THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No.: 2019-CP-21--00777

Appellate Case No.: 2019-002114

Dr. Gregory A. May,.....Respondent,

v.

Advanced Cardiology Consultants, P.A., Dr. Lew A. Rowe,
And Theresa Rowe,..... Appellants.

INITIAL BRIEF OF RESPONDENT

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1. **DID THE TRIAL COURT PROPERLY FIND THE RESTRICTIVE COVENANT OVERLY BROAD AND UNENFORCEABLE?**

STATEMENT OF THE CASE

The Respondent, Dr. Gregory A. May, commenced this civil action against the Appellants, Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe, on March 20, 2019 by filing his Verified Summons and Complaint in the Florence County Court of Common Pleas. R. pp. _____ (Complaint filed March 20, 2019). Respondent's Complaint alleged causes of action for: 1). breach of contract; 2). tortious interference with contract; 3). promissory estoppel; and 4). a declaratory judgment pursuant to S.C. Code Ann.§ 15-53-10 *et seq.* (*See generally id.*). Respondent's claim for a declaratory judgment sought an order declaring, in part, that the restrictive covenant contained in the employment agreement between the parties is an unenforceable contract at law. R. p. _____ (Complaint p. 11). Appellants filed their Answer to the Complaint of Respondent on April 23, 2019, denying many of the allegations made by Respondent and positing numerous defenses, as well as asserting a counterclaim for breach of contract. R. pp. _____ (Answer pgs. 9-11).

The Respondent filed a Motion for Restraining Order and Injunction on April 22, 2019 asking the court to issue an injunction to prevent the Appellants from interfering with his practicing medicine in the Florence area. R. pp. _____ (Respondent's Motion for Restraining Order and Temporary Injunction and Memo In Support). After a hearing on the motion on June

10, 2019, the lower court denied the Respondent's Motion for Temporary Injunction and entered an Order that the parties conduct expedited discovery. R. pp. _____ (Order dated June 17, 2019).

After the parties conducted expedited discovery as ordered by the trial court, Respondent filed his Motion for Summary Judgement on September 16, 2019. R. p. _____ (Respondent's MSJ, p. 1). In this Motion, Respondent moved for summary judgment on his fourth cause of action for a declaratory judgment, seeking an order from the trial court declaring that the employment agreement between the parties, in particular those portions of the contract which seek to restrict the Respondent's ability to practice interventional cardiology within the restricted area, is unenforceable. (*Id.*). The Respondent also moved the trial court for summary judgment on the alternative that the Appellants breached the underlying employment agreement, rendering the restrictive covenant null and unenforceable. (*Id.*). On September 26, 2019, the Appellants filed an opposing Motion for Summary Judgment with the trial court. R. p. _____ (Appellants' MSJ, p. 1). In their Motion, Appellants sought a judgment from the trial court that the restrictive covenant contained in the employment agreement was enforceable against the Respondent and that Appellants had not waived the restrictive covenant or otherwise breached the employment agreement. R. p. _____ (*See id.* p. 1); R. pp. _____ (Appellants' Memo in Support MSJ pgs. 12-13).

The trial court held a hearing and heard oral arguments on the parties' respective motions for summary judgment on October 2, 2019, with the Honorable Michael G. Nettles presiding. R. p. _____ (Transcript of October 2 Proceeding, p. 1 ("Transcript" hereinafter)). After hearing

oral arguments from parties' counsel and considering proposed orders submitted by both parties, the trial court on October 21, 2019 issued its order granting Respondent's Motion for Summary Judgment on the declaratory judgment cause of action and finding the restrictive covenant to be unenforceable. R. p. _____ (Order, p. 5). The trial court in its order denied both the Respondent's and the Appellants' opposing summary judgment motions on the breach of contract issue, finding disputed issues of materials fact existed for trial. (*Id.*). Appellants on October 30, 2019, filed a Motion for Reconsideration, requesting that the trial court reconsider its grant of summary judgment to the Respondent. R. p. _____ (Appellants' Mot. Recons. p. 1); R. p. _____ (Appellants' Memo in Supp. Mot. Recons.. p. 8). The trial court denied this motion on November 20, 2019. R. pp. _____ (Order Denying Mot. Recons.). It is the trial court's grant of partial summary judgment to the Respondent finding the restrictive covenant to be unenforceable that is at issue in the current appeal. On December 19, 2019, Appellants served their Notice of Appeal.

STANDARD OF REVIEW

The Respondent is satisfied with the Standard of Review as presented by the Appellants.

FACTS

Dr. May is an interventional cardiologist and has been engaged in the private practice of cardiology since 1992. He relocated to Florence from the Orlando area in April 2008 after accepting a position with Advanced Cardiology Consultants, P.C. ("ACC" or "Practice" hereinafter). R. pp. _____ (May Depo., pgs. 4 – 7).

The Defendant Dr. Lew Rowe moved to Florence in 1994 after completing his cardiology training program. Dr. Rowe founded Advanced Cardiology Consultants, P.C. in March 1994 and has been the Practice President and the sole owner/operator since that time. R. pp. _____, ___ (Dr. Rowe Depo., pgs. 4 – 6, 14). The Defendant Theresa Rowe has worked as the Practice's office manager since its founding. She and Dr. Rowe married in October 2007. R. p. _____ (Dr. Rowe Depo., p. 10). Beginning at its founding in 1994, Advanced Cardiology Consultant's physicians have maintained privileges at each of Florence's primary care hospitals. From Dr. May's hiring in 2008 until 2018/2019, Dr. Rowe and each member of the Practice provided call and maintained privileges at both McLeod and Carolinas Hospital System until relinquishing their privileges in 2019. R. p. ____; p. ___, line 24-p. ____, line 12; p. ____, line 3 – p. ____, line 20 (Dr. Rowe Depo., pg. 17; pg. 40, l. 24- pg. 41, l. 12; pg. 46, l. 3 – pg. 47, l. 20).

The Practice has utilized essentially the same employment agreement for all its employed physicians since its founding in 1994. R. p. _____, lines 1-4 (Dr. Rowe Depo., pg. 20, ll. 1-4, Exhibit A to Appellant's Memorandum Supp. MSJ, "Rowe Depo."). Under this employment agreement, Respondent's compensation was set at fifty percent (50%) of his collections generated the preceding month. The physicians were not provided a guaranteed income. R. p. ____ (Employment Agreement, p. 1). Since the founding of the Practice in 1994, the physicians at Advanced Cardiology Consultants, P.C. have maintained their own privileges to practice cardiology at various hospitals in the Pee Dee region including McLeod Regional Medical Center, Carolina Pines Regional Medical Center, Williamsburg Regional Hospital, Lake City Community Hospital, and Carolinas Hospital which is now MUSC Health Florence Medical

Center. R. p. ___, line 24-p. ____, line 16; p. ___ line 19-p. ___ line 5; p. ___, lines 21-25 (Dr. Rowe Depo., pg. 16, l. 24 - p. 17, l. 16; pg. 26, l. 19– pg. 27, l. 5; pg. 41, ll. 21-25). While the privileges are personal between the hospital and the physicians, given the nature of the practice of cardiology it is not possible for a single physician to provide call coverage to an entire hospital. R. p. _____ (Verified Complaint, Paragraph 29). In fact, in December 2018, after Dr. Rowe and the other employed physicians of the Practice determined to relinquish their privileges at Carolinas Hospital, Dr. May explored the possibility of single coverage with Mrs. Rowe. She informed him that the Practice would not be able to obtain medical malpractice coverage for such an arrangement. R. p. ____ lines 4-22 (Theresa Rowe Depo., pg. 17, ll. 4-22). The fact that the Practice could not obtain malpractice coverage for Dr. May foreclosed any opportunity for him to practice his specialty at the hospital.

In the Fall of 2018, Dr. Rowe informed the employed physicians of the Practice that he was removing himself from the call rotation and would no longer see patients at any of the hospitals. It was his desire to become an office-based practitioner. R. p. ____, line 17– p. ___, line 23; R. p. _____, line 12 – p. ____, line 5 (May Depos., pg. 26, l. 17 to pg. 27, l. 23; Dr. Rowe Depos., pg. 17, l. 12 – pg. 18, l. 5).

Dr. Rowe's indication that he intended to resign his hospital privileges caused Dr. May great concern about the health of the Practice as well as his personal financial wellbeing. He had several conversations with Dr. Rowe which are outlined in the Plaintiff's Motion for Summary Judgment. (Pgs. 3-6) R. pp. _____. As a result of these conversations with Dr. Rowe, Dr.

May was under the impression that Dr. Rowe had no objection to his working in the Florence area and that Dr. Rowe would not attempt to enforce the covenant at issue.

The Defendants, verbally and in writing, encouraged Dr. May to seek employment within the 25-mile geographic range. Dr. Rowe encouraged this with the knowledge that if Dr. May was seeking an interventional cardiology position, the nearest hospitals offering these services outside the 25 mile radius are in Murrells Inlet and Columbia.[1] R. p. _____ (Dr. Rowe Depo., pg. 65). Dr. Rowe testified that with regards to his discussions with Dr. May "consistently I and Theresa told him, "Look around. Go to other places. Interview." R. p. _____, lines 21-23 (Dr. Rowe Depo., pg. 68, ll. 21-23). Dr. Rowe testified:

> Q. Did he discuss with you employment options at two local hospitals?
>
> A. Yes.
>
> Q. And what was your response to that?
>
> A. Okay. I had no response. Okay.
>
> R. p. _____, lines 13-17 (Dr. Rowe Depo., pg. 70, ll.13 – 17).

> Q. Dr. May specifically told you or asked you if you would have any objection to him going to work for McLeod?
>
> A. And I probably said, "Do whatever you want." I would have said that multiple times. This was not one conversation. This was a series of hall, parking lot, grabbing sort of things. And I would have said, "Do whatever you want." Absolutely.
>
> R. p. ____, lines 9-18 (Dr. Rowe Depo., pg. 72, ll. 9 – 18).

1 Marie Saleeby testified that there was a cath lab at the Loris Hospital. R. ___, lines 9-20 (Saleeby Depo. pg. 6, ll. 9-20)

Dr. Rowe acknowledges that he was aware that Dr. May was looking for alternative employment.

> Q. Now did Dr. May ask you – or, excuse me, did he tell you that he was having conversations with Marie Saleeby about employment opportunities at McLeod?
>
> A. I can't recall if he mentioned Marie Saleeby. But he definitely mentioned that one of the places he was looking at was McLeod.
>
> Q. What other places did he say he was looking at?
>
> A. Locums, Carolinas, the beach. It varied from time to time.
>
> R. p. ___, line 17 – p. ___, line 2 (Dr. Rowe Depo., pg. 76, l. 17 – pg. 77, l. 2).

> Q. Did you ever tell Dr. May that you were not opposed to him seeking employment or accepting employment at either one of the local hospitals?
>
> A. I told him that he needs to explore his options.
>
> Q. Alright. But did you tell him –
>
> A. I never told Dr. May that he should work at McLeod Hospital or at Carolinas Hospital. I would never prohibit him from discussing employment options with either or those entities, however.
>
> R. p. ____, line 22 – p. ____, line 7 (Dr. Rowe Depo., pg. 77, l. 22 – pg. 78, l. 7).

When asked about Carolinas Hospital, Dr. Rowe testified:

> Q. And did you have any problems with him having discussions with Carolinas Hospital regarding employment?
>
> A. No, I wouldn't have a problem with it. In fact, I told him, "Look at all your options," many times.

Q. Did you ever tell him to look at all of his options, including the hospitals here in Florence?

A. I said, "Look at everywhere," is what I told him. "Don't limit yourself."

R. p. ___, lines 6-16 (Dr. Rowe Depo., pg. 102, ll. 6 – 16).

After discussions with both local hospitals, Dr. May received a conditional offer of employment from Carolinas Hospital on or about February, 2019. R. p. ____, lines 8-23 (May Depo., pg. 13, ll. 8-23). One of the conditions of hire was a written release of the employment agreement between the Practice and Dr. May. Despite the prior assurances given to Dr. May, the Practice refused to provide the hospital with a release and this action ensued.

ARGUMENTS

I. THE TRIAL COURT PROPERLY FOUND THE RESTRICTIVE CONVENANT OVERLY BROAD AND UNENFORCEABLE.

The trial court, relying on *Faces Boutique Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App, 1995), and the plain language of the contract, properly found that the restrictive covenant at issue was overly broad and unenforceable. R. pp. _____ (Order of October 21, 2019, pgs. 3-5). The covenant plainly provides a prohibition against Dr. May becoming employed in any capacity with any business entity, no matter how large or small, engaged in the practice of cardiology. This blanket prohibition of employment is precisely what this court found unenforceable in *Faces Boutique*.

A. **The restrictive covenant is a restraint of trade and contrary to public policy.**

"It is a universal maxim that covenants not to compete and similar restrictive covenants are to be strictly construed and enforced only under certain circumstances because they constitute restraints upon trade, and contracts in general restraint of trade are contrary to public policy. *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967 (D.S.C. 1976); 1976 U.S. Dist. LEXIS 16645. "While recognizing the legitimate interest of a business in protecting its clientele and good will, we are equally concerned with the right of a person to use his talents to earn a living." *Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 509, 273 S.E.2d 338 (1980).

Restrictive covenants not to compete are disfavored and will be strictly construed against the employer. *Rental Uniform Serv. v. Dudley,* 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983); *Stringer v. Herron,* 309 S.C. 529, 424 S.E.2d 547 (S.C. App. 1992); see also *Faces Boutique. Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App, 1995). A restriction against competition must be narrowly drawn to protect the legitimate interest of the employer. *Almers v. South Carolina National Bank,* 265 S.C. 48 217 S.E.2d 135 (1975). A covenant not to compete will be upheld only if it is:

(1) Necessary for the protection of the legitimate interest of the employer;

(2) Reasonably limited in its operation with respect to time and place;

(3) Not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;

(4) Reasonable from the standpoint of sound public policy; and

(5) Supported by valuable consideration.

Faces Boutiques, 455 S.E.2d at 708.

The restrictive covenant here, just as the covenant in *Faces Boutiques*, violates the requirements that a covenant must be "necessary for the protection for the legitimate interest of the employer", and "not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood." The Advanced Cardiology Consultant agreement specifically states that in the event of its termination, physician will not become employed by or associated with **another business entity**, "engaged in the practice of cardiology ... within a 25 mile radius of McLeod Regional Medical Center, ... for a period of two years from the date of such termination." R. pp. ____ (Employment Contract, pgs. 1-5, Paragraph 9). The plain construction of the covenant not to compete thus prevents Dr. May from working in any capacity with the largest and third largest employers in Florence County, South Carolina.

The covenant as written is not necessary for the protection of the legitimate interests of Advanced Cardiology Consultants, P.C. It is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood within the field of medicine. The Defendants cannot possibly articulate a legitimate reason to prohibit Dr. May from pursuing employment with either hospital in an administrative capacity. There is no legitimate argument that can be made that Advanced Cardiology Consultants would be harmed in any way if Dr. May chooses to pursue employment at the hospitals, for example, as a physician assistant, hospitalist, or as a general practitioner. Likewise, the blanket prohibition of Dr. May's employment with these entities is unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood.

B. The restrictive covenant is unenforceable and cannot be re-written by the courts.

The terms of the restrictive covenant are overly broad and unenforceable. "If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved." *Faces Boutiques* at 709, see also *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (The court "cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally." *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) (if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements.")

The Appellants argue that the ACC covenant is similar to the covenant at issue in *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 15, 738 S.E.2d 480, 488 (Ct. App. 2013). Here the trial court properly found that, contrary to Appellants' assertions, the restrictive covenant is very similar to the blanket prohibition found in the *Faces Boutique* case. The restrictive covenant at issue here reads "In the event this agreement is terminated ..., this physician covenants and agrees that he will not become employed by ... another business entity, engaged in the practice of cardiology,". It is undisputed that both McLeod Regional Medical Center and MUSC Florence are engaged in the practice of cardiology. A plain reading of the contract clearly establishes that Dr. May would be in violation of the covenant if he were employed in any capacity with either of these two institutions.

In responding to the inherent overly broad nature of this covenant, Appellants argue that "the Respondent himself throughout this litigation has never expressed any intention to perform

any service at either Florence hospitals that was unrelated to the practice of cardiology." (Initial Brief of Appellants, p. 11). They further argue that the parties "understood" the covenant to apply only to Dr. May's practice as a cardiologist. (Initial Brief of Appellants, p. 12). These arguments ignore the basic tenant of enforceability of restrictive covenants that they are disfavored and will be strictly construed against the employer. *Rental Uniform Serv. at 675.*

Referencing the five *Dudley* factors, the Court below properly noted "If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved." *Faces Boutiques* at 709, see also *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972). The court "cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally." *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) ("if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements.")

Dr. Rowe testified extensively as to how his practice had evolved in the 25 years prior to the commencement of this action. He also acknowledged that his employment contract remained the same over that period. R. p.____, line 24 – p. ____, line 8 (Rowe Depo., pg. 19, l. 24 – pg. 20, l. 8). In 1994, there were three (3) hospitals in the City of Florence where ACC physicians were performing cardiology services. There were several other private cardiology practices located in Florence and serving these hospitals. None of the hospitals employed cardiologists R. pp. _____ (Rowe Depo., pgs. 22-24). When Dr. May relocated to Florence in 2008, ACC was a much different practice than exists today. The physicians provided call coverage to two (2)

hospitals.[2] Dr. May testified that he was as busy as he wanted to be. R. p. ___, line 21 – p. ____, line 17 (May Depo., pg. 24, l. 21 – pg. 25, l. 17). From 2008 to 2018, Dr. May was able to do all things reasonably necessary to maintain and improve his professional skills as outlined in Paragraph 2 of the Employment Agreement. R. p. _____ (Employment Agreement, pg. 1). When Dr. Rowe announced that he was surrendering his privileges in favor of an office-based practice, this caused Dr. May great concern. By 2018, ACC was no longer in competition with any other private cardiology group within the Florence service area. By this time, all of the other cardiology practices and physicians had become direct employees of the two hospitals. R. pp. _____ (Dr. Rowe Depo., pgs. 22-24). There is no evidence in the record that when these parties entered into their initial agreement in 2008 either party contemplated the fact that in 2018, ACC would be the only private practice and every other physician in the area would be employed directly with one of the two hospitals. Respondent would also submit that he never contemplated that the Practice would abandon both hospitals for an office-based practice thereby preventing him from pursuing his specialty as an interventional cardiologist.

The fact remains that the contract as written is a blanket prohibition on Dr. May's employment with either hospital regardless of what capacity he is employed. To change the plain meaning of this covenant would require the court to rewrite the agreement, which existing law provides it cannot do. The court "cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally." *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) ("if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the

2 Bruce Hospital and Florence General Hospital had merged to become Carolinas Hospital System.

other necessary requirements."). As the lower court notes "Dr. May is trained and practiced in the medical field for over 30 years. He is more than qualified to perform a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology. In this respect, the covenant not to compete cannot be upheld since it is not necessary for the protection of the legitimate interest of the employer to prevent Dr. May from seeking any type of employment with the two hospitals. Likewise, the restriction against competition is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood." R. p. ____ (Order of October 21, 2019, p. 3)

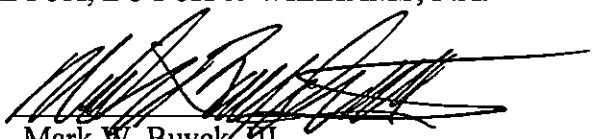
CONCLUSION

For the reasons stated, this Court should acknowledge and confirm the ruling of the trial court.

June 29, 2020

Respectfully submitted,

WILLCOX, BUYCK & WILLIAMS, P.A.

BY: 

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Dr. Gregory A. May,.....Respondent,

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and Theresa Rowe,..... Appellants.

PROOF OF SERVICE

I certify that I have served the foregoing **Initial Brief of Respondent** on the Appellants through their attorneys of record, Allan R. Holmes and Rebecca J. Wolfe, by depositing a copy of same in the United States Mail, postage prepaid, to Post Office Box 938, Charleston, South Carolina 29402 on June 29, 2020.

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Reply To: Florence

June 29, 2020

The Honorable Jenny Abbott Kitchings
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RE: Dr. Gregory A. May v. Advanced Cardiology, et al
Appellate Case No.: **2019-002114**
Our File No.: 16325.17418

Dear Ms. Kitchings:

Enclosed for filing is an original and one copy of the **Initial Brief of Respondent** and **Respondent's Designation of Matter To be Included in the Record on Appeal** in the above captioned case. Please time stamp the enclosed copies and return to us in the enclosed self-addressed stamped envelope provided for your convenience.

By copy of this letter, we are serving a copy of the above-stated pleading on Allan R. Holmes and Rebecca J. Wolfe, attorneys for Appellants.

Yours very truly,

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Enclosures
Cc: Allan R. Holmes, Esquire (w/enclosures)
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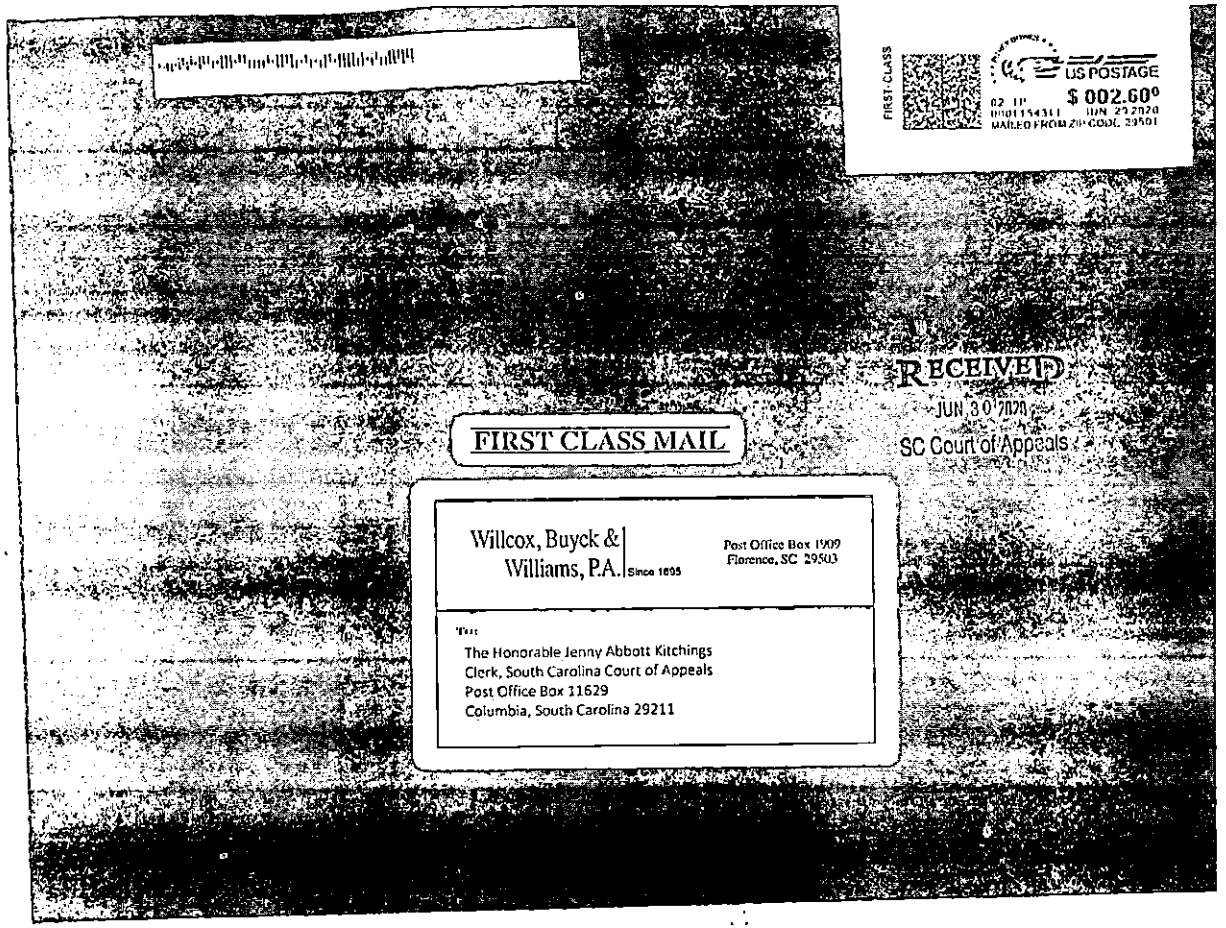
Dr. Gregory A. May (w/enclosures)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