

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2013-001410  
Civil Action No. 2011-CP-32-02282

Tanya Bennett, as next friend of Mykelvion  
Thurmond, a minor, ..... Appellant,

v.

Lexington County Health Services District,  
Inc. d/b/a Lexington Medical Center, ..... Respondent.

**RESPONDENT'S MOTION TO STRIKE**

The Respondent, Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("LMC"), by and through its undersigned counsel and pursuant to Rules 209(b), 210(c), and 240, SCACR, moves to strike certain materials from the Appellant's Designation of Matter to Be Included in the Record on Appeal (the "Appellant's DOM"). This motion is made on the grounds that the Appellant's DOM proposes for inclusion in the Record on Appeal materials which were not presented to the circuit court and, therefore, may not properly be included in the Record on Appeal.

Rule 210(c), SCACR, provides, in pertinent part: "The Record shall not . . . include matter which was not presented to the lower court or tribunal." Rule 209(b), SCACR, provides, in pertinent part: "[T]he Designation may only propose to include

portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]” (brackets in original). The Appellant’s DOM proposes to include in the Record on Appeal “[p]ages of depositions from which excerpts were cited in the Briefs” and “[a]ny other document cited in Appellant’s Initial Briefs.” However, the Appellant’s Initial Brief cites a deposition and numerous other documents which were not presented to the circuit court.<sup>1</sup> Accordingly, those materials may not be included in the Record on Appeal and must be stricken from the Appellant’s DOM.

The particular materials to which LMC objects include, but are not necessarily limited to, the following:

- Deposition of Scott Augustine, M.D. (December 14, 2012) (cited on pages 4 and 20 of the Appellant’s Initial Brief);
- Delivery Record (cited on page 4 of the Appellant’s Initial Brief);
- American College of Obstetricians & Gynecologists, *Precis: Obstetrics*, 2d ed. (2000) (cited on pages 4 and 7 of the Appellant’s Initial Brief);
- Larry C. Gilstrap, III, et al., *Operative Obstetrics*, 2d Ed. (2002) (cited on pages 4-5 and 7 of the Appellant’s Initial Brief);
- Kenneth F. Swaiman, et al., *Pediatric Neurology: Principles & Practice*, 4th ed., Vol. 1 (2006) (cited on pages 5 and 7 of the Appellant’s Initial Brief);
- Joseph J. Volpe, *Neurology of the Newborn*, 5th Ed. (2008) (cited on pages 5 and 7 of the Appellant’s Initial Brief);
- Robert H. Allen. et al., “Temporary Erb-Duchenne Palsy Without Shoulder Dystocia or Traction to the Fetal Head,” *Obstetrics & Gynecology*, Vol. 105, No. 5, Part 2 (May 2005) (cited on pages 5 and 7 of the Appellant’s Initial Brief);

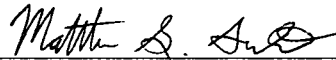
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<sup>1</sup> If the court so desires, LMC will provide copies of the transcript of the circuit court’s hearing on LMC’s Motion for Summary Judgment. The transcript indicates the materials which were presented to the circuit court.

- Edith D. Gurewitsch, et al., “Risk factors for brachial plexus injuries with and without shoulder dystocia,” *American Journal of Obstetrics & Gynecology* (2006) 194 (cited on pages 5 and 7 of the Appellant’s Initial Brief); and
- Edith Diamente Gurewitsch, “Optimizing Shoulder Dystocia Management to Prevent Birth Injury,” *Clinical Obstetrics & Gynecology*, Vol. 50, No. 3 (September 2007) (cited on pages 5, 6, and 7 of the Appellant’s Initial Brief).

This motion is not accompanied by a supporting memorandum because all applicable authorities are cited herein.

The undersigned states that, prior to filing this motion, he and/or his co-counsel communicated with opposing counsel in a good faith attempt to resolve the matters contained in the motion.



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February 21, 2014

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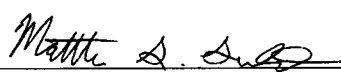
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**PROOF OF SERVICE**

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I, the undersigned attorney with Barnes, Alford, Stork & Johnson, LLP, do hereby state that I have on February 21, 2014, served a copy of the **RESPONDENT'S MOTION TO STRIKE, RESPONDENT'S INITIAL BRIEF, and RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** upon all other parties, through their attorney(s) of record, by depositing copies of the documents in the United States Mail, first class, sufficient postage prepaid, with the return address(es) clearly noted, addressed as follows:

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