The Supreme Court of South Carolina

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N O T I C E

VACANCIES ON THE COMMISSION ON LAWYER CONDUCT

Pursuant to Rule 3(c) of the *Rules for Lawyer Disciplinary Enforcement* (RLDE), Rule 413, SCACR, the Supreme Court appoints regular members of the South Carolina Bar to serve on the Commission on Lawyer Conduct. The Commission follows the procedural rules set forth in the RLDE.

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Submissions will be accepted through November 15, 2023.

Columbia, South Carolina
October 4, 2023

The Supreme Court of South Carolina

In the Matter of Michael Davis Moore, Deceased.

Appellate Case No. 2023-001518

ORDER

Decedent Michael Davis Moore passed away September 13, 2023. Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), Commission Counsel has filed a Petition for Appointment of the Receiver in this matter. The petition is granted.

IT IS FURTHER ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Decedent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Decedent may have maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Decedent's clients. Except as authorized by Rule 31(d)(5), RLDE, Rule 413, SCACR, Mr. Lumpkin may not practice law in any federal, state, or local court, including the entry of an appearance in a court of this State or of the United States. Mr. Lumpkin may make disbursements from and close Decedent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Decedent may maintain that are necessary to effectuate this appointment.

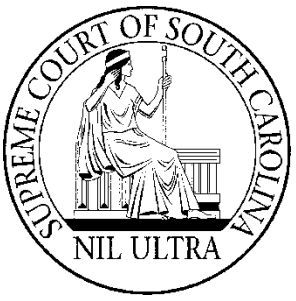
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Decedent, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by

this Court and has the authority to receive Decedent's mail and the authority to direct that Decedent's mail be delivered to Mr. Lumpkin's office.

s/Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
September 28, 2023



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
October 4, 2023
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Corey Jermaine Brown, Petitioner.

Appellate Case No. 2021-000941

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenwood County
Eugene C. Griffith Jr., Circuit Court Judge

Opinion No. 28179
Heard September 14, 2022 – Filed September 29, 2023

REVERSED AND REMANDED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, for Respondent.

CHIEF JUSTICE BEATTY: A jury convicted Corey Brown of conspiracy to commit grand larceny, armed robbery, and kidnapping. In a post-trial motion, Brown moved for a new trial on several grounds, including the State's failure to disclose its negotiations with Shadarron Evans, the State's key witness. The trial court granted the motion, and the State appealed.

The court of appeals reversed the grant of a new trial in *State v. Brown*, Op. No. 2021-UP-253 (S.C. Ct. App. filed July 7, 2021). Agreeing with the State, the court concluded that no plea offer had been extended and remanded the case to the circuit court to make specific findings as to whether the evidence was material to Brown's guilt under *Brady v. Maryland*, 373 U.S. 83 (1963). This Court granted Brown's petition for a writ of certiorari to review the decision of the court of appeals. We reverse and remand the case to the circuit court for a new trial in accordance with this opinion.

I. FACTS

On July 26, 2013, Latavius Spearman was robbed and kidnapped at gunpoint by a group of five men. Spearman had returned home from work late that night. An unknown man approached him when he exited his car to enter his apartment. Spearman saw a red laser pointer on his chest, and an armed man ordered him back to his car. Another man came out of the darkness, and Spearman was forced to empty his pockets. The men directed Spearman to drive his car, while the gunman sat behind him in the back seat. Spearman followed a grey Camry, driven by the other men, out of his apartment complex. Spearman was told to pull over in a wooded area. In the darkness, the gunman forced Spearman into the back seat of the car then continued driving.

The two cars stopped at a Hot Spot gas station in Greenwood County. There, Spearman grabbed the gun and wrestled with the gunman in the back seat of his car. The driver of the car panicked and attempted to drive off; however, he hit the grey Camry in front of him. Spearman jumped through an open door of the car and ran into the store connected to the gas station. The store's employee gave Spearman a phone and Spearman called the police. In total, five co-conspirators robbed and kidnapped Spearman that night. They allegedly were Corey Brown, Shadarron Evans, Antonio Nicholson, Christopher Johnson, and Torrance McLean.

At Brown's trial, the State called Spearman and two of Brown's co-defendants as witnesses: Nicholson and Evans. Nicholson confirmed both the

identity of Brown and Spearman's version of events. However, Nicholson did not know Brown before the incident and initially failed to pick him out of a line-up. Evans testified that he was a friend of Brown's and they participated in the robbery and kidnapping of Spearman. No physical evidence connected Brown to the crime, and Spearman could not initially identify him as one of the robbers.

During his testimony, Evans assured the court and jury that the State did not make him any promises for his cooperation. Rather, he testified that he wanted to tell the truth and correct a false statement he made to law enforcement. This statement was untrue, and the solicitor failed to correct it.

Sometime after trial, Brown's counsel gained access to jailhouse phone call recordings from Evans. By reviewing these records, counsel discovered that the State extended plea offers to Evans and that they engaged in extensive negotiations. Evans was heard saying "people" came to him asking him to testify and "they were trying to give me thirteen years." The State admitted it did not disclose these negotiations because it did not believe the State had made disclosable offers under *Brady*. Brown's counsel filed a post-trial motion for a new trial.

The full extent of the State's discussion with Evans did not come to light until the assistant solicitor testified in the post-trial hearing for a new trial. Initially, the State offered Evans a prison sentence of eighteen years in exchange for testifying. Evans declined this offer and asked the State to offer him ten years. Finally, the parties agreed on thirteen years in exchange for Evans's testimony, but, prior to Brown's trial, Evans breached the agreement because he believed that he could get a better deal. After Brown was convicted and sentenced, the State reduced Evans's original charges from kidnapping and armed robbery to false imprisonment and conspiracy to commit grand larceny. He pled guilty and received a sentence of four years on the conspiracy charge and eight years, suspended to four years, on the false imprisonment charge. The same judge that presided over Brown's trial also sentenced Evans.

At the post-trial hearing, the trial judge expressed his shock and discontent on the record: "I mean, for [the defense] to know he turned down thirteen and decided to start speaking to [the State] to me is a fact that would be important. Because I didn't—and this is the first I'm hearing of it today and so *I'm kind of like wow*."

The court issued an order granting Brown a new trial. In the brief order, the court concluded that "the state initially offered Evans thirteen years. But after

meeting with his attorney and a solicitor, Evans believed that, if he testified, the State would present a more favorable offer . . ." The court concluded that the State's failure to disclose this "material evidence" prejudiced Brown.

The State appealed the order granting a new trial, and the court of appeals reversed and remanded the case back to the circuit court to determine if the nondisclosure was material. In so ruling, the court stated:

> We find the [trial] court made no specific findings as to whether the evidence was material to Brown's guilt under *Brady* and likely to have changed the verdict under *Giglio*.[1] . . . Thus, we reverse and remand to the trial court to make specific findings on what basis the court is granting a new trial.

State v. Brown, Op. No. 2021-UP-253 (S.C. Ct. App. filed July 7, 2021). The court, finding the *Brady* issue dispositive, declined to rule on the remaining issues raised on appeal. *Id.*

II. STANDARD OF REVIEW

"The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion." *State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *State v. King*, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017).

III. DISCUSSION

Brown argues the court of appeals erred in reversing the grant of a new trial because the State admitted that plea offers extended to Evans were not disclosed. As to materiality, Brown contends that the jurors would have decided differently had they known about Evans's avoiding a possible life sentence in exchange for his

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[1] *Giglio v. United States*, 405 U.S. 150 (1972) (holding that, where a witness's testimony is material to a case, the prosecution's failure to disclose a promise not to prosecute made to that witness in exchange for his testimony violates the Due Process Clause of the United States Constitution).

testimony. Further, Brown maintains the court of appeals ignored the deferential standard of review when reviewing the grant of a new trial.

Conversely, the State first argues it extended only offers to Evans, which were insufficient to require disclosure. Second, the State claims, even if it should have disclosed the information, the testimony was immaterial or "[in]sufficient" to grant a new trial. In support, the State contends Spearman's and Nicholson's testimony rendered Evans's testimony inessential in the case. Further, the State maintains the testimony would not have impacted the outcome at trial.

Initially, we note that it is not possible to ignore the trial judge's shock at the discovery of the State's failure to disclose their offer and negotiations with Evans. Contrary to the State's position, the trial judge's reaction evinces impactful materiality. After all, he granted a new trial based on an alleged *Brady* violation. Moreover, a key witness's reliability is always material.

In *Brady v. Maryland*, the United States Supreme Court held, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963). The Court rationalized its holding to ensure the accused has a fair trial.[2] *Id.*

Almost a decade later, the United States Supreme Court included witness testimony under the reach of *Brady*'s holding: "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [*Brady*'s] general rule." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). The Court reaffirmed the need to have a finding of materiality under *Brady*. *Id.* ("We do

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[2] Later, the *Bagley* Court observed,

> The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

United States v. Bagley, 473 U.S. 667, 675 (1985) (footnotes omitted).

not, however, automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." (internal quotation omitted)). The *Giglio* Court restated the standard of materiality as any reasonable likelihood the testimony could have affected the jury's judgment. *Id.* Moreover, the Court has defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

In *Giglio*, the defense discovered that the prosecution did not disclose a promise made to a key witness in exchange for testimony. 405 U.S. at 150–51. There, the testifying witness was a co-conspirator and the *only* witness linking the defendant to the crime. *Id.* at 151. An affidavit filed by the prosecution as part of its opposition to a motion for a new trial confirmed a promise that, if he testified before a grand jury and at trial, he would not be prosecuted. *Id.* at 152. The United States Supreme Court reasoned, "[T]he Government's case depended almost entirely on [the witness's] testimony; without it there could have been no indictment and no evidence to carry the case to the jury." *Id.* at 154. Ultimately, the Court reversed Giglio's conviction on these grounds. *Id.* at 155.

The United States Supreme Court then made certain: "Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." *Bagley*, 473 U.S. at 676. There, the Court reversed the judgment of the United States Court of Appeals for the Ninth Circuit and remanded the case for a determination regarding materiality. *Id.* at 684. The prosecution promised its witnesses the "possibility of reward" if the information they gave helped convict the defendant. *Id.* at 683. The Court found this gave the witnesses a personal stake in the defendant's conviction and further increased the incentive to testify falsely. *Id.* Importantly, the witnesses were not given firm promises or deals; rather, a mere possibility of favorable treatment was sufficient.

Turning to the elements of the *Brady* test, a claim succeeds when "the evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant's guilt or punishment." *State v. Durant*, 430 S.C. 98, 107, 844 S.E.2d 49, 54 (2020).

The State admitted that there were plea negotiations with Evans and it did not disclose them to the defense before or during trial. Further, the defense properly requested all favorable evidence from the State in a "Rule 5 [*Brady*] Motion."

Therefore, we address only the first and fourth elements of the *Brady* test in the context of *Giglio* and *Bagley*.

A. Nature of the agreement

This case requires the Court to determine whether plea negotiations between the State and a witness need to be disclosed under *Brady*. *See Bagley*, 473 U.S. at 678 ("The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting cross-examination."). As will be discussed, we conclude that a formal agreement is not always necessary to warrant disclosure. Instead, the analysis must focus on a witness's bias when he or she has a "personal stake" in the conviction. *Id.* at 683.

In *State v. Hinson*, we affirmed the appellant's conviction but remanded the case so that appellant could renew a motion for a new trial before the circuit court. 293 S.C. 406, 361 S.E.2d 120 (1987). Despite the defense's timely *Brady* motion before and during trial, the State did not disclose a promise of immunity made to a witness. *Id.* at 407, 361 S.E.2d at 120. During direct and cross-examination, the witness testified that the State did not promise her anything in exchange for her testimony. In closing argument, the solicitor argued that the witness was testifying voluntarily despite her charges and that there was no agreement for leniency. *Id.* Moments after the jury announced its verdict, the solicitor informed the judge that the witness would not be prosecuted. We concluded "[w]hile the record strongly suggests an undisclosed promise, it does not clearly show that a promise existed." *Id.* at 408, 361 S.E.2d at 121. Importantly, a decision not to prosecute, as we termed it, provided a sufficient basis to justify a remand to determine when the witness knew of the State's decision to treat her favorably.

In *State v. Cain*, we ruled on what *does not* constitute a bargain, agreement, or deal under *Brady*: "The record here contains only a passing reference to a pre-trial statement by the solicitor that he would assist, if possible, in keeping [the witness] from being incarcerated in the same institution as appellant." 297 S.C. 497, 503, 377 S.E.2d 556, 559 (1988). At trial, the State's witness testified that he had not been offered anything in return for his testimony. *Id.* at 502, 377 S.E.2d at 558.

We distinguished the case from *Hinson* because there was no evidence that an undisclosed bargain or plea existed.[3] *Id.* at 503, 377 S.E.2d at 559.

Similarly, in *State v. Johnson*, we held no agreement was made concerning the witness's immunity from prosecution. 306 S.C. 119, 124, 410 S.E.2d 547, 551 (1991). Although we summarily concluded the State's witness was material, we agreed there was no evidence an agreement was made. *Id.* Our decision hinged entirely on the former solicitor's testimony that the witness ultimately was not prosecuted because the State's investigation indicated he was not guilty of a crime.[4] *Id.* Here, Evans and the State engaged in back-and-forth negotiations. The State initially offered a prison term of eighteen years, and Evans countered with ten. Then, the State offered Evans fifteen years, which Evans rejected. Evans again countered with thirteen years, and the State agreed. However, when it came time for Evans to plead, he refused.

In *Hinson*, we thought it was important to determine when the witness knew that the State would treat her favorably if she testified. In the instant case, Evans knew the State was willing to offer him more if his testimony was satisfactory. Further, the State did not seek violent charges, and the charges against Evans were ultimately reduced to false imprisonment and conspiracy to commit grand larceny. Therefore, unlike the witness in *Hinson*, it is clear that Evans knew of the State's intention to treat him favorably if he testified satisfactorily.

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[3] Regardless, we also ruled the testimony was not material to the appellant's defense in light of the physical evidence offered at trial. *Id.* at 503–04, 377 S.E.2d at 559 (referring to laboratory tests, bodies found, the crime scene, and the pathologist's testimony).

[4] Breaking from the previous trend, we affirmed the granting of a new trial in *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996). During its opening argument, the State told the jury that there was no plea agreement with its witness and, further, failed to correct this misstatement during trial. *Id.* at 236, 478 S.E.2d at 835. The Court expanded, in a way, the *Giglio* rule to more than the "deliberate deception of a court and jurors": "[T]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 235, 478 S.E.2d at 835.

Turning to the reasoning of the court of appeals, in reversing the grant of a new trial, the court first relied on *Tarver v. Hopper*, 169 F.3d 710, 717 (11th Cir. 1999). There, the government stated that no arrangement or deal existed and that only the witness's testimony would be "taken into consideration." *Id.* at 717. We find *Tarver* inapposite because the State engaged Evans with more than offering mere "consideration" of his testimony. The State and Evans had substantial back-and-forth discussions about what it would take for Evans to testify and entered into an agreement to that effect. Therefore, the court of appeals' reliance on *Tarver* is misplaced. The court of appeals relied secondly on *United States v. Rushing*, 388 F.3d 1153 (8th Cir. 2004). There, the witness rejected a plea offer. Here, the witness breached a plea agreement. An offer and an agreement are manifestly different things.

While these two cases seemingly exemplify when plea negotiations are *not* disclosable, we conclude that, here, the negotiations between the State and Evans have a fundamental difference. Evans and the State entered into an agreement when the State accepted Evans's offer to receive a thirteen-year sentence. Evans did not reject an offer as was the situation in *Rushing*. Instead, Evans *breached* the agreement that he had with the State. This does not change the fact that Evans and the State made an agreement for Evans to plead guilty in exchange for thirteen years. More importantly, Evans believed that he would get a better deal if he testified favorably, thus giving him incentive to do so. A key reasoning behind *Brady* and its progeny was the disclosure of incentives to give biased testimony.

Based on the foregoing, we conclude that the State and Evans entered into a sufficient agreement. The lack of a written document did not negate the existence of a deal nor the strong evidence of Evans's belief that he would be treated favorably if he cooperated with the State. Having concluded that, under the facts of this case, the plea negotiations between Evans and the State were favorable impeachment evidence, we must next determine whether Evans's testimony was material to Brown's case.

B. Materiality of non-disclosure

Testimony is material when it could "in any reasonable likelihood have affected the judgment of the jury.'" *Giglio*, 405 U.S. at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682.

Initially, we note that in remanding the case for a finding of materiality, the court of appeals seems to ignore the trial court's finding that the failure to disclose the "material evidence" prejudiced Brown.

We believe that Evans's testimony was material and the failure of the State to disclose its negotiations with Evans had a reasonable probability of affecting the outcome of the trial. After Evans negotiated with the solicitor, he was convinced that he could get a better deal if he testified satisfactorily. This supplied the incentive to provide biased testimony. Evans was the only witness to identify Brown in a pretrial police lineup, similarly to the situation in *Giglio*. 405 U.S. at 154 (observing, where the government's case depended almost entirely on one witness's testimony, "without it there could have been . . . no evidence to carry the case to the jury"). In fact, the State did not pursue Brown as a suspect until Evans identified him. Evans had a personal stake in Brown's conviction, as did the witnesses in *Bagley*, when he anticipated leniency on the part of the State and his charges were actually reduced to nonviolent offenses. 473 U.S. at 670, 683 (finding that giving witnesses a personal stake in a conviction, even if not in writing, undermines confidence in the outcome). Additionally, and unlike the case in *Cain*, no physical evidence—such as cell phone records—tied Brown directly or circumstantially to the crime. *Cf. Cain*, 297 S.C. at 503–04, 377 S.E.2d at 559 (finding testimony was not material in light of physical evidence offered at trial, including laboratory tests, bodies found, the crime scene and the pathologist's testimony).

Therefore, we find there is a reasonable probability the jury would have decided differently if the State's plea negotiations with Evans had been disclosed and Brown had been able to impeach Evans with this information. Under the facts of this case, this was a probability sufficient to undermine confidence in the outcome.[5]

IV. CONCLUSION

We hold the trial court did not abuse its discretion in granting Brown a new trial. The State had the duty to disclose evidence of the negotiations and deal because Evans and the State formed an agreement before Evans breached that agreement. The State's failure to disclose the negotiations and the accepted offer

[5] Brown also relies on *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976), and *Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008), in his arguments. Because we find other case law controlling, we need not address these authorities.

with Evans deprived Brown of a fair trial because Brown did not have the ability to impeach Evans.[6] Further, there exists a reasonable likelihood the jury would have decided differently had Brown impeached Evans based on the agreement. Therefore, we reverse the court of appeals and remand the case to the circuit court for a new trial in accordance with this opinion.

REVERSED AND REMANDED.

KITTREDGE, FEW, JAMES, JJ., and Acting Justice Kaye G. Hearn, concur.

[6] A remark was made at oral argument that solicitors now might begin to ask witnesses during examination if they entered into negotiations or previously accepted a plea offer. We sanction this practice and believe it will properly guard against the appearance of concealing plea negotiations when the witness has an incentive to testify. *See Bagley*, 473 U.S. at 678 ("The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Estate of Jane Doe 202, by John Doe MM and John Doe HS, each of whom holds power of attorney for Jane Doe, Petitioner,

v.

City of North Charleston, Leigh Anne McGowan, individually, Charles Francis Wohlleb, individually, and Anthony M. Doxey, individually, Respondents.

Appellate Case No. 2021-000721

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 28180
Heard May 17, 2023 – Filed September 29, 2023

AFFIRMED IN RESULT

Gregg E. Meyers, of Byron, M.N., for Petitioner Jane Doe 202.

Sandra J. Senn, of Senn Legal, LLC of Charleston, and Andrew F. Lindemann, of Lindemann Law Firm, P.A. of Columbia, for Respondents City of North Charleston,

Anthony M. Doxey, Leigh Anne McGowan, and Charles Frances Wohlleb.

JUSTICE JAMES: This appeal arises from a defense verdict in a case alleging law enforcement officers and the City of North Charleston violated the civil rights of Jane Doe, a vulnerable adult. During its deliberations, the jury submitted several questions, the last of which was ambiguous. The trial court answered the question without requesting clarification from the jury and denied Doe's request to charge the jury on nominal damages for a third time. The court of appeals affirmed. *Est. of Doe 202 by Doe MM v. City of N. Charleston*, 433 S.C. 444, 858 S.E.2d 814 (Ct. App. 2021).[1] We hold the trial court erred in not requesting clarification, but we conclude the error was harmless. We therefore affirm the court of appeals in result.

I.

In late 2012, Doe's daughter (Daughter) moved from North Carolina into Doe's home in a quiet neighborhood in North Charleston. Very shortly thereafter, Doe was diagnosed with Alzheimer's disease and dementia. She was unable to drive, make a telephone call, use the restroom unassisted, dress herself, prepare food, or even open containers of food.

On the evening of March 27, 2014, Daughter went out for a work event and, according to Daughter, returned home around 9:00 p.m. Daughter testified she went back outside around 10:00 p.m. to retrieve something from her car. She claims she locked herself out of the house, so she knocked on the front door and called for Doe to let her in. Daughter testified she went to the back of the house and Doe let her in through the sliding glass back door. Daughter went to bed upstairs. A few minutes after 10:00 p.m., a neighbor called the City of North Charleston Police Department and reported Daughter was outside Doe's home banging on the front door and yelling for Doe to let her in. Officer McGowan responded within minutes and knocked on the front door, but no one answered. Officer McGowan noticed the interior lights of a car parked in the driveway were on; she saw wine bottles in the back of the car and found a pair of high heels beside the driver's side door. Officer McGowan went around to the back of the house and found in the yard what she described as a leather bag with fresh blood on it. At Officer McGowan's request, dispatch called the

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[1] Doe died during the pendency of this appeal, but we still refer to the plaintiff as "Doe."

neighbor who reported the disturbance. Dispatch was told by the neighbor that Doe had dementia. Officers Wohlleb and Doxey responded to the scene. The officers entered the dwelling through the unlocked back sliding glass door, where they encountered Doe. The officers asked Doe if everything was okay, and she said it was. They asked Doe who else was in the home, and Doe told them Daughter was upstairs. The officers asked Doe to escort them upstairs.

Accounts of what occurred next differ significantly between the two sides, but the differing accounts mean little to the issues before us. Daughter testified she was asleep in her bed when she was awakened by a person in her bedroom; she claims she did not know who the person was and thought the person was there to do her harm, so she yelled at the person to get out. Daughter claims Officer McGowan flung her out of bed and restrained her. The officers contend Daughter was asleep fully clothed on top of the covers on the bed, had a large red wine stain on her shirt, and had a bleeding gash on her knee. One asked if Daughter needed medical attention and she said she did not. Wohlleb and Doxey left the room, and, according to Officer McGowan, Daughter began screaming at Doe, flailed her arms, and poked McGowan in the eye. Daughter was arrested for assault on a police officer and taken to jail. Doe was left alone until approximately noon the following day, when Daughter called Doe's brother and asked him to check on Doe. The brother testified he found Doe in obvious mental distress and wearing a soiled adult diaper. Doe was eventually taken to the hospital and was diagnosed with a urinary tract infection.

Doe sued the officers and the City. Pertinent to this appeal are Doe's causes of action against the officers and the City pursuant to 42 U.S.C. § 1983. Doe claims the officers violated her Fourth Amendment rights by entering the dwelling without a warrant. Doe's section 1983 claim against the City is based on Doe's contention that the City engaged in deliberate indifference to Doe's rights by failing to properly train its officers.

II.

Doe's appeal centers on the trial court's response to the last of several questions submitted during deliberations.

The substance of the trial court's first and second overall charge to the jury is not an issue in this appeal, but a summary of the charge relevant to the section 1983 claims against the officers and the City will aid understanding of the issue before us. The trial court instructed the jury that in order to prove her section 1983 claim against

the officers, Doe must establish: (1) the officers committed an act that deprived Doe of a right secured by the United States Constitution; (2) the officers acted under color of state law; and (3) the officers' actions proximately caused Doe's damages. The officers do not dispute they were acting under color of state law. As to the first element, the trial court charged the jury that a warrantless entry into one's dwelling is a per se violation of the Fourth Amendment to the United States Constitution. The officers did not dispute they entered without a warrant but claimed exigent circumstances justified the warrantless entry. The trial court charged the jury that the existence of exigent circumstances, if proven by the officers, would excuse the warrantless entry. As to the third element of Doe's section 1983 claim against the officers, the trial court instructed the jury that Doe must prove the constitutional violation was the proximate cause of Doe's injuries.

With regard to Doe's deliberate indifference claim against the City, the trial court instructed the jury that Doe must prove (1) the officers violated Doe's constitutional rights; (2) they were acting under color of state law; (3) the City failed to train its officers, thus illustrating a deliberate indifference to the rights of those with whom the officers came into contact; and (4) the City's failure to train actually caused the officers to violate Doe's rights and was so closely related to the violation of rights as to have been the moving force that cause damage to Doe. The trial court's instructions on the specifics of deliberate indifference are not relevant to this appeal.

The trial court then gave a relatively typical jury charge on actual damages applicable to the claims against the officers and the City. Pertinent to this appeal is the trial court's subsequent instruction on nominal damages:[2]

> [I]f you return a verdict for the plaintiff on a section 1983 claim but the plaintiff has failed to prove actual or compensatory damages for her claim[,] then you must award nominal damages of one dollar for that claim. A person whose federal rights were violated is entitled to a recognition of that violation even if he or she suffered no actual injury. Nominal damages such as one dollar are designed to acknowledge the depr[i]vation of a federal right even where you find no actual injury occurred.

[2] Nominal damages are important in a section 1983 case because if a jury awards even nominal damages to the plaintiff, the trial court may award reasonable attorney's fees under 42 U.S.C. § 1988.

There were no objections to the foregoing instructions, and the jury retired to deliberate, accompanied by three separate verdict forms pertaining to the three officers and one verdict form pertaining to the City. The parties advised the trial court that all agreed to the verdict forms. The first question on the officers' forms was, "Do you find that Plaintiff has proven by a preponderance of the evidence that [the officer] violated [Jane] Doe's constitutional rights by making a warrantless entry into [Jane] Doe's residence . . . . ?" The first question on the City's form was, "Do you find that the Plaintiff has proven by a preponderance of the evidence that the City of North Charleston violated [Jane] Doe's constitutional rights by being deliberately indifferent with regard to training its officers?" All four forms instructed the jury that if the answer to the first question was "No," the jury was to "stop deliberating on this cause of action and sign the bottom of this form."

The damages question on each officer's form read: "[D]o you find that Plaintiff has proven by a preponderance of the evidence that the constitutional violation caused damages to [] Doe?" The damages question on the City's form read substantially the same. None of the forms specifically referenced nominal damages.

The jury submitted several notes during deliberations. In its first note, the jury asked the trial court to repeat the entire jury charge, which the trial court did. Another note asked the trial court to define "preponderance," which it did. Another note requested a copy of section 1983, which the trial court declined.

Along with its note asking for a copy of section 1983, the jury submitted the note that is the focus of this appeal. The note read: "For there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or injury or mental i.e. damages." The trial court engaged in an extensive colloquy with counsel as to how this question should be interpreted and answered.

The trial court initially stated it was "not certain whether [the jury had] the concept of proximate cause or damages confused." The trial court read the note again and stated, "[T]he more I read this note the more I think they have confused damages in the elements of section 1983." The trial court continued the discussion and explained, "I think all they're asking is in order for there to be a violation of a civil right[] [under the] 4th Amendment the plaintiff must demonstrate . . . there must be bodily harm or injury and that's really not the inquiry." The trial court decided to recharge the jury on the elements of a section 1983 claim and stated it would reinstruct the jury on damages if the jury asked, and if the jury asked for more,

it would reinstruct more. Doe argued the jury might be confused if it were not reinstructed on nominal damages, and counsel went back and forth with the trial court on that point. The trial court concluded the jury would submit another question if it wanted additional instructions.

During the subsequent reinstruction, the trial court repeated the three basic things a plaintiff must prove to establish a section 1983 claim: (1) a constitutional violation; (2) acting under color of state law, and (3) and that the plaintiff "must prove by the greater weight or preponderance of the evidence that the constitutional violation was the proximate cause of her injuries." The trial court stopped at that point and did not go into detail about the various damages—including nominal damages—the jury could award Doe if it determined any defendant had violated her federal constitutional rights.

After this recharge, Doe argued the jury could "conceivabl[y] be hung up on whether the nominal damage fits as part of the injury." The trial court responded, "I think they were unclear about what constitutes the elements of the 1983 cause of action. They don't even get to nominal damages unless you've proven that there was a constitutional violation."[3]

The jury answered "No" to each of the first questions on all four verdict forms and deliberated no further. All four forms included subsequent questions pertaining to damages, which the jury did not reach because of its "No" answer to the first question.

III.

A. Did the trial court err in failing to clarify the jury's question?

Doe contends the disputed question inquired into damages (including nominal damages), not the threshold issue of whether there was a constitutional violation. Doe argues the trial court's refusal to again instruct the jury on nominal damages was misleading, incorrect, and omitted the language responsive to the jury's actual question. In other words, Doe does not argue the disputed recharge was substantively incorrect; rather, Doe argues the recharge did not go far enough.

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[3] In her brief, Doe contends a simple "No" answer to the disputed question from the jury would have sufficed. During oral argument, Doe argued she requested the trial court to give the jury a "No" answer, but that request is not in the record.

The court of appeals concluded the disputed question was ambiguous, stating, "The trial court could just as well have reached the conclusion the jury was asking about damages and not liability . . . . . Still, given that we believe both views of the jury's question are possible, we believe the trial court did not abuse its discretion." *Doe*, 433 S.C. at 454, 858 S.E.2d at 819.

We agree with the court of appeals that the disputed question was susceptible of more than one meaning. However, the court of appeals erred in applying a deferential standard of review of the trial court's decision as to how it would respond to the question. Other jurisdictions have addressed the general question of how a trial court should respond to a jury question when the question reflects confusion about a legal issue:

> "When a jury sends a note which demonstrates that it is confused, the trial court must not allow that confusion to persist; it must respond appropriately." *Alcindore v. United States*, 818 A.2d 152, 155 (D.C. 2003); *see also, e.g.*, *Murchison v. United States*, 486 A.2d 77, 83 (D.C. 1984) (trial court is under obligation to respond to jury's confusion where jury "makes explicit its difficulties") (internal quotation marks omitted). The trial court is required to clear away any confusion "with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 613, 66 S. Ct. 402, 90 L.E.d 350 (1946).

Sanders v. United States, 118 A.3d 782, 783-84 (D.C. 2015). If confronted with an ambiguous jury question, the trial court cannot select one reasonable interpretation and ignore other reasonable interpretations. If the parties do not agree how the trial court should respond to the question, the trial court must seek clarification from the jury. Failure to do so is an error of law.

B. Is a new trial required?

Doe and the dissent contend the trial court's error requires reversal and a new trial. They correctly note, as did the dissent in the court of appeals, that a plaintiff in a section 1983 claim does not have to prove "traditional damages" and that "the violation of a [constitutional] right is itself considered an injury." *Doe*, 433 S.C. at 455, 858 S.E.2d at 819-20 (Geathers, J., dissenting) (citing *Uzuegbunam v. Preczewski*, 592 U.S. ___, 141 S. Ct. 792, 802 (2021)). Doe contends the question of whether there was a constitutional violation and the unique role of nominal damages in a section 1983 action go hand in hand such that a recharge on the

elements of a section 1983 claim without a recharge on nominal damages is manifestly prejudicial. Under the circumstances present in this case, we disagree.

The officers' verdict forms instructed the jury to first determine whether "[the officer] violated [Jane] Doe's constitutional rights by making a warrantless entry into [Jane] Doe's residence . . . ." The specificity of that question—whether Doe had proven the officer had made an unconstitutional warrantless entry—is important. If the jury had answered "Yes" to that question, the jury would have moved to the damages questions. The jury's "No" answer to the first question establishes that the jury determined Doe had not proven an unconstitutional warrantless entry. The "No" answer renders moot the question of damages—nominal or otherwise.

We disagree with the dissent's contention that we are "repeating the trial court's mistake." Rather, we hold that in this case the trial court's mistake did not affect the verdict. A repeat of the nominal damages charge would not have resulted in a different answer to the first question on the verdict forms.[4] Therefore, the trial court's error in not seeking clarification of the question was harmless. *See State v. Middleton,* 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (holding in a harmless error analysis, the inquiry is whether the erroneous charge contributed to the verdict rendered); *see also Horry Cnty. v. Laychur*, 315 S.C. 364, 368, 434 S.E.2d 259, 262 (1993) ("In order to warrant reversal for refusal of the trial judge to give requested jury instructions, such refusal must have been both erroneous and prejudicial.").

Conclusion

The court of appeals erroneously applied a deferential standard of review in reviewing the trial court's reasoning of how the trial court would respond to the jury's ambiguous question. We hold that when a trial judge receives an ambiguous question from the jury and the parties do not agree how the trial court should respond, the trial court must seek clarification from the jury. Once the jury has clarified the question, the trial court may answer the question in the manner permitted by law. Here, we hold that a recharge on nominal damages would have had no impact on the jury's "No" answer to the first question on each verdict form. Therefore, the error was harmless and we affirm the court of appeals in result.

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[4] The dissent refers to the verdict forms as "ambiguous" because they do not mention nominal damages. The parties agreed to the verdict forms.

AFFIRMED IN RESULT.

KITTREDGE, Acting Chief Justice, and Acting Justice Jean H. Toal, concur. HILL, J., dissenting in a separate opinion in which Acting Justice Kaye G. Hearn, concurs.

HILL, J., dissenting: I agree with the majority that the trial court erred by not asking the jury to clarify its question. I respectfully dissent because, in my view, this error prejudiced Doe, and the trial court's ensuing recharge doomed her case at a pivotal point.

A jury's request for clarification of the law is often the defining moment (literally) of a trial, demanding a deft touch by the trial judge. *Horry Cnty. v. Laychur*, 315 S.C. 364, 369, 434 S.E.2d 259, 262 (1993); *State v. Smith*, 304 S.C. 129, 132, 403 S.E.2d 162, 164 (Ct. App. 1991). We have held that the stakes are raised at this critical moment, and the risk of prejudice rises when a bad supplemental charge is given in response to the jury's question. *Laychur*, 315 S.C. at 369; *see also McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 362 (2008) (because bad charge was in a supplemental instruction, it "likely attained special significance in the minds of jurors"); *Lowry*, 376 S.C. 499; *State v. Blassingame*, 271 S.C. 44, 46–47, 244 S.E.2d 528, 529–30 (1978). One of the strongest presumptions in law is that jurors are presumed to follow their instructions. When, as here, a supplemental instruction dilutes and distorts a previous charge on the same point of law, then "the judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). As best we can tell, the jury had been deliberating for about six hours before submitting the question that prompted the bad recharge. It reached a verdict less than fifteen minutes after it received the trial court's misleading answer.

The jury's question bears repeating: "[F]or there to be a violation of a civil right, 4th Amendment, the plaintiff must demonstrate through the preponderance of the evidence to be bodily harm or mental i.e. damages." One straightforward–and correct–answer to the question would have been the answer Doe urged the trial court to give: that a plaintiff in a §1983 case may prevail without proving damages. And, in fact, the trial court's initial instinct was that the jury appeared to be asking whether "in order for there to be a violation of a civil right," the plaintiff must prove she suffered bodily harm or mental injury. Unfortunately, the trial court suppressed that instinct, remarking "that's really not the inquiry. The inquiry is whether the plaintiff has proven by a preponderance of the evidence three elements [of a § 1983 claim]."

The trial court then recharged the jury, in part:

> In order to prove her claims the plaintiff must establish by the greater weight or the preponderance of the evidence the following three elements: The defendants committed

> an act which operated to deprive the plaintiff of her rights secured by the United States Constitution. Second that the defendants acted under color of state law. And finally the defendants actions were the proximate cause of the plaintiff's damages.
>
> Each of these elements must be established separately for the plaintiff to prevail on her claim. If the plaintiff proves all these elements by the greater weight or the preponderance of the evidence for her claim then you must return a verdict in favor of the plaintiff on that claim. If however she fails to prove any of these elements for her particular claim you must return a verdict for the defendants on that claim.

The trial court therefore recharged the jury—in response to their expressed confusion about damages—that, to win her case, Doe had to prove three elements, one of which was that the Defendants' actions were the proximate cause of her damages. This is not the law; a plaintiff in a §1983 civil rights case does not have to "prove" nominal damages, and in fact, the trial court had already twice instructed the jury that it could award nominal damages only in the event the plaintiff had not proven any actual damages. Doe did not have to prove the existence, amount, or causation of nominal damages. The importance of nominal damages in §1983 cases—and its central importance to the issue before us—was well stated by Judge Geathers in his dissent to the majority opinion of the Court of Appeals. The trial court's third charge removed any reference to nominal damages, leaving the jury with the indelible impression that the answer to their question was: "Yes. For there to be a civil rights violation, the plaintiff must prove her damages by a preponderance of the evidence." This was consistent with the trial court's earlier charge that "[d]amages are never presumed and the burden is on the plaintiff to present evidence that supports the assessment of damages."

The trial court erred by rejecting Doe's suggestion that the jury was likely struggling to understand how the concept of nominal damages related to the elements of a § 1983 claim. The majority finds the error irrelevant because it believes the verdict forms cured any confusion the jury may have had regarding whether Doe was required to prove damages to prevail on her claim. I cannot agree. The verdict form against the City, for example, was structured as follows:

1. Do you find that the Plaintiff has proven by a preponderance of the evidence that the City of North Charleston violated Rhonda Doe's constitutional rights by being deliberately indifferent with regard to training its officers?
   ___ yes (go to #2)
   ___ no (stop deliberations on this cause of action and sign the bottom of this form)

2. If you answered yes to #1, do you find that Plaintiff has proven by a preponderance of the evidence that any such constitutional violation by the City of North Charleston proximately caused damage to Rhonda Doe?
   ___ yes (go to #3)
   ___ no (stop deliberations on this cause of action and sign the bottom of this form)

3. If the answers to #1 and #2 are yes, please state the amount of damages that should be awarded to Plaintiff for the allegation that the City of North Charleston was deliberately indifferent with regard to training its officers.
   $_____ (please state damages award in numbers)

The majority is quite right that had the jury answered question one "yes," it would have then "moved to the damages questions." But, with great respect, I disagree with my friends in the majority that, had the jury answered question one "yes," then they would have understood they had to then award her at least nominal damages. The verdict forms do not mention nominal damages, and this reading of the forms overlooks question two, which asks if Doe proved the defendants' constitutional violation proximately damaged her. The fact that proof of proximate cause was the gist of question two reinforces the reality that the verdict forms contradicted rather than clarified the court's instruction.

The majority is repeating the trial court's mistake. Rather than clearing up the muddle caused by the trial court's recharge, the ambiguous verdict forms added to the confusion. All we can know for certain is that the jury resumed its deliberations armed with a misleading instruction on the applicable law and almost immediately

reached a verdict. (If nothing else, this case is a good example of when the jury should be furnished with a written copy of the charge).

The majority concedes it was error to recharge the jury without knowing what the jury was really asking. In other words, the majority rules it is error to answer a jury's ambiguous question about the law without seeking clarification. As the majority suggests, when faced with a jury question that could be interpreted as asking two different things, a trial court should not take a gamble on which interpretation is correct. The majority rightfully holds that we, as an appellate court, should not defer to the trial court's gamble as an acceptable act of discretion. There is no way to give an unambiguous answer to an ambiguous question, nor is it possible to cure an ambiguous recharge with an ambiguous verdict form. We should not re-roll the dice by hoping the verdict forms filtered out the flawed charge.

I therefore respectfully dissent.

Acting Justice Kaye G. Hearn, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Darren S. Haley, Respondent.

Appellate Case No. 2022-001523

Opinion No. 28181
Heard June 5, 2023 – Filed October 4, 2023

DEFINITE SUSPENSION

Deputy Disciplinary Counsel Ericka McCants Williams and Assistant Disciplinary Counsel Jeffrey Ian Silverberg, both of Columbia, for the Office of Disciplinary Counsel.

Darren S. Haley, of Greenville, Pro Se.

CHIEF JUSTICE BEATTY: By opinion dated August 11, 2022, the Virginia Supreme Court affirmed a decision by the Virginia State Bar Disciplinary Board imposing an eighteen-month definite suspension as a sanction for Respondent's professional misconduct in Virginia. *Haley v. Virginia State Bar*, 876 S.E.2d 165 (2022). The Office of Disciplinary Counsel (ODC) received notice of this discipline from Respondent on September 20, 2022. ODC filed Notice of Discipline with this Court on October 27, 2022. Following a hearing on June 5, 2023, we find none of the reasons set forth in Rule 29(d), RLDE, exist to justify different discipline in this matter. Accordingly, we find that a definite suspension of eighteen months, which shall be imposed retroactively to September 20, 2022, is the appropriate sanction as reciprocal discipline.

I.

Respondent was admitted to practice law in Virginia in 1996 and in South Carolina in 1997.[1] Respondent has a disciplinary history in both jurisdictions, and North Carolina, where he is not admitted to practice law. In November 2005, this Court suspended Respondent from the practice of law for thirty days for practice-related misconduct, including failing to return unearned fees, signing a client's name to a bond assignment form without authorization,[2] failing to pursue several client matters, losing a client file, unsuccessfully attempting to establish personal relationships with female clients, and failing to respond to ODC inquiries. *In re Haley*, 366 S.C. 363, 622 S.E.2d 538 (2005).[3] The Virginia State Bar Disciplinary Board imposed reciprocal discipline. In 2009, Respondent was privately reprimanded by the Virginia State Bar after it received notice that Respondent's trust account contained insufficient funds to honor five checks.

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[1] On March 3, 2023, and April 27, 2023, Respondent was placed on administrative suspension in South Carolina for failing to pay his annual license fees and failing to comply with annual continuing legal education requirements, respectively. *In re Admin. Suspensions for Failure to Pay License Fees*, S.C. Sup. Ct. Order dated Mar. 3, 2023; *In re Admin. Suspensions for Failure to Comply with Continuing Legal Educ. Requirements*, S.C. Sup. Ct. Order dated Apr. 27, 2023.

[2] Specifically, the bond authorization form Respondent signed without the client's permission provided that the $7,500 of posted bond money was to be assigned to Respondent's firm for its fee. Although Respondent lacked authority to sign the form, the amount of the fee was not in dispute. Respondent was not criminally prosecuted for this misconduct.

[3] Specifically, the Court found Respondent committed misconduct in violation of the following Rules of Professional Conduct: Rule 1.3 (diligence and promptness); Rule 1.4 (communication); Rule 1.7 (conflict of interest); Rule 1.15 (safekeeping property; prompt delivery of funds, property, and accounting to client); Rule 1.16 (protecting client's interest upon termination of representation); Rule 8.4(a) (violating RPC); Rule 8.4(d) (conduct involving dishonesty); Rule 8.4(e) (conduct prejudicial to the administration of justice).

In 2017, Respondent submitted a pro hac vice application for admission in North Carolina in which he failed to disclose the 2005 discipline he received in South Carolina and Virginia. During the pendency of North Carolina's disciplinary investigation, Respondent again failed to disclose his disciplinary history on a pro hac vice motion he filed in a federal court in New York. On May 14, 2019, the Grievance Committee of the North Carolina State Bar reprimanded Respondent for his misconduct in failing to disclose his disciplinary history. This Court subsequently imposed identical reciprocal discipline. *In re Haley*, 434 S.C. 378, 865 S.E.2d 379 (2021). Respondent did not notify the Virginia State Bar of the discipline imposed by North Carolina, despite being required to do so by Rule 8.3(e)(1) of the Virginia Rules of Professional Conduct.

In December 2019, Respondent overdrew his trust account in Virginia.[4] The NSF notice triggered a disciplinary investigation which revealed that Respondent had engaged in a pervasive pattern of financial misconduct, including regularly depositing unearned fees into his operating account (the vast majority of which were never transferred to the trust account), using his trust account to pay for personal and business expenses (credit card payments and employee wages), and overdrawing his trust account at least twice and his law firm operating account fifty-three times between January 1, 2018, and April 20, 2020. Respondent also failed to keep proper trust account records (receipts journal or client ledgers) and failed to conduct required reconciliations of his trust account. During the investigation, Respondent also made and failed to correct misleading statements about whether certain fees were paid by a client who lived in Virginia or South Carolina.[5] Investigators also discovered that Respondent failed to report the 2019

[4] The check returned for insufficient funds was in the amount of $864 payable to Respondent's employee for her wages.

[5] Specifically, on May 28, 2019, a Virginia client named Michael Campbell paid Respondent an advance fee of $3,500, which Respondent deposited into his operating account. Unlike in South Carolina (Rule 1.5(f), RPC), Virginia does not permit non-refundable legal fees under any circumstances. During the course of the disciplinary investigation, Respondent told investigators he believed Michael Campbell was a South Carolina client, not a Virginia client, ostensibly in an attempt to skirt repercussions for impermissibly depositing an unearned fee into his operating account. The Virginia State Bar concluded Respondent intentionally lied about Mr. Campbell's state of residence in an attempt to minimize his misconduct.

North Carolina reprimand to the Virginia State Bar. Following a hearing, the Virginia State Bar Disciplinary Board found Respondent violated numerous rules of professional conduct and imposed an eighteen-month definite suspension.

All findings of misconduct and the eighteen-month suspension were subsequently affirmed by the Virginia Supreme Court. *Haley*, 876 S.E.2d 165. In affirming the eighteen-month sanction, the Virginia Supreme Court noted Respondent's "long pattern of dishonest conduct in multiple jurisdictions" and observed Respondent has "previously been disciplined for similar forms of misconduct." *Id*. at 173 (adding that Respondent was privately reprimanded in Virginia in 2009 after five checks drawn on Respondent's trust account were returned for insufficient funds).

II.

Upon notice that another jurisdiction has disciplined a lawyer admitted to practice in South Carolina, Rule 29(b), RLDE, provides the lawyer and ODC have thirty days to submit any claims as to why the imposition of identical discipline in this state would be unwarranted and the reasons for that claim. Rule 29(d), RLDE, provides that upon the expiration of that thirty-day period, this Court "*shall impose* the identical discipline" unless certain conditions exist, including that "the misconduct established warrants substantially different discipline in this state." Rule 29(d)(4), RLDE (emphasis added).

ODC received notice of this discipline from Respondent on September 20, 2022. On October 27, 2022, ODC notified this Court that Respondent had received an eighteen-month definite suspension in Virginia. The following day, the Clerk's office issued a notice to ODC and Respondent allowing thirty days for the parties to file any objections to the imposition of identical discipline. Respondent filed an objection arguing identical discipline is unwarranted because this Court has already imposed reciprocal discipline for the nondisclosures on his North Carolina pro hac vice application, which he claims formed the basis of "a significant part of the [eighteen-month] suspension." Respondent argued that because the North Carolina misconduct has already been adjudicated in South Carolina, a six-month suspension is an appropriate sanction.

Haley, 876 S.E.2d at 169.

In return, ODC correctly noted that while this Court has already sanctioned Respondent for the underlying misconduct in North Carolina, the most recent sanction in Virginia included not only that underlying misconduct but also Respondent's dishonest conduct in failing to report the North Carolina discipline to the Virginia State Bar as he was required to do. ODC also highlighted the portion of the Virginia Supreme Court opinion emphasizing Respondent's "pattern of dishonest conduct in multiple jurisdictions," along with his history of financial misconduct in both Virginia and South Carolina, and Respondent's "extremely deficient" trust accounting practices, which Respondent admitted violated Rules 1.5 and 1.15 of the Rules of Professional Conduct. *Haley*, 876 S.E.2d at 173. For these reasons, ODC argues this Court should impose identical discipline in South Carolina.

At the hearing before this Court on June 5, 2023, Respondent abandoned his claim that a suspension of six months, rather than eighteen months, was the appropriate sanction. Accordingly, we do not analyze that argument and conclude that none of the reasons set forth in Rule 29(d), RLDE, exist to justify different discipline in this matter. We impose an eighteen-month definite suspension, which shall be made retroactive to September 20, 2022, the date ODC received notice of discipline from Respondent. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR. Within thirty days, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC.

DEFINITE SUSPENSION.

KITTREDGE, JAMES and HILL, JJ., concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: The Virginia Supreme Court found "Haley engaged in a long pattern of dishonest conduct in multiple jurisdictions." *Haley v. Virginia State Bar*, 876 S.E.2d 165, 173 (Va. 2022). "In addition," the Virginia Supreme Court stated,

> the evidence established that Haley had previously been disciplined for similar forms of misconduct. The South Carolina State Bar suspended Haley's license in 2005, for nine separate counts of misconduct that included financial improprieties. The [Virginia State Bar] also issued a private reprimand to Haley in 2009, after it received notice that Haley's trust account contained insufficient funds to honor five checks. Haley's 18-month suspension was also based, in part, on his conceded violations of Rules 1.5 and 1.15 [of the Virginia Rules of Professional Conduct]. The evidence presented in this case established that Haley's trust accounting practices were extremely deficient. *Significantly, Haley overdrew his trust account 53 times between January 2018 and April 2020*.

Id. (emphasis added).

For this pattern of financial misconduct and non-disclosure, were it not that this arose as reciprocal discipline, this Court would never consider imposing only an eighteen-month suspension for conduct occurring in South Carolina.

Haley complicated his situation with this Court when he did not comply with Rule 29(a) of the South Carolina Rules for Lawyer Disciplinary Enforcement. Rule 29(a) requires, "Within fifteen days of being disciplined or transferred to incapacity inactive status in another jurisdiction, a lawyer admitted to practice in this state shall inform disciplinary counsel in writing of the discipline or transfer." Rule 29(a), RLDE, Rule 413, SCACR. The Virginia Bar "certified several allegations of misconduct against Haley" on December 14, 2020. 876 S.E.2d at 168. On November 19, 2021, Haley appeared before the Virginia State Bar Disciplinary Board and "stipulated that he violated" some—but not all—of the Rules the Bar accused him of violating. *Id.* On December 6, 2021, the Board "unanimously decided to suspend Haley's license to practice law for 18 months. The Board declined to stay the suspension to allow Haley to 'wind down' his practice and ordered that the sanction be 'effective . . . immediately.'" 876 S.E.2d at 169. The Virginia Supreme Court entered its decision affirming Haley's discipline on August

11, 2022. 876 S.E.2d at 165. Haley finally reported his Virginia discipline to the Office of Disciplinary Counsel on September 20, 2022—well beyond the fifteen-day deadline Rule 29(a) imposes on South Carolina attorneys to report that another state has disciplined them.

Under Rule 29(d) of our Rules for Lawyer Disciplinary Enforcement, we are not required to "impose the identical discipline" if "it clearly appears upon the face of the record from which the discipline is predicated, that . . . (4) The misconduct established warrants substantially different discipline in this state." I would decline to impose the identical reciprocal discipline and impose a more appropriate sanction given the severity of Haley's misconduct.

The Supreme Court of South Carolina

In the Matter of Tara Dawn Shurling, Respondent.

Appellate Case Nos. 2023-0001523 and 2023-001524

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(b) and Rule 17(c) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver to protect the interests of Respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Except as authorized by Rule 31(d)(5), RLDE, Rule 413, SCACR, Mr. Lumpkin may not practice law in any federal, state, or local court, including the entry of an appearance in a court of this State or of the United States. Mr. Lumpkin may make disbursements from and close Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Respondent, shall serve as an injunction to prevent Respondent from making withdrawals from the account(s)

and shall further serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Respondent's mail and the authority to direct that Respondent's mail be delivered to Mr. Lumpkin's office.

s/Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
September 28, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mark Green, as Personal Representative of The Estate of Randall M. Green and Ann Green, Respondent,

v.

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

Appellate Case No. 2020-000046

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 6029
Heard December 6, 2022 – Filed October 4, 2023

AFFIRMED

John B. McCutcheon, Jr., of Thompson & Henry, PA, of Conway; Lisa Arlene Thomas, of Richardson Plowden & Robinson, PA, of Myrtle Beach; and Andrew F. Lindemann, of Lindemann Law Firm, P.A., of Columbia, all for Appellants.

L. Morgan Martin, of Law Offices of L. Morgan Martin, P.A., of Conway; O. Grady Query, of Query Sautter & Associates, LLC, of Charleston; and Cristin Ann Uricchio, of Uricchio Law Firm, of Charleston, all for Respondent.

MCDONALD, J.: This is the second round of appeals from the circuit court's order allocating the setoffs to which the non-settling defendants are entitled in this tragic case. Following the supreme court's reversal and remand of the circuit court's 80/20 allocation, Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. (collectively, Dr. Bauerle) have now appealed the circuit court's order equally allocating a prior settlement to set off the jury verdicts returned for Ann and Randall "Randy" Green (the Greens). Dr. Bauerle argues the circuit court erred in (1) finding the Greens intended that their settlement with Grand Strand Regional Medical Center (Grand Strand) be allocated equally between them; (2) calculating Mrs. Green's loss of consortium damages in a manner that exceeded the jury's verdict in order to find the Greens' proposed allocation did not result in a double recovery; (3) failing to treat the verdicts and settlement proceeds as marital or joint property; and (4) failing to apply controlling precedent. We affirm.

Facts and Procedural History

On April 17, 2004, the Greens were involved in a motor vehicle accident caused by the negligence of another driver. The Greens sustained serious bodily injuries and were transported to Grand Strand for treatment. Mr. Green's injuries included a fractured and dislocated right hip, as well as a severe laceration to his right arm that transected the muscle, nerves, and two arteries.

Dr. Bauerle, the on-call orthopedic surgeon, responded to the emergency room to treat Mr. Green's injured hip. Although Dr. Bauerle was told that the ER physician had already reduced the hip, he requested a CT scan to ensure the reduction was proper and check for bone fragments that might require immediate surgery. He did so despite the fact that Mr. Green was in the holding area for the operating room waiting to undergo surgery to repair his lacerated forearm.[1] Following the CT

[1] 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 who could prevent and stop a cardiac arrest. Dr. Bauerle conceded he would not have removed Mr. Green for the scan had he been aware of his instability. Dr. Bauerle's own expert agreed Dr. Bauerle should have checked Mr. Green's vital signs and chart; he further admitted no doctor should issue orders without confirming a patient's condition.

scan, Mr. Green went into cardiac arrest. Although Mr. Green was successfully resuscitated, he sustained permanent damage to his spinal cord and was paralyzed from the waist down. Carolinas Medical Response (CMR) later transported Mr. Green to the Medical University of South Carolina.

The Greens settled with the at-fault driver's liability carrier and their underinsured motorist (UIM) carrier.[2] They also brought suit against Grand Strand, Dr. Bauerle, and CMR for medical malpractice and loss of consortium. The Greens eventually settled or dismissed their claims against all defendants except Dr. Bauerle.[3]

A jury subsequently awarded Mr. Green $2.3 million on his medical malpractice claim and Mrs. Green $550,000 for loss of consortium. Dr. Bauerle filed a motion for setoff, which the circuit court granted, but only as to the proceeds of the Greens' settlements with Grand Strand and CMS. Because the Greens and the settling defendants did not specifically allocate the $2.025 million in settlement proceeds, the circuit court allocated the settlements based on the jury's distribution of the actual damages awarded:

> [T]he jury found for Mr. and Mrs. Green for a combined verdict of $2.85 million against the Defendants. The jury awarded Mr. Green $2.3 million of the total $2.85 million verdict, or 80.70% of the total verdict. The jury awarded Mrs. Green $550,000 or 19.30% of the total verdict. Using that very allocation, this Court rules that the $2 million settlement with Grand Strand shall off set the verdict for Mr. Green in the amount of $1,614,035.09 and the verdict for Mrs. Green in the amount of $385,694.91. Likewise, the settlement between Plaintiffs and [CMR] shall off set the verdict for Mr. Green in the

[2] Mr. Green settled with the at-fault driver for $100,000, and received $150,000 in the settlement of his UIM claim. Mrs. Green settled with the at-fault driver for $100,000, and received $75,000 in the settlement of her UIM claim.
[3] Grand Strand settled all claims with the Greens for $2,000,000; CMR settled for $25,000.

> amount of $20,175.44 and the verdict for Mrs. Green in the amount of $4,824.56.[4]

The Greens and Dr. Bauerle filed cross-appeals.[5] *Green v. Bauerle*, Op. No. 2016-UP-052 (S.C. Ct. App. filed Feb. 3, 2016). The Greens argued the circuit court erred in (1) finding section 15-38-50 of the South Carolina Code (2005 and Supp. 2022) mandated setoff; (2) finding it necessary to set off the entire amounts paid by Grand Strand and CMS; and (3) allocating the Grand Strand and CMS settlement proceeds between the Greens' claims. *Id.* at 2. In the cross-appeal, Dr. Bauerle argued the circuit court erred in denying setoff as to the funds paid by the at-fault driver and the Greens' UIM carrier. *Id.* This court affirmed the circuit court's order in an unpublished opinion. *Id.* at 2–3.

After granting the cross-petitions for writs of certiorari, our supreme court found "the jury verdicts are not subject to setoff by the settlements paid by the at-fault driver." *Green v. Bauerle*, Op. No. 2019-MO-026, at 2 (S.C. Sup. Ct. filed May 29, 2019). Additionally, the supreme court held the circuit court "properly found the jury verdicts were subject to setoff with regard to the settlement paid by [Grand Strand]."[6] *Id.* As to the calculation of the setoffs, the supreme court explained:

> The law requires the total amount paid by Grand Strand to be set off from the verdicts; however, we conclude the trial court's determination of the specific amounts to be set off from the verdicts was arbitrary, as the determination was based solely upon the ratios both verdicts bore to the whole. The setoffs should be

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[4] In 2014, Dr. Bauerle's insurer made an initial payment of $415,789.47 in partial satisfaction of Mr. Green's judgment. The remaining judgments include awards of $250,000.00 to Mr. Green and $159,480.53 to Mrs. Green.

[5] During the pendency of this appeal, Dr. Bauerle filed a motion seeking leave to deposit funds with the Horry County Clerk of Court and to release judgment liens against certain real property in Horry County. The circuit court granted this motion, specifically noting "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."

[6] Before the supreme court, the Greens did not pursue their challenge regarding the allocation of the CMR settlement. *Id.* at 4.

> calculated based upon the entirety of relevant circumstances, not solely upon such a formula. While these ratios may well be relevant to the ultimate determination of a proper setoff, they are not necessarily the sole relevant circumstance. Therefore, we vacate the trial court's order on this particular point and remand this issue to the trial court and direct it to convene a hearing to consider all relevant circumstances. The trial court shall then issue an order setting forth the amounts to be set off from the two verdicts.

Id. at 6. On remand, the circuit court held the hearing as directed and found "each of the Plaintiffs' verdicts shall be reduced by $1 million" and "[a]pplication of a $1 million setoff will reduce Mrs. Green's judgment to zero." The circuit court then set off Mr. Green's verdict by $1 million from the Grand Strand settlement and $20,175 from the CMR settlement.[7]

Dr. Bauerle moved to alter or amend pursuant to Rule 59(e), SCRCP, and the circuit court denied this motion. Dr. Bauerle timely appealed, and the Greens' request for Rule 204(b), SCACR certification was denied.

Law and Analysis

"The right to setoff has existed at common law in South Carolina for over 100 years." *Riley v. Ford Motor Co.*, 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015). The "jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties." *Id.* (quoting *Rookard v. Atlanta & Charlotte Air Line Ry. Co*., 89 S.C. 371, 71 S.E. 992, 995 (1911)); *see also Church v. McGee*, 391 S.C. 334, 342, 705 S.E.2d 481, 485 (Ct. App. 2011) (stating setoff is equitable in nature, and thus an appellate court may find facts in accordance with its own view of the preponderance of the evidence). Section 15-38-50 of the South Carolina Code (2005) "grants the [trial] court no discretion . . . in applying a set-off." *Green*, Op. No. 2019-MO-026, at 6

[7] Mark Green, personal representative of the Estate of Randall M. Green (the Estate), was substituted by consent order for Mr. Green, who died at the age of sixty-nine on June 22, 2019.

(quoting *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012)).

I. Allocation of Settlement Proceeds

Dr. Bauerle argues the circuit court erred in finding the Greens intended that their $2 million settlement with Grand Strand be allocated equally between them. He claims the circuit court referenced only the arguments of counsel as "evidence" to support its 50/50 allocation while erroneously rejecting the competent, probative evidence that did not support such a split. We disagree.

"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). "Allowing setoff 'prevents an injured person from obtaining a double recovery for the damage he sustained, for it is almost universally held that there can be only one satisfaction for an injury or wrong.'" *Riley*, 414 S.C. at 195, 777 S.E.2d at 830 (quoting *Rutland*, 400 S.C. at 216, 734 S.E.2d at 145).

In 1988, these equitable principles were codified through the Uniform Contribution Among Tortfeasors Act (the Act). S.C. Code Ann. §§ 15-38-10 to -70 (2005 and Supp. 2022). Section 15-38-50 provides:

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

When a prior settlement involves compensation for the same injury, the nonsettling defendant's right to a setoff arises by operation of law under section 15-38-50. *Ellis v. Oliver*, 335 S.C. 106, 112–13, 515 S.E.2d 268, 271–72 (Ct. App. 1999). "However, our case law favors a plaintiff's ability to apportion settlement proceeds 'in the manner most advantageous to it.'" *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 666–67, 869 S.E.2d 819, 851 (Ct. App. 2021) (quoting *Riley*, 414 S.C. at 197, 777 S.E.2d at 831).

Our supreme court's opinion in *Riley* provides guidance for the setoff analysis and reflects "the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" *Riley*, 414 S.C. at 196, 777 S.E.2d at 830 (quoting *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010)). Agreeing with the approach taken by the Illinois Court of Appeals, the supreme court explained:

> 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.

Id. at 197, 777 S.E.2d at 831 (quoting *Lard v. AM/FM Ohio*, 901 N.E.2d 1006, 1019 (Ill. App. 2009)).

Dr. Bauerle asserts there is no evidence in the record to support a finding that the Greens intended to allocate the $2 million Grand Strand settlement equally. He additionally argues that an April 14, 2016 consent order permitting the partial release of funds deposited with the clerk of court (the Consent Order) supports his position that the Greens did not intend to share equally in the settlement funds. The Consent Order followed the Greens' 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." The Consent Order further provided "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."

We are unable to find persuasive evidence in the record to support Dr. Bauerle's argument that the Greens did not intend to allocate the $2 million settlement equally. The language of the settlement agreement reflects that the $2 million was paid jointly to the Greens and was not otherwise allocated between them. The Greens submit that their decision not to specifically allocate the settlement funds indicates their intent to allocate the funds equally amongst themselves, and this is consistent with their joint bargaining for and acceptance of the settlement, the language of the agreement, Mrs. Green's testimony regarding her damages (including the extensive skilled care she provided her husband), Mr. Green's trial testimony acknowledging the extent of his wife's damages and care,[8] and the Greens' Life Care Plan. According to the Life Care Plan, Mrs. Green provided Mr. Green with more than $1,000,000 in round-the-clock skilled care.

By contrast, cases in which settlements have been reallocated in a manner contrary to the settling parties' intent have involved situations for which *no* evidence existed to support the allocations. *See, e.g.*, *Rutland*, 400 S.C. at 216, 400 S.E.2d at 145 (agreeing with the court of appeals that the circuit court properly reallocated settlement funds to wrongful death claim where decedent's instant death involved no suffering or medical expenses, making any allocation to the survival action unreasonable); *Welch v. Epstein*, 342 S.C. 279, 312–13, 536 S.E.2d 408, 425–26 (Ct. App. 2000) (affirming trial court's reallocation of settlement proceeds and noting decedent slipped into a coma at the time of his respiratory arrest and never awoke; thus, there was no evidence that he consciously suffered and the survival claim was properly limited to medical expenses). Such is not the case here.

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[8] Mr. Green testified that Mrs. Green "omitted an awful lot" from her testimony about her daily schedule of caring for Mr. Green and their home. Mr. Green explained that she could not keep doing all that she did for him after she was diagnosed with heart problems and that she had been living with a hernia for two years because she refused to take time away from him to address it. He concluded his testimony by saying, "She's sacrificing her life for what is left of mine."

Moreover, we find Dr. Bauerle's argument ignores critical language in the Consent Order. The Consent Order stated, "Following an unpublished decision by the South Carolina Court of Appeals entered on February 3, 2016 in *Green*, 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." Although Dr. Bauerle challenged the circuit court's denial of any setoff from the UIM settlement funds at the court of appeals, he did not pursue this argument before the supreme court. Thus, we agree with the Greens that an isolated sentence from a Consent Order directing the release of undisputed funds in the total amount of a UIM payout has no application here. We note the UIM settlement addressed injuries suffered in the car accident—not in relation to the malpractice claim—and the Consent Order simply referenced judgments still owed under a since-vacated allocation order. Notably, the Consent Order provided the Horry County Clerk of Court would continue to hold the remainder of the deposited funds in accordance with the terms and conditions set forth in the circuit court's December 11, 2014 "Order Granting Leave to Deposit Funds Into Court and Releasing Judgment Liens"—which specifically stated "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." This order further provided that if the Greens prevailed in the prior appeal, Dr. Bauerle and "the South Carolina Medical Malpractice Patients' Compensation Fund will be liable for the judgments as determined by the appellate courts." Accordingly, we reject this argument challenging the current allocation.

II. Loss of Consortium

Dr. Bauerle next argues the circuit court erred in calculating Mrs. Green's loss of consortium damages in a manner that exceeded the jury's verdict. As part of this argument, he contends the circuit court likewise "erred in concluding that such an allocation prevents the risk of a double recovery." We find no error.

Dr. Bauerle argues the circuit court should have abandoned its own analysis of the evidence altogether and relied solely on a comparison of the two jury verdicts to find "Mr. Green's injuries far exceeded the loss of consortium" suffered by Mrs. Green." *But see Riley*, 414 S.C. at 191, 777 S.E.2d at 828 (stating 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"). As in *Riley,* we find

the circuit court's allocation is supported by the evidence and is reasonable under the facts of this case. In *Riley*, the supreme court found the nonsettling defendant was entitled to set off only the $5,000 that the settlement agreement apportioned to the wrongful death claim, holding:

> The court of appeals erred in accepting Ford's invitation to reapportion the agreed-upon allocation of settlement proceeds based on the purported impropriety of an apportionment favoring the Estate. 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 Ford. Here, the trial court-approved allocation is unquestionably reasonable under the facts. In fact, Ford has never suggested that $20,000 for the survival action is unreasonable. Ford's effort to invalidate the allocation of settlement proceeds based on a "percentages" analysis is manifestly without merit under these circumstances.

Id. at 197, 777 S.E.2d at 831. Because the circuit court's allocation is supported by the evidence in the record and is reasonable under the circumstances of this case, we reject Dr. Bauerle's attempt to invalidate it based on his formula presented here.

Dr. Bauerle next urges us to find that a comparison of the Greens' jury verdicts governs the analysis of their respective rights to the Grand Strand settlement proceeds. However, to do so would contravene the supreme court's prior opinion in this case. *See Green*, Op. No. 2019-MO-026, at 6 ("The law requires the total amount paid by Grand Strand to be set off from the verdicts; however, we conclude the trial court's determination of the specific amounts to be set off from the verdicts was arbitrary, as the determination was based solely upon the ratios both verdicts bore to the whole. The setoffs should be calculated based upon the entirety of relevant circumstances, not solely upon such a formula. While these ratios may well be relevant to the ultimate determination of a proper setoff, they are not necessarily the sole relevant circumstance."). The circuit court's allocation of the setoff here prevented a double recovery because each plaintiff's verdict was reduced by the $1,000,000 settlement amount apportioned to their claim. *See* S.C.

Code Ann. § 15-38-50 (2005 and Supp. 2022) (examining the effect of a release or covenant not to sue and the reduction of the claim against other tortfeasors).

Incidentally, this afforded Mr. Green a total recovery equal to his $2.3 million verdict and eliminated all of Dr. Bauerle's liability to Mrs. Green. Dr. Bauerle seems to assert that Mrs. Green will receive a "windfall" if she is allowed to retain any settlement proceeds exceeding her jury award against him. *But see* § 15-38-50; *Riley*, 414 S.C. at 197, 777 S.E.2d at 831 (2015) ("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 [a nonsettling party]."). We find Dr. Bauerle's current suggested approach lacks support in our jurisprudence. *See, e.g.*, *Riley*, 414 S.C. at 197, 777 S.E.2d at 831 ("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." (quoting *Lard*, 901 N.E.2d at 1019)).

III. Marital Property

Dr. Bauerle asserts the circuit court erred in failing to treat the verdicts and settlement proceeds as marital or joint property, as previously argued by the Greens, and in failing to apply the setoff as dictated by our supreme court's precedent under similar circumstances. We disagree.

In *Orszula v. Orszula*, 292 S.C. 264, 266, 356 S.E.2d 114, 114 (1987), our supreme court found that a workers' compensation award acquired during the marriage was marital property. This holding was based on our equitable distribution statute, now codified at section 20-3-630 of the South Carolina Code (2014), which provides all property acquired during a marriage is marital unless it falls within a statutorily delineated exception. *Id.* at 266, 356 S.E.2d at 114–15; *see also* § 20-3-630 (defining the term "marital property" as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation"). The supreme court has likewise found "proceeds of a personal injury settlement acquired during the marriage are marital property subject to the family court's jurisdiction." *Marsh v. Marsh*, 313 S.C. 42, 46, 437 S.E.2d 34, 36 (1993). The court's reasoning emphasized the need

to give the family court "the flexibility to view each case based on the individual circumstances peculiar to the parties involved and to fashion a division of the parties' assets in a manner that is uniquely fair to the parties concerned." *Id.* Therefore, we do not disagree with Dr. Bauerle's position that "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." However, this argument is now moot—Mr. Green has passed away and the interests of the Estate and its beneficiaries will never be subjected to a divorce proceeding. In any event, this case law is irrelevant in the absence of the dissolution of a marriage or some related equitable distribution of a couple's assets.[9]

This case required an analysis of the terms of a joint settlement agreement and the question of the Greens' intent to allocate the joint settlement equally amongst themselves. The settlement agreement includes the following language:

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

[9] Dr. Bauerle also relies on *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995), in support of his position that the Greens' settlement with Grand Strand as well as their jury verdicts should be deemed marital property. However, *Broome* addressed matters of UIM coverage and section 38-77-160 of the South Carolina Code (2015 and Supp. 2022), rather than section 15-38-50, the applicable statute here. *Id.* at 341, 461 S.E.2d at 48. The *Broome* court did not consider issues related to settlement allocation—it merely considered the total damages legally recoverable under contractual terms and the statutory purpose of UIM coverage.

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

The Greens' decision not to specifically allocate the joint settlement proceeds supports their assertion that they intended to allocate it equally amongst themselves. This is consistent with the language of the agreement, Mrs. Green's testimony regarding her damages and the care she provided for her husband, Mr. Green's testimony recognizing the extent of his wife's care and damages, and the couple's Life Care Plan detailing the skilled care Mrs. Green had provided to Mr. Green by the time of the Grand Strand settlement.

We find no error in the circuit court's allocation.

Conclusion

For the foregoing reasons, the order of the circuit court is

AFFIRMED.

GEATHERS, J. and HILL, A.J. concur.