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Aug 30 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Maite Murphy
Circuit Court Judge

Appellate Case No. 2023-00029

Rebecca Turisk,

Appellant,

v.

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

Respondents.

**APPELLANT’S RETURN TO RESPONDENTS’ MOTION TO STRIKE
MATTER FROM RECORD ON APPEAL**

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Appellant Rebecca Turisk, through her undersigned counsel, respectfully submits this brief Return to Respondents’ Motion to Strike.

Respondents’ Motion to Strike is wholly without merit. Rule 210, SCACR, specifically states that the record shall not “include matter which was not presented to the lower court or tribunal.” Here, the subject deposition testimony was indisputably presented to the lower court. Indeed, it was presented to Judge Murphy on the record, and in writing, by Respondents themselves:

ATTORNEY MAPLES: Your Honor, before we proceed, it's our understanding that plaintiff intends to call Jordan Harper as their next witness via her discovery deposition. And in

preparing for trial, the parties negotiated denudations for Ms. Harper's deposition. However, they disagreed on the inclusion of seven lines, and so we'd like to take that up at this time.

THE COURT: All right. Yes, ma'am.

ATTORNEY MAPLES: So particularly, the defendants have objected to the inclusion of page 20, lines 13 through 20, as an improper opinion.

THE COURT: **Do you have a copy for me?**

ATTORNEY MAPLES: **Oh, yes.**

THE COURT: **Oh, is it in the notebook? I'm sorry.**

ATTORNEY MAPLES: **No, I have one handy.**

THE COURT: Okay. **Thank you. What page?**

ATTORNEY MAPLES: **Page 20.**

THE COURT: **Okay.**

ATTORNEY MAPLES: **Lines 13 through 20.**

(Trial Transcript, pp. 185:24-186:17, attached as Exhibit A, emphasis added)

Respondents now seek to exclude these lines from the Record on Appeal despite the fact that they were specifically presented to the lower court in writing and even read into the record by Respondents' own counsel:

ATTORNEY MAPLES: Yes. Your Honor, the question calls for an improper question. [...] So the question is: And what caused that? Do you know? Answer: I am definitely not a plastic surgeon, but so I feel like -- and not physician, you know, but I'm thinking would be just blood flow, an issue with blood flow. Question: Lack of blood flow? Answer: Correct, but, yeah, that's what I think.

(Trial Transcript pp. 186:20-187:2, Exhibit A)

The inclusion of the subject deposition testimony is all the more necessary to substantiate the accuracy of what was read into the record, which although close to the original testimony is not completely accurate. (Jordan Harper, NP, Deposition Transcript, p. 20:8-20, attached as Exhibit B).

The fact that the deposition testimony was not ultimately deemed admissible by Judge Murphy has no effect on its inclusion in the Record on Appeal because it was still a matter presented to the lower court. Indeed, the standard set forth under Rule 210(c) turns on whether the matter (i.e. deposition language) was presented to the lower court, not whether it was admitted as evidence at trial. “The record shall not, however, include matter which was not *presented to the lower court or tribunal.*” Rule 210(c), SCACR, emphasis added.

In an attempt to circumvent inclusion of the subject lines in the Record on Appeal, Respondents resort to misrepresenting this Court’s non-dispositional decision in *Fountain v. Fred’s, Inc. et al.*, Case No 2017-0068 (Ct. App. 2017). Even a cursory review of that decision, however, establishes that this Court struck the Settlement Agreement from the Record on Appeal because “the agreement was not actually presented to the lower court.” (Opinion, attached as Exhibit C). That is the opposite of what happened here, where a written copy of the deposition testimony was submitted to the Court for review and even read into the record. Further, it is worth noting that except for the Settlement Agreement—which was not presented to the court—the motion to strike at issue in *Fountain* was otherwise denied. (Exhibit C).

Further, contrary to Respondents’ contention, there is no requirement that a matter be admitted as evidence to be considered part of the Record on Appeal. If that were the case,

litigants would lack the ability to ever appeal a lower court's ruling excluding evidence. The record exists to aid the Appellate Court in understanding what happened at trial. Respondents should not be allowed to obfuscate the record in an effort to avoid judicial scrutiny by this Court.

Finally, Appellant respectfully submits that Respondents should be required to pay attorneys' fees and costs associated with defending this frivolous motion. Although Respondents claim to have "conferred with counsel for Appellant prior to filing this Motion in an effort to resolve it in good faith but that they were unable to reach an agreement," Respondents notably did not attach their counsel's correspondence with Appellant's counsel to their Motion. A review of that communication establishes that Respondents' counsel were specifically directed to the applicable language contained Rule 210(c), SCACR, and that Appellant's counsel advised Respondents' counsel as follows: "Even if the testimony is not admitted, the testimony is still part of the Record. If you can direct me to some case that states otherwise, I would be happy to revisit this matter. Short of that, however, we must respectfully decline your request to amend the Record on Appeal." (Letter to Respondents counsel, Exhibit D). Counsel for Respondents notably did not supply Appellant with a single case to support their position. The reason is clear: there is none.

Pursuant to Rule 269, SCACR, "Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Appellant respectfully

submits that sanctions are appropriate under these circumstances, and that, minimally, Respondents should be responsible for covering the attorneys' fees and costs incurred by Appellant's counsel in defending this motion.

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez

Jesse Sanchez, Esquire (SC Bar No. 101906)

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(843) 814-8181

Attorney for Appellant Rebecca Turisk

Mount Pleasant, South Carolina
August 30, 2023

EXHIBIT A

1 Q At that point how far out are you from the double
2 mastectomies performed by Dr. Herrera?

3 A Six or seven months.

4 Q I don't have any further questions. Thank you.

5 THE COURT: You may step down, ma'am. Thank you.

6 Could counsel approach?

7 (Sidebar discussion off the record.)

8 THE COURT: Ladies and gentlemen, it's 12:00. Our next
9 witness is expected to be pretty lengthy, so it's a good time for
10 us to take our lunch break. I need you, today, to take a little
11 bit of an extra lunch break due to another matter that I must
12 handle outside of your presence. It's not related to this case.
13 So if you would return to your jury room at 1:30, we will resume
14 with the trial of this case. Have a nice lunch.

15 (Jury escorted out of the courtroom at 12:00 p.m.)

16 THE COURT: All right. Anything further before we recess
17 for lunch?

18 ATTORNEY BURKE: Nothing from the plaintiff, Your Honor.

19 THE COURT: Okay, thank you. Have a good lunch.

20 (Court recessed at 12:01 p.m. and reconvened at 1:40 p.m.,
21 without the jury present.)

22 THE COURT: Everyone ready to proceed?

23 MATTER(S) OF LAW

24 ATTORNEY MAPLES: Your Honor, before we proceed, it's our
25 understanding that plaintiff intends to call Jordan Harper as

1 their next witness via her discovery deposition. And in
2 preparing for trial, the parties negotiated denudations for
3 Ms. Harper's deposition. However, they disagreed on the
4 inclusion of seven lines, and so we'd like to take that up at
5 this time.

6 THE COURT: All right. Yes, ma'am.

7 ATTORNEY MAPLES: So particularly, the defendants have
8 objected to the inclusion of page 20, lines 13 through 20, as an
9 improper opinion.

10 THE COURT: Do you have a copy for me?

11 ATTORNEY MAPLES: Oh, yes.

12 THE COURT: Oh, is it in the notebook? I'm sorry.

13 ATTORNEY MAPLES: No, I have one handy.

14 THE COURT: Okay. Thank you. What page?

15 ATTORNEY MAPLES: Page 20.

16 THE COURT: Okay.

17 ATTORNEY MAPLES: Lines 13 through 20.

18 THE COURT: So tell me the nature of your objection and what
19 we're looking at here.

20 ATTORNEY MAPLES: Yes. Your Honor, the question calls for
21 an improper question. And we would like to strike not only the
22 question but also Jordan Harper's answer, as it's speculative.
23 So the question is: And what caused that? Do you know? Answer:
24 I am definitely not a plastic surgeon, but so I feel like -- and
25 not physician, you know, but I'm thinking would be just blood

1 flow, an issue with blood flow. Question: Lack of blood flow?

2 Answer: Correct, but, yeah, that's what I think.

3 So for context, Jordan Harper was a nurse practitioner for
4 defendant, and she qualified in her answer that she is not
5 qualified to render an opinion as to what causes -- and directly
6 proceeding that is -- the eschar appearance, as seen in
7 photograph 83 that counsel was referencing in the deposition. So
8 her answer alone qualifies that she is not qualified to render an
9 opinion about what would cause that.

10 And additionally, plaintiff had not laid any foundation in
11 any other portions of the deposition that she should be qualified
12 to render such an opinion. In fact, just subsequent, on page 22,
13 she again qualifies that she is not a physician; she is not a
14 surgeon.

15 So asking her to comment on what would cause the eschar
16 appearance would necessarily require her to speculate. This is
17 outside the scope of her practice as a nurse practitioner.

18 THE COURT: Thank you. Response?

19 ATTORNEY TANENBAUM: May it please the Court.

20 THE COURT: Yes, sir.

21 ATTORNEY TANENBAUM: I took that deposition, I'm pretty
22 sure, which is pretty typical of my meeting out certain portions
23 of things. However, let me say that with her -- I think under
24 Rule 72 -- with her experience and with her practice with
25 Dr. Schimpf, and for a long time taking care of these types of

1 wounds, that she would have the experience necessary to offer an
2 opinion, which she says, I'm not a physician but this is what I
3 believe.

4 Second, and most important, each one of the defendant's
5 experts, the two experts, and the defendant, have all
6 acknowledged that there was the disruption of the blood flow,
7 which is what caused the infection.

8 So I don't really see what the issue is. Everybody
9 acknowledges that this infection was caused by disruption of the
10 blood flow.

11 THE COURT: However, if she wasn't properly qualified to
12 render that opinion as far as her education and training and
13 experience in the deposition, I don't think it's a proper --

14 ATTORNEY O'NEAL: If I may, Your Honor. She actually
15 testified as to her education, experience, and background, which
16 we have designated as portions to be read onto the record. She
17 testified that she was a nurse practitioner with nine years of
18 experience at the time of her deposition as a nurse practitioner;
19 four of those as a -- I'm sorry -- at the time of her deposition;
20 four of those as a nurse practitioner; five years experience as
21 an ICU nurse at MUSC; and experience treating what she quotes, a
22 fair amount of patients receiving this particular implant-removal
23 surgery from Dr. Schimpf, whom she had been working for nearly
24 three years at the time of her deposition.

25 It's our opinion that, in that capacity as a nurse

1 practitioner who had worked with Dr. Schimpf for three years at
2 this point, who had assisted with several patients receiving the
3 surgery, and their postoperative care, and that based on her
4 personal knowledge seeing the patient at that visit, is qualified
5 to give this testimony.

6 THE COURT: I highly disagree, and I don't think it
7 prejudices the other two experts, who basically put that in
8 anyway. So I'm going to agree with that redaction.

9 ATTORNEY MAPLES: Thank you, Your Honor. That concludes our
10 objection to Ms. Harper's deposition.

11 THE COURT: Are we ready to proceed?

12 ATTORNEY BURKE: Yes, Your Honor.

13 THE COURT: All right. Let's have our jury, please.

14 (Jury seated in the courtroom at 1:47 p.m.)

15 THE BAILIFF: Jurors are all present, Your Honor.

16 THE COURT: Welcome back, ladies and gentlemen of the jury.
17 I hope that you have had a nice lunch. We're now ready to
18 proceed with the trial of this case. You may call your next
19 witness.

20 ATTORNEY ROBINSON: Your Honor, plaintiff calls Jordan
21 Harper by way of deposition testimony. My colleague, Ms. O'Neal,
22 will be reading Ms. Harper's testimony.

23 THE COURT: Yes, ma'am. If you would please come on up.
24 Madam Clerk, if you'd please swear in the witness.

25 MISTY BLACK O'NEAL, duly sworn in, read answers to questions

1 intramammary(sic) fold incision that's below that, we're
2 looking at that line below the tissue that you've
3 identified; is that correct?

4 A. I'm kind of; yeah. Like this area here?

5 Q. Uh-huh.

6 A. Yeah.

7 Q. You just circled it, right?

8 A. Correct.

9 Q. Okay. And then the nipple itself, tell me
10 what's going on with that?

11 A. That's called Eschar. It's just --

12 Q. Dead tissue?

13 A. -- dead tissue.

14 Q. Is that normal?

15 A. Normal? I mean...

16 Q. How many times after an implant have you seen,
17 have you seen a nipple that looked like that after an
18 implant removal?

19 A. A few.

20 Q. A few? Do you have a number? Less than five?

21 A. Yeah.

22 Q. Yeah. Less than five. Okay. And how many
23 patients with implant removal's have you, do you think
24 you've seen during your career with Dr. Schimpf?

25 A. Uh.

1 Q. A hundred or more?

2 A. Gosh, I have no idea. I feel like I would be
3 totally guessing.

4 Q. Okay. All right.

5 A. Yeah, a fair amount.

6 Q. A fair amount.

7 A. Yeah.

8 Q. So, would this, would it be fair to say that
9 this Eschar appearance as seen in Photograph 83 is rare?

10 A. In, from what I've seen?

11 Q. Yeah.

12 A. I would say it's not common.

13 Q. All right. And what caused that, do you know?

14 A. I am definitely not a Plastic Surgeon, but, so
15 I feel like in my not Physician, you know, what I'm
16 thinking, would be just blood flow, an issue with the
17 blood flow.

18 Q. Lack of blood flow?

19 A. Correct. But, yeah that's, that's what I
20 would think.

21 Q. Uh-huh. Okay.

22 A. Again, I am not --

23 Q. And what I see around the Eschar is again what
24 appears to me to be pus. Tell me what pus is, first of
25 all? Do you know?

EXHIBIT C

The South Carolina Court of Appeals

Martha M. Fountain and Curtis Fountain, Plaintiffs,

v.

Fred's, Inc. and Wildevco, LLC, Respondents,

v.

Tippins-Polk Construction, Inc. and Rhoad's Excavating
Services, LLC, Third-Party Defendants,

Of whom Tippins-Polk Construction, Inc. is the
Appellant.

Appellate Case No. 2017-000688

ORDER

After careful consideration, Appellant's consent motion to amend its final brief is granted. This court will take no further action on Respondent Fred's Inc.'s motion to strike.

Respondent Wildevco, LLC's motion to strike is granted in part. The motion to strike the settlement agreement from Appellant's designation of matter is granted because the agreement was not actually presented to the lower court. *See* Rule 210(c), SCACR. The motion to strike is otherwise denied.


FOR THE COURT

Columbia, South Carolina

FILED

November 29, 2017

cc:

Morgan S. Templeton, Esquire

Matthew Clark LaFave, Esquire

Regina Hollins Lewis, Esquire

Lee Ellen Bagley, Esquire

John Joseph Dodds, IV, Esquire

EXHIBIT D



August 16, 2023

VIA EMAIL ONLY

Allie A. Maples, Esquire
amaples@smythwhitley.com

RE: Rebecca Turisk, Appellant v. Dennis K. Schimpf, M.D. and
Sweetgrass Plastic Surgery, LLC, Respondents,
Appellate Case No. 2023-000029

Dear Allie:

Please allow this letter to serve as our response to your letter dated August 16, 2023. Respectfully, we disagree with your characterization of the applicable rules. Specifically, Rule 210(c) SCACR, requires that “The record shall not, however, include matter which was not presented to the lower court or tribunal.” The section of Ms. Harper’s testimony that you reference (Harper Tr., 20:13-20) was indeed presented to the lower court. Specifically, it was presented to Judge Murphy. (Trial Tr., 185:24-189:10). The fact that Judge Murphy did not allow that this section of Ms. Harper’s testimony be read to the jury, does not mean that the matter was not presented to the lower court or tribunal. It means the matter was not presented to *the jury*.

This is no different than what happens when one proffers a witness. Even if the testimony is not admitted, the testimony is still part of the Record. If you can direct me to some case that states otherwise, I would be happy to revisit this matter. Short of that, however, we must respectfully decline your request to amend the Record on Appeal.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

Cc: All counsel of record (via email only)

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Aug 30 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Maite Murphy
Circuit Court Judge

Case No.: 2018-CP-10-02109
Appellate Case No. 2023-000029

Rebecca Turisk,

Appellant,

v.

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

Respondents.

PROOF OF SERVICE

I, the undersigned, certify that I have served *Appellant's Return to Respondents' Motion to Strike Matter from Record on Appeal*, on Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC by email on August 30, 2023, addressed to their attorneys of record at the following AIS-designated email addresses:

Todd W. Smyth, Esquire (tsmyth@smythwhitley.com)
Allie A. Maples, Esquire (amaples@smythwhitley.com)

Pursuant to Rule 262(C)(3), SCACR, and the Order of The Supreme Court of South Carolina, RE: Methods of Electronic Filing Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), a copy of the email correspondence to counsel is attached.

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez

Jesse Sanchez, SC Bar No. 101906

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Mount Pleasant, SC 29464

Telephone (843) 814-8181


jesse@jessesanchezlaw.com

Attorney for the Appellant

Mount Pleasant, South Carolina

August 30, 2023



From: Jesse Sanchez jesse@jessesanchezlaw.com 

Subject: Turisk v. Schimpf, et al.

Date: August 30, 2023 at 1:53 PM

To: amaples@smythwhitley.com, Todd Smyth tsmyth@smythwhitley.com

Cc: Mark Tanenbaum mark@tanenbaumlaw.com, Allison Rogers allison@tanenbaumlaw.com, [Misty O'Neal \(moneal@rpwb.com\) moneal@rpwb.com](mailto:Misty O'Neal (moneal@rpwb.com) moneal@rpwb.com), trobenson@tanenbaumlaw.com, Beth Middleton Burke bburke@rpwb.com, thargrove@rpwb.com, Karen Sandoval Karen@tanenbaumlaw.com, Katie Rhodes krhodes@smythwhitley.com

Counsel,

Attached for service, please find Appellant's Return to Respondents' Motion to Strike Matter from Record on Appeal and corresponding Cover Letter, both of which will be filed momentarily with the South Carolina Court of Appeals via OneDrive Electronic Submission.

Regards,

Jesse

--

PLEASE NOTE WE HAVE A NEW ADDRESS:

Jesse Sanchez
The Law Office of Jesse Sanchez, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
Office: (843) 804-4753
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515 KB	110 KB



August 30, 2023

VIA ONEDRIVE ELECTRONIC SUBMISSION

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

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Aug 30 2023

SC Court of Appeals

RE: Rebecca Turisk, Appellant v. Dennis K. Schimpf, M.D. and
Sweetgrass Plastic Surgery, LLC, Respondents,
Appellate Case No. 2023-000029

Dear Ms. Kitchings:

Enclosed for filing, please find *Appellant's Return to Respondents' Motion to Strike Matter from Record on Appeal*.

Thank you for your assistance with this matter. Should you have any questions or wish to discuss the filing, please do not hesitate to contact me directly.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

Enclosures (as stated)

Cc: All counsel of record (via email only)

THE LAW OFFICE OF JESSE SANCHEZ, LLC

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