

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2013-CP-20-0012

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, P.A., Defendants

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

**RESPONDENT'S RETURN IN OPPOSITION TO APPELLANTS'
MOTION TO EXCEED PAGE LIMITATIONS AND
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL**

The Appellants have filed a second motion pursuant to Rule 208(b)(5), SCACR, to allow them to exceed the fifty-page limitation for their initial brief.

The Respondent Guy R. Bibeau, M.D. opposes that motion and further moves for the dismissal of this appeal for the reasons discussed below.

By way of background, on January 21, 2016, the Appellants filed an Initial Brief totaling 79 pages in length, together with a Motion for Permission to File Brief Exceeding Page Limit. Dr. Bibeau filed an opposition to that motion on February 1, 2016. Thereafter, on March 14, 2016, this Court issued an Order denying the Appellants' motion. This Court specifically found that "the issues raised on appeal do not demand a brief of this length." This Court further directed that "Appellants may file an amended brief *totaling no more than fifty pages in length*" and gave them thirty days to file an Amended Initial Brief. *See*, Order filed March 14, 2016. (Emphasis added).

On March 31, 2016, the Appellants filed an Amended Initial Brief *totaling 64 pages in length*, together with another Motion for Permission to File Amended Initial Brief Exceeding Page Limit. Dr. Bibeau opposes that motion and further submits that the Appellants' blatant disregard for the Court's Order filed March 14, 2016, and their lack of candor about the reduction of 15 pages from the original brief warrant the dismissal of this appeal as an appropriate sanction.

In their current motion, the Appellants claim that their counsel "carefully and repeatedly reviewed and modified the original initial brief" and that "[s]ignificant portions of the brief were deleted." Counsel even claims to have

"cut[] into the bones of the case ... [but] have not been able to comply with the limit." Despite what is described as "diligent effort and thought," counsel was only able to reduce the original brief by 15 pages. The Appellants' lack of candor with the Court in this respect is troubling.

A review of the two briefs reveals the following:

1. A total of only 1563 words was deleted from the original brief. That is not "significant portions." The deleted sentences are included in Appendix A to this return so that the Court can clearly consider the minimal amount of text that was actually deleted.¹

2. The Appellants used several techniques to reduce the brief by 15 pages, including primarily the conversion of substantial amounts of text to lengthy, single-spaced footnotes and the single spacing of two sections of the brief.²

3. The original brief contained 14 footnotes. The amended brief now has a total of 34 footnotes. Each of the 20 "new" footnotes consist of text from the original brief that was converted to single-spaced footnotes. Several of the "new"

¹ The original brief includes approximately 23,368 words of text and footnotes, and the amended brief includes approximately 21,805 words of text and footnotes. Thus, to put it in proper context, the deletion of 1563 words represents less than seven percent of the original content.

² The Appellants also used shorter abbreviations in referencing the record and stopped the practice of starting each new section of the brief on a new page. There is nothing wrong with those techniques to reduce the number of pages, but Dr. Bibeau calls this to the Court's attention only to further make the point that the Appellants did not delete "significant portions" of the brief (as claimed) in order to reduce it by 15 pages in length.

footnotes are of substantial length, each encompassing more than a page of text from the original brief. The Court is referred to footnotes 7, 10, 14, and 34 in the amended brief as examples. There are numerous other "new" footnotes that contain a half-page or more of text from the original brief. None of the "new" footnotes actually contains new or rewritten language not previously included in text of the original brief. Clearly, the conversion of text to footnotes is the technique utilized to achieve a majority of the 15-page reduction.

4. As indicated, the Appellants also made two sections of the brief single-spaced where they were double-spaced in the original brief. The Court is referred to the sections entitled "Statement of Issues on Appeal" and "Standard of Review" where that technique was used.

In sum, the Appellants totally disregarded this Court's express direction that the amended brief shall total "no more than fifty pages in length." *See*, Order filed March 14, 2016. Yet, even in trying to now submit a 64-page brief, the Appellants made little effort to reduce the total content of the brief. Instead, the Appellants relied on converting large amounts of text to footnotes and other measures which did not reduce the content by any significant measure. The Appellants not only violated the letter of this Court's Order but its spirit as well. The Appellants are absolutely disingenuous in advising this Court that "significant portions" of the original brief were deleted; the reality is "significant portions" of the original brief

were converted to footnotes. A total of 1563 words deleted from a 79-page brief is hardly "significant portions." The so-called "reorganization" of the brief by the Appellants, together with the fact that a 64-page brief still far exceeds the allowable page limit by 14 pages, warrants serious sanction including the dismissal of this appeal.

In their latest motion, the Appellants continue to argue that the issues raised on appeal require a brief in excess of the 50-page limit established by Rule 208(b)(5), SCACR. This Court has already considered such arguments and rejected them in previously directing the Appellants to file "an amended brief totaling no more than fifty pages in length." *See also*, Order filed March 14, 2016 (this Court found that "the issues raised on appeal do not demand a brief of this length"). In addition, the Appellants cite to numerous cases that require an appellant to furnish a sufficient record for review. However, the Appellants fail to understand the difference between the brief and the Record on Appeal. The adequate record for review must be contained in the Record on Appeal; it need not be re-stated or even summarized in detail in the brief in order to satisfy an appellant's duty to provide an adequate record.

For the foregoing reasons, the Respondent Guy R. Bibeau, M.D. respectfully requests that the Court deny the Appellants' latest motion to exceed the fifty-page limitation for their initial brief. Dr. Bibeau further requests that the Court strike

the Amended Initial Brief and dismiss the appeal as a sanction for violating the letter and spirit of Rule 208(b)(5), SCACR, and this Court's Order filed March 14, 2016.

Respectfully submitted,

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Columbia, South Carolina

April 11, 2016

APPENDIX A

Deleted from page 5 of Initial Brief of Appellant:

The following is a description of relevant trial testimony. Additional facts pertinent to each post-trial issue are discussed below.

Deleted from page 7 of Initial Brief of Appellant:

Mr. Ethier testified that after returning to work at the hospital in December 2011 after recovering from surgery, when he saw Respondent for the first time at the ED nurses' station, Respondent "turned around and looked at me and said, no wonder I couldn't figure out what was going on." Mr. Ethier testified the statement shocked and angered him, upsetting him so much that he nearly passed out, but he just walked away. Respondent denied making the statement.

Deleted from page 23 of Initial Brief of Appellant:

The jury's verdict in favor of Mrs. Ethier and the award of damages of \$250,000 to her are proper.

Deleted from page 25 of Initial Brief of Appellant:

The jury's verdict in favor of Mrs. Ethier and the award of damages of \$250,000 to her are proper.

Deleted from page 28 of Initial Brief of Appellant:

The jury's verdict in favor of Mrs. Ethier and the award of damages of \$250,000 to her are proper.

Deleted from pages 29-30 of Initial Brief of Appellant:

See also McCracken v. Government Employees Ins. Co., 325 S.E.2d 62, 64, 284 S.C. 66, 69 (1985) (noting coverture has long been abolished and "in South Carolina, the acts of one spouse are not, as a matter of law, imputed to the other spouse"; thus innocent spouse could recover fire insurance policy proceeds where other spouse intentionally had burned the property); McCall v. Batson, 207 S.E.2d 91, 93, 262 S.C. 657, 661 (1974) (stating that the "common-law theory of unity or identity of the spouses and the disability of coverture, insofar as they affect litigation have long since been completely abolished in this jurisdiction" by statute; therefore, usual statute of limitations applied to wife's claim against husband).

Deleted from page 34 of Initial Brief of Appellant:

In this case, the jury found Respondent's negligence caused Mrs. Ethier's damages. Each Appellant's action is separate and independent, and the jury clearly and properly awarded damages to Mrs. Ethier for loss of consortium as a result of Respondent's negligence. The law of

comparative negligence is irrelevant and inapplicable to her claim. The negligence of Mr. Ethier as determined by the jury is not imputed to her and has no impact on her award. The jury's verdict in favor of Mrs. Ethier and the award of damages of \$250,000 to her are proper.

Deleted from pages 42-43 of Initial Brief of Appellant:

The State argues that because respondent has not shown that he was prejudiced by Juror B's responses, the Court of Appeals' decision [granting the defendant new trial] was erroneous. We disagree. The test pronounced in *Thompson v. O'Rourke, supra*, makes clear that *where a juror's response to voir dire amounts to an intentional concealment, the movant need only show that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Where the juror's failure to disclose information is "without justification," i.e., intentional, the juror's bias will be inferred.* Conversely, where the failure to disclose is innocent, no inference of bias can be drawn.

Deleted from pages 49-50 of Initial Brief of Appellant:

Killian intentionally concealed information by failing to respond to direct, straightforward, unambiguous questions. Bias of the juror is inferred and a new trial is required because the information concealed by Killian would have supported a challenge for cause or would have been a material factor in the use of Appellants' peremptory challenges.

Given the fact that Killian sat silently when the jury pool was asked direct, straightforward, unambiguous questions about personal, business or working relationships with any party or witness, Appellants were unaware that Killian personally knew and had personally worked with Respondent or the nurses. Given the fact that Killian sat silently when the jury pool was asked direct, straightforward, unambiguous questions whether anyone had any bias or prejudice for or against any party, Appellants were unaware that Killian harbored a bias or prejudice in favor of Respondent and the nurses. See State v. Galbreath, 359 S.C. 398, 404, 597 S.E.2d 845, 848 (Ct. App. 2004) (juror's decision not to respond to question about being fair and impartial to all parties suggests that juror felt she could be fair and impartial). Appellants were entitled to rely on the truthfulness of prospective jurors' responses, as well as their non-responses, during voir dire. See Gullede, 277 S.C. at 371, 287 S.E.2d at 490 ("Necessarily, it is expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon a general question, any matters which might tend to disqualify them from sitting on the case for any reason.")

Deleted from page 51 of Initial Brief of Appellant:

See Woods, 345 S.C. 587-89, 550 S.E.2d 282 (when a case involves unintentional concealment, a new trial will be granted where the moving party can show prejudice resulting from the juror's failure to respond. "If a juror intentionally withholds material information requested on voir dire, bias and prejudice are inferred from such concealment. . . . Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is unintentional, should the trial court inquire into prejudice.") (quoting Doyle v. Kennedy Heating & Service, Inc., 33 S.W.3d 199, 201 (Mo. Ct. App. 2000) (emphasis in original).

Deleted from page 52 of Initial Brief of Appellant:

Juror Linda Albowicz testified that Killian at one point even confessed she did not believe she should be on the jury. "She let us know that she wasn't sure how she got chosen to be on the jury because she worked with everybody. . . . We explained to her when she was asked if this would, you know, prevent her from rendering a non-bias[ed] judgment that was her opportunity to get out of it. She should have answered in the affirmative," Albowicz testified. "But she didn't?" the trial judge asked. "No, she didn't," Albowicz replied.

Deleted from page 64 of Initial Brief of Appellant:

When the fact of premature deliberations becomes known after the jury's verdict, the Supreme Court held that the trial court may consider affidavits. If the trial court finds the affidavits credible, and indicative of premature deliberations, an evidentiary hearing should be held to assess whether such deliberations in fact occurred, and whether they affected the verdict. At such an evidentiary hearing, the trial court may, upon request of the moving party, reassemble the jurors and conduct voir dire to ascertain the nature and extent of the premature deliberations. If the court determines the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed. Aldret, 333 S.C. at 315-16, 509 S.E.2d 811.

Deleted from page 68 of Initial Brief of Appellant:

Beginning on the second or third day of the trial, Teresa began saying in the jury room during breaks that she personally knew Dr. Guy Bibeau and had worked with him for about three years.

Beginning on the second or third day of the trial, Teresa began saying in the jury room during breaks that she personally knew the nurse, "Jeri," and had worked with her for about three years. I know that Teresa, when she referred to "Jeri," meant Jerilyn Wadford, the registered nurse who testified at trial. It was clear to me that "Jeri" was Nurse Wadford who testified at trial.

Deleted from pages 69-70 of Initial Brief of Appellant:

Carmichael testified that at the beginning of deliberations, she believed that Respondent was more at fault than Mr. Ethier, and that several other jurors expressed the same opinion. "However, Teresa repeatedly stated her opinions about knowing Dr. Bibeau and Jeri personally, and that she had worked with them for three years, and that they were very careful and thorough. Teresa's statements, which she had made so often and so firmly and which she made during deliberations, were a big reason that I eventually changed my mind and became persuaded that Mr. Ethier was more negligent than Dr. Bibeau." Carmichael verified the accuracy of her affidavit and offered the same testimony at the juror evidentiary hearing held after the trial. Carmichael testified that Killian's statements affected her verdict and the verdict of several other jurors during deliberations, as set forth in detail above in Section III. "I just felt like she kept on saying it over and over once we started deliberating to sway other jurors to her side Doctor Bibeau as far as his reputation or whatever, you know," Carmichael testified.

As discussed in Section III, other jurors' testimony at the hearing and the trial judge's findings establish without doubt that Killian did make the reported statements before deliberations began, although every juror did not hear or recall every statement. Other jurors' testimony strongly corroborates Carmichaels detailed testimony about Killian's misconduct and the premature deliberations.

Carmichael and eight other jurors recalled Killian talking about working at the hospital with Respondent and the nurses. Carmichael and three other jurors testified that Killian vouched for the skill or proficiency of the doctor and nurses. Carmichael and three other jurors testified that Killian vouched for the truthfulness or credibility of the doctor and nurses. Carmichael and three other jurors testified that Killian talked about the red-haired, white lady.

Deleted from page 73 of Initial Brief of Appellant:

Aside from Killian herself, Carmichael was the only juror to testify that Killian's misconduct affected her verdict based on Killian's statements made prematurely and during deliberations. However, the effect on even a single juror's verdict is enough to prove prejudice because one juror can change the verdict or even cause a hung jury.

Deleted from pages 77-78 of Initial Brief of Appellant:

Appellants were greatly prejudiced because Killian's own verdict was affected by her bias and alleged insider knowledge. Carmichael testified that Killian's statements affected her verdict, and the effect on a single juror's verdict is enough to prove prejudice. One juror can change the entire verdict or even cause a hung jury.

THE STATE OF SOUTH CAROLINA
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Roger L. Couch, Circuit Court Judge

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APR 11 2016

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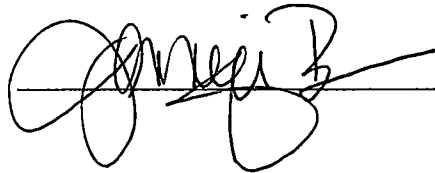
CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondent, does hereby certify that service of the **Motion to Dismiss Appeal and Respondent's Return in Opposition to Appellants' Motion to Exceed Page Limitations and Memorandum in Support of Motion to Dismiss Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 11th day of April 2016:

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The Honorable Jenny Abbott Kitchings
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APR 11 2016

SC Court of Appeals

RE: Philip Ethier and Jeanne Ethier v. Guy R. Bibeau, M.D.
Appellate Case Number: 20158-001964
Civil Action Number: 2013-CP-20-0012
Claim Number: CB127439M
Our File Number: 22.9679

Dear Ms. Kitchings:

Please find enclosed for filing the originals and seven copies each of the **Motion to Dismiss Appeal and Respondent's Return in Opposition to Appellants' Motion to Exceed Page Limitations and Memorandum in Support of Motion to Dismiss Appeal** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my courier. I have also enclosed my firm's \$25.00 check for the filing fee.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

The Honorable Jenny Abbott Kitchings
April 11, 2016
Page Two

cc: (w/ Enclosures)

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