THE STATE OF SOUTH CAROLINA
In the Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

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

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.

RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE RECORD ON APPEAL

The Appellants have filed a Memorandum In Opposition to Respondents' Motion to Strike Record on Appeal wherein they oppose the Respondents' Motion to Strike the Record on Appeal.

First, the Appellants assert that the appellate filings (from the prior appeal before this Court as well as the Supreme Court) designated by Respondents were omitted from the Record on Appeal because they do not appear on the Horry County Public Index, and the transcript does not reveal that they were handed to the trial court judge. As Respondents have already made clear, Rule 210 (c), SCACR, does not state that the materials be formally entered into evidence or filed. The purpose of this rule is to ensure that only properly preserved issues are considered on appeal.

Moreover, "our courts are not required to be ignorant of a fact which is generally and reliably established merely because evidence of the fact is not offered." Matter of Harry C., 280 S.C. 308, 310, 313 S.E.2d 287 (1984) *quoting* State v. Newton, 21 N.C. App. 384, 204 S.E. (2d) 724, 725 (1974). As Appellants concede, courts may take judicial notice of matters contained in filings, records, and proceedings in the same action. It is undisputed that both sides urged the trial court to rely on these filings, and it clearly did as the Order below includes an express finding based upon them. In recognition of the fact that they were considered by the trial court despite not being filed, the Appellants point out that it is equally unnecessary to file them in the Record on Appeal. However, this position fails to recognize that Rule 210 (h), SCACR, does not apply to the trial court. It also attempts to shift the Appellants' burden onto the Respondents and this Court. It is indisputable that these filings were considered by the trial court, and they were therefore properly included in the Record on Appeal.

Of further note, even if these appellate filings had not been "presented" to the trial court consistent with the purpose and meaning of Rule 210 (c), SCACR, the Appellants admittedly raised new issues for the first time in their Petition For Rehearing which would also bring these omitted appellate filings into issue.[1] It is extraordinarily disingenuous to make admittedly new

[1] The preservation argument is addressed in Respondents' Initial Brief as well as Appellants' Reply Brief. *On remand to the trial court*, Appellants argued that a 2016 Consent Order releasing undisputed funds during the pendency of the first appeal should (1) judicially estop and/or (2) constitute a wavier to the Respondents' right to argue in favor of an equal allocation of the hospital settlement at issue here. The Consent Order released funds in the sum total amount of two separate UIM settlements each Respondent had received as a result of different injuries they sustained many years prior in a car accident caused by a non-party to this medical malpractice case. The trial judge found that transaction was not intended to impact the allocation of the unrelated hospital settlement which, at that time, was an issue pending appeal, subsequently extensively argued before the Supreme Court, and ultimately remanded for analysis. As consented to and urged by both sides, the trial judge applied the 2016 disbursal so as to give Appellants proper credit for the entire payment, finding that this was what the parties intended and also noting that, to the extent an isolated sentence could be construed to prevent such relief, it was harmless error. *Now*, Appellants attempt to argue on appeal that (1) the Consent Order was entitled to preclusive effect and (2) the trial judge has impermissibly overruled another judge in granting the very relief they requested. Responses to these new unpreserved arguments *also* require review of the omitted appellate filings and the issues under appeal both *before* and *after* the 2016 Consent Order.

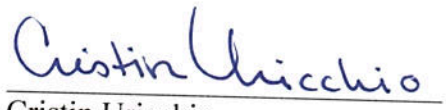
arguments on appeal and attempt to preclude the Respondents from providing materials in response, particularly materials which *were* referenced and relied on below for separate issues.

Second, the Appellants assert that, to the extent the parties wish to rely on prior appellate filings, this Court may pull these filings itself and there is therefore no reason to include them in the Record on Appeal. They concede that these materials are proper to consider on appeal as this Court may take judicial notice of them and further claim that they will unnecessarily add to the size and cost of the Record on Appeal. As Appellants are well aware, as a result of the current Orders in place during the coronavirus emergency, they do not have to make copies or even print the Record on Appeal. Therefore, the size and costs involved are minimal. Moreover, there is absolutely no basis or exception in the Rules allowing Appellants to unilaterally omit designated matter from the Record On Appeal in order to reduce its size - or their costs. It is presumptuous to shift that burden onto this Court, claiming that it can pull the records itself in order to reduce their own, minimal, burden. Moreover, the Appellants have already field their Initial Brief and are unable to request therein that the Court seek out and take judicial notice of specific facts demonstrated by the filings from the previous appeal before both this Court and the Supreme Court. This argument assumes that the Court would be willing to take on this additional task of its own accord. This is an assumption the Respondents would not presume to make.

Finally, Appellants claim that the proper remedy for their failure to comply with Rule 210, SCACR, is to order that a Supplemental Record be filed rather than striking the intentionally incomplete filing, shifting onto the Respondents and this Court the burden of correcting and mitigating their failure to object either at the time the matter was designated or at any time during the eighty one (81) days that elapsed prior to serving and prematurely filing the substantially incomplete Record on Appeal. These materials are obviously, and admittedly, properly reviewable

by this Court, and it is remarkable that this issue has even arisen. This has resulted in even further unnecessary delay to what has become miserably protracted litigation and required Respondents to file a motion, two additional memorandums, a motion for an extension to file their final brief, and, most likely, an additional motion for an extension while the present motion is decided. Similar dilatory tactics have already once been curbed by the Supreme Court in declining to permit Appellants from filing a brief out of time. Respondents respectfully renew their request that this Court strike the Record on Appeal and take such other and further action as it deems appropriate. If this Court decides to allow Appellants to file a Supplemental Record on Appeal, Respondents also respectfully renew their previous request that Appellants be ordered to do so expeditiously and that Respondents be granted an additional ten (10) days from the date it is served in order to complete, file, and serve their final brief.

Respectfully Submitted,



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October 12, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

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

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.

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order Re: Operation of the Appellate Courts During the Coronavirus Emergency (Amended May 29, 2020), I do hereby certify that I have served the **Respondents' Reply Memorandum in Support of Motion to Strike the Record on Appeal** on all counsel of record via email only at the addresses below:

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October 12, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Mark Green, as 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.
Civil Action No. : 2011-CP-26-7403
Court of Appeals Tracking No: 2020-000046

Dear Ms. Kitchings,

Please find attached for filing the **Respondents' Reply Memorandum in Support of Motion to Strike the Record on Appeal** in the above-referenced case. By copy of this correspondence, copies are being served on all counsel of record via email only pursuant to Section (g)(3) of the Supreme Court's Order Re: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020).

Your attention to this request would be greatly appreciated. Should you have any questions, please do not hesitate to contact this office.

With kindest regards, I am

Sincerely,

Cristin A. Uricchio

Enclosures

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