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JOINT TORTFEASORS BEWARE: DOUBLE RECOVERY MAY BE ALLOWED

I. INTRODUCTION

Consider the following situation: Two doctors are each sued for wrongful death based on medical malpractice for failing to diagnose a condition on separate occasions. One doctor settles with the plaintiff before trial. The second doctor does not settle. The jury is not informed of the previous settlement and renders a substantial verdict against the nonsettling defendant. The trial judge grants the nonsettling defendant's motion for setoff to prevent the plaintiff from receiving a double recovery. This result is consistent with principles of setoff and the rule against double recoveries. Generally, nonsettling defendants are entitled to a reduction in verdicts rendered against them by the amount for which a joint tortfeasor settles.[1] The theory behind this rule is that, although compensation is one purpose of tort law, victims should not be overcompensated.[2] If a jury verdict is not offset by a previous settlement amount, the plaintiff could receive total compensation in excess of the damages suffered.[3] However, the South Carolina Court of Appeals in *Hawkins v. Pathology Associates*,[4] recently overturned a trial court's setoff of a settlement in a Georgia wrongful death lawsuit against a jury verdict in a South Carolina wrongful death case.[5]

This Note considers whether the ruling in *Hawkins* establishes a dangerous precedent by not offsetting settlements of prior lawsuits for the same causes of action despite minor statutory differences. Part II summarizes the case and the wrongful death statutes involved. Part III analyzes how other courts have handled this issue, the policies behind the setoff rule, and problems with the court's analysis in this case. Part IV sets forth potential methods that can be used to accomplish a result that is fair to both plaintiffs and defendants.

II. BACKGROUND

A. *Facts of* Hawkins

In *Hawkins* the South Carolina Court of Appeals overturned the trial

1. Truesdale v. South Carolina Highway Dep't, 264 S.C. 221, 234, 213 S.E.2d 740, 746 (1975) (citing Powers v. Temple, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967)).

2. *See* Hawkins v. Pathology Assocs., 330 S.C. 92, 113, 498 S.E.2d 395, 406-07 (Ct. App. 1998) (quoting *Truesdale*, 264 S.C. at 235, 213 S.E.2d at 746).

3. However, refusal to offset may be appropriate if two separate injuries result. This would not be deemed as overcompensation.

4. 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998).

5. *Id.* at 115, 498 S.E.2d at 407.

court's setoff of a jury verdict by $550,000 received in settlement of a Georgia wrongful death suit.[6] The case involved the death of a young mother from cervical cancer.[7] The decedent's husband brought survival and wrongful death claims in South Carolina against a doctor and the pathology group with whom he practiced alleging that the physician negligently failed to diagnose precancerous cervical lesions.[8] The husband also brought a wrongful death claim in Georgia under that state's law against a subsequent treating physician, but the parties settled that claim for $550,000.[9] The South Carolina jury awarded the plaintiff $3,500,000 in the survival action and $1,100,000 in the wrongful death action.[10] The trial court granted the defendants' motion for setoff in the amount of $550,000, the settlement amount in the Georgia case, against the wrongful death recovery.[11] The court of appeals found that the trial court abused its discretion when it deducted $550,000 from the $1,100,000 wrongful death award.[12] The court held that, for setoff to be appropriate, "the reduction in the judgment must be from a settlement for the same cause of action."[13] While the court recognized that "it is almost universally held that there can be only one satisfaction for an injury or wrong,"[14] the court reasoned that the Georgia and South Carolina wrongful death statutes do not compensate a plaintiff for the same elements of damage; therefore, suits under both statutes do not constitute the same cause of action.[15] On this basis, the court found that the plaintiff's wrongful death verdict should not have been offset by the Georgia settlement.[16]

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6. *Id.* at 114-15, 498 S.E.2d at 407.

7. *Id.* at 100-01, 498 S.E.2d at 400.

8. *Id.* at 98, 498 S.E.2d at 399.

9. Settlement Agreement and Covenant Not to Sue at 4 (No. 2:93-CV-0167-WCO) (Nov. 6, 1995) (on file with *South Carolina Law Review*).

10. *Hawkins*, 330 S.C. at 98, 498 S.E.2d at 399.

11. *Id.*

12. *Id.* at 115, 498 S.E.2d at 407. The standard of review is abuse of discretion. *Id.* at 113, 498 S.E.2d at 406 (quoting Rookard v. Atlanta & Charlotte Air Line Ry., 89 S.C. 371, 376, 71 S.E. 992, 995 (1911)).

13. *Id.* at 113, 498 S.E.2d at 407 (citing Ward v. Epting, 290 S.C. 547, 560, 351 S.E.2d 867, 874-75 (Ct. App. 1986) (finding that an anesthesiologist was not entitled to setoff for the settlement of a survival cause of action against a wrongful death verdict)); *see also* Powers v. Temple, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967) (stating that "one tort feasor is entitled to credit for the amount paid by another tort feasor for a covenant not to sue," and that credit should be applied by the court, not by the jury).

14. *Hawkins*, 330 S.C. at 113, 498 S.E.2d at 407 (quoting Truesdale v. South Carolina Highway Dept., 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975)).

15. *Id.* at 113-14, 498 S.E.2d at 407.

16. *Id.* at 115, 498 S.E.2d at 407.

B. *The Two Wrongful Death Statutes*

1. *Georgia*

The Georgia Wrongful Death Act provides that a party may recover "the full value of the life of the decedent."[17] Georgia courts have held that the "'full value of the life of the decedent' consists of two elements, the economic value of the deceased's normal life expectancy and the intangible element incapable of exact proof."[18] Georgia courts emphasize that no set formula exists for determining the pecuniary element, but lifetime earnings reduced to present value are a starting point.[19] In addition, juries may consider the value of the intangible relationship between decedents and their families.[20]

The Georgia wrongful death statute is a "hybrid" of wrongful death and survival causes of action.[21] Like traditional wrongful death statutes, Georgia allows the decedent's beneficiaries to recover for economic and intangible losses.[22] The statute also contains elements of survival causes of action because damages are measured from the decedent's perspective, and the

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17. GA. CODE ANN. § 51-4-2(a) (Supp. 1998) ("The surviving spouse or, if there is no surviving spouse, a child or children, either minor or sui juris, may recover for the homicide of the spouse or parent the full value of the life of the decedent, as shown by the evidence.").

18. Miller v. Jenkins, 412 S.E.2d 555, 556 (Ga. Ct. App. 1991).

19. *See* McQurter v. City of Atlanta, 572 F. Supp. 1401, 1422 (N.D. Ga. 1983).

20. *See id.*; *see also* City of Macon v. Smith, 160 S.E.2d 622, 630-31 (Ga. Ct. App. 1968) (finding that the jury is not confined to an "inflexible rule" and that intangible elements include a mother's unique services which are "invaluable and incapable of exact proof").

21. *See* C. Frederick Overby & James E. Butler, Jr., *What's a Human Life Really Worth? Recovering Damages for Decedents' Non-Economic Losses in Georgia Wrongful Death Actions*, 7 GA. ST. U. L. REV. 439, 443 (1991). The authors explained:

> The chief distinction between a traditional wrongful death statute, modeled on Lord Campbell's Act and a survival statute, such as Georgia's, is that the former creates a new cause of action that views damages from the perspective of the statutorily named beneficiaries. The latter, however, merely continues the cause of action the decedent would have had if the death had not occurred; thus, damages are viewed from the perspective of the decedent. A survival statute allows compensation for all losses that would have been compensable if the decedent had survived the injury. . . .
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> . . . .
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> Although Georgia's wrongful death statute evolved from Lord Campbell's Act, it is a modified version. This modified statute is really a "hybrid" because judicial construction has incorporated characteristics from both Lord Campbell's Act and from the pure survival statutes.

Id. at 442-43 (citations omitted).

22. *Id.* at 446.

statutory beneficiaries are subject to the same defenses that could have been asserted against the decedent.[23] However, Georgia espouses the view that the "add-up-the-paychecks" method is inadequate to determine the value of life and to compensate for the entire injury.[24] Hence, Georgia courts also compensate for the decedent's intangible losses.

Georgia case law does not clearly define this intangible element. "In Georgia, the jury appraises these intangibles based upon their experiences and knowledge of human affairs [and] may also consider the decedent's relationships, living conditions, and family circumstances."[25] Even though juries are not supposed to award damages for the beneficiaries' grief and sorrow, the beneficiaries can "testify about the 'society, advice, counsel, and companionship' that they enjoyed with the decedent."[26] The reason for allowing such testimony is that the "relationships are reciprocal."[27] "Consequently, the statutory beneficiaries and others can testify about their relationship with the decedent, and 'the jury may determine what intangibles were lost by the deceased in the destruction of such relationship[s]' by death."[28]

2. *South Carolina*

The South Carolina wrongful death statute[29] provides for recovery of

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23. *Id.* at 443-44.

24. *Id.* at 442.

25. *Id.* at 447; *see also City of Macon*, 160 S.E.2d at 631 (charging the jury that the value of a mother's life is not limited to the familial services she performed, but also may be measured by the "facts and circumstances of the family and their living conditions, and from the jurors' own experience and knowledge of human affairs").

26. Overby & Butler, *supra* note 21, at 454 (quoting F. ELDRIDGE, GEORGIA WRONGFUL DEATH ACTIONS § 6-7, at 125 (1987)).

27. *Id.*

28. *Id.* (quoting ELDRIDGE, *supra* note 26, § 6-7, at 126).

29. S.C. CODE ANN. § 15-51-10 (Law. Co-op. 1976). The statute provides:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, *have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured*, although the death shall have been caused under such circumstances as make the killing in law a felony. In the event of the death of the wrongdoer, such cause of action shall survive against his personal representative.

Id. (emphasis added). Interestingly, the language of this wrongful death statute is very similar to a survival statute. *See supra* note 21. The wrongful death statute allows an action under circumstances that would have entitled the decedent to file a suit against "the person who would have been liable, if death had not ensued." S.C. CODE ANN. § 15-51-10.

the following damages:

> (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the [decedent's] society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries.[30]

As in Georgia, the plaintiff in a case brought under South Carolina's wrongful death statute can recover for both pecuniary and intangible losses. The South Carolina Supreme Court has held that pecuniary loss is automatically presumed at death even if no evidence of pecuniary loss is presented when either a marital or parental relationship existed between the decedent and the plaintiff.[31]

The South Carolina wrongful death statute is typical of the traditional wrongful death statutes that measure damages from the beneficiaries' perspective.[32] "Once it has been established the deceased could have maintained an action for damages, then her statutory beneficiaries are entitled to bring an action . . . ."[33] Similarly, Georgia requires the decedent to have had a cause of action, which is a personal property right that is inherited by the beneficiaries.[34]

3. *Summary and Comparison of the Statutes*

The Georgia wrongful death statute compensates beneficiaries based on the "full value of the life of the decedent" measured from the decedent's

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30. Hawkins v. Pathology Assocs., 330 S.C. 92, 114, 498 S.E.2d 395, 407 (quoting Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1993)); *see* Nance v. State Bd. of Educ., 277 S.C. 64, 65, 282 S.E.2d 848, 849 (1981); Smith v. Wells, 258 S.C. 316, 319, 188 S.E.2d 470, 471 (1972); Zorn v. Crawford, 252 S.C. 127, 137, 165 S.E.2d 640, 645 (1969).

31. *See* Ellison v. Simmons, 238 S.C. 364, 370, 120 S.E.2d 209, 212 (1961).

32. *See Nance*, 277 S.C. at 65, 282 S.E.2d at 849; *Smith*, 258 S.C. at 319,188 S.E.2d at 471.

33. *Nance*, 277 S.C. at 65, 282 S.E.2d at 849.

34. Vickers v. Vickers, 80 S.E.2d 817, 817 (Ga. 1954). According to the Georgia Supreme Court,

> [t]he fruits of the recovery are not a part of the decedent's estate . . . . [T]hey belong to the widow and the children of the deceased, both minors and adults[,] . . . and they are distributable according to the law of descents . . . as if they were personal property descending to the widow and children from the deceased.

Id.

perspective, allowing compensation for the decedent's lifetime earnings reduced to present value.[35] However, "full value" also means that the jury is to compensate for the intangible loss of the decedent—the loss of the relationship with the decedent's relatives.[36]

The South Carolina wrongful death statute encompasses Georgia's elements and adds more.[37] The South Carolina statute allows recovery for pecuniary loss, grief of the beneficiaries, wounded feelings, mental shock and suffering, loss of companionship, and deprivation of the decedent's society.[38] The South Carolina elements that exceed the Georgia elements are wounded feelings, mental shock and suffering, and grief of the beneficiaries. The identical elements between the two statutes are pecuniary loss, loss of companionship, and deprivation of the decedent's society. The only real differences between the two statutes are that South Carolina measures the loss from the *beneficiaries'* perspective while Georgia measures the loss from the *decedent's* perspective, and South Carolina appears to compensate for more elements than Georgia.

III. ANALYSIS

A. The Majority Rule: No Double Recovery Allowed

Most jurisdictions follow the view that when one tortfeasor in a single action settles, the nonsettling tortfeasor is entitled to setoff.[39]

> A payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made, whether or not the person making the payment is liable to the injured person and whether or not it is so agreed at the time of payment or the payment is made before or after judgment.[40]

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35. *See supra* Part II.B.1.
36. *See supra* Part II.B.1
37. *See supra* Part II.B.2.
38. *See supra* note 30 and accompanying text.
39. *See generally* T.J. Oliver, Annotation, *Manner of Crediting One Tortfeasor with Amount Paid by Another for Release or Covenant Not to Sue*, 94 A.L.R.2d 355 (1961) (discussing the rules of setoff between joint tortfeasors).
40. RESTATEMENT (SECOND) OF TORTS § 885(3) (1977); *see also* 12 PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 3.03[1], at 73-74 (Louis R. Frumer & Melvin I. Friedman eds., 1998) ("[A]ny compensation received as consideration for a release of a joint tortfeasor will operate to reduce pro tanto the amount recoverable from the others.").

This rule also applies in South Carolina. "A nonsettling defendant is entitled to a *pro tanto* reduction of a judgment in the same cause of action."[41] Cases holding that setoff is not allowed usually involve situations where two distinct causes of action exist and where the settlement specified that a certain sum of money was for one action and a certain sum for the other.[42] In the case at hand, the Georgia settlement did not specify the elements of damage for which the plaintiff was being compensated. The Georgia release merely stated that payment was made "in partial compensation for the full value of the life of Susan T. Hawkins."[43]

Some jurisdictions have addressed issues similar to those presented in *Hawkins*. For example, in *Dixon v. Ross*[44] the Georgia Court of Appeals refused to allow a wrongful death suit to be brought in state court when the widow brought suit under the Federal Employers' Liability Act (FELA) in federal court, despite the fact that both tortfeasors could not be joined in the federal action. The court found that although these were different causes of action, the recoveries under both were similar; therefore, allowing recovery under both suits would amount to a double recovery.[45] The court stated unequivocally:

> There can be only one recovery for damage by joint tort-feasors . . . [I]t would be monstrous to allow a recovery for a wrongful death under the State statute from one joint tort-feasor when there has been a recovery for the same death under the Federal statute from the other joint tort-feasor.[46]

Likewise, in *Brown v. United States*[47] the Eleventh Circuit Court of Appeals allowed a setoff of a settlement in a state cause of action against a federal court judgment rendered against different defendants in medical-malpractice-wrongful-death actions. In *Brown* the plaintiff initially brought suit

41. Vaughn v. City of Anderson, 300 S.C. 55, 61, 386 S.E.2d 297, 301 (Ct. App. 1989) (citing Ward v. Epting, 290 S.C. 547, 560, 351 S.E.2d 867, 875 (Ct. App. 1986)).

42. *See generally Vaughn*, 300 S.C. at 61, 386 S.E.2d at 301 (refusing to allow setoff where the settling defendant agreed to pay expert witness fees because the jury does not calculate expert witness fees in its determination of damages); *Ward*, 290 S.C. at 559-60, 351 S.E.2d at 874-75 (allowing setoff of $500 against a wrongful death verdict when the settlement specifically stated that $29,500 was for pain and suffering and only $500 was allocated for wrongful death).

43. Settlement Agreement, *supra* note 9, at 4.

44. 94 S.E.2d 86 (Ga. Ct. App. 1956).

45. *Id.* at 88.

46. *Id.* (citations omitted).

47. 838 F.2d 1157, 1162 (11th Cir. 1988).

in federal court for failure to diagnose tongue and throat cancer.[48] Brown then brought suit in state court against four defendants who were dismissed from the federal suit due to lack of jurisdiction.[49] Brown died before either suit was tried, and the complaints were amended to add causes of action under Florida's wrongful death statute.[50] The plaintiff subsequently settled the state suit for $237,500.[51] In the federal suit, the district court found that the United States was entitled to a reduction of the jury's $49,328.50 verdict by the amount of the settlement due to Florida's adoption of the Uniform Contribution Among Tortfeasors Act.[52] The result was that the plaintiff recovered nothing in the federal suit.[53]

The *Brown* court reasoned that "[t]he fact of the matter is that [the plaintiff] sought recovery for the same injury—the injury flowing from [the decedent's] death—in two separate suits, one of which was settled out of court."[54] The court also found that both suits "requested damages to the full extent authorized" under Florida's wrongful death statute; therefore, the court *assumed* "that the state court settlement and the federal court judgment each independently comprehended every item of recovery enumerated" under the wrongful death statute.[55] The court stated that the settlement would not have reduced the judgment if different items of injury were being compensated (for example, if the judgment compensated the injury to the survivors and the settlement compensated the injury to the estate).[56]

Similarly, in *Power v. Alexandria Physicians Group*[57] a federal district court held that the failure by separate individuals to diagnose a condition,

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48. *Id.* at 1158.
49. *Id.* at 1159.
50. *Id.* at 1159-60.
51. *Id.* at 1160.
52. *Id.* at 1158, 1162. The Florida statute 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 . . . 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 . . . .

FLA. STAT. ANN. § 768.31(5)(a) (West 1997). South Carolina also adopted the Uniform Contribution Among Tortfeasors Act. S.C. CODE ANN. § 15-38-50 (Law. Co-op. Supp. 1998). The result in *Hawkins* depended on a narrow interpretation of "the same injury or the same wrongful death." Hawkins v. Pathology Assocs., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. Ap. 1998). If "the same wrongful death" is interpreted to mean more than the same *cause of action*, then a setoff would have applied under this Act.

53. *Brown*, 838 F.2d at 1162.
54. *Id.*
55. *Id.*
56. *Id.*
57. 887 F. Supp. 845 (E.D. Va. 1995).

although involving distinct acts, constituted only one injury.[58] Therefore, a suit brought under the Federal Emergency Medical Treatment and Active Labor Act (EMTALA) against a hospital, in which the plaintiff recovered $1,000,000, required dismissal of her state court suit against the doctor and physicians group that managed the hospital because she had reached the statutory cap for medical malpractice actions.[59]

B. Policy Reasons for Setoff

The goal of tort law is the compensation of plaintiffs and deterrence of negligent conduct by defendants.[60] However, plaintiffs are not entitled to double recovery.[61] Setoff is an equitable tool utilized by courts to ensure that plaintiffs are not overcompensated.

> 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 . . . [and is] addressed to the discretion of the Court—a discretion which is not arbitrarily or capriciously exercised, but according to settled principles. When it would result inequitably, setoff should be refused.[62]

While courts recognize that an important aim of tort law is to compensate plaintiffs, courts apply setoff as a tool to prevent a windfall to plaintiffs, unless

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58. *Id.* at 849-50.

59. *Id.* at 852-53. South Carolina does not have a statutory cap on medical malpractice verdicts.

60. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 5, at 23 (4th ed. 1971). According to Dean Prosser:

> The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm.

Id.

61. *See* Inman v. Imperial Chrysler-Plymouth, Inc., 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990); Harper v. Ethridge, 290 S.C. 112, 121, 348 S.E.2d 374, 379 (Ct. App. 1986); Boardman v. Lovett Enters., 283 S.C. 425, 428, 323 S.E.2d 784, 786 (Ct. App. 1984), *rev'd on other grounds*, 287 S.C. 303, 338 S.E.2d 323 (1985); Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc., 279 S.C. 468, 473, 309 S.E.2d 763, 766 (Ct. App. 1983).

62. Rookard v. Atlanta & Charlotte Air Line Ry., 89 S.C. 371, 376, 71 S.E. 992, 995 (1911) (citation omitted).

unfairness would otherwise result.

Another reason for allowing setoff, particularly in the medical malpractice area, is the high cost of liability insurance, which results in higher health care costs to the public.[63] Some states, like Florida, have mandatory setoff rules for any collateral payments made to a plaintiff in a medical malpractice case.[64] These states may be reforming their tort law due to rising liability insurance costs as a result of excessive medical malpractice verdicts. South Carolina adheres to the collateral source rule and does not offset collateral source payments.[65]

C. *Critique of the* Hawkins *Holding*

Despite the policies supporting setoff, the appellate court in *Hawkins* overturned the trial court's setoff of the Georgia settlement amount.[66] The rule in South Carolina, as in most states, is that "[a] tortfeasor who is held liable to a plaintiff is entitled to a set-off to the extent of all payments made by other tortfeasors for the same injury."[67] The *Hawkins* court's ruling undermines this fundamental rule of tort law.

First, the court overlooked that, although the two statutes measure damages from different perspectives (Georgia from that of the decedent and South Carolina from that of the beneficiaries), the two statutes compensate essentially the same elements of damage. The trial court recognized that the "purpose of the Georgia and South Carolina wrongful death Statute[s] is the right of beneficiaries to recover monetary damages to compensate the

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63. *See* J.T.H. JOHNSON, OUR LIABILITY PREDICAMENT: THE PRACTICAL AND PSYCHOLOGICAL FLAWS OF THE AMERICAN TORT SYSTEM 145-46 (1997). Dr. Johnson argued that malpractice suits "punish the wrong people—all malpractice premium payers, and ultimately all patients in the form of higher prices." *Id.* at 145. Medical malpractice premiums rose from sixty million dollars in 1960 to seven *billion* dollars in 1988. *Id.* at 146. "Malpractice premiums averaged $16,000 per year per doctor in 1988 with some local rates as high as $200,000 . . . ." *Id.*; *see also* Patricia M. Danzon, *Malpractice Liability: Is the Grass on the Other Side Greener?*, *in* TORT LAW AND THE PUBLIC INTEREST 176, 178, 180 (Peter H. Schuck ed., 1991). Danzon noted that doctors frequently practice "defensive medicine" due to rising malpractice premiums. *Id.* at 176, 180. For example, the onslaught of medical malpractice claims in the 1970s resulted in alarming 500% increases in malpractice premiums in some states. *Id.* at 178.

64. *See* Pamela Burch Fort et al., *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U. L. REV. 505, 517 & n.49 (1986) (noting that mandatory, collateral source setoff in medical malpractice cases has been constitutionally upheld in Arizona, Florida, Iowa and Nebraska); James J. Watson, Annotation, *Validity and Construction of State Statute Abrogating Collateral Source Rule as to Medical Malpractice Actions*, 74 A.L.R.4th 32 (1989). An in-depth discussion of state statutes abrogating the collateral source rule as to medical malpractice actions is beyond the scope of this Note.

65. *See* 6 S.C. JUR. *Set-off* § 22, at 103 (1991).

66. Hawkins v. Pathology Assocs., 330 S.C. 92, 115, 498 S.E.2d 395, 407 (Ct. App. 1998).

67. S.C. JUR. *Set-off* § 22, at 103 (1991); *see* S.C. CODE ANN. § 15-38-50 (Law. Co-op. Supp. 1998).

deceased's surviving family members for the loss sustained as a result of the wrongdoer."[68] Georgia law also supports the trial court's conclusion:

> "[T]he gist of the [wrongful death] action is not the injury suffered by the deceased, but the injury suffered by the beneficiaries, resulting from the death of the deceased[.] . . . The cause of action, while dependent upon the fact of an actionable tort against the deceased, *accrues only by reason of the death.*"[69]

This statement comports with South Carolina's view that wrongful death actions compensate the decedent's beneficiaries.

The trial court in *Hawkins* also recognized that both statutes contain an economic or pecuniary element and that both allow "compensation for the destruction of an intangible relationship."[70] The trial court addressed the similarities between the intangible relationship under the Georgia statute and the South Carolina statute's recovery for "loss of companionship and loss of use and comfort of the [decedent's] society, loss of her experiences, knowledge, and ability to care for children."[71] In addition, the trial court recognized that Georgia does not allow recovery for the beneficiaries' mental shock and grief; however, these two elements are simply in addition to elements that are recoverable under both statutes: pecuniary loss and loss of society.[72]

The trial court found that "the money awarded from both statutes is for the wrongful death [of the plaintiff's decedent]."[73] This statement is very similar to the Eleventh Circuit's reasoning in *Brown v. United States* that both suits attempt to recover for the same injury.[74] The same parties stand to benefit under both statutes. The trial court in *Hawkins* stated: "The 'fruits of recovery' under Georgia's wrongful death Statute belong to the surviving spouse and the children of the deceased. Likewise, the fruits of recovery under the South Carolina wrongful death Statute belong to the surviving spouse and children of the deceased."[75]

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68. Order at 4.

69. Lovett v. Garvin, 208 S.E.2d 838, 839-40 (Ga. 1974) (quoting Thompson v. Watson, 197 S.E. 774, 778 (Ga. 1938) (allowing a husband to recover for the wrongful death of his wife despite the fact that the wife was injured and died three weeks before their marriage)).

70. Order at 5.

71. *Id.*

72. *See id.*

73. *Id.*

74. 838 F.2d 1157, 1162 (11th Cir. 1988). *See supra* notes 47-56 and accompanying text.

75. Order at 8-9 (citations omitted).

Both statutes have a pecuniary element,[76] and both states allow expert testimony to establish the economic value of the decedent's life.[77] Economic damage is the only tangible element upon which a jury may base its verdict. Therefore, the economic element is key under both wrongful death statutes. In the instant case, the plaintiff's expert testified that the economic loss suffered was $1,146,023.28.[78] The jury verdict in the wrongful death cause of action was $1,100,000.[79] The South Carolina Court of Appeals concluded that because the jury verdict was not itemized, the jury may have based the entire award on the other elements of damage such as mental shock and grief.[80] While this is theoretically possible, the similarity of the two numbers suggests otherwise. Possibly, the jury took the figure that the economist suggested and rounded to the nearest $100,000.

The court of appeals also suggested that setoff should not be granted because the defendants did not prove that "the jury awarded at least $550,000 [the amount of the Georgia settlement] entirely from the pecuniary loss suffered."[81] The court of appeals did not appear to take into account that some of the money may have been awarded for the nonpecuniary element. However, the Georgia settlement agreement did not specify whether the $550,000 awarded was for the pecuniary element or for the intangible element incapable of exact proof.[82] Although the plaintiff argued to the trial court that the defendants had the burden of requesting special interrogatories for the jury to break down the verdict, the trial court noted that the plaintiff had drafted the agreement; special interrogatories would have been to no avail because the agreement did not specify what elements of damage were compensated.[83] The plaintiff could have drafted the agreement more precisely and eliminated the dispute as to what items of damage were actually compensated. Under these circumstances, the plaintiff should bear the risk of having the verdict offset.

The drafting of the settlement agreement in the Georgia case raises another issue. Even though the Georgia wrongful death statute is really a hybrid of wrongful death and survival causes of action, setoff should still have applied because the South Carolina lawsuit also involved a survival action. In *Dick v. Gursoy*[84] an Illinois court offset combined survival and wrongful death verdicts when the plaintiff drafted a vague settlement agreement that failed to specify which elements of damage were being compensated.[85] The *Gursoy* court also

76. *See supra* notes 18-19, 30-31 and accompanying text.
77. *See* Hawkins v. Pathology Assocs., 330 S.C. 92, 114, 498 S.E.2d 395, 407 (Ct. App. 1998); Overby & Butler, *supra* note 21, at 453.
78. *Hawkins*, 330 S.C. at 114, 498 S.E.2d at 407.
79. *Id.*
80. *Id.*
81. *Id.*
82. *See* Order at 6-7; Settlement Agreement, *supra* note 9, at 4.
83. Order at 6-7.
84. 471 N.E.2d 195 (Ill. App. Ct. 1984).
85. *Id.* at 198.

stated that it would not accept the plaintiff's *post hoc* explanation of the settlement for two policy reasons: (1) to protect nonsettling parties' financial interests and (2) to prevent double recovery.[86] The plaintiff in *Hawkins* could have drafted the settlement agreement with greater precision, but failed to do so. Therefore, offsetting the verdict when the trial court had no way of determining exactly which elements of damage the plaintiff had already received is fair.

IV. METHODS FOR ACHIEVING A FAIR RESULT

Other methods exist to ensure that a victim is properly compensated without receiving double recovery.

> [T]here is also authority for the view that although the credit may properly be made by the court where there is no factual determination to be made by the jury concerning the release or covenant not to sue, the credit may also be given under such circumstances by allowing the jury to consider the settlement, with instructions to confine the plaintiff's recovery to the excess of the plaintiff's damages over the amount received under the settlement agreement.[87]

The *Hawkins* court did not allow the jury to consider the previous settlement. However, allowing the jury to do so may have prevented the dispute over setoff.

To protect themselves from the result in *Hawkins*, defendants must request special verdicts to identify the elements the jury compensated. This method is perhaps the only way to compare the damages awarded in a jury verdict with those provided during settlement. On the other hand, plaintiffs will prefer general verdicts based on the holding in this case.

Allowing the jury to consider the settlement or requiring a special verdict in this kind of case ensures fairness to both parties. This fairness results because the plaintiff is fully compensated, and the defendant does not pay a greater amount of damages than the amount the jury determines.

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86. *Id.* at 199.
87. *See* Oliver, *supra* note 39, § 7, at 385.

V. CONCLUSION

The *Hawkins* holding on the setoff issue has the potential of creating negative incentives on the part of plaintiffs in South Carolina. Future plaintiffs may file lawsuits against joint tortfeasors in different states or different courts in order to take advantage of the *Hawkins* holding.[88]

In the case at hand, perhaps the sole reason the Georgia defendants were not in the South Carolina wrongful death suit was that they were located in Georgia. If the Georgia defendants had resided in South Carolina, they most likely would have been defendants in the South Carolina suit. The fact that some defendants were in Georgia was fortuitous for the plaintiff in this case.[89] The plaintiff brought two separate suits and recovered two amounts without any setoff.

Although compensating injured victims and deterring tortfeasors are worthy goals, double recovery may create over-deterrence or windfalls to plaintiffs. Courts faced with the situation outlined in this Note must read between the lines and ascertain whether a plaintiff has already been compensated for the same injury in a prior settlement. This can be achieved by looking at the purpose of the statutes and determining who the ultimate beneficiaries are, as the trial court did in *Hawkins*. To prevent double recovery, courts should require that settlements be drafted with precision enumerating which elements of damage the settlement is compensating. Courts could also allow the jury to consider the settlement and deduct it from its verdict. On the other hand, courts could use special verdicts in a case in which a previous settlement has taken place in order to determine exactly how the jury's award is allocated. Otherwise, plaintiffs may be allowed to obtain a windfall, and defendants may pay more than the total damages determined by the jury.

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88. The ability to bring separate lawsuits would all depend on jurisdictional requirements, which are beyond the scope of this Note. However, due to the expansive reach of state long-arm statutes, plaintiffs may have incentives to bring suits in separate states if they are able to obtain personal jurisdiction over a defendant due to that defendant's contacts with these states.

89. *See supra* note 88 and accompanying text.