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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY COURT OF COMMON PLEAS
Frank R. Addy, Jr., Circuit Court Judge

Civil Action No. 2011-CP-30-1137

Appellate Case No. 2014-002509

Pamela Neighbors and Carroll Neighbors .... Respondents,

v.

Byron A. Brown, MD and
Laurens County Obstetrics and Gynecology, LLC .... Appellants.

INITIAL BRIEF OF APPELLANTS

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ISSUE

Did the trial court err in admitting into evidence two agreements between Brown and the Medical Executive Committee of Laurens County Health Care System in violation of the peer review confidentiality statute and Rules 402 and 403?

STATEMENT OF THE CASE

Pamela and Carroll Neighbors filed this medical malpractice action in Laurens County on December 9, 2011 against Byron A. Brown, M.D. and his medical practice, Laurens County Obstetrics and Gynecology, LLC (LCOG), alleging negligence resulting in complications of gynecological surgery performed by Brown on November 24, 2009. Defendants filed an answer denying liability. The case was tried by jury before the Honorable Frank R. Addy, Jr. on July 21-25, 2014. The jury found for Plaintiffs and against Brown and LCOG and awarded Pamela Neighbors $500,000 in economic damages and $2,450,000 in noneconomic damages and awarded Carroll Neighbors $10,000 on his loss of consortium claim.[1] The jury did not find gross negligence and did not award punitive damages. The verdict was reduced in accordance with the South Carolina Noneconomic Damage Awards Act of 2005, S.C. Code §§ 15-32-200 *et seq.*, and on or about October 17, 2014, judgment was entered for Pamela Neighbors in the amount of $1,115,464.35 and for Carroll Neighbors in the amount of $10,000.[2]

Brown and LCOG timely moved for a new trial on the grounds, *inter alia*, that the trial court improperly admitted documents and allowed testimony related to Brown's peer review in violation of the peer review confidentiality statute, common law, and Rules 402 and 403, SCRE. On October 16, 2014, Judge Addy heard argument on Brown's and LCOG's post-trial motions and denied them

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[1] Verdict, pp. 3-4, ROA __.

[2] Order Entering Judgment, pp. 1-2, ROA __.

all. On October 22, 2014, Brown and LCOG received written notice of the entry of Judge Addy's order denying their post-trial motions and entering judgment against them. On November 18, 2014, Brown and LCOG timely served a Notice of Appeal.

SUMMARY OF THE FACTS

Pamela Neighbors saw Dr. Brown in October 2009 with complaints of worsening abdominal pain and difficulty urinating.[3] A CT scan showed a large fibroid uterus and left ovarian cyst.[4] Brown examined Neighbors and found that she had a cystocele (anterior prolapse—bladder bulging into the vagina) descending to the hymenal ring, a rectocele (posterior prolapse—rectum bulging into the vagina) descending to the hymenal ring, and cervix descending to the hymenal ring (uterine prolapse).[5] Brown recommended and Neighbors consented to a total abdominal hysterectomy, anterior and posterior repair (A&P), and placement of a transobdurator sling.[6] During the surgery, Brown performed a cystoscopy to check the bladder and ureters and found no injury.[7]

Following surgery, Neighbors experienced abdominal pain, bladder spasms, and urine leaking from her vagina.[8] She saw Brown in his office on December 2, 2009 and complained that she was leaking urine. She reported to Brown that 23 years earlier she had a problem with healing of a surgical wound due to an "allergy" to suture. Brown suspected that she had formed a fistula that

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[3] Def. Ex. 3, p. 8, ROA __.

[4] *Id.* at 1-3, ROA __.

[5] *Id.* at 9, ROA __.

[6] *Id.* at 8-9, 13, 21-25, ROA __.

[7] *Id.* at 24, ROA __.

[8] *Id.* at 29, 34, ROA __.

was causing the urine leakage.[9] Brown referred her to a urologist, Dr. Mayher, who diagnosed her with a possible vesicovaginal fistula, which was confirmed by CT cystogram.[10] On January 5, 2010, Mayher attempted to surgically repair the fistula.[11] After her discharge from the hospital, Neighbors continued to experience bladder spasms and leaking from her vagina, so Mayher referred her to MUSC.[12]

On March 2, 2010, Neighbors saw urologist Dr. Rovner at MUSC. A CT scan confirmed that she still had a vesicovaginal fistula. On March 15, Rovner performed surgery to repair the fistula. Following this surgery, Neighbors complained of pelvic pain and pain with intercourse. On November 15, 2010, Rovner performed a procedure to remove a portion of the mesh placed by Brown. When Neighbors continued to experience pelvic pain, pain with intercourse, and mesh extrusion, Rovner performed another surgery on March 21, 2011 to remove more mesh and the sling.[13]

On December 14, 2009, Dr. Stribling, then Chief of Surgery at Laurens County Hospital, delivered a letter to Dr. Weaver, Chief of Staff, expressing concerns about recent complications resulting from surgeries performed by Brown.[14] Stribling did not refer to Neighbors' case in the letter. Stribling wrote:

> As Chief of Surgery, I need to make you aware of a situation that is of great concern to me.

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[9] *Id.* at 34, ROA __.

[10] *Id.* at 43, 46, ROA __.

[11] *Id.* at 49, ROA __.

[12] *Id.* at 52-53, 56, 58, ROA __.

[13] Pl. Ex. 92, ROA __.

[14] Pl. Ex. 36 (Identification only), ROA __.

I worry greatly about what appears to be a continuing pattern of surgical misadventure by Dr. Byron Brown.

To my knowledge, within the last year Dr. Brown has damaged a ureter on 3 separate occasions. He also perforated a colon (twice in the same patient) which lead to tremendous complications.

The first damaged ureter I recall presented with an obstruction of the ureter and I was able to coax a ureteral stent past the damaged area. It is unusual to be able to pass a stent in that manner, but with luck it did go up.

The second case was not so lucky. With great difficulty I passed a stent up what appeared to be the ureter, but the patient kept leaking urine from the vagina. I therefore recommended that she go to MUSC because of the reconstruction that would be needed.

The last case was this past Friday. This was another cut ureter that required a ureteral reimplant into the bladder.

The case with the perforated colon can be better described by Dr. Watkins who repaired that.

The reason this is such a worrisome pattern is that a cut ureter is a fearsome complication. It rarely heals well; often requiring revisions and can result in reflux, scarring, kidney infection/damage, and stone formation. Needless to say this is a terrible injury and has huge implications to the urologist who has to repair the damage.

In nearly 20 years of practice in NC, among multiple gynecologists and numerous general surgeons I had to repair exactly ZERO damaged ureters. This is not an insignificant statement; it is a telling revelation of how careful surgeons and gynecologists are operating in the vicinity of the ureter. They realize what a fearsome injury it is.

Because of what appears to me to [be] a worrisome pattern of complications, I will, as Chief of Surgery, respectfully ask Dr. Brown to temporarily relinquish his privileges to doing all pelvic surgery until the cases can be reviewed by an outside reviewer. If Dr. Brown chooses not to do this I will request an emergency meeting of the MEC [Medical Executive Committee] to decide whether official action should be considered regarding his operating privileges.[15]

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[15] *Id.* Stribling was mistaken when he stated that Brown had injured three ureters. Stribling later admitted that Brown's partner had caused one of the three ureteral injuries mentioned in the letter.

Stribling's letter initiated a peer review process at Laurens County Hospital. Stribling met with Brown to discuss his concerns and asked Brown to temporarily relinquish some of his surgical privileges pending the outcome of the peer review. Soon thereafter, Brown wrote a letter to Weaver stating, "I would like to temporarily relinquish privileges to perform hysterectomies, anterior and posterior repairs, and urethral slings until the beginning of 2010."[16] On February 17, 2010, Brown and the Medical Executive Committee (MEC) of Laurens County Health Care System (LCHCS) entered into an Agreement whereby Brown voluntarily resigned certain surgical privileges and retained others.[17] The Agreement provided as follows (in pertinent part):

(1) Brown would not, without first obtaining written permission from the MEC, schedule any surgical procedures at LCHCS, except for C-Sections, Post-Partum Endometrial Ablations and Dilation & Curettages;

(2) Brown would take a "leave of absence" from his positions as Chair of the Peer Review Committee and Chair of the Department of Obstetrics/Pediatrics until such time as the MEC consented in writing to his return to these positions; and

(3) Brown would participate in "the MEC's ongoing professional review activity" and would "meet in person with other members of the LCHCS medical staff in order to respond/discuss any areas of concern regarding his clinical proficiency."[18]

After the parties executed the Agreement, the MEC continued the "professional review activity" described in the Agreement. However, before the MEC "t[ook] any action as provided for under Section 10.5 of the Medical Staff Bylaws, the Parties reached an agreement to resolve the

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[16] Pl. Ex. 16, ROA __.

[17] Pl. Ex. 17, ROA __.

[18] *Id.*

issues giving rise to the professional review activity," which was memorialized in an Addendum signed on May 21, 2010.[19] The Addendum provided as follows (in pertinent part):

(1) Brown "voluntarily resigned" the clinical privileges listed in Attachment 1 to the Addendum (an extensive list of GYN surgical privileges);

(2) Brown was not entitled to the Fair Hearing Procedures provided for in the Medical Staff Bylaws; and

(3) Brown and LCHCS (through its MEC) agreed that "the matters giving rise to this Addendum [were] reportable to the National Practitioner Data Bank ("Data Bank")...and to the South Carolina Board of Medical Examiners..."[20]

At trial, over Defendants' objections, Neighbors sought to admit the two agreements into evidence. Neighbors argued that the Agreement and the Addendum were relevant and admissible because the fact that Brown's surgical privileges were "suspended" pending a peer review process was relevant to his "credibility" as an "expert witness."[21] Defendants argued that the two agreements were created and executed as a part of the peer review process and were only provisional agreements, not the final outcome of the peer review, and thus were inadmissible under the confidentiality statute (S.C. Code § 40-71-20) and *McGee v. Bruce Hospital System*.[22] The court

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[19] Pl. Ex. 18, p. 1, ROA __.

[20] *Id.*

[21] Tr. 400:15-403:8, ROA __.

[22] Tr., pp. 395-98, ROA __. The full citation is *McGee v. Bruce Hosp. Sys.*, 312 S.C. 58, 439 S.E.2d 257 (1993).

admitted both agreements (after redacting portions of them), ruling that the agreements were relevant to Brown's "qualifications" and "competency" to give expert opinion testimony.[23]

ARGUMENT

The trial court erred in admitting into evidence the two agreements between Brown and the Medical Executive Committee of Laurens County Health Care System in violation of the peer review confidentiality statute and Rules 402 and 403.

The "proceedings and all data and information acquired by" a hospital peer review committee are "confidential" and "not subject to discovery, subpoena, or *introduction into evidence in any civil action* except upon appeal from the committee action" (the "confidentiality statute").[24] "The overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care."[25] All documents generated or acquired by a hospital peer review committee are protected under this law.[26]

Rule 402 of the South Carolina Rules of Evidence provides, "Evidence which is not relevant is not admissible." Rule 403 of the South Carolina Rules of Evidence provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..."

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[23] Tr., pp. 400-03, 414-15, ROA __.

[24] S.C. Code § 40-71-20 (emphasis added). This section applies to hospital peer review proceedings and documents pertaining to incidents predating June 26, 2012, the effective date of 2012 South Carolina Laws Act 275 (H.B. 4008), which amended section 40-71-20 and added section 44-7-392 to govern the hospital peer review process.

[25] *McGee v. Bruce Hosp. Sys.*, 312 S.C. 58, 61, 439 S.E.2d 257, 259 (1993).

[26] *McGee*, 312 S.C. at 62, 439 S.E.2d at 260.

First, the Agreement and Addendum fall within the ambit of the confidentiality statute and were therefore inadmissible because they were generated during a peer review process of the Medical Executive Committee (MEC) of Laurens County Health Care System (LCHCS) initiated by Dr. Stribling when he sent his letter to Dr. Weaver in December 2009. Regardless of how the plaintiffs obtained these agreements during the course of discovery[27], the confidentiality statute dictates that they are inadmissible in civil litigation.

Second, the Agreement and Addendum were irrelevant and should have been excluded under Rule 402. The surgical cases Stribling cited in his letter did not include the surgery Brown performed on Pamela Neighbors. Her case was not the reason for, or the subject of, the peer review. In his letter Stribling mentioned three cases involving a cut ureter and one case involving a perforated colon—complications which Neighbors did not have.[28] Citing *Ward v. Epting*[29], Plaintiffs argued that the agreements, which both stipulated that Brown voluntarily resigned certain surgical privileges, were relevant to the issue of Brown's "credibility" as an "expert witness."[30] Defendants contended that Brown was *not* an expert witness and did not testify as such. Ultimately, Judge Addy ruled that the agreements were relevant to the issue of Brown's "qualifications" or

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[27] Plaintiffs' counsel obtained the agreements from the Richland County court, where they had been filed in connection with motions in a civil case Brown filed against LCHCS and several individuals for tortious interference and civil conspiracy after the hospital refused to release information regarding Brown's peer review to several hospitals where Brown had applied for privileges (thus effectively preventing him from obtaining employment elsewhere).

[28] Pl. Ex. 36 (Identification only), ROA __.

[29] 290 S.C. 547, 556, 351 S.E.2d 867, 872 (Ct. App. 1986) ("Where a physician sued for malpractice testifies as an expert, evidence as to his age, practice, and like matters going to his qualifications as an expert is admissible.")

[30] Tr., pp. 45-46, 400, ROA __.

"competency" (not credibility) to render expert opinion testimony.[31] This ruling was incorrect because Brown testified as a fact witness, not an expert witness. Brown, now living outside the United States, did not appear for trial. Plaintiffs played for the jury the majority of Brown's videotaped discovery deposition.[32] Brown was not qualified by the defense as an expert in gynecology and did not render expert opinions.

Third, even if the agreements were relevant to the issue of Brown's qualifications, they should have been excluded under Rule 403 because their probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. The peer review had nothing to do with Pamela Neighbors' case. Yet Plaintiffs, by introducing these documents, gave the jury the false impression that the peer review and the voluntary resignation of surgical privileges which followed had some connection with Pamela Neighbors' case. These agreements were highly prejudicial (and unfairly so) because one or both of them provided that (1) Brown would not be allowed to perform the type of surgical procedures which he performed on Pamela Neighbors (hysterectomy, anterior and posterior repair, and transobdurator sling)[33], (2) Brown would take a "leave of absence from his positions as Chair of the Peer Review Committee and Chair of the Department of Obstetrics/Pediatrics until such time as the MEC provides written consent to his return to these positions"[34]—which sounds punitive—and (3) Brown would be reported to the National Practitioner Data Bank and to the South Carolina Board of Medical Examiners—from which one could infer (incorrectly) that Brown's "peers" had determined that he

[31] Tr., pp. 400-03, ROA __.

[32] Court's Exhibit 14 identifies the portions of the deposition that were played for the jury.

[33] Pl. Ex. 17, p. 1, ROA __; Pl. Ex. 18, pp. 1, 4-5, ROA __.

[34] Pl. Ex. 17, p. 1, ROA __.

had failed to meet the standard of care in performing certain surgical procedures and/or had negligently injured patients.[35]

Plaintiffs' counsel tried to amplify the impact of these agreements by emphasizing them while cross-examining Defendants' expert, Dr. Taylor, and in closing argument. Mr. Wright examined Dr. Taylor as follows:

> Q. Second document, Doctor, is an agreement…And in addition to Dr. Brown only being allowed [to do] C-Sections, post-partum endometrial ablations and dilation and curettages. That is all he could [do] as a gynecologist at Laurens County Hospital, right?
>
> A. According to that agreement, yes.
>
> Q. That is a pretty binding agreement?
>
> A. Yes.
>
> Q. And, Dr. Brown, just happened at the same time to take a leave of absence from his position of the Chair of the Peer Review Committee and Chair of the Department of Obstetrics/Pediatrics, correct?
>
> A. Correct.
>
> Q. And, Doctor, would you agree with me that the hospital requiring a physician, a surgeon, to vacate his position as Chair of a Peer Review Committee and a Chair of the Department of Obstetrics and Pediatrics is a drastic step for that hospital to take?
>
> Mr. Snyder: [Objection]
>
> …
>
> The Court: [Overruled]
>
> …
>
> Q. Would you agree that if the hospital required Dr. Brown to take a leave of absence from his position as Chair of Peer Review and Chair of Department of Obstetrics, that would be a drastic move on the part of the hospital?

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[35] Pl. Ex. 18, p. 2, ROA __.

A. I don't know about the word, drastic. Last time we did something like this it was a substance abuse issue in our hospital. It is a[n] unusual, it is not a common occurrence, no.

Q. That was a bad choice of words, you are exactly right. But it is a serious action?

A. Correct.

Q. ...Now, in addition to that, that is on the 17th of February, there is another agreement on May the 21st, 2010. Do you recall that?

A. I do not.

Q. And this one says that the hospital and Dr. Brown agree that the matters being advised are reportable to the National Data Bank and South Carolina Board of Medical Examiners. Are you familiar with the National Practitioner Data Bank?

A. Yes, sir.

Q. What type makes National Practitioner's Data Bank?

A. Relinquishment of privileges.

Q. While under investigation?

A. Correct.

Q. It also says it is reportable to the South Carolina Board of Medical Examiners. Do you see that?

A. I do.

Q. And any adverse action has to be reported by law to the South Carolina Board of Medical Examiners, correct?

A. Correct.[36]

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[36] Tr., pp. 579-81, ROA __.

At the conclusion of Dr. Taylor's testimony, Defendants' counsel moved for mistrial due to the prejudice of the agreements, especially the language referring to the National Practitioner Data Bank and the South Carolina Board of Medical Examiners. The motion was denied.[37]

At the end of his closing argument, Mr. Wright returned to the agreements and expressly invited the jury to draw erroneous conclusions from them. He argued:

> Three weeks after surgery on Ms. Neighbors the hospital required Dr. Brown to give up his privileges of hysterectomy, [a]nterior/posterior repair and urethral slings. The question to you, ladies and gentlemen, if somebody with medical authority thinks he was practicing out of line. On May the 21st the hospital entered into an agreement with Dr. Brown where Dr. Brown had to give up his privileges and right to even perform surgeries in the hospital. All of these surgeries [listed in Appendix 1 to the Addendum] you will have a chance to look at. All of those were exactly what he did on, everything, surgery he did on Ms. Neighbors is included in surgeries that he could no longer perform. Do you think somebody with authority felt like he was operating—
>
> MR. SNYDER: Your Honor, I object. That was a resignation of privileges, the documents did not say that they enforced [sic]. He is arguing things that are not in evidence.
>
> THE COURT: You want to be heard on that, Mr. Wright? I have stopped the clock.
>
> MR. WRIGHT: You and I and Mr. Snyder know exactly what went on and I can draw a reasonable inference.
>
> MR. SNYDER: Objection—
>
> THE COURT: Here is the way we will handle this. It has been argued by both sides that he was various things, it is introduced for purposes for qualifications of the Doctor. But it is in evidence and I will allow it, you may proceed, Mr. Wright.
>
> . . .
>
> MR. WRIGHT: And Dr. Brown's conduct was to be reported to the National Practitioner Data Bank which is the National Clearinghouse set up by the Federal Government to handle problems with patients. Also it would be reported to the

[37] Tr., pp. 601-08.

> South Carolina Board of Medical Examiners. Is that practicing out of line? Is that evidence of practicing out of line?[38]

The use Plaintiffs' counsel made of the agreements in his argument was extremely prejudicial, confusing, and misleading. Mr. Wright insinuated that "somebody with medical authority" at the hospital found fault with Brown in a peer review process having something to do with Pamela Neighbors' case and as a result took away his surgical privileges and his positions of responsibility within the hospital. The peer review had nothing to do with Neighbors' case, and there is no evidence that the peer review was completed or that any peer reviewer found that Brown had departed from the standard of care and caused injury to patients. Moreover, even if the hospital's peer review committee had made a determination or taken action adverse to Brown, the outcome of the peer review of other (nonparty) patients' cases could not be admitted to prove negligence in Neighbors' case.[39] Mr. Wright also erroneously argued that Brown's *conduct* (i.e. negligence/malpractice) was to be reported to the National Practitioner Data Bank and the medical board. In fact, there is no evidence in the record what information the parties agreed was "reportable" to the Data Bank and the medical board. The admission of these agreements was not harmless error; the prejudicial effect was devastating and insurmountable.

CONCLUSION

Because the trial court erred in admitting the two agreements and this error deprived Defendants of a fair trial, this Court should grant Brown and LCOG a new trial.

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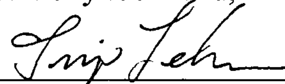
[38] Tr., pp. 654-56, ROA __.

[39] In *Hollman v. Woolfson*, our Supreme Court held that evidence relating to a defendant doctor's treatment of nonparty patients is *irrelevant* to a plaintiff's medical malpractice claims in that it cannot be used to show that the defendant breached the standard of care in rendering medical care to the plaintiff. 384 S.C. 571, 579, 683 S.E.2d 495, 499 (2009).

Respectfully submitted,



May 6, 2015

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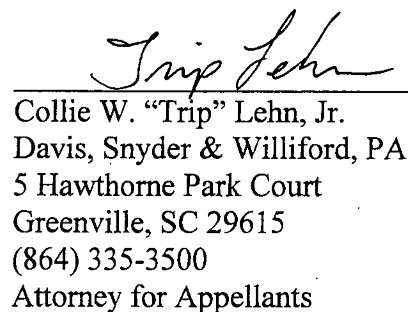
PROOF OF SERVICE

I certify that I have served Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal on Pamela and Carroll Neighbors by depositing a copy of same in the United States Mail, postage prepaid, on May 6, 2015, addressed to their attorney of record, Joseph G. Wright, III, Post Office Drawer 1778, Anderson, South Carolina 29622-1778.

May 6, 2015



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May 6, 2015

The Honorable Jenny Abbott Kitchings
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Re: Pamela Neighbors v. Byron A. Brown
Civil Action No. 2011-CP-30-1137
Appellate Case No. 2014-002509

Dear Ms. Kitchings:

Enclosed for filing is the original and one copy of the Initial Brief of Appellants, Designation of Matter to be Included in the Record on Appeal, and Proof of Service. Please return a clocked-in copy to me. Thank you for your assistance.

Sincerely,

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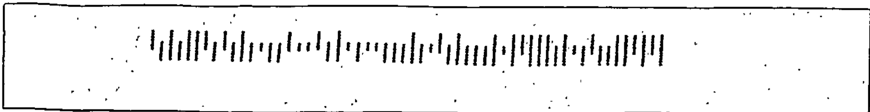
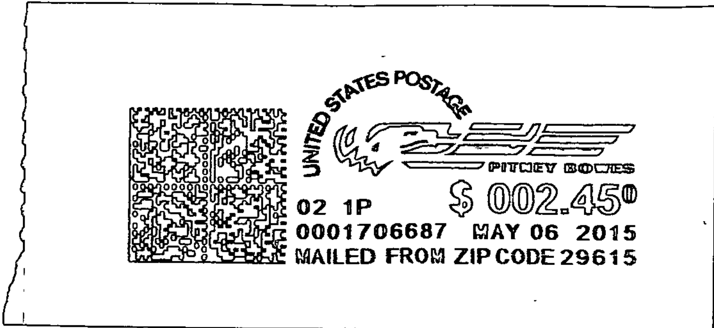
Enclosures
cc: Joseph G. Wright, III (w/encl.)





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