

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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JUN 07 2018

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

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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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**MOTION TO FILE RESPONDENTS' BRIEF OUT OF TIME**

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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"), respectfully move this Court to allow the filing of the Respondents' Brief of Petitioners-Respondents out of time.

The bases for this motion are as follows:

1. On November 20, 2017, the Respondents-Petitioners Randall M. Green and Ann Green served their Petitioner's Brief by mail, and it was received on November 27, 2017.

2. The undersigned counsel for Dr. Bauerle prepared and drafted the Respondents' Brief which was due thirty days later on December 20, 2017. While finalizing the brief on the evening of December 20, 2017, counsel realized that there was an important argument that needed to be brought before the Court based on post-appeal filings by the parties that resulted in a partial satisfaction of the judgments. In good faith, counsel filed a Motion to File Supplemental Appendix, for Leave to Argue Judicial Estoppel, Waiver, and/or Release and to Hold Deadlines in Abeyance. Counsel believed that the issues related to the post-appeal filings<sup>1</sup> could be first heard by this Court rather than after remand to the Circuit Court particularly given their impact on certain issues raised on appeal. Counsel also did not want to encounter a waiver argument after remand for the failure to first raise these issues before this Court on appeal. Finally, the undersigned counsel sincerely believed that judicial economy would be best served by having these issues decided as part of this appeal rather than on remand, and that was articulated in the motion and supporting memoranda.

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<sup>1</sup> These issues are briefed in the supporting memorandum filed with the Motion to File Supplemental Appendix, for Leave to Argue Judicial Estoppel, Waiver, and/or Release and to Hold Deadlines in Abeyance, and those arguments are incorporated herein.

3. The undersigned counsel's initial recognition and development of these issues occurred after business hours as he was finalizing the brief, and accordingly, counsel was unable to consult with opposing counsel prior to filing the motion. As a result, the undersigned counsel made the decision to proceed with preparing and filing the motion.

4. As an officer of the court, the undersigned represents that the motion was not filed for purposes of delay but rather for the reasons stated above. Based upon years of experience doing appellate work, the undersigned believed that was the best and most appropriate path to take to address what is a unique and extraordinary set of circumstances. The undersigned believes the issues raised by the motion are legitimate and are not frivolous, which should also be evident from the parties' briefing on the motion, and perhaps also by the length of time that the motion was under advisement by this Court.

5. As an officer of the court, the undersigned also represents that, at the point that the motion was prepared and filed on December 20, 2017, the draft of the Respondents' Brief was completed except for final proofreading and preparing the table of contents and table of authorities. In fact, the Respondents' Brief filed with this motion is the same brief as it existed on December 20, 2017, with the exception of the correction of several typographical errors, the change in counsel's address (which changed in January 2018), and the completion of the Table of Contents and

Table of Authorities. No material changes or additions were made to the draft as it existed on December 20, 2017.

6. In hindsight and after contemplating the Court's recent Order, the undersigned now recognizes that he could have possibly filed a conditional brief, but there is no provision in the Appellate Court Rules for such a brief and he also would not want to appear to be pre-judging or anticipating the Court's ruling on the motion. Further, given his prior experience, the undersigned honestly did not foresee that the Court would not hold the deadlines in abeyance during the pendency of the motion to supplement the record which was filed in good faith and believed to have considerable merit. In his experience, motions to supplement the record or to strike matters designated for the record during the briefing phase have routinely resulted in deadlines being held in abeyance by the appellate courts.

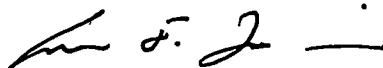
7. Given the complexity of this case on appeal and the importance of the issues both for precedence and for these parties, including Dr. Bauerle, the undersigned respectfully requests that the Court accept the Respondents' Brief out of time. There is a legitimate, valid and good faith basis for the actions taken by the undersigned counsel in proceeding with the motion rather than filing the brief on December 20, 2017. With all due respect, under these circumstances, Dr. Bauerle should not be disadvantaged by the procedural decisions made by the undersigned counsel and not be permitted to submit his brief on the merits. In addition, the

undersigned counsel humbly submits that the interests of justice and allowing this Court's decision to be based on the arguments of both sides also warrant the granting of this motion.

The undersigned counsel has consulted with opposing counsel, Grady Query, prior to the filing of this motion and has been advised that his clients will oppose the motion.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: 

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

Columbia, South Carolina

June 7, 2018

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**CERTIFICATE OF SERVICE**

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S.C. SUPREME COURT

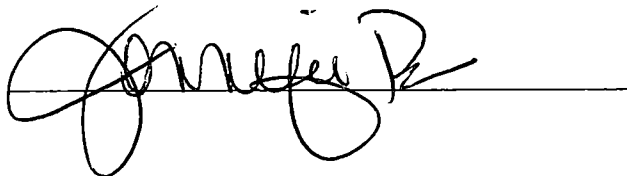
The undersigned employee of Lindemann, Davis & Hughes, P.A., attorneys for the Petitioners-Respondents, does hereby certify that service of the **Motion to File Out of Time** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 7th day of June 2018:

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