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Feb 21 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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 RETURN TO PETITIONER'S
MOTION FOR TAXATION OF COSTS**

Respondents Dennis K. Schimpf, M.D. ("Dr. Schimpf") and Sweetgrass Plastic Surgery ("Sweetgrass"), by and through their counsel, respectfully request that this Court deny Petitioner's Motion for the taxation of \$16,551.20 in costs and attorneys' fees against Respondents. As detailed below, this Court's decision to reverse and remand on only one of Petitioner's three issues on appeal and the case's other procedural history does not support an award of costs or attorneys' fees.

BACKGROUND

This appeal arose out of medical malpractice case tried to a Charleston County jury between August 26, 2019 and August 30, 2019 that resulted in a complete and unanimous verdict for Respondents. The central issue at trial was whether Dr. Schimpf applied too much tension in closing the incision line on Petitioner's right breast, which allegedly caused it to separate after Petitioner underwent an elective, bilateral replacement of her breast implants, as well as a breast lift.

Despite this, on October 11, 2019, Petitioner filed a Notice of Appeal seeking to overturn the decision of the jury on the grounds that (i) Respondents' experts should have been excluded from testifying about the results of the examinations that the circuit court ordered pursuant to Rule 35 of the South Carolina Rules of Civil Procedure and that Petitioner underwent; (ii) Petitioner should have been permitted to cross examine Sweetgrass's Office Manager about her compensation and personal relationship with Dr. Schimpf because she testified that Dr. Schimpf would not have been angry during an appointment with Petitioner; and (iii) Petitioner should have been granted directed verdict on her negligence per se cause of action because certain medical records were lost and/or could not be located when Dr. Schimpf's dictation recorder malfunctioned and a third party physician could not locate preoperative photos of Petitioner. On November 23, 2022, the Court of Appeal rejected all of Petitioner's arguments and affirmed the decision of the trial court. On January 20, 2023, the Court of Appeals also rejected Petitioner's Petition for Rehearing.

Consequently, on February 17, 2023, Petitioner petitioned for Writ of Certiorari. However, her Petition to this Court sought review of four alleged issues: (i) whether the Court of Appeals' opinion relating to the testimony of Respondents' experts contravened *Fairchild v. South Carolina*

Department of Transportation; (ii) whether the Court of Appeals’ opinion relating to the testimony of Respondents’ experts conflated the standard for discovery with the standard of admissibility; (iii) whether the Court of Appeals erred in failing to apply the clear exception to proffering testimony in its analysis of the Office Manager’s testimony; and (iv) whether the Court of Appeals erred in failing to grant directed verdict to Petitioner’s negligence per se claim relating to medical records. On March 5, 2024, this Court granted certiorari but only to the first three issues presented by Petitioner. In other words, it declined to review the denial of directed verdict on Petitioner’s negligence per se cause of action, so the Court of Appeals’ decision was affirmed as to that issue.

On January 8, 2025, this Court reversed and remanded and issued its opinion. In its opinion, it specified that it was only reversing as to one issue: the Court of Appeals’ exclusion of evidence of the Office Manager’s alleged bias. Indeed, it expressly held that the Court of Appeals was “correct to affirm” on the issues relating to Respondents’ experts. Therefore, while a judgment was reversed, Respondents were ultimately successful on almost all of the issues, so the decision only has the “effect of affirming or reversing in part or vacating the judgment of the lower court[.]” See Rule 242(j)(i), SCACR. (“When the decision of the Supreme Court has *the effect of* affirming or reversing in part or vacating the judgment of the lower court or tribunal which was on appeal, costs shall be allowed only as ordered by the Supreme Court.”) (emphasis added).

ARGUMENT

This Court has authority to deny costs and attorneys’ fees to Petitioner. Rule 222(a), 242(j)(1), SCACR. In this instance, denying costs and attorneys’ fees is appropriate and equitable. The decision of this Court, while largely favorable to Respondents, was based on the rationale of the trial judge that was not offered or argued by Respondents. As this Court’s opinion points out, “[f]or reasons not explained, the trial court then analyzed the admissibility of the evidence [of

the Office Manager’s testimony] under Rule 608(a), SCRE—the subsection of Rule 608 dealing with attacking credibility with evidence of the witness's character for untruthfulness.” (emphasis added). As further demonstrated by this Court’s opinion, it was also based on the trial judge’s misapplication of the law and his role:

- “[t]he trial court also relied on Rule 403, SCRE, stating initially at the pretrial hearing the evidence was "more prejudicial than probative," and then during trial finding, ‘I just don't see the probative value outweighing the prejudicial effect of . . . her testifying as to the relationship that she may have with the defendant.’ These two statements are based on a fundamental misunderstanding of the law set forth in Rule 403, and this misunderstanding undoubtedly led the trial court to make its erroneous ruling;”
- “[t]he trial court's failure to apply the correct legal standard in these two respects was itself an abuse of discretion[;]”
- “the trial court misunderstood its role in evaluating the admissibility of evidence. The trial court 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 the fact that she's been untruthful in any way.’”

Stated another, the lone ground for the reversal was not due to any improper conduct by Respondents, so an assessment of costs, which is tantamount to a sanction is not warranted.

Equally important, Respondents did not initiate this appeal or the underlying lawsuit that they were already forced to litigate once and will have to litigate at their expense again. Thus, Petitioner was the only party who was in the position to avoid expenses here. Finally, Respondents were entirely successful before the Court of Appeals (and the jury), so an assessment of costs under both Rules 222 and 242, SCACR would be inherently unjust. This is particularly true given the sole ground for reversal does not affect the merits of the case – i.e., whether Respondents complied with the standard of care during Petitioner’s breast surgery.

CONCLUSION

Based on the foregoing, Respondents request that this Court deny Petitioner’s Motion for the Taxation of Costs in its entirety. The award only stands to punish Respondents for matters out of their control and does not promote the interests of justice.

Respectfully submitted,

s/Todd W. Smyth

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February 21, 2025