

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

MAKENZIE GREER, Minor,
KENNETH GREER, Individually and
as Conservator for MAKENZIE
GREER, and ELIZABETH GREER,

SUPREME CT DOCKET NO:
149494

Plaintiffs/Appellees/
Cross-Appellants,

CT OF APPS DOCKET NO:
312655

vs

ADVANTAGE HEALTH and
ANITA R. AVERY, MD,
Jointly and Severally,

KENT CO CIR CT FILE NO:
10-09033-NH

Defendants/Appellants/
Cross-Appellees,

**BRIEF ON APPEAL OF
CROSS-APPELLANTS
KENNETH GREER, IND
AND AS CONSERVATOR
FOR MAKENZIE GREER,
A MINOR, AND ELIZABETH
GREER**

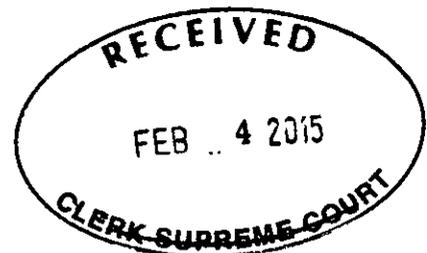
and

TRINITY HEALTH-MICHIGAN,
d/b/a ST. MARY'S HOSPITAL, and
KRISTINA MIXER, MD,

Defendants.
_____ /

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TABLE OF CONTENTS

Table of Contents	i
Index of Authorities	ii
Statement of Question Presented	iii
Statement of Jurisdiction	iv
Statement of Proceedings and Facts	2
Issues and Discussion	5
DID THE TRIAL COURT ERR IN RULING THAT SETTLEMENT PROCEEDS RECEIVED FOR THEIR INDIVIDUAL AND INDEPENDENT DAMAGE CLAIMS BY KENNETH GREER AND ELIZABETH GREER SHOULD NOT BE SET OFF FROM THE DAMAGES AWARDED TO MAKENZIE GREER?	5
A. Standard of Review	5
B. The Court of Appeals erred in applying the common law set-off rule in the present case.	5
Relief Requested	11

INDEX OF AUTHORITIES

Cases

Eide v Kelsey-Hayes Co, 431 Mich 26, 29; 427 NW2d 488 (1988)..... 6
Greer v Advantage Health, 305 Mich App 192; 852 NW2d 198 (2014) 4
Gumienny v Hess, 285 Mich 411; 280 NW 409 (1938) 6
Sizemore v Smock, 430 Mich 283; 422 NW 666 (1988)..... 6
Velez v Tuma, 492 Mich 1, 11; 821 NW 432 (2012). 5,6

Statutes

MCL 600.6303 4
MCR 2.420..... 10

STATEMENT OF QUESTION PRESENTED

DID THE TRIAL COURT ERR IN RULING THAT SETTLEMENT PROCEEDS RECEIVED FOR THEIR INDIVIDUAL AND INDEPENDENT DAMAGE CLAIMS BY KENNETH GREER AND ELIZABETH GREER SHOULD NOT BE SET OFF FROM THE DAMAGES AWARDED TO MAKENZIE GREER?

Trial court said no

Plaintiffs/Appellees/Cross-Appellants Greer say no

Defendants/Appellants/Cross-Appellees Advantage Health and Dr. Avery say yes

Court of Appeals said yes

STATEMENT OF JURISDICTION

The decision of the Court of Appeals from which Advantage Health and Dr. Anita R. Avery, MD sought leave to appeal was released on May 13, 2014. The application for leave to appeal filed by Advantage Health and Dr. Avery was timely filed within 42 days thereof, on June 17, 2014. The application for leave to appeal as cross-appellants filed on behalf of the Greers was timely, having been filed within 28 days thereof. MCR 7.302(D)(2). This court granted leave to appeal to both appellants Advantage Health and Avery and cross-appellants Greer in an order of December 10, 2014.

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State Medical Society

STATEMENT OF PROCEEDINGS AND FACTS

This is a medical malpractice action. On September 7, 2010 plaintiffs Kenneth Greer, Individually and as Conservator for Makenzie Greer, a minor, and Elizabeth Greer Individually filed the present complaint. [X-App Greer Appendix, p 13a; App Avery Appendix, pp 1a-11a]. The complaint was filed against four health care providers: Advantage Health; Dr. Anita R. Avery, MD; Trinity Health-Michigan, d/b/a St. Mary's Hospital; and Dr. Kristina Mixer, MD. Liability was to be imposed jointly and severally, and arose out of the devastating, negligently performed delivery of Mr. and Mrs. Greer's daughter Makenzie on September 28, 2008. [Complaint, ¶¶ 4, 19, 24, 39].

Mr. Greer, acting as Conservator for his daughter, sought damages for the injuries sustained by Makenzie, which included hypoxic brain injury, respiratory depression, metabolic acidosis, permanent and irreversible brain damage, and blindness. [Complaint, ¶¶ 24, 39].

Mr. Greer, Individually and as Conservator for Makenzie, made claim for medical expenses incurred for treatment of Makenzie. [Complaint, ¶ 41].

Mrs. Greer made claim for personal injuries she herself sustained as a result of the botched delivery, including a uterine rupture, urethral injury, disfigurement and scarring. [Complaint, ¶¶ 24, 43]. And Mr. Greer sought damages for loss of consortium for the injuries sustained by his wife. [Complaint, ¶ 42].

Discovery, as well as the normal procedures attendant in a complicated medical malpractice case, ensued. Eventually the Greers and St. Mary's Hospital entered into a confidential settlement. That settlement was for \$600,000.00 for all claims brought by the Greers. [App Avery Appendix, pp 17a-19a; X-App Greer Appendix, pp 23a-25a]. (Dr. Mixer

had been dismissed, without prejudice, in an earlier Stipulation and Order of Dismissal. [X-App Greer Appendix, p 11a]).

Once St. Mary's had completed its settlement and been dismissed pursuant to orders approving the settlement and dismissing the action as to it [X-App Greer Appendix, pp 23a-25a; App Avery Appendix, pp 20a-22a], the case continued against Advantage Health and Dr. Avery. Trial began before Kent County Circuit Court Judge the Hon James Robert Redford on April 17, 2012 and continued until the jury returned its verdict on April 27, 2012. [X-App Greer Appendix, pp 30a-34a]. The jury found no cause for action as to the individual claims of Mr. and Mrs. Greer [X-App Greer Appendix, pp 32a-33a] but found in favor of Makenzie and awarded her substantial damages. [X-App Greer Appendix, pp 33a-34a; 35a-39a].

Various post-trial motions were filed by both parties, two of which are now before this court. Advantage Health and Dr. Avery first argued that the entirety of the \$600,000.00 settlement the Greers reached with St. Mary's should be set-off from the award to Makenzie. Advantage Health and Dr. Avery also argued that the judgment should be reduced by the difference between the stipulated medical expenses incurred on behalf of Makenzie and the amount of liens claimed by the health plans/insurers providing coverage for her. Following briefing and argument, Judge Redford issued a seven page Opinion and Order on August 8, 2012, first holding that the set-off from the settlement with St. Mary's Hospital would be in the sum of \$162,058.11, which he determined was that portion of the settlement paid by St. Mary's in exchange for releasing liability for Makenzie's injuries. [App Avery Appendix, pp 78a-81a]. Judge Redford also ruled that the difference between the medical expenses incurred and the liens

claimed would not be set-off, as payment by the health plans/insurers did not constitute a “collateral source” under MCL 600.6303. [App Avery Appendix, p 77a].

On August 28, 2012, Dr. Avery and Advantage Health filed a motion for reconsideration [X-App Greer Appendix, p 2a], which was denied in an Opinion and Order of September 12, 2012. [App Avery Appendix, pp 82a-86a]. Accordingly on September 14, 2012, the court entered its Order For Judgment in favor of Kenneth Greer, Conservator for Makenzie Greer against defendants Anita R. Avery, MD and Advantage Health, jointly and severally, in the sum of \$1,058,825.56 plus taxed costs [App Avery Appendix, pp 87a-88a], and entered an order taxing costs against Advantage Health and Dr. Avery in the sum of \$32,393.80. [X-App Greer Appendix, p 1a]. Advantage Health and Dr. Avery timely filed an appeal of right with the Court of Appeals.

In a published opinion of May 13, 2014, *Greer v Advantage Health*, 305 Mich App 192; 852 NW2d 198 (2014), the Court of Appeals affirmed in part and reversed in part. The court affirmed Judge Redford’s ruling that damages for medical expenses awarded Makenzie were not to be reduced, in whole or in part, by payments made by health plans/insurers due because of liens which they asserted, holding that those payments were not “collateral sources” under MCL 600.6303. That ruling, and the Court of Appeals’ affirmance thereof, is the subject of the appeal filed on behalf of Advantage Health and Dr. Avery. The Greers’ response to that will be submitted in a separate brief.

The Court of Appeals also ruled that the full \$600,000.00 settlement received by all three Greers to compensate them for their individual claims, not just the amount of the settlement apportioned to Makenzie, was to be set off against Makenzie’s recovery. It is from that ruling that the Greers appeal.

ISSUES AND DISCUSSION

DID THE TRIAL COURT ERR IN RULING THAT SETTLEMENT PROCEEDS RECEIVED FOR THEIR INDIVIDUAL AND INDEPENDENT DAMAGE CLAIMS BY KENNETH GREER AND ELIZABETH GREER SHOULD NOT BE SET OFF FROM THE DAMAGES AWARDED TO MAKENZIE GREER?

A. STANDARD OF REVIEW.

This court reviews issues regarding set-off *de novo*. *Velez v Tuma*, 492 Mich 1, 11; 821 NW 432 (2012).

B. THE COURT OF APPEALS ERRED IN APPLYING THE COMMON LAW SET-OFF RULE IN THE PRESENT CASE.

Cross-appellants Greer do not challenge the viability or the applicability of the common law set-off rule in this case. That was resolved in *Velez*.

Instead, it is the method of application of the rule by the Court of Appeals which is challenged as erroneous, both legally and factually. In holding that the entire \$600,000.00 settlement received by the Greer family from St. Mary's Hospital was to be set off against the recovery by Makenzie, the Court of Appeals ignored the fact that each of the Greers had their own legally recognized, distinct and independent claim for damages, all of which were incorporated in that settlement. The Court of Appeals also erred in its determination that the \$600,000.00 settlement had not been properly apportioned between the Greer family members, for that apportionment had occurred at the time of the settlement.

The ruling of the majority in the Court of Appeals' decision (there was a concurrence, which disagreed with the panel's legal reasoning but nevertheless concurred in its ultimate ruling) appears to be unique to the jurisprudence of this state, for it requires that a jury's award for one person's injury must be reduced by settlements received by others for entirely separate

legal claims. In its ruling the panel relied upon this court's decision in Velez, supra. In so doing, however, the Court of Appeals failed to recognize one crucial distinction between the cases – in Velez, there was but one injured person, one plaintiff, who recovered one settlement, for one injury. In the present action, the settlement with St. Mary's Hospital extinguished distinct and independent claims by three individuals. For as noted, there was a claim on behalf of Makenzie for the devastating injuries she received during the delivery. There was a claim brought on behalf of her mother for the disfiguring injuries she sustained. And Makenzie's father, husband of Elizabeth, had a viable claim for economic damages (medical bills) and loss of consortium. That consortium claim could not have been for the injuries sustained by Makenzie, but only for those sustained by his wife. Sizemore v Smock, 430 Mich 283; 422 NW 666 (1988); Eide v Kelsey-Hayes Co, 431 Mich 26, 29; 427 NW2d 488 (1988). Mr. Greer's claim for medical expenses incurred on behalf of his daughter, likewise, is an independent cause of action. Gumienny v Hess, 285 Mich 411; 280 NW 409 (1938). Despite recognizing the existence of the three claims, the Court of Appeals nevertheless ordered a set-off of the amounts received in settlement for all three claims solely against the damages awarded Makenzie. How did the Court of Appeals do this?

First, the court erred, at page 5 of its decision [305 Mich App at 203], in finding that all of the damages arose out of a single incident, the birth of Makenzie, and therefore there was but a single injury for which plaintiffs could have but one recovery. This ignored the existence of the independent causes of action and, in fact, separate and distinct injuries suffered by the Greers. There was not just one injury – there were three.

Any argument that Mr. and Mrs. Greer's damage claims were derivative of Makenzie's must be rejected. Putting aside the legal independence of the three claims noted above, the

physical injuries suffered by Mrs. Greer were certainly distinct from those suffered by her daughter.

Strangely, the Court of Appeals looked to the jury's verdict to support its decision, yet that is the epitome of *ex post facto* reasoning. The claims brought against St. Mary's differed from those brought against Dr. Avery, and St. Mary's obviously felt that the claims had sufficient merit to support a \$600,000.00 settlement. The jury may have found that the individual claims of Mr. and Mrs. Greer had no merit, but only as to their claims against Advantage Health and Dr. Avery. It made no determination, nor could it, of the validity of their claims against St. Mary's. The jury's verdict, therefore, offers no support whatsoever for the reasoning behind the panel's decision. Indeed, Judge Redford noted the difference between the claims asserted against Dr. Avery and those asserted against the hospital when he stated, in his Opinion and Order Denying Motion for Reconsideration of 9/12/12, p 4 [App Avery Appendix, p 85a]:

"The settlement of the claims was as to all three plaintiffs. The Court notes while the mother and father received a 'no-cause' on their claims against the Plaintiff Doctor, in the Court's opinion, it is more likely than not that such would not have been the case in the parents' claim against the hospital. Multiple times during the trial, the parents provided specific and detailed testimony of how they had advised agents of the hospital that the delivery was in *extremis* and it was suggested the hospital and its agents did not act properly."

This finding by Judge Redford has never been challenged by Advantage Heath/Dr. Avery.

Any intimation that Mr. and Mrs. Greer did not suffer individual and distinct injuries must be rejected. Their claims were not found meritless by the jury because of a lack of injuries and damages; rather, the jury found that their injuries were not the result of professional negligence by Dr. Avery. [X-App Greer Appendix, pp 27a, 32a-33a]. Indeed, Advantage Health

and Dr. Avery actually stipulated to the medical bills incurred for Mrs. Greer's injuries as \$31,023.33. [X-App Greer Appendix, p 28a; App Avery Appendix, p 24a]. Thus the jury never reached the issue of what damages had Mr. and Mrs. Greer themselves suffered.

Strangely, the Court of Appeals considered Judge Redford's "apportionment" of the settlement as "speculative". As noted below, that simply was wrong. Yet is it not even more speculative for the Court of Appeals to apportion the entire settlement to Makenzie's claim. The Court of Appeals did exactly what it criticized Judge Redford for doing, but Judge Redford had a reason, of record, for making his apportionment. The Court of Appeals did not.

Certainly by applying the entire \$600,000.00 settlement solely against Makenize's recovery the Court of Appeals ignored the intent of the parties to the St. Mary's settlement, not only on the part of the Greers, but also on the part of St. Mary's. St. Mary's did not consider the \$600,000.00 to be payment only to Makenzie – it was payment for all of the claims that were brought by the Greer family against it. By ruling as it did, the Court of Appeals actually contradicted this intention of the Greers and St. Mary's.

Most important, however, the Court of Appeals simply ignored the fact that at the time of the settlement with St. Mary's the \$600,000.00 had been apportioned. Although the release referred only to the \$600,000.00 settlement figure, it also provided that the settlement was to be kept confidential. In their petition for approval of partial settlement and distribution of proceeds [X-App Greer Appendix, pp 20a-22a], the Greers explicitly and repeatedly referred to a document, to be kept confidential, "Exhibit A". Paragraphs 2 and 3 of the petition stated:

"2. One of the defendants, Trinity Health — Michigan, d/b/a, St. Mary's Hospital, has made a confidential settlement with the plaintiffs subject to this court's approval.

3. The confidential settlement will be produced as Exhibit A to the court at the time of hearing in an effort to protect defendant's

confidentiality. The petitioner requests that Exhibit A be returned to plaintiffs' counsel after the court's review."

Specifically, the petition requested, in paragraph 10, that:

"[T]he settlement be distributed to plaintiffs', Kenneth Greer, individually and as Conservator for Makenzie Greer, and Elizabeth Greer, as outlined in the confidential Exhibit A."

The petition went on, in paragraph 12, to ask that bond be waived since "the minor child's settlement proceeds" were to be held in a restricted account.

The settlement with St. Mary's was to be kept confidential. Exhibit A was clearly a part of that settlement, outlining, in confidence, the apportionment of the settlement proceeds, and clearly establishing that a portion was to be given to Makenzie's parents for their individual claims. In his order for approval of partial settlement and distribution of proceeds, Judge Redford specifically referenced Exhibit A, ordering, at page 2:

"The plaintiffs', Kenneth Greer, individually and as Conservator for Makenzie Greer, and Elizabeth Greer, shall receive their share of settlement as outlined in the confidential Exhibit A." [X-App Greer Appendix, p 24a].

The request to waive bond was also granted.

Strangely, despite knowing, or certainly having reason to know (the petition and order being of record) of the existence of the apportionment set out in Exhibit A, counsel for Advantage Health and Dr. Avery never sought to review it. Had he, it is highly unlikely he would even have raised this issue. Certainly the confidentiality provision could have been avoided by entry of a protective order limiting the identities of those entitled to review Exhibit A, but it does not appear that any such request was ever made by Advantage Health/Dr. Avery. And as noted by Judge Redford in both his Opinion and Order of August 8, 2012, [App Avery Appendix, pp 78a-81a], ruling on the various post-trial motions, as well as in his Opinion and

Order Denying Motion for Reconsideration of September 12, 2012, [App Avery Appendix, pp 84a-86a], the verdict in favor of Makenzie was indeed reduced, by \$200,000.00 minus a portion of the medical liens, for a total reduction of \$162,058.11.

The settlements received by Mr. Greer and Mrs. Greer did not require court approval. The settlement for Makenzie did require approval from the Circuit Court. MCR 2.420. Judge Redford, in recognizing the apportionment of the \$600,000.00, clearly intended to resolve all three individual claims brought against St. Mary's and did as he was legally obliged to do in approving Makenzie's share. Judge Redford was never asked to, nor did he, approve a \$600,000.00 settlement for Makenzie.

Inexplicably, in the weeks between the March 2012 settlement with St. Mary's and the beginning of trial against Advantage Health and Dr. Avery which began on April 17, no request was made by them to review Exhibit A, to ask the court for clarification on what amount would be set-off from any judgment entered against them, or for any other determination how the set-off would be handled. It was only after the jury returned its verdict against them that Advantage Health and Dr. Avery asked that the full \$600,000.00 settlement be set-off from their obligation.

The decision of the Court of Appeals, a published decision, must be overturned. It is unique, the only known occasion that one individual's independent recovery was set-off against another person's recovery for a different cause of action. Its rationale, looking at the single event causing the claims rather than the nature of the claims themselves, is without support. *Velez, supra*, upon which the Court of Appeals relied, is, as noted above, entirely inapposite to this case, which involves independent causes of action by multiple individuals. It entirely ignores the apportionment made contemporaneous with the settlement with St. Mary's, as set out in Exhibit A. And finally, and perhaps most importantly, the decision of the Court of Appeals

creates a gross miscarriage of justice, drastically reducing the jury's determination of Makenzie's damages by amounts she was never intended, by her parents, by St. Mary's Hospital, or by Judge Redford, to receive. Judge Redford perhaps stated it best when he ruled, in his Opinion and Order of August 8, 2012:

"In the instant case, like in *Markley*, joint and several liability applies. Plaintiffs Makenzie Greer and her parents Mr. and Mrs. Greer, together accepted a settlement payment in the amount of \$600,000 in exchange for a full release of their claims against Defendant St. Mary's Hospital. Defendants Advantage Health and Dr. Avery chose not to settle their liability and proceeded to trial where the jury found Defendants at fault for the injuries to Makenzie Greer only. Wherefore, without application of the set-off rule the Court is satisfied that Plaintiff Makenzie Greer would be permitted to recover twice for her injury and that some set-off is required as to the injury suffered by Makenzie Greer.

The jury, however also found no cause of action as to the claims of Plaintiffs Mr. and Mrs. Greer. Taking into account, that the settlement agreement with St. Mary's Hospital applied to not only Makenzie Greer's claims but also to those of her parents Mr. and Mrs. Greer individually, the Court is mindful that to allow a set-off for the full settlement amount would be manifestly unjust as it would diminish the damages the jury awarded to Makenzie Greer to set-off against the portions of the settlement which were paid in consideration of Mr. and Mrs. Greer's individual claims. Being separate causes, the amount of the settlement made between Mr. and Mrs. Greer and the St. Mary's defendants is separate from and distinct from any amount that might be determined to be allowed for a set-off against the jury verdict on Makenzie's damages. In order to prevent this manifest injustice, the Court finds it appropriate to allow a set-off in the amount of \$162,058.11 or 1/3 of the settlement amount with St. Mary's which represents that portion of the settlement paid in exchange for release of liability for Makenzie's injuries." [App Avery Appendix, pp 79a-80a].

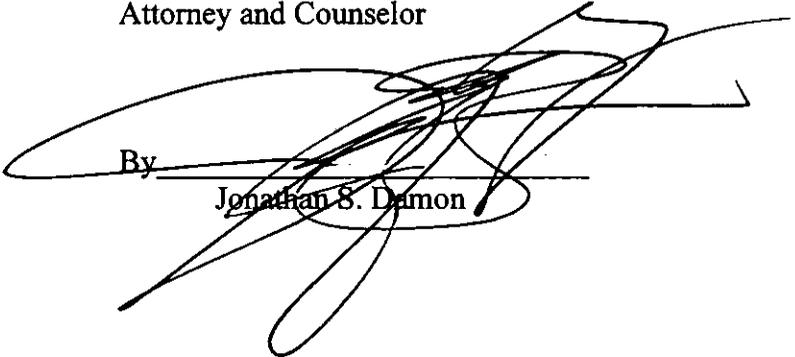
RELIEF REQUESTED

For the reasons expressed above, plaintiffs/appellees/cross-appellants Greer ask this court to reverse the decision of the Court of Appeals requiring the full \$600,000.00 settlement with St. Mary's to be set off solely against the recovery by Makenzie Greer, and affirm the judgment

entered in the circuit court. Should this court believe that more detail on the apportionment of the settlement, or the contents of Exhibit A, are important, then it is requested that the case be remanded to the Kent County Circuit Court for clarification, with a protective order regarding confidentiality if necessary.

DATE: February 2, 2015

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Attorney and Counselor

By 
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