

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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JAN 12 2018

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.

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

The Petitioners-Respondents Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C. (hereafter collectively referred to as "Dr. Bauerle"), filed a motion for leave of Court to allow the filing of a Supplemental Appendix to include post-judgment orders and partial satisfactions of the judgments and to

allow Dr. Bauerle to brief a judicial estoppel, waiver and/or release arguments based on those post-judgment filings as part of his Respondent's Brief. The Respondents-Petitioners Randall and Ann Green ("Greens") have filed return in opposition to the motion.

In their lengthy return, the Greens primarily address the merits of the judicial estoppel, waiver and/or release arguments that Dr. Bauerle is seeking leave to brief based on post-judgment payments to the Greens and two partial satisfactions of the judgments entered for the Greens. Dr. Bauerle did not fully brief the issues with his motion because the motion was designed to first obtain leave of court to brief these issues. The motion merely provided the Court with sufficient background information to show that there are legitimate arguments to be made. The Greens' extensive arguments certainly show that these are legitimate issues and appropriate for the Court's consideration. However, these issues should not be decided on the basis of this motion but should rather be decided, after full briefing by the parties, as part of the Court's ultimate decision in this case. That is the purpose of Dr. Bauerle's motion -- to put these issues before the Court so that they be fully and appropriately brief and adjudicated.¹

¹ The Greens attach to their return a print-out from the Public Index for this litigation which reflects that the judgment amounts remain \$665,789.47 for Mr. Green and \$159,480.53 for Mrs. Green. It is disingenuous for them to argue that those remain the judgment amounts when they know -- and Dr. Bauerle has presented the Court proof of court orders and partial satisfactions -- that those judgments have been partially satisfied on two occasions by the Greens since initially entered in 2013. In addition, the Public Index is not always necessarily

Although they offer arguments contesting the merits of the judicial estoppel, waiver and/or release issues, the Greens really offer no legitimate reason for the Court to deny Dr. Bauerle's motion. They cite no prejudice other than a unsubstantiated claim of "further unnecessary delay." To the contrary, what Dr. Bauerle proposes will result in just the opposite for two reasons. First, the briefing of the case will not be greatly delayed. Dr. Bauerle is prepared to include the arguments on these issues in his Respondent's Brief which can be filed in short order after the Court rules on this motion. The Greens will then have the opportunity to respond in their reply brief, and it appears that they have already prepared the majority of their reply arguments as articulated in the return filed on the pending motion. Second and more importantly, if the Court does not grant this motion, the judicial estoppel, waiver and/or release arguments will not simply disappear. Instead, Dr. Bauerle will need to raise those issues in the Circuit Court by way of a Rule 60(b)(2) and Rule 60(b)(5) motion which will need to be filed and adjudicated upon remand to the Circuit Court. That decision and any

accurate. In fact, the Public Index includes disclaimer language that states "[n]either the County nor any agency, officer, elected official or employee of the County, warrants the accuracy, reliability or timeliness of any information on this web site" and further cautions that "[p]ortions of such information may be incorrect or not current." In addition, the Public Index warns that "nothing contained within this web site is an official record of the County or the elected officials responsible therefore. All official records of the County and the offices of countywide elected officials are on file in their respective offices and may be reviewed by the public at those offices." In short, the Public Index cannot be reviewed as accurately stating the judgment amounts currently entered and remaining unsatisfied.


subsequent appeals could delay the resolution for years. In reality, Dr. Bauerle is proposing a mechanism whereby those issues can be resolved by way of this appeal. Thus, Dr. Bauerle's motion is, in reality, attempting to prevent unnecessary delay.

Finally, it should be noted that in their return the Greens include arguments to dispute Dr. Bauerle's contention that the issue of an equal allocation of the \$2 million pre-trial settlement was not raised in the Greens' Petition for Rehearing filed in the Court of Appeals. That preservation issue is being asserted in Dr. Bauerle's Respondent's Brief and should be decided not by this motion but in the Court's eventual opinion. Suffice it to say, the parties' analysis of that question will be subservient to the Court's simply reading of the Petition for Rehearing which includes no mention of the equal allocation issue. In other words, the Court is very capable of reading the Petition for Rehearing for itself and deciding if that issue was even raised on rehearing.

In sum, Dr. Bauerle renews his request for leave of court to file the Supplemental Appendix and to be permitted to raise the judicial estoppel, waiver and/or release arguments in the Respondents' Brief rather than waiting until jurisdiction is returned to the Circuit Court to raise those issues.

Respectfully submitted,

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Columbia, South Carolina

January 9, 2018

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Petitioners-Respondents, does hereby certify that service of the **Reply 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** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 9th day of January 2018:

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