

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No. 2023-000245

Jeane Whitfield,

Petitioner,

v.

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

Respondents.

PETITIONER'S REPLY BRIEF

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Petitioner Jeane Whitfield, through her undersigned counsel, hereby respectfully submits this Reply to Respondents' Brief.

Reply to Respondents' Factual Representations

Respondents' Brief attempts to divert attention from the core legal issues in this appeal by presenting a distorted account of the record and undeservedly attacking Petitioner's mental health. Contrary to Respondents' intimations, Petitioner's injuries are not "fantastical assertions" brought about by a mental condition. Mrs. Whitfield's injuries are life-altering and very real. (*See* Pl. Photo Exhibits, R. pp. 1702 to 1713).

Respondents' contention that "it is uncontested that Dr. Schimpf used the medically accepted and standard techniques to perform the surgeries in question" is directly contradicted by the record. Dr. Rosenberg, Petitioner's medical expert, provided ample testimony that Dr. Schimpf deviated from the standard of care and caused Mrs. Whitfield harm. (Trial Tr., R. p. 1016, line 2 to p. 1050 line 25). Dr. Rosenberg specifically testified that explanation (i.e. removal) of *both* breast implants was necessary for purposes of treating necrosis and maintaining symmetry. (Trial Tr., R. p. 1042, line 4 to page 1044, line 3). Additionally, Dr. Rosenberg testified that Dr. Kalus provided Ms. Whitfield with appropriate medical care, having inherited "a really tough situation" from Dr. Schimpf. (Trial Tr., R. p 1044, line 4 to p. 1045, line 11).

Petitioner respectfully requests that this Honorable Court look beyond Respondents' diversionary tactics and apply the straightforward, unambiguous law established by this Court in *Fairchild v. South Carolina Department of Transportation*, 727 S.E2d 407, 398 S.C. 90 (2012). Independent Medical Examinations (IMEs) must be conducted by *and testified to* by independent and disinterested medical examiners, not Defendants' own previously-retained experts. The lower court abused its discretion in allowing Defendants' previously-retained experts to offer

testimony regarding their physical and mental examinations of Mrs. Whitfield, particularly when these experts had already reached conclusions and rendered opinions as to Ms. Whitfield's physical and mental state before a single examination had taken place. (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).

The lower court's decision to allow the testimony ignores the very purpose of 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." *Id.* 737 S.E.2d at 417, 398 S.C. at 109-110 [Emphasis added]. By allowing Defendants' previously-retained 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 this court's decision in *Fairchild*. This alone is reversible error.

A. Petitioner did not waive her right to challenge the admission of the defense experts' testimony.

Petitioner did not waive her right to challenge the admission of highly-biased and prejudicial testimony simply because she complied with the court's discovery order commanding her to submit to a physical examination by Defendants' experts. Both Respondents' Brief and the Court of Appeals' opinion err in conflating the standard for challenging discovery orders with that of challenging the admission of evidence at trial. In fact, every single case cited by Respondent and the Court of Appeals in support of this purported waiver argument specifically deals with challenges to discovery orders, and not challenges to the admission of evidence at trial. This is an important distinction, because an order granting discovery has no effect on whether the evidence obtained in discovery is later admissible at trial. "[The] judge hearing the

motion for discovery has no authority to determine the admissibility of evidence of the document produced, that being a matter for the trial court.” *Hansen v. DHL Laboratories, Inc.*, 450 S.E.2d 624, 316 S.C. 505 (Ct. App. 1994) at n. 5, *quoting* 27 C.J.S. Discovery § 87 (1959). Additionally, “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 (Ct. App. 2019).

Contrary to Respondents’ contention and the Court of Appeals’ unpublished opinion, a party in this State is not required to violate a discovery order and be held in contempt in order to later challenge the admissibility of evidence at trial. None of the cases cited by the Court of Appeals or Respondents’ brief stand for this proposition. Respectfully, this is an absurd proposition that would drastically change the practice of law in this State of South Carolina. It would require lawyers to advise their clients to voluntarily violate court orders and subject themselves to the contempt powers of the court in order to preserve their ability to later challenge the admission of evidence at trial. This would lead to a complete breakdown of the discovery process as we know it.

Additionally, Respondents’ Brief erroneously contends that “absent a Rule 35 examination, Respondents had no access to Petitioner and no way to evaluate the key damages evidence in this case.” (Resp. Brief, p. 15). This is also incorrect. Respondents could have sought a Rule 35 examination of Mrs. Whitfield by any qualified expert other than the ones they had previously designated. Respondents’ contention that they sought to “level the playing field” by allowing their own experts to conduct the Rule 35 examination is precisely why the rule exists in the first place. Rule 35 experts are not there to “level the playing field,” they are there to “materially aid the jury, not just the defendant, in evaluating the actual damages sustained and

arriving at a just verdict.” *Fairchild*. 737 S.E.2d at 417, 398 S.C. at 109-110.

There is also nothing odd, nefarious, or unfair about a Plaintiff’s treating physicians testifying about the care the Plaintiff has received. This has long been the standard in just about every medical malpractice case across this state and country. If Respondents wanted to challenge said testimony, they could have sought court-appointment of any qualified expert other than their own previously-retained experts pursuant to Rule 35, SCRPC. They chose not to do so, opting to employ experts who had already been paid, rendered opinions, and reached conclusions before any examinations had even taken place. In this sense, they are the architects of their own problem.

B. Petitioner properly objected to the admission of defense experts’ testimony regarding their physical and mental examinations.

Respondents’ generalized claim that Petitioner “waived her right to appeal” is also unfounded. Mrs. Whitfield properly objected to the admission of Respondents’ expert testimony at trial. Specifically, on July 17, 2019, Mrs. Whitfield filed a Motion in Limine Regarding Defense Examinations of Plaintiff, wherein she moved to prevent Respondents from introducing any evidence to the jury regarding medical examinations performed on her by Respondents’ experts on the grounds that the examinations were a direct violation of the standard set forth by the South Carolina Supreme Court in *Fairchild*. (Motion, R. p. 169; see also Memo in Opp., R. p. 110; Hr’g Tr., p.404, line 4 – p. 408, line 20).

Mrs. Whitfield’s counsel 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, SCRPC. (Memo in Opp., R. p. 110; Hr’g Tr., R. p.404, line 4 – p. 408, line 20). See *Fairchild v. Dept. of Transp.*, 683 S.E.2d 818, 826, 385 S.C. 344 (Ct. App. 2009), affirming the trial court’s

finding that, “independent means independent and that means no witness has previously been identified by the Plaintiff or the Defendant gives the independent medical exam.”

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

Respondents’ contention that Petitioner “opened the door” to discussion of the examinations by purportedly placing the examinations before the jury during examination of her own witnesses is incorrect and directly contradicted by the record. First, as noted above, the trial court had already denied Petitioner’s Motion and Limine and ruled that the Respondents could introduce evidence of their experts’ mental and physical examinations at trial. Further, the Court specifically instructed Respondents’ counsel that they could bring up their experts’ opinions in their opening statement, which they expressly did:

Opening Statement by Mr. Smyth:

We are also going to bring you some expert witness testimony to help you understand that. So we have hired an internationally-recognized plastic surgeon from Fort Lauderdale. His name is Dr. Perez. He’s literally spoken in over twenty different countries on surgery procedures. He’s been in practice more than thirty years. He does this surgery on a regular basis.

He’s going to come to this courtroom and he’s going to tell you that he’s looked at the medical records in this case, he’s looked at the photographs in this case, he’s examined all the evidence, he’s read the deposition testimony of all the witnesses. And he’s going to offer you his opinion. And I suspect that his opinion is going to support the care that Dr. Schimpf provided to Ms. Whitfield.

Dr. Perez is also going to look at the causes. And he’s going to evaluate the evidence and tell us what else could have caused this

wound to separate besides the tension. And you're going to get to hear that information from him, as well.

[...]

So we're going to bring you another expert who's one of the world's leading experts in psychiatry, Dr. James Ballenger. Dr. Ballenger founded the Institute of Psychiatry at MUSC. He lives here in Charleston and he has incredible expertise in the field of psychiatry. He's written the textbook that psychiatrists turn to when they're going to make a diagnosis.

He's going to come and tell you that he's read the psychiatric records of Ms. Whitfield and he's looked at all of the records and the testimony and the evidence in the case and he's going to give you his opinion as to why that matters.

How does it help us understand what happened here? How does a patient go from having a successful procedure, three or four weeks later develops a complication she was told could happen, into thinking this man (pointing) kicked her out of her [sic] office?

Which I guarantee you he's going to come on this stand and tell you he's never done in his life. How do you explain that? Dr. Ballenger is going to tie those pieces together for us.

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

Further, had Petitioner's counsel not examined Mrs. Whitfield's psychiatrist, Dr. Sara Marcino, about her present sense impressions and medical opinion of Dr. Ballenger's examination, he would not have been able to elicit testimony from her regarding the multitude of issues plaguing the examination. (See Trial Tr., R. p. 1124, line 4 to p. 1128, line 6, wherein Dr. Marcino describes, *inter alia*, the problems that arise when there is a lack of baseline trust between an examiner and examinee, directly contradicting Respondents' claim that Petitioner's experts "found nothing out of the ordinary during the examinations.")

Respondents' contention that "Petitioner cannot point to any prejudice" is also without merit. The admission of testimony by Respondents' previously-retained experts was highly

prejudicial to Mrs. Whitfield because they had already reached conclusions and rendered opinions as to Mrs. Whitfield's physical and mental state before conducting the examinations. (Trial Tr., R. p. 1383, line 10 -13; p. 1394, lines 1-7; p. 1507, lines 6-9; p. 1508, line 13 – p. 1509 line 9; p. 1544, lines 3-5; p. 1553, lines 8-17) They were biased experts who had already been paid thousands of dollars by Defendants before any physical or mental examinations had taken place. (Trial Tr., R. p. 1507, lines 6-18). Respondents' experts could not provide the unbiased assessment contemplated by Rule 35, SCRCF. This is the very reason why the Supreme Court rendered its decision in *Fairchild*.

C. Petitioner properly moved to question Respondents' Office Manager regarding her compensation and ongoing sexual relationship with Dr. Schimpf in order to elicit evidence of bias. There was no question at trial as to the character or content of the testimony Petitioner wished to elicit from Respondents' Office Manager.

As noted in Petitioner's brief, on August 26, 2019, Defendants' counsel filed Defendant's Motion in Limine to Seal and Exclude Certain Inadmissible Evidence, wherein they sought to preclude Mrs. Whitfield's counsel from eliciting any testimony regarding Dr. Schimpf's personal life, including any evidence of an admitted, nine-year sexual relationship with Office Manager. (Motion, R. p. 179). During her deposition on February 11, 2019, Office Manager testified that she had been engaged in a sexual relationship with Dr. Schimpf *and his wife* since 2010, and had engaged in sexual relations with Dr. Schimpf as recently as a week before her deposition (Depo. Tr., 2/11/19, R. p. 376, line 5 – p. 377, line 9). Respondents claim that Petitioner was trying to embarrass Respondents by subpoenaing Dr. Schimpf's wife are unfounded, particularly considering that the Office Manager testified that the wife not only had knowledge of the extramarital relationship, but was also a party to it.

Defendant's Motion in Limine was heard at trial, at which point, Defendant's counsel also argued that Mrs. Whitfield's counsel should be precluded from eliciting any testimony from

Office Manager regarding the amount of money she is being paid by Dr. Schimpf, or about any of the various complementary cosmetic procedures he has performed on her throughout the years.¹ (Trial Tr., R. p. 933, line 21 – p. 941, line 5).

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

¹ Respondents’ Brief, without providing any supporting authority, attempts to characterize the Office Manager’s testimony regarding the numerous complementary cosmetic procedures she received from Dr. Schimpf as “protected health history.” Respondents ignore that privacy rules under HIPAA and equivalent state laws do not apply to an individual’s testimony regarding their own medical history, but rather to the non-consensual release of information by “covered entities” such as Healthcare providers and Health plans. 45 CFR 160.102. Further, “short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.” *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 687, 692 (2010).

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

As noted above, there was no question at trial as to the character or content of the testimony. (Tr. Transcript, R. p. 590, line 13 – p. 591, line 19; p. 602, line 9 to p. 603, line 13; p. 06, lines 4 -13). During her deposition, the Office Manager admitted to an ongoing sexual relationship with Dr. Schimpf and testified as to the various forms of compensation she received from him. The Office Manager had also testified as to her salary and the numerous complimentary cosmetic procedures she received from Dr. Schimpf over the years. (Depo. Tr., 2/11/19, R. p. 377, line 10 to p. 385, line 22). Petitioners’ lawyers even filed the depositions for purposes of entering and preserving the testimony the record (Trial Tr., R. p. 590, line 13 – p. 591, line 19). In addition, the very purpose of Respondents’ Motion in Limine, filed August 26, 2019, was to exclude the Office Manager’s testimony due to the admission made by her during her deposition. (Motion, R. p. 179).

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

[W]hen it is clear from the record that prejudice exists, the issue will be preserved on appeal despite the absence of a proffer. See *State v. Myers*, 301 S.C. 251, 391 S.E.2d 551 (1990). The reason for the rule requiring a proffer of excluded evidence is to enable

the reviewing court to discern prejudice. *Id.* That rule has been relaxed where the record clearly demonstrates prejudice. *Id.*

The record reflects Thomason was going to testify to the statements Walker made in his letter to her. The record clearly indicates King would be prejudiced by the exclusion of Thomason's testimony. Therefore, the issue of whether Thomason's testimony was properly excluded is preserved for review despite the lack of a proffer.

Similarly, in the present case, it is clear that the Office Manager would have testified as to her ongoing sexual relationship with Dr. Schimpf and the types of compensation she received from him. Exclusion of this testimony was the very subject matter of Respondent's Motion in *Limine*.² Further, it was clear that Mrs. Whitfield was prejudiced by the exclusion of this testimony because she had no other means by which to establish the Office Manger's interest, bias, or partiality toward Dr. Schimpf and impeach her credibility. It is clear from the Record that Ms. Whitfield was prejudiced by the exclusion of the testimony, which would have undermined the Office Manager's credibility and demonstrated bias. Accordingly, a proffer was not necessary and the issue raised by Mrs. Whitfield as to the exclusion of the Office Manager's testimony was properly preserved for appeal pursuant to Rule 103(a)(2), SCRE and this Court's decision in *State v. King*.

² Respondents' Motion in *Limine* conceded that Petitioner had a right to establish bias through cross-examination, but then attempted to preclude Petitioner from examining the Office Manager about her ongoing sexual and financial relationship with Dr. Schimpf as the source of said bias, stating, "If Plaintiff wishes to establish that the witness may be loyal to Dr. Schimpf, or that their interests are aligned, she is entitled to do so and will do so by examining her regarding other reasons aside from the Defendant's private personal life." (R. p. 187). Curiously, Respondents' Motion expressly acknowledges the existence of Dr. Schimpf and the Office Manager's extramarital relationship, stating, "neither the Defendant or witness have ever denied the information at issue." (R. at *Ibid.*)

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

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

Here, Office Manager's long-standing sexual relationship with Dr. Schimpf and her "emotions or feelings toward him" are likely to have "a slanting effect" upon her testimony. Her "self-interest in the outcome of the case" can be directly tied to maintaining her personal and professional relationship with Dr. Schimpf. Minimally, a fact exists which tends to show "interest, bias, or partiality of the witness." Accordingly, Respondents' contention that the Office Manager's relationship with Dr. Schimpf was irrelevant is clearly without merit.

The trial court failed to take into account the law and particular circumstances of the case, and, instead, based its ruling on the conclusory findings: "I don't think she's biased" and "I don't think anything has been elicited as to fact that she's been untruthful in any way." (Trial Tr., R. p. 939, lines 9-12). In doing so, the trial court 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 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, 354 S.E.2d 565 (1987)). Accordingly, this Court should grant the relief sought in Ms. Whitfield’s petition, vacate the Court of Appeals’ unpublished opinion, and remand this case for a new trial on the merits.

CONCLUSION

Mrs. Whitfield respectfully requests that this Honorable Court grant the relief sought in 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 relief: 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,

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