THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas
Roger L. Couch, Circuit Court Judge

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FEB 08 2016
SC Court of Appeals

Appellate Case No. 2015-001964

Philip Ethier and Jeanne Ethier,

Appellants,

v.

Fairfield Memorial Hospital; Guy R. Bibeau, M.D.; Tuomey Medical Professionals, Inc; and Pee Dee Emergency Medical Associates, PA,

Defendants,

Of whom Guy R. Bibeau, M.D., is the Respondent.

APPELLANTS' REPLY TO RESPONDENT'S RETURN TO APPELLANTS' MOTION FOR PERMISSION TO FILE BRIEF EXCEEDING PAGE LIMIT

Appellants, by and through their undersigned counsel and pursuant to Rule 240, submit their reply to Respondent's return opposing Appellants' motion to file an initial brief exceeding the 50-page limit.

Respondent asserts that Appellants' initial brief contains immaterial and redundant information. Specifically, Respondent asserts there is no reason for a Statement of Facts which explains the trial testimony, plus additional facts for each of the four issues on appeal. Respondent contends that none of the issues on appeal go to the factual merits of the case, and that purely legal questions are involved.

Respondent is absolutely wrong.

As explained in their motion, Appellants believe the first issue raised is a novel one in South Carolina – whether the trial judge erred in ruling that comparative negligence law dictates Appellant Jeanne Ethier recover nothing on her loss of consortium claim when the directly injured spouse, Appellant Philip Ethier, recovered nothing because he was found more negligent than Respondent. Appellants' arguments and explanation of law, both in South Carolina and elsewhere, are necessary.

Appellants further submit this case presents novel and unusually egregious acts of juror misconduct during voir dire and in premature and actual deliberations. It is necessary for Appellants to exceed the page limit in order to adequately explain the trial testimony and evidence, as well as the facts, law and arguments related to the post-trial issues.

The four issues on appeal are not "purely legal." Legal issues are decided in the context of events, facts and testimony occurring at trial. In this complex, medical malpractice case, Appellants must present a sufficient explanation of the factual background at trial because that goes to the very heart of the wrongdoing and error alleged in the issues on appeal.

For example, the unlawful actions and statements of the rogue juror, and her impact on the jury, can be analyzed properly only when the Court understands how her silence during voir dire and her obvious bias and unlawful efforts as a juror worked in favor of Respondent on the crucial issue of credibility. When Appellants argue that they should be granted a new trial because the rogue juror was constantly back in the jury room during the trial saying, "If Dr. Bibeau or Nurse Wadford said they did something, then they did it," the error and prejudice are understood only when the Court knows what "something" she was talking about.

The prejudicial and wrongful impact of the rogue juror's actions simply cannot be argued or understood in the absence of relevant trial testimony and sufficient factual background. The post-trial issues involve events and testimony which occurred *during* the trial and are inextricably linked. The post-trial issues cannot be considered or decided in a vacuum that ignores the trial testimony and evidence, as if a door had slammed shut on all things occurring before the jury returned its verdict and cannot be mentioned on appeal.

Respondent would only benefit, of course, if Appellants were not allowed to fully present their arguments or present a complete or adequate record on appeal. If Appellants had submitted a brief with an insufficient explanation of trial testimony or arguments, or an insufficient record, such that the Court was not able to understand the unlawful and prejudicial impact of the rogue juror's actions and place them in the context of what happened at trial, then Respondent would surely attack Appellants on that ground. See e.g. Zaman v. S.C. Bd. of Medical Examiners, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) (refusing to address issue where record did not show what appellant requested, whether it was refused, and if so, why); Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 215, 493 S.E.2d 826, 834 (1997) (appellant has burden of presenting sufficient record for appellate review); Conran v. Joe Jenkins Realty, Inc., 263 S.C. 332, 210 S.E.2d 309 (1974) (appellant has the right to propose the record and designate its contents and burden is on appellant to do so; Court dismissed appeal where appellant failed to include sufficient trial testimony in the record to support his argument on appeal); South Carolina Natl. Bank of Charleston v. B.H. Stepp Co., 248 S.C. 521, 151 S.E.2d 752 (1966) (dismissing appeal where record did not contain testimony necessary to decide issues raised by appellant); Windham v. Honeycutt, 290 S.C. 60, 63, 348 S.E.2d 185, 187 (Ct. App. 1986) ("The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent

review."); Colleton County Taxpayers Assn. v. School Dist. of Colleton County, 371 S.C. 224, 638 S.E.2d 685, 694 (2006) (issue is deemed abandoned if the argument in the brief is conclusory); First Savings Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating a party failing to provide arguments or supporting authority for its assertion is deemed to have abandoned the issue).

Finally, Respondent has not asserted that he is somehow prejudiced by a brief which exceeds the page limit and, of course, there is no such prejudice. The Rules specifically contemplate the filing of a brief exceeding the page limit, and Appellants submit it is appropriate and necessary in this case.

Respectfully submitted,

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Attorneys for Appellants

February 4, 2016

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Defendants,

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PROOF OF SERVICE

I, the undersigned lawyer or employee in the offices Proffitt & Cox, LLP, Attorneys for Appellants, do hereby certify that I have served the counsel or parties specified below in this action with a copy of the specified pleadings by causing a copy of the same to be _X_ mailed by United States Mail, postage prepaid; ____ e-mailed; ____faxed; ____ hand-delivered, to the following address:

Pleading: Appellants' Reply to Respondent's Return to Appellants' Motion For Permission to File Brief Exceeding Page Limit

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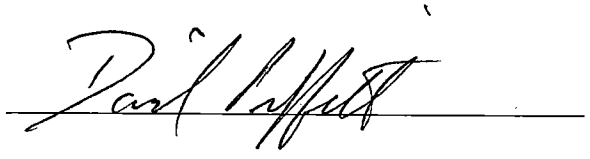

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Philip Ethier and Jeanne Ethier v. Guy R. Bibeau, M.D.
C.A. No. 2013-CP-20-12
PC File No. 1236.01

Dear Ms. Kitchings:

Please find enclosed the original and seven copies of Appellants' Reply to Respondent's Return to Appellants' Motion for Permission to File Brief Exceeding Page Limit. Please file the original and return one, date-stamped copy to us in the enclosed envelope.

With kindest personal regards, I remain

Sincerely yours,

PROFFITT & COX, LLP

David Proffitt

RDP/nif
Enclosures

cc: Andrew F. Lindemann (w/ enclosures)
G. Murrell Smith, Jr. (w/ enclosures)
David Holler (w/ enclosures)
Stanley L. Myers (w/ enclosures)

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