicted with public policy and substantial justice).

Here, the trial court's finding that the sentence setting forth specific numbers to be released under each verdict would be disregarded so as to effect substantial justice between the parties should be conclusive. It was not only suggested and consented to by both sides but was also required by the Consent Order's own language, the analysis on remand, this State's strong public policy favoring the settlement of disputes, and Rule 61, SCRCP. As was implicitly recognized by the Consent Order and prior Orders it referenced, the lower court did not have jurisdiction at that time to make a determination impacting an issue pending appeal. Rule 205, SCRCP. (R. 8; 144-145). Language directing a single joint payment also clearly contemplated that the sentence directing specific credits against each verdict could very well be nullified, vacated, or modified by the pending appeal. (R. 26; 126). The trial court's ruling on this issue

was necessary to comply with the Supreme Court's Order and was consistent with its findings as to the parties' intentions.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE ALLOCATION OF $ 1M TO ANN GREEN WAS REASONABLE UNDER THE FACTS, CONSISTENT WITH THE PARTIES' INTENTIONS UNDER THE SETTLEMENT AGREEMENT, AND SETOFF OF HER VERDICT IN THIS AMOUNT WOULD NOT LEAD TO A DOUBLE RECOVERY.

Bauerle argues that the trial court should have evaluated the reasonableness of the Grand Strand settlement based solely upon a comparison of the later jury verdicts. There is no precedent for such a proposition in our jurisprudence, especially not in cases relevant to the issue of setoff. This would also directly conflict with the Supreme Court's express instructions in this case as well as Riley, 414 S.C. 185, 777 S.E.2d 824. As in Riley, the trial-court approved allocation is supported by ample evidence and is unquestionably reasonable under the facts of this case. Therefore, Bauerle's attempt to have it invalidated on appeal "based on a 'percentages' analysis is "manifestly without merit." Id. at 197-198. He incorrectly asserts that the jury verdicts should be given "preclusive effect" in evaluating the pre-trial Grand Strand settlement, misconstruing that the trial judge's refusal to rely on the same exact formula derived from the jury verdicts is "based on the fallacy that the jury's determination of damages was wrong." (Appellants' Br., p. 15). However, the trial court made no such finding but merely set forth reasons why pre-trial settlement terms are not dictated by, and might not correlate with, subsequent jury verdicts against a different defendant in light of our strong public policy favoring the settlement of disputes. (R. 5; 6-7).

S.C. Code §15-38-50 doesn't authorize modification of "good faith" settlements and protects against a double recovery by mandating that subsequent verdicts be reduced "to the extent of any amount stipulated by the release or the covenant." S.C. Code Ann. § 15-38-50(1) (2005). Non-settling defendants who ask the court to invalidate settlement terms must prove an amount is so unreasonable as to demonstrate a fraudulent or bad faith intent to obtain an unfair

double recovery. Id. at 196-197 (quoting Lard, 901 N.E.2d 1006, 1018 ("Although the manipulation of an allocation can be evidence of bad faith in a settlement negotiation, it is not per se bad faith to engage in the advantageous apportioning of a settlement.")) Courts have only found that this threshold was met in very few cases where *no evidence* existed to support the dollar amount apportioned to an individual claim. Rutland, 400 S.C. 2019, 734 S.E.2d 142; Welch, 342 S.C. 279, 536 S.E.2d 408.

In contrast with the very few cases which have met the high threshold for appellate reapportionment of a trial-court approved settlement, there is **no** evidence here of bad faith or fraudulent intent to deprive Bauerle of a benefit to which he would have otherwise been entitled. Not only is it indisputable that Ann Green suffered damages and that an allocation of funds to the consortium claim was reasonable, there was also **ample** evidence to support damages in the amount of at least $1M. Expert testimony labeled this as a "tragedy" for Ann. (R. 242). She lost her previous life as well as her husband as he was before. (R. 232). There is **overwhelming** evidence that she suffered, and would continue to suffer, horribly. Moreover, the Life Care Plan valued the 24-hour care that she was spending every day of her life providing at $1.2 M, with future care more than doubling this amount. (R. 451; 463; 466; App. 11-12).

Notably, the Supreme Court remanded this case for consideration of the "relevant circumstances" in determining the proper amounts to be setoff from each verdict. The settlement agreement was **not** to be modified based upon any allegations of fraud or unreasonableness but simply for the technical necessity of applying a setoff. However, Bauerle argues that the Greens can't share equal entitlement to the settlement as intended because Randy's damages "far exceeded" Ann's. (Appellants' Br. p. 18). He cites no evidentiary basis for this other than a comparison of the relative sizes of the jury verdicts, which the Supreme Court's Order expressly prohibited. Moreover, it is not "within the province of a reviewing court" to evaluate the reasonableness of "the relative percentage of settlement proceeds assigned to each claim." Riley

at 191. The trial-court approved allocation is supported by ample evidence and is **unquestionably** reasonable under the facts of this case. Bauerle's attempt to have it invalidated on appeal "based on a 'percentages' analysis is manifestly without merit under these circumstances." Riley at 197-198.

By definition, the trial court's application of the setoff prevented a double recovery because each Plaintiff's verdict was reduced by the $1 M settlement amount apportioned to their claim. See S.C. Ann. § 15-38-50. Incidentally, this afforded Randy a total recovery *equal to his $2.3 M verdict.* (R. 6; 9). It also *eliminated all of Bauerle's liability to Ann* while still allowing her to retain her equal bargained-for right to the settlement proceeds. (R. 6). Nevertheless, Bauerle asserts that Ann has received a double recovery because her settlement was larger than her verdict. This grossly misapplies and perverts that very policy which permits a reduction of a *verdict* by the amount of a *settlement*. Bauerle argues that the maximum amount a Plaintiff may recover in a *settlement* is capped by a future unknown *verdict*, asserting that a "windfall" occurs where the Plaintiff has negotiated a settlement larger than the subsequent verdict. However, a settlement allocation has never been deemed to be unreasonable, fraudulent, or a sham on the basis that it exceeded a subsequent unknown jury verdict. As the trial court noted, the Greens' intentions cannot be judged based on future unknown factors outside of their control. (R. 3; 7). This is nonsensical, and there is simply no precedent for such a proposition under any theory of law or equity.

Bauerle's proposed reversal of the setoff rule profoundly conflicts with this State's strong public policy favoring the settlement of disputes. His position would actually condone retroactive judicial modification of good faith settlements based solely upon subsequent jury verdicts. It would penalize innocent parties for obtaining a verdict and do so on the basis of comparing that verdict's size to the verdict obtained by a different Plaintiff. Riley expressly forbids "appellate reapportionment" just to make it more advantageous to a nonsettling

defendant. Riley at 197. This would effectively obliterate one of the strongest motivating factors for parties considering settlement as it would no longer afford any protection against the unpredictability and uncertainty of litigation. Such a rule would have an absolutely stifling effect on settlements in this State. "Indeed, parties regularly reach compromise settlements for a variety of reasons, including the vagaries and unpredictability of litigation and the desire for finality." Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007).

Application of the setoff rules must strike "the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" Riley, at 196-197 (citing Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010)). Here, the apportionment of the good faith settlement was amply supported by evidence on the record and thus, by definition, the setoff effectively prevented a double recovery. There is no basis for reversing the trial court at this juncture. "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, 414 S.C. at 197.

III. THE TRIAL COURT WAS CORRECT IN DECLINING TO TREAT THE GREENS' SEPARATE VERDICTS AS EITHER JOINT OR MARITAL PROPERTY AND IN DECLINING TO TREAT THE GRAND STRAND SETTLEMENT AS MARITAL PROPERTY.

Bauerle asks that this Court direct the trial court to combine Ann and Randy's separate, independent verdicts and enter a single judgment in favor of both Ann and her husband's Estate. This is clearly prohibited under South Carolina law and directly violates the Supreme Court's directive that the trial court issue an order "setting forth the **amounts** to be set off from the **two verdicts**. (R. 36) (emphasis added). Though Ann and the Estate have consented to an equal division of the joint Grand Strand settlement, combining their separate, independent verdicts into

a single joint judgment would be a ***gross*** violation of their most basic rights and defeat the fundamental purpose of our current tort system. "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).

First, property is only deemed "marital" if it is "owned as of the date of filing or commencement of marital litigation." Sexton v. Sexton, 298 S.C. 359 (1989). Further, S.C. Code Ann. § 20-7-420(2) grants the Family Courts exclusive jurisdiction for the settlement of all rights "to the real and personal property of the marriage." Baurele's assertion that the settlement and verdicts should be treated as marital property represents a failure to recognize that such a classification, even if permissible, would entirely derail the analysis from all existing arguments to entirely different factors relevant to the division of marital property while also divesting the trial court of jurisdiction. As Mr. Green has passed away, divorce litigation will obviously never be commenced, and neither the settlement nor verdicts can ever be deemed marital. Accordingly, it is unclear why Bauerle remains adamant that the Greens made this argument to the Supreme Court. The term "marital property" was mentioned a **single** time on page 21 of their brief, as explained in a footnote, to illustrate that an unequal allocation could affect a future family court division *if* they were to divorce. (Supp. R. 98). This side point was made to demonstrate further inequity in a potential far reaching consequence if the settlement was modified in a manner inconsistent with their intentions because this could also impact division of the funds in a potential divorce proceeding. (Supp. R. 98). The statement quoted on p. 20 of Bauerle's Brief in further support of his assertion refers to the Greens' argument that the pecuniary interest of a third party tortfeasor is not a legally tenable basis for a trial court to retroactively modify a contractual agreement between a husband and wife (though this obviously applies to unmarried parties as well) without their consent to divide "***joint*** property," not "***marital*** property." (Supp. R. 98). Any use of the term "marital" rather "joint" in classifying the proceeds earlier in the appellate process had been corrected by the time the case reached the Supreme Court, with case

law on "marital property" retaining relevance *only* to the extent of the point made in the above-referenced footnote. (R. 504, lns. 17-18; 512, lns. 20-21; 513, lns. 14-24; Supp. R. 78-125). In any case, that side-point is moot now that Mr. Green has passed away and the interests of the Estate and its beneficiaries will never be subjected to divorce proceedings.

The distinction between ***jointly*** owned property and ***marital*** property is significant because Bauerle relies entirely on case law simply classifying settlement and personal injury proceeds as ***marital*** and thus subject to the jurisdiction of the Family Court for division in a divorce. However, the present case requires an analysis of the terms of a joint settlement agreement and the Greens' intentions thereunder pursuant to basic contract law principles. In contrast, the specific and lengthy list of factors relevant to the division of marital property in a divorce proceeding are utterly irrelevant to this case and would obviously involve an ***entirely*** different analysis altogether. Bauerle misinterprets case law subjecting settlement and litigation proceeds to division by the Family Courts, asserting instead that these cases permit the courts to arbitrarily strip tort Plaintiffs of their individual rights existing pursuant to *both* their settled contractual transactions *and* their independent jury awards. "[C]ontractual or property rights [are] matters in which predictability and stability are of prime importance." Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974). "[S]ettled expectations should not be lightly disrupted." Landgraf v. USI Film Products, 511 US 244 (1994). "A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do." Riley, 414 S.C. at 197, 777 S.E.2d at 83.

Second, while the settlement may be "joint," the jury verdicts may not. South Carolina law very clearly prohibits the combination of the Plaintiffs' separate, independent jury verdicts into a single judgment as Bauerle asks this Court to order. "Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative." Preer v. Mims, 323 SC 516, 521, 476 SE2d 472, 474 (1996). "It is well settled in South Carolina that

one spouse's cause of action for medical expenses and loss of consortium resulting from negligent injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action." Graham v. Whitaker, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984). As the trial court noted, the Plaintiffs carried different burdens at trial in proving causation and different elements of damages. They could have even asserted their causes of action in separate lawsuits. Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998); Cook v. Atlantic Coast Ln. R.R., 196 S.C. 230, 243, 13 S.E.2d 1 (1941). Ann and Randy were each entitled to their separate verdicts based upon the law and the evidence presented in support of their distinct damages.

Finally, even if the settlement and jury verdicts could legally be deemed "marital" in this case, which they cannot, there would *still* be no precedent for the approach Bauerle urges and which the Supreme Court has already expressly prohibited. (R. 36). Bauerle's reliance on Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 as precedent in support of his proposed novel approach is ***grossly*** misplaced. The setoff addressed in Broome was based purely on insurance statutes, **not** Section 15-38-50 of the South Carolina Contribution Among Tortfeasors Act and relevant *tort* cases which govern the setoff mandated in the present case. Broome does **not even address** any issues related to a court's allocation or re-allocation of a settlement, and is only relevant to the total amount of damages that can legally be recovered pursuant to contractual terms and the statutory definition of UIM coverage under this State's automobile insurance laws. Id.

Broome involved an unallocated settlement with a defendant paid to a husband and wife which was setoff from the verdict against **that same defendant**. In contrast, §15-38-50 provides for a setoff of settlements from verdicts against "**others**." S.C. Code Ann §15-38-50 (1). The settlement in that case was paid by the auto liability carrier and the verdict was paid by

the underinsured carrier. The setoff was mandated by our laws governing **auto insurance** which make clear that underinsured coverage exists solely to pay those damages sustained in *excess* of the liability coverage. S.C. Code Ann. § 38-77-160. "The very definition of UIM insurance mandates set-off." Broome at 341. Under our automobile insurance laws, a loss of consortium claim is subject to the same per person bodily injury limits as the physically injured spouse. This does not alter the separate, independent nature of the claims but merely caps the insurance benefits available to satisfy them. Accordingly, the insurer's total liability for **both** of the two spouses' verdicts could not exceed the per person bodily injury limits set by the insurance contract. The court's consideration of the sum of the two verdicts was ***only*** considered because of the limitations and definitions set forth in an insurance contract and laws governing automobile insurance. It is entirely irrelevant to the issues in the present case and provides no support for combining Randy and Ann's separate verdicts into a single judgment *or* for allocating the settlement based on a formula derived from such a sum.

> Our courts have decided that "per person" liability limits include loss of consortium claims. However, the courts' rulings in these cases did not nullify the independent status of a loss of consortium claim. Nor did they rule that a loss of consortium claim is inseparable from the claim of an injured spouse. The courts simply pointed out that the bodily injury claim and the loss of consortium claim share the limits of a per person liability limits policy.

Kizer v. Kinard, 361 S.C. 68, 72, 602 S.E.2d 783 (2004) (citing Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); Sheffield v. Am. Indem. Co., 245 S.C. 389, 140 S.E.2d 787 (1965)). Here, the trial court properly declined to rely on the Broome case and focused on the proper analysis of evidence and relevant circumstances as addressed in the parties' arguments before the Supreme Court as well as extensive case law directing the application of setoffs. (R. 1-10).

CONCLUSION

There is **no precedent or support** for modifying a settlement based upon a comparison of subsequent jury verdicts obtained by two separate Plaintiffs, and the Supreme Court prohibited reliance on this "arbitrary" formula. Furthermore, combining the two verdicts into one is *expressly* prohibited by extensive case law and the Supreme Court's directive that the trial court set "forth the **amounts** to be set off from the **two verdicts**." (R. 36) (emphasis added). The trial court correctly applied the setoff against the two verdicts in the amounts of the settlement proceeds to which each Plaintiff was entitled consistent with the agreement's terms and pursuant to proper factual findings as to the parties' intentions as amply supported by the record. This, by definition, precluded a double recovery and was consistent with extensive precedent on the application of setoffs in tort cases. The jury verdicts may not be used to retroactively determine the Greens' rights to their prior settlement and, as an unknown factor not existing at the time, cannot be evidence of their intentions regarding same. A settlement has only been found to have been made in bad faith and its terms modified in a manner inconsistent with the parties' intentions in cases where there was no evidence to support allocating any amount to a specific claim. Here, the trial court set forth *ample* evidence to support the Greens' decision to share equal rights to the $2 million settlement *and* for allocating $1 million to Ann. This was unquestionably reasonable under the facts, and there is no permissible basis for altering the trial court's ruling on the allocation. The trial court's analysis and findings are consistent with the Supreme Court's clear directives and result in application of the setoff in a manner which prevents a double recovery while protecting this State's strong and clear public policy in favor of promoting and fostering the settlement of disputes. Therefore, the Respondents respectfully request that this Court affirm the trial court's order *in toto*.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with the Supreme Court's Revised Order of April 15, 2014, regarding personal identifiers and sensitive information.

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