THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
Apr 04 2024
S.C. 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)
Appellate Case No. 2023-000245

Jeane Whitfield,

Petitioner,

v.

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

Respondents.

BRIEF OF PETITIONER JEANE WHITFIELD

Daniel S. Slotchiver
Andrew J. McCumber
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Boulevard, Suite 100
Mount Pleasant, South Carolina 29464
(843) 577-6531

Brent S. Halversen
Halversen and Halversen, LLC
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, SC 29464
(843) 284-5790

Jesse Sanchez
The Law Office of Jesse Sanchez, LLC
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, SC 29464
(843) 814-8181

Attorneys for Petitioner Jeane Whitfield

Other Counsel of Record:

Todd W. Smyth
Smyth Whitley, LLC
126 Seven Farms Drive, Suite 260
Charleston, South Carolina 29492
(843) 606-5635

Attorney for Respondents

INDEX

Certificate of Counsel 1

Questions Presented 1

Statement of the Case...1

Arguments

1. THE COURT OF APPEALS' OPINION DEVIATES FROM THE SOUTH CAROLINA SUPREME COURT'S DECISION IN *FAIRCHILD v. S.C. DEP'T OF TRANSPORTATION* AND VIOLATES THE SACROSANCT REQUIREMENT THAT INDEPENDENT MEDICAL EXAMINATIONS MUST BE CONDUCTED BY AND TESTIFIED TO BY INDEPENDENT AND DISINTERESTED MEDICAL EXAMINERS, NOT DEFENDANTS' OWN PREVIOUSLY-RETAINED EXPERTS…………………………..13

2. THE COURT OF APPEALS' OPINION CONFLATES THE STANDARD FOR DISCOVERABILITY WITH THE STANDARD FOR ADMISSIBILITY, ERRONEOUSLY HOLDING THAT A PARTY'S COMPLIANCE WITH A PRIOR DISCOVERY ORDER PRECLUDES HER FROM LATER CHALLENGING THE ADMISSION OF EVIDENCE AT TRIAL……………………………………………………………………………...16

3. THE COURT OF APPEALS ERRED IN FAILING TO APPLY THE CLEAR EXCEPTION TO PROFFERING TESTIMONY CARVED OUT BY BOTH RULE 103(a)(2), SCRE, AND THE SOUTH CAROLINA SUPREME COURT'S DECISION IN *STATE V. KING*……………………………………………………………………………………17

Conclusion……………………………………………………………………………….22

CERTIFICATE OF COUNSEL

Counsel for Petitioner Jeane Whitfield certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 20, 2023.

QUESTIONS PRESENTED

1. Whether the Court of Appeals' unpublished opinion contravenes the South Carolina Supreme Court's decision *in Fairchild v. S.C. Dep't of Tranportation*, violating the sacrosanct requirement that Independent Medical Examinations (IMEs) must be conducted by *and testified to* by independent and disinterested medical examiners, not Defendants' own previously-retained experts?
2. Whether the Court of Appeals' unpublished opinion conflates the standard for discoverability with the standard for admissibility by holding that a party's compliance with a prior discovery order precludes her from later challenging the admission of evidence at trial?
3. Whether the Court of Appeals erred in failing to apply the clear exception to proffering testimony carved out by Rule 103(a)(2), SCRE, and the South Carolina Supreme Court's decision in *State v. King*?

STATEMENT OF THE CASE

This is a medical malpractice action arising out of treatment of Petitioner Jeanne Whitfield ("Mrs. Whitfield") by Dennis K. Schimpf, M.D. ("Dr. Schimpf") and Sweetgrass Plastic Surgery, LLC ("SPS") (collectively, "Defendants"). (Am. Compl., R. p. 67).

Relevant Facts

In 2013, Mrs. Whitfield began experiencing discomfort under the right side of her breast and around her ribs. (Trial Tr., R. p. 658, lines 20-24). She had previously undergone a breast

augmentation procedure in 2009 with a physician named Dr. Kline and had been satisfied with the result. (Trial Tr., R. p. 658, lines 8-16). Mrs. Whitfield's gastroenterologist recommended that she consider removal of scar tissue by a plastic surgeon to address her pain and discomfort. (Trial Tr., R. p. 659, line 21 – p. 660, line 3).

Thereafter, Mrs. Whitfield met with Dr. Schimpf at Sweetgrass Plastic Surgery and was diagnosed with encapsulation and heavy scar tissue. (Trial Tr., R. p. 660, lines 14-22; p. 661, line 15-p. 662, line 2). Dr. Schimpf recommended a procedure known as a mastopexy, wherein he would remove Mrs. Whitfield's existing breast implants, clean out the encapsulation and scar tissue, and insert smaller 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 her incisions checked. (Trial Tr., R. p. 676, lines 6-19). As set forth below and in Petitioners' Final Briefs to the Court of Appeals, Mrs. Whitfield began experiencing a myriad of ever-increasing complications following her surgery. Despite her concerns and deteriorating physical conditions, however, she was repeatedly told that her symptoms were part of "the natural progression of healing". (Trial Tr., R. p. 679, lines17-19; 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, however, 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, lines 18-23; p. 695, line 18-p. 697, line 24). Instead, after repeatedly being denied post-operative care by the Defendants, Mrs. Whitfield's right implant blew through the stiches Dr. Schimpf had placed on her breast. (Trial

Tr., R. p. 701, line 24- p. 704, line 2; Pl's Photo Exhs., R. pp. 1681, 1702-1708, 1710-1713). As a result, Mrs. Whitfield was forced to undergo further surgical procedures in an effort to reconstruct her chest, including removal of her breasts and additional reconstructive 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).

Procedural History

On May 30, 2017, Mrs. Whitfield filed a medical malpractice action against Dr. Schimpf and Sweetgrass Plastic Surgery, LLC. The Amended Complaint alleged, *inter alia*, that Respondents were negligent in rendering medical care to Mrs. Whitfield and also by failing to keep and/or destroying medical records, including photographs, results of physical examinations, surgical notes, documentation of visits, documentation of care provided, and medical assessments in violation of S.C. Code of Regulations R. 61-16 and S.C. Code § 40-47-110. (Am. Compl., R. p. 67). The Amended Complaint further alleged that as a direct and proximate result of acts and omissions of Defendants, Mrs. Whitfield sustained, *inter* alia, physical injuries, and was caused to endure additional surgical procedures, medical expenses, physical pain and suffering, disfigurement, shame, humiliation, mental anguish, emotional distress, and that she will continue to suffer these damages. (Ibid.)

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. (R. p. 84)

The Rule 35 Motion

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 or testify to 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**." *Fairchild v. S.C. Dep't of Transp.,* 727 S.E.2d at 417, 398 S.C. at 109-110. [Emphasis added]

Despite the clear holding in *Fairchild*, the lower 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 lower court rendered its own divergent interpretation of Rule 35, SCRCP, ***and expressly rebuked 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 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 lower 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

[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*.

insisted on using their own, previously-retained experts to conduct the medical examinations. Accordingly, pursuant to the lower 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]

Petitioner's Motion in Limine

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 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 physicians; and that the expert witness testimony should not be allowed because *Fairchild* expressly forbids a court from compelling a Plaintiff to submit to physical examination by a witness from the other side. (Memo in Opp., R. p. 110; Hr'g Tr., p.404, line 4 – p. 408, line 20).

[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 this 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 invasive examination. (Trial Tr., R. p. 1384, lines 15 - 25; p. 1387, lines 8 - 18).

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 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."**

Thereafter, a five-day jury trial was held in Charleston, South Carolina from August 26, 2019 to August 30, 2019.

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 lower court did not make *any* findings or offer *any* legal rationale to support its ruling.** (R. at Ibid.). As a result of the lower court's ruling, Defendants' previously retained experts were allowed to testify about their own physical and mental examinations of Mrs. Whitfield, thereby affording them the same status, privilege, and authority reserved for independent, disinterested, and unbiased physicians under Rule 35, SCRCP, and the South Carolina Supreme Court's decision in *Fairchild.*

Conflicting Testimony at Trial

At trial, Defendants' Office Manager, Vicky Tolbert, 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. (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 Mrs. Whitfield as to what transpired when Mrs. Whitfield requested a copy of her medical file, and of Dr. Schimpf's treatment and behavior towards her once complications arose. (App., pp. 17-24). Mrs. Whitfield testified that Defendants became unresponsive as her conditioned worsened; that she became immobilized with pain; and that she was forced to seek out and meet with another physician, Dr. Ram Kalus. (App., pp. 17 – 20). Concerned about Mrs. Whitfield's condition, Dr. Kalus called Dr. Schimpf directly, imploring him to meet with her. (Trial Tr., R. p. 699, lines 13-20). Mrs. Whitfield testified that Dr. Schimpf agreed to meet with her, but that he became incensed when she showed up for the visit, angered that she had shown her deteriorating condition to another physician. (App., pp. 20-22). She testified that Dr. Schimpf became physically aggressive when tending to her wound, admonishing and verbally assaulting her, re-stitching her without anesthesia. (See App. at Id.).

The Office Manager, however, testified to having a very different recollection of the office visit, testifying that she had no recollection of Dr. Schimpf stitching Mrs. Whitfield without anesthesia or of Mrs. Whitfield 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).

<u>Impeachment of Office Manager's Credibility and Eliciting Evidence of Bias</u>

On the first day of trial, Defendants' counsel filed a Motion in Limine 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 the Office Manager**. (Motion, R. p. 179). **During her deposition on February 11, 2019, the 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 both of them as recently as a week before her deposition.** (Depo. Tr., 2/11/19, R. p. 376, line 5 – p. 377, line 9).

Defendants' Motion in Limine was heard at trial, at which point, Defendants' counsel also argued that Mrs. Whitfield's trial counsel should be precluded from eliciting any testimony from the 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 trial counsel argued that the Office Manager's ongoing sexual relationship with Dr. Schimpf and the types of 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, Mrs. Whitfield's counsel noted that the Office Manager's observation regarding Dr. Schimpf's post-operative care and missing medical records were starkly at odds with Plaintiff's observations. (Id. at R. p. 934, line 9 to p. 941, line 5; p. 920, lines 1-13).

After hearing arguments from the parties, the lower court granted Defendants' Motion in

Limine and barred Mrs. Whitfield's counsel from eliciting any testimony from the Office Manager regarding her nearly decade-long sexual relationship with Dr. Schimpf. (Trial Tr., R. p. 938, line 6 – p. 940, line 23). The lower court also barred Mrs. Whitfield's counsel from eliciting any testimony regarding the amount of money she was receiving from Dr. Schimpf or the complementary cosmetic surgeries she had received from him over the years. (Trial Tr., R. p. 941, lines 4-5). In making its ruling, the trial court summarily 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 stated, "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). As a result of the lower court's ruling, Mrs. Whitfield's counsel was precluded from impeaching the Office Manager's credibility and establishing bias by examining her about the ongoing personal relationship with Dr. Schimpf and the forms of compensation she received from him.

Trial and Appeal

At the conclusion of the five-day trial, the jury found for the Defendant on August 30, 2019. (R. pp. 41-45). 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. (Id.)

On October 8, 2019, Mrs. Whitfield served and filed the *Notice of Appeal* on the Respondents.

Thereafter, the parties filed their Final Briefs with the Court of Appeals (App., pp. 1-

107). Petitioner's Final Brief noted, *inter alia*, that the lower court had violated the Supreme Court's decision in *Fairchild* by allowing Defendants' previously-retained experts to provide testimony regarding their physical and mental examination of Mrs. Whitfield; that the lower court had erred by prohibiting Mrs. Whitfield's counsel from impeaching the credibility of Defendants' Office Manager and eliciting evidence of bias; and that the lower court had erred in failing to grant Mrs. Whitfield's Motion for Directed Verdict as to negligence *per se*. (App., pp. 1-34)

At the Court of Appeals' request, oral argument was held via Webex on September 15, 2022.

On November 23, 2022, the Court of Appeals issued a per curiam, unpublished opinion, wherein it affirmed the lower court's rulings, holding that Mrs. Whitfield was prohibited from challenging the *admission* of Defendants' expert testimony regarding their physical and mental examinations of her because she had complied with the discovery order commanding her to appear for the examination. (App., p. 108). In rendering its opinion, however, the Court of Appeals only cited to cases involving the *discoverability* of evidence, and not to any cases addressing *admissibility*.

The Court of Appeals also held that, absent a proffer, Mrs. Whitfield was precluded from challenging the lower court's ruling that prohibited her trial attorneys from eliciting testimony regarding the Office Manager and Dr. Schimpf's personal relationship and the forms of compensation the Office Manager was receiving. In rendering its opinion, the Court of Appeals acknowledged that an exception to the proffer requirement existed under Rule 103(a)(2), SCRE, but then did not take the additional step of applying the Rule to the facts of this case or providing any explanation as to why the Rule was inapplicable.

Finally, the Court of Appeals held that the lower court had not erred in denying Mrs. Whitfield's Motion for a Directed Verdict on her negligence *per se* claim, stating that causation of the injury must also be evaluated. However, the Court did not explain why the testimony provided by Mrs. Whitfield's treating physicians linking Defendants' statutory violations to Mrs. Whitfield's injuries were insufficient to establish causation of injury.

On December 8, 2022, Mrs. Whitfield filed a Petition for Rehearing. (App., p. 111). On January 20, 2023, the Court of Appeals denied the Petition for Rehearing (App., p. 124).

On February 17, 2023, Mrs. Whitfield filed a Petition for Writ of Certiorari with the Supreme Court of South Carolina. On April 3, 2023, Respondent filed a Return. On April 25, 2023, Mrs. Whitfield filed a Reply to Respondent's Return. On March 5, 2024, this Honorable Court granted Certiorari.

Mrs. Whitfield seeks a Writ of Certiorari to review the Court of Appeals' unpublished opinion on the grounds that 1) the Court of Appeals' opinion conflicts with the South Carolina Supreme Court's Decision in *Fairchild v. S.C. Dep't of Transportation* and violates the sacrosanct requirement that independent medical examinations must be conducted by *and testified to* by independent and disinterested medical examiners, not Defendants' own previously retained experts; 2) the Court of Appeals decision conflates the standard for discoverability with the standard for admissibility; an order compelling discovery does not render evidence admissible, particularly where admission of the testimony violates a controlling Supreme Court decision and a fundamental Rule of Civil Procedure; and 3) the Court of Appeals erred in failing to apply the clear exception to proffering testimony carved out by Rule 103(a)(2), SCRE, and the South Carolina Supreme Court's decision in *State v. King*.

ARGUMENTS

1. The Court of Appeals' Opinion deviates from the South Carolina Supreme Court's Decision in *Fairchild v. S.C. Dep't of Transportation* and violates the sacrosanct requirement that Independent Medical Examinations (IMEs) must be conducted by *and testified to* by independent and disinterested medical examiners, not Defendants' own previously-retained experts.

In rendering its decision in *Fairchild*, the South Carolina Supreme Court cited a series of guidelines holding that the medical evaluation under Rule 35, SCRCP, 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.

In the present case, the lower court abused its discretion in allowing Defendants' previously-designated experts to offer testimony regarding their physical and mental

examinations of Mrs. Whitfield. In doing so, the lower court ignored the primary purpose of ***independent*** medical examinations 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 the Court of Appeals' 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."

As noted in Petitioners' Final Briefs and Petition for Rehearing, Defendants' experts 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*.

By allowing Defendants' previously-designated experts to testify to a jury about their physical and mental examinations of Mrs. Whitfield, the lower court afforded them the same status, authority, and privileges reserved for independent, disinterested, and unbiased physicians under Rule 35, SCRCP and the South Carolina Supreme Court's holding *Fairchild*. This was an abuse of discretion that resulted in the admission of biased and highly prejudicial testimony to the jury.

The lower court failed to take into account the law or the particular circumstances of the case. "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)). Here, the lower court 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). Petitioner respectfully submits that the lower court's ruling—being devoid of any findings or legal rationale—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).

In reviewing this matter, the Court of Appeals erred in failing to apply the standard set forth by the Supreme Court in *Fairchild*, which requires that Independent Medical Examinations

(IMEs) be conducted by and ***testified to*** by independent and disinterested medical examiners, not Defendants' own experts. Accordingly, Petitioner respectfully requests that this Court grant her Petition, vacate the Court of Appeals' unpublished opinion, and remand this case for a new trial on the merits.

2. The Court of Appeals' Opinion conflates the standard for discoverability with the standard for admissibility. An order compelling discovery does not render evidence admissible, particularly where admission of the testimony violates a controlling Supreme Court decision and a fundamental Rule of Civil Procedure.

Petitioner respectfully submits that the Court of Appeals 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, Mrs. Whitfield objected to the ***admission*** of testimony by Defendants' experts regarding their physical and mental examinations. (Motion in Limine, R. pp. 169-172; Trial Tr., R. p. 618, line 14 to p. 627, line 4). The Court of Appeals erred in finding that Mr. Whitfield was precluded from challenging the admission of said testimony at trial simply because she had complied with the underlying discovery order. In doing so, the Court failed 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 of Appeals' opinion speak to

the *admissibility* of evidence, but rather only to their *discoverability*. (App., p. 109). Contrary to the Court's conclusion, a party does not need to be held in contempt in order to later challenge the admissibility of evidence at trial. It was error for the Court of Appeals to find that Petitioner was precluded from challenging the admissibility of patently biased and highly prejudicial testimony simply because she had complied with a prior discovery order commanding her to submit to examinations in violation of Rule 35, SCRCP and *Fairchild*. Accordingly, Petitioner respectfully requests that this Court grant her Petition for Writ of Certiorari, vacate the Court of Appeals' unpublished opinion, and remand this case for a new trial on the merits.

3. The Court of Appeals erred by failing to apply the clear exception to proffering testimony carved out by both Rule 103(a)(2), SCRE, and the South Carolina Supreme Court's Decision in *State v. King*.

The Court of Appeals erred in finding that Petitioner 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. impeaching of Office Manager's credibility) were already clearly established in the record. A proffer is <u>not</u> 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) it was clearly established in the record before the lower

court 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 Petitioner.

Specifically, a proffer was not necessary because there was no question at trial as to the character or content of the excluded testimony or of Petitioner's grounds for seeking to elicit it. (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). The Office Manager had already admitted to having an ongoing sexual relationship with Dr. Schimpf during her deposition. (Depo. Tr., 2/11/19, R. p. 377, line 10 to p. 385, line 22). She had also already testified as to her salary and the numerous complimentary cosmetic procedures she received from Dr. Schimpf over the years. Id. **Petitioners' 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 Defendants' Motion in Limine, filed August 26, 2019, was to exclude these very revelations at trial. (Motion, R. p. 179).

The Court of Appeal's opinion also overlooks that the South Carolina Supreme Court has carved out a clear exception to the general 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 a party:

> [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 on cross-examination 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 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). **Not only was the testimony filed as of record, but the trial judge also specifically considered the testimony contained in the deposition during Defendants' Motion in Limine and found it inadmissible.** (Trial Tr., R. p. 939, lines 9-12). 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 at trial. As noted, *supra*, the Office Manager had given starkly different testimony than Mrs. Whitfield regarding the post-operative care and hostile treatment she received from Dr. Schimpf. By precluding Mrs. Whitfield from eliciting testimony regarding the Office Manager's relationship with Dr. Schimpf and the form of compensation she received, Mrs. Whitfield was unable to impeach the Office Manager's credibility and establish bias.

Mrs. Whitfield respectfully submits that the Court of Appeals erred in failing to apply the clear exception to proffering testimony carved out by Rule 103(a)(2), SCRE, and the South Carolina Supreme Court's decision in *State v. King.* It was error for the 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 Petitioner. Accordingly, Mrs. Whitfield respectfully requests that this Court grant her Petition, vacate the Court of Appeals' unpublished opinion, and remand this case for a new trial on the merits.

The case should also be remanded because the lower court abused its discretion in failing to acknowledge and/or apply the general rule for establishing bias. Contrary to the lower court's ruling, the standard is not whether the lower 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."

Here, 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 improperly weighed evidence and supplanted its own judgment for the jury's, thereby abusing its discretion and prejudicing Mrs. Whitfield who could not otherwise demonstrate that the Office Manager's testimony was 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)).

Further, "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). **"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). [Emphasis added]

In the present case, the Office Manager's long-standing personal 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."

CONCLUSION

Mrs. Whitfield respectfully requests that this Honorable Court grant her Petition, vacate the Court of Appeals' unpublished opinion, and remand this case for a new trial on the merits. Special and important circumstances exist for granting the Petition: 1) the Court of Appeals' opinion conflicts with the South Carolina Supreme Court's Decision in *Fairchild v. S.C. Dep't of Transportation* and violates the sacrosanct requirement that independent medical examinations must be conducted by *and testified to* by independent and disinterested medical examiners, not Defendants' own previously retained experts; 2) the Court of Appeals' decision conflates the standard for discoverability with the standard for admissibility; an order compelling discovery does not render evidence admissible, particularly where admission of the testimony violates a controlling Supreme Court decision and a fundamental Rule of Civil Procedure; and 3) the Court of Appeals erred in failing to apply the clear exception to proffering testimony carved out by Rule 103(a)(2), SCRE, and the South Carolina Supreme Court's decision in *State v. King*.

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/ Jesse Sanchez
Jesse Sanchez (SC Bar No. 101906)
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, South Carolina 29464
(843) 814-8181
jesse@jessesanchezlaw.com

SLOTCHIVER & SLOTCHIVER LLP

s/Daniel S. Slotchiver
Daniel S. Slotchiver (SC Bar No. 15129)
Andrew J. McCumber (SC Bar No. 101559)
751 Johnnie Dodds Boulevard, Suite 100
Mount Pleasant, South Carolina 29464
(843) 577-6531
dan@slotchiverlaw.com

HALVERSEN AND HALVERSEN, LLC

s/Brent S. Halversen
Brent S. Halversen (SC Bar No. 76495)
Halversen and Halversen, LLC
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, SC 29464
(843) 284-5790
brent@halversenlaw.com

Attorneys for Petitioner Jeane Whitfield

April 4, 2024
Mount Pleasant, South Carolina