

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
S. Jackson Kimball, Special Circuit Court Judge

AUG 15 2016

SC Court of Appeals

Case No. 2014-CP-46-0508

Patricia A. Craig, Appellant,

v.

E. Earl Jenkins, Jr., M.D. also known as
Everett Earl Jenkins, Jr., M.D.,
Amisub of South Carolina, Inc. d/b/a
Piedmont Medical Center, and
York Pathology Associates, LLC, Respondents.

**REPLY TO APPELLANT'S RETURN TO
MOTION TO STRIKE MATERIALS DESIGNATED BY APPELLANT
FOR INCLUSION IN THE RECORD ON APPEAL**

The Respondents moved to strike materials that the Appellant had designated for inclusion in the Record on Appeal which are not included in the lower court record and were not otherwise submitted to the lower court judge. Specifically, the

Respondents maintain that the following deposition transcript and other matters that have been designated by the Appellant are *not* filed in the lower court record nor were presented to Judge S. Jackson Kimball at the motion hearing held on August 13, 2015:

- (1) Deposition of Patricia Craig
- (2) Plaintiff's Discovery Requests and Defendants' Responses
- (3) Medical records for Patricia Craig, with the exception of the following four records:
 - (a) Fine Needle Aspiration Report (2 pages), found as Exhibit 4 of Kovacs Deposition
 - (b) Dr. Jones' Report-Pathologic Diagnosis (2 pages), found as Exhibit 2 of Defendants York and Jenkins' Memorandum in Support of Summary Judgment
 - (c) Intraoperative Pathology Report a/k/a Surgical Pathology Report (3 pages), found as Exhibit 5 of Defendants York and Jenkins' Memorandum in Support of Summary Judgment
 - (d) Dr. Jones' Operative Report (3 pages), found as Exhibit 5 of Kovacs Deposition and Exhibit 6 of Defendants York and Jenkins' Memorandum in Support of Summary Judgment

In her return, the Appellant concedes that none of the challenged documents were filed in the lower court record or submitted to Judge S. Jackson Kimball at the summary judgment motion hearing. Nonetheless, the Appellant still argues that three excerpts from the Deposition of Patricia Craig should be included in the Record on

Appeal – not because those excerpts were actually filed with the lower court but because they were cited in a memorandum of law that was filed.¹ The Appellant makes a similar argument with respect to four interrogatory responses from two separate discovery documents. The actual discovery documents were never filed with the lower court, as the Appellant concedes, but there is a reference to the four interrogatory responses in the Appellant's memorandum of law that was filed.

The Respondents submit that the citation to deposition testimony and interrogatory responses within the contents of a memorandum of law is insufficient under Rule 210(c), SCACR, to allow those deposition excerpts or discovery documents, which were never actually filed or submitted, to then be included in the Record on Appeal and be treated as evidence on appeal. The fundamental purpose of Rule 210(c), SCACR, is to ensure that the appellate court considers the same record as the lower court. *See, Martin v. Rapid Plumbing*, 369 S.C. 278, 631 S.E.2d 547, 553 (Ct. App. 2006) (appellate court's review is restricted to evidence considered by the lower tribunal in reaching its decision); *Kaiser Aluminum and Chemical Corp. v. Westinghouse Electric Corp.*, 981 F.2d 136, 140 (4th Cir. 1992) ("[i]t is well established that affidavits and exhibits not before the court in making its decision are not to be considered on appeal"). Thus, the deposition excerpts and discovery documents should actually be included in the record rather than merely

¹ Only one of the three excerpts is even cited verbatim in the memorandum of law.

cited in written or oral arguments in order for that evidence to be considered on appeal.

Finally, as for the Appellant's generic, non-specific designation of "Medical records of Patricia Craig" in her Amended Designation, the Appellant concedes that she "did not submit the medical records into the record of this case." That concession should result in the exclusion of any medical records, other than the four records (consisting of ten pages total) that actually appear in the lower court's file. *See, Patane Aff.*, ¶ 5. The Appellant nonetheless asks the Court to allow the inclusion of "25 pages of Craig's medical records" – none of which are identified with any specificity – because Dr. Gabor Kovacs states in his affidavit that he reviewed "medical records consisting of approximately 25 pages." The Appellant claims that records were attached to the Kovacs affidavit and filed with the Notice of Intent to File Suit, but there is no indication of that in the affidavit itself or in the Notice of Intent to File Suit or in the lower court record per the Patane affidavit. In his affidavit, Ryan Patane, after a thorough review of the lower court file, has attested that only ten pages of medical records are in the record. *See, Patane Aff.*, ¶ 5. Accordingly, the medical records to be considered on appeal from the summary judgment order should be the ten pages of records actually submitted to Judge Kimball.

In conclusion, the Respondents renew their request that this Court issue an order directing that the deposition transcript of Patricia Craig, the Plaintiff's Discovery Requests and Defendants' Responses, and any "medical records" (with the exception of the four records that are in the lower court record) be excluded from the Record on Appeal when it is prepared by the Appellant following submission of initial briefs.

Respectfully submitted,

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August 11, 2016

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents E. Earl Jenkins, Jr., M.D. and York Pathology Associates, LLC, does hereby certify that service of the **Reply to Appellant's Return to Motion to Strike Materials Designated by Appellant for Inclusion in the Record on Appeal** 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 11th day of August 2016:

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
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RE: Patricia A. Craig v. E. Earl Jenkins, Jr., MD also known as Everett Earl Jenkins, Jr., MD, Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center, and York Pathology Associates, LLC
Appellate Case Number: 2015-002174
Civil Action Number: 2014-CP-46-0508
Claim Numbers: CB137729M and CB137730M
Our File Number: 22.9851

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the **Reply to Appellant's Return to Motion to Strike Materials Designated by Appellant for Inclusion in the Record on Appeal** with regard to the above referenced matter. Please file the original and return a clocked-in copy to me in the enclosed envelope. By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

The Honorable Jenny Abbott Kitchings
August 11, 2016
Page Two

cc: (w/ Enclosure)

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