

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
In The Court of Common Pleas

Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-001525

Trial Court Case No. 2014-CP-39-350

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JAN 30 2017

SC Court of Appeals

Alliance Biomedical Research, LLC Appellant,

v.

Judith H. Parham, Personal Representative of
the Estate of David Michael Parham, deceased
and Parham & Smith, LLC Respondents.

REPLY TO APPELLANT'S RETURN TO RESPONDENTS' MOTION TO EXCLUDE
MATTER DESIGNATED TO BE INCLUDED IN THE RECORD ON APPEAL

M. Dawes Cooke, Esq.
Jeffrey M. Bogdan, Esq.
Barnwell Whaley Patterson & Helms, LLC
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700
Attorneys for Respondent

January 27, 2017
Charleston, South Carolina

Other Counsel of Record:
F. Milton Mann, Jr.
151 Harold Fleming Court
Spartanburg, SC 29303
(864) 680-5079
Attorney for Appellant

AND NOW COMES Respondents Judith H. Parham, Personal Representative of the Estate of David Michael Parham, deceased and Parham & Smith, LLC and files the following Reply to Appellant's Return to Respondents' Motion to Exclude Matter Designated to be Included in the Record on Appeal.

Respondents requested that the Court exclude the following matter, as designated by the Appellant, from the Record on Appeal because they were not presented to the lower court:

6. Deposition of Steven Clemons taken on March 20, 2012 in *John L. Bruce v. Greenville Pharmaceutical Research, Inc. and Alliance Biomedical Group*, case number 2011-CP-23-6967
7. Letter from Mike Parham to Ashby Davis dated April 16, 2012 in *John L. Bruce v. Greenville Pharmaceutical Research, Inc. and Alliance Biomedical Group*, case number 2011-CP-23-6967
13. Appellant's Answers to Interrogatories dated April 17, 2015
14. Appellant's Responses to Requests for Production dated April 17, 2015
15. Deposition transcript of Gregory J. Feldman, M.D., taken on December 16, 2015
18. Appellant's Amended Responses to Respondents' Requests for Production dated March 9, 2016
27. Disc containing Appellant's bate-stamped documents ABR0001-ABR1282

In its Return, Appellant's chief argument is that the materials should be included in the Record on Appeal, not because they were presented to the lower court, but because Respondents did not timely object to Appellant's desire to include them in the Record.

It is axiomatic that "[t]he Record shall not, however, include matter which was not presented to the lower court of tribunal." Rule 210(c), SCACR. The rules do not provide a time limit whereby a party must object to or challenge materials designated for

inclusion in the Record on Appeal. Regardless of the timing of any objection or motion, the Record on Appeal still cannot include matter which was not presented to the lower court. Appellant should have known this and should not have incurred the cost of submitting materials to the printer for inclusion in the Record on Appeal that were not presented to the lower court. The materials cited above were not presented to the lower court and should not be included in the Record on Appeal.

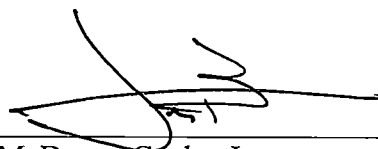
As to the specific items listed above, Appellant argues that items number 6 and 7 were presented to the lower court by way of Appellant's counsel's statement at the hearing that "[all documents are in the record from the underlying case." As stated in Respondents' initial Motion, Appellant takes this comment out of context. The comment was made by Appellant's counsel as justification for Appellant's failure to conduct any discovery in this case not to argue that certain materials were before the lower court. Items 6 and 7 were never presented to the lower court and should not be included in the Record on Appeal. Appellant further argues that these items should be included in the Record on Appeal because they were referenced in Appellant's Second Amended Responses to Respondents' Request for Production, which written responses were presented to the lower court. However, while items 6 and 7 may have been referenced in those written responses, the documents themselves were not presented to the lower court and thus should not be included in the Record on Appeal.

Appellant next argues that item 15 (which it erroneously refers to as item 11) should be fully included in the Record on Appeal because Respondents also designated it for inclusion. Such argument does not obviate the rule that only materials presented to the lower court can be included in the Record on Appeal. While excerpts from the deposition transcript of Dr. Feldman were presented to the lower court, the entire transcript was not. The Record on Appeal should include only those portions of the transcript which were presented to the lower court.

Finally, while Appellant makes no specific arguments as to items 13, 14, 18, or 27, it argues that all of the materials that Respondents seek to exclude should be included because they were produced in discovery “and are central to the litigation, showing there are triable issues of fact.” While Respondents disagree that these materials include evidence that would allow this case to survive summary judgment, the fact is that they were not presented to the lower court. Had Appellant felt that something within these materials would have defeated Respondents’ Motion for Summary Judgment, it should have submitted any such materials to the lower court and, then, those materials could have been included in the Record on Appeal.

Appellant seeks to burden the Court with an unnecessarily large Record on Appeal, which would include two complete deposition transcripts and 1,282 pages of production, none of which was presented to the lower court. If Appellant’s concerns were rooted in saving costs, it should not have wrongfully designated these materials in the first place.

For the foregoing reasons, Respondents respectfully request that the Court grant this Motion to Exclude Matter Designated to be Included in the Record on Appeal by ordering that matters numbered 6, 7, 13, 14, 18, and 27 be excluded in their entirety and item 15 limited to only those portions that were actually presented to the lower court.



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Dated: January 27, 2017
Charleston, South Carolina

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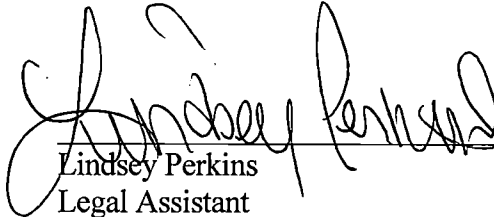
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PROOF OF SERVICE

I certify that I have served the Respondents' Motion to Exclude Matter Designated to be Included in the Record on Appeal on Appellant Alliance Biomedical Research, LLC by depositing a copy of it in the United States Mail, postage prepaid, on January 21, 2017, addressed to its counsel of record F. Milton Mann, Jr., Esquire at address 151 Harold Fleming Court, Spartanburg, SC 29303.


Lindsey Perkins
Legal Assistant



Jeffrey M. Bogdan, Esquire
jbogdan@barnwell-whaley.com

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SC Court of Appeals

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29202

RE: Alliance Biomedical Research, LLC vs. Judith H. Parham, Personal Representative of the Estate of David Michael Parham, deceased and Parham & Smith, LLC
Appellate Case No.: 2016-001525
Trial Court Case No.: 2014-CP-39-350
BWPH File No.: 59.020

Dear Ms. Kitchings,

Enclosed please find an original and six (6) copies of Respondents' Reply to Appellant's Return to Respondents' Motion to Exclude Matter Designated to be Included in the Record on Appeal. Upon filing the original, please return one (1) clocked copy to me in the envelope enclosed for your convenience. Please let me know if you have any questions or concerns.

With kind regards,

Yours truly,

Jeffrey M. Bogdan

JMB/lap
Enclosures
cc: Milton F. Mann, Esquire (w/enclosure)

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REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE