THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-000245

Jeanne Whitfield,

Petitioner,

v.

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

Respondents.

RESPONDENTS DENNIS K. SCHIMPF, M.D. AND SWEETGRASS PLASTIC SURGERY, LLC'S BRIEF

Respectfully submitted,

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(2) WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED THE CIRCUIT COURT'S DECISION TO LIMIT EVIDENCE OF A WITNESS'S PERSONAL RELATIONSHIP WITH DR. SCHIMPF THAT WAS NOT RELEVANT, WAS LADEN WITH POTENTIAL FOR UNFAIR PREJUDICE, AND WAS OFFERED SOLELY TO HARASS AND EMBARRASS RESPONDENTS AND WHERE PETITIONER WAIVED THE RIGHT TO CHALLENGE IT BY FAILING TO MAKE A NECESSARY OFFER OF PROOF?

COUNTER STATEMENT OF THE CASE

On May 30, 2017, Petitioner filed this medical malpractice action against Respondents alleging that they were medically negligent in the performance of a set of elective, cosmetic procedures for her on June 6, 2014, including liposuction of the abdomen, thighs, chin, and axillae; a bilateral replacement of breast implants; a breast lift (or "mastopexy"); and an upper eyelid lift (or "blepharoplasty"). (*See generally,* Amended Compl., R. pp. 65-83). More specifically, she alleges that Dr. Schimpf "must have" applied too much tension in closing the incision line on her right breast, which caused it to separate.[1] Furthermore, she contends that, because of this separation, she required multiple surgeries, including an unrelated surgery on her left breast and

[1] At trial, Petitioner also contended that Dr. Schimpf performed liposuction on her chin without consent. This was noticeably missing from her Petition for a Writ of Certiorari and Brief. Accordingly, Petitioner has abandoned, waived, and/or deserted this claim and Respondents will not address it further in this Brief. Additionally, Petitioner contended that Dr. Schimpf's charting was incomplete and that he and his practice lost and/or destroyed photographs and that constituted negligence per se. However, this Honorable Court denied Petitioner's Question 4 about her negligence per se claim in her Petition, so Respondents will also not address it further.

reconstructive procedures with her new plastic surgeon, Dr. Ram Kalus, and that, in addition to her economic damages, she suffered mental and emotional injury. Respondents deny liability and assert that the procedures were performed according to the accepted standards of care, and that Petitioner's injuries were the result of knowns complication of her procedures of which she was properly informed at the outset. (R. pp. 84-93). Between August 26, 2019 and August 30, 2019, the parties tried this case to a jury. Ultimately, the jury returned a **complete and unanimous verdict** for Respondents. (R. p. 1652, lines 13-19; R. pp. 43-45; R. pp. 41-42).

A. Relevant Facts

As indicated in her Brief, Petitioner alleges that her surgical wounds did not heal, she was repeatedly denied post-operative care by Respondents, Dr. Schimpf was angry with her during at least one post-operative appointment, and her right implant "blew through" stiches that Dr. Schimpf had placed. However, as demonstrated below and as determined by an impartial jury, Petitioner's claims are unsupported by the evidence and legal record.

Petitioner first saw Dr. Schimpf in December 2013. (R. p. 661, lines 9-10). Prior to her first visit with Respondents, Petitioner 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 that she chose to withhold from Respondents. (R. p. 1132, line 18-p. 1148, line 21; R. pp. 1813-15, 1869-1873). In these appointments with her psychiatrist, Petitioner 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 and heavy psychiatric medications including antidepressants, mood stabilizers like lithium, antipsychotics,

and three benzodiazepines to treat panic disorder, all of which, the evidence showed, played a role in her outcome in this case. (R. p. 1376, line 13-p. 1379, line 24).

Immediately before seeing Dr. Schimpf, Petitioner saw a gastroenterologist in Summerville, South Carolina 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). Consequently, Petitioner saw Dr. Schimpf on December 19, 2013. (*Id.*; R. p. 892 lines 5-8). On that day, she filled out a medical history form, but chose to withhold her very significant history of previously diagnosed psychiatric disorders, including bipolar depression, anxiety, or emotional problems, as well as the fact that she had begun drinking again, had nightmares, was having martial issues, had stopped taking her psychiatric medications on her own against medical advice, was under tremendous stress, and 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 in her 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 he consulted on the additional cosmetic concerns that she raised. (R. p. 661, lines 15-21).

On May 27, 2014, Petitioner met with Dr. Schimpf to discuss the procedures that she was requesting and to sign the Informed Consent forms for each. (R. pp. 1816-57). The record confirms that Petitioner was specifically 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.*). Petitioner signed

these forms and confirmed her understanding and acceptance of these risks. Thereafter, 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).

Dr. Schimpf saw Petitioner postoperatively on June 10 and June 19, 2014, and he or his office also 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). However, at trial, Petitioner tried to assert that no one from Respondents 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, completely refuted these allegations at trial with the Petitioner's telephone records, which proved otherwise. (R. p. 1880). Petitioner further testified that because no one would help her, she had to go to the hospital on June 20, 2014 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 actually called an ambulance because she thought she was having a heart attack, which was more likely than not a panic attack. (R. p. 811, line 14-p. 813, line 20; R. pp. 1865-6). Petitioner 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 offered these bills, for $21,000, as her damages to the jury. (*Id.*; R. pp. 1714). At trial, Respondents' expert psychiatrist, Dr. James Ballenger, placed this episode in context, explaining that it was a panic attack, characteristic of and driven by Petitioner's pre-existing and 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)).

Petitioner next called for Dr. Schimpf on June 30, 2014 and he saw her in the office the very next day, July 1. (R. pp. 1880, 1876-7; R. p. 1250, lines 5-9). Petitioner had clear 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, Petitioner 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). Petitioner then chose to turn to Google and found Dr. Kalus, a plastic surgeon with a practice in Mt. Pleasant, whom she would later name as an expert witness. (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). Notably, he did not rush her to surgery, nor did he diagnose her with an infection, administer antibiotics, or take any wound cultures. (R. p. 529, lines 22-25; R. p. 530, lines 11-13, 18-20). Instead, he diagnosed her with a simple 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" Petitioner to return to Dr. Schimpf and called Dr. Schimpf to inform him that he had seen Petitioner. (R. p. 531, lines 14-16; R. p. 440, lines 20-23).

Petitioner returned to Respondents on July 11, 2014. In her trial testimony, she dramatically recounted that Dr. Schimpf was purportedly "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 purportedly 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). However, the medical record proves that Petitioner was healing appropriately at this time and there is no 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)).

The next day, July 12, 2014, Petitioner'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 allegedly 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, 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 examination at trial, Petitioner said that her daughter "helped [her] out of the shower." (R. p. 702, line 15). On cross, Respondents 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, Petitioner 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 also clear at trial, however, that her breast was not bleeding before she got into the shower. (R. p. 828, lines 18-19).

Petitioner's daughter called Dr. Kalus' office the same day. (R. p. 843, line 3). He saw Petitioner 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, he inadvertently exposed the implant. (*Id.,* R. p. 537, lines 19-23). Because he exposed the implant, he then had to remove it. (R. p. 537, line 24-p. 538, line 2). Dr. Kalus removed the implant and closed the breast to allow it to heal, diagnosing Petitioner with delayed healing. (R. p. 532, lines 15-20; R. p. 535, lines 4-7). Significantly, neither Dr. Kalus nor any other provider ever treated Petitioner for any type of infection during this hospitalization. (R. p. 534, line 24-p. 535, line 3). Despite this glaring lack of evidence, Petitioner, nonetheless, tried to insist at trial that Dr. Kalus had to remove her implant because it "was full of infection and necrosis." (R. p. 751, lines 22-23).

On July 29, 2014, Petitioner 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 unrelated 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). Petitioner continued to receive psychiatric treatment from Dr. Marcino for the same problems she had for years before her procedure and, like Dr. Kalus, designated Dr. Marcino as one of her expert witnesses for trial. (R. pp. 766-67, 1714). Dr. Marcino appeared and provided expert testimony, based on her observations and knowledge of the Petitioner, contending that Petitioner's pre-existing 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, Petitioner 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 inexplicably took an additional 490 grams of native breast tissue from the left side, leaving Petitioner 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 that Dr. Kalus created by doing this, and because Petitioner now said she no longer desired implants, Dr. Kalus then attempted fat grafting, seeking to add volume back to the breast to address the asymmetry he created, but it was only marginally 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 Petitioner's current physical complaints. (R. p. 1457, line 24-p. 1459, line 10).

In the months prior to trial, Petitioner 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 fundamentally changed his prior sworn testimony, now offering a negative standard of care opinion as to Dr. Schimpf, on which he was thoroughly cross-examined.[2] (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 Petitioner's wound separation was a known complication of the procedure that can and does occur in the absence of negligence, that he removed an excessive amount of breast tissue from the left side,

[2] Respondents first deposed Dr. Kalus long before Petitioner named him as an expert on December 19, 2018. (R. p. 492, lines 1-6).

that her breasts were now asymmetric as a result, that his own informed consent forms were inconsistent and inaccurate, and that there was no evidence that he treated Petitioner 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. Relevant Procedural History

During the September 24, 2018 deposition of Respondents' Office Manager, Petitioner questioned the Office Manager regarding her personal relationships, salary, 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, Petitioner 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 circuit court heard arguments and denied the motions on January 16, 2019, allowing Petitioner to further explore these topics in continued depositions, which developed no evidence related to Petitioner's care and treatment. (R. pp. 7-10).

As noted above, prior to trial, Petitioner also designated her treating physicians, Dr. Kalus and Dr. Marcino, as experts. (R. pp. 341-45). Both had the benefit of examining Petitioner multiple times and treating her over the course of multiple years. Additionally, Petitioner's non-treating expert, Dr. Rosenberg, also had the opportunity to meet with Petitioner and discuss her claimed injuries prior to trial. (R. pp. 1055, 1066). Her physical and mental condition was the central issue in the case. Accordingly, Respondents sought to have their expert plastic surgeon and expert psychiatrist examine Petitioner pursuant to Rule 35 of the South Carolina Rules of Civil Procedure. (R. pp. 100-09). After the circuit court determined that the examinations were proper and denied Petitioner's subsequent Motion to Reconsider, Petitioner complied with the Circuit Court's order

and attended the examinations. (R. pp. 11-32). These examinations were held in her physicians' offices and **in the presence of her physicians and Petitioner's expert witnesses**, Dr. Kalus and Dr. Marcino. (*Id.*). After the examinations, Petitioner deposed Respondents' experts regarding their findings and conclusions. Prior to trial, Petitioner filed a Motion in Limine seeking to exclude Respondent's experts' testimony **because the exams had occurred**, which was denied. (*See e.g.* R. p. 624, line 13-p. 625, line 18).

In addition to filing the above, on August 19, 2019, one week prior to trial, Petitioner filed the transcripts from the depositions of Dr. Schimpf and the Office Manager, *in toto*, with the Court. (*See* R. pp. 175-8). Petitioner failed to redact personal information, including information regarding minor children, from the transcripts as required by Rule 41.2 of the South Carolina Rules of Civil Procedure. (*Id.*). Presumably to intimidate Respondent, Petitioner 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 knowledge of or involvement in Petitioner's medical care. Respondents filed motions, including a Motion to Strike, challenging these maneuvers, and contending that Petitioner 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. Petitioner argued then and argues now that she has broad latitude, unchecked by any limits, to question witnesses so that she might show bias.

During pretrial arguments on August 26, 2019, the circuit court granted Respondents' Motion to Strike and entered an order sealing the transcripts and removing the substance of the documents from the public index. (R. p. 33). Notably, Petitioner did not attempt to proffer the testimony then to preserve it for appeal. Furthermore, the Circuit Court, questioning Petitioner as

to what possible relevance Mrs. Schimpf's testimony might have since she was not involved in Petitioner's care at all, voluntarily released her from the trial subpoena. (R. p. 607, lines 16, 22-3). The circuit court also considered Respondent's Motion in Limine regarding the same evidence and excluded it under Rule 403 of the South Carolina Rules of Evidence. (R. p. 603, line 14-p. 604, line 7).

STANDARDS OF REVIEW

On appeal from a case 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 will not be disturbed unless "the record discloses that there is no evidence which reasonably supports the jury's findings." *Id.* In her appeal, Petitioner challenges (1) the admission of certain expert testimony, and (2) the exclusion of testimony regarding a personal relationship between Dr. Schimpf and his Office Manager to include the Office Manager's protected health history and compensation.

A. 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 Petitioner 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)).

B. 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 Petitioner**, (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)) (emphasis added). In order to preserve the issue as to evidence that is excluded, the proponent of that testimony must generally make an offer of proof or 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)).

ARGUMENTS

A. The Court Of Appeals Properly Affirmed The Circuit Court's Decision To Admit The Testimony Of Expert Witnesses Who Had Performed Examinations Of Petitioner Because Petitioner Waived The Right To Challenge It And It Was Otherwise Admissible.

The Court of Appeals properly affirmed the decision of the Circuit Court to admit testimony by Respondents' experts, Dr. Perez and Dr. Ballenger, about their physical and mental examinations of Petitioner conducted pursuant to Rule 35 because Petitioner plainly waived the right to challenge it by submitting to the examination. *See 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."); *Richardson v. Halcyon Real*

Estate Servs., 439 S.C. 419, 425, 887 S.E.2d 153, 156 (Ct. App. 2023) (*quoting Davis*, 409 S.C. at 280, 762 S.E.2d at 543).

Petitioner attempts to avoid her preservation obligations by trying to rely on *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (2012), contending that it established a rule that a party is absolutely prohibited from using his or her own expert to perform a medical exam under Rule 35.[3] In other words, Petitioner argues that because the underlying examination, to which she waived her right to appeal, violated *Fairchild*, testimony about it must have too. However, this is the same argument (that requires the issue to have been preserved) under a different name.

As an initial matter, *Fairchild* is not controlling 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, Petitioner hired her own treating physicians to serve as her retained experts, both of whom had benefit of their knowledge of her and longstanding relationship with her. Their testimony played a major role in Petitioner's presentation to the jury. Furthermore, Petition's non-treating expert also had the benefit of meeting with Petitioner before testifying at trial. Absent a Rule 35 examination, Respondents had no access to Petitioner and no way to evaluate the key damages evidence in the case, much of which requires observation in order to properly assess. Petitioner told the jury that she was physically deformed and psychiatrically injured, and she presented those claims for damages through two of 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

[3] By its plain language, Rule 35 of the South Carolina Rules of Civil Procedure does not require that the court-appointed medical examiner be "independent," nor does it employ the concept, borrowed from Workers' Compensation law, of an "IME" or "Independent Medical Examination." Rule 35, SCRCP. Indeed, the word "independent" does not appear in the rule. *Id.* Instead, it provides for "physical and mental examinations" in discovery. *Id.*

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 Petitioner to level the playing field and the Circuit 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.[4] Here, Petitioner challenged the occurrence of the examinations altogether and never proposed any reasonable alternative. (R. pp. 395-410).

Irrespective, for Petitioner's contention to be true (i.e., that the testimony was inadmissible because it was about something that was somehow conducted unlawfully - even though done pursuant to court order), Petitioner was required to challenge the underlying discovery order by refusing to undergo the examinations because she is, in essence, relitigating the discovery order. However, Petitioner chose not to do that. Similar to visits with her own experts, she submitted to the examinations thereby waiving her objections to them under South Carolina law. D*avis*, 409 S.C. at 280, 762 S.E.2d at 543 (cited *supra*). The Court of Appeals did not conflate the standard for discovery with admissibility. It merely examined the issue as presented by Petitioner and, by Petitioner's own logic, she was required to challenge the underlying examinations, but failed to do so. Petitioner does not get a second bite at the apple by recharacterizing her objection, after trial, as one to the testimony because she is relying on the same authority and making the same arguments that she lodged during the discovery dispute.

[4] Whether Dr. Ballenger is the same expert involved in *Fairchild* is immaterial. As indicated above, Dr. Ballenger was not permitted to conduct a medical exam in that case for reasons specific to that case and that are distinguishable from the present. He was not disqualified based on lack of expertise, training, experience, or any other reason under Rule 702 of the South Carolina Rules of Civil Procedure.

Secondly, Petitioner waived her right to appeal this issue by opening the door to it herself by testifying about her examinations during her case-in-chief, as well as by failing to lodge a contemporaneous objection to its admissibility during Respondents' trial presentation. (*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); 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.")); *S.C.* DOT, 372 S.C. at 301-02, 641 S.E.2d at 907 (requiring contemporaneous objections to the admission of evidence in order to preserve the right to appeal the trial court's ruling). Regardless of the Circuit Court's order, Petitioner was not obligated to address the examinations in her case-in-chief yet chose to do so and now complains that reference to these examinations was allowed despite being the side who opened the door to it. Nevertheless, the reality is, she could not lodge any other objections because the examinations were proper, and Dr. Perez and Dr. Ballenger's testimony was admissible under the applicable Rules of Evidence (e.g., Rules 401, 702, 703, SCRE).

Petitioner also opened the door to the evidence by having her own physicians/experts testify about their pre-trial examinations of her. Justice demands that Respondents be able to rebut such testimony. Petitioner seemingly acknowledges this but contends that Respondents should have hired a third expert that had not been previously retained to conduct and testify about the examinations. However, that expert would have likewise been retained and paid by Respondents and given access to Petitioner's medical records, which Petitioner claims tainted the subject examinations. Furthermore, a third expert does nothing to remedy the fundamental unfairness of allowing Petitioner's treating physicians, who were self-interested, had reviewed Petitioner's medical records, and formed their own opinions before trial, to testify as experts. Given these

similarities, if Petitioner's treating physicians/experts can be said to aid the jury, by the same token, so do Respondents' experts.

Importantly, even assuming *arguendo* that the Circuit Court erred in the admission of testimony regarding the examinations, any error that resulted was harmless and would never rise to the level requiring a reversal of the jury's decision. Petitioner cannot point to any prejudice that the admission of this evidence had on her case, especially when all three of her retained experts also examined and met with her themselves and then testified on the basis of their findings. Petitioner, likewise, had a full and fair opportunity to depose each expert on their examinations, and to challenge the evaluations on cross examination. Moreover, Petitioner's experts were present and found nothing out of the ordinary during the examinations. Finally, these examinations did not comprise a significant part of either of the Respondents' experts' testimony. Simply put, while proper (as discussed above), the admission of evidence regarding the examinations did not change anything in the outcome of the trial. *See Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009) (internal citation omitted) ("Error is harmless where it could not reasonably have affected the result of the trial. Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result.").

B. The Court Of Appeals Properly Affirmed The Circuit Court's Decision To Limit Evidence Of A Witness's Personal Relationship With Dr. Schimpf, Protected Health History, and Compensation Because Petitioner Waived The Right To Challenge It By Failing To Make A Necessary Offer Of Proof.

Petitioner contends that she should have been permitted at trial to examine Respondents' office manager on the subject of that individual's relationship with Dr. Schimpf, her protected health history, and compensation simply because her testimony did not support Petitioner's portrayal of her interactions with Dr. Schimpf and, therefore, she had to be biased. (Petition, p. 19). First, that is not the standard for admissibility, and it ignores the rules of evidence on relevance

and prejudice. *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 officer on the subject of his relationship with the solicitor who initially handled the case). Moreover, the gravamen of Petitioner's Complaint was that there was medical malpractice – a breach in the standard of care in the way the surgery was performed that led to a wound dehiscence – something on which the office manager's testimony would have absolutely no bearing. Second, Petitioner similarly did not preserve her right to appeal this issue because she did not make an offer proof as required by South Carolina law. (*See* R. pp. 904-941 (circuit court ruling) and 942, (Petitioner's counsel stating that he has no further questions for the witness and circuit court excusing witness)); *see also 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.").

Without a proffer, this Court is left without a permissible means for determining the substance of the excluded testimony. The Court cannot recreate this testimony *post-facto*, nor can it merely rely on the representations of Petitioner or assume the substance of the anticipated testimony because the "litigants were clearly aware" as Petition suggests in her Brief. Consequently, the Court is left with no ability to weigh any asserted probative value of the testimony relative to the record and it therefore is unable to find any prejudice, if any, that the exclusion of this testimony purportedly caused to Petitioner. For instance, this Court cannot know whether Petitioner 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 having the benefit of such information, the Court does not have

the ability to now weigh the excluded testimony, which is exactly why South Carolina has strict preservation rules.

Petitioner seeks to invoke the lone exception to the proffer requirement to further sidestep her preservation obligations. (Petition, p. 18). In support of this, she points to the transcripts that she filed **in their entirety** a week before trial. (*Id.*). However, as detailed above, the Circuit Court struck them from the public record prior to trial because they were improvidently filed against this Court's Rules. (R. p. 33). Absent such a specific proffer about what would have been elicited had Petitioner actually questioned the witness, there was nothing to consider or to assess regarding the testimony purportedly being sought or Petitioner's grounds for seeking it. Petitioner may not now rely on Respondents' broad Motion in Limine to exclude evidence of the office manager's relationship with Dr. Schimpf because it is not evidence and does not delineate the specific testimony that would have been purportedly sought by Petitioner or her reason for seeking it. **Moreover, the Motion was not made by Petitioner herself, so the issue was not raised by the Petitioner, which is a preservation requirement.** *S.C. DOT* (cited *supra*) (listing the four issue preservation requirements). As a result, the record is devoid as to the character and content of the excluded testimony or of Petitioner's basis for admitting it, so the exception does not apply, and a proffer was required as the court of appeals properly concluded. *King,* 274 S.C. at 20, 260 S.E.2d at 708.

Also, even assuming that Petitioner had somehow arguably preserved this issue, the Circuit Court's decision to exclude the evidence was proper because it was not relevant to any fact at issue, it was unfairly prejudicial, and it does not constitute proper impeachment evidence in the context of the trial. *See* Rule 401, 403, and 608(c), SCRE; *see also Dial*, 405 S.C. at 256, 746 S.E.2d at 499-500 (holding impeachment evidence still subject to Rule 401/403, SCRE analysis).

It is inarguable that the office manager's relationship with Dr. Schimpf, her protected health history, and compensation did not bear on any aspect of Petitioner's medical care or treatment. Furthermore, there was never any evidence presented that the office manager was untruthful or inconsistent in her testimony, regardless of reason. Indeed, the record indicates that the offered testimony that was critical of Respondents, which Petitioner relied upon and continues to do so today (e.g., admitting that items from chart were lost during office move). (R. p. 903, lines 8-17). Therefore, there was no legitimate reason or need to impeach this witness or for the excluded evidence – even if it had been properly proffered, which it was not. It would have only served to spark scandal, harass Respondents, inflame the passions of the jury, and invite a decision on something other than whether the standard of care was met during the surgery in question.

CONCLUSION

At base, as was the case for the Court of Appeals, this Court is left with a straightforward conclusion. None of the issues presented by Petitioner demonstrate an error of law or warrant the reversal of the Circuit Court, which exercised its discretion and made proper, well-considered decisions to admit and exclude testimony. The jury spent a week hearing the evidence and promptly returned a verdict for Respondents in accordance with the overwhelming weight of the evidence demonstrating that there was no medical malpractice. The rulings of the Circuit Court challenged here did not prejudice Petitioner, who was able to present her entire case. Because there is no indication in this record that the Circuit Court abused its discretion or otherwise contravened South Carolina law, this Court should affirm the verdict below as well as the decision of the Court of Appeals.