THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
Circuit Court Judge

Opinion No. 2022-UP-417 (S.C. Ct. App. filed November 23, 2022)

Jeane Whitfield,

Petitioner,

v.

Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,

Respondents.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2017-CP-10-02758
Appellate Case No. 2019-001716

Jeane Whitfield,

Appellant,

v.

Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,

and

Patrick O'Neil, M.D. and O'Neil Plastic Surgery, LLC,

Respondents.

FINAL BRIEF OF APPELLANT

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2. WHETHER THE TRIAL COURT ERRED IN NOT PERMITTING PLAINTIFF TO IMPEACH THE CREDIBILITY OF DEFENDANT'S OFFICE MANAGER AND ELICIT EVIDENCE OF BIAS BY EXAMINING HER ABOUT HER COMPENSATION AND SEXUAL RELATIONSHIP WITH DEFENDANT AND DEFENDANT'S WIFE.

3. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF'S DIRECTED VERDICT MOTION AS TO NEGLIGENCE PER SE FOR ADMITTEDLY DESTROYED AND/OR MISSING MEDICAL RECORDS.

STATEMENT OF THE CASE

On May 30, 2017, Jeane Whitfield brought this medical malpractice action against Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC. The Amended Complaint alleged, *inter alia*, that the Defendants were negligent in rendering medical care to Mrs. Whitfield and in failing to keep and/or destroying medical records, including photographs, results of physical examinations, surgical notes, documentation of visits, documentation of care provided, assessments, plans, and diagnostic materials in violation of S.C. Code of Regulations R. 61-16 and S.C. Code § 40-47-110. The Amended Complaint further alleged that as a direct and proximate result of the acts and omissions of Defendants, Mrs. Whitfield sustained physical injuries, and was caused to endure additional surgical procedures, medical expenses, physical pain and suffering, scarring, disfigurement, shame, humiliation, mental anguish, emotional distress, and that she will continue to suffer these damages.

On October 4, 2017, Defendants filed *Defendants' Amended Answer to Plaintiff's Amended Complaint*, generally denying the allegations made against them and raising various affirmative defenses.

A five-day jury trial was held in Charleston, South Carolina from August 26, 2019 to August 30, 2019, whereafter the jury found for the Defendant. Judgment was entered on September 11, 2019 and written notice of entry of this Judgment was mailed to Mrs. Whitfield's counsel on or about September 16, 2019. On October 8, 2019, Mrs. Whitfield served the *Notice of Appeal* on Defendants.

On October 28, 2019, the trial court held a post-trial hearing on *Defendants' Motion for Costs* and Non-Party Patrick O'Neil and O'Neil Plastic Surgery LLC's *Motion to Compel Compensation to Non-Party Witness Patrick O'Neill, M.D.*

On November 7, 2019, the trial court entered its *Order Granting Non-Party O'Neill Plastic Surgery's Motion to Compel Compensation*. On November 18, 2019, Mrs. Whitfield served the *Notice of Appeal* for this post-trial order on Non-Party Respondents Patrick O'Neil, M.D. and O'Neill Plastic Surgery, LLC.

On December 11, 2019, the trial court entered its *Order Granting Defendant's Motion for Costs*. Mrs. Whitfield served the *Notice of Appeal* for this post-trial order on Defendants Dr. Schimpf and Sweetgrass Plastic Surgery, LLC on December, 19, 2019.

This appeal follows.

STANDARD OF REVIEW

An appellate court has the power to affirm, reverse, or modify the judgment of the trial court. *See generally Detheridge v. Earle.* 3 S.C. 396, 399 (1872). In an appeal of a trial by jury of an action at law, the jurisdiction of the appellate court generally extends to correcting errors of law. *Townes Assocs. Ltd v. Greenville.* 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). The appellate court, however, may also modify or reverse the factual finding of a trial court where no evidence reasonably supports the finding. *Id.* at 85-86, 221 S.E.2d at 775.

Although the admission or exclusion of evidence is within the sound discretion of the trial court, "the exercise of a trial court's discretion implies conscientious judgment, not arbitrary action, and takes account of the law and particular circumstances of the case, being directed by the reason and conscience of the judge to a just result." *Horn v. Davis Elec. Constructors.* 312 S.C. 363, 366, 440 S.E.2d 398, 400 (Ct. App. 1994) (citing *Nienow v. Nienow.* 268 S.C. 161, 232 S.E.2d 504 (1977); *State v. Hill.* 266 S.C. 49, 221 S.E.2d 398 (1976)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell.* 339 S.C. 369, 389, 529 S.E.2d

528, 539 (2000) (citing *Fontaine v. Peitz.* 291 S.C. 536, 354S.E.2d565 (1987)).

Physical and Mental Examinations of Parties

Rule 35 of the South Carolina Rules of Civil Procedure governs requests for physical and mental examinations and provides in relevant part as follows:

> In any case in which the amount in controversy exceeds $100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown....
>
> The physician of the party to be examined may be present at the examination. Unless the parties agree, or the court for good cause shown determines otherwise, the examination shall be in the county where the person to be examined, or his physician, resides.... Upon *reasonable objection* to the physician designated to make the examination, and if the parties shall fail to agree as to who shall make the examination, the court may designate a physician; but the fact that a physician was so designated shall not be admissible upon the trial.

Fairchild v. S.C. Dep't of Transp., 727 S.E.2d 407, 416-417, 398 S.C. 90, 108 (2012), citing Rule 35(a), SCRCP.

"The purpose of the rule for an IME is to materially aid the jury, not just the defendant, in evaluating the actual damages sustained and arriving at a just verdict. […] Thus, the better rule is that the physician should not be affiliated with either party in order to serve the purposes of Rule 35." [Emphasis added]. *Fairchild v. S.C. Dep't of Transp.*, 727 S.E.2d at 417, 398 S.C. at 109-110.

Eliciting Evidence of Bias to Impeach Witness

Our courts have followed the "general rule: that "'anything having a legitimate tendency

to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony,' "so that "'on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." *Smalls v. State*, 810 S.E.2d 836, 840, 422 S.C. 174, 182-183 (2018). "Rule 608(c) [of the South Carolina Rules of Evidence] 'preserves [this longstanding] South Carolina precedent.'" *Id.*, citing *State v. Sims* , 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002). Specifically, Rule 608(c), SCRE, states: "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."

Considerable latitude is generally allowed in the cross-examination of an adverse witness for possible bias. *North Greenville College v. Sherman Const. Co*., Inc., 243 S.E.2d 441, 442, 270 S.C. 553, 556 (1978), citing *Martin v. Dunlap*, 266 S.C. 230, 222 S.E.2d 8 (1976). As noted by McCormick: "The law recognizes the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties or the self-interest of the witness in the outcome of the case. Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility." *Id*., citing McCormick on Evidence, § 40, p. 78 (1972).

Directed Verdicts

When evidence presented at trial yields only one conclusion concerning liability, the trial court may properly grant a motion for directed verdict. *Fairchild v. Dept. of Transp*., 683 S.E.2d 818, 385, 823 S.C. 344, 353 (Ct. App. 2009), aff'd,398 S.C. 90, 727 S.E.2d 407 (2012). "A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability." *Ecclesiastes Prod. Ministries v. Outparcel Assocs*., 374 S.C. 483, 490, 649 S.E.2d 494, 497 (Ct. App. 2007)

Negligence Per Se and Punitive Damages

"The causative violation of a statute constitutes negligence per se and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury." *Wise v. Broadway*, 433 S.E.2d 857, 315 S.C. 273 (1992)

FACTS

This is a medical malpractice action arising out of treatment of Jeanne Whitfield ("Mrs. Whitfield") by Dennis K. Schimpf, M.D. ("Dr. Schimpf") and Sweetgrass Plastic Surgery, LLC ("SPS"). (Am. Compl., R. p. 67). In 2013, Mrs. Whitfield began experiencing discomfort and pain under the right side of her breast and around her ribs. (Trial Tr., R. p. 658, lines 20-24). Thereafter, she was evaluated by her gastroenterologist, Dr. Arron Domm, who recommended that she consider removal of scar tissue by a plastic surgeon. (Trial Tr., R. p. 659, line 21 – p. 660, line 3). Mrs. Whitfield had previously undergone a breast augmentation procedure in 2009 with a physician named Dr. Kline and had been satisfied with that procedure. (Trial Tr., R. p. 658, lines 8 – 16).

While leaving Dr. Domm's office, Mrs. Whitfield encountered an old acquaintance of hers named Vickie Tolbert (hereinafter, "Ms. Tolbert" or "Office Manager"). (Trial Tr., R. p. 660, lines 9-13). Ms. Tolbert happened to work in the building as an office manager for Dr. Schimpf at SPS. (Trial Tr., R. p. 660, lines 14-22, p. 679, lines 17-23, R). Upon Ms. Tolbert's recommendation, Ms. Whitfield set up a consultation with Dr. Schimpf, who diagnosed her breast with heavy encapsulation and heavy scar tissue. (Trial Tr., R. p. 660, lines 14-22, p. 661, line 15- p. 86, line 2). Dr. Schimpf recommended a procedure known as a mastopexy, wherein he would remove the larger implants, clean out the encapsulation and scar tissue, and insert smaller breast implants to remove some weight and reduce pain. (Trial Tr., R. p. 661, lines 15-

21, p. 663, line 24 – p. 664, line 5).

On Friday, June 6, 2014, Mrs. Whitfield underwent surgery with Dr. Schimpf at SPS. (Trial Tr., R. p. 673, lines 21-23). She was advised to return to the office for a follow-up visit on June 10, 2014 to have eye sutures removed and her incisions checked. (Trial Tr., R. p. 676, lines 6-19). As set forth in greater detail below, Mrs. Whitfield began experiencing a plethora of ever-increasing complications following her surgery. Yet despite here concerns and deteriorating physical conditions, she was repeatedly told that her symptoms were part of "the natural progression of healing". (Trial Tr., R. p. 679, lines 17-19, p. 680, lines 1-4, p. 694, lines 1-3, p. 696, lines 7-9, p. 765, lines 11-16, p. 807, lines 1-8, p. 812, lines 10-14). Mrs. Whitfield's surgical wounds did not heal. (Trial Tr., R. p. 679, lines 7-23; p. 680, lines 5-7; p. 693, line 20 – p. 694, line 8; p. 695, line 18-23; p. 695, line 18 to p. 697, line 24; Pl's Photo Exhs. 1, 6-11, 14s, 15, 16, 18s, 19s, 20s, 21s, R. pp. 1681, 1702-1706, 1707, 1708, 1710, 1711, 1712, 1713). Ultimately, her right implant blew through the inadequate stitches placed upon her breast by Dr. Schimpf. (Trial Tr., R. p. 701, line 24 to p. 704, line 2). She was later forced to undergo further surgery to remove her left breast and reconstruct her chest with fat-grafting surgery. (Trial Tr., R. p. 749, line 20 to p. 751, line 23; p. 754, lines 1-21). She continues to need medical care as a result. (Trial Tr., R. p. 1045, line 14 – p. 1047, line 25; p. 1123, lines 1-18).

ARGUMENTS

I. BECAUSE A PARTY MAY NOT USE HIS OR HER OWN PREVIOUSLY-IDENTIFIED EXPERT TO PERFORM AN INDEPENDENT MEDICAL EXAMINATION OF AN OPPOSSING PARTY, THE TRIAL COURT ERRED IN ADMITTING TESTIMONY FROM DEFENDANT'S PSYCHIATRIC AND PLASTIC SURGERY EXPERTS REGARDING THEIR EXAMINATIONS OF THE PLAINTIFF.

On December 14, 2018, Defendants filed a Rule 35 Motion for Physical and Mental Examination of Plaintiff, seeking that Mrs. Whitfield "make herself available for a medical

examination by Defendant's [sic] plastic surgery expert and for a mental examination by Defendant's [sic] psychiatry expert." (Motion, R. p. 100) Prior to filing their motion, Defendants' plastic surgery expert and psychiatry expert had already been retained and identified by Defendants as expert witnesses, reviewed Mrs. Whitfield's medical records, been deposed by her counsel, written extensive notes on their findings, reached conclusions, and rendered opinions as to Mrs. Whitfield's physical and mental state. (Trial Tr., R. p. 1383, line 10 -13; p. 1394, lines 1-7; p. 1507, lines 6-9; p. 1508, line 13 – p. 1509 line 9; p. 1544, lines 3-5; p. 1553, lines 8-17). In addition, Defendants had already paid their experts thousands of dollars for their time and evaluations. (Trial Tr., R. p. 1507, lines 6-18).

In response to Defendants' Motion, Mrs. Whitfield filed a Memorandum in Opposition arguing that Defendants cannot force Plaintiff to undergo an intimate physical examination of her breasts and/or mental examinations by Defendants' already-retained experts. (Memo in Opp., R. p. 110). In support of her position, Plaintiff cited the well-settled case of *Fairchild v. S.C. Dep't of Transp.*, 727 S.E.2d 407, 398 S.C. 90 (2012), wherein the South Carolina Supreme Court found that an adversary's listed expert may **not** perform an independent medical examination on the opposing party under Rule 35, SCRCP. "The purpose of the rule for an IME is to **materially aid the jury**, not just the defendant, in evaluating the actual damages sustained and arriving at a just verdict. […] Thus, the better rule is that **the physician should not be affiliated with either party in order to serve the purposes of Rule 35**." [Emphasis added]. *Fairchild v. S.C. Dep't of Transp.,* 727 S.E.2d at 417, 398 S.C. at 109-110.

In rendering its decision in *Fairchild*, the South Carolina Supreme Court cited a series of guidelines holding that the medical evaluation under Rule 35 must be independent, and not performed by an opposing party's previously-designated expert. "**The physician must be**

selected by the court, not the defendant, and must be competent and disinterested. […] [I]t is clear that the power so vested in the Court is a discretionary power, and not an absolute right in the applicant, and that **the physician or physicians so appointed act as officers of the court, and not as agents of either party**." [Emphasis added] *Id.*, quoting *Richardson v. Johnson*, 60 Tenn.App. 129, 444 S.W.2d 708, 718 (1969). "**When the court makes such an appointment, [it] does so because [it] determines in [its] discretion that the case calls for the opinion of disinterested and unbiased physicians, not friends of either parties, whose testimony is likely to be biased**." [Emphasis added] *Fairchild v. S.C. Dep't of Transp.*, 727 S.E.2d at 418, 389 S.C. at 110, quoting *Atkinson v. United Rys. Co.*, 286 Mo. 634, 228 S.W. 483, 485 (1921).

The South Carolina Supreme Court also noted that "**a court could not compel [a] plaintiff to submit to [a physical] examination by witnesses for the other side**," and **"[t]he physicians appointment is such cases are the officers of the Court.**" *Id*., quoting *Atkinson*, 286 Mo. 632, 228 S.W., 485.

Despite the clear holding in *Fairchild*, the Circuit Court granted Defendants' Rule 35 Motion and ordered that Mrs. Whitfield submit herself to a physical examination of her breasts by Defendants' previously-retained plastic surgery expert, Jorge Perez, M.D., and a three-hour long psychiatric examination by Defendants' previously-retained psychiatric expert, James Ballenger, M.D. [1] (Order, R. p. 11). In reaching its decision, the Circuit Court rendered its own divergent interpretation of Rule 35, SCRCP, expressly rebuking the South Carolina Supreme Court for holding that physical examinations of an opposing party must be conducted by an independent physician: "The Fairchild court too is guilty of the perpetuation of this language in

[1] It is notable that Dr. Ballenger is the **same** expert that both the South Carolina Court of Appeals and Supreme Court disallowed from performing a psychiatric medical evaluation of an opposing party in *Fairchild*.

the context of Rule 35." (Order, R. p. 16). Thereafter, Plaintiff filed a Rule 59(e) Motion to Alter or Amend the Order, which the Circuit Court denied. (Motion, R. p. 115; Order, R. p. 19).

On June 21, 2019, prior to any physical examination of Mrs. Whitfield by Defendants' experts, Plaintiff's counsel wrote Defendants' counsel, Todd Smyth, to put him on notice that Plaintiff would move to exclude any expert testimony offered by Defendants' experts at trial:

> Todd, understanding that you are insisting on moving forward with the IMEs and utilizing your designated experts for same, please know that we will move to exclude the testimony of both of your experts based on improper qualifications for the medical examinations. Although the court has authorized you to use them for the IMEs, it does not mean that their testimony will be admissible. We believe it will be the decision of [the Judge] as to whether or not to exclude them. I say this to you now because I want there to be no surprise when we raise it before trial. You have an opportunity now to retain experts who have not previously given opinions in this case. Although we will certainly comply with the courts order to allow the IMEs to go forward, I want it to be expressly clear that nothing in our communications should be viewed as acquiescence or a waiver of our right to object to the introduction of their findings and, based on their improper examination, their testimony in total. (Trial Tr., R. p. 618, line 14 - p. 627, line 4).

Despite being put on notice about the prospective evidentiary challenge, Defendants insisted on using their own, previously-retained experts to conduct the medical examinations. Accordingly, pursuant to the Circuit Court's order, Mrs. Whitfield submitted herself to physical examination of her breasts by Defendants' plastic surgery expert, Jorge Perez, M.D. and a psychiatric

examination by Defendants' psychiatric expert, James Ballenger, M.D.[2]

As anticipated, on July 17, 2019, Mrs. Whitfield filed a Motion in Limine Regarding Defense Examinations of Plaintiff, wherein she moved to prevent Defendants from introducing any evidence to the jury regarding medical examinations performed on her by Defendants' experts on the grounds that the examinations were a direct violation of the standard set forth by the South Carolina Supreme Court in *Fairchild*. (Motion, R. p. 169). Mrs. Whitfield argued, *inter alia*, that Defendants' previously-retained experts could not aid the jury by providing the type of impartiality and independence required of a medical examiner appointed under Rule 35, SCRCP; that Plaintiff had reasonably objected to physical examination by Defendants' experts on the grounds that they had been previously-retained by Defendants, reviewed records, and are not disinterested and/or unbiased physician; and that expert witness testimony should not be allowed because *Fairchild* expressly forbids a court from compelling a Plaintiff to submit to physical examination by a witnesses from the other side. (Memo in Opp., R. p. 110; Hr'g Tr., p.404, line 4 – p. 408, line 20). Plaintiff further noted that Defendants' psychiatric expert, James Ballenger, M.D., had been the very expert disallowed by both the South Carolina Court of Appeals and the Supreme Court in *Fairchild* from medically examining an opposing party under Rule 35, SCRCP. (Memo in Opp., R. p. 110; Hr'g Tr., R. p.404, line 4 – p. 408, line 20). See *Fairchild v. Dept. of Transp*., 683 S.E.2d 818, 826, 385 S.C. 344 (Ct. App. 2009), affirming the

[2] It is worth noting that Defendants' plastic surgery expert was not licensed to practice medicine in the State of South Carolina, yet conducted the court-ordered medical examination of Plaintiff's breasts within the state. (Trial Tr., R. p. 1528, lines 4-8, line 25 – p. 1529, line 3). Defendants' psychiatric expert—who lacked even a semblance of baseline trust with Plaintiff—insisted that as part of his examination Plaintiff rehash and delve into painful memories of a decades old sexual assault. (Trial Tr., R. p. 776, lines 12-25; p. 1124, line 4 – p. 1126, line 2). Defendants' psychiatric expert proceeded with this line of questioning despite the fact that Plaintiff had handed him a hand-written letter at the onset of his questioning, begging that he not perform such an examination. (Trial Tr., R. p. 1384, lines 15 - 25; p. 1387, lines 8 - 18).

trial court's finding that, "independent means independent and that means no witness has previously been identified by the Plaintiff or the Defendant gives the independent medical exam."

On the first day of trial, Mrs. Whitfield's Motion in Limine was heard by the Honorable Bentley D. Price and summarily denied. (Trial Tr., R. p. 618, line 14 to p. 627, line 4). The trial court did not make any findings or offer any legal rationale to support its ruling. (R. at Id.) Because the trial court's ruling runs in direct contravention to the holdings in *Fairchild*, cited *supra*, it committed an error of law in allowing Defendants' experts to testify to the jury about their physical and mental examinations of Mrs. Whitfield. Contrary to the requirements set forth in *Fairchild*, Dr. Perez and Dr. Ballenger were not "disinterested and unbiased physicians." They could not "serve the purposes of Rule 35" by "materially aiding the jury". The opposite was true. Dr. Perez and Dr. Ballenger were clearly "affiliated with" and "friends of" Defendants; the types of witnesses—under *Fairchild*—"whose testimony is likely to be biased." *Fairchild v. S.C. Dep't of Transp.*, 727 S.E.2d 407, 417-418, 398 S.C. 90, 109-110 (2012).

"The exercise of a trial court's discretion implies conscientious judgment, not arbitrary action, and takes account of the law and particular circumstances of the case, being directed by the reason and conscience of the judge to a just result." *Horn v. Davis Elec. Constructors.* 312 S.C. 363, 366, 440 S.E.2d 398, 400 (Ct. App. 1994) (citing *Nienow v. Nienow.* 268 S.C. 161, 232 S.E.2d 504 (1977); *State v. Hill.* 266 S.C. 49, 221 S.E.2d 398 (1976)). In the present case, the trial court failed to take into account the law or the particular circumstances of the case. By allowing Defendants' experts to testify to a jury about their physical and mental examinations of Mrs. Whitfield, the trial court afforded them the same privileges reserved for independent, disinterested, and unbiased physicians contemplated under both Rule 35, SCRCP and the holding

in *Fairchild*. A court cannot compel a plaintiff to submit to a physical examination by a witnesses for the other side. *Fairchild v. S.C. Dep't of Transp.*, 727 S.E.2d at 418, 389 S.C. at 110. As a result, Mrs. Whitfield was extremely prejudiced by the testimony.

Further, because the trial court arbitrarily denied Mrs. Whitfield's Motion in Limine and did not make any finding or offer any legal rational to support its ruling, it abused its discretion. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell.* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citing *Fontaine v. Peitz.* 291 S.C. 536, 354S.E.2d565 (1987)). Here, the trial court failed to address or apprehend any aspect of the law or ground its ruling on any discernable facts. Accordingly, this Court should reverse the trial court's ruling and remand this case for a new trial on the merits.

II. THE TRIAL COURT ERRED IN NOT PERMITTING PLAINTIFF TO IMPEACH THE CREDIBILITY OF DEFENDANT'S OFFICE MANAGER AND ELICIT EVIDENCE OF BIAS BY CROSS-EXAMINING HER ABOUT HER COMPENSATION AND ONGOING SEXUAL RELATIONSHIP WITH DEFENDANT AND DEFENDANT'S WIFE.

At trial, Defendant's Office Manager testified as to Defendants' record-keeping practices. (Trial Tr., R. p. 867, line 7 – 879, line 16; p. 884, line 21 – p. 893, line 25; p. 900, line 17 – p. 919, line 9; p. 921, line 4 – p. 933, line 20) She admitted that Mrs. Whitfield's medical records were incomplete, that there were no preoperative or postoperative records in Mrs. Whitfield's file, that photographs were missing, and that Defendants' had failed to maintain organized medical records for her. (Trial Tr., R. p. 867, line 23 – p. 868, line 9; p. 903, lines 4-7; p. 903, lines 13-17). Despite the foregoing admissions, the Office Manager gave starkly different testimony than Plaintiff as to what transpired when Mrs. Whitfield requested a copy of her medical file and as to Dr. Schimpf's treatment and behavior towards the Mrs. Whitfield once

complications arose.

Post-Operative Treatment of Plaintiff

Mrs. Whitfield testified that she had begun experiencing complications the day following her surgery and immediately contacted Dr. Schimpf's office:

> Q. To the best of your abilities, walk us through what happened next. What was the next day you would have seen Dr. Schimpf or had any interaction with him or his practice?
>
> A. Well, the next morning I called them. It was on the 11th, because the suture right here (motioning) on my eyelid came open. And when I looked down -- because when I was in there, he removed a piece -- one of the pieces of tape up top and I could see the nipple and the areola. And I noticed the skin wasn't seamed. It wasn't touching and there were no stitches and it looked gooey. And so I immediately called. And I spoke with Vicky; and she said, don't worry, natural progression of healing, we can tweak it later.
>
> Q. Vicky is Vicky Tolbert?
>
> A. I'm sorry. Yes.
>
> Q. The office ---
>
> A. The office manager, yes. (Trial Tr., R. p. 679, lines 7-23)

Plaintiff's condition did not improve:

> Q. What's the next thing that happened?
> A. That was on the 11th. And I'm doing exactly what they tell me to do. And I -- on the 16th, over the weekend, I noticed it was starting to smell funny and it wasn't healing. As a matter of fact, it was pulling away more. It was -- the seam was opening more.
>
> And I called them on the 16th and I left a message. I said I really think I need to come in because this isn't looking the way it's supposed to.
>
> I've already had a breast surgery. I already knew to keep an eye on things. And this was not -- it was going the other way. It was just not seaming. I did not get a call

back on the 16th.

I waited the 17th. Still heard nothing. So on the 18th I called and I -- and I got a hold of the office manager again.

Q. Vicky?

A. Vicky Tolbert. And I'm like, something's happening, my chest is hurting now, it smells really bad. And when she asked me to explain it, it smells like the meat pad underneath the hamburger that's been in your refrigerator. That's what it smelt like. It was -- and I'm like, something's going on here.

The skin was angry red. It was starting to turn, and the Tape was black. Actually, I shouldn't say angry. It was redder. She gave me two cell phone numbers to send -- to text pictures to, and I did. And that went on a couple of times, I believe, that day. Well, the very next day ---

(Trial Tr., R. p. 680, line 5 to p. 681, line 7)

Plaintiff texted the photographs as instructed, but did not receive a call back until the following day. Again, she was refused an appointment and her condition continued to deteriorate:

Then I had -- then on -- let's see, that was on the 18th when I texted two pictures to two different cell phone numbers. He was in surgery. And she -- they got back to me on the 19th and said there's -- that my chest hurt, it smelt bad. And, oh, my God, my chest was hurting. It felt like it was ripping open.

I begged to please come in. And I was told it was a natural progression of healing, there was nothing that was done by their -- by Sweetgrass that was causing my discomfort. And so on the 20th when my chest was -- it was hot. It was like the chest area was hot and it was almost like something was stabbing me.

I went to Roper St. Francis Hospital and they kept me in the cardiac-care wing for three days […]

(Trial Tr., R. p. 693, line 20 to p. 694, line 8)

After being released from the cardiac care unit, Mrs. Whitfield contacted Defendants' office, wherein Dr. Schimpf finally agreed to see her.

> Okay. The next morning I called Sweetgrass O'Neill Plastic Surgery and I spoke to Dawn. And they had me come in because I was crying. I told them my chest hurt and it was feeling like it was splitting open, I really needed to be seen. And they said, come on in.
>
> And so I came in, and Dr. Schimpf came in.
>
> (Trial Tr. p., R. 695, lines 18-23)

At trial, Mrs. Whitfield described a very perfunctory visit in which Dr. Schimpf cleaned and anesthetized the area, inserted two small stitches using a little cat needle, and prescribed here some antibiotics. (Trial Tr., R. p. 696, lines 3-15, p. 699, lines 21-23) Again, she was informed that her condition was "part of the natural progression of healing." (Trial Tr., R. p. 696, lines 8-15).

Mrs. Whitfield's condition continued to deteriorate thereafter:

> It wasn't getting any better. I called again on the 30th of June where I -- they was a message saying they were going to be closed for the 2nd, 3rd and 4th of July. So I called them. And it was like evening, like five o'clock. I called and said, this isn't getting any better, somebody please see me, please see me. And no call back.
> So I called back in on the 2nd of July, somebody's really got to see me. And nobody called. They were closed. Over that timeframe I was getting worse, the chest was -- by the -- by the 6th of July, the stitches, those two little stitches, were just like really, really done holding me together. Oh, God.
>
> And so the morning of the 7th I called and I spoke to Sweetgrass Plastic Surgery on Daniel Island. I spoke to them

> for like six minutes. And I said I -- this is -- this hurts, I feel like I'm ripping open, please, God, somebody just see me, see me.
>
> I got two phone calls back from Dr. Schimpf leaving me a message -- one was for one minute, the other was for two minutes leaving me a message to come by the office. That was Monday the 7th.
>
> I went by the office thinking, thank God, somebody's going to see me. I get in there and there was a lady behind the counter with brown hair, and she handed me two prescriptions. And I'm like, well, is somebody going to see me, please somebody see me. There was nobody there to see me. So I was given two prescriptions.
>
> And I went home, cried my eyes out. I laid in the bed. And I was just getting so sick. The smell was putrid, is the word. And something said inside of me, you have got to get help. (Trial Tr., R. p. 695, line 18 to p. 697, line 24)

As a result of her worsening condition and lack of care, Mrs. Whitfield performed a web search for plastic surgeons that dealt with radicals and mastectomies. (Trial Tr., R. p. 697, line 25 to p. 698, line 3). She made an appointment with Dr. Ram Kalus the following day. (Trial Tr., R. p. 698, lines 11-14). By the time she met with Dr. Kalus, the two stitches placed by Dr. Schimpf had popped. (Trial Tr., R. p. 698, lines 19-20) As a result of that visit, a concerned Dr. Kalus called Dr. Schimpf and advised him that he needed to see Mrs. Whitfield. (Trial Tr., R. p. 699, lines 13-20). Dr. Schimpf's Office Manager called Mrs. Whitfield and scheduled an appointment with Dr. Schimpf for the following day. (Id. at R. p, 699, lines 13-20)

Mrs. Whitfield and Office Manager's accounts of that visit diverged dramatically at trial. Plaintiff testified that Dr. Schimpf was very angry, physically aggressive, and admonished

her for consulting another physician:

> When I went on to Sweetgrass Plastic Surgery on the 11th I was placed in a room at the end of the hall and Vicky came in in her little white jacket, and then he -- Dr. Schimpf comes through the door.
>
> And he was very angry. Why did you go to someone else? Why did you go there? Why did -- why did you let someone else see this? Why didn't you come to me?
>
> And my answer to him was you wouldn't call me back, you wouldn't bring me in, this is four weeks, just a four-week timeframe, and one of them being the week of the Fourth of July where nobody works, it is like I wanted to be seen, I wanted you to see me.
>
> And he was just so angry. And he was sucking this little mint. And he was just so angry. He took -- he put out his instruments. He put silvadene on some kind of pad. He opened up my wound, the area. And I was on that reclining chair; and he proceeds to stitch me up with no anesthetic, no little cat needle, no cream or anything, no spray.
>
> And I start screaming, stop, it hurts, stop, it hurts, please stop, it hurts. And I looked at Vicky, whose eyes were big and brown - you are probably going to see her - and he said these stitches. And he is tugging and putting in these three stitches.
>
> And he wasn't happy with me. And he kept muttering about the fact I can't believe you went somewhere else and you wouldn't see me, I can't believe that you went somewhere else, you didn't -- you didn't come here.

> No one would call me back. They had all of these cell phones numbers. Nobody would call me back. That's why I went to Dr. Kalus. (Trial Tr., R. p. 699, line 24 – p. 701, line 3)

Mrs. Whitfield testified that Dr. Schimpf was visibly incensed when he left room:

> And when he got done he was so incensed with me he threw the tray into the sink. He took the pad with the silvadene on it, stuck it to my breast, taped it down, took off his gloves, threw them in the sink, and he goes get out of here. And out the door he went. I saw his back. The door was still open.
>
> Vicky left the room and left me -- just left me there. So I got myself dressed, and I walked out. And she handed -- Still not saying anything. And she handed me two pieces of paper, which were prescriptions. Not a word. And she turned around and walked off. That was it. That was it.
>
> I went home, got in the bed, and cried my eyes out. I could not believe that just happened to me.
>
> (Trial Tr., R. p. 701, lines 4 to 15)

Defendant's Office Manager, however, testified to having a very different recollection of the office visit. The Office Manager testified that she had no recollection of Dr. Schimpf stitching Mrs. Whitfield without anesthesia or of Defendant crying. (Trial Tr., R. p. 920, lines 1-13). When asked if Dr. Schimpf was angry during the visit, she testified "No. He would never be angry." (Trial Tr., R. p. 920, lines 22-25). When asked if Dr. Schimpf had slammed his surgical utensils in the sink and told Mrs. Whitfield to leave, she testified "No. Dr. Schimpf would never do that." (Trial Tr., R. p. 921, lines 1-3). Defendants' Office Manager also testified that she had a good working relationship with Dr. Schimpf. (Trial Tr., R. p. 866, lines 11-13).

Missing Records and Withholding of File

Mrs. Whitfield and Office Manager also offered conflicting testimony as to what transpired when Mrs. Whitfield requested a copy of her medical file. Mrs. Whitfield testified that after her last visit with Dr. Schimpf she contacted the practice and requested a copy of the medical records (Trial Tr. p. 176, lines 7-122, R.___). She further testified that she needed the medical records for Dr. Kalus, who had taken over her post-operative care and was going to perform additional surgeries to address the aforementioned complications. (Trial Tr., R. p. 751, line 22 to p. 752, line 22; p. 753, line 1 to p. 754, line 4, R.__)

Mrs. Whitfield testified that an employee at the practice told her that the medical records would be available the next day for pickup. (Trial Tr., R. p. 752, line 18-24) However, when Mrs. Whitfield called the next day to confirm their availability, a hesitant employee told her that the records could not be released until she spoke with the Office Manager; the employee assured her that the records would be made available to her. (Trial Tr., R. p. 752, line 24 – p. 753, line 4). Mrs. Whitfield testified that she spoke with the Office Manager the following day and was told that she would not be receiving her medical records and that the file had been forwarded to Defendants' attorneys for review:

> A. She told me they've been sent to our attorneys, Josh Whitley of Smith Whitley, my entire record was, for them to review them before I could have them for my surgery that I needed to have. And I told her I need these, they are mine, I've got to have them, my doctor has to have them. Nope, you're not getting them. (Trial Tr., R. p. 753, lines 15-20).

Mrs. Whitfield also testified that she never received the missing medical records:

> Q. Jeane, you asked for the miss -- for the records to be given; and you said they weren't given to you, they were sent to counsel. Have you ever seen those records?
>
> A. I have never seen those records. (Trial Tr., R. p. 758, lines 1-3).

At trial, Office Manager testified that she had no recollection of speaking with Mrs. Whitfield about her medical records. (Trial Tr., R. p, 910, lines 12-15). The Office Manager also denied telling Mrs. Whitfield that her medical records had been forwarded to Defendants' attorneys for review, but that it was possible that the records were sent to Defendants' attorneys after Mrs. Whitfield had requested them. (Trial Tr., R. p, 910, line 16 to p. 911, line 4). In addressing why the records were missing, the Office Manager testified that it was possible that the records were incomplete due to a malfunctioning recorder used by Dr. Schimpf. (Trial Tr., R. p. 868, lines 6-9; p. 884, line 21 – p. 887, line 10) When asked if she had erased the tapes on the record, Office Manager testified, "No. We had no ability to erase the tapes. (Trial Tr., R. p. 876, lines 9-10).

Impeaching Credibility and Eliciting Evidence of Bias

On August 26, 2019, Defendants' counsel filed Defendant's Motion in Limine to Seal and Exclude Certain Inadmissible Evidence, wherein they sought to preclude Mrs. Whitfield's counsel from eliciting any testimony regarding Dr. Schimpf's personal life, **including any evidence of an admitted, nine-year sexual relationship with Office Manager**. (Motion, R. p. 179). During her deposition on February 11, 2019, **Office Manager testified that she had been engaged in a sexual relationship with Dr. Schimpf and his wife since 2010, and had engaged in sexual relations with Dr. Schimpf as recently as a week before her deposition** (Depo. Tr., 2/11/19, R. p. 376, line 5 – p. 377, line 9).

Defendant's Motion in Limine was heard at trial, at which point, Defendant's counsel also argued that Mrs. Whitfield's counsel should be precluded from eliciting any testimony from Office Manager regarding **the amount of money she is being paid by Dr. Schimpf**, or about **any of the various complementary cosmetic procedures he has performed on her**

throughout the years. (Trial Tr., R. p. 933, line 21 – p. 941, line 5). During her deposition, Office Manager had testified that Dr. Schimpf performed various complementary cosmetic procedures on her, including a breast augmentation, liposuction, fillers, and laser treatments. (Depo. Tr., 2/11/19, R. p. 377, line 10 to p. 385, line 22).

Mrs. Whitfield's counsel argued that Office Manager's relationship with Dr. Schimpf and the compensation she received from him were relevant for purposes of establishing bias and impeaching Office Manager's credibility. (Trial Tr., R. p. 934, line 9 to p. 941, line 5). Specifically, Plaintiff's counsel noted that Office Manager's observation regarding Dr. Schimpf's post-operative care were starkly at odds with Plaintiff's observations. (Id. at R. p. 934, line 9 to p. 941, line 5). Plaintiff's counsel also noted that Office Manager had offered innocent explanations as to why the medical records had gone missing, blaming their absence on a malfunctioning recorder, and denying that she or Dr. Schimpf could have destroyed the alleged recordings. (Id. at R. p. 934, line 9 to p. 941, line 5). Her account of what transpired when Plaintiff requested a copy of her medical file was also at odds with Plaintiff's testimony. (Trial Tr., R. p. 920, lines 1-13). As noted above, when asked if Dr. Schimpf was angry during his last visit with Plaint, Office Manager testified, "No. He would never be angry." (Trial Tr., R. p. 920, lines 22-25). When asked if he slammed his surgical utensils in the sink and told Plaintiff to leave, Office Manager testified, "No. Dr. Schimpf would never do that." (Trial Tr., R. p. 921, lines 1-3).

After hearing arguments from the parties, the trial court granted Defendants' Motion in Limine and prohibited Mrs. Whitfield's counsel from eliciting any testimony from Office Manager regarding her nearly decade-long sexual relationship with Dr. Schimpf. (Trial Tr., R. p. 938, line 6 – p. 940, line 23). The trial court also barred Mrs. Whitfield's counsel from eliciting

any testimony regarding the amount of money she was receiving from Dr. Schimpf or the number of complementary cosmetic surgeries she received. (Trial Tr., R. p. 941, lines 4-5). In making its ruling, the trial court stated, "I don't think she's biased, in my opinion at this point in time. And I don't think anything has been elicited as to fact that she's been untruthful in any way." (Trial Tr., R. p. 939, lines 9-12). The trial court also reasoned, "I mean, this is a trial. There's going to be differences of testimony and there's going to be conflicting evidence in the case. But I don't think that we need to get into her personal life as to the bias of anything. So I'm not going to let you get into it. Now whether -- do you consider the fact that he asks her how much that she's paid -- I mean, I don't know really what the relevance of that is." (Trial Tr., R. p. 940, line 16 – line 23).

In making its ruling, however, the trial court failed to acknowledge and/or apply the general rule for establishing bias. The standard is not whether the Court deems the sought-after evidence "relevant" to the proceedings, but rather whether the testimony can demonstrate the witness is biased in rendering her testimony. "[O]ur courts have followed the "general rule" that "'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony,'" so that "'on cross-examination, **<u>any</u> fact may be elicited which tends to show interest, bias, or partiality' of the witness**." [Emphasis added] *Smalls v. State*, 810 S.E.2d 836, 840, 422 S.C. 174, 182-183 (2018). "Rule 608(c) [of the South Carolina Rules of Evidence] 'preserves [this longstanding] South Carolina precedent.'" *Id.*, citing *State v. Sims* , 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002). Specifically, Rule 608(c), SCRE, states: "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."

"**Considerable latitude is generally allowed in the cross-examination of an adverse witness for possible bias.**" [Emphasis added] *North Greenville College v. Sherman Const. Co*., Inc., 243 S.E.2d 441, 442, 270 S.C. 553, 556 (1978), citing *Martin v. Dunlap*, 266 S.C. 230, 222 S.E.2d 8 (1976). As noted by McCormick: "**The law recognizes the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties or the self-interest of the witness in the outcome of the case. Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility."** [Emphasis added] *Id*., citing McCormick on Evidence, § 40, p. 78 (1972).

Here, Office Manager's long-standing sexual relationship with Dr. Schimpf and her "emotions or feelings toward him" are likely to have "a slanting effect" upon her testimony. Her "self-interest in the outcome of the case" can be directly tied to maintaining her personal and professional relationship with Dr. Schimpf. Minimally, a fact exists which tends to show "interest, bias, or partiality of the witness."

The trial court failed to take into account the law and particular circumstances of the case, and, instead, based its ruling on the conclusory findings: "I don't' think she's biased" and "I don't think anything has been elicited as to fact that she's been untruthful in any way." (Trial Tr., R. p. 939, lines 9-12). In doing so, the trial court abused its discretion and prejudiced the Plaintiff who could not otherwise demonstrate that Office Manager's testimony was clearly biased and not credible. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell.* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citing *Fontaine v. Peitz.* 291 S.C. 536, 354S.E.2d565 (1987)). Accordingly, the trial court's ruling should be reversed and the case should be remanded for a new trial on the merits.

III. THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF'S DIRECTED VERDICT MOTION AS TO NEGLIGENCE PER SE FOR ADMITTEDLY DESTROYED AND/OR MISSING MEDICAL RECORDS.

At trial, Office Manager testified that she was in charge of maintaining medical records for the Defendant Sweetgrass. (Trial Tr., R. p. 900, lines 22-25). As such, Mrs. Whitfield's counsel examined her regarding S.C. Code of Regulations 61-91, Standards for Licensing and Ambulatory Surgical Facilities, Section 700, titled Patient Records. (Trial Tr., R. p. 900, line 17 to p. 903, line 17). With regard to Mrs. Whitfield's medical records, Office Manager admitted that Defendant SPS did not comply with Section A of the Code, which states:

> The facility shall initiate and maintain an organized record for each patient. The record shall contain: sufficient documented information to identify the patient; the person responsible for each patient; the description of the diagnosis and the care, treatment, procedures, surgery, and/or services provided, to include the course of action taken and results; and the response and reaction to the care, treatment, procedures, surgery, and/or services provided. All entries shall be indelibly written, authenticated by the author, and dated.

Office Manager testified:

> Q. Would you agree with me that Sweetgrass did not follow that section with regards to Mrs. Whitfield?
> A. As I said before, we do our best.
> Q. And I understand that you've done -- you try. But what I'm specifically trying to get an answer to is did Sweetgrass comply with Section A as it pertains to Mrs. Whitfield's medical records?
> A. No. (Trial Tr., R. p. 901, line 21 – p. 902, line 3)

Office Manager also testified that Defendant SPS did not comply with Section B of the Code, which states in relevant part:

> Specific entries/documentation shall include at a minimum:
>
> 1. Consultations by physicians or other legally authorized healthcare providers;

[…]

3. Orders and recommendations for all care, treatment, procedures, surgery, and/or services from physicians or other legally authorized healthcare providers, completed prior to, or at the time of patient arrival at the facility, and subsequently, as warranted;

4. Care, treatment, procedures, surgery, and/or services provided;

5. Record of administration of each dose of medication;

11. Signed informed consent;

Office Manager testified:

Q. Okay. So what I'm asking you is did Sweetgrass comply with Paragraph B because of not keeping those records?
A. The records were incomplete.
Q. Okay. Did they comply with Paragraph B?
A. No.

Q. Would you agree with me that Sweetgrass failed to maintain an organized record for Mrs. Whitfield?
A. Yes. But we -- we treat patients, not medical records.
Q. Are medical records important?
A. Yeah. (Trial Tr., R. p. 903, lines 8- 17)

In addition to the Office Manager's admissions regarding medical records, Dr. Schimpf testified that there was no signed informed consent form for the procedure he performed on Ms. Whitfield neck. (Trial Tr., R. p. 1335, line 17 to p. 1336, line 8). Mrs. Whitfield's Medical Expert, Dr. Michael Rosenberg, testified that Defendants' failure to maintain records caused the patient harm and damage. (Trial Tr., R., p. 1035, line 20 to p. 1036, line 14; p. 1037, lines 2-19). Lastly, Plaintiff's psychiatrist, Dr. Sara Marcino, offered testimony that Mrs. Whitfield experienced psychological trauma from having a nonconsensual procedure performed on her. (Trial Tr., R. p. 1122, line 21 – p 1124, line 3).

Based on the foregoing factors, Mrs. Whitfield's counsel moved for a direct verdict on

the issue of negligence per se. (Trial Tr., R. p. 1559, line 8 to p. 1560, line 9). The trial court denied the Motion. In doing so, it did not make any findings or offer any legal rationale to support its ruling, merely stating, "Alright. I'm going to deny the motion. And I'm not charging it either." (Trial Tr., R. p. 1561, lines 13-15).

It was an error of law to deny Plaintiff's Motion for a Directed Verdict. When evidence presented at trial yields only one conclusion concerning liability, the trial court may properly grant a motion for directed verdict. *Fairchild v. Dept. of Transp*., 683 S.E.2d 818, 385, 823 S.C. 344, 353 (Ct. App. 2009), aff'd,398 S.C. 90, 727 S.E.2d 407 (2012).

With regard to claims for negligence per se, the South Supreme Court has held, "The causative violation of a statute constitutes negligence per se and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury." *Wise v. Broadway*, 433 S.E.2d 857, 315 S.C. 273 (1992) Here, Defendants' office manager admitted that records were not properly maintained and that Defendant Sweetgrass had violated both Section A and Section B of S.C. Code of Regulations 61-91, Section 700. Further, Dr. Schimpf admitted that there was not a signed informed consent form for the procedure he performed on Ms. Whitfield neck. (Trial Tr., R. p. 1335, line 17 to p. 1336, line 8). Because there was an admitted violation of the statute and there can only be one conclusion concerning liability, it was error for the Court not to grant Plaintiff's Motion for a Directed Verdict as to the negligence per se. Accordingly, the ruling should be reversed, Plaintiff's Motion for Directed verdict should be granted.

CONCLUSION

Based on the foregoing, Appellant Jeane Whitfield respectfully requests that this Court reverse the trial court's rulings and remand this case for a new trial on the merits. It was

reversible error for the trial court to allow Defendants' previously-retained experts to testify to a jury about their physical and mental examination of Mrs. Whitfield. It was also reversible error for the trial court to prohibit Mrs. Whitfield's counsel from eliciting evidence of bias from the Office Manager by examining her about her compensation from and sexual relationship with Dr. Schimpf. Finally, it was error for the trial court to deny Mrs. Whitfield's Motion for a Directed Verdict as to Negligence Per Se.

[Signature on following page]

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November 2, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2017-CP-10-02758
Appellate Case No. 2019-001716

Jeane Whitfield,

Appellant,

v.

Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,

and

Patrick O'Neil, M.D. and O'Neil Plastic Surgery, LLC,

Respondents.

APPELLANT'S RULE 211 CERTIFICATION

The undersigned certifies that the *Final Brief of Appellant* and *Appellant's Final Reply Brief to Respondent's Brief* comply with Rule 211(b), SCACR.

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November 2, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2019-001716
Lower Court Case No. 2017-CP-10-2758

Jeane Whitfield,

Appellant,

v.

Dennis K. Schimpf, M.D. and
Sweetgrass Plastic Surgery, LLC,

Respondents.

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(1) Whether the Trial Court properly admitted testimony of expert witnesses who had performed examinations of Appellant when that testimony was appropriate testimony under the Rules of Evidence, where Appellant had introduced this evidence, and where that testimony provided overwhelming proof that Respondents met the standard of care and did not cause the damages complained of by Appellant.

(2) Whether the Trial Court properly applied the Rules of Evidence governing relevance to limit Appellant's cross-examination of a witness, disallowing Appellant from presenting material at trial that had nothing to do with the alleged malpractice, that was not relevant, had speculative value, and was laden with potential for unfair prejudice, offered solely to attempt to smear and embarrass Respondents.

(3) Whether the Trial Court's denial of Appellant's Motion for a Directed Verdict on Negligence Per Se was proper where there was no evidence that the regulatory scheme at issue applied to Respondents, no evidence of causation, and where factual inferences available from the evidence were susceptible to more than one interpretation.

INTRODUCTION

This medical malpractice appeal arises from the unanimous defense verdict rendered at the end of a week-long jury trial held from August 26 – 30, 2019. This Court should affirm the jury's verdict and the Trial Court, which properly admitted the testimony of Respondents' experts, reasonably limited the examination of a key fact witness to prevent that examination from careening into wholly irrelevant and unfairly prejudicial territory, and properly denied Appellant's motion for a directed verdict as to Appellant's claim of improper recordkeeping, which Appellant's own treating physician conceded did not affect his treatment of her. At the conclusion of trial, the jury received the evidence, deliberated, and returned to the courtroom with a complete and unanimous verdict for Respondents confirming there was no malpractice in this case. Dissatisfied with this outcome and having been prevented from laying bare the private personal lives of Respondents and their experts at trial, Appellant now argues that this Court should substitute its judgment for that of the jury and provide her a new trial on the merits. Appellant's arguments are without merit. This Court should affirm the verdict below.

COUNTER-STATEMENT OF THE CASE[1]

I. FACTUAL BACKGROUND

Jeane Whitfield ("Appellant" or "Mrs. Whitfield") filed this medical malpractice action against Dennis K. Schimpf, M.D. ("Dr. Schimpf") and his practice, Sweetgrass Plastic Surgery, LLC ("Sweetgrass"), alleging that Respondents were medically negligent in the performance of a set of cosmetic procedures for her on June 6, 2014. (*See generally,* Amended Compl., R. pp. 65-83). That day she underwent liposuction of the abdomen, thighs, chin, and axillae; a bilateral

[1] Respondents do not consent to be bound by Appellant's Statement of the Case and the Statement of the Facts, and, pursuant to Rule 208(b)(2), SCACR, submit their own Counter-Statement of the Case and Facts.

replacement of breast implants; a breast lift (called a "mastopexy"); and an upper eyelid lift (a "blepharoplasty"). Before the procedures, Mrs. Whitfield signed consent forms for each of the procedures she was requesting. (*See* R. pp. 1816-57). At trial, Mrs. Whitfield contended that Dr. Schimpf's charting was incomplete, that he and his practice lost and/or destroyed medical records, that he performed liposuction on her chin without consent, and, primarily, that he applied too much tension in closing the incision line on her right breast, which caused it to separate.[2] She contends that, because of this separation, she required multiple surgeries, including an unrelated surgery on her left breast and reconstructive procedures with her new plastic surgeon, Dr. Ram Kalus, and that, in addition to her economic damages, she suffered mental and emotional injury.

A. Medical Treatment

Turning to the relevant particulars, Mrs. Whitfield first saw Dr. Schimpf in December 2013. (R. p. 661, lines 9-10). Prior to her first visit with Respondents, Mrs. Whitfield had been seeking treatment to address pain in her right side, near her breast and ribs, which "was like a hot, searing ache." (R. p. 685, line 20-p. 660, line 6). She also sought and received regular treatment from her psychiatrist, Dr. Sara Marcino, for a number of very serious, pre-existing psychiatric conditions but she chose to withhold those conditions to Respondents. (R. p. 1132, line 18-p. 1148, line 21; R. pp. 1813-15, 1869-1873). In these appointments with her psychiatrist, Mrs. Whitfield reported and received treatment for significant prior traumas, anxiety, increased stress, fear for her safety, depression, heavy drinking, and self-initiated attempts to stop taking her psychiatric mediations. (*Id.*). She had also been prescribed many different psychiatric medications including

[2] Appellant herself contended that she developed a raging infection in her right breast, which, in her telling, was "full of infection and necrosis." (R. p. 751, line 23). Her counsel however did not take this position because it lacked evidentiary or testimonial medical support. *See, e.g.* Appellant's Counsel's comment to court during argument regarding Dr. Kalus' *de bene esse* testimony at R. p. 980, lines 4-5: "The jury will know that she did not get an infection. That's been gone over ad nauseaum."

multiple antidepressants, multiple mood stabilizers like lithium, multiple antipsychotics, and three benzodiazepines to treat panic disorder, all of which conditions played a role in her outcome. (R. p. 1376, line 13-p. 1379, line 24). Before seeing Dr. Schimpf, Mrs. Whitfield saw a gastroenterologist in Summerville for the pain in her side. (R. p. 658, line 20-p. 660, line 6). He performed a workup and could not find any gastrointestinal source for her pain but suggested that it might emanate from the scar tissue from her prior breast implant surgery. (*Id.*; R. p. 1106, line 23-p. 1107, line 2). As she was leaving her appointment with the gastroenterologist, she encountered an old friend and former co-worker of hers, who was working as the office manager of Sweetgrass Plastic Surgery. (R. p. 660, lines 9-25; R. p. 866, line 10).

Mrs. Whitfield therefore came to see Dr. Schimpf on December 19, 2013. (*Id.*; R. p. 892 lines 5-8). She filled out a medical history form that day but withheld her very significant psychiatric history, including bipolar depression, anxiety, or emotional problems, including the fact that she had begun drinking again, that she had nightmares, was having martial issues, that she stopped taking her psychiatric medications on her own, that she was under tremendous stress, and that she had extreme anxiety. (R. p. 1132, line 18-p. 1146, line 21; R. pp. 1813-15, 1869-1871). In her initial consultation with Respondents, she discussed the discomfort side/ribs/breasts but also sought to discuss additional cosmetic concerns, including her breasts, arms, legs, abdomen, eyelids, and neck / chin. (R. pp. 1773-4 (Plaintiff's Calendar / Journal) and 1862). Dr. Schimpf explained to her that the pain could be caused by scar tissue encapsulation from her prior breast augmentation and consulted on her additional cosmetic concerns. (R. p. 661, lines 15-21). The practice provided her with an estimate for the procedures. (R. pp. 1686-7). At this point in time, there was no procedure planned for her chin / neck, but in her own contemporaneous notes,

Mrs. Whitfield wrote that she and Dr. Schimpf discussed a procedure on her neck in the initial consultation. (R. pp. 1816-23; R. pp. 795-97).

On May 27, 2014, Mrs. Whitfield met with Dr. Schimpf at Dr. O'Neill's office to discuss the procedures and sign consent forms. (R. pp. 1816-57). The records reflect that Mrs. Whitfield was informed of the risk of infection, crusting, fluid collection, headache, inflammation, loss of flap, nerve damage, pain or persistent pain, redness, skin breakdown, skin loss, skin ulceration, swelling, and unsightly scarring. (*Id.*). Not only did she sign consents for the procedures outlined in the estimate, but she signed two separate consents for liposuction procedures. (*Id.*).

On June 6, 2014, the surgeries went forward as planned and no intraoperative complications were noted. (R. pp. 1859-61, 1878-9, 1881-2000). It is uncontested that Dr. Schimpf used the medically accepted and standard techniques to perform the surgeries in question. (R. p. 1071, line 21-p. 1072, line 2). Notably, the preoperative record, the anesthesia record, completed by a non-party anesthesiologist, and the operative note all confirm that she was to have submental liposuction, i.e. liposuction addressing her neck and chin (and taking place in the area under the jaw). (R. pp. 1859-61). Furthermore, she left the office that day with a pressure wrap called a "jaw bra" but testified that she was unaware of the liposuction on her chin / neck until she returned for her first postoperative visit with Dr. Schimpf on June 10, 2014. (R. p. 1864 (Defendants' Exhibit 15 (admitted into evidence on R. p. 802, lines 12-13)); R. p. 802, lines 3-17). Mrs. Whitfield now contends that this portion of the procedure occurred without her consent, that she was "happy with the chin and neck [she] had," that she "never spoke to [Dr. Schimpf] about my neck and chin." (R. p. 666, lines 8-20). On cross examination however, Respondents demonstrated that she signed an additional consent form for liposuction that references the face and neck, wrote in her journal that after her initial consultation that she had discussed "neck," and further that her prior medical

records demonstrate that she regularly sought and received nine treatments designed to tighten her neck and chin in the year and a half leading up to the procedure at issue. (R. pp. 785-9, line 6; R. pp. 1858-9, 1863; R. pp. 1773-4 (Plaintiff's Calendar / Journal)).

Dr. Schimpf saw Mrs. Whitfield postoperatively on June 10 and June 19, 2014 and he or his office spoke to her on the telephone on June 9, 16, and 18, 2014. (R. pp. 1775-6; R. pp. 1995-2000; R. pp. 1248-9). At trial, Mrs. Whitfield insisted that no one from Sweetgrass would call her back on June 16 and 17, and that, when she did speak with the office manager on June 18, she was told that her discomfort was simply a result of the natural healing process. (R. p. 812, lines 7-16). Respondents however refuted these allegations at trial with the Appellant's telephone records, which proved otherwise. (R. p. 1880). Mrs. Whitfield further testified that because no one would help her, she had to go to the hospital on June 20 because her "breast was ripping open from the inside out." (R. p. 812, lines 2-3; R. p. 816, lines 10-11). On cross examination, Respondents established that she called an ambulance because she thought she was having a heart attack. (R. p. 811, line 14-p. 813, line 20; R. pp. 1865-6). Mrs. Whitfield received a full cardiac workup, was hospitalized for three days, never received any treatment whatsoever for her breasts, and was sent home without any cardiac or other findings. (R. p. 813, line 18-p. 816, line 14). Yet she submitted these bills, for $21,000, as damages to the jury. (*Id.*; R. pp. 1714). At trial, Defendants' expert psychiatrist, Dr. James Ballenger, placed this episode in context, explaining that it was a panic attack, characteristic of and driven by Mrs. Whitfield's preexisting severe panic disorder. (R. p. 1362, line 21-p. 1366, line 15). Further, Dr. Schimpf explained that, as of June 25, 2014, according to a time-stamped photograph in Dr. Kalus' chart, her skin was healing well nineteen days after surgery. (R. p. 1254, line 14-p. 1258, line 4; R. p. 1874 (Kalus 6-25-14 text photo) and 1875 (Schimpf Text Photo)).

Mrs. Whitfield called for Dr. Schimpf on June 30 and was seen in the office the next day, July 1. (R. pp. 1880, 1876-7; R. p. 1250, lines 5-9). Appellant had drainage and a small opening of the incision line on her right breast, so Dr. Schimpf placed two small stitches and changed her bandages, prescribed prophylactic antibiotics, and attempted to reassure her that she was healing appropriately. (R. p. 695, line 18-p. 696, line 15). Over the Fourth of July weekend, Appellant became increasingly concerned about her right breast incision line. She called the office, and, according to her testimony, begged to be seen, stating, "I feel like I'm ripping open, please, God, somebody just see me, see me." (R. p. 697, lines 9-10). She went to the office and was given prescriptions. (R. p. 696, line 18-p. 697, line 20). She testified that she went home and cried, laid in bed, and believed she was "just getting so sick." (R. p. 697, lines 21-24). Mrs. Whitfield then turned to Google and found Dr. Ram Kalus, a plastic surgeon with a practice in Mt. Pleasant. (R. pp. 1773-4; R. p. 697, line 25-p. 698, line 4).

She saw Dr. Kalus on July 10, 2014. The implant was not exposed. (R. p. 529, lines 17-19). He did not rush her to surgery. (R. p. 529, lines 22-25). He did not diagnose an infection. (R. p. 530, lines 11-13). He did not administer antibiotics or take wound cultures. (R. 530, lines 18-20). He diagnosed her with a wound dehiscence (a separation), which he explained is a common complication of the breast procedure at issue. (R. p. 530, line 13; R. p. 531, lines 3-4). Dr. Kalus then "strongly encouraged" Mrs. Whitfield to return to Dr. Schimpf and called Dr. Schimpf to inform him that he had seen Mrs. Whitfield. (R. p. 531, lines 14-16; R. p. 440, lines 20-23).

Mrs. Whitfield returned to Sweetgrass on July 11, 2014. In her trial testimony, she dramatically recounted that Dr. Schimpf was "so angry" that he "stitched her up" without any anesthetic and that she started "screaming," begging for him to stop. (R. p. 700, lines 11-21). She further recounted that Dr. Schimpf was angry that she had gone to another plastic surgeon, and

that when he was finished, "he was so incensed with me he threw the tray into the sink" and said "get out of here." (R. p. 700, line 22-p. 701, line 8). The evidence in fact shows that Mrs. Whitfield was healing appropriately and does not support her fantastical assertions. (*See* R. p. 1997 (noting "2.5 x 1 cm superficial [opening] with no undermining or tunneling. The granulation tissue was present at base w/ no implant exposure…placed suture…to take tension off incision line and prevent further dehiscence"); *see also* R. p. 1454, lines 7-16 (discussing granulation tissue as a sign of wound healing visible in preoperative photographs taken three days later on July 14, 2014)). Mrs. Whitfield testified that she "could not believe that just happened to me" and that she "went home, got in the bed, and cried my eyes out." (R. p. 701, lines 14-15).

The next day, July 12, 2014, Mrs. Whitfield's mother died unexpectedly. (R. p. 701, lines 19-22). Then, on July 13, 2014, when she was in the shower, she became dizzy, saw black, and saw blood pooling around her feet. (R. p. 702, lines 2-15; R. p. 822, line 25-p. 823, line 15). She contends that she did not fall, did not bump or scrape anything, but was in and out of consciousness, and then, her "breast blew open all the way through" and her "areola [was] eaten away." (R. p. 823, line 16-p. 824, line 1). On direct, Mrs. Whitfield said that her daughter "helped [her] out of the shower." (R. p. 702, line 15). On cross, Defense Counsel impeached her with her deposition testimony regarding the same event, in which she had testified that "my daughter dragged me out of the shower where blood was pooling around my feet." (R. p. 860, lines 2-11; R. p. 827, lines 5-8). At trial, Mrs. Whitfield would not concede that she had to be "dragged" out of the shower, but only that her daughter had to help her out after she became dizzy. It was clear at trial however that her breast was not bleeding before she got into the shower. (R. p. 828, lines 18-19).

Mrs. Whitfield's daughter called Dr. Kalus' office. (R. p. 843, line 3). He saw Mrs. Whitfield in the emergency room at Roper St. Francis Hospital and planned to perform a

debridement of the incision line the next day. (R. p. 1453, lines 14-20). During the course of this procedure, as Dr. Kalus was probing the wound with his finger, the implant became inadvertently exposed. (R. p. 537, lines 19-23). Because he exposed the implant, he had to remove it. (R. p. 537, line 24-p. 538, line 2). Dr. Kalus therefore removed the implant and closed the breast to allow it to heal, diagnosing Mrs. Whitfield with delayed healing. (R. p. 532, lines 15-20; R. p. 535, lines 4-7). He did not encounter any pus or purulence during the procedure and further agreed that her lab work did not reveal evidence of a systemic infection. (R. p. 535, lines 8-11; R. p. 534, lines 7-22). Significantly, neither Dr. Kalus nor any other provider treated Mrs. Whitfield for infection during this hospitalization. (R. p. 534, line 24-p. 535, line 3). She insisted at trial however that Dr. Kalus had to remove the implant and to go into her breast and "clean it out" because it "was full of infection and necrosis." (R. p. 751, lines 22-23).

On July 29, 2014, Mrs. Whitfield resumed regular appointments with her psychiatrist, Dr. Sara Marcino, reporting that she was not taking her medications, that she could not sleep or function, was anxious, depressed, and felt like Frankenstein. (R. p. 1871). She became angry and fixated on the surgery, lumping blame onto it for her problems, which had been treated by Dr. Marcino since at least 2013. (R. pp. 1869-1873; R. p. 1152, line 16-p. 1155, line 4). Her diary entries thereafter reflect her attributing her problems to the procedure as well. (R. p. 1773-4). Mrs. Whitfield has continued to receive psychiatric treatment from Dr. Marcino for the same problems she had for years before this procedure and, in her First Supplemental Answers to Interrogatories, designated Dr. Marcino as one of her expert witnesses for trial. (R. pp. 766-67, 1714). Dr. Marcino appeared and provided expert testimony contending that Mrs. Whitfield's preexisting psychiatric condition was exacerbated by the events of this case. (*See, e.g.* R. pp. 1090 and 1155, lines 14-15).

In the meantime, instead of having Dr. Kalus re-augment her right breast and although her left breast had healed appropriately, Mrs. Whitfield curiously chose to have her left implant removed. (R. p. 540, lines 13-25; R. p. 1078, lines 4-8). Unfortunately for her, along with the implant removal, Dr. Kalus also took an additional 490 grams of native breast tissue from the left side, leaving Mrs. Whitfield with significant asymmetry. (R. p. 544; R. p. 1496, lines 22-24; *see also* R. pp. 1867-8, which illustrate her condition before and after Dr. Kalus' intervention on the left side). In order to repair the defect he created, and because Appellant said she no longer desired implants, Dr. Kalus attempted fat grafting, seeking to add volume back to the breast to address the asymmetry, but it was not successful. (R. p. 550, lines 8-12). His course of treatment, and especially his decision to remove 490 grams of breast tissue from the well-healed left breast, was criticized at trial and identified as the actual source of Mrs. Whitfield's current physical complaints. (R. p. 1457, line 24-p. 1459, line 10). Mrs. Whitfield continued to seek treatment from Dr. Kalus and her most recent pretrial records reflected her desire to have implants again, even larger than those she originally asked Dr. Schimpf downsize. (R. p. 481, lines 10-16 and p. 550, line 18-p. 551, line 4; R. p. 2001; R. pp. 1714, 1754, 1772). Mrs. Whitfield has not undergone any such surgery. (R. p. 481, lines 10-23). In the months prior to trial and in spite of not being interested in additional surgery, Whitfield returned to Dr. Kalus for the first time in four and a half years to get a quote for additional surgery, retained him as an expert witness, and noticed his *De Bene Esse* deposition for trial, for which she paid him $1,000 per hour. (R. p. 494, line 1-p. 497, line 13).

In that deposition, Dr. Kalus changed his prior sworn testimony, now offering a negative standard of care opinion as to Dr. Schimpf, on which he was thoroughly cross-examined. (R. p. 492, line 1-p. 562, line 16). On cross examination, Dr. Kalus admitted under oath that he had previously testified that he was not critical of Dr. Schimpf's care, that Appellant's wound

separation was a known complication of the procedure that can and does occur in the absence of negligence, that he removed excess tissue from the left side, that her breasts were asymmetric, that his own informed consent forms were inconsistent and inaccurate, and that there was no evidence that he treated Mrs. Whitfield for infection. (R. p. 499, line 9-p. 500, line 1; R. p. 508, line 9-p. 517, line 13; R. p. 530, lines 11-13; R. p. 531, lines 3-6; R. p. 534, line 13-p. 535, line 7).

B. Recordkeeping

Appellant contends that Dr. Schimpf failed to keep a complete and accurate medical record and argues that she was entitled to a directed verdict on negligence per se due to these failures. The evidence presented at trial showed that Dr. Schimpf was transitioning to a new practice and, as a result, Mrs. Whitfield's records were contained in part on two separate medical records systems. Dr. Schimpf opened his practice in 2013. (R. p. 868, lines 20-23). He had an office in Summerville and also shared space with another plastic surgeon on Daniel Island, Dr. Pat O'Neill. (R. p. 868, line 22-p. 869, line 7). The entities were separate, but, at Dr. O'Neill's office, Dr. Schimpf used O'Neill's electronic medical record system. (R. p. 869, lines 9-14). If Dr. Schimpf saw the patient at his office, it went onto his electronic medical record system. If he saw the patient at Dr. O'Neill's office, he used Dr. O'Neill's system and stored any associated photographs on that system. (*Id.*). In discovery, Appellant pursued an extensive and costly forensic evaluation of Dr. O'Neill's computer system, which turned up no evidence that records had been deleted, altered, or destroyed. (*See, e.g.* R. p. 943, line 18-p. 948, line 21; R. pp. 1779-80 (Affidavit of Dr. O'Neill)).

Dr. Schimpf dictated his patient notes with handheld recorders / dictation devices, which dictations were transcribed and entered into the patient's chart. (R. p. 869, line 15-p. 870, line 9). Around the time of Mrs. Whitfield's treatment, the transcriptionist returned some tapes to the office saying that she could not transcribe them, because it appeared that dictation had been attempted but that the recorder did not pick up usable material. (R. p. 875, line 6-p. 877, line 10).

The transcriptionist would erase the tapes and return them to the office so that they might be re-used. (R. p. 876, lines 10-17). The practice ultimately determined that there were problems with the recorders. (R. p. 877, line 5-p. 878, line 15). The faulty equipment was thrown away. (R. p. 878, line 25-p. 879, line 1). In her testimony, the office manager admitted further that is was theoretically possible that the challenged notes were never dictated or were lost. (R. p. 884, line 21-p. 885, line 1). She did not discover that there were missing records until 2015, when Mrs. Whitfield requested her chart. (R. p. 887, lines 8-12). Ultimately however, Dr. Kalus, Mrs. Whitfield's subsequent plastic surgeon and retained expert, testified that the existence or non-existence of records did not delay or impair his treatment of Mrs. Whitfield. (R. p. 518, lines 15-21).

II. PROCEDURAL HISTORY

Mrs. Whitfield filed this medical malpractice action against Respondents on May 30, 2017. (R. pp. 46-64). Respondents challenged defects in the initial pleadings and filed their Answer to the Amended Complaint on October 4, 2017, in which, amongst other defenses, they denied liability and asserted that Appellant's injuries were the result of knowns complication of the procedures about which she was properly informed at the outset. (R. pp. 84-93). Thereafter, the case proceeded into discovery.

During the September 24, 2018, deposition of the office manager for Sweetgrass Plastic Surgery, Appellant's counsel questioned the office manager regarding her personal relationships and the confidential medical and surgical history of her and of other practice employees. Respondents objected and moved for a protective order. (R. pp. 94-98). During the deposition of Dr. Schimpf on October 17, 2018, Appellant's counsel again engaged in a line of questioning regarding Dr. Schimpf's private life and relationships. Respondents objected and again moved for a protective order. (R. pp. 97-9). The Trial Court heard argument and denied the motions on

January 16, 2019, allowing Appellant's counsel to further explore these topics in continued depositions, which developed no evidence related to Mrs. Whitfield's care and treatment. (R. pp. 7-10).

As noted above, prior to trial, Appellant designated her treating physicians, Dr. Kalus and Dr. Marcino, her plastic surgeon and psychiatrist, as experts. Both had the benefit of examining Mrs. Whitfield multiple times and treating her over the course of a number of years. Her physical and mental condition was the central issue in the case. Because of a number of then-unanswered questions regarding the etiology and causal relation of Mrs. Whitfield's claimed and future damages, respondents sought to have their expert plastic surgeon and expert psychiatrist examine Appellant pursuant to Rule 35, SCRCP. (R. pp. 100-09). After the Court determined that Motion was proper and denied Appellant's subsequent Motion to Reconsider, Mrs. Whitfield complied with the order and attended the examinations. These examinations were held in her physicians' offices and in the presence of her physicians, Drs. Kalus and Marcino. (R. pp. 11-32). After the examinations, Appellant deposed Respondents' experts regarding their conclusions. Prior to trial, Appellant filed a motion in limine seeking to exclude Respondent's experts' testimony because the exams had occurred. (*See, e.g.* R. p. 624, line 13-p. 625, line 18).

One month before trial, Respondents entered an offer of judgment in the amount of $100,000. (R. pp. 173-4). Appellant did not accept the offer. (*See* R. pp. 328-32). On August 19, 2019, one week prior to trial, Appellant filed the transcripts from the depositions of Dr. Schimpf and his office manager, *in toto*, with the Court. (*See* R. pp. 175-8). Appellant did not redact personal information, including information regarding minor children, from the transcripts as required by Rule 41.2, SCRCP. (*Id.*). Appellant also proceeded to have Dr. Schimpf's wife personally served with a subpoena for appearance at trial although she had never been identified

as a witness by either side in the five years leading up to the trial and had no involvement in Appellant's care. Respondents filed motions challenging these maneuvers, contending that Appellant had undertaken them so that she might try to smear and embarrass Respondents with potentially scandalous and unfairly prejudicial subject matter that had absolutely no relevance to the medical malpractice claims before the jury.

Appellant argued then and argues now that she has broad latitude, unchecked by any limits, to question witnesses so that she might show bias. Similarly, Respondents filed motions in limine seeking to limit Appellant from presenting evidence or argument concerning the personal relationships contending such evidence and presentation was not relevant to any issue in the case and furthermore presented a substantial risk of unfair prejudice under Rule 403, SCRCP. In these motions, Respondents contended that Appellant's efforts were undertaken so that she might explore scandalous and unfairly prejudicial subject matter that had absolutely no relevance to the medical malpractice claims at issue.

During pretrial arguments on August 26, 2019, the Court granted Respondents' Motion to Strike the Transcripts from the Public Index and / or to Seal and entered an Order sealing the transcripts and removing the substance of the documents from the public index. (R. p. 33). Furthermore, the Court, questioning Appellant's counsel as to what possible relevance Mrs. Schimpf's testimony might have since she had no involvement in Appellant's care at all, released her from the trial subpoena. (R. p. 607, lines 16, 22-3). The Court considered Respondent's Motion in Limine regarding evidence of the personal relationship between Dr. Schimpf and his office manager and issued a preliminary ruling excluding it under Rule 403, SCRE, barring some showing during the testimony that the relationship was the cause of the office manager trying to "cover up" for Dr. Schimpf in reference to missing records. (R. p. 603, line 14-p. 604, line 7).

The parties tried the case to a jury from August 26 – 30, 2019. At the end of the trial, Appellant moved for a directed verdict on negligence per se contending that Respondents lacked complete documentation of their interactions with Appellant. (R. pp. 1559-61). The Trial Court denied these motions. (R. p. 1561, lines 13-14). The jury returned a complete and unanimous verdict for Respondents. (R. p. 1652, lines 13-19; R. pp. 43-45; R. pp. 41-42). Appellant filed her notice of appeal on October 8, 2019. (R. pp. 333-40). Respondents then moved for costs related to their previously-filed offer of judgment. (R. pp. 328-32).[3] After a hearing, the Court entered an order awarding recoverable costs to Respondents on December 11, 2019. (R. pp. 34-40). Appellant timely filed an additional Notice of Appeal as to this order. After multiple extensions, Appellant filed her amended initial brief on July 30, 2020. Appellant did not address either award of costs to Respondents in her initial brief.[4]

STANDARD OF REVIEW

On appeal from a case at law tried to a jury, the authority of the appellate court is restricted to correcting errors of law. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). The jury's findings of fact therefore will not be disturbed unless "the record discloses that there is no evidence which reasonably supports the jury's findings." *Id.* In this appeal, Mrs. Whitfield challenges (1) the admission of certain expert testimony, (2) the exclusion of testimony

[3] Dr. O'Neill, a nonparty, was compelled to provide services to Appellant during discovery, having to participate in a forensic examination of his electronic medical records system, which did not turn up any discoverable information, and for which Appellant refused to pay him. He filed a motion for compensation, which was granted. Appellant appealed that order as well. This issue was part of this case until recently, and, when Appellant failed to raise the issue in her Initial Brief, she consented to Dr. O'Neill's dismissal from this Appeal.

[4] Because Appellant did not address the issues in her Initial Brief, and because she never filed a separate, brief, pleading, or motion regarding the Order for Compensation or Order for Costs, Respondents contend that the issues have been waived, abandoned, and deserted and her Notice of Appeal as to the December 11, 2019, order awarding costs should be dismissed. *See* Rule 208(b)(1)(B), SCACR; *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011); and *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993).

regarding a personal relationship between Respondent and his office manager, and (3) the Trial Court's denial of Whitfield's motion for directed verdict.

Admission or Exclusion of Evidence

It is well-settled law that "[t]he admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court." *State v. Douglas,* 369 S.C. 424, 632 S.E.2d 845 (2006). The decision below "will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *Id.* "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion is without evidentiary support." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). This standard applies to cross examination as well. *State v. Johnson*, 338 S.C. 114, 125, 525 S.E.2d 519, 524 (2000) (holding that the appellate court "will not disturb a trial court's ruling concerning the scope of cross-examination").

"To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 408, 764 S.E.2d 249, 251 (Ct. App. 2014) (quoting *Fields v. Reg'l Med. Ctr.*, 363 S.C. at 26, 609 S.E.2d at 509). Furthermore, when considering the "legal propriety of an evidentiary ruling," the court must focus not on the particular evidence admitted or excluded but, instead, it "must consider the entire record when determining whether a party was prejudiced by a questionable ruling." *State v. Fuller*, 452 S.C. 468, 479, 822 S.E.2d 910, 915 (Ct. App. 2019) (citing *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018). This means that, even in an instance where the trial court should have allowed testimony, "the determination of prejudice must be based on the entire record, and the result will generally turn on

the facts of each case." *Id.* It is axiomatic that in order "to warrant reversal based on the admission or exclusion of evidence, the appellate must prove both the error of the ruling and the resulting prejudice." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. at 408, 764 S.E.2d at 251 (quoting *Fields v. Reg'l Med Ctr.*); *see also State v. Fuller*, 452 S.C. at 479, 822 S.E.2d at 915 (same) (quoting *State v. White*, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007)).

Directed Verdict

When deciding a motion for directed verdict, "the trial court is concerned only with the existence or non-existence of evidence." *Enos v. Doe*, 380 S.C. 295, 300-01, 66 S.E.2d 619, 621 (Ct. App. 2008) (citing *Corbett v. Weaver*, 380 S.C. 288, 292-93, 669 S.E.2d 615, 617 (Ct. App. 2008) (quoting *Sims v. Giles*, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001)). This means that, when considering the motion, "when the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Id.* (quoting *Howard v. Roberson*, 376 S.C. 143, 150, 654 S.E.2d 877, 880 (Ct. App. 2007)). The task of the appellate court is to:

> [D]etermine whether a verdict for the party opposing the motion would be reasonably possible under the facts as liberally construed in his or her favor. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006); *Erickson v. Jones St. Publishers*, L.L.C., 368 S.C. 444,463, 629 S.E.2d 653, 663 (2006). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 292, 628 S.E.2d 496, 503 (Ct. App. 2006). A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability. *Huffines Co. v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Wright v. Craft*, 372 S.C. 1, 19,640 S.E.2d 486, 496 (Ct. App. 2006) (citing *Erickson*, 368 S.C. at 463, 629 S.E.2d at 663).

Id.

Issue Preservation

Finally, in South Carolina, in order for an appellate court to consider an issue, it must have been preserved. Our courts maintain a stringent body of law on issue preservation because "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). In order to preserve the issue as to evidence that is excluded, the proponent of that testimony must generally make an offer of proof, a proffer. *Ellis by Ellis v. Oliver*, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996). Furthermore, "a proffer that is confusing or incomplete will not provide grounds for the appellate court to find prejudice." Jean Hoefer Toal, et al. *Appellate Practice in South Carolina* 200 (3d ed. 2016) (contrasting *Designer Showrooms, Inc. v. Kelley*, 304 S.C. 478, 405 S.E.2d 417 (Ct. App. 1991)).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ADMISSION OF RESPONDENT'S EXPERTS' TESTIMONY BECAUSE IT WAS RELEVANT AND USEFUL TO THE JURY AND WAS NOT SUBJECT TO EXCLUSION MERELY BECAUSE RESPONDENT'S EXPERTS EXAMINED PLAINTIFF PURSUANT TO A COURT ORDER.

"The admission or exclusion of evidence is within the circuit court's discretion, and the circuit court's ruling on the admissibility of evidence is not subject to reversal on appeal absent a showing of a clear abuse of that discretion." *Turner v. Med. Univ. of S.C.*, 846 S.E.2d 1, 23, Op. No. 5723 (S.C. Ct. App. filed May 6, 2020) (Shearouse Adv. Sh. No. 18, at 119) (citing *Haselden v. Davis*, 341 S.C. 486, 497, 534 S.E.2d 295, 301 (Ct. App. 2000), *aff'd*, 353 S.C. 481, 579 S.E.2d

293 (2003)). Rule 702, SCRE, permits the admission of expert testimony when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." "Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). At base, evidence is admissible under Rule 702, SCRE, where (1) it aids the jury in its determination of some fact in issue and (2) where its probative value is not outweighed by its prejudicial effect in confusing the jury. *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

Prior to trial, Appellant moved in limine to prevent Respondents' expert plastic surgeon, Dr. Jorge Perez, and Respondents' expert psychiatrist, Dr. James Ballenger, from giving testimony, contending that *Fairchild v. S.C. Dep't of Transp*., 398 S.C. 90, 727 S.E.2d 407 (2012), established a rule providing that a party is absolutely prohibited from using his or her own expert to perform an independent medical exam. (*See, e.g.* R. p. 618, line 15-p. 620, line 25). In pretrial argument, Appellants employed their motion in limine as an opportunity to re-litigate the propriety of the Circuit Court's prior ruling ordering Appellant to attend the examination. (*Id.*). Despite having three of her own experts examine her, Appellant argued, reading language into Rule 35, SCRCP, that appears nowhere in the Rule, that a previously retained expert cannot perform a Rule 35 medical examination because that expert is not "independent." (*Id.*). The Trial Court, weighing *Fairchild*, the prior procedural history, and the prior order of the Circuit Court, denied Appellant's motion to exclude the testimony. (R. p. 622, line 17-p. 627, line 3). Now, on appeal, Appellant challenges that decision of the Trial Court to permit the testimony, ***not*** the underlying decision of the Circuit Court to permit the examinations in the first place. (*See* Initial Brief of Appellant, Issues Presented, Numeral I, "The trial court erred in admitting testimony from Respondents' Psychiatric

and Plastic Surgery Experts Regarding Their Examinations of Appellant."). Appellant made no argument below regarding the admissibility of the testimony under the appropriate Rule 702 standard, instead, she contended that it was not admissible because the examinations themselves had, in her view, violated *Fairchild*. This argument was misplaced then and it is misplaced now.

Appellant contends that *Fairchild* stands for the proposition that a retained defense expert may never perform an "independent medical examination" of a plaintiff under Rule 35, SCRCP. This is simply not the case. First, Rule 35, SCRCP does not require that the court-appointed examiner be independent nor does it employ the concept, borrowed from Workers' Compensation law, of an "IME" or "Independent Medical Examination." Appellant had her own physicians, Drs. Kalus and Marcino, serve as her experts in the case. As discussed above, both had the opportunity of treating her over many years. Furthermore, Mrs. Whitfield's retained expert plastic surgeon, Dr. Rosenberg, was also able to meet with her prior to his testimony and to consider the evidence with her and her lawyers. (*See, e.g.* R. pp. 1055, 1066). Respondents sought examinations under Rule 35 so that their experts' opinions might also have the benefit of first-hand evaluation. The court-ordered examinations took place in the offices of Mrs. Whitfield's physicians and that Mrs. Whitfield never suggested an alternate examiner to the Court below – she simply argued that the examinations could not occur because of *Fairchild*. (R. pp. 395-410). Moreover, she never presented evidence at trial tending to show that the examinations themselves involved anything improper or were anything other than normal medical examinations.

Finally, *Fairchild* is not controlling here because (1) the portion concerning Rule 35 examinations is dicta and (2), *Fairchild* is factually distinct from the case at bar. Unlike *Fairchild*, in this case, Mrs. Whitfield had her own treating physicians serving as her experts, both of whom had benefit of their knowledge of her and longstanding relationship with her. Their testimony

played a major role in Mrs. Whitfield's presentation to the jury. Absent a Rule 35 examination, Respondents had no access to Mrs. Whitfield and no way to evaluate the key damages evidence in the case. Mrs. Whitfield told the jury that she was physically deformed and psychiatrically injured, and she presented those claims for damages through the very experts who treated her for those conditions and who had a vested interest in continuing to treat her for those conditions. One of her own experts, Dr. Kalus, was further identified as the source of her alleged physical deformities because, as noted above, he removed nearly 500 grams of native breast tissue from her left side without sufficient medical justification. Facing this unique circumstance, Respondents sought to have access to Mrs. Whitfield to level the playing field and the Court, in its discretion, allowed the examinations, ensuring that all of the Rule 35 safeguards were employed. Lastly, the *Fairchild* plaintiff challenged the identity of the examiner. Here, Appellant challenged the occurrence of the examinations altogether and did not propose any reasonable alternative. (R. pp. 395-410). Concluding that an examination was reasonable, the Court allowed Defendant's experts to examine Appellant under Rule 35, subject to the conditions and protections contained in the Rule. This case is not *Fairchild*.

A. The Court Properly Admitted the Testimony of Respondents' Experts Under Rule 703, SCRE, and Appellant Interposed No Contemporaneous Objection to the Testimony of Either Expert.

As noted above, expert testimony is admissible where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and where it is not unfairly prejudicial. Rule 702, SCRE; *State v. Council*, 335 S.C. at 20, 515 S.E.2d at 518. "The qualification of expert witnesses and the admissibility of their testimony is largely within the discretion of the trial court." *Walker v. Bluffs Apartments*, 324 S.C. 350, 353, 477 S.E.2d 472, 473 (Ct. App. 1996) (citation omitted). An appellate court "will not disturb a trial court's ruling to exclude or admit expert testimony absent a clear abuse of discretion."

Id. (citation omitted). An expert will be qualified and his testimony admitted when the proponent shows that the witness has "acquired by reason of study or experience or both suck knowledge and skill in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Id.* (citing *Botehlo v. Bycura*, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984)).

At trial, Mrs. Whitfield did not object to Respondents calling either expert to the stand. (*See* R. pp. 1410-11 (Respondents call Dr. Perez to the stand and begin direct examination without objection) and pp. 1345-6 (Respondents call Dr. Ballenger to the stand and begin direct examination without objection)). In each examination, Respondents laid a foundation, demonstrating in turn that Dr. Ballenger is one the world's foremost experts in psychiatry generally and anxiety disorders specifically and that Dr. Perez is appropriately credentialed and very experienced in the field of cosmetic and reconstructive surgery. (*See* R. pp. 1345-55 regarding Dr. Ballenger and pp. 1411-15 regarding Dr. Perez). Each physician possesses the scientific, technical, or other specialized knowledge required by Rule 702 and Appellant did not object to the qualification of either as an expert, nor does she do so in the present appeal. (*See* R. pp. 1355, 1415).

In his testimony, Dr. Perez discussed the technical performance of the procedure at issue, discussed the causes of and treatments available for wound separation, scrutinized the treatment of Dr. Schimpf and Dr. Kalus, and evaluated the etiology of the damages claimed by Mrs. Whitfield. (*See, eg.* R. p. 1516, line 15-p. 1518, line 20; R. p. 1448, line 19-p. 1455, line 24; R. p. 1448, lines 11-16; R. p. 1459, line 2-p. 1464, line 9). This testimony, based on the underlying sources of evidence typically employed by expert physicians in their specialties, including medical records, testimony, and in-person examinations, is textbook expert testimony, i.e. it is that which

might aid or assist the jury in understanding the evidence and determining the facts in issue. *See, e.g. Watson v. Ford Motor Co.*, 389 S.C. at 445, 699 S.E.2d at 175 (referring to Rule 702, SCRE and holding that, "[s]tated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge."). Similarly, Dr. Ballenger's testimony discussed the nature of certain psychiatric disorders from a clinical perspective, including panic disorders and other related anxiety disorders, and then assessed how those likely effect Mrs. Whitfield and inform her ability to cope with postoperative complications. (*See, e.g.* R. pp. 1363-5, discussing the practical effects of a panic disorder). This is not a subject matter within the general purview of a juror's knowledge. Furthermore, Dr. Ballenger, a renowned expert in panic disorder, is inarguably well-qualified to assist the jury in its evaluation of Mrs. Whitfield's damages. Therefore, expert testimony was properly admitted by the Trial Court under Rule 702, SCRE.

B. Appellant Waived Her Argument Against the Admission of Testimony Regarding Defense Expert's Examinations Because She "Opened the Door" and Also Failed to Make a Contemporaneous Objection to Their Testimony.

At trial, Appellant "opened the door" to discussion of the examinations, first placing it in issue before the jury on her direct examination of her own witnesses. During Appellant's direct examination of her treating / expert psychiatrist, Dr. Marcino, Mrs. Whitfield's counsel elicited testimony from her regarding her role during Dr. Ballenger's examination, which took place in her office. (R. p. 1124, lines 4-6 "Q: Were you present for when the defense psychology expert, Dr. Ballenger, performed his examination of Mrs. Whitfield? A: Yes, I was."). This was the first the jury heard of the examinations. She discussed Mrs. Whitfield's alleged aversion to the evaluation, Dr. Ballenger's approach to the session, and asserted that Dr. Ballenger made Mrs. Whitfield nervous. (R. pp. 1124-7). Finally, Dr. Marcino suggested that there was no trust between Mrs.

Whitfield and Dr. Ballenger so therefore Mrs. Whitfield was not entirely forthcoming in her responses. (R. pp. 1125-7).

In spite of having put the topic in issue and used it to attempt to garner sympathy from the jury, Appellant now contends that this Court should give her a new trial because the Trial Court permitted discussion of the evaluations. This is not reasonable nor is it the law in this state. In order to have an appellate court consider an issue, it must be preserved. "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. DOT v. First Carolina*, 372 S.C. at 301-02, 641 S.E.2d at 907. Not only did Appellant put the evaluations in issue, she did not object to Respondents calling or qualifying either expert witness. Similarly, Appellant failed to lodge a contemporaneous objection to each expert's discussion of his examination of Appellant. On direct examination, Dr. Ballenger discussed his appointment with Mrs. Whitfield, replying to Dr. Marcino's negative gloss on his session with her patient:

> Q. "And were you also given an opportunity to meet with Ms. Whitfield and perform your own evaluation?
>
> A. I did. And we did. And we met for about three hours in Dr. Marcino's office, actually with Dr. Marcino sitting almost beside her in that office. And as I said, we met for about three hours.
>
> Q. And is that a fairly common thing for you to do, to interview patients in the forensic world?
>
> A. I like to do it every time that it's possible. …
>
> Q. And you mentioned that Dr. Marcino was present for this evaluation. There was some testimony yesterday that Dr. Marcino appeared to question whether Ms. Whitfield was able to give reliable answers during your evaluation. What was your impression of that?
>
> A. Well, Ms. Whitfield is certainly smart and capable and quite verbal and can do that. She didn't want to do the interview, was afraid of me. And I think that's fair to say. Certainly distrusted me because I was from the other side and that I would be not nice to her. …

> So it's become my pattern over the last probably maybe ten years, maybe, to ask people afterwards how was it, because of those reasons. I mean did I -- was I nice to you. Ms. Whitfield said, yes, you were very nice. And was I respectful? Yes, very respectful. And then she went on to say, yes, it was not -- essentially it wasn't traumatic, it wasn't anywhere near as bad as I thought it would be. And as I was walking out, she stopped me to thank me; again, saying you made it actually a pleasant experience.

(R. p. 1357, line 16-p. 1358, line 25). Dr. Ballenger then continued to explain his conclusions and diagnoses of Appellant's condition. Appellant failed to lodge a single objection to this colloquy and thereby failed to preserve the admission of his testimony for consideration on appeal. Similarly, Appellant did not object to the discussion of Dr. Perez's evaluation of Appellant, which was a standard plastic surgery evaluation held in the presence and at the offices of Mrs. Whitfield's plastic surgeon, Dr. Kalus. (*See* R. p. 1417, lines 10-24). Because Appellant did not make a contemporaneous objection, this issue is not preserved for review.

C. Assuming That the Trial Court Erred in the Admission of Testimony Regarding the Examinations of Appellant by Drs. Perez and Ballenger, Such Error was Harmless.

The admission of the Defense experts' testimony, both generally and as to their examinations of Appellant, was proper under the Rules of Evidence. Further, and although the issue is not directly before this Court because Appellant appealed only the admission of the defense experts' testimony and not the underlying March 28, 2019 Order requiring Appellant to attend the examinations, those examinations were appropriate under Rule 35, SCRCP. However, assuming *arguendo* that the Trial Court erred in the admission of testimony regarding the examinations, any error that resulted was harmless and would not support reversal. First, Appellant can point to no improper prejudice that the admission of this evidence had on her case, especially when all three of her retained experts examined and met with her themselves and then testified on the basis of their findings. The record is also clear that Appellant's counsel had a full and fair opportunity to

depose each expert regarding their examinations and to challenge the evaluations on cross examination and, further, did in fact challenge the examinations through their examinations of Appellant's treating physician experts, having them testify about the process as well as Appellant's alleged begging and pleading that the examinations not go forward. Moreover, these examinations did not comprise a significant part of either of the Defense experts' testimony. Simply put, the admission of evidence regarding the examinations did not change anything in the outcome of the trial.

i. Legal Standard Governing Harmless Error and Additional Sustaining Grounds.

In South Carolina, harmless error is not a proper grounds for reversal of a trial court:

> Whether an error is harmless depends on the circumstances of the particular case. *In re Harvey*, 355 S.C. 53, 63, 584 S.E.2d 893, 897 (2003). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Mitchell*, 286 S.C. 572, 573,336 S.E.2d 150, 151 (1985). Error is harmless where it could not reasonably have affected the result of the trial. *Harvey*, 355 S.C. at 63, 584 S.E.2d at 897. Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991).

Judy v. Judy, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009). Where a claimed error would not have changed a jury's verdict, it is not a proper basis for reversal on appeal. Similarly, "[u]nder the present rules, a respondent - the "winner" in the lower court - may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

i. The Purported Error of Admitting Defense Expert's Testimony Did Not Affect the Verdict Because there are Multiple Alternate Sustaining Grounds for the Verdict.

Contrary to Appellant's arguments, the overwhelming evidence presented at trial does not support Appellant's contention that Respondents breached a duty of care to Mrs. Whitfield or that Respondents proximately caused her claimed damages. This is true with or without the very small portion of challenged testimony from Respondents' experts. As such, this Court should therefore affirm the jury's verdict under the doctrines of harmless error and alternate sustaining grounds.

The elements of a claim for medical malpractice are well-settled under South Carolina law:

> To establish a cause of action for medical malpractice, the plaintiff must prove the following facts by a preponderance of the evidence: (1) The presence of a doctor-patient relationship between the parties; (2) Recognized and generally accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances; (3) The medical or health professional's negligence, deviating from generally accepted standards, practices, and procedures; (4) Such negligence being a proximate cause of the plaintiff's injury; and (5) An injury to the plaintiff.

See Brouwer v. Sisters of Charity Providence Hosps, 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014). Because "South Carolina does not recognize the doctrine of res ipsa loquitur," Appellant must affirmatively prove each of the above elements via expert testimony. *See Fletcher v. Med. Univ. of S.C.*, 390 S.C. 458, 463, 702 S.E.2d 372, 374 (Ct. App. 2010). The same is not necessarily true for a medical malpractice defendant, who will prevail if he or she convinces the jury in his or her favor on any single one of the above elements. Furthermore, a defendant in a professional negligence action is generally competent to provide testimony as to the standard of care alone, without an expert.

Contrary to Appellant's innuendo, there is no evidence that Dr. Schimpf breached the standard of care in the performance of the surgery at issue. At best, Appellant's expert speculated that he placed too much tension on the incision line, but, even then, there is no proof of the same.

(See, e.g. R. p. 1072, line 8-p. 1073, line 44). Looking to Dr. Schimpf's own testimony, without that of his experts, the jury could very reasonably have concluded that Dr. Schimpf was not negligent. Specifically, Dr. Schimpf denied liability and confirmed that he performed the procedure according to universally accepted techniques. Dr. Schimpf explained how the wound separation was not tension-related; had it been, it would have manifested within a number of hours or days, not weeks. (R. p. 1238, line 16-p. 1239, lines 1-19; R. p. 1255, line 23-p. 1256, line 11; R. p. 1261, lines 19-20; R. p. 1277, lines 6-9). He explained that wound separation was in fact a known complication of any such procedure, which Appellant and her experts conceded as well. (R. p. 806, lines 408; R. p. 1214, line 22-p. 1216, line 7; R. p. 1072, line 24-p. 1073, line 7; R. p. 458, lines 9-12). Dr. Schimpf testified that Dr. Kalus' preoperative photographs show a healing wound, with granulation tissue in the wound bed. (R. p. 1270). Dr. Schimpf testified that he could not understand how this was the "worst wound" Dr. Kalus had seen and explained the size of the wound in context. (R. p. 1257, line 14-p. 1259, line 7). Finally, Dr. Schimpf testified that the conservative approach he would have taken, aimed at preserving the implant, would have been successful had she stayed the course and worked with him to preserve the implant. (R. p. 1262, lines 18-24). As to her damages, he contended that had Mrs. Whitfield continued to treat with him, he would likely have been able to preserve her right implant, preventing her from undergoing the process of having Dr. Kalus remove one implant, then the other, plus nearly five hundred grams of additional tissue, and then having failed fat grafting to address that defect. (*See, e.g.* R. p. 1277, line 2-p. 1278, line 24).

This discussion of Dr. Kalus' role generally reveals the fact that, even without defense experts' testimony, the jury could have concluded that Dr. Kalus, and not Dr. Schimpf, was responsible for Mrs. Whitfield's damages. It also could have concluded that she herself was

responsible due to whatever may have happened that resulted in her being dragged out of the shower on July 13, 2014. Lastly, Appellant's own experts admitted that wound separation is a known complication, meaning it can and does happen in the absence of negligence. All of these issues offer grounds for sustaining the verdict alternative to the testimony of Respondents' experts.

II. THE TRIAL COURT PROPERLY LIMITED THE PRESENTATION OF EVIDENCE THAT WAS NOT RELEVANT AND UNFAIRLY PREJUDICIAL DURING APPELLANT'S EXAMINATION OF RESPONDENTS' OFFICE MANAGER.

Appellant contends that she should have been permitted at trial to examine Sweetgrass Plastic Surgery's office manager on the subject of that individual's relationship with Dr. Schimpf because the office manager "gave starkly different testimony than Appellant as to what transpired when Mrs. Whitfield requested a copy of her medical file and as to Dr. Schimpf's treatment and behavior towards the [sic] Mrs. Whitfield once complications arose." (Initial Brief of Appellant, p. 12). She argues that the Trial Court erred in excluding this evidence because "on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." (*Id.* at 22). In so arguing, Appellant is putting several carts before the proverbial horse – not only does she ignore the requirements of relevancy, but she confuses the process for examining a witness for purposes of revealing bias, interest, or prejudice under Rule 608(c), SCRE, with the process for impeachment on the basis of a prior inconsistent statement under Rule 613, SCRE.

A. Appellant Has Not Preserved this Issue for Appeal.

After the Trial Court limited Appellant from examining Respondent's office manager regarding her personal life, including her relationship with Dr. Schimpf, Appellant failed to make any proffer of what that excluded evidence would have shown. (*See* R. pp. 904-941 (Trial Court ruling) and 942, (Appellant's counsel stating that he has no further questions for the witness and Trial Court excusing witness). In order to preserve an issue for appeal as to evidence excluded at trial, the proponent of that testimony must generally make an offer of proof or proffer. *Ellis by*

Ellis v. Oliver, 323 S.C. at 132, 473 S.E.2d at 799. Furthermore, "a proffer that is confusing or incomplete will not provide grounds for the appellate court to find prejudice." Jean Hoefer Toal, et al. *Appellate Practice in South Carolina* 200 (3d ed. 2016) (contrasting *Designer Showrooms, Inc. v. Kelley*, 304 S.C. 478, 405 S.E.2d 417).

Appellant made no proffer. Without one, this Court is left without a reliable means for determining the substance of the excluded testimony. Because the Court cannot recreate this testimony post-facto, it cannot measure the probative value of the testimony relative to the record and it therefore is left without the ability to measure the prejudice, if any, that the exclusion of this testimony caused to Appellant. For instance, this Court cannot know whether Appellant would have been able to impeach the office manager with her deposition testimony or whether the question as to any relationship would simply have produced a one-word admission from the witness. Not knowing, the Court cannot now weigh the excluded testimony, which is why South Carolina has strict preservation rules. "It is well settled that a reviewing court may not consider error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been." *State v. Roper*, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979). Because Appellant failed to make a proffer and preserve the issue for appeal, it is now moot.

B. Assuming that Appellant Has Preserved this Issue for Appeal, the Trial Court Properly Excluded Evidence Regarding the Personal Life of Respondent's Office Manager Such Evidence is Not Relevant, is Unfairly Prejudicial, and Because it Was Not Proper Impeachment Evidence in the Context of This Trial.

i. Standard for Relevancy and Impeachment.

The Trial Court has broad discretion in determining whether or not evidence shall be admitted at trial. *Parker v. Spartanburg Sanitary Sewer Dist.,* 362 S.C. 276, 287, 607 S.E.2d 711, 717 (Ct. App. 2005) (citing *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000) and *Gamble*

v. International Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996)). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). The threshold determination is "whether the proffered evidence is relevant as required under Rule 401 of the South Carolina Rules of Evidence." *Id.* Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Therefore, evidence regarding a fact *not* of consequence to the determination of the action is not relevant, and, under Rule 402, SCRE: "[e]vidence which is not relevant is not admissible." If the evidence is relevant, it is admissible, unless some exception applies. *See* Rule 402, SCRE. Here there is nothing whatsoever linking the proposed testimony to the alleged acts of malpractice—i.e. such testimony has nothing to do with the amount of tension the surgeon used to close the incision.

Relevant evidence however is frequently excluded when that evidence is unfairly prejudicial, confusing to the jury, or when its introduction would waste the time of the court and jury. Rule 403, SCRE, therefore provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." When analyzing probative value under Rule 403, a trial court "considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Lee*, 399 S.C. 521, 527-28, 732 S.E.2d 225, 228 (Ct. App. 2012). Evidence is unfairly prejudicial under Rule 403 when it has a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Torres*, 390 S.C.

618, 623, 703 S.E.2d 226, 228-29 (2010); *see also State v. Lee*, 399 S.C. at 528, 732 S.E.2d at 228. When evidence is unfairly prejudicial, it should be excluded. The unfair prejudice of the proposed evidence in this case is obvious – a personal attack designed only to smear Respondents, which has nothing to do with the patient's surgery, is precisely the kind of evidence Rule 403 was designed to preclude.

Rule 608(c) SCRE, unique to the South Carolina Rules of Evidence, is the basis for Appellant's attempts to introduce testimony regarding the information at issue. This Rule preserves South Carolina common law precedent and allows the impeachment of a witness by the introduction of character evidence regarding that witness's "bias, prejudice or any motive to misrepresent." Rule 608(c), SCRE. *See also State v. Jones*, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001). The ability to present evidence, including impeachment evidence, is however subject to the relevancy and probative value restrictions set forth by Rules 401, 402, and 403 of the South Carolina Rules of Evidence. *See, e.g., State v. Dial*, 405 S.C. 247, 256, 746 S.E.2d 495, 499-500 (Ct. App. 2013) (upholding trial court's decision to disallow, on relevancy grounds, the cross examination of a key witness, the officer who took criminal Respondent's confession to homicide, on the subject of his relationship with the solicitor who initially handled the case). Finally, the only reversals for disallowing examination as to bias arise out of the criminal context and are primarily based on the Confrontation Clause of the Sixth Amendment, which "guarantees a Respondent this right to a meaningful cross-examination of adverse witnesses." *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000) (reversing trial court's limitation of examination on basis of Confrontation Clause and Rule 608(c) where, in capital murder trial, state's primary witness against accused had a romantic relationship with the victim). As indicated above, this proposed line of inquiry cannot survive the threshold requirements of either Rules 401 or 403, SCRE.

Rule 613, SCRE, permits the examination and impeachment of a witness on the basis of the prior sworn testimony of that witness. It "does not provide for the admission of prior statements, but rather sets forth the conditions under which such statements may be admitted." *Hunter v. Staples*, 335 S.C. 93, 99, 515 S.E.2d 261, 265 (Ct. App. 1999). The prerequisite for impeachment under Rule 613, is that *the witness* must make a statement inconsistent with *his or her prior testimony*. *See* Rule 613, SCRE (providing "[in] examining a witness concerning a prior statement *made by the witness*...")(emphasis added) and *Hunter*, 335 S.C. at 99, 515 S.E.2d at 265 (holding "[i]n order to have an inconsistent statement, there must be a statement with which to compare it."). In the case at bar, there was no prior inconsistent statement with which to impeach and Appellant was not entitled to impeach the office manager solely because she disagreed with the testimony or offered alternate testimony herself.

In sum, there is no evidentiary rule, not even Rule 608(c), that creates an absolute right to present evidence simply because one party disagrees with or dislikes the substance of another witness' trial testimony.

ii. Evidence and Presentation Regarding The Non-party Office Manager's Personal Life was Not Relevant and was Therefore Properly Excluded.

Appellant contends that she should have been permitted to examine Respondents' office manager on the subject of her relationship with Dr. Schimpf at trial because her account diverged from that of Appellant. The threshold inquiry is not whether evidence might be harmful to an opponent, but instead, is whether that evidence is relevant. Information concerning the office manager's personal life is in no way relevant to the determination of a medical malpractice action. In order to prevail in a medical malpractice action, a plaintiff must prove the standard of care, that defendant deviated from the standard of care, and that the deviation was the proximate cause of damages to Appellant. (*See* Section I(C)(i) above for discussion of the elements with citation to

relevant authority). The relevant evidence or "facts of consequence" to these elements in this case are how Respondents performed the surgery at issue, how they took care of their patient thereafter, and whether Appellant was injured as the result of any substandard care on the part of Respondents.

The personal life of the office manager does not make it any more or less likely that Dr. Schimpf appropriately closed the incision line on Appellant's right breast. It does not make Appellant's claimed damages and more or less likely. It does not make it any more or less likely that Appellant read and signed the informed consent forms. It does not make it more or less likely that Respondents' dictation equipment malfunctioned.[5] Evidence is not automatically relevant because it may show bias. The office manager's personal life is not relevant to the elements of a medical malpractice claim and therefore this evidence was properly excluded by the Trial Court.

iii. The Trial Court Properly Excluded Evidence Regarding the Personal Life of Respondents' Office Manager under Rule 403 Because The Danger of Unfair Prejudice Substantially Outweighed Its Probative Value.

While all evidence is prejudicial to one party or the other, Rule 403 prohibits the introduction of evidence whose probative value is substantially outweighed by its *unfairly* prejudicial nature. Unfair prejudice is the undue tendency of certain evidence to suggest "[a] decision on an improper basis." *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). "The determination of prejudice must be based on the entire record." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). Furthermore, "the [determination] will generally turn on the facts of each case. *Id.*

[5] Which the office manager admitted on the stand was the most likely explanation. It is not clear what more Appellant could have wanted from this witness in terms of material admissions relating to her theories of recovery regarding recordkeeping, nor would the personal life evidence conceivably make the disputed lines of questioning Appellant wished to pursue at all relevant. Finally, Appellant spent time and money running down 'missing' records and her own forensic expert never concluded that records had been altered, deleted, or destroyed. That being the case, it is apparent that the office manager had nothing to lie about in the first place.

The evidence challenged here by Appellant involves a textbook application of Rule 403, SCRE. Not only does Rule 403 apply to prohibit unfairly prejudicial evidence, it serves to exclude evidence that would cause undue delay or waste of time and serves to prevent the needless presentation of cumulative evidence. Appellant sought to examine a nonparty about her personal relationships solely to embarrass the witness and to attempt to inflame the jury against Respondents. As noted above, medical malpractice actions involve discrete questions of duty, breach, and causation. Not one of these elements has anything to do with this nonparty office manager's personal relationships. Appellant sought to make office manager's personal life into an issue but had no avenue to do so at trial because no testimony opened a door to admission of the information. Moreover, because Respondents never denied the information in their depositions, there was no legally sufficient basis for its potential service as impeachment evidence. Because the information was not relevant and was offered for the improper purpose of smearing Respondents, its attempted introduction presented a substantial risk that the jury would be misled and encouraged to decide the case on an improper emotional basis. The Trial Court properly exercised its discretion to exclude this information and its ruling should be affirmed.

iv. Appellant Had No Proper Purpose for Seeking to Introduce the Evidence.

Where there is no proper purpose for introducing evidence, it should be excluded because it is not relevant. Rule 608(c) permits only the presentation of evidence that has a "legitimate tendency" to cast light on the motivations of a witness. Rule 608(c), SCRE. Further, evidence "calculated to arouse the sympathies or prejudices of the jury" may be irrelevant and should be excluded. *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). Appellant claims that she should be permitted to introduce this evidence so that she might establish bias. It is clear from Appellant's argument, however, that she actually sought to introduce the evidence to smear the office manager's credibility and to try to argue to the jury later that she *might* therefore lie for Dr.

Schimpf. (*See, e.g.* R. p. 601, lines 5-6: "so it goes to credibility about what took place" and 939, lines 19-20: "[s]he's got a motive to say something, to cover for him."). However, none of this is borne out by the record – Appellant took two depositions of the office manager and still had nothing to impeach her with at trial. The Trial Court, addressing truthfulness, found that office manager responded truthfully to Appellant's questioning: "I don't think that she's testified to anything contrary than she has in her deposition. Every question that you've asked her you've either moved on from or she's been able to say that's what I said or that's how I said it and let me clarify as to what I meant." (R. pp. 938-939). There is a mechanism for impeaching a witness on prior sworn testimony, and that mechanism is set forth in Rule 613, SCRE (see below). Appellant was not able to impeach the office manager however, so Appellant sought to besmirch her credibility through the presentation of wholly irrelevant avenues of questioning.

The excluded questioning was not probative of any fact at issue in the case and the Court properly excluded it under Rules 701, 702, and 703, SCRE. Appellant sought to introduce the information for an illicit purpose: to engender prejudice, to besmirch the witnesses, and to hopefully garner some condemnation from the jury. These are not permissible uses of evidence at trial. *See, e.g. State v. Johnson*, 338 S.C. at 128, 525 S.E.2d at 526 (holding that unfairly prejudicial evidence is that which "create[s] a tendency to suggest a decision on an improper basis, commonly though not necessarily, and emotional one."). Because Appellant attempted to introduce evidence for the purpose of suggesting a decision on an improper basis, the information was properly excluded. Finally, even had the Trial Court erred in failing to admit the evidence, it was harmless at best. Even if admitted, the evidence still had nothing to do with the treatment at issue, causation, or damages. As argued above, there are plentiful additional supporting grounds in the record that would have allowed the jury to reach the same conclusion with or without this evidence.

v. Appellant Confuses Available Means of Impeachment.

Finally, note that Appellant contends, in essence, that she should have been permitted to impeach the credibility of Respondents' office manager because the office manager's testimony conflicted with Appellant's own testimony. This is not how impeachment works. At trial, Appellant's counsel, adopting the framework of Rule 613, argued that he should be permitted to impeach the office manager with evidence of her relationship with Dr. Schimpf and her compensation paid by the practice because her testimony was "squarely at odds with what Ms. Whitfield has testified to." (R. p. 934, lines 21-22). Again, Rule 613 sets the framework for impeachment upon prior sworn testimony and it applies only to prior statements made by the witness being examined. *See* Rule 613, SCRE ("[i]n examining a witness concerning a prior statement made by the witness…") and *Hunter*, 335 S.C. at 99, 515 S.E.2d at 265 (holding "[i]n order to have an inconsistent statement, there must be a statement with which to compare it.").

The Trial Court heard argument from Appellant's counsel and properly concluded that Appellant had not in fact demonstrated the existence of an inconsistent statement. (R. p. 938). It noted that the office manager had already admitted that the practice had an incomplete medical record and then declined to allow Appellant to drag the office manager's personal life into the courtroom, determining that the evidence was more prejudicial than probative. (R. pp. 598-599). Not giving up, Appellant's counsel then again attempted to have leeway to impeach the office manager simply because her testimony differed from that of Mrs. Whitfield: "I understand you ruling…But what about the testimony about the inconsistencies she's saying about what Mrs. Whitfield testified to? She's offered these explanations …" and again, the Trial Court properly limited the examination because it was not relevant and because it was not proper grounds for impeachment under the Rules of Evidence. (R. p. 940). Accordingly, the verdict should be affirmed.

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S APPLICATION FOR A DIRECTED VERDICT FOR NEGLIGENCE PER SE BECAUSE THE EVIDENCE WAS CAPABLE OF MORE THAN ONE INFERENCE AND BECAUSE APPELLANT HAD NOT PROVEN CAUSATION OR DAMAGES ARISING FROM MISSING MEDICAL RECORDS.

Lastly, Appellant contends that she was entitled to a directed verdict on her Negligence Per Se theory because Respondents' office manager admitted that Respondents' medical chart was incomplete due to the reasons discussed above. That admission, however, is not the end of the inquiry. To make out a cause of action for negligence per se, a plaintiff must prove that the defendant owed him a duty of care, that the defendant failed to exercise due care, and furthermore that the violation of the statute was the proximate cause of some injury to the Appellant. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 53, 410 S.E.2d 251, 252 (1991). In order to establish the first element, a duty of care, a plaintiff must show "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Id.* He or she then must show that the defendant failed to exercise due care, but, "[v]iolation of the statute…is not conclusive of liability." *Id.*, 306 S.C. at 54, 410 S.E.2d at 253.

Furthermore, not all violations of statues rise to the level of failure to exercise due care. *See, e.g. Trivelas v. S.C. DOT*, 348 S.C. 125, 134, 558 S.E.2d 271, 275 (Ct. App. 2001) (holding that the violation of a statue "under explanatory or excusatory circumstances" "does not constitute negligence per se") (citing *Davis v. Boyd*, 262 S.C. 679, 207 S.E.2d 101 (1974) and *Myers v. Evans*, 225 S.C. 80, 81 S.E.2d 32 (1954)). Lastly, as to causation, "it is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence. *Trivelas v. S.C. DOT*, 348 S.C. 125, 136, 558 S.E.2d 271, 276 (Ct. App. 2001). The Appellant's burden on proximate cause is clear:

> Proximate cause requires proof of both causation in fact, and legal cause. Causation in fact is proved by establishing the injury would not have occurred 'but for' the

> defendant's negligence. Legal cause is proved by establishing foreseeability. The standard by which foreseeability is determined is that of looking to the 'natural and probable consequences' of the complained of act. Furthermore, legal cause is ordinarily a question of fact for the jury. Only when the evidence is susceptible to only one inference does it become a matter of law for the court.

Trivelas, 348 S.C. at 135-36, 558 S.E.2d at 276 (Ct. App. 2001) (internal quotations omitted). Appellant did not meet this burden.

A. Appellant Did Not Establish that the Regulation At Issue Created a Duty of Care to Appellant.

At trial and in her Brief, Appellant argues that Respondents violated the requirements set forth in S.C. Code Ann. Regs. 61-91, Standards for Licensing Ambulatory Surgery Facilities. Respondents challenged her ability to examine the office manager on these regulations, contending that they do not apply to Respondents. Respondents pointed out that Dr. Schimpf was not the "licensee" within the meaning of the Regulation, explaining that if anyone, the licensee was Dr. Pat O'Neill, the individual with whom Dr. Schimpf shared office space, on whose EMR system he kept records, and in whose office-based operating room he performed the surgery at issue.[6] Respondents further contended that a licensing statute cannot serve as an appropriate basis for establishing the standard of care because the essential purpose of a licensing statue is licensing, not the affirmative proscription of a standard of care. The Trial Court ultimately permitted the examination of the office manager on the regulations, but it properly denied Appellant's motion

[6] Although Respondents contended that the regulation did not apply to them below, the clearest basis for that fact is that Respondents nor Dr. O'Neil operate a DHEC-inspected or DHEC-licensed Ambulatory Surgery Facility. Ambulatory Surgery Facilities are those larger standalone facilities run by hospitals and other organizations who must first obtain a certificate of need to operate. See, for example, the DHEC listing of accredited Ambulatory Surgery Facilities at https://www.scdhec.gov/sites/default/files/docs/Health/docs/LicensedFacilities/hrasc.pdf. These are not individual medical practices. Respondents, like most private practice physicians, operate an office-based operating room under the authority of the South Carolina Board of Medical Examiners. This means, as argued below, that S.C. Reg. 61-91 has no application to Respondents and therefore cannot serve as a basis for proving their duty of care owed Appellant. Appellant simply did not carry her burden of proving that the DHEC ASF regulations applied to Respondents.

for directed verdict and arrived at the appropriate result as to the applicability of the regulations by refusing to charge them to the jury.

As noted above, to make out a case for negligence per se, a Appellant must show that (1) that the essential purpose of the statute is to protect from the kind of harm the Appellant has suffered; and (2) that he is a member of the class of persons the statute is intended to protect. Whitlaw v. Kroger Co., 306 S.C. 51, 53, 410 S.E.2d 251, 252 (1991). There is no evidence that S.C. Reg. 61-91 has an *essential purpose* of protecting the public from the type of harm that Appellant claimed to have suffered in this case. They are in fact "Standard for Licensing Ambulatory Surgery Facilities" not standards for the practice of medicine. Furthermore, Appellant is not a member of a class of persons to be protected by the regulations because she did not undergo treatment at an Ambulatory Surgery Facility but instead had her surgery at an office-based operating room regulated by the S.C. Medical Board. Simply put, S.C. Reg. 61-91 is inapplicable to the matter at hand and therefore cannot serve as a basis for negligence per se.

B. Appellant Did Not Establish that the Purported Violation of S.C. Reg. 61-91 Rose to the Level of Negligence Per Se.

Violation of a statue "under explanatory or excusatory circumstances" may not be sufficient proof of the lack of due care. *See Trivelas*, 348 S.C. at 134, 558 S.E.2d at 275 (explaining that simply because a traffic statute exists and it was violated does not meant that a Respondent failed to exercise due care). At trial, Appellant questioned Respondents' office manager extensively regarding recordkeeping. She admitted that Appellant's medical chart was missing some dictated office notes and further that it was missing preoperative photographs. (R. pp. 867-868, 903). She explained that Respondents had a periodic issue with malfunctioning dictation recorder by which they lost office notes. (*See, e.g.* R. pp. 906, 913-916). She explained that Respondents did not realize contemporaneously to the treatment that the recorder was malfunctioning. (R. p. 916). She

explained that when Respondents discovered the missing notes in July, 2015, Dr. Schimpf dictated a summary of Mrs. Whitfield's treatment. (R. p. 913). She explained that someone in Dr. O'Neill's office would have taken preoperative photographs of Mrs. Whitfield on the morning of surgery and that these would have been maintained by Dr. O'Neill's office exclusively. (R. pp. 918-919, 868). Dr. O'Neill performed an extensive evaluation of his records and determined that there was no evidence that they had been altered, deleted, or destroyed. (R. pp. 1779-80, Affidavit of Dr. O'Neill).

In *Trivelas*, the defendant S.C. DOT driver caused the crash at issue when he slowed on the interstate to drive across the median, thereby violating the letter of the statute that prohibits slowing and another that prohibits driving across the median. 348 S.C. at 132-33, 558 S.E.2d at 274-75. He explained that he did so at the direction of a police officer, which Appellant disputed. 348 S.C. at 133, 558 S.E.2d at 275. The Court of Appeals reversed the trial court's conclusion that these actions constituted negligence as a matter of law because the evidence regarding the purported violations was disputed and because the violation of a statute under explanatory or excusatory circumstances may not rise to the level of negligence per se. In the case at hand, Respondents kept a medical chart that totaled 146 pages. (R. pp. 1881-2000, 1813-1857, 1860-1). Respondents had a reasonable explanation for the records that were missing, and they furthermore addressed the issue by creating a summary note when the issue came to their attention. Medical records exist to document the care and to provide subsequent doctors with information to enable continuity of care. Appellant's own subsequent treating physician and expert admitted the missing items in no way prevented him from providing care to Mrs. Whitfield. Appellant had a very full and fair opportunity to conduct discovery into the recordkeeping in this matter, collecting and analyzing audit trails and even going to the trouble and expense of hiring a digital forensic examiner. That

examiner, Mr. Abrams, wrote a program and spent hours examining Dr. O'Neill's computer system for patient photographs, ultimately finding no evidence that Appellant's records had been deleted or destroyed. (*See* R. p. 943, line 18-p. 455, line 11). Similarly, Dr. O'Neill found no evidence that records had been deleted or destroyed. (R. pp. 1779-80). Respondent's conduct simply does not evince a lack of due care and the totality of the record reflects that Appellant was not able to prove otherwise.

C. Appellant Did Not Establish that the Purported Violation of S.C. Reg. 61-91 was the Proximate Cause of Her Alleged Injuries.

Even were Appellant capable of proving the violation of a statue intended to protect her, she must further show the violation of the statute was causally linked, both in fact and law, to the injury. *Whitlaw*, 306 S.C. at 55, 410 S.E.2d 253. As the *Whitlaw* court explained:

> Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Legal cause is proved by establishing foreseeability. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have contemplated the particular event which occurred. The defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence.

Id. At trial, Appellant made no showing that her alleged injuries were the natural and probable consequence of Respondents' violation of any statute. She also makes no such showing in her Initial Brief, instead stating in a conclusory fashion that "[b]ecause there was an admitted violation of a statue and there can be only one conclusion concerning liability" the Trial Court should have granted her motion for directed verdict. (Initial Brief of Appellant, p. 26). That is not so.

The evidence presented at trial demonstrated absolutely zero connection between records and the separation of the incision line on Appellant's right breast. In fact, the evidence on this subject is clear: Dr. Kalus, Appellant's expert and treating plastic surgeon testified that when he

first saw Mrs. Whitfield on July 10, 2014, he was able to formulate his opinion and make treatment recommendations without medical records and further that the subsequent lack of records in the case did not prohibit him from taking proper care of Mrs. Whitfield. (R. p. 518, lines 21-4). Likewise, Appellant's retained expert, Dr. Rosenberg, agreed that Dr. Kalus was able to get in touch with Dr. Schimpf and was able to get any specific information he may have needed to treat Mrs. Whitfield. (R. p. 1059, line 4-p. 1060, line 13). It is axiomatic that "[i]n South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 249, 626 S.E.2d 1, 4 (2006). Appellant is not permitted to assume liability, causation, or damages as a result of allegedly missing medical records when she could not present evidence tending to show *how* she was allegedly harmed.

D. The Trial Court Appropriately Denied Appellant's Motion for Directed Verdict Because There Was More than One Inference Available from the Evidence.

When deciding a motion for directed verdict, "the trial court is concerned only with the existence or non-existence of evidence." *Enos v. Doe*, 380 S.C. 295, 300-01, 66 S.E.2d 619, 621 (Ct. App. 2008) (citing Corbett v. Weaver, 380 S.C. 288, 292-93, 669 S.E.2d 615, 617 (Ct. App. 2008)). This means that, in considering the motion, "when the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Id.* At trial, the evidence regarding recordkeeping was inarguably susceptible to more than one inference. As noted above, it was not clear from the evidence presented that the regulation complained of applied to Respondents, that any volitional act or omission of Respondents lead to missing records, or that Appellant sustained any damages whatsoever as a result of missing records. Furthermore, when considering a motion for directed verdict, the trial court is directed to liberally construe the facts in the light most favorable to the non-moving party (the Respondents). *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) (holding that the task of the trial court is to "determine whether a verdict

for the party opposing the motion would be reasonably possible under the facts as liberally construed in his or her favor."). This is a high bar and Appellant fell well short. Because she did not carry her burden, the Trial Court appropriately denied Appellant's motion for directed verdict and should be affirmed.

CONCLUSION

At base, this Court is left with a straightforward decision. None of the issues presented by Appellant warrant the reversal of the Trial Court, which exercised its discretion and made proper, well-considered decisions to admit and exclude testimony and to deny a motion for directed verdict. The jury spent a week hearing the evidence and promptly returned a verdict for Respondents. The rulings of the Trial Court challenged here did no prejudice to Appellant, who was able to present her entire case. Because there is no indication in this record that the Trial Court abused its discretion, this Court should affirm the verdict below.

Respectfully submitted,

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October 30, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2019-001716
Lower Court Case No. 2017-CP-10-2758

Jeane Whitfield,

Appellant,

v.

Dennis K. Schimpf, M.D. and
Sweetgrass Plastic Surgery, LLC,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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APPEAL FROM CHARLESTON COUNTY
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Appellate Case No. 2019-001716

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v.

Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,

and

Patrick O'Neil, M.D. and O'Neil Plastic Surgery, LLC,

Respondents.

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I. The examinations conducted by Respondents' previously-retained experts were improper for reasons set forth and preserved at trial.

A. A party defendant to a medical malpractice action may not use his own previously-retained expert to conduct a physical examination of an opposing party under Rule 35, SCRCP, particularly when the experts have already been deposed, written extensive notes on their findings, reached conclusions, and rendered opinions as to the plaintiff's condition before the examination.

Respondents contend that it was proper to allow their own previously-retained experts to physically examine Mrs. Whitfield under Rule 35, SCRCP, because otherwise "Respondents had no access to Mrs. Whitfield and no way to evaluate the key damages evidence in the case." (Respondents' Initial Brief, p. 20). Respondents' argument misconstrues the issue before this Court and fails to recognize the options afforded to a medical malpractice defendant under Rule 35, SCRCP. Although not an absolute right, a defendant in such an action may seek a physical and/or mental examination of the plaintiff pursuant to the Rule. However, the physician performing an examination pursuant to a Rule 35 motion must be appointed by the Court and may not be affiliated with the defendant. "The physician **must** be selected by the court, **not the defendant**, and must be competent and disinterested." [Emphasis added] *Fairchild v. S.C. Dep't of Transp.*, 727 S.E.2d 407, 417, 398 S.C. 90, 110 (2012), quoting *Richardson v. Johnson*, 60 Tenn App. 129, 444 S.W.2d 708, 710 (1969). (See Appellant's Brief, Argument I, pp. 6-12 for a detailed analysis of the Supreme Court's finding in *Fairchild*).

Most notably in *Fairchild*, the Supreme Court held that the trial court properly exercised its discretion in barring Defendant's previously-retained expert, Dr. James Ballenger—the same defense expert in this case—from performing a mental examination of the plaintiff and, consequently, providing testimony as to the same. In rendering its decision, the Supreme Court reasoned, "Dr. Ballenger was retained as a defense witness and had reviewed not only

[Plaintiff's] medical records, but also the deposition testimony of other potential witnesses, and it was alleged that he had already formed adverse opinions regarding [Plaintiff's] injuries before the IME was requested." *Id*. 727 S.E.2d at 418, and 398 S.C. at 111.

The same set of facts exists in the present case. Defendant's plastic surgery expert, Dr. Jorge Perez, and psychiatry expert, Dr. Ballenger, had already 1) been retained and identified by Defendants as expert witnesses, 2) reviewed Mrs. Whitfield's medical records, 3) been deposed by her counsel, 4) written extensive notes on their findings, 5) reached conclusions, and 6) rendered opinions as to Mrs. Whitfield's physical and mental state prior to conducting any mental and physical examinations. (Trial Tr., R. p. 1383, line 10 -13; p. 1394, lines 1-7; p. 1507, lines 6-9; p. 1508, line 13 to p. 1509 line 9; p. 1544, lines 3-5; p. 1553, lines 8-17). Defendants had also paid their experts thousands of dollars for their time and evaluations. (Trial Tr., R. p. 1507, lines 6-18). Accordingly, these experts could not provide the unbiased assessment contemplated by Rule 35, SCRCP.

Despite having ample opportunity to seek physical and mental examinations of Mrs. Whitfield by court-appointed physicians under Rule 35, SCRCP, and being advised by Mrs. Whitfield's counsel of the precedent set in *Fairchild*, Respondents insisted on using their own previously-retained experts. (See Defendants' Rule 35 Motion for Physical and Mental Examination, R. p. 100, and Plaintiffs Memorandum in Opposition, R. p. 110). In this sense, they are the architects of their own problem. Their misguided effort to "level the playing field" has no basis in law and runs in direct contravention to the Supreme Court's holding in *Fairchild*. (See Respondent's Brief, p. 21, stating, "Respondents sought to have access to Mrs. Whitfield to level the playing field.")

B. Mrs. Whitfield properly objected to the admission of testimony regarding defense expert's examinations and did not "open the door" to the admission of their

testimony.

Mrs. Whitfield properly objected to the admission of Respondents' expert testimony at trial. Specifically, on July 17, 2019, Mrs. Whitfield filed a Motion in Limine Regarding Defense Examinations of Plaintiff, wherein she moved to prevent Respondents from introducing any evidence to the jury regarding medical examinations performed on her by Respondents' experts on the grounds that the examinations were a direct violation of the standard set forth by the South Carolina Supreme Court in *Fairchild*. (Motion, R. p. 169). As noted in Appellant's Brief, Mrs. Whitfield argued, *inter alia*, that Defendants' previously-retained experts could not aid the jury by providing the type of impartiality and independence required of a medical examiner appointed under Rule 35, SCRCP; that Plaintiff had reasonably objected to physical examination by Defendants' experts on the grounds that they had been previously-retained by Defendants, reviewed records, and are not disinterested and/or unbiased physician; and that expert witness testimony should not be allowed because *Fairchild* expressly forbids a court from compelling a Plaintiff to submit to physical examination by a witnesses from the other side. (Memo in Opp., R. p. 110; Hr'g Tr., p.404, line 4 – p. 408, line 20).

Mrs. Whitfield's counsel further noted that Defendants' psychiatric expert, James Ballenger, M.D., had been the very expert disallowed by both the South Carolina Court of Appeals and the Supreme Court in *Fairchild* from medically examining an opposing party under Rule 35, SCRCP. (Memo in Opp., R. p. 110; Hr'g Tr., R. p.404, line 4 – p. 408, line 20). See *Fairchild v. Dept. of Transp*., 683 S.E.2d 818, 826, 385 S.C. 344 (Ct. App. 2009), affirming the trial court's finding that, "independent means independent and that means no witness has previously been identified by the Plaintiff or the Defendant gives the independent medical exam."

On the first day of trial, Mrs. Whitfield's Motion in Limine was heard by the Honorable Bentley D. Price and summarily denied. (Trial Tr., R. p. 618, line 14 - p. 627, line 4,). The trial court did not make any findings or offer any legal rationale to support its ruling, but rather simply stated, "**All right. I am going to deny the motion. And you're—you [Defendants] can bring it up in your opening.**" [Emphasis added] (Trial Tr., R. p. 627, lines 3-4).

Respondents' contention that Appellant "opened the door to discussion of the examinations, first placing it in issue before the jury on her direct examination of her own witnesses" is incorrect and directly contradicted by the record. First, as noted above, the trial court had already denied Appellant's Motion and Limine and ruled that the Respondents' could introduce evidence of their experts' mental and physical examinations at trial. Further, the Court instructed Respondents' counsel that they could bring up their experts' opinions in their opening statement, which they did:

> Opening Statement by Mr. Smyth:
>
> We are also going to bring you some expert witness testimony to help you understand that. So we have hired an internationally-recognized plastic surgeon from Fort Lauderdale. His name is Dr. Perez. He's literally spoken in over twenty different countries on surgery procedures. He's been in practice more than thirty years. He does this surgery on a regular basis.
>
> He's going to come to this courtroom and he's going to tell you that he's looked at the medical records in this case, he's looked at the photographs in this case, he's examined all the evidence, he's read the deposition testimony of all the witnesses. And he's going to offer you his opinion. And I suspect that his opinion is going to support the care that Dr. Schimpf provided to Ms. Whitfield.
>
> Dr. Perez is also going to look at the causes. And he's going to evaluate the evidence and tell us what else could have caused this wound to separate besides the tension. And you're going to get to hear that information from him, as well.
>
> […]

> So we're going to bring you another expert who's one of the world's leading experts in psychiatry, Dr. James Ballenger. Dr. Ballenger founded the Institute of Psychiatry at MUSC. He lives here in Charleston and he has incredible expertise in the field of psychiatry. He's written the textbook that psychiatrists turn to when they're going to make a diagnosis.
>
> He's going to come and tell you that he's read the psychiatric records of Ms. Whitfield and he's looked at all of the records and the testimony and the evidence in the case and he's going to give you his opinion as to why that matters.
>
> How does it help us understand what happened here? How does a patient go from having a successful procedure, three or four weeks later develops a complication she was told could happen, into thinking this man (pointing) kicked her out ofher [sic] office?
>
> Which I guarantee you he's going to come on this standand tell you he's never done in his life. How do you explain that? Dr. Ballenger is going to tie those pieces together for us.

(Trial Tr., R. p. 646, line 22 to p. 647, line 15; p. 648, line 14 to p. 649, line 8).

Further, had Appellant's counsel not examined Mrs. Whitfield's psychiatrist, Dr. Sara Marcino, about her present sense impressions and medical opinion of Dr. Ballenger's examination, he would not have been able to elicit testimony from her regarding the multitude of issues plaguing the examination. (See Trial Tr., R. p. 1124, line 4 to p. 1128, line 6, wherein Dr. Marcino describes, *inter alia*, the problems that arise when there is a lack of baseline trust between an examiner and examinee.)

C. The admission of testimony by Respondents' previously-retained experts was highly prejudicial to Ms. Whitfield.

As noted above and in Appellant's brief, the admission of testimony by Respondents' previously retained experts was highly prejudicial to Ms. Whitfield because they had, *inter alia*, rendered opinions as to Mrs. Whitfield's physical and mental state prior to conducting any

mental and physical examinations. (Trial Tr., R. p. 1383, line 10 -13; p. 1394, lines 1-7; p. 1507, lines 6-9; p. 1508, line 13 – p. 1509 line 9; p. 1544, lines 3-5; p. 1553, lines 8-17) Said differently, they were biased experts who had already been paid thousands of dollars and rendered opinions before any physical or mental examinations took place. (Trial Tr., R. p. 1507, lines 6-18). Accordingly, Respondents' experts could not provide the unbiased assessment contemplated by Rule 35, SCRCP. This is the very reason why the Supreme Court rendered its decision in *Fairchild*.

"The physician must be selected by the court, not the defendant, and must be competent and disinterested. […] [I]t is clear that the power [to conduct a Rule 35 examination] so vested in the Court is a discretionary power, and not an absolute right in the applicant, and that the physician or physicians so appointed act as officers of the court, and not as agents of either party." [Emphasis added] Fairchild v. S.C. Dep't of Transp., 727 S.E.2d at 417, 398 S.C. at 109-110, quoting *Richardson v. Johnson*, 60 Tenn.App. 129, 444 S.W.2d 708, 718 (1969). "When the court makes such an appointment [under Rule 35], [it] does so because [it] determines in [its] discretion that the case calls for the opinion of disinterested and unbiased physicians, not friends of either parties, whose testimony is likely to be biased." [Emphasis added] *Fairchild v. S.C. Dep't of Transp.*, 727 S.E.2d at 418, 389 S.C. at 110, quoting *Atkinson v. United Rys. Co.*, 286 Mo. 634, 228 S.W. 483, 485 (1921). Contrary to Respondents' contention, the inclusion of Dr. Ballenger and Dr. Perez's testimony was not harmless.

D. The evidence shows that Dr. Schimpf breached the standard of care in the performance of the surgery at issue.

Respondents' contention that "it is uncontested that Dr. Schimpf used the medically accepted and standard techniques to perform the surgeries in question" is directly contradicted by the record. Specifically, Dr. Rosenberg, Plaintiff's medical expert provided ample testimony that

Dr. Schimpf deviated from the standard of care and caused Mrs. Whitfield harm. (Trial Tr., R. p. 1016, line 2 to p. 1050 line 25). Plaintiff's psychiatric expert, Dr. Sara Marcino also testified that Dr. Schimpf breached the standard of care by performing a nonconsensual procedure on Mr. Whitfield's neck and that his medical treatment caused her psychological harm. (Trial Tr., R. p. 1122, line 21 – p. 1124, line 3).

II. Appellant properly moved to question Respondent's Office Manager regarding her compensation and ongoing sexual relationship with Respondent in order to elicit evidence of bias. <u>There was no question at trial as to the character or content of the testimony Appellant wished to elicit from Respondents' Office Manager</u>.

As noted in Appellant's brief, on August 26, 2019, Defendants' counsel filed Defendant's Motion in Limine to Seal and Exclude Certain Inadmissible Evidence, wherein they sought to preclude Mrs. Whitfield's counsel from eliciting any testimony regarding Dr. Schimpf's personal life, including any evidence of an admitted, nine-year sexual relationship with Office Manager. (Motion, R. p. 179). During her deposition on February 11, 2019, Office Manager testified that she had been engaged in a sexual relationship with Dr. Schimpf and his wife since 2010, and had engaged in sexual relations with Dr. Schimpf as recently as a week before her deposition (Depo. Tr., 2/11/19, R. p. 376, line 5 – p. 377, line 9).

Defendant's Motion in Limine was heard at trial, at which point, Defendant's counsel also argued that Mrs. Whitfield's counsel should be precluded from eliciting any testimony from Office Manager regarding the amount of money she is being paid by Dr. Schimpf, or about any of the various complementary cosmetic procedures he has performed on her throughout the years. (Trial Tr., R. p. 933, line 21 – p. 941, line 5). During her deposition, Office Manager had testified that Dr. Schimpf performed various complementary cosmetic procedures on her, including a breast augmentation, liposuction, fillers, and laser treatments. (Depo. Tr., 2/11/19, R. p. 377, line 10 to p. 385, line 22). **<u>There was no question at trial as to the character or</u>**

content of the testimony Appellant wished to elicit from Respondents' office Manager. (Tr. Transcript, R. p. 590, line 13 – p. 591, line 19; p. 602, line 9 to p. 603, line 13; p. 606, lines 4 - 13).

Mrs. Whitfield's counsel argued that Office Manager's relationship with Dr. Schimpf and the compensation she received from him were relevant for purposes of establishing bias and impeaching Office Manager's credibility. (Trial Tr., R. p. 934, line 9 – p. 941, line 5). Specifically, Plaintiff's counsel noted that Office Manager's observation regarding Dr. Schimpf's post-operative care were starkly at odds with Plaintiff's observations. (Id. at Trial Tr., R. p. 934, line 9 – p. 941, line 5). Plaintiff's counsel also noted that Office Manager had offered innocent explanations as to why the medical records had gone missing, blaming their absence on a malfunctioning recorder, and denying that she or Dr. Schimpf could have destroyed the alleged recordings. (Id. at Trial Tr., R. p. 934, line 9 – p. 941, line 5). Her account of what transpired when Plaintiff requested a copy of her medical file was also at odds with Plaintiff's testimony. (Trial Tr., R. p. 920, lines 1-13). As noted above, when asked if Dr. Schimpf was angry during his last visit with Plaint, Office Manager testified, "No. He would never be angry." (Trial Tr., R. p. 920, lines 22-25). When asked if he slammed his surgical utensils in the sink and told Plaintiff to leave, Office Manager testified, "No. Dr. Schimpf would never do that." (Trial Tr., R. p. 921, lines 1-3).

A. A proffer of the Office Manager's testimony was not necessary to preserve the issue on appeal where 1) it was clear from the record that Office Manager would have testified about her admitted ongoing sexual relationship with Dr. Schimpf and the forms of compensation that she received from him, and 2) it was clear from the record that the exclusion of the Office Manager's testimony regarding these subjects prejudiced the Appellant.

As noted above, there was no question at trial as to the character or content of the testimony. (Tr. Transcript, R. p. 590, line 13 – p. 591, line 19; p. 602, line 9 to p. 603, line 13; p.

606, lines 4 -13). During her deposition, the Office Manager admitted to an ongoing sexual relationship with Dr. Schimpf and testified as to the various forms of compensation she received from him. The Office Manager had also testified as to her salary and the numerous complimentary cosmetic procedures she received from Dr. Schimpf over the years. (Depo. Tr., 2/11/19, R. p. 377, line 10 to p. 385, line 22). Appellant's lawyers even filed the depositions for purposes of entering and preserving the testimony the record (Trial Tr., R. p. 590, line 13 – p. 591, line 19). In addition, the very purpose of Respondents' Motion in Limine, filed August 26, 2019, was to exclude the Office Manager's testimony due to the admission made by her during her deposition. (Motion, R. p. 179).

"**Generally,** a proffer of testimony is required to preserve the issue of whether that testimony was properly excluded by the trial court." *State v. King*, 623 S.E.2d 865, 868, 367 S.C. 131 (2006). [Emphasis added]. However, the South Carolina Supreme Court has carved out a clear exception to this rule where 1) the record reflects what the witness was going to testify to, and 2) it is clear from the record that the Court's failure to admit the witness's testimony prejudiced the Appellant. *Id.* 623 S.E.2d at 868, stating:

> [W]hen it is clear from the record that prejudice exists, the issue will be preserved on appeal despite the absence of a proffer. See State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990). The reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice. Id. That rule has been relaxed where the record clearly demonstrates prejudice. Id.
>
> The record reflects Thomason was going to testify to the statements Walker made in his letter to her. The record clearly indicates King would be prejudiced by the exclusion of Thomason's testimony. Therefore, the issue of whether Thomason's testimony was properly excluded is preserved for review despite the lack of a proffer.

Similarly, in the present case, it is clear that the Office Manager would have testified as

to her ongoing sexual relationship with Dr. Schimpf and the types of compensation she received from him. Exclusion of this testimony was the very subject matter of Respondent's Motion in Limine. Further, it was clear that Mrs. Whitfield was prejudiced by the exclusion of this testimony because she had no other means by which to establish the Office Manger's interest, bias, or partiality toward Dr. Schimpf and impeach her credibility. As noted in Appellant's Brief, the Office Manager gave starkly different testimony at trial than Ms. Whitfield as to what transpired when Mrs. Whitfield requested a copy of her missing medical records. (Appellant's Brief, Argument II, pp. 11-22). As argued by Appellant's counsel at trial, the Office Manager's observations regarding Dr. Schimpf's post-operative treatment of and behavior towards Mrs. Whitfield were directly at odds with Mrs. Whitfield's testimony. (Trial Tr., R. p. 934, line 9 – p. 941, line 5). It is clear from the Record that Ms. Whitfield was prejudiced by the exclusion of the testimony. Accordingly, a proffer was not necessary and the issue raised by Mrs. Whitfield as to the exclusion of the Office Manager's testimony was properly preserved for appeal.

B. Considerable latitude is allowed in the cross-examination of an adverse witness for possible bias and it was error for the trial court to conclude that such evidence was not relevant.

As noted in Appellant's Brief, "Considerable latitude is generally allowed in the cross-examination of an adverse witness for possible bias." [Emphasis added] *North Greenville College v. Sherman Const. Co*., Inc., 243 S.E.2d 441, 442, 270 S.C. 553, 556 (1978), citing *Martin v. Dunlap*, 266 S.C. 230, 222 S.E.2d 8 (1976). As noted by McCormick: "The law recognizes the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties or the self-interest of the witness in the outcome of the case. Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility." [Emphasis added] *Id*., citing McCormick on Evidence, § 40, p. 78 (1972).

Here, Office Manager's long-standing sexual relationship with Dr. Schimpf and her "emotions or feelings toward him" are likely to have "a slanting effect" upon her testimony. Her "self-interest in the outcome of the case" can be directly tied to maintaining her personal and professional relationship with Dr. Schimpf. Minimally, a fact exists which tends to show "interest, bias, or partiality of the witness."

The trial court failed to take into account the law and particular circumstances of the case, and, instead, based its ruling on the conclusory findings: "I don't' think she's biased" and "I don't think anything has been elicited as to fact that she's been untruthful in any way." (Trial Tr., R. p. 939, lines 9-12). In doing so, the trial court abused its discretion and prejudiced Mrs. Whitfield who could not otherwise demonstrate that Office Manager's testimony was clearly biased and not credible. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell.* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citing *Fontaine v. Peitz.* 291 S.C. 536, 354S.E.2d565 (1987)). Accordingly, the trial court's ruling should be reversed and the case should be remanded for a new trial on the merits.

III. The trial court erred in not granting Appellant's Motion for a Directed Verdict as to negligence per se where 1) Respondents admitted that they did not properly maintain medical records for Mrs. Whitfield as required by statute, 2) the evidence established that Respondent's failure to maintain records proximately caused harm to Mrs. Whitfield, and 3) there were no other inferences to be drawn from Respondents' failure to maintain the medical records as required by statute.

The Record directly contradicts Respondents' contention that they did not violate Section 700 of S.C. Code of Regulations 61-91, Standards for Licensing and Ambulatory Surgical Facilities, titled Patient Records. First, Respondents' assertion that Sweetgrass Plastic Surgery ("SPS") is not an "Ambulatory Surgical Facility" is in direct conflict with the Regulations definition of the same. Specifically, section 101(E) of the Regulation, defines "Ambulatory

Surgical Facility" as follows:

> 101. Definitions […]
>
> E. Ambulatory Surgical Facility: A facility organized and administered for the purpose of performing surgical procedures and/or endoscopy for which patients are scheduled to arrive, receive surgery, and be discharged on the same day.

As evidenced by the record, Respondent Sweetgrass Plastic Surgery is precisely this type of surgical facility. Mrs. Whitfield, for example, had her surgeries performed by Dr. Schimpf at SPS on June 6, 2014 and was discharged the same day. (Trial Tr., R. p. 673, lines 21-23; p. 675, line 25 to page 676, line 1).

Second, Respondents' Office Manager specifically testified that she was in charge of maintaining medical records for Sweetgrass Plastic Surgery. (Trial Tr., R. p. 900, lines 22-25). Any contention that SPS was not responsible for maintaining its own medical records is directly contradicted by her clear and unambiguous testimony.

Third, as set forth in Appellant's Brief, the Office Manager testified that Sweetgrass Plastic Surgery had failed to comply with both Sections A and B of the Regulation, which pertained to the maintenance of patient records:

> Q. Would you agree with me that Sweetgrass did not follow that section [A] with regards to Mrs. Whitfield?
> A. As I said before, we do our best.
> Q. And I understand that you've done -- you try. But what I'm specifically trying to get an answer to is did Sweetgrass comply with Section A as it pertains to Mrs. Whitfield's medical records?
> A. No. (Trial Tr., R. p. 901, line 21 – p. 902, line 3)

And

> Q. Okay. So what I'm asking you is did Sweetgrass comply with Paragraph B because of not keeping those records?
> A. The records were incomplete.
> Q. Okay. Did they comply with Paragraph B?
> A. No.

Q. Would you agree with me that Sweetgrass failed to maintain an organized record for Mrs. Whitfield?
A. Yes. But we -- we treat patients, not medical records.
Q. Are medical records important?
A. Yeah. (Trial Tr., R. p. 903, lines 8- 17)

Fourth, Respondents' assertion that Appellant made no showing that she was harmed by Respondents' failure to maintain her medical records is simply not true. Mrs. Whitfield's Medical Expert, Dr. Michael Rosenberg specifically testified that Respondents' failure to maintain medical records caused Mrs. Whitfield harm and damage. (Trial Tr., R. p. 1035, line 20 to p. 1036, line 14; p. 1037, lines 2-19).

Fifth, Respondents provide no factual or legal support for their contention that there was more than one inference available for the evidence. Again, the opposite is true: 1) SPS is by definition an Ambulatory Surgical Facility, 2) Respondents' Office Manager admitted that she was responsible for maintaining SPS's records, 3) Respondents' Office Manager admitted that SPS had failed to comply with both sections of the regulation governing maintenance of medical records, and 4) Appellant's Medical Expert testified that that Mrs. Whitfield was proximately harmed by SPS's failure to maintain its medical records.

It was an error of law to deny Plaintiff's Motion for a Directed Verdict. When evidence presented at trial yields only one conclusion concerning liability, the trial court may properly grant a motion for directed verdict. *Fairchild v. Dept. of Transp*., 683 S.E.2d 818, 385, 823 S.C. 344, 353 (Ct. App. 2009), aff'd,398 S.C. 90, 727 S.E.2d 407 (2012). Here, there are no other conclusions that could be reached or any alternate inferences that could be drawn from the evidence. Notably, in denying Mrs. Whitfield's Motion for a Directed Verdict, even the trial court did not and could not make any findings or offer any legal rationale to support its ruling,

but merely stated, "Alright. I'm going to deny the motion. And I'm not charging it either." (Trial Tr., R. p. 1561, lines 13-15). It was error for the Court deny Mrs. Whitfield's Motion for a Directed Verdict as to the negligence *per se*. Accordingly, the ruling should be reversed and the Motion for Directed verdict should be granted.

CONCLUSION

Based on the foregoing, Appellant Jeane Whitfield respectfully requests that this Court reverse the trial court's rulings and remand this case for a new trial on the merits. It was reversible error for the trial court to allow Defendants' previously-retained experts to testify to a jury about their physical and mental examination of Mrs. Whitfield. It was also reversible error for the trial court to prohibit Mrs. Whitfield's counsel from eliciting evidence of bias from the Office Manager by examining her about her compensation from and sexual relationship with Dr. Schimpf. Finally, it was error for the trial court to deny Mrs. Whitfield's Motion for a Directed Verdict as to Negligence Per Se.

[Signature on following page]

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November 2, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2017-CP-10-02758
Appellate Case No. 2019-001716

Jeane Whitfield,

Appellant,

v.

Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,

and

Patrick O'Neil, M.D. and O'Neil Plastic Surgery, LLC,

Respondents.

APPELLANT'S RULE 211 CERTIFICATION

The undersigned certifies that the *Final Brief of Appellant* and *Appellant's Final Reply Brief to Respondent's Brief* comply with Rule 211(b), SCACR.

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November 2, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jeane Whitfield, Appellant,

v.

Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, Respondents.

Appellate Case No. 2019-001716

Appeal From Charleston County
Bentley Price, Circuit Court Judge

Unpublished Opinion No. 2022-UP-417
Heard September 15, 2022 – Filed November 23, 2022

AFFIRMED

Daniel Scott Slotchiver and Andrew Joseph McCumber, both of Slotchiver & Slotchiver, LLP, of Mount Pleasant; Jesse Sanchez, of The Law Office of Jesse Sanchez, of Charleston; and Brent Souther Halversen, of Halversen & Halversen, LLC, of Mount Pleasant, all for Appellant.

Todd W. Smyth and Kevin Richard Horton, both of Smyth Whitley, LLC of Charleston; Stephen Tyler Graves, of Graves & Davis, LLC, of Charleston, all for Respondents.

PER CURIAM: This is a medical malpractice action in which Jeane Whitfield contends plastic surgery performed by Dr. Dennis K. Schimpf and Sweetgrass Plastic Surgery, LLC, caused her physical and psychological damages. On appeal, Whitfield raises three allegations of error: (1) the trial court erred in excluding testimony from defense experts Dr. James Ballenger and Dr. Jorge Perez relating to their examination of Whitfield pursuant to Rule 35, SCRCP; (2) the trial court erred in excluding evidence regarding a personal relationship between a witness and Dr. Schimpf; and (3) the trial court erred in denying Whitfield's directed verdict motion regarding the failure of Sweetgrass Plastic Surgery to maintain certain medical records relating to her treatment pursuant to Regulation 61-91.703(D) of the South Carolina Code (2012 & Supp. 2022). We affirm pursuant to Rule 220(b), SCACR and the following authorities:

1. As to the trial court's excluding certain testimony from Dr. Ballenger and Dr. Perez: *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014) (stating "to challenge the specific rulings of [a] discovery order[], the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding"); *Ex parte Whetstone,* 289 S.C. 580, 580, 347 S.E.2d 881, 881-82 (1986) ("An order directing a party to participate in discovery is interlocutory and not directly appealable . . . . Instead of appealing immediately, a non-party has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply."); *Green By & Through Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (hearing the appeal of a civil contempt order against grandmother who refused to produce her grandson for examination by clinical psychologist under Rule 35, SCRCP); *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One [c]ircuit [c]ourt [j]udge does not have the authority to set aside the order of another.").

2. As to the trial court's exclusion of testimony regarding a personal relationship between a witness and Dr. Schimpf: Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach [a] witness either by examination of the witness or by evidence otherwise adduced."); *State v. Roper*, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979); ("It is well settled that a reviewing court may not consider error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been."); *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) ("An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on

appeal in absence of an adequate proffer of evidence in the court below."); *Ellis v. Oliver* 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996) ("[A]ppellant failed to proffer [the] records he sought to introduce. Consequently, this issue is not preserved for review."); *Martin*, 301 S.C. at 244, 391 S.E.2d at 547 ("Because appellant's trial counsel failed to make an offer of proof in order to preserve the question for appeal, we do not need to address whether the trial judge erred in excluding such testimony."); Rule 103(a)(2), SCRE ("Error may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.").

3. As to the trial court's denial of Whitfield's directed verdict motion on her negligence cause of action brought under Regulation 61-91.703 of the South Carolina Code: *McKaughan v. Upstate Lung & Critical Care Specialists, P.C.*, 421 S.C. 185, 189, 805 S.E.2d 212, 214 (Ct. App. 2017) ("When reviewing the trial court's decision on a motion for directed verdict, this court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." (quoting *Burnett v. Family Kingdom, Inc*. 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010))); *Turner v. Med. Univ. of S.C.,* 430 S.C. 569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020) ("This court will reverse the circuit court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law."); *Whitlaw v. Kroger Co.*, 306 S.C. 51, 53-54, 410 S.E.2d 251, 252-53 (1991) ("[B]reach of [a] duty can be found with a showing of [the] violation of [a] statute. The finding of a statutory violation, however, does not end the inquiry. The causation of the injury must also be evaluated.").

AFFIRMED.

KONDUROS, HEWITT, and VINSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2017-CP-10-02758
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Jeane Whitfield,

Appellant,

v.

Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,

Respondents.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant Jeane Whitfield, through her undersigned counsel, hereby petitions this Honorable Court for a rehearing in connection with the unpublished opinion issued in this case (Opinion No. 2022-UP-417), filed on November 23, 2022, attached hereto. Appellant respectfully submits that the following points have been overlooked or misapprehended by the Court:

I. Appellant's compliance with a prior discovery order requiring her to submit to physical and mental examinations by Defendants' previously-designated medical experts does not render the testimony regarding those examinations admissible at trial, particularly where the experts are not independent, disinterested physicians as required by Rule 35, SCRCP and

Fairchild v. S.C. Dep't of Transp., 727 S.E.2d 407, 398 S.C. 90 (2012).

Appellant respectfully submits that this Court's erred in conflating the standard for discoverability with that of admissibility. Specifically, an order granting discovery has no effect on whether the evidence obtained in discovery is admissible at trial. See *Hansen v. DHL Laboratories, Inc.*, 450 S.E.2d 624, 316 S.C. 505 at n. 5, quoting 27 C.J.S. Discovery § 87 (1959), "[The] judge hearing the motion for discovery has no authority to determine the admissibility in evidence of the document produced, that being a matter for the trial court."

In the present case, Appellant objected to the *admission* of testimony at trial by Defendants' expert witnesses regarding the physical and medical examinations they had conducted on her. (Motion in Limine, R. pp. 169-172; Trial Tr., R. p. 618, line 14 to p. 627, line 4). This Court's opinion errs in finding that Appellant was somehow precluded from challenging the admission of said testimony at trial simply because she had complied with the underlying discovery order. In doing so, the opinion fails to acknowledge and/or consider the difference between items that are discoverable and those which prove admissible. "Just because evidence is discoverable does not mean it is admissible." *Hesline v. Lenahan (In re Eleanor Mccarthy Lenahan Trust Under Agreement Dated July 12, 2001)*, 428 S.C. 598, 836 S.E.2d 793. (S.C. App. 2019).

In addition, none of the cases cited in Section 1 of the Court's opinion speak to the *admissibility* of evidence, but rather to their discoverability. It was error for the Court to find that Appellant was precluded from challenging the admissibility of patently biased and highly prejudicial testimony simply because she had complied with a discovery order that commanded her to submit to examinations in violation of Rule 35, SCRCP and *Fairchild*. Accordingly, Appellant respectfully requests that this Court grant her petition for rehearing and reverse its

finding that Appellant was precluded from challenging the admissibility of testimony at trial.

II. The lower court abused its discretion in allowing Defendant's previously-designated experts to offer testimony regarding their examination of the Appellant.

"The exercise of a trial court's discretion implies conscientious judgment, not arbitrary action, and takes account of the law and particular circumstances of the case, being directed by the reason and conscience of the judge to a just result." *Horn v. Davis Elec. Constructors.* 312 S.C. 363, 366, 440 S.E.2d 398, 400 (Ct. App. 1994) (citing *Nienow v. Nienow*. 268 S.C. 161, 232 S.E.2d 504 (1977); and *State v. Hill*. 266 S.C. 49, 221 S.E.2d 398 (1976)). In the present case, the trial court failed to take into account the law or the particular circumstances of the case. Specifically, the trial court ignored the primary purpose of independent medical evaluations under Rule 35, SCRCP, and *Fairchild*. "The purpose of the rule for an IME is to materially aid the jury, not just the defendant, in evaluating the actual damages sustained and arriving at a just verdict. [...] Thus, the better rule is that the physician should not be affiliated with either party in order to serve the purposes of Rule 35." Id. 727 S.E.2d at 417, 398 S.C. at 109-110 (Emphasis added). See also this Court's own opinion in *Fairchild*, 683 S.E.2d 818, 826, 385 S.C. 344 (Ct. App. 2009), affirming the lower court's finding that "[I]ndependent means independent and that means no witness has previously been identified by the Plaintiff or the Defendant gives the independent medical exam."

By allowing Defendants' previously-designated experts to *testify* to a jury about their physical and mental examinations of Mrs. Whitfield, the trial court afforded them the same privileges reserved for independent, disinterested, and unbiased physicians contemplated under both Rule 35, SCRCP and the South Carolina Supreme Court's holding *Fairchild*. This was an

abuse of discretion and resulted in the admission of patently biased and highly prejudicial testimony to the jury.

As noted in Appellant's Final Briefs, the expert witnesses were not independent, disinterested, and unbiased physicians that could offer the type of testimony that could "materially aid the jury" under Rule 35, SCRCP and *Fairchild*. To the contrary, Defendants' plastic surgery expert and psychiatry expert had already been retained and identified by Defendants as expert witnesses prior to their examination of Mrs. Whitfield; they had already reviewed Mrs. Whitfield's medical records, been deposed by her counsel, written extensive notes on their findings, reached conclusions, and rendered opinions as to Mrs. Whitfield's physical and mental state. (Trial Tr., R. p. 1383, line 10 -13; p. 1394, lines 1-7; p. 1507, lines 6-9; p. 1508, line 13 – p. 1509 line 9; p. 1544, lines 3-5; p. 1553, lines 8-17). In addition, Defendants had already paid their experts thousands of dollars for their time and evaluations prior to the examinations. (Trial Tr., R. p. 1507, lines 6-18). Most strikingly, Defendants' psychiatric expert, Dr. James Ballenger, was the very expert disallowed by the trial court, the Court of Appeals, and the Supreme Court in *Fairchild*.

The lower court also abused its discretion by summarily denying Appellant's Motion in Limine without making *any* findings or offering *any* rationale for its ruling, simply stating, "All right. I am going to deny the motion. And you're—you [Defendants] can bring it up in your opening." (Trial Tr., R. p. 627, lines 3-4). Respectfully, the lower court's ruling was manifestly arbitrary, unreasonable, and unfair, and amounted to an abuse of discretion meriting reversal by this Court. "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." *Fields v Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005); *Means v. Gates*, 348 S.C. 161,

558 S.E. 2d 921 (Ct. App. 2001). Based on the foregoing, Appellant respectfully requests that this Court grant her petition for rehearing, reverse the lower court's ruling, vacate its unpublished opinion, and remand this case for a new trial on the merits.

III. This Court erred in finding that Appellant was required to proffer the Office Manager's testimony to preserve the evidentiary issue for appeal where the substance of the testimony and the grounds for allowing the testimony (i.e. impeachment of the Office Manager's credibility) were already clearly established in the record. A proffer is not required under these circumstances:

> [W]here the specific evidentiary basis supporting admission of evidence is apparent from the context of the case, the failure to make an offer of proof will not be fatal to the appeal of that issue. Rule 103(a)(2), SCRE. The official note of the rule specifically states that "[t]he rule does change South Carolina law by dispensing with the requirement of a proffer and a statement of the grounds for admissibility where the substance of the evidence and the grounds are apparent from the context." Rule 103(a)(2), SCRE note.
>
> Jean Hoefer Toal, *Appellate Practice in South Carolina* (3rd ed. 2016) at 201.

In the present case, a proffer of the office manager's testimony was not necessary to preserve the issue on appeal because 1) The record before the lower court clearly established that the Office Manager would have testified about her *admitted* ongoing sexual relationship with Dr. Schimpf and the various forms of compensation that she received from him, and 2) it was clear from the record that the exclusion of the Office Manager's testimony regarding these subjects prejudiced the Appellant.

Specifically, a proffer was not necessary because there was no question at trial as to the character or content of the Office Manager's excluded testimony or the grounds for allowing the testimony. (Tr. Transcript, R. p. 590, line 13 – p. 591, line 19; p. 602, line 9 to p. 603, line 13; p.

606, lines 4 -13). During her deposition, the Office Manager admitted to an ongoing sexual relationship with Dr. Schimpf and testified as to the various forms of compensation she received from him. (Depo. Tr., 2/11/19, R. p. 377, line 10 to p. 385, line 22). The Office Manager testified as to her salary and the numerous complimentary cosmetic procedures she received from Dr. Schimpf over the years. Id. Appellant's lawyers even filed the depositions for purposes of entering and preserving the testimony in the record (Trial Tr., R. p. 590, line 13 – p. 591, line 19). In addition, the very purpose of Respondents' Motion in Limine, filed August 26, 2019, was to exclude the Office Manager's testimony due to the admissions made by her during her deposition, admissions which were, again, *filed in the lower court and in the record*. (Motion, R. p. 179).

This Court's opinion also overlooks that the South Carolina Supreme Court has carved out a clear exception to the requirement for a proffer where 1) the record reflects what the witness was going to testify to, and 2) it is clear from the record that the Court's failure to admit the witness's testimony prejudiced the Appellant:

> [W]hen it is clear from the record that prejudice exists, the issue will be preserved on appeal despite the absence of a proffer. See State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990). The reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice. Id. That rule has been relaxed where the record clearly demonstrates prejudice. Id.
>
> The record reflects Thomason was going to testify to the statements Walker made in his letter to her. The record clearly indicates King would be prejudiced by the exclusion of Thomason's testimony. Therefore, the issue of whether Thomason's testimony was properly excluded is preserved for review despite the lack of a proffer.
>
> *State v. King*, 623 S.E.2d 865, 868, 367 S.C. 131 (2006)

In the present case, it is clear that the Office Manager would have testified as to her ongoing sexual relationship with Dr. Schimpf and the types of compensation she received from him. (Depo. Tr., 2/11/19, R. p. 377, line 10 to p. 385, line 22). Again, the Office Manager's deposition transcripts were filed with the Court and in the record. (Tr. Transcript, R. p. 590, line 13 – p. 591, line 19; p. 602, line 9 to p. 603, line 13; p. 606, lines 4 -13). Additionally, this testimony was the very subject matter of Respondent's Motion in Limine. (Motion, R. p. 179).

The Appellant is not required to make a proffer of the Office Manager's testimony, where the subject matter of the sexual relationship and forms of compensation had just been discussed before the Court. (Tr. Transcript, R. p. 590, line 13 – p. 591, line 19; p. 602, line 9 to p. 603, line 13; p. 8 606, lines 4 -13). Not only was the witnesses' deposition testimony filed as of record, but the trial judge also specifically considered the testimony contained within the depositions during Appellant's Motion in Limine and found the testimony inadmissible. (Depo. Tr., 2/11/19, R. p. 377, line 10 to p. 385, line 22). All litigants were clearly aware that it was this very deposition testimony concerning these matters that was the subject of the trial judge's ruling granting Defendants' Motion in Limine. See also Defendants' Motion to Remove the Deposition Transcripts from the Public Index and Motion in Limine corroborating the same. (R. pp. 175-188).

Mrs. Whitfield was prejudiced by the exclusion of this testimony because she had no other means by which to establish the Office Manger's interest, bias, or partiality toward Dr. Schimpf and impeach her credibility. As noted in Appellant's Final Brief, the Office Manager gave starkly different testimony at trial than Ms. Whitfield as to what transpired when Mrs. Whitfield requested a copy of her missing medical records. (Appellant's Final Brief, Argument II, pp. 11-22). The Office Manager's observations regarding Dr. Schimpf's post-operative

treatment of and behavior towards Mrs. Whitfield were also directly at odds with Mrs. Whitfield's testimony. (Trial Tr., R. p. 934, line 9 – p. 941, line 5). It was error for this Court to find that a proffer was necessary where neither the rules nor caselaw require one under the present circumstances and where exclusion of the testimony prejudiced Appellant. Accordingly, Appellant respectfully request that this Court grant her petition for rehearing, vacate its unpublished order, and remand this case for a jury trial on the merits.

IV. **The lower court abused its discretion in failing to acknowledge and/or apply the general rule for establishing bias.** As set forth in Appellant's Final Brief and at trial, the standard for establishing bias is not whether the Court deems the sought-after evidence "relevant" to the proceedings, but rather whether the testimony can demonstrate the witness is biased in rendering her testimony. "[O]ur courts have followed the "general rule" that "'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony,'" so that "'on cross-examination, <u>any</u> fact may be elicited which tends to show interest, bias, or partiality' of the witness." [Emphasis added] *Smalls v. State*, 810 S.E.2d 836, 840, 422 S.C. 174, 182-183 (2018). "Rule 608(c) [of the South Carolina Rules of Evidence] 'preserves [this longstanding] South Carolina precedent.'" *Id.*, citing *State v. Sims* , 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002). Specifically, Rule 608(c), SCRE, states: "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."

Considerable latitude is generally allowed in the cross-examination of an adverse witness for possible bias." *North Greenville College v. Sherman Const. Co*., Inc., 243 S.E.2d 441, 442, 270 S.C. 553, 556 (1978), citing *Martin v. Dunlap*, 266 S.C. 230, 222 S.E.2d 8 (1976). As noted

by McCormick: “The law recognizes the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties or the self- interest of the witness in the outcome of the case. Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility.” *Id*., citing McCormick on Evidence, § 40, p. 78 (1972).

Here, the Office Manager’s long-standing sexual relationship with Dr. Schimpf and her “emotions or feelings toward him” are likely to have “a slanting effect” upon her testimony. Her “self-interest in the outcome of the case” can be directly tied to maintaining her personal and professional relationship with Dr. Schimpf. Minimally, a fact exists which tends to show “interest, bias, or partiality of the witness.”

The trial court manifestly failed to take into account the law and particular circumstances of the case, and, instead, based its ruling on the conclusory findings: “I don't’ think she’s biased” and “I don’t think anything has been elicited as to fact that she’s been untruthful in any way.” (Trial Tr., R. p. 939, lines 9-12). In doing so, the trial court abused its discretion and prejudiced the Plaintiff who could not otherwise demonstrate that Office Manager’s testimony was clearly biased and not credible. “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” *Clark v. Cantrell.* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citing *Fontaine v. Peitz.* 291 S.C. 536, 354S.E.2d565 (1987)). Accordingly, Appellant respectfully requets that the trial court’s ruling be reversed, that this Court’s unpublished opinion be vacated, and that the case be remanded for a new trial on the merits.

V. **The lower court abused its discretion in failing to grant Appellant’s directed verdict motion on the negligence per se claim brought under Regulation 61-1.703 of the South Carolina Code.** Specifically, the lower court erred in denying Appellant’s motion for a

directed verdict as to negligence per se where 1) Defendants admitted that they did not properly maintain medical records for Mrs. Whitfield as required by statute, 2) the evidence established that Defendants' failure to maintain records proximately caused harm to Mrs. Whitfield, and 3) there were no other inferences to be drawn from Defendants' failure to maintain the medical records as required by statute.

At trial, the Office Manager testified that she was in charge of maintaining medical records for the Defendants. (Trial Tr., R. p. 900, lines 22-25). As such, Mrs. Whitfield's counsel examined her regarding S.C. Code of Regulations 61-91, Standards for Licensing and Ambulatory Surgical Facilities, Section 700, titled Patient Records. (Trial Tr., R. p. 900, line 17 to p. 903, line 17). With regard to Mrs. Whitfield's medical records, the Office Manager admitted that Defendants did not comply with Section A of the Code, which states:

> The facility shall initiate and maintain an organized record for each patient. The record shall contain: sufficient documented information to identify the patient; the person responsible for each patient; the description of the diagnosis and the care, treatment, procedures, surgery, and/or services provided, to include the course of action taken and results; and the response and reaction to the care, treatment, procedures, surgery, and/or services provided. All entries shall be indelibly written, authenticated by the author, and dated.

Specifically, the Office Manager testified:

> Q. Would you agree with me that Sweetgrass did not follow that section with regards to Mrs. Whitfield?
>
> A. As I said before, we do our best.
>
> Q. And I understand that you've done -- you try. But what I'm specifically trying to get an answer to is **did Sweetgrass comply with Section A as it pertains to Mrs. Whitfield's medical records**?
>
> A. **No.**
>
> (Trial Tr., R. p. 901, line 21 – p. 902, line 3)

The Office Manager also testified that Defendant SPS did not comply with Section B of the Code, which states in relevant part:

> Specific entries/documentation shall include at a minimum:
>
> 1. Consultations by physicians or other legally authorized healthcare providers;
>
> [...]
>
> 3. Orders and recommendations for all care, treatment, procedures, surgery, and/or services from physicians or other legally authorized healthcare providers, completed prior to, or at the time of patient arrival at the facility, and subsequently, as warranted;
>
> 4. Care, treatment, procedures, surgery, and/or services provided;
>
> 5. Record of administration of each dose of medication; […]
>
> 11. Signed informed consent;

Specifically, the Office Manager testified:

> Q. Okay. So what I'm asking you is did Sweetgrass comply with
>
> Paragraph B because of not keeping those records?
>
> A. The records were incomplete.
>
> Q. Okay. **Did they comply with Paragraph B?**
>
> **A. No.**
>
> Q. Would you agree with me that Sweetgrass failed to maintain an organized record for Mrs. Whitfield?
>
> A. Yes. But we -- we treat patients, not medical records.
>
> Q. Are medical records important?
>
> A. Yeah.
>
> (Trial Tr., R. p. 903, lines 8- 17)

In addition to the Office Manager's admissions regarding medical records, Dr. Schimpf testified that there was no signed informed consent form for the procedure he performed on Ms. Whitfield neck. (Trial Tr., R. p. 1335, line 17 to p. 1336, line 8). Clearly, Defendants admitted that they did not properly maintain medical records for Mrs. Whitfield as required by statute.

VI. This Court's opinion erred in finding that Appellant did not sufficiently establish causation of injury to support her motion for directed verdict on the negligence per se claim. Specifically, there was sufficient evidence to establish causation of harm to Appellant where her 1) her Medical Expert, Dr. Michael Rosenberg, testified that Defendants' failure to maintain records caused the Appellant harm and damage. (Trial Tr., R., p. 1035, line 20 to p. 1036, line 14; p. 1037, lines 2-19), and 2) Plaintiff's psychiatrist, Dr. Sara Marcino, offered testimony that Mrs. Whitfield experienced psychological trauma from having a nonconsensual procedure performed on her by Dr. Schimpf. (Trial Tr., R. p. 1122, line 21 – p 1124, line 3). There are absolutely no other inferences to be drawn from Defendants' failure to maintain the medical records as required by statute.

Conclusion

For the foregoing reasons, Appellant respectfully request that this Honorable Court grant her petition for rehearing, vacate its unpublished opinion, and remand this case for a new trial on the merits.

[Signature on following page]

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December 8, 2022
Charleston, South Carolina

The South Carolina Court of Appeals

Jeane Whitfield, Appellant,

v.

Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, Respondent.

Appellate Case No. 2019-001716

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

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