RECEIVED
Jun 03 2025
SC Court of Appeals

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, LLC, and Lowcountry Infectious Diseases, P.A.,

Respondents.

---

# FINAL BRIEF OF RESPONDENTS TIMOTHY E. WEST, M.D. AND LOWCOUNTRY INFECTIOUS DISEASES, P.A.

---

Todd W. Smyth
Allie A. Maples
Smyth Whitley, LLC
115 Central Island Street, Suite 250
Charleston, South Carolina 29492
Tel: (843) 606-5635
Fax: (843) 654-4095
tsmyth@smythwhitley.com
amaples@smythwhitley.com

*Attorneys for Respondents Timothy E. West, M.D. and Lowcountry Infectious Diseases, P.A.*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### RULES



### TREATISES

## COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court properly act within its discretion in sustaining Respondent Timothy E. West and Lowcountry Infectious Diseases, P.A.'s hearsay objection and refusing an attempt by Appellants, if any, to ask Dr. West to read a paragraph from a medical treatise?

   a. Is the evidentiary issue preserved for appeal where neither the paragraph at issue nor Appellants' evidentiary arguments were proffered at the Circuit Court?

   b. Can the excluded paragraph be used to impeach an uncontradicted treating physician's testimony where the paragraph would be used as direct proof of negligence?

   c. Can the excluded paragraph be admitted under the learned treatise hearsay exception if used with a non-expert treating physician?

   d. Can the excluded paragraph be admitted pursuant to the rule of completeness where no part of it was introduced to the jury?

II. Did Appellants suffer prejudice where they did not intend for the excluded paragraph to be read, and the paragraph was about inpatient antibiotic orders and Appellants were only critical of Dr. West's outpatient antibiotic orders?

## INTRODUCTION

This medical malpractice appeal arises from the unanimous defense verdict rendered at the end of a six-day jury trial held between September 9-16, 2024 before the Honorable Deadra L. Jefferson and during which the jury found the Defendants not liable for negligence or loss of consortium for allegedly failing to promptly diagnose and treat Appellant Patricia P. McGougan's ("Ms. McGougan") post-operative infection with a sufficient course of IV antibiotics. This Court

should affirm the jury's verdict because Appellants' lone appellate issue about whether Appellants should have been permitted to ask Dr. West to read a paragraph ("Paragraph 7") from an infectious disease guideline onto the record was not preserved, and their arguments are otherwise without merit as Appellants impermissibly seek to establish the standard of care through the guideline, Dr. West was not offered as an expert witness, and Appellants did not suffer any prejudice.

## COUNTER-STATEMENT OF THE CASE[1]

### I. Factual Background

On August 2, 2016, Ms. McGougan, a nurse with chronic pain and rheumatoid arthritis ("RA"), underwent a left L4 laminectomy and L4-L5 discectomy with Respondent Richard F. Frisch, M.D ("Dr. Frisch"), a surgeon with Respondent The Southeastern Spine Institute, LLC ("Southeastern Spine"). (R. p. 123, lines 15-21, p. 388, line 19-p. 389, line 9, p. 592, lines 6-22, p. 628, lines 17-19). She was discharged from the hospital the next day with a prescription for oral antibiotics, doxycycline 100 milligrams for seven days, and instructions for follow-up in two weeks. (R. pp. 1304, 1306-07). On August 16, 2016, Ryan Aprill, PA-C of Southeastern Spine saw Ms. McGougan for a postoperative visit and did not note any signs of infection. (R. p. 1307). It was not until August 23, 2016, during a subsequent postoperative visit with Anne Buck, PA-C of Southeastern Spine, that incisional discharge was first noted in Ms. McGougan. (R. p. 1308). Accordingly, during this visit, PA Buck prescribed an antibiotic, Bactrim, for Ms. McGougan. (*Id.*).

On August 30, 2016, PA Aprill prescribed an additional course of antibiotics for Ms. McGougan – this time, 100 milligrams of oral doxycycline. (R. p. 1310). She continued it the

[1] Respondents Timothy E. West, M.D. and Lowcountry Infectious Diseases, P.A. do not consent to be bound by Appellants' Statement of the Case, and, pursuant to Rule 208(b)(2), SCACR, submit their own Counter-Statement of the Case.

following week. (R. p. 1311). By September 8, 2016, PA Aprill noted that Ms. McGougan's incision seemed to be closing and that there was only minimal drainage on her bandage. (R. p. 1312).

However, on September 20, 2016, Ms. McGougan presented to Dr. Frisch with complaints of a fever and increased pain. (R. p. 1317). Dr. Frisch then noted wound dehiscence or separation but no active drainage. (*Id.*). He consequently admitted Ms. McGougan to the hospital for an MRI and blood culture to assess further treatment options. (R. pp. 1313-14). The MRI showed a collection of fluid behind the surgical site with a differential diagnosis of postoperative infection or small seromas (collections of fluid). (R. pp. 1315-16).

During this hospitalization, Dr. Frisch first asked Respondent Timothy E. West, M.D. ("Dr. West") of Respondent Lowcountry Infectious Diseases, P.A. as an infectious disease consultant. In other words, this hospitalization was Dr. West's first opportunity to care for Ms. McGougan. Since Dr. Frisch and Dr. West were assessing whether there was an abscess or seroma and they are treated differently, Dr. West recommended holding off on prescribing any antibiotic until they had more information from cultures as well as a decision about whether surgery was indicated. (R. pp. 1318-19).

On September 22, 2016, Dr. Frisch performed an incision and drainage of the lumbar spine and during which he found a pocket of purulent material over the previous surgical decompression site that he had cultured. (R. pp. 1321-22). Notably, during the procedure, Dr. Frisch had an IV antibiotic, vancomycin, administered. (R. p. 1323). Ultimately, the culture of the material revealed methicillin-resistant Staphylococcus aureus (MRSA). (R. p. 1320). Accordingly, after surgery, Dr. West ordered 1.25 grams of IV vancomycin every twelve hours for three days for Ms. McGougan, as well as an additional dose on September 26, 2016 prior to her discharge. (R. pp. 1324, 1353).

Additionally, prior to Dr. Frisch's discharge of Ms. McGougan, Dr. West wrote a prescription for Ms. McGougan for 100 milligrams of minocycline, another antibiotic, to be taken twice daily for fourteen days. (R. pp. 1325-26).

Ms. McGougan returned to Southeastern Spine for a follow up visit with PA Aprill on October 11, 2016 who found that Ms. McGougan was doing well and that her incision was healing well. (R. p. 1327). She also resumed seeing her rheumatologist and her RA medications. (R. p. 190, line 12-p. 191, line 8). On November 28, 2016, PA Buck saw Ms. McGougan again. (R. p. 1328). During this visit, Ms. McGougan complained of increased back pain and muscle spasms with the physical therapy. (*Id.*). PA Buck did not note any evidence of gross infection process but nevertheless recommended an updated lumbar MRI scan, which Ms. McGougan declined. (*Id.*).

Ms. McGougan chose not to undergo another MRI until her December 13, 2016 visit when she complained of increased back and leg pain. (R. p. 1330). Ms. McGougan underwent the second MRI on December 16, 2016. It showed "exuberant granulation tissue on the left at L4-5" and an "apparent residual lateral recess stenosis with probable compression of the left L5 root." (R. pp. 1331-32). Dr. Frisch met with Ms. and Mr. McGougan on the same day and discussed admission to the hospital for another infectious workup, but Ms. McGougan chose to wait to see if an increased medication dosage would help better control her pain. (R. pp. 1333-34).

By December 19, 2016, Ms. McGougan agreed to be admitted to the hospital again. (R. pp. 1335-36). Dr. West was then consulted for a second time. It was the first time that Dr. West had heard anything about Ms. McGougan's condition since her first work up. (R. p. 472, lines 10-23). Blood cultures showed MRSA. (R. pp. 1343-45) A CT scan and MRI both showed osteomyelitis (a bone infection). (R. pp. 1337-39). Dr. West also documented that Ms. McGougan was doing fairly well until mid-November when she resumed her RA medications. (R. pp. 1340-42). Dr. West

subsequently started Ms. McGougan on IV antibiotics via a PICC line. (R. pp. 1346-47). On January 3, 2017, Ms. McGougan was discharged to home health with a PICC line for three more months of antibiotics, weekly blood draws, and management by Lowcountry Infectious Diseases. (R. pp. 1348-49).

Between January 24, 2017 and March 28, 2017, Ms. McGougan treated with another provider at Lowcountry Infectious Diseases, Dr. Ebama. (R. p. 474, lines 6-13). She never returned to Respondents again. Instead, four months later, Ms. McGougan presented to a spine surgeon, Dr. Grossi, at Duke University, for reported continued low back pain. (R. p. 1299-1303). X-rays showed almost complete collapse of the disc space at L4-5. (*Id.*). However, Dr. Grossi noted that Ms. McGougan was "doing well" and did not recommend surgery. (*Id.*).

## II. Procedural History

On November 30, 2018, Appellants filed their Complaint. (R. pp. 8-12). Respondents timely answered, denying Appellants' allegations. (R. pp. 13-28). On September 9, 2025, the six-day trial began. During their case-in-chief, Appellants offered (i) an expert in orthopedic surgery, Dr. Davne, and (ii) an expert in infectious disease, Dr. Blass. Although Dr. Davne acknowledged that he was not an infectious disease expert and would defer to an infectious disease physician as to choice of antibiotic, Dr. Davne nonetheless opined that Dr. Frisch should have operated on Ms. McGougan on August 30, 2016 and that Dr. Frisch should have objected to Dr. West's order for oral antibiotics following her first hospitalization. (R. p. 170, lines 24-25, p. 206, lines 13-14, p. 206, line 22-p. 207, line 1, p. 215, lines 10-23). Appellants' second expert, Dr. Blass, opined that the doses of IV antibiotics administered to Ms. McGougan during her first hospitalization were "reasonable and prudent," but that the prescription for oral antibiotics to be taken as an outpatient was "inadequate" and "insufficient" and violated the standard of care. (R. p. 1237, lines 15-21). Neither Dr. Blass nor any of the other experts offered in the case were critical of Dr. West's care

*during* Ms. McGougan's hospitalizations – only his handling of Ms. McGougan's care as an outpatient. Equally important, neither Dr. Blass, nor any of the other experts who testified in this case were asked about the paragraph now at issue in this appeal, Paragraph 7.

During the Respondents' cases-in-chief, Dr. Frisch testified as treating physician and offered two experts without objection: (i) an expert in orthopedic surgery, Dr. Glaser, and (ii) an expert in infectious disease, Dr. Dailey. (R. p. 733, line 24-p. 734, line 7, p. 801, lines 20-25). As an orthopedic surgeon, Dr. Glaser did not offer any opinions relating to Dr. West but testified that there were no "red flags" for an orthopedic surgeon to second guess the infectious disease consultant or get a second consult. (R. p. 745, lines 11-16). Dr. Daily similarly testified that there was no reason for Dr. Frisch to intervene in Dr. West's orders; that the IV antibiotics were appropriate in type and duration; and that the discharge prescription for oral antibiotics was appropriate and within the standard of care. (R. p. 804, lines 12-20, p. 814, lines 20-25, p. 815, line 24-p. 816, line 7).

Dr. West also testified about his care and treatment of Ms. McGougan. He also offered an infectious disease expert, Dr. Simmons, without objection. (R. p. 953, lines 15-21). Unlike Dr. West who only testified about the specific care that he provided and his decision making for it, Dr. Simmons opined that Dr. West's care met the standard of care. (R. p. 954, lines 19-25). Specifically, he opined that the IV antibiotic order was appropriate in type and duration for MRSA and that the oral antibiotic ordered at discharge was appropriate. (R. p. 954, lines 20-25, 957, lines 18-25).

At the close of the case, the Circuit Court charged the jury on the applicable legal principles without any objection by Appellants, and the jury returned its verdict in favor of all Respondents, specifically finding that:

- The Plaintiffs did not prove by a preponderance of the evidence that Dr. Frish and Southeastern Spine Institute deviated from the standard of care; and
- The Plaintiffs did not prove by a preponderance of the evidence that Dr. West and Lowcountry Infectious Diseases deviated from the standard of care.

(R. pp. 1068, 1167). The Appellants made a post-trial motion for a new trial solely based on the thirteenth juror doctrine, arguing that the jury's verdict is against the manifest weight of the evidence. (R. p. 1170, lines 21-24). The Circuit Court denied the new trial motion by Order filed on September 27, 2024, and entered judgment on the jury's defense verdict. This appeal followed on October 9, 2024.

## STANDARD OF REVIEW

### I. Issue Preservation Requirements

As an initial matter, 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 appellant, (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* Hon. Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). 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). "Absent a proffer, it is impossible for [an appellate court]

to determine the effect of the excluded testimony." *Burroughs v. Worsham*, 352 S.C. 382, 398, 574 S.E.2d 215, 223 (Ct. App. 2002) (*quoting Baber v. Greenville County*, 327 S.C. 31, 41, 488 S.E.2d 314, 319 (1997)).

The South Carolina Rules of Evidence set forth the proffer requirement, as well. Specifically, under Rule 103, SCRE, where evidence is excluded, the offering party must make known to the circuit court the substance of the evidence and the evidentiary basis supporting admission. Rule 103(a)(2), SCRE. If evidence is excluded as hearsay, South Carolina law further requires the proponent of the hearsay to establish that the evidence is not hearsay or that the hearsay falls into an applicable hearsay exception. *Marshall v. Thomason*, 241 S.C. 84, 89, 127 S.E.2d 177, 179 (1962) (proponent of hearsay under exception bears the burden of establishing the required elements). Where an appellant makes no argument at trial that the proffered statement was either admissible as non-hearsay or admissible under an exception, the appellate court will not review those issues when raised for the first time on appeal. *State v. Garner*, 389 S.C. 61, 66, 697 S.E.2d 615, 617 (Ct. App. 2010). As detailed below, Appellants did not preserve their issue for appeal because it was never proffered. Also, Appellants did not offer or even lay the foundation for either ground for admissibility that they now attempt to invoke (i.e., learned treatise and rule of completeness).

## II. Requirement of Abuse of Discretion for Evidentiary Rulings

Moreover, 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, 429, 632 S.E.2d 845, 847-48 (2006) (internal citations omitted). 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 appellant 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*, 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*, 410 S.C. at 408, 764 S.E.2d at 251 (internal citation omitted); *see also Fuller*, 452 S.C. at 479, 822 S.E.2d at 915 (*quoting State v. White*, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007). As is also explained below, the Circuit Court did not abuse its discretion and, regardless, Appellants cannot prove prejudice.

## ARGUMENT

### I. The Evidentiary Issue Raised on Appeal Was Not Preserved at the Circuit Court.

Appellants did not proffer any part of Paragraph 7 of the guidelines on which they now base their appeal, so they did not preserve the only issue in this appeal. Most telling of the lack of any proffer is the fact that Appellant's brief is devoid of the substance of "Paragraph 7." Instead, it merely refers to the disputed text as "Paragraph 7" without more. As the trial transcript demonstrates, Appellants did not read Paragraph 7 to the Circuit Court or attempt to make it a Court's Exhibit:

> [Appellants' counsel] Q. Okay. And – and paragraph seven is in reference to surgical site infections, correct?
>
> [Dr. West] A. It says, "For the hospitalized patients with complicated SSTI" –
>
> [Dr. West's counsel]: Objection.
>
> THE WITNESS: – "defined as patients with deeper soft-tissue infection" –
>
> THE COURT: Basis?
>
> [Dr. West's counsel]: 801.
>
> THE WITNESS: – surgical traumatic wound infection –
>
> [Dr. West's counsel]: 801.
>
> THE COURT: Sir.
>
> THE WITNESS: Pardon me?
>
> **[Appellants' counsel]: I didn't ask him –**
>
> THE COURT: There's an objection.
>
> **[Appellants' counsel]: I didn't ask him to –**
>
> THE COURT: The question elicited that. Sir, please don't read anything from any of those records. Thank you.

Ladies and gentlemen, the last question and answer will be stricken, you're to give it no consideration in your deliberation.

The objection is sustained. Hearsay.

(R. p. 933, lines 3-24) (emphasis added). Indeed, the transcript indicates that Appellants did not even intend for the Paragraph on which they seek a new trial to be read to the jury. (R. p. 933, lines 16, 18) ("[Appellants' counsel] I didn't ask him to –"). Appellants impermissibly attempt to describe the unoffered text in a footnote but demonstratively do not cite to the record when doing so because the text is not in the record. (Appellants' Br., p. 9, n. 3). They also try to fill in the blanks through citations to cases from other jurisdictions that only discuss the guidelines more generally. However, none of these remedies the glaring omission of failing to preserve the issue. Therefore, this Court has no text to meaningfully review, so this Court is left completely unable to determine its effect (or lack thereof) on this jury's unanimous verdict as required by South Carolina law. *See Burroughs* (cited *supra*); *see also Roof v. Kimbrough*, 297 S.C. 156, 158, 375 S.E.2d 318, 320 (Ct. App. 1988) (reviewing an offer of proof of a medical treatise that a party attempted to use during the cross examination of a medical expert).

In addition to failing to proffer Paragraph 7, Appellants also did not argue that Paragraph 7 was not hearsay or was otherwise admissible as a learned treatise or under the rule of completeness. They did not make any evidentiary arguments in support of their line of questioning. This is equally fatal to their appeal. Rule 103(a)(2), SCRE. Appellants cannot raise these arguments for the first time on this appeal, so the jury's unanimous verdict should be affirmed. *Garner* (cited *supra*).

## II. The Excluded Guideline Is Hearsay and Not Admissible for Impeachment or Under Any Exception.

Even assuming *arguendo* that Appellants somehow preserved their appellate issue and arguments, their arguments are nonetheless unavailing because (A) a medical treatise cannot be

used for impeachment where the medical treatise would amount to direct proof of a defendant physician's negligence; (B) Dr. West did not testify as an expert witness so the learned treatise exception is not applicable; and (C) the rule of completeness is also inapplicable because Paragraph 7 is a distinct guideline and no part of it was introduced.

**A. Impeachment**

First, Appellants contend that Paragraph 7 is not hearsay because they offered it for impeachment. Specifically, they claim that Dr. West testified that he followed or exceeded the requirements of Paragraph 7. However, this is plainly unsupported by the record. During his direct examination, Dr. West never once mentioned, referenced or cited to "Paragraph 7," including in the testimony cited by Appellants, so any attempt to impeach him on this would have been improper. Indeed, the only paragraph referenced by Dr. West was Paragraph 5. (R. p. 932, lines 9-24). Regardless, impeachment does not allow a party to backdoor hearsay. *See State v. Long*, 186 S.C. 439, 444, 195 S.E. 624, 626 (1938) (internal citations omitted) (holding a fact cannot be proved by a purely hearsay statement even under the guise of impeaching a witness).

Second, this Court has already held that a medical treatise cannot be used for impeachment where the medical treatise would amount to direct proof of a defendant physician's negligence, which is exactly what Appellants were attempting to do. *Roof*, 297 S.C. at 158, 375 S.E.2d at 320 (holding that a plaintiff could not cross examine an expert who testified that cutting a spinal dura did not violate the standard of care with a textbook that suggested that it did). Stated another way, Appellants were attempting to use hearsay to prove that Dr. West did not comply with the standard of care set forth in an out of court document. As Respondents Dr. Frisch and Southeastern Spine also highlight, Appellant's brief acknowledges this much:

- "Dr. West got to claim he met their requirements and complied with the standard of care, but the McGougans were denied the chance to show otherwise." (Appellants' Brief, pp. 7-8).
- "[T]he important role a document like the IDSA guidelines can have in evaluating the performance of a professional like Dr. West. Courts have long recognized industry safety standards are important evidence to establish the standard of care in a negligence claim." (*Id.* at p. 16).
- "[T]he country recognize the IDSA guidelines not just as relevant to the standard of care for medical providers but as fully stating the standard of care for addressing a patient's infection." (*Id.*).
- "The wrongfully excluded evidence concerned the proper course of antibiotics for a hospitalized patient with a complex surgical site infection ([R. p. 933, lines 3-6]). That evidence was directly related to the standard of care Dr. West was required to meet in his role as Ms. McGougan's infectious disease physician. Dr. West's compliance with the standard care was an issue the jury was required to reach." (*Id.* at p. 18).
- "[T]he IDSA guidelines are a crucial factor in defining an infectious disease physician's standard of care, and Paragraph 7's contents were directly on point for this case." (*Id.*).
- "In sum, the wrongful exclusion of Paragraph 7 of the IDSA guidelines from evidence was a prejudicial error because it concerns Dr. West's standard of care, a crucial issue in the case." (*Id.* at p. 19).

The cases cited by Appellants do not obfuscate South Carolina's prohibition on using hearsay to try to prove violations of the standard of care either. In fact, they directly support it. Even before *Roof*, South Carolina's Supreme Court in *Baker v. Port City Steel Erectors, Incorporated*, held

that a scientific textbook could not be used as direct proof of any issue in the case – only to test the reliability of one of the factors used by an expert in analyzing an accident. 261 S.C. 469, 474, 200 S.E.2d 681, 682-83 (1973). The New York case cited by Appellants, *Hinlicky v. Dreyfuss*, reached the same holding despite considering a factually distinguishable scenario and different law. 2006 NY Slip Op 3444, ¶¶ 8-9, 6 N.Y.3d 636, 646-47, 815 N.Y.S.2d 908, 914, 848 N.E.2d 1285, 1290-91(N.Y. 2006). In *Hinlicky*, a New York court allowed a defendant anesthesiologist to admit a diagram of clinical guidelines that the defendant used to evaluate whether his patients needed cardiac evaluation because it was not admitted to establish a standard of care and the plaintiff did not request a limiting instruction on the use of the diagram. *Id.* In short, Appellants stated purpose for Paragraph 7 runs afoul of South Carolina law, so the Circuit Court was correct, and the jury's verdict should not be disturbed.

**B. Learned Treatise**

Appellants also contend for the very first time in their appeal that Paragraph 7 is admissible under the learned treatise exception to the hearsay rule found in Rule 803 of the South Carolina Rules of Evidence. Rule 803(18), SCRE. However, this exception is inapplicable because, by its plain language, it pertains to expert witnesses, and Dr. West was never offered or qualified by the Court as an expert witness. Specifically, Rule 803(18), SCRE, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ****
>
> (18) Learned Treatises. To the extent called to the attention of an ***expert witness*** upon cross-examination or relied upon by the ***expert witness*** in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. This rule is in addition to any statutory provisions on this subject. (Emphasis added).

Since Dr. West only testified as one of McGougan's physicians, he was not identified or qualified as an expert witness. Appellants did not proffer him as an expert either. Furthermore, unlike the physician in *Ward v. Epting*, relied upon by Appellant and wherein this Court specifically noted that the defendant physician "gave her opinion to a reasonable degree of medical certainty[,]" Dr. West did not offer any opinions within a reasonable degree of medical certainty. 290 S.C. 547, 556, 351 S.E.2d 867, 872 (Ct. App. 1986). Instead, Dr. West testified:

> Q. Do you believe you gave Ms. McGougan good quality care?
>
> A. Yes.
>
> Q. Taking Ms. McGougan's condition into account, did you believe you treated her appropriately?
>
> Yes.

(R. p. 905, lines 12-17). The foregoing testimony is starkly different from the expert testimony elicited by Respondents and Appellants from the two infectious disease experts Respondents qualified and offered as experts:

**1. Dr. Daily**

> [Dr. West's counsel] Q. Did you see any deficiencies where Dr. West in any way deviated from the standard of practice for an infectious disease provider? If you review this case (sic).
>
> A. I did not.
>
> Q. You hold those opinions to a reasonable degree of medical certainty as a board-certified infectious disease provider?
>
> A. I do.

**2. Dr. Simmons**

> [Dr. West's counsel] Q. Was there anything you saw that was below the standard of care or a deviation in any way in [Dr. West's] treatment?
>
> A. No.
>
> Q. All right. And were they able to resolve that infection for her? The bactermia?
>
> A. Yeah. Yes, they did. Yes.
>
> Q. Alright right. Doctor, the opinions that you've expressed here today, do you hold those to a reasonable degree of medical certainty as an infectious disease provider?
>
> A. Yes, I do.

****

> [Appellants' counsel] Q. Doctor, is it your opinion to a reasonable degree of medical certainty, that the MRSA infection that started in September postoperatively 2016 was the same MRSA infection that was in her body in December of 2016?
>
> A. Yes.

(R. p. 817, lines 10-17, p. 960, lines 8-21, p. 961, lines 10-14). Dr. West's testimony also does not overcome the burden of proof in medical malpractice cases. In South Carolina, "the plaintiff must provide expert testimony to establish both the required standard of care and the defendants' failure to conform to that standard[.]" *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006). Thus, Dr. West's testimony alone would conceivably have entitled Appellants to a directed verdict because Appellants' infectious disease expert, Dr. Blass, testified within a reasonable degree of medical certainty. (R. p. 1247, line 10-p. 1248, line 3). This further removes Dr. West from the learned treatise exception.

Moreover, none of the cases cited by Appellants transform Dr. West from a treating physician to an expert or support the backhanded attempt to use the learned treatise exception with a treating physician witness. The Appellants cite to *Mizell v. Glover* as support for the use of a medical article during cross examination. 351 S.C. 392, 403-04, 570 S.E.2d 176, 182 (2002). However, in that case, the defendant treating podiatrist was not the expert witness at the center of the dispute. Instead, the plaintiffs correctly sought to question the defendant's retained expert on an article that he wrote and in which the plaintiffs contended that he contradicted. *Id.* Consequently, the South Carolina Supreme Court held that it was proper for the trial court to deny admission of the article as an exhibit, but to allow the plaintiffs to cross-examine the expert regarding the article and to publish portions of it through their questions. *Id.* at 351 S.C. at 404-405, 570 S.E. 2d at 183.

Appellants out of state citations are equally unsupportive and not persuasive. *Rowland v. Novartis Pharmaceutical Corporation* concerned a Pennsylvania court's ruling on a defendant's motion in limine to exclude testimony of plaintiff's treating physicians' opinions on causation because the physician was not deposed and another did not testify within a reasonable degree of medical certainty at his deposition. 9 F. Supp. 3d 553, 556 (W.D. Pa. 2014). *Montoya v. Sheldon* concerned a Minnesota's court ruling on whether to disclose a treating physician as an expert after a disclosure deadline in which it concluded that the physician would only be permitted to testify as to her lay witness observations. 286 F.R.D. 602, 619 (D.N.M. 2012). Finally, *Langston v. Kidder* is a trucking case that concerns a Mississippi's court's ruling on the trial court's decision to allow an undisclosed, non-medical expert to testify. 670 So.2d 1, 4 (Miss. 1995). Therefore, the learned treatise exception still does not apply, and the jury's verdict should remain.

### C. Rule of Completeness

As another new argument, Appellants contend that that the circuit court should have allowed them to ask Dr. West to read Paragraph 7 under the rule of completeness. As a preliminary matter, this ignores Appellants' position on the record that they did not ask Dr. West to read Paragraph 7. Moreover, it is a misapplication of the rule of completeness codified in Rule 106 of the South Carolina Rules of Evidence, which provides: "When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106, SCRE.

The South Carolina Supreme Court has interpreted the "fairness" requirement in Rule 106, SCRE, to mean that only the portion of the remainder of a statement which explains or clarifies the previously admitted portion should be introduced. *State v. Taylor*, 333 S.C. 159, 171, 508 S.E.2d 870, 876 (1998) (internal citations omitted). This Court has further clarified that the purpose of the rule is to avoid misleading impressions created by taking a conversation out of context. *State v. Oglesby*, 384 S.C. 289, 294, 681 S.E.2d 620, 622 (Ct. App. 2009).

Paragraph 7 neither fits the text of the rule, nor its purpose. As Appellants acknowledge in their brief, Paragraph 7 is a distinct guideline from the Paragraph 5 about which Dr. West testified. Moreover, in subsequent questioning by Appellants, Dr. West clarified that Paragraph 7 concerned an irrelevant treatment period – i.e., the treatment of hospitalized patients which McGougan was not at that point in time. Appellants experts were only critical of Dr. West's treatment of Ms. McGougan as an outpatient after her first hospitalization. Thus, there can be no confusion about Paragraph 5 such that Paragraph 7 needed to be read as it was completely inapplicable and would likely have only confused the jury.

Finally, Appellants also suggest that because Dr. West began to read from Paragraph 7 at the time the objection was lodged, the jury should have been permitted to hear the rest of the paragraph. However, as noted above, Appellants clarified that they did not ask Dr. West to the paragraph, so they do not get to try to capitalize on that now on appeal. Plus, the Circuit Court struck the few phrases read onto the record, so no portion of Paragraph 7 became evidence such that the remainder needed to be read too. Consequently, none of the evidentiary rules newly raised by Appellants serve as a basis for a new trial.

### III. The Excluded Guideline Did Not Cause Appellants Prejudice.

To warrant reversal, Appellants must show abuse of discretion and resulting prejudice. *Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009) (internal citation omitted). To prove prejudice, Appellants must show that there was a reasonable probability that the jury's verdict was influenced by the challenged evidence. *Id.* Otherwise, any presumed error is harmless. *Id.*

Importantly, like an abuse of discretion, a showing of a prejudice also requires issue preservation. *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) ("Because appellant's trial counsel failed to make an offer of proof in order to preserve the question for appeal, we do not need to address whether the trial judge erred in excluding such testimony."). As detailed above, this precludes Appellants' appeal on numerous levels. Even setting that aside and assuming Appellants intended to introduce Paragraph 7 into evidence (despite their representation to the contrary at trial), Appellants cannot show that there was even a possibility that the jury's decision was affected by their inability to read Paragraph 7 onto the record.

First, the record demonstrates that the Circuit Court nevertheless allowed Appellants to fully cross examine Dr. West about Paragraph 7:

[Appellants' counsel] Q. You agree that paragraph seven and this guideline does not identify any Tetracycline derivative as being appropriate standard of care, correct?

[Dr. West] A. You have to define that a little bit better. This is on hospitalized patients. When she was hospitalized, I gave her Vancomycin.

Q. And --

A. And so when she was discharged, and there's another page in here on Tetracyclines in their utility and treatment, which you've left out.

Q. Sir.

A. Right now. So she was hospitalized. She got the antibiotic, which was recommended for hospitalization.

Q. For how long, sir, is it recommended?

A. She got it for –

****

THE WITNESS: She got it as an outpatient for 14 days. She got it as an inpatient for five days.

BY [Appellants' counsel]:

Q. How long is the standard recommend for my client to have received IV Vancomycin?

A. It doesn't recommend IV antibiotics. It recommends antibiotics for seven to four -- 14 days. doesn't say IV or PO, but she was in the hospital and it usually recommend -- it recommended IV while in the hospital.

****

Q. The standard does not list Tetracycline or any of its derivatives for surgical site infections, correct?

A. This standard right here, this paragraph is referring to hospitalized patients. If you turn another page or two, there's several paragraphs listing the utility of using Tetracyclines.

Q. And again, seven to 14 days without IV is what the recommendation is, correct?

A. It doesn't say it says seven to 14 days of antibiotics. It doesn't say that it has to be IV.

(R. p. 934, line 1-p. 935, line 2, p. 936, lines 11-20).

Accordingly, the Circuit Court's decision further comports with *Mizell*. As discussed above, in that case, the South Carolina Supreme Court held that it was proper for the circuit court to exclude a medical article from evidence but allow the introducing party to cross examine the witness about the article. *Mizell*, 351 S.C. at 405, 570 S.E.2d at 183. Therefore, there was no error in excluding Paragraph 7 but, also, any potential harm by the Circuit Court's decision was remedied because Dr. West's subsequent cross examination testimony ultimately allowed the jury to consider Paragraph 7 in their deliberations. Regardless, like the case in *Fields*, when this trial is viewed as a whole, there is nothing in the record to show that Paragraph 7 was "so crucial and important that its wrongful exclusion constitutes prejudicial error." 609 S.E.2d at 514. In fact, the only testimony on this paragraph establishes that it does not apply to the situation that Dr. West was being questioned about, so had it been admitted, there was a substantial risk the jury could have considered misleading evidence. There is simply nothing in the record to show that there is a reasonable probability the jury's verdict was influenced by the lack of the text of Paragraph 7. *See Johnson v. Horry Cnty. Solid Waste Auth*., 389 S.C. 528, 536, 698 S.E.2d 835, 839 (Ct. App. 2010) (court found that no prejudice was shown where jury was presented in a battle of the experts).

Tellingly, Appellants had the opportunity to develop evidence on Paragraph 7 during the testimony of their own infectious disease expert, Dr. Blass, who testified that he consulted/considered the same guidelines at issue. Specifically, he testified: "[T]he Infectious

Diseases Society of America, which is one of the societies that I work, that I do my best to adhere to their guidelines, they provide guidelines on the management of, and treatment of MRSA infections. And so, yes, I've looked at things like that." (R. p. 1202, lines 4-9). Dr. Blass even referred to the IDSA journal as "authoritative." (R. p. 1261, line 22-p. 1262, line 2). However, Appellants did not elicit any discussion or opinion specifically about Paragraph 7 from Dr. Blass or any of the defense experts. This makes sense because, as detailed above, the paragraph was not relevant as it concerned inpatient orders and Appellants were only critical of Dr. West's outpatient orders. In other words, it was not central to their case then and should not be now. Thus, since the Plaintiffs had not alleged or offered any proof that Dr. West's inpatient medication orders breached any standard of care, there is no reasonable probability the jury's verdict was influenced by the exclusion of Paragraph 7.

## CONCLUSION

At base, this Court is left with a straightforward decision because Appellants failed to preserve the lone issue they now seek to raise on appeal. Beyond that, none of their arguments otherwise warrant the reversal of the Circuit Court, which exercised its discretion and made a proper, well-considered decision to preclude Dr. West from reading Paragraph 7 into the record. The ruling of the Circuit Court challenged here did not prejudice Appellants, who were able to present their entire case, including through their own infectious disease expert, and who made the decision not to have Dr. West read Paragraph 7 aloud. The jury spent over a week listening to the evidence and promptly returned a verdict for Respondents, which is supported by the factual record detailed above. In other words, the jury was presented with a battle of the experts and chose – as is their right – to give more credit to Respondents' experts. Because there is no indication in this record that the Circuit Court abused its discretion in any way, this Court should affirm the jury's unanimous verdict in favor of Respondents.

s/Todd W. Smyth
Todd W. Smyth
Allie A. Maples
Smyth Whitley, LLC
115 Central Island Street, Suite 250
Charleston, South Carolina 29492
Tel: (843) 606-5635
tsmyth@smythwhitley.com
amaples@smythwhitley.com

*Attorneys for Respondents Timothy E. West, M.D. and Lowcountry Infectious Diseases, P.A.*

June 3, 2025

RECEIVED
Jun 03 2025
SC Court of Appeals

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, LLC, and Lowcountry Infectious Diseases, P.A.,

Respondents.

---

**PROOF OF SERVICE**

---

I certify that I have served RESPONDENTS TIMOTHY E. WEST, M.D. AND LOWCOUNTRY INFECTIOUS DISEASES, P.A.'s FINAL BRIEF electronically on June 3, 2025, to all counsel of record as listed below:

Daniel W. Luginbill
Julia M. Flumian
McGowan, Hood, Felder & Phillips, LLC
dluginbill@mcgowanhood.com
jflumian@mcgowanhood.com

Jordan C. Calloway
McGowan, Hood, Felder & Phillips, LLC
jcalloway@mcgowanhood.com

*Attorneys for Appellants*

James B. Hood, Esquire
Brian J. Kern, Esquire
Hood Law Firm, LLC
james.hood@hoodlaw.com
brian.kern@hoodlaw.com

*Attorneys for Respondents Richard F. Frisch, M.D. and The Southeastern Spine Institute, LLC*

PROOF OF SERVICE
Appellate Case No. 2024-001698

s/Todd W. Smyth
Todd W. Smyth
Allie A. Maples
Smyth Whitley, LLC
115 Central Island Street, Suite 250
Charleston, South Carolina 29492
Tel.: (843) 606-5635
Fax: (843) 654-4095
tsmyth@smythwhitley.com
amaples@smythwhitley.com

*Attorneys for Respondents Timothy E. West, M.D., and Lowcountry Infectious Diseases, P.A.*

RECEIVED
Jun 03 2025
SC Court of Appeals

SMYTH WHITLEY, LLC
ATTORNEYS AT LAW

June 3, 2025

**VIA EMAIL ONLY**
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *Patricia P. McGougan and Edgar McGougan v. Richard F. Frisch, M.D., Timothy E. West, M.D., The Southeastern Spine Institute, LLC, and Lowcountry Infectious Diseases, P.A.*
Appellate Case No.: 2024-001698

Dear Ms. Kitchings:

Enclosed for filing, please find the following:

1. Final Brief of Respondents Timothy E. West, M.D. and Lowcountry Infectious Diseases, P.A.; and
2. Proof of Service.

Please note, one bound copy of the Final Brief of Respondents is being mailed to your office.

Very truly yours,

Todd W. Smyth

TWS:cmr
Enclosures

cc: all counsel of record (via email only)

Todd W. Smyth
115 Central Island Street, Suite 250, Charleston, SC 29492
*main* 843-606-5635• *fx.* 843-654-4095•tsmyth@smythwhitley.com
www.smythwhitley.com