

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Bentley Price, Circuit Court Judge

Unpublished Opinion No. 2023-UP-177 (S.C. Ct. App. filed May 11, 2023)

John Mayers,

Petitioner,

v.

Konan Henthorn,

Respondent.

REPLY BRIEF OF PETITIONER

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RULES

Rule 803(4), SCRE 1

The Petitioner, John Mayers, disputes the validity of Respondent’s purported Return, which was signed by counsel who has not yet appeared in the case. But assuming *arguendo* that the Return was proper, Mayers respectfully submits this Reply to clarify two points related to his Petition for Writ of Certiorari.

ARGUMENT

I. Respondent has not shown that the prejudicial medical note was admissible.

Respondent argues that the prejudicial medical note was admissible because it accords with evidence of twenty-four-ounce beer cans on the scene and because, where “the statement [came] from an orthopedic consult note,” an “orthopedic physician . . . likely obtained [the] information directly from Mr. Mayers.” (Return p. 8).

The basis for Respondent’s argument is the Rule 803(4), SCRE hearsay exception, which permits “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” Respondent, the proponent of the hearsay testimony, had “the burden of showing it fit[] appropriately within” the Rule 803(4) exception. *State v. Simmons*, 423 S.C. 552, 563, 816 S.E.2d 566, 572 (2018); *cf. State v. Davis*, 371 S.C. 170, 178–79, 638 S.E.2d 57, 62 (2006) (quoting 31A C.J.S.*Evidence* § 359 (1996)) (“[T]he burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence.”). Given that Mayers moved *in limine* to exclude the records, and objected to their eventual introduction, (*see, e.g.*, R. p. 39, line 13-p. 40, line 43, line 3; p. 256, line 25-p. 257, line 7), Respondent most certainly had to make an appropriate showing as to admissibility.

Mayers has already explained in detail why the medical note does not “fit[] appropriately within” the exception. (Petition for Cert. pp. 8-9). Respondent attempts to counter these facts with conjectural arguments, but such arguments do not carry his burden.

Firstly, evidence of unopened beer cans at the scene has no bearing on the hearsay issue—except to suggest that the author of the medical note may have gathered the information from personnel who observed the cans.

Secondly, the fact that the information appeared in an “orthopedic consult note”¹ does not necessarily mean that it came from Mayers. Even Respondent was careful to state that an “orthopedic physician . . . *likely* obtained [the] information directly from Mr. Mayers.” (Return p. 8) (emphasis added). In this case, in particular, the author of the consult note apparently copied most of the intake nurse’s note.

Specifically, according to Respondent’s counsel, it was “the intake nurse” who wrote that “patient reports that his pain in the upright [sic] arm but says that he is in shock. She was crossing the street, review struck by vehicle. Patient also has blood coming from his head. Patient drank approximately two 24-ounce beers. He’s alert and oriented.”² (R. p. 43, line 24-p. 44, line 8). The trial court accepted Respondent’s representation. (R. p. 44, line 9). The intake nurse’s comment included two obvious errors: it called Mayers a female, and it stated that “42-year-old male with no past medical history presents as auto versus *pedestrian*.” (R. p. 45, lines 11-24; p. 158, lines 9-

¹ The note does not appear in the Appendix presently extracted from the records of the Court of Appeals, but it appears in Respondent’s Motion to Supplement the Record on Appeal. The Court of Appeals considered the document, as the opinion clarifies (and as stated in the Letter of January 5, 2023). (Opinion p. 3). Appellant has included both the Motion to Supplement and the Letter of January 5, 2023 with this Reply.

² See Petition for Cert p. 1 n.1, which discusses the error in the Record on Appeal. Like the Petition, this Reply relies on the wording and representations from the transcript.

16) (emphasis added). It also included information based on the writer's physical observation: "[p]atient has obvious deformity to his upper right arm" and "[p]atient also has blood coming from his head." (R. p. 45, line 20-p. 46, line 3).

The HPI (History of Present Illness) section of the orthopedic consult note is eerily similar to the portions of the intake nurse's note that appear on the record:

42-year-old male with no past medical history presents as auto versus ped. Patient has obvious deformity to his right upper arm. Patient reports that HIS pain is in his right upper arm but says that he is in "shock." He was crossing the street review struck by vehicle, vehicle tried to stop. Patient also has blood coming from his 4 head. Patient drank approximately 2 24 ounce beers today. He is alert and oriented. Orthopaedics was consulted for distal humerus fracture. (Motion to Supplement Record on Appeal p. 3).

The blatant similarity immediately renders the source of the information suspect. Under these circumstances, Respondent needed additional evidence to carry his burden. Mayers himself certainly did not provide such evidence—he explicitly denied making any such statement. (R. p. 254, lines 10-14; p. 256, lines 14-21). Respondent could have deposed the note's author or called him at trial; he did not do so. Respondent could also have deposed the physician who attended the orthopedic consult, or called him at trial. Again, he did not do so.

Therefore, when Respondent suggests that an "orthopedic consult note" is necessarily reliable because it necessarily contains only Mayers' communications, his suggestion "amount[s] to nothing more than 'hearsay shrouded in a doctor's'" title. *See Simmons*, 423 S.C. at 565, 816 S.E.2d at 573 (stating that doctor's testimony "amounted to nothing more than 'hearsay shrouded in a doctor's white coat'").

II. The evidence of the unopened beer cans and the medical note was not “merely cumulative.”

Respondent also argues that even if “the evidence of the beer cans at the scene of the accident and medical records were inadmissible, they were merely cumulative,” and thus, the contested evidentiary rulings did not prejudice Mayers.³ (Return p. 9).

Not so. As Mayers explained in great detail and with copious citations to the Record, the remaining evidence did not show either that Mayers was negligent or that Respondent was not negligent. (Petition for Cert. pp. 1-3). Contrary to Respondent’s claims, the testimony regarding Mayers’ driving and what took place on-scene did not establish that Mayers was impaired when Respondent rear-ended him. (*See* Return p. 9; Petition for Cert. pp. 2-3). Therefore, as Mayers argued in his Petition, (*see* Petition for Cert p. 12), there is a reasonable probability that the evidence about the beer cans and the medical notes tipped the scale by inflaming the jury. *See Fields v. Reg’l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citations omitted) (“The objecting party is prejudiced if ‘there is a reasonable probability the jury’s verdict was influenced by the challenged evidence or the lack thereof.’”).

CONCLUSION

For the reasons stated here and in the original Petition for Writ of Certiorari, this Court should grant John Mayers’ Petition and review all grounds presented.

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³ Mayers does not agree that “cumulative” evidence is necessarily harmless. As our Supreme Court has stated in *State v. Barrett*, the “cumulative effect” may be exactly what “enhances the devastating impact of” improperly admitted evidence; thus, cumulative evidence may be prejudicial enough to “mandate[] reversal.” 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989).

Respectfully submitted,

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