

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
D. Garrison Hill, Circuit Court Judge

Opinion No. 5127
(S.C. Ct. App. filed May 1, 2013)

Jenean Trammell Gibson, as Personal Representative
for the Estate of James E. Gibson, III, Appellant,

v.

Christopher C. Wright, M.D., Respondent.

**RESPONDENT'S RETURN TO
PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC**

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MAY 31 2013

SC Court of Appeals

On May 1, 2013, this Court issued a published decision affirming the order of Circuit Court Judge D. Garrison Hill denying the post-trial motions filed by the Appellant Jenean Trammell Gibson, as Personal Representative for the Estate of

James E. Gibson, III ("Gibson"). The Court thereby affirmed the jury's verdict and judgment entered in favor of the Respondent Christopher C. Wright, M.D.

The Appellant Gibson has now filed a petition for rehearing. In response, Dr. Wright submits that this Court correctly addressed each of the issues raised by Gibson in her petition for rehearing. Dr. Wright submits the following discussion with respect to the arguments raised in the petition:

I.

Gibson argues on appeal that the trial judge erred in allowing counsel for Dr. Wright to use a Powerpoint presentation showing medical record excerpts instead of the medical records themselves. Gibson complains that the excerpts were based on medical records that were produced only the Friday before the trial began. Gibson argues in her petition for rehearing that the Court disregarded "South Carolina law establishing that reversal on appeal is proper when the documents are not provided in a timely manner." *See*, Petition for Rehearing, p. 2. Gibson then cites to the case of *Crowley v. Spivey*, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985), but fails to identify any holding in *Crowley* that supports the "established" law she intends to cite. *Crowley* stands for the proposition that a summary of voluminous records may be submitted to the jury, which is consistent with what Judge Hill allowed in the case at bar.

Moreover, to the extent that Gibson complains that her counsel did not have the medical records until the Friday prior to trial, that is Gibson's own fault. The record clearly reflects that those medical records were available to Gibson's counsel before that Friday. In fact, Court Exhibit 14 includes correspondence that was sent to Gibson's counsel agreeing to make 29 volumes of medical records available for copying on several occasions throughout February and March 2010. (R. 734-739). Most of those records were produced in the litigation by the Greenville Hospital System, which had previously been a co-Defendant. (R. 735). Gibson's counsel had the ability to obtain those extremely voluminous records from the hospital just as Dr. Wright's counsel had. Nonetheless, to avoid any issues, Gibson's counsel was advised by correspondence dated February 12, 2010; February 13, 2010, February 25, 2010; and March 2, 2010, that all medical records were available for inspection and copying. (R. 734-739). Thus, Dr. Wright is not at fault if Gibson's counsel did not have certain medical records prior to trial or if Gibson's counsel did not get records specifically referenced by Bates-number in the slides until the Friday before trial. (R. 297-298). There can be no dispute that those records were repeatedly offered to counsel for inspection and copying.

In sum, this Court correctly concluded that Judge Hill did not abuse his discretion in allowing Dr. Wright's counsel to utilize the Powerpoint slides as a visual aid and/or demonstrative aid for the jury. The slides allowed for a more

expeditious use of the medical records in questioning witnesses. Judge Hill clearly did not abuse his discretion in how he worked through the objections raised and in allowing the use of the slides. Judge Hill even delayed the trial to give Gibson's counsel additional time to review the slides for any objections. Gibson has not shown that the slides were erroneous or misleading to the jury. As a result, the rulings by Judge Hill relative to the use of the slides were properly affirmed.

II.

Gibson also argues that this Court erred in affirming the denial of Gibson's motion for mistrial. Gibson claims that the Court overlooked that the collateral source rule was violated when defense counsel raised the issue of police and social security disability. The Court's ruling is correct and does not warrant any rehearing for several reasons.

First, as this Court recognized, the record does not show that there was actually an order issued by Judge Hill in limine. Instead, Dr. Wright's counsel agreed not to mention the issue of disability income "as long as it doesn't come up." Yet, during his direct examination, James Gibson offered testimony giving the jury the impression that he was impoverished. He testified that he lost his house because he "couldn't make the payments, uh, rent payments on it" and had to live in a motel. (R. 61). He testified that he had no transportation because he had "lost" his truck. (R. 62). He testified that he could not afford bandages and "was

having to use Kleenex and masking tape to put on [his wound]." (R. 62). He also informed the jury that a friend (Deane Hines) was stealing from him. (R. 63-64). With that testimony, Mr. Gibson was attempting to curry sympathy with the jury to his financial condition and to offer an explanation for his failure to comply with doctor's instructions. He opened the door to cross-examination on his financial status. Dr. Wright's counsel, in response to this testimony, inquired about Mr. Gibson's claimed financial problems and raised the issue of police and social security disability. (R. 65). In short, Mr. Gibson's financial status did become an issue, and it was made an issue by Mr. Gibson himself.

Second, Judge Hill gave a curative instruction to which the Gibson agreed. "Generally, a curative instruction is deemed to have cured any alleged error." *State v. White*, 371 S.C. 439, 639 S.E.2d 160, 163 (Ct. App. 2006). "Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review." *Id.* Gibson, however, made no objection to the sufficiency of the curative instructive given by Judge Hill. Gibson also did not renew his motion for mistrial at the time the curative instruction was given. As a result, Gibson's objection to the inquiry regarding disability income and his claim of prejudice is not even preserved for appellate review.

Finally, Gibson has failed to demonstrate any legal prejudice. As this Court recognized, the brief mention of the police and social security disability did not even implicate the collateral source rule nor at any rate violate the rule.

In sum, Gibson did not show that Judge Hill abused his discretion in denying the motion for mistrial, that is, assuming that the issue is even properly preserved for appellate review.

III.

Lastly, Gibson contends that Judge Hill erred in denying his request to impeach Dr. Wright with the deposition testimony of Dr. James Wallace. This Court's analysis of this issue is correct.

Importantly, Gibson sought to impeach Dr. Wright not with inconsistent testimony from his own deposition but rather with the deposition testimony of Dr. Wallace. The use of the deposition testimony of Dr. Wallace in an attempt to "impeach" Dr. Wright is not a proper use of a deposition under Rule 32(a), SCRPC. Quite simply, there is no rule of evidence that allows use of one witness's deposition testimony to "impeach" another witness. Indeed, such "impeachment" constitutes the improper pitting of one witness's testimony against another. *See, State v. Outen*, 237 S.C. 514, 118 S.E.2d 175, 181 (1961), *overruled on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (it is improper to

pit one witness against another for the purpose of impeachment); *Burgess v. State*, 329 S.C. 88, 495 S.E.2d 445 (1998) (same).

At any rate, Gibson was not prejudiced by this ruling. Dr. Wallace was available to testify and indeed did testify at trial. If Gibson had wished to impeach Dr. Wallace with his deposition testimony, he could have done so, and that would have been a proper application of Rule 32(a)(1). Furthermore, Judge Hill had already permitted Gibson's counsel to question Dr. Peter Smith, the defense expert, regarding this same excerpt from Dr. Wallace's deposition. That use of the Wallace deposition was allowed by Judge Hill over a defense objection on the basis that the Wallace deposition was reviewed and relied upon by Dr. Smith in forming his opinions. (R. 277-289). Thus, as Gibson's counsel readily admitted, Gibson was permitted to publish Dr. Wallace's testimony at issue to the jury. (R. 343-344). Judge Hill, however, did not allow Gibson to use that deposition testimony to improperly impeach Dr. Wright. As this Court correctly concluded, that ruling was not an abuse of discretion and did not give rise to any reversible error.

CONCLUSION

Based on the foregoing discussion, the Respondent Christopher C. Wright, M.D. respectfully requests that this Court deny the petition for rehearing.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY:  _____

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May 28, 2013

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent, does hereby certify that service of the **Respondent's Return to Petition for Rehearing and Petition for Rehearing En Banc** 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 28th day of May 2013:

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May 28, 2013

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Jenean Trammell Gibson, as Personal Representative for the Estate of
James E. Gibson, III v. Christopher C. Wright, M.D.
SCCA Case Tracking Number: 2010163726
Civil Action Number: 2008-CP-23-5737
Claim Number: CB085123M
Our File Number: 22.8422

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of the **Respondent's Return to Petition for Rehearing and Petition for Rehearing En Banc** in the above referenced matter. Please file the original and return a clocked-in copy to me in the enclosed envelope.

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

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The Honorable Jenny Abbott Kitchings
May 28, 2013
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cc: (w/ Enclosure)

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