IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2018-002135
Trial Court Case No. 2016-CP-43-01289

Gwendolyn Scott, ...Respondent,

v.

James Applewhite.....Appellant.

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CERTIFICATE

I, Wesley B. Sawyer, Esquire, attorney for Appellant, certify that the Appellant's Initial Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number

CASES

STATUTES

REGULATIONS

OTHER

STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court abused its discretion when it allowed a chiropractor to give opinion testimony as to Respondent's permanent whole person impairment rating based on the AMA Guides even though a chiropractor is not qualified under the AMA Guides and South Carolina law to give such an opinion.

II. Whether the Circuit Court abused its discretion when it allowed Respondent to present a "rebuttal" and testify a second time to rehabilitate her testimony from her case-in-chief even though Defendant's only evidence in his case-in-chief was admitting liability.

STATEMENT OF THE CASE

This case arose out of an automobile accident on November 1, 2013, when Appellant's vehicle rear-ended Respondent's car. (Complaint). Respondent was treated at the Emergency Room and was discharged on the same day. (Tr. 51:7–9, 23). A few days later, however, Respondent began treating with Chiropractor Dowdy Rudolph. (Tr. 52:23–25). She continued this treatment until April 2014. (Tr. 70:18–21). Respondent presented medical bills totaling $9,425.32.

I. Improper Expert Opinion

At trial, over objection from Appellant, Chiropractor Rudolph testified based on the American Medical Association's Guides to the Evaluation of Permanent Impairment (hereinafter the "AMA Guides") that Respondent had 15% whole person impairment because of the car accident with Appellant. (Tr. 13:22–14:1; 82:13–14; 100:19–23). Chiropractor Rudolph admitted he was not a medical doctor nor a member of the AMA. (Tr. 109:25–110:1; 114:20). Moreover, the AMA Guides provide that "Impairment evaluations are performed by a licensed physician." (American Medical Association, Guides to the Evaluation of Permanent Impairment, 18 (5th ed. 2001)). As a chiropractor, Rudolph is not a "licensed physician." Nonetheless, the Circuit Court

permitted him to rely on the AMA Guides used by "physicians" to diagnose their patients and use the AMA Guides to support his opinion testimony.

Chiropractor Rudolph testified that Respondent's injuries resulted from the accident with Appellant, but he also admitted he had no knowledge of an accident that occurred just five years earlier that also injured Respondent. (Tr. 133:6–8). Because Respondent did not disclose the prior accident to Chiropractor Rudolph, Chiropractor Rudolph did not consider whether Respondent's impairment could have resulted from that prior accident. Nonetheless, the Circuit Court allowed Chiropractor Rudolph to render an opinion as to whole person impairment and to bolster his opinion testimony by relying on the Guides promulgated by the American Medical Association, giving the impression that the whole of the American Medical Association supported his permanent impairment diagnosis of Respondent.

II. Improper Reply Testimony

In her deposition prior to trial, Respondent testified that she had treated at Fields Chiropractic for injuries she suffered in the accident five years before the accident in this case. (Depo. Tr. 17:8). At trial, when asked about her injuries from that accident, Respondent could not recall hurting her back or receiving treatment from a chiropractor. (Tr. 64:13–20). However, on cross-examination during Respondent's case-in-chief, Appellant impeached Respondent using her prior deposition testimony, and Respondent conceded that she had treated at Fields Chiropractic for her prior injuries. (Tr. 64: 21–25). Although she had an opportunity to do so, Respondent's counsel did not address Respondent's prior treatment on redirect of Respondent. Respondent's counsel also did not address the issue with Chiropractor Rudolph while he was on the stand. Respondent's counsel likewise did not attempt to re-call Respondent after Appellant's attorney cross-examined Chiropractor Rudolph about Respondent's prior accident and injuries. Instead,

Respondent rested her case and left the jury with the impression – consistent with her previous deposition testimony – that she had previously treated at a chiropractor for injuries from another accident, that she had not disclosed that prior injury to Chiropractor Rudolph, and thus Respondent's chiropractor – who was providing expert testimony – did not take the prior accident into account when he attributed her impairment solely to the accident in this case. (Tr. 146:15).

Although Appellant did present a defense case, his entire defense case presentation consisted of one witness – Appellant himself – and his testimony consisted of him admitting fault for the accident. (Tr. 149:6–9). Appellant did not present any testimony regarding Respondent's prior automobile accident or prior medical treatment, and Appellant did not present any evidence to impeach Respondent's testimony from her case-in-chief. After admitting fault, Appellant rested his case. (Tr. 162:21–23; 163:9–10).

Despite the very narrow scope of Appellant's case-in-chief, Respondent's counsel sought permission to present a reply case and re-call Respondent to testify. (Tr. 165:18–22). Over Appellant's objection, the Circuit Court allowed Respondent to come back on the stand, recant her earlier, twice-sworn testimony, and then explain her prior inconsistent statements by claiming that she had discussed the matter with her husband after her testimony. (Tr. 175:4–18; 178:21–24; 179:8–12). Specifically, Respondent testified that she had treated with a physical therapist, not a chiropractor, for her injuries resulting from the prior accident. (Tr. 179:10). Respondent testified that she only remembered this after she had testified at trial and then discussed the case with her husband. (Tr. 178:23–24). According to Respondent's reply testimony, it was only after her testimony at trial that she and her husband could recall that she treated with a physical therapist for her prior injuries, despite having testified twice under oath that she treated at Fields Chiropractic. (Tr. 180:1–10; 19).

The singular goal of this "reply" testimony was to downplay the significance of Respondent's prior automobile accident and pre-existing injuries – the very injuries that were not disclosed to her testifying expert. Importantly, Respondent's reply testimony presented no evidence in rebuttal to Appellant's case-in-chief, but merely served to rehabilitate her testimony from her own case-in-chief—an opportunity available to and passed up by Respondent earlier in the trial during redirect. (Tr. 175:8–18).

At trial, Respondent's only evidence of permanent injury came from Chiropractor Rudolph. Importantly, Appellant's counsel elicited testimony from Respondent and Chiropractor Rudolph that Respondent had not sought additional treatment between her discharge from Chiropractor Rudolph's care and the trial more than four years later. (Tr. 70:22; 71:8–16; 142:24–143:1). Yet, after hearing Chiropractor Rudolph's opinion testimony giving Respondent a 15% whole person permanent impairment rating and hearing Respondent's "reply" testimony downplaying her prior accident and injuries, the jury returned a verdict for Respondent in the amount of $70,000.00—more than seven times her medical expenses, the only monetary damages offered by Respondent. (Verdict Form). Appellant did not present a claim for lost wages or other economic damages. Therefore, the question of whether she sustained a permanent impairment as a result of the accident was a critical question in the case.

Appellant filed Motions for a New Trial or New Trial *Nisi* Remittitur and for Judgment Notwithstanding the Verdict, both of which the Circuit Court denied. (Order). This appeal followed.

SUMMARY OF THE ARGUMENT

The Circuit Court improperly allowed Chiropractor Rudolph to render expert testimony beyond the scope of his expertise and to use the AMA Guides to place the imprimatur of the

American Medical Association on his opinions. The AMA Guides require an impairment evaluation to be performed by a "licensed physician," and Chiropractor Rudolph is not a "physician" under South Carolina law. Despite this, the Circuit Court erroneously allowed Chiropractor Rudolph to rely on the AMA Guides to render an opinion as to whole person impairment.

The Circuit Court also abused its discretion in permitting Respondent to provide reply testimony that merely reopened her case-in-chief and did not address evidence offered by Appellant during his testimony. A reply case is appropriate for the limited purposes of rebutting affirmative defenses raised or to clarify matters confused during the defense's case-in-chief, or to impeach defense witnesses.[1] During his case-in-chief, Appellant merely admitted fault for the car accident – he provided no evidence other than his admission. Yet, the Circuit Court permitted Respondent to go beyond Appellant's admission and permitted reply testimony for Respondent to rehabilitate her own testimony from cross-examination that took place during her own case-in-chief. Respondent had an opportunity to clarify her testimony on redirect during her case-in-chief, and it was an abuse of discretion to allow her to reopen her case and rehabilitate her uncontradicted, twice-sworn testimony after Appellant had rested.

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[1] *See e.g.*, *Ford v. A.A.A. Highway Exp.*, 204 S.C. 433, 29 S.E.2d 760, 764 (1944) (allowing plaintiff to present reply testimony to rebut a contributory negligence affirmative defense raised for the first time during the defense's case-in-chief); *State v. Stewart*, 283 S.C. 104, 107, 320 S.E.2d 447, 449 (1984) (allowing reply witness to testify that defendant had pointed out to him the location where he "stabbed that old woman" after the defense case included alibi witnesses accounting for the defendant's whereabouts during the murder); *State v. Robinson*, 223 S.C. 314, 318–19, 75 S.E.2d 465, 467 (1953) (prohibiting, as outside the scope of proper reply, testimony that the defendant's client had never mentioned "Leadbetter" as the source of the fraudulent documents the client obtained when the real issue presented during defense's case was whether the defendant himself had any knowledge of how the client procured fraudulent documents).

The jury awarded Respondent with damages more than seven times the cost of her medical bills. Chiropractor Rudolph's opinions and Respondent's testimony discounting her prior injury were both material and probative on the critical question at trial – did Respondent suffer a permanent injury? Therefore, prejudice is presumed. *See Mali v. Odom*, 295 S.C. 78, 84, 367 S.E.2d 166, 170 (Ct. App. 1988). Moreover, because this testimony was critical to respondent's theory of the case, there is a reasonable probability that the improperly admitted testimony influenced the jury. Thus, the improper admission of Chiropractor Rudolph's opinions and Respondent's reply testimony both constitute a prejudicial abuse of discretion, and this Court should reverse.

STANDARD OF REVIEW

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). Likewise, the trial court's decision to allow reply testimony will be evaluated for an abuse of discretion. *McGaha v. Mosley*, 283 S.C. 268, 277 S.E.2d 461, 465 (Ct. App. 1984). An abuse of discretion occurs when the trial court's ruling "is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). Moreover, "the admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." *Mali*, 295 S.C. at 84, 367 S.E.2d at 170.

ARGUMENT

Respondent testified at her deposition and at trial that she had treated at a chiropractor for injuries resulting from a prior accident. Yet Chiropractor Rudolph did not know this when he treated her for injuries arising out of the underlying car accident—he did not know there was a

previous accident that could have resulted in her impairment, and he attributed any impairment observed to the current accident. Respondent changed her testimony entirely on reply, despite the defense's case-in-chief being limited only to Appellant admitting fault for the underlying accident. Respondent was permitted to end the trial contradicting her earlier, unrefuted testimony. Furthermore, the Circuit Court permitted Chiropractor Rudolph to testify based on the AMA Guides, giving his testimony the imprimatur of the American Medical Association's authority, which it unequivocally did not have. And the jury listened.

I. The Circuit Court abused its discretion by allowing Chiropractor Rudolph to provide expert testimony based on the *American Medical Association's Guides to the Evaluation of Permanent Impairment* because he is not a "licensed physician" permitted to use the AMA Guides.

The AMA Guides specifically limit the scope of individuals who are qualified to use the AMA Guides to render opinions respecting impairments: "Impairment evaluations are performed by a *licensed physician*." American Medical Association, Guides to the Evaluation of Permanent Impairment 18 (5th ed. 2001) (emphasis added).[2] The AMA Guides also provide that "performing an impairment evaluation requires considerable medical expertise and judgment." AMA Guides, 18. Thus, the AMA Guides also state that "[a] state may restrict the type of practitioner allowed to perform an impairment evaluation." AMA Guides, 18. Under South Carolina law, a chiropractor is not a "physician," and the South Carolina General Assembly has only ever authorized physicians and surgeons to testify under the AMA Guides. Therefore, according to the AMA Guides' own strictures, Chiropractor Rudolph was not qualified to opine on whole person impairments, and his testimony should not have been admitted.

A. A chiropractor is not a "physician" under South Carolina law, and cannot, therefore, rely on the AMA Guides to offer expert testimony.

[2] Throughout the trial, both parties and Chiropractor Rudolph relied upon the 5th edition of the AMA Guides.

As noted above, the AMA Guides state that only a "physician" can render impairment opinions, but the AMA Guides leave the definition of "physician" up to the local jurisdiction, and even permit the jurisdiction to further limit who can use the AMA Guides. South Carolina Code § 40-47-20 defines "physician" as a "doctor of medicine or doctor of osteopathic medicine." Additionally, the Code defines the "practice of medicine" in part as

> [U]sing the designation Doctor, Doctor of Medicine, Doctor of Osteopathic Medicine, Physician, Surgeon, Physician and Surgeon, Dr., M.D., D.O., or any combination of these in the conduct of any occupation or profession pertaining to the prevention, diagnosis, or treatment of human disease or condition *unless such a designation additionally contains the description of another branch of the healing arts for which one holds a valid license in this State* that is applicable to the clinical setting…

S.C. Code § 40-47-20(36)(g) (emphasis added). As a chiropractor, Rudolph does not qualify as a "physician" under South Carolina law and, therefore, he is not a "licensed physician" as that term is used in the AMA Guides. By contrast, a chiropractor in South Carolina may refer to himself only as "Chiropractic Physician, D.C., Chiropractor, [or] Doctor of Chiropractic." S.C. Code Ann. Regs. 25–5 (2018). Therefore, the General Assembly has codified a legal distinction in this state between a "physician" and a "chiropractor."

The difference between chiropractors and physicians is more than just semantic; it is practical. "Chiropractic practice" is limited to "spinal analysis of any interference with normal nerve transmission and expression" and the use of adjustments and "rehabilitation of the patient without the use of drugs or surgery." S.C. Code § 40-9-10(b). By contrast, South Carolina recognizes that the "practice of medicine" done by a "physician" involves, among other things, the offering or undertaking to prescribe medication, prevent or diagnose illnesses and infirmities, and perform surgery, as well as testifying as a physician in civil proceedings within the state by expressing expert medical opinions. S.C. Code § 40-47-20(36). Thus, a physician's scope and

knowledge is much broader than a chiropractor's scope. A physician can prescribe medications, make diagnoses for ailments beyond just the spine, and even perform surgeries. On the other hand, a chiropractor absolutely cannot. Under South Carolina law, a chiropractor is not equal in name or practice to a physician.

There is a wide gap between the training and scope of treatment between chiropractors and physicians under South Carolina law. A chiropractor has a limited right to practice. He cannot prescribe medicine, and he is limited to a specific part of the body – the spine. In stark contrast, a physician is not limited to a particular body part, can prescribe medication, and even may perform surgery. Therefore, the AMA Guides' choice to limit its use to licensed physicians is consistent with South Carolina's statutory limitation of certain acts to "physicians."

Because a chiropractor's scope of practice is limited by South Carolina law and by training, it follows that there are subjects on which a chiropractor may not testify in court as an expert—those topics that fall within the purview of a physician, rather than a chiropractor. The difference in what a chiropractor and a physician is allowed to do under South Carolina law reflects the "significant difference in the education, training, and authority to diagnose and treat diseases between physicians and non-physician healthcare providers. In short, physicians have unlimited licenses, while…chiropractors have limited licenses." *Totton v. Bukofchan*, 80 N.E.3d 891, 894, (Ind. Ct. App. 2017). By limiting their use to licensed physicians, the AMA Guides adopt this same distinction.

The Circuit Court relied on the South Carolina Supreme Court's decision in *Williams v. Capital Life & Health Ins. Co.*, 209 S.C. 512, 41 S.E.2d 208 (1947), to admit Chiropractor Rudolph's opinion testimony. The Supreme Court in *Williams* held, "at least to the extent that he limits his activities to the recognized scope of his particular profession," a chiropractor may give

opinion testimony. *Id.* at 518, 41 S.E.2d at 210. In other words, "a duly licensed chiropractor stands for all purposes in the position of a physician, to the extent that he limits his activities to the scope of his profession." *Daniels v. Bernard*, 270 S.C. 51, 57, 240 S.E.2d 518, 520 (1978) (emphasis added). The scope of the chiropractor's profession – and thus the extent of permissible expert testimony by a chiropractor – is strictly limited by statute to "spinal analysis of any interference with normal nerve transmission and expression" and the use of adjustments and "rehabilitation of the patient without the use of drugs or surgery." S.C. Code § 40-9-10(b). In light of this definition and the definition of "physician" in § 40-47-20, *Williams* cannot stand for the proposition that a chiropractor can rely on the AMA Guides to heap the authority of the American Medical Association onto his opinions. The AMA Guides expressly limit their use to licensed physicians, and a chiropractor is not a licensed physician under South Carolina law. Therefore, Chiropractor Rudolph's reliance on the AMA Guides in his opinion testimony goes beyond the scope of his profession.

In this case, Appellant's counsel moved to exclude Chiropractor Rudolph's testimony because the AMA Guides do not allow a chiropractor to render an opinion on whole person permanent impairment. (Tr. 13:22–14:1). The Circuit Court allowed Chiropractor Rudolph to utilize the AMA Guides because the court allowed a chiropractor to testify as a "medical witness" in *Daniels*. (Tr. 22:20–25). However, the court in *Daniels* did not give a chiropractor *carte blanche* to testify on any issue of medicine. Rather, the court held the chiropractor must limit his testimony to "the scope of the practice of chiropractic as defined by statute." *Daniels*, 270 S.C. at 58, 240 S.E.2d at 521. The chiropractor in *Daniels* testified to his diagnosis of the patient and his recommended chiropractic treatment. *Id.* Notably, the *Daniels* chiropractor did not testify based on the AMA Guides. *Id.* Thus, a chiropractor *can* testify as a medical witness *within his field*, but

authority to testify in one area does not render the chiropractor a "physician" that can testify based on the AMA Guides.

B. The South Carolina General Assembly has permitted only physicians and surgeons to testify on whole person impairment under the AMA Guides – not chiropractors.

As noted above, the AMA Guides limit their use to a "licensed physician," but they also instruct that "[a] state may restrict the type of practitioner allowed to perform an impairment evaluation." AMA Guides, 18. Thus, South Carolina's General Assembly could expressly allow a chiropractor to testify. However, South Carolina's General Assembly has done exactly the opposite. Although South Carolina has not addressed expert testimony based on the AMA Guides in the civil personal injury tort context, the General Assembly has specifically limited impairment evaluations in claims based on the Asbestos and Silica Claims Procedure Act to a treating "physician." S.C. Code § 44-135-60(B)(1). Likewise, the General Assembly has limited impairment evaluations in workers' compensation cases to a "physician or surgeon." S.C. Code §§ 42-17-30; 42-1-172; 42-15-80; 44-135-60. As discussed above, South Carolina defines "physician" as a "doctor of medicine or doctor of osteopathic medicine," which excludes chiropractors. S.C. Code § 40-47-20. Thus, because a chiropractor is neither a "physician" nor a "surgeon" under South Carolina law, a chiropractor cannot testify as to permanent impairment based on the AMA Guides in workers' compensation or asbestos and silica exposure cases. Although no similar statute has been enacted with respect to tort cases, the AMA Guides state that "[i]mpairment evaluations are performed by a licensed physician," though a state may further limit who performs these evaluations. AMA Guides, 18. The South Carolina General Assembly has demonstrated a preference for impairment evaluations done by physicians and surgeons. Moreover, the limitations in the workers' compensation and asbestos and silica contexts confirm

that the General Assembly has not chosen to expressly authorize chiropractors to use the AMA Guides.

Although South Carolina's appellate courts have not addressed the propriety of a chiropractor using the AMA Guides to render impairment ratings, the Montana Supreme Court has held such testimony improper. In *Wacker v. Park Rural Elec. Co-op, Inc.*, 239 Mont. 500, 783 P.2d 360 (1989), the Montana Supreme Court addressed this very issue and held a chiropractor is not qualified to render whole person impairment opinions under the AMA Guides. Previously, Montana had decided that chiropractors cannot testify based on the AMA Guides in workers' compensation cases—physicians alone had that privilege. *Id.* at 502, 783 P.2d at 361. In *Wacker*, the Montana Supreme Court held that a chiropractor likewise could not testify based on the AMA Guides in civil cases:

> [O]nly qualified physicians should be allowed to render opinions on impairment ratings based upon the American Medical Association's Guides to Evaluation of Permanent Impairment. The [AMA] formulated the Guides for the use of licensed medical physicians.... This is not to say that chiropractors should not testify as to their patients' injuries, or that they should never use percentages in describing their patients' injuries.... Chiropractors should not, however, add unwarranted weight to their opinions by adopting the trappings of licensed medical physicians.

Id., 239 Mont. at 502, 783 P.2d at 362. Thus, chiropractors are qualified to render opinions within the scope of their expertise, but it is improper to allow a chiropractor to use the imprimatur of the AMA Guides and guidelines for licensed medical physicians to bolster their opinions and gain credibility in front of the jury.

Like Montana, South Carolina's General Assembly has decided that chiropractors are not qualified to testify based on the AMA Guides in workers' compensation and asbestos cases. Therefore, this Court should apply the AMA Guides' own restrictions and the reasoning of the

Montana Supreme Court in *Wacker* and find that only a licensed medical physician is qualified to render whole person impairment ratings under the AMA Guides.

The AMA Guides themselves limit their application to "licensed physicians," and South Carolina's statutory definition of "physician" does not encompass chiropractors. Therefore, Chiropractor Rudolph testified outside of his expertise when he was allowed to rely on the AMA Guides to render a whole person impairment rating. A non-physician should not be allowed to violate the restrictions of the AMA Guides by rendering a whole person impairment opinion based on those guidelines. Allowing Chiropractor Rudolph to cloak his opinions with the AMA Guides added the imprimatur of the American Medical Association's authority to that opinion. The testimony leaves the jury with an impression that the chiropractor's opinion has the full weight of the American Medical Association behind it, which it does not. Therefore, the testimony should have been excluded, and the Circuit Court abused its discretion by admitting the opinion testimony.

II. The Circuit Court abused its discretion in permitting Respondent to reopen her case-in-chief, after Appellant rested, under the guise of reply testimony.

After the defense rests, the Court may permit the plaintiff to present evidence in "direct reply to witnesses presented as part of [the defendant's] case" and addressing issues identical to those presented by the defense's own witnesses. *See McGaha*, 283 S.C. at 277, 277 S.E.2d at 466. A reply case is properly used to impeach the Defense's witnesses or rebut issues raised during the Defense's case-in-chief. *See e.g.*, *Stewart*, 283 S.C. at 107, 320 S.E.2d at 449 (allowing reply witness to testify that defendant had pointed out to him the location where he "stabbed that old woman" after Defense case included alibi witnesses accounting for defendant's whereabouts during the murder); *Robinson*, 223 S.C. at 318–19, 75 S.E.2d at 467 (prohibiting, as outside the scope of proper reply, testimony that the defendant's client had never mentioned "Leadbetter" as the source of the fraudulent documents the client obtained when the real issue presented during

defense's case was where the defendant himself had any knowledge of how the client procured fraudulent documents). Although "[t]estimony that is 'arguably contradictory and in reply to' that offered by the defense is admissible," testimony that is not limited to evidence presented during the defense's case-in-chief is improper because it reopens and completes the plaintiff's case-in-chief instead of rebutting a specific issue raised in the defense's case. *State v. Prather*, 422 S.C. 96, 105-106, 810 S.E.2d 419, 423-424 (Ct. App. 2017), *cert. granted* (S.C. Aug. 3, 2018).

Instead of rebutting testimony presented in Appellant's defense case, Respondent's "reply" solely addressed her previous, uncontradicted testimony during her case-in-chief during which she testified she had treated with a chiropractor after her previous accident. (Tr. 64:16–20). During her reply testimony, for the first time, Respondent recalled that after the first accident she actually treated at a physical therapist's office near Fields Chiropractic. (Tr. 179:5–12). Respondent's "reply" testimony removed the impression that she could have had a serious injury to her back, prompting her to treat at a chiropractor, prior to her accident with Appellant. Consequently, her "reply" testimony also eliminated any inference that Chiropractor Rudolph's impairment rating was improperly attributed to the accident with Appellant, rather than a previous accident.

The Circuit Court improperly allowed Respondent to use reply testimony to rehabilitate and directly alter testimony obtained via cross-examination during her case-in-chief. During the "reply" testimony, Respondent's attorney solely referred back to and asked questions based on Respondent's answers on cross-examination during her own case-in-chief. (Tr. 175:8). Appellant did not obtain this testimony in his defense case, and he did not refer to it during his case-in-chief. Indeed, Respondent's attorney admitted at trial that such evidence was not responding to "the Defense's case." (Tr. 169:23–24). This is not the proper use of reply testimony. Reply testimony is to be used for impeaching a defense witness, not for rehabilitating a plaintiff's witness. *See,*

e.g., *Prather*, 422 S.C. at 105–06, 810 S.E.2d at 423–24 (holding as improper reply testimony not limited to refuting defense's testimony but used to complete the State's case-in-chief). Allowing a plaintiff to re-open her case after the close of all evidence because she failed to testify truthfully in her deposition and in her case-in-chief is not proper "reply" or rebuttal testimony.

The Supreme Court's opinion in *Ford v. A.A.A. Highway Exp.*, provides an example of a proper use of a reply case. In *Ford*, the Supreme Court permitted reply testimony based on testimony from a plaintiff witness's cross-examination only because the theory the defense sought to promote with this elicited testimony was unclear until the defense presented its entire case. 204 S.C. 433, 29 S.E.2d 760, 764 (1944). *Ford* involved the collision of a mule-drawn wagon and a motor truck, resulting in the wagon driver's death. *Id.*, 29 S.E.2d at 761. The defense set up a contributory negligence case, arguing the wagon driver had turned to the left in front of the truck as the truck was attempting to pass the wagon on the highway. *Id.*, 29 S.E.2d at 762–63. In support of this theory, which had not been specifically pled by the defense prior to trial, the defendant elicited testimony from a plaintiff's witness that the wagon was hit in the left front wheel, rather than the rear of the wagon. *Id.*, 29 S.E.2d at 763. However, the witness was rehabilitated on re-direct and indicated he had misspoken and the wagon was hit on the left rear wheel. *Id.* All of the plaintiff's other witnesses testified that the wagon was hit from the rear. *Id.* During the plaintiff's case-in-chief, the defendant's theory of the case was still concealed.

During its case-in-chief, the defense in *Ford* offered testimony in support of its theory that the wagon was actually hit on the left front wheel, indicating the wagon driver had turned into the truck's path. *Id.* Thus, the defense's theory was not revealed until the defense's case-in-chief. To rebut this theory, the plaintiff was allowed to present the four wagon wheels as reply testimony, which revealed little damage to the left front wheel and a completely destroyed left rear wheel. *Id.*

The defense argued that the reply testimony was improper because, by the one plaintiff's witness to testify that the wagon was hit on the left front wheel, the plaintiff was on notice of the defense's theory that the left front wheel was the point of primary impact. *See id.* Therefore, according to the defense, the plaintiff had the opportunity to address the issue during its case-in-chief rather than by last-minute evidence. *See id.* However, the Court held that the reply testimony was proper because the defense's contributory negligence theory was not affirmatively plead or readily discernible until the defense had presented its case-in-chief, despite the elicited testimony from the one plaintiff's witness. *Id.* ("This evidence was purely in rebuttal, and had no place in the case until the defendants offered evidence tending to show that the truck hit the left front wheel of the wagon.").

By contrast, in this case, Appellant's cross-examination of the Respondent did not set-up his own theory of the case that would be presented and developed during his case-in-chief.[3] In fact, during his case, Appellant merely testified that he was at-fault in causing the accident; Appellant was his only witness and did not address Respondent's prior accident or her treatment after it.

Instead of responding to any evidence presented in Appellant's case-in-chief, the Circuit Court allowed Respondent to reopen her case-in-chief under the guise of reply testimony in order

[3] This is not to say that the testimony elicited from Respondent on cross-examination was not important to Appellant's case. On the contrary, the testimony elicited from Respondent would have been left to the jury to evaluate in light of Chiropractor Rudolph's testimony. Taken together, the testimony from the two witnesses would indicate that Respondent likely had a severe enough back injury from the previous accident that she sought treatment with another chiropractor – a spinal care provider. Thus, the jury could infer that Respondent's previous injury could have affected Chiropractor Rudolph's analysis of Respondent and that, because Chiropractor Rudolph did not have this information when he evaluated Respondent, he did not have sufficient bases for his conclusion that her impairment resulted from the accident with Appellant.

to have the last word. Her new testimony on reply showed the jury that she was not lying on direct and had not concealed her history to Chiropractor Rudolph. Moreover, the reply testimony implied the prior accident was not as consequential – that her previous injuries had no lasting effect. The manifest purpose of the reply testimony was to rehabilitate Respondent's case-in-chief by minimalizing her prior accident and pre-existing injuries. Because Appellant never raised these issues during his case-in-chief, Respondent's reply testimony went beyond the scope of the Appellant's case and was improper. *See Belcher v. Charleston Area Med. Ctr.*, 188 W.Va. 105, 110, 422 S.E.2d 827, 832 (1992) (concluding that any attempt to have a previous plaintiff witness "testify to [the same] issues again, as proffered rebuttal, is in reality, an attempt to reopen [plaintiff's] case"). Respondent should not have been permitted to readdress her prior testimony on reply because it was not in response to evidence offered by Appellant, let alone "arguably contradictory" to such evidence. *Prather*, 422 S.C. at 105, 810 S.E.2d at 423. Therefore, the Circuit Court abused its discretion by allowing Respondent to rehabilitate her prior testimony on "reply" when her testimony was not designed to rebut any evidence presented by Appellant in his defense case.

III. Cumulatively, the improper testimony from Chiropractor Rudolph and the reopening of Respondent's case allowing her to rehabilitate her previous, uncontradicted testimony prejudiced Appellant.

An abuse of discretion occurs when the trial court's ruling "is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). As discussed above, the Circuit Court committed two errors of law by allowing Chiropractor Rudolph to use the AMA Guides to bolster his opinion testimony and by allowing Respondent to reopen her case-in-chief after Appellant rested.

Although the Circuit Court's errors of law will only be overturned if they are prejudicial, "the admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." *Mali*, 295 S.C. at 84, 367 S.E.2d at 170; *Johnson v. Broome*, 175 S.C. 385, 179 S.E. 315 (1935) (applying legal presumption of prejudice where wrongly-admitted evidence has some probative value upon a material issue); *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249 (Ct. App. 2014). *See White*, 382 S.C. at 270, 676 S.E.2d at 686; *Prather*, 422 S.C. at 109–10, 810 S.E.2d at 426. "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence." *Watson v. Ford Motor Co.*, 389 S.C. 434, 448, 699 S.E.2d 169, 176 (2010).

The jury awarded over seven times the amount of Respondent's medical expenses. Such a large discrepancy between the medical expenses and the damages award reveals the significant weight the jury gave Chiropractor Rudolph's opinions regarding a whole person permanent impairment. The permanent nature of Respondent's injury was disputed at trial, and Chiropractor Rudolph's opinions were probative on this material issue. Therefore, this Court must presume prejudice. *See Fowler*, 410 S.C. at 413, 764 S.E.2d at 254. Moreover, Respondent relied heavily on this improper testimony in her closing and rebuttal arguments. (Tr. 187:5–191:3; 15–24). Twice, Respondent's counsel bolstered Chiropractor Rudolph's testimony by saying his opinions were based on the AMA Guides, which she referred to as "the Bible" for doctors:

> And he told you that she had ratable findings under the guidelines of the American Medical Association, the gold standard, the Bible for doctors. This is what doctors use when they are rating folk....So according to the Bible doctor's use, Dr. Rudolph said that Mrs. Scott had a 25 percent impairment to body that she will have to live with for the rest of her life.

(Tr. 189:12–14; 190:2–5). Clearly, Respondent's counsel believed the imprimatur of the American Medical Association on Chiropractor Rudolph's opinions was important.

Chiropractor Rudolph's testimony was the only evidence admitted by Respondent to show the allegedly permanent nature of Respondent's injuries. Because Respondent presented no additional testimony as to permanent impairment, it is reasonably probable that the jury's verdict was influenced by this improper testimony. *See Watson*, 389 S.C. at 452, 699 S.E.2d at 178–79.

Additionally, Respondent's improper reply testimony rehabilitated her previous deposition and trial testimony. When she closed her case-in-chief, Respondent's testimony left the impression – consistent with her prior deposition testimony – that she had previously treated with a chiropractor for another car accident that resulted in severe injury to her back. Her reply testimony, however, exceeded the scope of the evidence presented by Appellant and implied that her previous injuries were not so severe as 1) to require a chiropractor's care, contradicting her previous deposition and trial testimony; and 2) to cause lasting injury that could have affected Chiropractor Rudolph's impairment diagnosis in this case. Respondent was permitted to come back to the stand to contradict her previous twice-sworn testimony and then explain away the inconsistencies in her story. By allowing Respondent to give this improper "rebuttal" testimony, Respondent was able to carefully craft the last pieces of evidence in the case to her benefit.

The key dispute at trial was the extent of Respondent's injuries and whether she sustained a permanent injury. The jury verdict was heavily influenced by Chiropractor Rudolph's opinion testimony. Although he is not a "physician," Chiropractor Rudolph was allowed to render a whole person permanent impairment rating using the AMA Guides, which authorize only "licensed physician[s]" to give such ratings. AMA Guides, 18. Then, the Circuit Court allowed Respondent to come back on the stand and downplay her prior accident and pre-existing injuries. As a result, the jury awarded Respondent $70,000 in damages although she had accumulated only $9,425.32

in medical bills. The severe discrepancy between Respondent's economic damages and the jury's verdict demonstrates the prejudicial influence of this improper testimony.

CONCLUSION

The Circuit Court erred when it allowed a chiropractor to give an opinion on whole person permanent impairment under the AMA Guides. The AMA Guides limit their application to a "licensed physician," and South Carolina's statutes do not treat a chiropractor as a "physician." The Circuit Court then compounded that error by allowing Respondent to rehabilitate her case through reply testimony that had nothing to do with the defense case presented by Appellant. In both instances, the Circuit Court abused its discretion.

Having heard the testimony of an expert cloaked in the authority of the American Medical Association and Respondent's last-minute testimony downplaying her prior injuries, the jury awarded Respondent with damages more than seven times the amount of her medical bills. Because the improperly-admitted testimony was probative on material issues in the case, there is a presumption of prejudice. Moreover, the mere size of the verdict creates a reasonable probability the jury's award was influenced by the improper testimony. Therefore, the Circuit Court's abuse of discretion in allowing Chiropractor Rudolph's excessive testimony and Respondent's improper reply case was prejudicial to Appellant, and this Court should reverse.

Respectfully submitted,

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Columbia, South Carolina
February 4, 2019

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

Case No. 2016-CP-43-01289

Gwendolyn Scott, ... Respondent,

v.

James Applewhite, ... Appellant.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief, Certificate of Counsel, and Designation of Matters on Gwendolyn Scott by depositing a copy of it in the United States Mail, postage prepaid, on February 4, 2019, addressed to her attorney of record, Toyya Brawley Gray, Esquire, 2201 Green Street, Columbia, South Carolina, 29205.

February 4, 2019

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February 4, 2019

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Gwendolyn Scott vs. James Applewhite
Civil Action No: 2016-CP-43-01289
Claim No.: 133950748
Date of Loss: 11-01-13
Our File No.: 1115-2739

Dear Ms. Kitchings:

Enclosed please find herewith for filing with the Court the original and two (2) copies of Appellant's Initial Brief, Certificate of Counsel, and Designation of Matters, along with our Proof of Service with regard to the above-referenced matter:

I would appreciate your filing the originals and returning a clocked copy of each to me via our firm's runner.

By copy of this letter, I am serving same on all counsel of record. Thank you for your assistance with this matter.

Yours truly,

Wesley B. Sawyer

WBS/dlb
Enclosures
cc: Toyya Brawley Gray, Esquire (via U.S. mail w/enclosures)