THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2024-001698

Patricia P. McGougan and Edgar McGougan, …….. Appellants,

v.

Richard F. Frisch, M.D., Timothy E. West, M.D., The Southeastern Spine Institute, L.L.C., and Lowcountry Infectious Diseases, P.A. …… Respondents.

REPLY BRIEF

Daniel W. Luginbill
Julia M. Flumian
McGowan, Hood, Felder & Phillips, LLC
10 Shem Drive, Suite 300
Mt. Pleasant, SC 29464
dluginbill@mcgowanhood.com
jflumian@mcgowanhood.com

Jordan C. Calloway
McGowan, Hood, Felder & Phillips, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
jcalloway@mcgowanhood.com

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

South Carolina

Other Jurisdictions

Court Rules

Secondary Source

REPLY ARGUMENT

1. There is no merit in Respondents' preservation argument.

Respondents err in suggesting the hearsay dispute in this appeal was not preserved for appeal. The primary aim of error preservation rules is to ensure an issue was raised and ruled on. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). Whether West's reference to IDSA Guideline Paragraph 7 was hearsay is an issue the circuit court plainly considered and ruled on. The objection to this testimony was identified as "801," the South Carolina Rule of Evidence defining the term "hearsay." (R. p. 933, lines 10-11). Similarly, Respondents err in arguing a proffer was required to preserve issues regarding the disputed IDSA Guidelines. As the South Carolina Supreme Court recently held, a proffer is not always required to preserve an issue for appeal. Whitfield v. Schimpf, 444 S.C. 633, 648, 911 S.E.2d 310, 318 (2025) (citing Rule 103(a)(2), SCRE). An evidentiary admissibility issue is preserved where the evidence and basis for admission "were apparent from the context." Id. Here, the context shows the circuit court was unwilling to permit the McGougans to have their opponents' experts read from a medical treatise during cross examination. (R. p. 774, lines 18-19) ("You don't get to just publish hearsay under the guise of somebody being an expert").

The McGougans' counsel did not offer further argument or a proffer because she was following the governing rules on evidence admissibility disputes and arguments of counsel during trial. Rule 43, SCRCP imposes a number of duties and limitations on attorneys in their trial conduct. Subsection (i) is especially important to the disputes at issue in this appeal. That subsection categorically prohibited the McGougans' attorney from presenting an argument on the objection to West's proposed testimony absent a request from Judge Jefferson. Rule 43(i), SCRCP ("No argument shall be made on objections to admissibility of evidence . . . unless specifically

requested by the court"). The transcript shows Judge Jefferson never requested the McGougans' attorney present an argument in response to opposing counsel's objection. In fact, Judge Jefferson interrupted when the McGougans' counsel attempted to clarify her question to West. (R. p. 933, lines 16-17). From there, Judge Jefferson made her ruling immediately and issued an instruction to the jury to disregard the previous question-and-answer between the McGougans' attorney and West. (R. p. 933, lines 19-24).

Once this ruling had been made, the McGougans' attorney was prohibited by rule from pressing the matter further. Rule 43(i), SCRCP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced."). Thus, the McGougans' attorney followed the rules, the key hearsay disputed was known and ruled on, and Respondents' preservation arguments should be rejected. At the very least, this is not the type of situation where Respondents' questionable preservation concerns should prevent the Court from addressing the evidentiary issues on their merits. Spring Valley Interests, LLC v. Best for Last, LLC, 444 S.C. 281, 290, 907 S.E.2d 124, 128 (Ct. App. 2024) (citing Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring) ("where the question of preservation is subject to multiple interpretations, any doubts should be resolved in favor of preservation").

2. West did not limit his testimony to "treatment decisions."

Respondents challenge only one component of the Rule 803(18), SCRE, requirements for applying the learned treatise hearsay exception. Respondents ask the Court to find West was not an "expert witness" simply because they did not identify him as such to the jury during his testimony. (Frisch Br. at 23) (arguing West "was not identified" as an expert) (West Br. at 17). However, as this Court has long held, West's status as lay or expert witness is not determined by

how his attorneys choose to characterize his testimony. Ward v. Epting, 290 S.C. 547, 555-56, 351 S.E.2d 867, 872 (Ct. App. 1986) (finding substance of testimony showed defendant physician "testified as an expert" even though his attorney stated on record that defendant "took the stand as a party, not as an expert").

Beyond that, Respondents claim West "did not offer any expert opinions" but rather limited himself to describing "his treatment decisions." (Frisch Br. at 24) (West Br. at 18). The trial transcript shows otherwise. The second half of West's direct examination testimony covered a number of intricate medical matters beyond his "treatment decisions" for Ms. McGougan's post-operative infection. West's attorney asked him whether a certain antibiotic is used to treat "the plague" (R. p. 899, lines 7-8), a medical condition from which no one has suggested Ms. McGougan suffered. West responded with a full paragraph response ending with references to "kids . . . with Rocky Mountain spotted fever." (R. p. 899, line 17). On the next page, West talked about "an alcoholic . . . sleeping under the bridge" and spreading tuberculosis, another condition with no connection to Ms. McGougan's medical treatment. (R. p. 900, lines 13-15). At trial at least, West made no effort to hide the fact that he was straying beyond "treatment decisions" into the realm of traditional expert opinion. He prepared for his trial testimony by searching for medical articles to support his thesis on rheumatoid arthritis and other medical maladies. (R. p. 902, lines 15-18).

In sum, since West chose to testify as an expert would during his direct examination, he was subject to the evidentiary rules for an "expert witness" on cross.[1] West's attorney should not

[1] Other courts have recognized the learned treatise hearsay exception can be applied during a treating physician's testimony. See e.g. Musorofiti v. Vlcek, 783 A.2d 36, 47-48 (Conn. App. 2001) (finding trial court was within its discretion in applying exception during cross-examination of plaintiff's treating physician).

be permitted to elicit opinions unrelated to Ms. McGougan's specific treatment decisions and then balk at the use of reliable medical literature calling West's opinions into question. As this court recognized in Ward, a treating physician who chooses to offer expert opinions may open the door for contrary evidence that otherwise may not be admissible. 290 S.C. at 556, 351 S.E.2d at 872-73 (finding treating physician's choice to offer expert opinions made admissible his failure to achieve medical board certification). The McGougans' attempt to use IDSA Guideline Paragraph 7 during West's cross-examination met all requirements for the learned treatise hearsay exception, and the circuit court erred in excluding this evidence from trial.

3. IDSA Guideline Paragraph 7 was a "related writing or statement" to the IDSA Paragraph 5 West read and relied on in his direct examination testimony.

Respondents do not dispute that jurors only received a small portion of the IDSA Guidelines regarding the treatment of skin and soft tissue infections like the one from which Ms. McGougan suffered at the time West ordered antibiotics for her. Instead, they argue what West touted from IDSA Guideline Paragraph 5 was so distinct from Paragraph 7 that the circuit court was correct in keeping Paragraph 7 from the jury. (Frisch Br. at 27-28; West Br. at 21). This argument is at odds with the governing rule and evidence presented at trial.

Once West chose to bring the IDSA Guidelines into the trial by reading Paragraph 5 to justify his treatment decisions, Rule 106, SCRE, gave the McGougans the right to insist on the introduction of "any other part" of the IDSA Guidelines or even a separate document ("any other writing") that "ought in fairness to be considered" contemporaneously with" Paragraph 5. Per its title, Rule 106 is meant to ensure the admissibility of "related writings or statements." Paragraph 7 meets that standard. Both Paragraph 5 and Paragraph 7 are part of an article appearing in the medical journal *Clinical Infectious Diseases* titled "Clinical Practice Guidelines by the Infectious Disease Society of America for the Treatment of Methicillin-Resistant Staphylococcus Aureus

Infections in Adults and Children."[2] Not only that, they are both part of the article's first section devoted to "management of skin and soft-tissue infections (SSTIs) in the era of community-associated MRSA." In fact, they appear on the same page, separated by a single sentence. Respondents' claim that Paragraphs 5 and 7 are "separate guidelines applying to different circumstances" is unfounded. (Frisch Br. at 28). Paragraph 7 covers "hospitalized patients with complicated SSTI" including "patients with deeper soft-tissue infection[s] . . ." (R. p. 933, lines 5-12).

That is precisely the situation Ms. McGougan faced, and West's treatment decisions made during her hospitalization were essential components of West's alleged medical negligence. The McGougans' infectious disease expert Dr. Mitchell Blass testified to errors West made during Ms. McGougan's September 2016 hospitalization including his choice to discontinue the antibiotic after approximately five days and to begin using a course of oral minocycline. (R. pp. 1232-34). Thus, despite West's protestations, Paragraph 7's provisions were relevant to the disputed medical issues and including Paragraph 7 was important to providing essential context to the Paragraph 5 provisions in which West sought cover in his direct examination testimony. Respondents contend precedent has limited Rule 106 in a way that prevents the McGougans from invoking it here. (Frisch Br. at 27) (citing State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998)). But, Taylor holds only that Rule 106 does not contemplate the introduction of portions of a witness's statement unrelated to "the only issue encompassed" by the statement's original use earlier in trial. Id. (finding circuit court erred in applying Rule 106 to admit entire statement when portion was first

[2] Catherine Liu et al. "Clinical Practice Guidelines by the Infections Diseases Society of America for the Treatment of Methicillin-Resistant *Staphylococcus aureus* Infections in Adults and Children," *Clinical Infectious Diseases* (2011), available at https://academic.oup.com/cid/article/52/3/e18/306145

offered solely on the issue of a disputed date within it). While Taylor may have prevented the McGougans from publishing the IDSA Guidelines in full, it should not be read to place Paragraph 7 from beyond Rule 106's reach. Paragraph 7 was adjacent to Paragraph 5, covered the same issue for which West cited Paragraph 5, and related directly to the propriety of West's treatment decisions that stand at the center of this case.

4. The IDSA Guidelines were probative on the case's central issue as evidenced by their central role in West's defense.

Finally, Respondents argue that the wrongfully excluded IDSA Guideline Paragraph 7 caused no harm because the alleged error was either remedied by later events in the trial or was not a factor in its ultimate outcome. (Frisch Br. 28-30; West Br. at 22-24). Both arguments fail to acknowledge the substantial probative value the IDSA Guidelines had in this case and the unique benefit of having Paragraph 7 read in conjunction with, and as a counterweight to, West's reliance on Paragraph 5.

As this Court recently held, whether a legal error is prejudicial depends on the unique circumstances presented by the case, and "the materiality and prejudicial character of the error must be determined from its relationship to the entire case." Matter of Daily, 443 S.C. 557, 905 S.E.2d 310 (Ct. App. 2024) (quoting In re Care & Treatment of Harvey, 355 S.C. 53, 62-63, 584 S.E.2d 893, 897 (2003)). Respondents first attempt to downplay Paragraph 7's exclusion by suggesting the McGougans got the equivalent of what Rules 106 and 803(18), SCRE entitled them through follow-up questions posed to West during his cross-examination. (Frisch Br. at 29). Rule 106 called for "the introduction" of Paragraph 7 "contemporaneously with" Paragraph 5 as a matter of "fairness" given West's choice to read Paragraph 5 to the jury. Similarly, Rule 803(18) required that, since Paragraph 7 met all requirements for the learned treatise, it was to be "read into

evidence." Thus, had the circuit court properly applied these rules, Paragraph 7 would have been read verbatim to the jury.

The record rejects Respondents' suggestion that the McGougans got the equivalent of this through their cross-examination of West after Paragraph 7 was excluded. None of the questions-and-answers that followed were even a reasonable facsimile for reading Paragraph 7 to the jury. To the extent West was asked direct questions about Paragraph 7's contents, he gave anything but a straight answer. (R. p. 934, lines 1-6). These exchanges could most fairly be described as an unsettled debate about both what Paragraph 7 said and what it meant. (R. p. 934, line 8 – p. 935, line 21). It is simply not reasonable to read West's self-serving and defensive responses as equal to a full recitation of Paragraph 7's text followed by whatever explanation West might attempt to offer. It certainly was not equal to the way in which Paragraph 5—the adjacent IDSA Guideline West promoted—was presented to the jury. (R. p. 932, lines 20-24) (West reading a portion of Paragraph 5 uninterrupted and verbatim). The notion that West's follow-up answers could be equal to a full reading of Paragraph 7 also conflicts with another fundamental evidentiary principle—the best evidence of Paragraph 7's contents is Paragraph 7's original text, not a West-curated version of what it says and means. Rule 1002, SCRE (generally requiring "the original writing" to prove the writing's contents).

Respondents also argue that any wrongful exclusion of Paragraph 7 was harmless because it was inconsequential. (Frisch Br. at 30). Frisch even goes so far as to speculate on the jury's reasoning for its verdict, assuring the Court it was unrelated to Respondents' compliance with or deviation from the IDSA Guidelines. (Frisch Br. at 30); see also (West Br. at 24) (arguing record lacks indications that IDSA Guidelines issue was influential in verdict). However, to discard an error as harmless, the Court would have to find "beyond a reasonable doubt that the alleged error

did not contribute to the verdict." Wells v. Halyard, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000) (citing State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998)). This record does not support that finding. Excluding Paragraph 7 could not be a harmless error because the IDSA Guidelines addressed the most important issue before the jury. In re Care & Treatment of Thomas S., 402 S.C. 373, 379, 741 S.E.2d 27, 30 (2013) (citing State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001)) (holding that an evidentiary admissibility error is not harmless when it goes to the "heart of the case").

The liability question in a medical malpractice claim centers on whether the defendant doctor breached the standard of care by failing to do what a reasonably competent physician would do under similar circumstances. Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014). To answer this question, jurors are often called on to determine whether the physician's thought process was reasonable and whether he adhered to objective standards recognized in his field of practice. The IDSA Guidelines were a key factor in those considerations. According to West, it was the IDSA Guidelines that he "had in mind" when he made crucial treatment decisions for Ms. McGougan. (R. p. 889, line 20 – p. 890, line 6); (R. p. 931, line 24 – p. 932, line 2) (West telling jurors IDSA Guidelines "helped formulate [his] decision-making").

Moreover, the Court should look with extra suspicion at West's current position that erroneously excluding IDSA Guidelines Paragraph 7 was unrelated to the jury's verdict, since the IDSA Guidelines were a central pillar of his argument for a defense verdict below. West's closing argument covers 14 pages in the trial transcript. Within it, West's attorney referenced guidelines 11 different times. West's counsel promoted the IDSA Guidelines as the reason for finding in his client's favor. Those guidelines supposedly were the reason West's experts concluded West met

the standard of care. (R. p. 1113, lines 15-16) (arguing West's infectious disease expert "told you exactly what the guidelines say for a soft-tissue infection . . ."). West's counsel specifically asked jurors to think back to West's testimony on the IDSA Guidelines during their deliberations. (R. p. 1114, lines 3-4) (arguing West "knew the guidelines, he knew exactly what they required"). According to West's closing argument, the IDSA Guidelines were not just relevant to the standard of care, they *were* the standard of care. (R. p. 1114, line 21 – p. 1115, line 9) ("We talked about the [IDSA]'s guidelines . . . That's good care. That's standard of care"); see also (R. p. 1117, lines 11-12) (summarizing testimony of West and his experts by arguing, "They knew what they were doing. They knew the guidelines").

Finally, Frisch errs in suggesting any prejudice arising from errors during West's testimony must be limited to the verdict against West. (Frisch Br. at 30). Although Frisch brought West in to consult on the matter, Frisch recognized he remained responsible to make sure Ms. McGougan's post-operative infection was properly addressed. (R. p. 697). Accordingly, Frisch also played an active role in the process of selecting antibiotics to address Ms. McGougan's infection. (R. pp. 677-78). The governing IDSA Guidelines are as important in evaluating Frisch's medical decisions in this context as they are for West.

In sum, the circuit court's erroneous exclusion of IDSA Guideline Paragraph 7 prejudiced the McGougans' case because reading Paragraph 7 had unique probative value on the case's most important liability issue. Nothing in West's cross-examination was remotely equivalent to the full reading of Paragraph 7 to which the McGougans were entitled under Rules 106 and 803(18). Cf. Brambley v. McGrath, 788 A.2d 861, 862 (N.J. Super. App. Div. 2002) (finding exclusion of medical device pamphlet was prejudicial error where its exclusion prevented plaintiff from rebutting defendant's misleading argument0. Nor can Respondents credibly claim the IDSA

Guidelines' specific contents were unimportant to the trial's outcome when West made his alleged compliance with those Guidelines a central part of his testimony and closing argument.

CONCLUSION

Based on the arguments above and those in their earlier brief, the McGougans respectfully request the Court reverse and remand for a new trial.

Respectfully submitted,

s/ Jordan C. Calloway
Daniel W. Luginbill
Julia M. Flumian
McGowan, Hood, Felder & Phillips, LLC
10 Shem Drive, Suite 300
Mt. Pleasant, SC 29464
dluginbill@mcgowanhood.com
jflumian@mcgowanhood.com

Jordan C. Calloway
McGowan, Hood, Felder & Phillips, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
jcalloway@mcgowanhood.com

Attorneys for Appellants

Rock Hill, SC
May 28, 2025