

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

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

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**RECEIVED**

DEC 27 2017

**S.C. SUPREME COURT**

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

v.

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

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

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

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

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

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

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

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

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

At the close of the trial, Dr. Bauerle moved for a set-off of the amounts paid in settlement on behalf of other Defendants. By Order filed October 17, 2013, Judge John granted in part and denied in part the Motion for Set-Off. Judge John allowed for a set-off of the settlements received two of the other Defendants, but he denied the set-off for the amounts paid for the release of the at-fault driver and the UIM insurer. Judge John directed the Clerk of Court to enter judgment in the amount of \$665,789.47 in favor of Randall M. Green and to enter judgment in the amount of \$159,480.53 in favor of the Ann Green.

On October 11, 2013, Dr. Bauerle filed a Notice of Appeal with the South Carolina Court of Appeals. The Greens subsequently filed a Notice of Cross-Appeal.

On August 5, 2014, the insurer for Dr. Bauerle made an initial payment of \$415,789.47 in partial satisfaction of the judgment in favor of Randall M. Green. The remaining judgments are in the amount of \$250,000.00 in favor of Randall M. Green and in the amount of \$159,480.53 in favor of the Ann Green. The Receipt

and Partial Satisfaction of Judgment executed by the Greens was filed on August 8, 2014.

On December 10, 2014, a hearing was held on a Motion for Leave of Court to Deposit Funds into Court before Circuit Court Judge Larry Hyman. By Order filed December 11, 2014, Judge Hyman allowed for the sum of \$446,669.82 to be paid into the court pursuant to Rule 67, SCRCP.

On February 3, 2016, the Court of Appeals issued an unpublished opinion affirming the rulings of the trial court and denied the relief sought by both sides on appeal. Dr. Bauerle and the Greens filed petitions for rehearing, which were subsequently denied on March 24, 2016.

On April 14, 2016, a Consent Order to Partially Release Funds Deposited with Clerk of Court was signed and filed by Circuit Court Judge Larry Hyman. That Consent Order was based on the Plaintiffs' motion "for an Order directing that the sum of \$228,505.69 be paid by the Clerk of Court to the Plaintiffs Randall Green and Ann Green." That Consent Order further provided that "the judgment in favor of the Plaintiff Randall Green is partially satisfied by the payment of \$163,622.01 and the judgment in favor of the Plaintiff Ann Green is partially satisfied by the payment of \$64,883.68."

On April 20, 2016, the Greens filed a Receipt and Partial Satisfaction of Judgment in the amount of \$228,505.69 consistent with the Consent Order.

On April 25, 2016, Dr. Bauerle filed a Petition for Writ of Certiorari. On or about May 16, 2016, the Greens filed a Petition for Writ of Certiorari after receiving an extension.

On October 2, 2017, this Court granted both Petitions for Writ of Certiorari.


On November 20, 2017, the Greens filed their Petitioner's Brief. In that brief, one of the positions that the Greens take is that the trial court erred in failing to allocate a \$2 million pre-trial settlement from another defendant equally between Mr. Green and Mrs. Green. Dr. Bauerle has taken the position both in opposition to the Petition for Writ of Certiorari and in his response brief to be filed that that issue is not preserved for appellate review because it was not raised below and most importantly was not raised in the Greens' Petition for Rehearing. According to the Greens' argument, the \$2 million settlement should have been allocated so that there was a \$1 million set-off for both Mr. Green and Mrs. Green. That argument thus means that the original \$2.3 million judgment in favor of Mr. Green would be reduced to \$1.3 million, and the original \$550,000 judgment in favor of Mrs. Green would be reduced to \$0. Dr. Bauerle disputes that position both on preservation grounds as mentioned and on the merits. Yet, while preparing Dr. Bauerle's appellate brief, it was determined that Dr. Bauerle may also validly argue that the Greens have released and/or waived this position and/or are otherwise judicially estopped to take that position not only because it was not raised in their Petition for Rehearing but also because Mrs. Green, with her husband's signed

consent, accepted \$64,883.68 in April 2016 (which was after the Petitions for Rehearing were denied), and they partially satisfied/released Dr. Bauerle in that amount on April 20, 2016. That acceptance of funds by Mrs. Green is inconsistent with the current position taken on appeal whereby if the Court were to adopt the Greens' allocation argument, no payment of any amount was required to satisfy Mrs. Green's verdict of \$550,000.

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

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY:   
\_\_\_\_\_  
ANDREW F. LINDEMANN  
1611 Devonshire Drive  
Post Office Box 8568  
Columbia, South Carolina 29202  
(803) 806-8222

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

Columbia, South Carolina

December 20, 2017

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

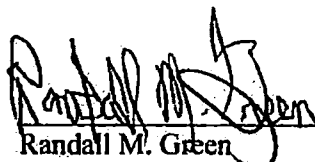
IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO: 2005-CP-26-2805


Randall M. Green and Ann Green )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
Wayne B. Bauerle, M.D., and Wayne B. )  
Bauerle, M.D., P.C., )  
 )  
Defendants. )  
\_\_\_\_\_ )

**RECEIPT AND  
PARTIAL SATISFACTION OF  
JUDGMENT**

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

ENTERED AND AGREED UPON this 5<sup>th</sup> day of August, 2014.

  
\_\_\_\_\_  
Randall M. Green

  
\_\_\_\_\_  
Ann Green

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS

Randall M. Green and Ann Green, )  
 )  
Plaintiff, )

Civil Action No. 2011-CP-26-7403

v. )

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

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

DEC 11 PM 1:13  
CLERK OF COURT  
WARD

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

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

The Court finds as follows:

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

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

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

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

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

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

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

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

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

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

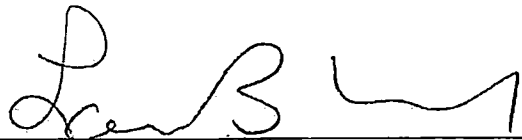
IT IS, THEREFORE, ORDERED that the Defendants deposit as requested with the Court the sum of \$446,669.82. The deposit pursuant to this Order shall be made to the Horry County Clerk of Court.

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

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

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

AND IT IS SO ORDERED.



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

Conway, South Carolina

December 11, 2014

Randall M. Green, et al

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

No 609

Wayne B. Bauerle, M.D et al

DATE 12-11, 2014

RECEIVED OF SC Medical Malpractice

Four hundred forty six thousand six hundred sixty nine & 62/100 \$ 446,669.82

CASE NO. 2011-cp-26-7403

TRUST NO. \_\_\_\_\_

Melanie Huggins Hand

Clerk of Court for Horry County, S.C.

REGULAR  OPEN I/B  CLOSED I/B

PHOTO COPY SUPPLY

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

Randall M. Green and Ann Green, )  
 )  
Plaintiffs, )

v. )

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

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-26-7403

**CONSENT ORDER TO  
PARTIALLY RELEASE FUNDS  
DEPOSITED WITH CLERK OF COURT**

FILED  
HORRY COUNTY  
2016 APR 14 PM 4:18  
LAVILLE HUGGINS-WARREN  
CLERK OF COURT

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

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

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

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

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

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

**AND IT IS SO ORDERED.**

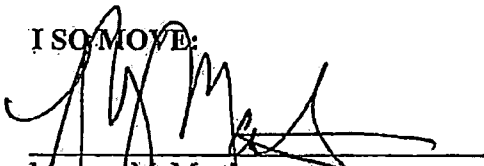


\_\_\_\_\_  
Chief Administrative Judge  
For the Fifteenth Judicial Circuit


Conway, South Carolina

Dated: 4-13-16

**I SO MOVE:**

  
\_\_\_\_\_  
Morgan M. Martin  
*Counsel for Plaintiffs*

**I CONSENT:**

  
\_\_\_\_\_  
Andrew F. Lindemann  
*Counsel for Defendants*

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

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

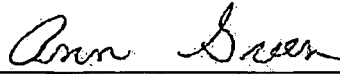
Randall M. Green and Ann Green )  
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Plaintiffs, )  
 )  
vs. )  
 )  
Wayne B. Bauerle, M.D., and Wayne B. )  
Bauerle, M.D., P.C., )  
 )  
Defendants. )  
\_\_\_\_\_ )

**RECEIPT AND  
PARTIAL SATISFACTION OF  
JUDGMENT**

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

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

  
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Randall M. Green

  
\_\_\_\_\_  
Ann Green

FILED  
CLERK OF COURT  
2016 MAY -6 AM 8:18  
CORDE HOUSINS-TEAN

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