

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2015-001964

RECEIVED

APR 01 2016

SC Court of Appeals

79125

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' MOTION FOR PERMISSION TO FILE AMENDED
INITIAL BRIEF EXCEEDING PAGE LIMIT**

Appellants, by and through their undersigned counsel and pursuant to Rules 240 and 263(b), SCACR, move for permission to file a principal brief which exceeds the limit of 50 pages contained in Rule 208(b)(5), SCACR.

Appellants in this complex, medical malpractice case filed an initial brief on January 22, 2016, that was 79 pages. Appellants simultaneously submitted a motion for permission to file a brief exceeding the page limit.

Respondent filed a return in opposition to the motion on February 1, 2016. Appellants filed a reply to Respondent's return on February 8, 2016.

The Court by order filed March 14, 2016, denied Appellants' motion, stating that the "issues on appeal do not demand a brief of this length." The Court directed Appellants to file an amended initial brief of no more than 50 pages.

Appellants on March 31, 2016, filed an amended initial brief of 64 pages.

Appellants raise four post-trial issues in their appeal of a defense verdict in this medical malpractice case. Appellants believe the first issue raised is a novel one in South Carolina and consequently requires extended discussion of the law: 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 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.

Appellants' counsel have carefully and repeatedly reviewed and modified the original initial brief. Significant portions of the brief were deleted and it was reorganized in an effort to comply with the Court's order and the 50-page limit. After diligent effort and thought, Appellants' counsel have reduced the length of the brief by 15 pages.

The amended brief consists of the following:

- Statement of the Issues on Appeal (1 page);
- Statement of the Case (about 1 page);
- Statement of Facts describing testimony and evidence presented in the seven-day trial (9½ pages);

- Standard of Review (<1 page);
- A description of the law on the validity of the verdict awarding damages to Mrs. Ethier on her loss of consortium claim, including discussion and citation of the law in South Carolina and other states on the nature of a loss of consortium claim and whether the injured spouse's negligence affects a verdict awarding damages to the other spouse on a consortium claim, and Appellants' arguments regarding this issue (14½ pages);
- A description of the facts surrounding the rogue juror's actions in concealing her work relationship and personal knowledge of Respondent and two testifying nurse witnesses during jury selection, citation of applicable law, and Appellants' arguments on this issue (15½ pages);
- A description of the facts surrounding the rogue juror's unlawful and prejudicial lobbying efforts on behalf of Respondent and the testifying nurse witnesses in the jury room during premature deliberations, citation of applicable law, and Appellants' arguments on this issue (13 pages); and
- A description of the facts surrounding the rogue juror's unlawful and prejudicial lobbying efforts on behalf of Respondent and the testifying nurse witnesses in the jury room during actual deliberations, citation of applicable law, and Appellants' arguments on this issue (9 pages).

A primary reason for the need to exceed the page limit is that Appellants must explain and address three sets of facts: (1) facts related to the trial testimony and evidence (9½ pages); (2) facts related to the juror concealment issue (4½ pages); and (3) facts related to the issue of juror misconduct in premature and actual deliberations (7 pages).

As this Court well knows, it is Appellants' right and burden to raise issues and rulings which Appellants believe constitute reversible error by the trial court. It is Appellants' right and burden to present a sufficient record of the facts and evidence, a sufficient description of the law, and sufficient, persuasive arguments to convince the Court of errors below. 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); Rule 208(b), SCACR (describing content of brief); Rule 210(h), SCACR (court will not consider facts which do not appear in record).

Appellants further note that, contrary to Respondent's contention, 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 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 certainly would enjoy a strategic advantage if Appellants are not allowed to fully present the necessary facts, law and arguments. If Appellants are forced to submit a brief with an insufficient explanation of trial testimony or arguments, or an insufficient description of the factual record as it pertains to different phases of the trial, such that the Court is not able to adequately understand the unlawful and prejudicial impact of the rogue juror's actions and place them in the context of what happened at trial, that would accrue only to Respondent's benefit.

Appellants note that 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. Furthermore, the Rules specifically contemplate the filing of a brief exceeding the page limit.

In sum, Appellants' counsel have done their best to comply with the Court's order and the 50-page limit. However, while significantly reducing the length of the brief by 15 pages and even cutting into the bones of the case, counsel have not been able to comply with the limit. It is counsel's studied judgment that further deletions of the facts, law and arguments would be extremely prejudicial to Appellants' presentation of their case as well as a violation of counsel's duty to serve as a vigorous and effective advocate. Accordingly, Appellants ask that the Court grant permission for them to file an amended initial brief containing 64 pages.

Respectfully submitted,



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Attorneys for Appellants

March 31, 2016

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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' Motion for Permission to File Amended Initial Brief Exceeding Page Limit

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A handwritten signature in cursive script, appearing to read "David Puffett", is written over a horizontal line.

March 31, 2016

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March 31, 2016

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

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Dear Ms. Kitchings:

Please find enclosed the original and one copy of Appellant's Amended Initial Brief.

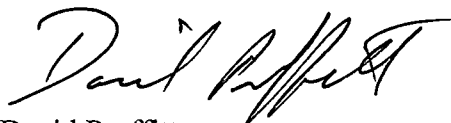
Also enclosed are seven copies of Appellants' Motion for Permission to File an Amended Initial Brief Exceeding the Page Limit, and a check for the \$25 filing fee.

Please file the originals and return date-stamped copies to us in the enclosed envelope.

With kindest personal regards, I remain

Sincerely yours,

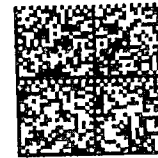
PROFFITT & COX, LLP




David Proffitt

RDP/nif
Enclosures

cc: Andrew F. Lindemann (w/ enclosures)
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