

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE BERKELEY COUNTY

The Honorable Dale Van Slambrook, Master-in-Equity

Appellate Case No. 2016-001307

RECEIVED

OCT 17 2016

SC Court of Appeals

Blue Chip Medical Products, Inc. Respondent,

v.

Robert L. Bonifay, Jr., Airus Medical Services, LLC
and Airus Medical LLC. Appellants.

**RESPONDENT'S RETURN TO APPELLANTS' MOTION FOR CERTIFIED COPIES
OF THE TRIAL COURT'S MARKED AND ENTERED TRIAL EXHIBITS AND
EXTENSION OF TIME TO FILE APPELLANT'S BRIEF**

BACKGROUND

This is a breach of contract/debt collection case. The case was filed in May of 2011 and tried before the Master in Equity on April 11, 2016. By way of order dated May 17, 2016, the Plaintiff-Respondent ("Respondent") was awarded a Judgment against the Defendant-Appellants ("Appellants") in the amount of \$425,391.50. No Rule 59 Motion was filed.

On June 20, 2016, the Appellants filed the Notice of Appeal, appealing the May 17, 2016 order and judgment. The undersigned counsel for the Respondent was served with the Notice of Appeal on the same day. On June 29, 2016, counsel for the Appellants sent a letter requesting the transcript to a different court reporter than the reporter who transcribed the

trial. *See* Letter Ordering Transcript. Counsel for Appellants failed to copy the undersigned counsel and the Office of Court Administration on this letter, and this Court issued a deficiency Notice to Appellants on July 7, 2016. On July 13, 2016, the Appellants filed a corrected request, but still listed the wrong court reporter. Thereafter, on July 27, 2016, the Appellant filed a Motion for Extension of Time to request the trial transcript. The undersigned counsel did not oppose the Motion, and on August 1, 2016, the court granted the Motion.

On August 23, 2016, the undersigned counsel received email correspondence from the Court Reporter indicating that the Appellant had ordered the transcript and inquired as to whether the undersigned counsel also needed a copy of the transcript. *See* August 23, 2016 email, attached as "**Exhibit A.**" The undersigned counsel replied in the affirmative, and on August 31, 2016, received a copy of the transcript from the court reporter. *See* August 31, 2016 email, attached as "**Exhibit B.**"

A month later, on September 30, 2016, after the Appellants failed to file an initial brief pursuant to Rule 208, SCACR, the undersigned counsel sent correspondence to the Court advising that the Appellants received the transcript by at least August 31, 2016. *See* Rule 207(a)(2), SCACR ("Records shall be transcribed by the court reporter in the order in which the requests for transcripts are made."). The Appellants' counsel was copied on the Respondent's letter, and four (4) days later the undersigned counsel was served with the instant Motion, wherein Appellants seek an extension of time to file their Initial Brief. It has been nearly four (4) months since the Notice of Appeal was filed. For the reasons set forth herein, this Motion should be denied.

ARGUMENT

I. THE APPELLANTS RECEIVED THE TRANSCRIPT BY AT LEAST AUGUST 31, 2016, AND HAVE BEEN IN POSSESSION OF THE MARKED TRIAL EXHIBITS SINCE THE DAY OF TRIAL.

The Appellants' Motion seeks a Court order for the "true and certified copies of all Exhibits Marked and Entered into Evidence" and further "requests a thirty (30) day extension with which to file Appellant's Brief." *See* Motion at pg. 1. The Appellants' Motion is nothing more than a stalling tactic and should be denied.

The Exhibits that were introduced at trial were all 8.5 x 11 paper documents. The undersigned counsel is not aware of any Rule or authority that provides that an appellant is entitled to "certified copies" of paper exhibits that were marked and entered into evidence. *See generally* Rule 210(f), SCACR ("All exhibits *other than paper exhibits* must be retained in the trial court and delivered to the appellate court only upon receipt of an order from the clerk of the appellate court . . . ") (emphasis added). The Appellants' Motion fails to cite any Rule or authority in support of their Motion. The failure to cite any authority is a violation of Rule 240(c)(2) of the South Carolina Appellate Court Rules. *See* Rule 240(c)(2), SCACR ("Each motion or petition shall include . . . (2) [a] memorandum with citation of authorities in support of the motion."). The Motion should be denied on this basis alone.

In any event, during the trial, the Appellants were handed an exact copy of each and every pre-marked Exhibit that was presented to a witness at trial. The Appellants also received a copy of the full transcript from the court reporter by at least August 31, 2016. Therefore, the Appellants were in possession of the Exhibits and the full transcript well over a month ago.

Though not required to do so, the undersigned counsel, upon Appellants' request, sent additional copies of the marked Exhibits to the Appellants on September 30, 2016. *See* Motion at pg. 1. Still, the Appellants now assert, "there are large gaps in the numbering of the exhibits" that the undersigned counsel sent. *See* Motion at pg. 1. This statement is misleading. Of course there are gaps in the numbering of the Exhibits. Not all of the Exhibits marked for trial were used, and many of the Exhibits were not admitted. The Exhibits that the undersigned counsel sent to the Appellants – which they now claim are somehow insufficient – were the Exhibits admitted into evidence at trial. Of course there are gaps in the numbering.

The Exhibits that were not admitted into evidence, or were otherwise not used at trial, are not relevant to any alleged appellate issues in this case. The Appellants' Motion is merely a stalling tactic and should be denied. The Appellants have been in possession of the marked trial exhibits since April 11, 2016 and the trial transcript since August 31, 2016. At the very latest, the Appellants were in possession of the marked exhibits by September 30, 2016, when the undersigned forwarded the exhibits upon request. The Appellants are in possession of all of the documents necessary for their appeal. The Motion should be denied.

II. THE APPELLANTS SHOULD NOT BE AFFORDED AN EXTENSION TO FILE WHEN THE APPEAL IS ALMOST 4 MONTHS OLD AND THE TRANSCRIPT WAS RECEIVED WELL OVER A MONTH AGO.

The instant Appeal is almost 4 months old, and the Appellants have routinely ignored the Appellate Court Rules. Pursuant to Rule 207 (a)(1), the Appellants have the duty to order the transcript:

Where a transcript of the proceeding must be prepared by *the* court reporter, appellant shall, within the time provided for ordering the transcript, make satisfactory arrangements (including agreement

regarding payment for the transcript), in writing with the court reporter for furnishing the transcript.

Rule 207(a)(1), SCACR (emphasis added). "In appeals from the court of common pleas, masters in equity, special referees or the family court in domestic actions, the transcript must be ordered within ten (10) days after the date of service of the notice of appeal." *Id.* The Appellants failed to comply with Rule 207. Rather than requesting the transcript from "the court reporter" pursuant to Rule 207(a)(1), the Appellants sent the request – two (2) different times – to a different court reporter. The Berkeley County Master in Equity does not have a resident court reporter. Rather, the party wishing to have a proceeding transcribed must arrange on its own to have a reporter present. It is the Appellants' burden to order the transcript pursuant to the Rules.

Nor did the Appellants comply with this Court's August 1, 2016 Order granting the first extension of time. That Order stated "Appellant must notify the Court in writing immediately upon receipt of the transcript so the appropriate briefing deadlines may be set." *See* Order. The Respondent, who was not the first party to request the transcript, received the transcript on August 31, 2016. Assuming the Appellants received the transcript on the same date, the Appellants still did not notify the court immediately. In fact, it has been well over a month and the Appellants have still not notified the Court of their receipt of the transcript.

Finally, Rule 208(a)(1) provides, "Within thirty (30) days after receiving the transcript or, if no transcript is ordered, within thirty (30) days after serving the notice of appeal, appellant shall serve one copy of his brief on all parties to the appeal" Rule 208(a)(1), SCACR. The Appellants' initial brief was due September 30, 2016, pursuant to the

thirty-day requirement of Rule 208(a)(1). The Appellants' Motion for Extension of Time was not filed until October 3, 2016. Under the circumstances, the Appellants should not now be allowed an additional thirty (30) days to file their initial brief, particularly considering that the Appeal is now nearly four months old.

CONCLUSION

Based on the foregoing, the Respondent does not believe the instant Motion should be granted as requested. The Appellants have been in possession of the marked exhibits since April 11, 2016 and the transcript since at least August 30, 2016. The undersigned counsel has attempted to be as accommodating as possible over the course of this now five (5) year old case, but any further delay in justice would be unfair to the Respondent.

LEATH BOUCH & SEEKINGS, LLP



October 14, 2016

Yancey A. McLeod III, Esq. (Bar No.: 80911)
92 Broad Street, Post Office Box 59
Charleston, South Carolina 29401
Attorneys for Appellant

OTHER COUNSEL OF RECORD:

DEJONG LAW FIRM, LLC
Karen DeJong, Esq.
272 West Coleman Blvd., Ste. 200
Mt. Pleasant, SC 29464-5652
Attorney for Appellants

EXHIBIT A

Subject: Re: Blue Chip v. Bonifay, Hearing on 4-11-16
Date: Tuesday, August 23, 2016 at 4:07:48 PM Eastern Daylight Time
From: Yancey McLeod
To: Jan Hayward
CC: Amy Melvin, Cara Scott

Hi Jan! Yes, I suppose I will need a copy. Electronic is fine for now. Call me with any questions. Hope you are well.
-Yancey

Yancey A. McLeod III
Leath, Bouch & Seekings, LLP
92 Broad Street
Post Office Box 59
Charleston, South Carolina 29402
Phone: (843) 937-8811
Direct Dial: (843) 513-1074
Fax: (843) 937-0606

From: Jan Hayward <janhayward1@gmail.com>
Date: Tuesday, August 23, 2016 at 4:04 PM
To: Yancey McLeod <ymcleod@leathbouchlaw.com>
Subject: Blue Chip v. Bonifay, Hearing on 4-11-16

Yancey,

I was the reporter who reported the above hearing for Kim Hogle. Ms. DeJong has ordered the transcript. Would you like a copy? If so, paper or electronic only?

Thank you.

Jan

Janice D. Hayward, RMR
Independent Court Reporter
101 Dorchester Court
Charleston, South Carolina 29418-3079
Contact: 843.478.6756
janhayward1@gmail.com

EXHIBIT B

Subject: Blue Chip v. Bonifay, et al., Trial on April 11, 2016

Date: Wednesday, August 31, 2016 at 12:35:21 PM Eastern Daylight Time

From: Jan Hayward

To: Yancey McLeod

Below please find the Dropbox link for the transcript of the above trial. Your invoice is also attached. Please let me know if you need anything else.

Jan

https://www.dropbox.com/s/5eaquve96tcubhs/041116BlueChip_F.pdf?dl=0

https://www.dropbox.com/s/zl7wyo84gp5wh4a/041116BlueChip_4PP.pdf?dl=0

Janice D. Hayward, RMR
Independent Court Reporter
101 Dorchester Court
Charleston, South Carolina 29418-3079
Contact: 843.478.6756
janhayward1@gmail.com

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM THE BERKELEY COUNTY

OCT 17 2016

The Honorable Dale Van Slambrook, Master-in-Equity

90 Court of Appeals

Appellate Case No. 2016-001307

Blue Chip Medical Products, Inc. Respondent,

v.

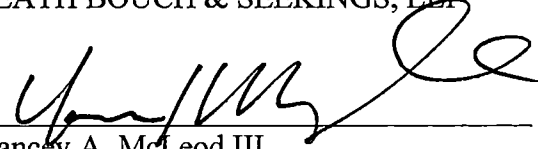
Robert L. Bonifay, Jr., Airus Medical Services, LLC
and Airus Medical LLC Appellants.

PROOF OF SERVICE

I certify that I served *RESPONDENT'S RETURN TO APPELLANTS' MOTION FOR CERTIFIED COPIES OF THE TRIAL COURT'S MARKED AND ENTERED TRIAL EXHIBITS AND EXTENSION OF TIME TO FILE APPELLANT'S BRIEF* on October 14, 2016, by depositing a copy of it in the United State Mail, postage prepaid, addressed as follows:

Karen DeJong, Esq.
272 West Coleman Blvd., Ste. 200
Mt. Pleasant, SC 29464-5652

LEATH BOUCH & SEEKINGS, LLP



Yancey A. McLeod III
92 Broad Street, Post Office Box 59
Charleston, South Carolina 29402
Attorneys for Respondent



LEATH, BOUCH & SEEKINGS, LLP

COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

October 12, 2016

VIA US MAIL AND FACSIMILE

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals, Clerk of Court
P.O. Box 11629
Columbia, SC 29211
FAX: (803) 734-1839

RECEIVED

OCT 17 2016
SC Court of Appeals

Re: Blue Chip Medical Products, Inc. v. Robert L. Bonifay, Jr., et al
Appellate Case No. 2016-001307

Dear Ms. Kitchings:

Enclosed for filing please find *Respondent's Return to Appellants' Motion for Certified Copies of Trial Court's Marked and Entered Trial Exhibits and Extension of Time to File Appellant's Brief*. By copy of this letter, I am forwarding a copy of this filing to all counsel of record.

Thank you and with best regards, I am

Yours very truly,

LEATH, BOUCH & SEEKINGS, LLP

Yancey A. McLeod, III

Cc:
Karen DeJong
Blue Chip Medical Products, Inc.

J



DAVID RAMSAY HOUSE
c. 1740

LEATH, BOUCH & SEEKINGS, LLP

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CHARLESTON, SC 29401



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The Hon. Jenny Abbott Kitchings
SC Court of Appeals, Clerk of Court
P.O. Box 11629
Columbia, SC 29211

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