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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Court of Common Pleas
for the Sixteenth Judicial Circuit

Honorable William A. McKinnon, Presiding Judge

Case No. 2019-CP-46-01736

The Center for Oral and Maxillofacial Surgery, P.A., & Mark Billman, DMD, MD,

Appellants,

v.

Thomas Lovelace & Carol Lovelace,

Respondents.

REPLY BRIEF OF APPELLANTS

By: *s/Joseph J. Tierney, Jr.*
Joseph J. Tierney, Jr., Esq. (SC Bar#13917)
Dir Tel: (843) 531-6109
E-Mail: Joseph.Tierney@rogerstownsend.com
Rogers Townsend, LLC
177 Meeting Street, Suite 320
Charleston, SC 29401
And
Matthew S. Coles, Esq.
Coles Barton, LLP
150 South Perry Street, Suite 100
Lawrenceville, GA 30046
Dir Tel: (770) 995-5578
E-Mail: mcoles@colesbarton.com
Attorneys for Appellants

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In response to the initial brief of Appellants The Center for Oral and Maxillofacial Surgery, P.A. and Mark Billman, DMD, MD ("Dr. Billman"), Respondent Thomas Lovelace ("Mr. Lovelace") goes to great lengths to avoid having to address the actual merits of this appeal, raising multiple contentions that Dr. Billman waived the arguments he raised in Appellants' initial brief, purportedly because Dr. Billman either did not make sufficient objections at trial or did not include sufficient documents or transcript pages in his designation of matter to be included in the record on appeal. Each of those waiver arguments is unavailing, however, and Dr. Billman's substantive arguments on appeal warrant a reversal and remand.

1. The trial court improperly allowed into evidence a redacted version of Dr. Billman's medical records of his examination of Mr. Lovelace, with the redactions "whited out" making them invisible to the jury and allowing the jury to speculate – at Mr. Lovelace's urging – that the Dr. Billman did not do a complete examination of Mr. Lovelace.

As demonstrated in Appellants' initial brief, the trial court committed reversible error when it refused to give the jury a redacted version of Dr. Billman's records of his examination of Mr. Lovelace that indicated to the jury the areas that had been redacted. Prior to trial, the trial judge had excluded evidence of Mr. Lovelace's history of smoking and drinking. Appellants do not appeal that decision, but the way that the trial court allowed Mr. Lovelace to redact Dr. Billman's records – with "whited out" redactions that were invisible to the jury – gave the jury the impression that Dr. Billman did not perform a thorough examination of Mr. Lovelace. The redacted records looked like Dr. Billman left blanks in his own forms as he examined the lesion on Mr. Lovelace's tongue. At trial, Mr. Lovelace argued that Dr. Billman was an overly busy doctor who took short cuts. Mr. Lovelace also urged the jury to look closely at Dr. Billman's records to see what was

not contained there because, according to Mr. Lovelace, the jury should assume that Dr. Billman had failed to do or say to Mr. Lovelace anything that was not in Dr. Billman's records. Accordingly, a version of the records with "whited out" portions made it appear as if Dr. Billman did not do a complete examination, and the introduction of that redacted version of the records was very prejudicial to Dr. Billman because it played right into Mr. Lovelace's argument that Dr. Billman rushed through his examination of Mr. Lovelace. Thus, the trial court erred when it refused to introduce into evidence a version of the medical records with "blacked out" redactions that would have indicated to the jury that Dr. Billman had not skipped portions of Mr. Lovelace's examination.

a. Appellants did not waive their objection to the "whited out" redactions of Dr. Billman's medical records.

Before reaching the merits of this appellate issue in his initial brief, Mr. Lovelace first argues that Dr. Billman waived his objection to the "whited out" redactions of his medical records, but Mr. Lovelace made this same argument at trial, and the judge rejected it.

Prior to trial, the trial judge excluded all evidence of Mr. Lovelace's history of smoking, and accordingly, the parties came to trial with redacted versions of Dr. Billman's records of his examination of Mr. Lovelace. Dr. Billman's counsel had two separate exhibits prepared, one with "blacked out" redactions. (T-469:17-470:6). At the conclusion of Plaintiffs' case, when it became clear that Mr. Lovelace was going to argue that Dr. Billman rushed through his examination of the lesion in Mr. Lovelace's mouth, because Dr. Billman had not yet published his copy of his records, Dr. Billman's counsel asked for permission to submit to the jury a version of the records with "blacked out" redactions instead of "whited out" redactions. (T-468:23-469:2). In response, Mr. Lovelace's counsel contended that Dr. Billman had waived that objection, but after Dr. Billman's counsel reminded everyone that Dr. Billman had "objected to this at the beginning of this trial,"

the trial court rejected Mr. Lovelace's argument and specifically held that "there's no waiver." (T-470:2-7).

"The rationale behind the requirement of a contemporaneous objection is to 'enable[ ] trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition.'" *State v. Byers*, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011). The trial judge in the present case had previously addressed the redaction issue, and thus, had the ability to make a reasoned decision, as the trial judge himself indicated when he held that there had been no waiver of Dr. Billman's objection to the "whited out" redactions. Accordingly, this argument must fail.

Mr. Lovelace also makes the perplexing argument that Dr. Billman waived this appellate issue because he did not proffer to the trial court the "blacked out" version of his records. To make this argument, Mr. Lovelace cites *Ellis v. Oliver*, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996), in which the appellant completely failed to proffer any of the records he was seeking to introduce. But in the present case, Dr. Billman gave the trial court judge a "blacked out" version of the records. (*See* T-464:10-13, 468:23-469:2, 469:17-23). Additionally, it is no mystery what Dr. Billman was asking the trial court to admit into evidence: a copy of Dr. Billman's records with the redactions done with black squares instead of with misleading blank white spaces. Accordingly, Dr. Billman made a proffer of the excluded document, and this argument must also fail.

b. The admission of the "whited out" medical records was prejudicial to Dr. Billman.

In his initial brief, Dr. Billman stated the proper standard of review applicable to the trial court's refusal to admit medical records with "blacked out" redactions. *See State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (holding that the trial court's decision to admit or exclude

evidence is subject to an "abuse of discretion" standard of review). Citing cases addressing a trial court's ruling on attorney's fees in a divorce case and a trial court's refusal to revoke a criminal defendant's probation, Mr. Lovelace argues that Dr. Billman must show "substantial or violent disagreement" with the trial court's determination. (Initial Brief of Respondents at p. 13). But that is not the proper standard to apply here. Rather, an abuse of discretion occurs in the context of the admission of evidence "when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

As explained in Dr. Billman's initial brief, the trial court abused its discretion here because Mr. Lovelace's counsel urged the jury to look carefully at the "whited out" records for things that were missing, which according to Mr. Lovelace meant that those missing items did not occur or were not asked about during Dr. Billman's examination of the lesion on Mr. Lovelace's tongue. Because the "whited out" redactions were invisible to the jury, the redactions improperly led them to believe, without any evidentiary support, that Dr. Billman did not ask Mr. Lovelace about his medical history.

In response to this conclusion, Mr. Lovelace contends that the trial court was prohibited from introducing a version of Dr. Billman's medical records that indicated redactions had occurred, because those redactions would have called attention to themselves. But that is not the standard this Court applies to determine whether redactions have been properly made. In fact, the cases that Mr. Lovelace cites to support his argument, although of limited applicability, would actually call for a reversal in this case. The cases Mr. Lovelace cites were addressing the Sixth Amendment right of criminal defendants to confront and cross-examine the witnesses against them. That right has been interpreted to prohibit a prosecutor from introducing into evidence a

written confession by a third party when that confession implicates the defendant. Accordingly, prosecutors will often attempt to introduce redacted versions of those confessions, and the courts must address whether those redactions sufficiently protect the defendant's Sixth Amendment rights. *See, e.g., State v. Jackson*, 410 S.C. 584, 765 S.E.2d 841 (Ct. App. 2014) (cited on p. 14 of Mr. Lovelace's initial brief). Although those cases analyze through the lens of a criminal defendant's constitutional rights whether redactions of a written confession may cause a jury to infer that the defendant is implicated by the statement, they do provide the helpful precedent that redactions of trial exhibits should not "invite the jury to speculate" about what the blanked-out portions of a document infer. *Id.* at 599, 765 S.E.2d at 849. And that is precisely the problem with the "whited out" version of Dr. Billman's medical records.

The redactions of the medical records were invisible to the jury. There was no way for them to even know something had been removed from the records. Mr. Lovelace's counsel and expert witnesses repeatedly told the jury that, if something was not contained in Dr. Billman's records, then they should assume that Dr. Billman did not talk to Mr. Lovelace about that issue. (T-89:13-25, T-90:3-7; T-289:6-14; T-679:10-21; T-682:13-14 [Mr. Lovelace's counsel argued that the medical records' "very purpose is to say what happened"]). During closing arguments, Mr. Lovelace's counsel repeatedly urged the jury to look at the medical records to confirm that there were things missing. (T-680:20-681:6). Accordingly, Mr. Lovelace was improperly inviting the jury to speculate about things that were not apparent in Dr. Billman's medical records because they had been "whited out."

Additionally, contrary to what Mr. Lovelace asserts in his brief, his counsel did argue at trial that Dr. Billman operated a busy and rushed and practice. Mr. Lovelace's counsel emphasized at trial that Dr. Billman's "busy" practice required him to see 15 to 25 patients a day and perform

six to eight surgeries a day. (T-608:5-611:3; 680:9-17). During opening statements, Mr. Lovelace's counsel even stated that Dr. Billman "took a short cut" when examining Mr. Lovelace. (T-80:3-4).

Accordingly, the jury easily could have inferred that Dr. Billman skipped portions of his own medical record forms when they saw the "whited out" blank spaces in those forms, making it look like Dr. Billman had simply skipped questions during his examination of Mr. Lovelace.[1] The trial court committed reversible when it refused to allow Dr. Billman to introduce a version of his records that showed what portions had been redacted with black boxes.[2]

2. The trial court committed reversible error when it instructed the jury that the negligence of a later treating physicians is foreseeable because that instruction was not applicable to the facts of this case.

Dr. Billman was not the first doctor to examine the lesion on Mr. Lovelace's tongue. Rather, Mr. Lovelace was first seen by his dentist, Dr. Robert Renner, who conducted the initial examination of the lesion. (T-118:2-6). In fact, one of plaintiff's experts agreed that Dr. Renner's office was responsible for managing the decisions about addressing the lesion after Dr. Billman made his diagnosis. (T-198:6-10). Dr. Renner's plan to address that lesion was to refer Mr. Lovelace to Dr. Billman to look at Mr. Lovelace's tongue and then to give Dr. Renner a

[1] Mr. Lovelace contends that the jurors would not have known what the abbreviations on those forms mean because they are medical terms, but that argument assumes that there were no jurors with a medical background. Mr. Lovelace's assertion that the judge and attorneys at trial did not know what the abbreviations meant, and thus, the jurors also must not have known what they meant is based on a bad assumption. Legally trained individuals might not know what the abbreviations meant, but anyone with medical training likely would have.

[2] Mr. Lovelace makes the nonsensical argument that the error caused by the "whited out" redactions was cured by the trial court's instruction to the jury that they should not infer anything from the redactions to the exhibits. But the jury had no idea the records had been redacted. It was impossible for them to apply the trial court's instruction to ignore redactions they did not even know about. Accordingly, the trial court's instruction regarding redactions did nothing to fix the error caused by the admission of the "whited out" records.

recommendation. (T-118:21-24). Dr. Renner did not tell Mr. Lovelace that the lesion could be cancerous, which is exactly what Mr. Lovelace contends was negligent about Dr. Billman's treatment of Mr. Lovelace. (T-120:9-121:2). Dr. Renner also did ***not*** tell Dr. Billman that he should perform a biopsy. (T:121:7-15). In his referral note to Dr. Billman, Dr. Renner did not mention "cancer" or "biopsy." (Plaintiff's Trial Ex. 2). In other words, Dr. Billman was one of many physicians who examined Mr. Lovelace, and he was not the first one who purportedly did not tell Mr. Lovelace that the lesion could have been cancerous. Accordingly, the trial court committed reversible error when it instructed the jury that the negligence of later treating physicians was foreseeable because that instruction did not apply to the facts of the case and, therefore, was confusing to the jury.

a. Dr. Billman properly objected to the trial court's jury charge regarding the foreseeability of a later treating physician and preserved this error for consideration on appeal.

i. The specificity of Dr. Billman's objection to the jury charge.

Mr. Lovelace contends that Dr. Billman acquiesced to the trial court's charge on the foreseeability of a later treating physician, but that simply is not true. During a conference about the jury charges, Dr. Billman objected to Mr. Lovelace's requested charge on the foreseeability of a treating physician because it was confusing.[3] (T-480:4-15). The trial judge then ruled that he was going to give the charge. (T-481:12-13). Dr. Billman's counsel then asked, if the trial court was going to give the charge, that the language of the charge be clarified, which the trial judge agreed to do. (T-481:14-15). Accordingly, contrary to what Mr. Lovelace asserts in his brief, Dr.

[3] Citing *State v. Kerr*, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998), Mr. Lovelace argues that an objection based on the confusing nature of a charge is not enough to preserve that objection for review on appeal. The *Kerr* case does not stand for that proposition. In fact, the Court in that case did not even address the sufficiency of the appellant's objection at trial. *Id.* at 145, 498 S.E.2d at 218.

Billman did not acquiesce to the charge at issue. He was simply asking that, if the trial court was going to give the charge over his objection, additional language be added to clarify the charge. The following day, immediately before the trial judge instructed the jury, the judge again asked for any objections to the charges. Dr. Billman's counsel again objected to the foreseeability charge. (T-645:7-646:3). The trial judge then stated, "We talked about that yesterday. You are protected for the record." (T-646:4-5). In other words, the trial judge understood that, even with the edits he had made to the charge that Mr. Lovelace had proposed, Dr. Billman still objected to the charge because it was confusing and not appropriate for the jury to hear.

To preserve an objection to a jury charge, this Court's rules "only require[] an objection on the record, opportunity for discussion, and a specific ruling by the trial court on the jury charge issue." *Dixon v. Ford*, 362 S.C. 614, 625, 608 S.E.2d 879, 885 (Ct. App. 2005). The objection made at trial does not have to use the same words that an appellant argues on appeal, so long as the objection at trial directed the trial judge to the grounds for the objection and allowed for a discussion of the relevant issues. *See State v. Mitchell*, 378 S.C. 305, 313, 662 S.E.2d 493, 498 (Ct. App. 2008) (holding that "[e]ven without a citation to [the applicable case law], [the appellant's] assertions were sufficient to direct the trial judge's attention to the problems" underlying the issues asserted on appeal); *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) ("Although [appellant] did not use the exact words 'corpus delicti' in his request for a directed verdict, it is clear from the argument presented in the record that the motion was made on this ground."). Additionally, an appellant is allowed to renew objections later in trial by simply referring to his prior objection as "the same one" as before. *State v. Walker*, 430 S.C. 411, 417, 844 S.E.2d 405, 408 (Ct. App. 2020). Finally, a request for modification to the trial judge's ruling, once that ruling is made, is not to be treated as a waiver of a prior objection to the ruling.

See South Carolina Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–03, 641 S.E.2d 903, 907 (2007). In short, it is "good practice" for this Court "to reach the merits of an issue [even] when error preservation is doubtful." *Walker*, 430 S.C. at 417, 844 S.E.2d at 408 (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012)).

Dr. Billman objected to the trial court's instruction on the foreseeability of later treating physicians, and the trial court ruled that it was going to give that instruction anyway. The trial court then agreed to modify the instruction to make it less confusing, but that was not a concession by Dr. Billman that the charge could be given. In fact, the trial court understood all of this when Dr. Billman's counsel later renewed his objection to the charge, and the trial judge said, "We talked about that yesterday. You are protected for the record." (T-646:4-5). Accordingly, Dr. Billman did not waive this appellate issue.

ii. The completeness of Dr. Billman's designation of matters for the appellate record.

In a classic (but unavailing) "gotcha" argument, Mr. Lovelace contends that this Court cannot review this particular error because Dr. Billman did not include all of the trial court's jury instructions in his appellate record designation. Mr. Lovelace cites a single case to support that argument, but in that case the appellant argued that the trial court erroneously failed to give an instruction that the appellant had requested. *See Beverly S. v. Kayla R.*, 395 S.C. 399, 401–02, 718 S.E.2d 224, 225–26 (Ct. App. 2011).[4] In the present case, Dr. Billman is arguing that the trial court gave an instruction that was not applicable to the facts of the case and likely confused the

[4] Mr. Lovelace also cites *State v. Vanderhorst*, 257 S.C. 114, 184 S.E.2d 540 (1971) to support his argument, but that case addressed the appeal of the denial of a motion for directed verdict, not an appeal of an incorrect jury charge. *Id.* at 120, 184 S.E.2d at 542. In other words, that case is wholly inapplicable to Mr. Lovelace's argument.

jury. Accordingly, everything that the trial court charged the jury is not at issue here, and in an effort to follow this Court's rule requiring a party to certify that only relevant material has been designated for inclusion in the record, Dr. Billman designated only the portion of the trial court's instructions that included the erroneous jury charge. *See* SCACR 209(c) ("The Designation shall be accompanied by a certificate signed by the party's counsel of record that the Designation contains no matter which is irrelevant to the appeal.").

In any event, this Court's rules allow an appellant to make additional record designations with his reply brief. *See* SCACR 209(a) ("At the time a party serves his initial brief(s) under Rule 208, ***to include a reply brief***, he shall also serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal . . . .") (emphasis added). Dr. Billman is filing with this brief an additional designation that includes the trial court's entire charge to the jury. Accordingly, just like all the other "waiver" arguments Mr. Lovelace has made, this argument is unavailing.

b. The trial court's jury charge regarding the foreseeability of a later treating physician was prejudicial to Dr. Billman and requires a reversal.

As demonstrated in Dr. Billman's initial brief, he was one of many doctors who examined the lesion in Mr. Lovelace's mouth. Dr. Renner was the first one to examine the lesion, and he was the one who referred Mr. Lovelace to Dr. Billman – but without mentioning cancer or a biopsy in his referral note. (*See* Plaintiff's Trial Ex. 2). All of the cases that Mr. Lovelace cites in his initial brief to contend that the instruction was proper were addressing the negligence of an initial tortfeasor, not the alleged negligence of someone who began treating the plaintiff after other doctors had begun the plaintiff's treatment. *See, e.g., Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 103–05, 727 S.E.2d 407, 414–15 (2012) (cited on page 22 of Mr. Lovelace's brief); *Payton v. Kearse*, 319 S.C. 188, 211, 460 S.E.2d 220, 233–34 (Ct. App. 1995), *rev'd on other grounds*, 329 S.C. 51, 495 S.E.2d 205 (1998) (cited on page 22 of Mr. Lovelace's brief); *Graham v. Whitaker*,

282 S.C. 393, 397, 321 S.E.2d 40, 42–43 (1984) (cited on page 21 of Mr. Lovelace's brief); *Bessinger v. De Loach*, 230 S.C. 1, 4, 94 S.E.2d 3, 5 (1956) (cited on page 21 of Mr. Lovelace's brief). Accordingly, pursuant to the standard Mr. Lovelace himself provides in his initial brief, the jury charge was not "applicable to the issues and the evidence of the case." *Fernanders v. Marks Constr. of S.C.*, 330 S.C. 470, 473, 499 S.E.2d 509 (1998) (cited on page 21 of Mr. Lovelace's brief). Thus, the trial court erred when it gave that charge.

Mr. Lovelace contends that Dr. Billman has not shown prejudice, but this Court has held that when a trial court's instructions are confusing to the jury, leading to "a reasonable chance of influencing the jury's verdict and prejudicing" the appellant, then the improper instruction "amount[s] to reversible error." *Hughes v. W. Carolina Reg'l Sewer Auth.*, 386 S.C. 641, 650, 689 S.E.2d 638, 643 (Ct. App. 2010). The prejudice to Dr. Billman here is plain. The trial court's instruction on the foreseeability of a later treating physician confused the jury and likely caused it to ignore the negligence of other doctors who were treating Mr. Lovelace at the same time as Dr. Billman, thereby improperly influencing their verdict.

Moreover, the charge at issue not only confused the jury, but it also prevented Dr. Billman from making his statutorily permitted argument that "another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." S.C. Code Ann. § 15-38-15(D). In his brief, Mr. Lovelace contends that this "empty chair" argument is available only if Dr. Billman was able to establish that he was not negligent. Obviously, Dr. Billman contends his treatment of Mr. Lovelace was completely devoid of any negligence, but in any event, Mr. Lovelace's argument ignores the plain language of the statute, which allows a defendant to argue that another tortfeasor "contributed" to the plaintiff's alleged injuries. *Id.* Accordingly, whether Dr. Billman was negligent or not, he still

should have been permitted to argue that Mr. Lovelace's other doctors contributed to Mr. Lovelace's injuries. But the trial court's instruction about the foreseeability of a later treating physician effectively stripped Dr. Billman of his ability to make that argument, and thus, the trial court committed reversible error when it gave that instruction to the jury.

CONCLUSION

For the foregoing reasons and for the reasons given in their initial brief, Appellants ask this Honorable Court to reverse the judgment entered by the trial court on the jury's verdict and remand this case for a new trial.

Respectfully submitted,

By: *s/Joseph J. Tierney, Jr.*
Joseph J. Tierney, Jr., Esq. (SC Bar#13917)
Dir Tel: (843) 531-6109
E-Mail: Joseph.Tierney@rogerstownsend.com
Rogers Townsend, LLC
177 Meeting Street, Suite 320
Charleston, SC 29401
And
Matthew S. Coles, Esq.
Coles Barton, LLP
150 South Perry Street, Suite 100
Lawrenceville, GA 30046
Dir Tel: (770) 995-5578
E-Mail: mcoles@colesbarton.com
Attorneys for Appellants

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THE STATE OF SOUTH CAROLINA
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Appeal from the York County Court of Common Pleas
for the Sixteenth Judicial Circuit

Honorable William A. McKinnon, Presiding Judge

Appellate Case No. 2021-000907
Circuit Case No. 2019-CP-46-01736

Thomas Lovelace & Carol Lovelace,

Respondents,

v.

The Center for Oral and Maxillofacial Surgery, P.A., & Mark Billman, DMD, MD,

Appellants.

PROOF OF SERVICE

I certify that I have served Respondents with a copy of the Appellants' Reply Brief by depositing a copy of it in the United States Mail, postage prepaid, on January 31, 2022, addressed to their attorneys of record, Theile B. McVey, Esquire, John D. Kassel, Esquire, and Jamie Rae Rutkoski, Esquire, 1330 Laurel Street, PO Box 1476, Columbia, South Carolina 29202.

January 31, 2022

Tracey N. Bugg

Tracey Bugg
Paralegal to Joseph J. Tierney, Jr., Esq. (SC Bar# 13917)
Rogers Townsend, LLC

ROGERS TOWNSEND, LLC
177 MEETING STREET, SUITE 320
CHARLESTON, SOUTH CAROLINA 29401
P 843.737.8668 F 843.790-8828
W ROGERSTOWNSEND.COM

JOSEPH J. TIERNEY, JR., ESQUIRE
MEMBER
JOSEPH.TIERNEY@ROGERSTOWNSEND.COM
D 843.531-6109

ROGERS TOWNSEND
ATTORNEYS AT LAW

RECEIVED
Jan 31 2022
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VIA ELECTRONIC FILING (ctappfilings@sccourts.org)
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Thomas Lovelace and Carol Lovelace, Respondent v. The Center for Oral and Maxillofacial Surgery and Mark Billman, DMD, MD, Appellants
Appellate Case No.: 2021-000907
RT File No.: 023657.10

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the following:

1) Reply Brief of Appellants.
2) Appellants' Reply Designation of Matter to be Included in the Record on Appeal.
3) Proof of Service of Reply Brief.
4) Proof of Service of Reply Designation of Matter.

With kindest regards, I am,

Sincerely,

By: *s/Joseph J. Tierney, Jr.*
Joseph J. Tierney, Jr., Esq. (SC Bar#13917)
Dir Tel: (843) 531-6109
E-Mail: Joseph.Tierney@rogerstownsend.com
177 Meeting Street, Suite 320
Charleston, SC 29401
And
Matthew S. Coles, Esq.
Coles Barton, LLP
150 South Perry Street, Suite 100
Lawrenceville, GA 30046
Dir Tel: (770) 995-5578
E-Mail: mcoles@colesbarton.com
Attorneys for Appellants

Cc: Other Counsel of Record:

John D. Kassel (SC Bar 3286)
Theile B. McVey (SC Bar 16682)
Jamie Rae Rutkoski (SC Bar 103270)
Kassel McVey Attorneys at Law
1330 Laurel Street
Post Office Box 1476
Columbia, South Carolina 29202-1476
(803) 256-4242
Attorneys for Respondents