

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JAN 03 2018

APPEAL FROM Horry COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Steven H. John, Circuit Court Judge

Op. No. 2016-UP-052
(S.C. Ct. App. Filed February 3, 2016)

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

v.

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

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

The Respondents-Petitioners, Randall and Ann Green (“the Greens”), respectfully request that this Court decline to grant Petitioners-Respondents’ (Dr. Bauerle’s) motion to hold the briefing deadlines in abeyance. The basis for Dr. Bauerle’s motion is that he has recognized the existence of additional arguments he would like to make for which there is no support in the existing Appendix. This motion has been made for the purpose of causing further unnecessary delay and cites no authority in support of his request or the novel arguments as required by Rule 240 (c)(2), SCACR. Furthermore, the documents with which Dr. Bauerle wishes to supplement the Appendix do not provide any evidence of facts which would satisfy the elements necessary to apply the doctrine of Judicial Estoppel or the defense of Waiver/Release. The July 2014 order of this Court establishes the following regarding extensions in cases filed under Rule 242, SCACR:

(1) Upon a showing of good cause, a party (or multiple parties if represented by the same counsel) may be granted extensions totaling no more than twenty (20) days during the proceedings before this Court. If multiple extensions are taken within the twenty (20) day cumulative limit, the minimum period that can be requested is five (5) days.

(2) Any extension beyond the twenty (20) days specified in (1) above will be granted only if extraordinary circumstances such as illness or other circumstances beyond the control of the movant warrant the granting of the extension. The parties are warned that the press of other business is not an extraordinary circumstance which will warrant the granting of an extension.

These extensions will generally be granted for no more than ten (10) days.

(2014-07-16-01). This Court has previously granted Dr. Bauerle fifteen (15) consecutive days of additional time to complete briefs in this proceeding. The realization that he could have made additional arguments which are unsupported by the current record does not constitute good cause, much less extraordinary circumstances which would warrant the granting of an extension of additional time. The Greens respectfully request that his motion be denied, or, if the court finds that there is good cause, that the deadline be extended by only five (5) additional days in accordance with the previous order of this Court. The following reasons demonstrate that good cause has not been shown to grant additional time, and that the granting of Dr. Bauerle's motion will result in further unnecessary and unfair delay in resolving this case:

1. Even if Dr. Bauerle was correct in asserting that this Court cannot now allocate the settlement funds equally, it would not prevent the Greens from arguing that the trial court should have. The Greens argued that, only in the event this Court finds Dr. Bauerle was entitled to a setoff and that the arbitrary allocation of their settlement was required and/or appropriate, the method used was erroneous and unjust. Accordingly, their argument that any allocation should have been equal served two purposes: (1) to provide an alternative for consideration in the event this Court finds that a re-allocation must be performed utilizing a different method than the one employed by the trial court **AND** (2) to support the Greens' position that the trial court's chosen method was unjust, erroneous, and unnecessary in light of the existence of a far more equitable solution. The

latter purpose makes the argument relevant, *even if* there was any merit to Dr. Bauerle's position that the later post-judgment disbursement of uncontested proceeds would prevent this Court from now employing the allocation method suggested by the Greens.

2. In Riley v. Ford, this Court made clear that the burden of demonstrating a bona fide, fair, and just alternative methodology rests on Dr. Bauerle as he is the party seeking to depart from the standard setoff rules. Riley, 414 S.C. 185, 777 S.E.2d 824 (2015). This Court additionally made clear that a court may not re-allocate the proceeds of a settlement unless the non-settling defendant demonstrates that the settlement terms were a fraud or sham. Id. However, in his Petition For Rehearing, Dr. Bauerle conceded that he did not meet either of these burdens, stating that he was "not in a position to contest the settlement and seek additional terms to that settlement." (Amended Joint Appendix p. 29). Accordingly, he has taken the position that the court is at liberty to allocate a settlement however it deems appropriate, regardless of whether the non-settling defendant failed to even request or suggest a particular allocation, much less demonstrate that it is bona fide, fair, and just. If this Court were to agree with his position on this issue, it is irrelevant that the Greens presented an alternative option for consideration.

3. In making this motion, Dr. Bauerle seeks to introduce multiple legal issues that have not been previously raised or addressed, which will result in further unnecessary delay. Further, the documents with which he seeks to supplement the existing Appendix do not provide any support for the legal theories which he now seeks to assert. Specifically, he argues that the Greens are judicially estopped from, and have released and/or waived their right, to assert that, if *any* method of allocation was appropriate, the funds should have been divided equally. He bases this assertion on the release of funds deposited with the court in the amount of \$228,505.869 upon abandoning his claim on appeal that he was entitled to a setoff of the Greens' UIM settlements.

a. Waiver and/or Release

Waiver is a voluntary and intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). However, the Receipt and Partial Satisfaction of the Judgments executed by the Greens, which was attached to Dr. Bauerle's motion, did **NOT** allocate the funds to be disbursed by the court or specify how their respective verdicts would be reduced. The Greens accepted the funds jointly and agreed to a partial satisfaction of Bauerle's total liability. The language in the April 14, 2016 consent order which states that the disbursement would reduce Mrs. Green's verdict by \$64,883.68 was added by Dr. Bauerle's counsel without discussion between the parties and had no bearing on the fact that the *entire* amount disbursed by the court was jointly *paid* to the Greens pursuant to the order. It is unclear how Dr. Bauerle's counsel even arrived at this number as it does not correspond to the amount of UIM proceeds received by Mrs. Green. The Receipt and Partial Satisfaction of Judgment executed on April 20, 2016 provides even further evidence that the Greens did not intend to release or waive any rights subject to the pending appeal.

b. Judicial Estoppel

Dr. Bauerle asserts that the Greens' acceptance of these funds renders them judicially estopped from arguing that any allocation, if permissible at all, should have been equal. He asserts that allocating the GSRMC settlement equally would have reduced Mrs. Green's verdict to zero, which is inconsistent with her acceptance of these funds. First, the funds were released by the court jointly, and there is no evidence that Mrs. Green individually accepted any specific portion thereof. Further, in order to prevail on a claim of judicial estoppel, a party must prove the following:

(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the

inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 632 (2004). In South Carolina, the doctrine of judicial estoppel applies only to matters of fact, not conclusions of law. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). Here, the Greens' assertion that, in the event the trial court even had the authority to allocate the settlement, it should have been allocated equally is **not** an assertion of fact. Judicial Estoppel cannot apply here as there are no allegations that the Greens have misrepresented facts or changed their version of events to gain an advantage. *See Bailey*, 327 S.C. at 252, 489 S.E.2d at 477 ("When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.") There has been no allegation of an intentional effort to mislead the court.

4. The Receipt and Satisfaction executed by the Greens is evidence of a benefit to Bauerle by reducing his *total* liability, and does not satisfy any *specific* portion of either verdict. In the event this Court finds that the settlement should have been allocated in a manner which reduces Mrs. Green's verdict to zero, the receipt and partial satisfaction will effectively reduce Mr. Green's remaining verdict by the total amount indicated therein. The amounts by which the verdicts should or should not be reduced remains a matter for this Court. The language of the April 2016 Consent Order makes very clear that the court would 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.**" The Order Granting Leave to Deposit Funds states that it shall have "no effect on the issues currently on appeal including the amount of the verdicts to which the Plaintiffs are ultimately entitled, which will be determined by the appellate courts." Further, it **EXPRESSLY** states that

“[s]hould the Plaintiffs prevail on appeal, [Dr. Bauerle and his insurers] will be liable for the judgments as determined by the appellate courts.” (Dec. 11, 2014 Order, p. 5).

The April 13, 2016 Consent Order directs that the Clerk of Court “shall release the sum of Two Hundred Twenty-Eight Thousand Five Hundred Five and 69/100 Dollars (\$228,505.69) to the Plaintiffs Randall and Ann Green by delivery of such check to their attorneys of record.” (April 3, 2016 Order, p. 2). In contrast, the language added by Dr. Bauerle’s counsel to the Consent Order does not allocate the actual *payment*, but only indicates the amounts by which their individual judgments will be reduced. This is an issue pending appeal and, pursuant to Rule 205, SCRCPC, the trial court did not have jurisdiction to make such a determination. Consistent with this Rule as well as the language of the orders, the court records attached hereto show that the judgments have not been modified by the disbursements, remaining at \$665,789.47 for Mr. Green and \$159,480.53 for Mrs. Green. The issues of whether the verdicts should be reduced and by how much remain before this Court, and as stated in the December 11, 2014 order attached to Dr. Bauerle’s motion, his insurers “will be liable for the judgments as determined by the appellate courts.” Accordingly, the language in the order indicating that Mrs. Green’s verdict would be further reduced by a specific amount was harmless error which has no bearing on the actual nature of the joint payment, and does not prejudice Bauerle in any way. *See* Rule 61, SCRCPC.

5. Finally, Dr. Bauerle asserts that he took the position in his response brief to the Greens’ Petition for Certiorari that the issue of whether, if it is determined that *any* allocation was appropriate, the funds should have been allocated equally was not raised below or in the Greens’ Petition for Rehearing. (Memorandum in Support of Motion, p. 5). This is not true. In his Return to Petition for Writ of Certiorari, he stated “[t]he issue was raised for the first time on appeal and specifically in the petition for rehearing.” (Petitioner-Resp’t Rtrn.to Pt. For Writ of Cert., p. 9).

In any case, the argument *was* preserved for review, and this Court has already granted certiorari to review this and other issues presented in the Greens' petition. Regarding requests for certiorari to the Court of Appeals, "[a] question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 226(d)(2), SCACR. The trial court's method of allocation has been a central issue in controversy raised to the trial court, argued **extensively** by both sides on appeal, and was very clearly raised in the Petitioners' Petition for Rehearing. The lack of any allocation of the settlement between the two Plaintiffs renders their proportionate rights to the funds equal. The existence of a simpler and more equitable alternative method of allocation is clearly a subsidiary question incumbent in any analysis of the equity and legality of the novel method which the trial court arbitrarily created.

Of note, it is significant that Bauerle did not request that the trial court allocate the settlement. (R. pp. 45-48). Accordingly, the Greens could not have made arguments regarding the trial court's reasons for making the unilateral decision to perform the allocation, nor could they make arguments against the court's unforeseeable decision to utilize a percentages analysis based on the jury verdicts until *after* the order created these issues. Nevertheless, in opposing Bauerle's motion, they repeatedly argued that setoff was not appropriate partially *because* the settlement was paid *equally* to multiple Plaintiffs. (R. pp. 49-69).¹ They clearly argued that "[n]either equity or legal precedent would allow this Court to deprive either of the Plaintiffs of their claim to the entire amount of the Settlement proceeds or any portion thereof." (R. p. 66). Finally, they argued that, not only was there no basis for determining that Bauerle was *entitled* to setoff, there was no way to *apply* one under the facts of the case. (R. pp. 78-79).

¹ Remarkably, the Greens' argument regarding the injustice of such a circular analysis was confirmed shortly thereafter by this Court in the Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015) opinion, which noted that the *amount* allocated to one claim or the other affects the Defendants' very entitlement to the setoff in the first place.

Following the trial court's order, which arbitrarily granted an allocation and created a novel analysis for performing same, the Greens argued in their Rule 59(e) motion that "[t]he settlement should be viewed by the court as belonging to both of the parties. Here, the court applies an ex post facto analysis to grant setoff, using the ratios between the jury verdict for Mr. Green and the jury verdict for Mrs. Green . . ." (R. p. 96). Further, they argued "[i]f the Court determines that [the] allocation between the parties is permitted based on the cases that allowed reallocation between causes of action, the only fair and reasonable way to do so would be to allocate one half of the settlement proceeds to each of the Plaintiffs and then for each of the Plaintiffs' portions of the settlement to be set off against his or her individual verdict." (R. pp. 96-97).

On Appeal, the Greens argued that, in the event that an allocation was appropriate, "[t]he evidence dictates that it should be allocated equally to each cause of action, and equity requires that it be allocated equally between the two Plaintiffs." (Appellant Br. of Resp't-Appellant, pp. 42-43). *As further evidence of the inequity of an unequal allocation*, the Greens further noted on appeal that they could have asserted their causes of action in separate lawsuits even if they had divorced after the settlement. (Appellant Br. of Resp't-Appellants, p. 43).

Of note, this Court issued its ruling in Riley v. Ford, 414 S.C. 185, 777 S.E.2d 824 (2015), during the pendency of the appeal of this case after all briefs had been filed and prior to oral arguments. The Greens submitted the case as a supplemental citation pursuant to Rule 208(b)(8), SCACR, stating that "[t]his Supreme Court opinion is pertinent to Respondents/Appellants' position that the Trial Court's allocation of the settlement proceeds among claims based on a percentages analysis is without merit, particularly where the settlement is unquestionably reasonable under the facts." (Nov. 3rd Correspondence). Bauerle consented to the consideration of the Riley case, specifically stating that both sides had relied on that case's now-overruled opinion

in their briefs. Accordingly, it was conceded that the issues of the permissibility and method of the allocation had been previously raised, argued by both sides, and preserved for review.

As set forth above, the Greens argued repeatedly below that they were equally entitled to the settlement, and that any allocation should be consistent with this clearly conceded point. As set forth in the Petition for Rehearing which was the first opportunity to address this argument in the context of the new Riley opinion, it was not the Plaintiffs' burden to demonstrate an equitable method of allocation. The issue of the impermissibility of the trial court's method of allocation was more than adequately preserved in the Petition For Rehearing, and Bauerle's suggestion that Plaintiffs did not reassert their suggestion for an alternative compromise methodology is a remarkable attempt to benefit from his admitted failure to meet his own burden of proof.

Based on the foregoing, the Greens respectfully request that this Court deny Dr. Bauerle's motion requesting that the briefing deadlines be held in abeyance and deny his requests for leave to raise additional arguments and supplement the Appendix.

Respectfully Submitted,



Cristin Uricchio
Uricchio Law Firm
147 Wappoo Creek Drive, Suite 205
Charleston, South Carolina 29412
(843)795-9300

O.Grady Query
Elizabeth Brooke Hurt
Michael W. Sautter
Query, Sautter, & Associates
147 Wappoo Creek Drive, Suite 202
Charleston, SC 29412
(843)795-9500

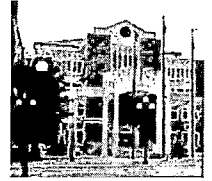
L.Morgan Martin
1121 Third Avenue
Conway, South Carolina 29526

Counsel for Respondents-Petitioners

Charleston, South Carolina
January 2, 2018



Horry County Fifteenth Judicial Circuit Public Index



Horry County Home Page [South Carolina Judicial Department Home Page](#) [SC.GOV Home Page](#)

Switch View

Randall M Green , plaintiff, et al VS Wayne B MD Bauerle , defendant, et al					
Case Number:	2011CP2607403	Court Agency:	Common Pleas	Filed Date:	09/01/2011
Case Type:	Common Pleas	Case Sub Type:	Medical Malpract 220	File Type:	Jury
Status:	Appeal	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Ended by Jury Trial	Disposition Date:	09/16/2013	Disposition Judge:	John, Steven H.
Original Source Doc:		Original Case #:		Restore Reason:	Reopen Case for Rule 40J
Judgment Number:	2011CP2607403	Court Roster:			

Case Parties	Judgments	Tax Map Information	Associated Cases	Actions	Financials		
For:	Green, Randall M	Against:	Bauerle, Wayne B MD	Judg. Amount:	\$665,789.47	Judgment Date:	09/16/2013
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	09/16/2013 - 10/18/2013
Notes:	None						
Judgment Details							
Claims Code	Detail Desc.	Detail Amount	Detail Date				
None							
For:	Green, Randall M	Against:	Wayne B Bauerle MD PC	Judg. Amount:	\$665,789.47	Judgment Date:	09/16/2013
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	09/16/2013 - 10/18/2013
Notes:	None						
Judgment Details							
Claims Code	Detail Desc.	Detail Amount	Detail Date				
None							
For:	Green, Ann	Against:	Bauerle, Wayne B MD	Judg. Amount:	\$159,480.53	Judgment Date:	09/16/2013
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	09/16/2013 - 10/18/2013
Notes:	None						
Judgment Details							
Claims Code	Detail Desc.	Detail Amount	Detail Date				
None							
For:	Green, Ann	Against:	Wayne B Bauerle MD PC	Judg. Amount:	\$159,480.53	Judgment Date:	09/16/2013
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	09/16/2013 - 10/18/2013
Notes:	None						
Judgment Details							
Claims Code	Detail Desc.	Detail Amount	Detail Date				
None							

Claims Code	Detail Desc.	Detail Amount	Detail Date
None			

RECEIVED

JAN 03 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2016-UP-052 (S.C. Ct. App. filed Feb. 3, 2016)

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

v.

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

CERTIFICATE OF SERVICE

I do hereby certify that I have served the Memorandum In Opposition to Motion to File Supplemental Appendix, For Leave To Argue Judicial Estoppel, Waiver, And/Or Release And To Hold Deadlines In Abeyance on Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. by depositing a true copy in the United States Mail, with first class postage prepaid, on January 2, 2018, addressed to his attorneys of record at the addresses below:

Andrew F. Lindeman
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202

John B. McCutcheon, Jr., Esquire
Lisa A. Thomas, Esquire
Post Office Box 1740
Conway, South Carolina 29528

Date: January 2, 2018

Cristh Uricchio