

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Steven H. John, Circuit Court Judge

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Appellate Case No. 2020-000046  
Case No. 2011-CP-26-7403

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**RECEIVED**  
**Oct 05 2020**  
**SC Court of Appeals**

Mark Green, as Personal Representative of the Estate of  
Randall M. Green and Ann Green, ..... Respondents,

v.

Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C., ..... Appellants.

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**RETURN IN OPPOSITION TO RESPONDENTS’  
MOTION TO STRIKE RECORD ON APPEAL**

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The Respondents have filed a motion to strike the Record on Appeal as filed on September 11, 2020. The Appellants oppose that motion.

In their Designations to be Included in the Record on Appeal, the Respondents included a number of appellate court filings from the first appeal to the Court of Appeals and from the review on certiorari by the South Carolina

Supreme Court. Those items are identified as #17 through #21 and #23 through #25 in the Respondents' designations and are listed below. Those appellate court filings have not been included in the Record on Appeal as prepared and filed by the Appellants.

Rule 209(b), SCACR, provides that "the 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)]." Rule 210(c), SCACR, then provides that "[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal." There is no provision in the Appellate Court Rules that allows for the designation of prior appellate court filings that were not presented to the lower court.

The appellate filings at issue are not part of the Circuit Court record. A review of the Horry County Public Index shows only a few appellate orders as filed in the Circuit Court record. Those appellate orders, as designated by the Respondents, have been included in the Record on Appeal because they do appear in the Circuit Court record. The following items, however, have not been included:

17. Appellants-Respondents' Petition For Rehearing Filed February 18, 2016
18. Respondents-Appellants' Petition For Rehearing Filed February 22, 2016

19. Respondents-Petitioners' Petition for Certiorari Filed May 16, 2016
20. Petitioners-Respondents' Return to Petition for Certiorari Filed June 21, 2016
21. Respondents-Petitioners' Reply to Return to Petition for Certiorari Filed July 1, 2016
23. Respondents-Petitioners' Brief Filed November 21, 2017
24. Petitioners-Respondents' Motion and Memorandum in Support of Motion to Supplement Appendix, for Leave to Argue Judicial Estoppel, Waiver, and/or Release and to Hold Deadlines in Abeyance dated December 20, 2017
25. Respondents-Petitioners' Return to Motion to Supplement Appendix for Leave to Argue Judicial Estoppel, Waiver, and/or Release and to Hold Deadlines in Abeyance dated January 2, 2018

As the Public Index reveals, the parties did not file any of these appellate filings in the Circuit Court record. Additionally, there is no indication in the transcript of the August 28, 2019 motion hearing held after remand from the Supreme Court that the parties handed up any of these filings to Judge Steven John. In short, these appellate documents were never filed or otherwise included as part of that record.

Moreover, to the extent that the parties wish to rely on prior appellate court filings, this Court already has access to those without including them in the Record on Appeal. Moreover, this Court has ruled that "[a] court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts

established in its records.” *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325, 327 (Ct. App. 1984).

Nonetheless, as discussed, there is no basis in the Appellate Court Rules nor is there a need to include prior appellate court filings in the Record on Appeal where those filings have not been filed with the Circuit Court. That will only add unnecessarily to the size and cost of the Record on Appeal.

In sum, the Appellants believe that they have complied with Rule 210(c), SCACR, by including in the Record on Appeal only those filings that were actually submitted to the Circuit Court. However, in the event that the Court rules that prior appellate filings are appropriately included in a Record on Appeal, despite not being submitted to the Circuit Court, the appropriate remedy is not striking the Record on Appeal as already prepared and filed. The appropriate remedy would be an order directing that a Supplemental Record on Appeal be filed.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann

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*Counsel for Appellants Wayne B. Bauerle,  
M.D. and Wayne B. Bauerle, M.D., P.C.*

October 5, 2020

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Oct 05 2020

SC Court of Appeals

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CERTIFICATE OF SERVICE

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In accordance with Section (g)(3) of the Supreme Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellants, does hereby certify that service of the **Return in Opposition to Respondents' Motion to Strike Record on Appeal** was made upon all counsel of record by email only this the 5th day of October 2020:

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Uricchio Law Firm  
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October 5, 2020

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**Via Email Only**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
Email: [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)

**RECEIVED**  
**Oct 05 2020**  
**SC Court of Appeals**

RE: Mark Green, Personal Representative of the Estate of Randall M. Green and Ann Green v. Wayne B. Bauerle, M.D. and Wayne B. Bauerle, M.D., P.C.  
Court of Appeals Tracking Number: 2020-000046  
Civil Action Number: 2011-CP-26-7403  
Claim Number: CB053262M  
Our File Number: 22.9301

Dear Ms. Kitchings:

In accordance with Section (c)(5) of the Supreme Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), please find enclosed for filing the **Return in Opposition to Respondents' Motion to Strike Record on Appeal** in the above referenced matter. In accordance with Section (g)(3) of this same order, I am hereby serving copies on all counsel of record by email only.

If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb  
Enclosure

The Honorable Jenny Abbott Kitchings  
October 5, 2020  
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cc: (w/ Enclosure)

O. Grady Query, Esquire (*Via Email Only*)  
L. Morgan Martin, Esquire (*Via Email Only*)  
Cristin A. Uricchio, Esquire (*Via Email Only*)  
John B. McCutcheon, Jr., Esquire (*Via Email Only*)  
Lisa A. Thomas, Esquire (*Via Email Only*)

The Honorable Jenny Abbott Kitchings  
October 5, 2020  
Page Three

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bcc: (w/ Enclosure)

**Via Email Only**

Mr. Thomas J. McCall

Vice President

Claims Manager

Marsh USA, Inc.

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