THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2019-001716
Lower Court Case No. 2017-CP-10-2758

Jeane Whitfield,

Appellant,

v.

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

Respondents.

INITIAL BRIEF OF RESPONDENTS DENNIS K. SCHIMPF, M.D. AND SWEETGRASS PLASTIC SURGERY, LLC

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(2) Whether the Trial Court properly applied the Rules of Evidence governing relevance to limit Appellant's cross-examination of a witness, disallowing Appellant from presenting material at trial that had nothing to do with the alleged malpractice, that was not relevant, had speculative value, and was laden with potential for unfair prejudice, offered solely to attempt to smear and embarrass Respondents.

(3) Whether the Trial Court's denial of Appellant's Motion for a Directed Verdict on Negligence Per Se was proper where there was no evidence that the regulatory scheme at issue applied to Respondents, no evidence of causation, and where factual inferences available from the evidence were susceptible to more than one interpretation.

INTRODUCTION

This medical malpractice appeal arises from the unanimous defense verdict rendered at the end of a week-long jury trial held from August 26 – 30, 2019. This Court should affirm the jury's verdict and the Trial Court, which properly admitted the testimony of Respondents' experts, reasonably limited the examination of a key fact witness to prevent that examination from careening into wholly irrelevant and unfairly prejudicial territory, and properly denied Appellant's motion for a directed verdict as to Appellant's claim of improper recordkeeping, which Appellant's own treating physician conceded did not affect his treatment of her. At the conclusion of trial, the jury received the evidence, deliberated, and returned to the courtroom with a complete and unanimous verdict for Respondents confirming there was no malpractice in this case. Dissatisfied with this outcome and having been prevented from laying bare the private personal lives of Respondents and their experts at trial, Appellant now argues that this Court should substitute its judgment for that of the jury and provide her a new trial on the merits. Appellant's arguments are without merit. This Court should affirm the verdict below.

COUNTER-STATEMENT OF THE CASE[1]

I. FACTUAL BACKGROUND

Jeane Whitfield ("Appellant" or "Mrs. Whitfield") filed this medical malpractice action against Dennis K. Schimpf, M.D. ("Dr. Schimpf") and his practice, Sweetgrass Plastic Surgery, LLC ("Sweetgrass"), alleging that Respondents were medically negligent in the performance of a set of cosmetic procedures for her on June 6, 2014. (*See generally,* Amended Compl.). That day she underwent liposuction of the abdomen, thighs, chin, and axillae; a bilateral replacement of

[1] Respondents do not consent to be bound by Appellant's Statement of the Case and the Statement of the Facts, and, pursuant to Rule 208(b)(2), SCACR, submit their own Counter-Statement of the Case and Facts.

breast implants; a breast lift (called a "mastopexy"); and an upper eyelid lift (a "blepharoplasty"). Before the procedures, Mrs. Whitfield signed consent forms for each of the procedures she was requesting. (*See* Def. Exs. 3-7). At trial, Mrs. Whitfield contended that Dr. Schimpf's charting was incomplete, that he and his practice lost and/or destroyed medical records, that he performed liposuction on her chin without consent, and, primarily, that he applied too much tension in closing the incision line on her right breast, which caused it to separate.[2] She contends that, because of this separation, she required multiple surgeries, including an unrelated surgery on her left breast and reconstructive procedures with her new plastic surgeon, Dr. Ram Kalus, and that, in addition to her economic damages, she suffered mental and emotional injury.

A. Medical Treatment

Turning to the relevant particulars, Mrs. Whitfield first saw Dr. Schimpf in December 2013. (TT. 85:9-10). Prior to her first visit with Respondents, Mrs. Whitfield had been seeking treatment to address pain in her right side, near her breast and ribs, which "was like a hot, searing ache." (TT. 82:20 – 84:6). She also sought and received regular treatment from her psychiatrist, Dr. Sara Marcino, for a number of very serious, pre-existing psychiatric conditions but she chose to withhold those conditions to Respondents. (TT. 556:18 – 570:21; Def. Exs. 2, 26-32). In these appointments with her psychiatrist, Mrs. Whitfield reported and received treatment for significant prior traumas, anxiety, increased stress, fear for her safety, depression, heavy drinking, and self-initiated attempts to stop taking her psychiatric mediations. (*Id.*). She had also been prescribed many different psychiatric medications including multiple antidepressants, multiple mood

[2] Appellant herself contended that she developed a raging infection in her right breast, which, in her telling, was "full of infection and necrosis." (TT. 175:23). Her counsel however did not take this position because it lacked evidentiary or testimonial medical support. *See, e.g.* Appellant's Counsel's comment to court during argument regarding Dr. Kalus' *de bene esse* testimony at TT. 404, "The jury will know that she did not get an infection. That's been gone over ad nauseaum."

stabilizers like lithium, multiple antipsychotics, and three benzodiazepines to treat panic disorder, all of which conditions played a role in her outcome. (TT. 800:13 – 803:24). Before seeing Dr. Schimpf, Mrs. Whitfield saw a gastroenterologist in Summerville for the pain in her side. (TT. 82:20 – 84:6). He performed a workup and could not find any gastrointestinal source for her pain, but suggested that it might emanate from the scar tissue from her prior breast implant surgery. (*Id.*, 530:23 – 531:2). As she was leaving her appointment with the gastroenterologist, she encountered an old friend and former co-worker of hers, who was working as the office manager of Sweetgrass Plastic Surgery. (TT. 84:9-25, 290:10).

Mrs. Whitfield therefore came to see Dr. Schimpf on December 19, 2013. (*Id.*, 316:5-8). She filled out a medical history form that day but withheld her very significant psychiatric history, including bipolar depression, anxiety, or emotional problems, including the fact that she had begun drinking again, that she had nightmares, was having martial issues, that she stopped taking her psychiatric medications on her own, that she was under tremendous stress, and that she had extreme anxiety. (TT. 556:18 – 570:21; Def. Exs. 2, 26, 27, 28). In her initial consultation with Respondents, she discussed the discomfort side/ribs/breasts but also sought to discuss additional cosmetic concerns, including her breasts, arms, legs, abdomen, eyelids, and neck / chin. (Pl. Ex. 25; Def. Ex. 13). Dr. Schimpf explained to her that the pain could be caused by scar tissue encapsulation from her prior breast augmentation and consulted on her additional cosmetic concerns. (TT. 85:15-21). The practice provided her with an estimate for the procedures. (Pl. Ex. 2). At this point in time, there was no procedure planned for her chin / neck, but in her own contemporaneous notes, Mrs. Whitfield wrote that she and Dr. Schimpf discussed a procedure on her neck in the initial consultation. (Def. Ex. 13; TT. p. 219 – 221).

On May 27, 2014, Mrs. Whitfield met with Dr. Schimpf at Dr. O'Neill's office to discuss the procedures and sign consent forms. (Def. Exs. 3-7). The records reflect that Mrs. Whitfield was informed of the risk of infection, crusting, fluid collection, headache, inflammation, loss of flap, nerve damage, pain or persistent pain, redness, skin breakdown, skin loss, skin ulceration, swelling, and unsightly scarring. (*Id.*). Not only did she sign consents for the procedures outlined in the estimate, but she signed two separate consents for liposuction procedures. (*Id.*).

On June 6, 2014, the surgeries went forward as planned and no intraoperative complications were noted. (Def. Exs. 9, 11, 12, 41, 43). It is uncontested that Dr. Schimpf used the medically accepted and standard techniques to perform the surgeries in question. (TT. 495:21 – 496:2). Notably, the preoperative record, the anesthesia record, completed by a non-party anesthesiologist, and the operative note all confirm that she was to have submental liposuction, i.e. liposuction addressing her neck and chin (and taking place in the area under the jaw). (Def. Exs. 9, 11, 12). Furthermore, she left the office that day with a pressure wrap called a "jaw bra" but testified that she was unaware of the liposuction on her chin / neck until she returned for her first postoperative visit with Dr. Schimpf on June 10, 2014. (Def. Ex. 15; TT. 226:3-17). Mrs. Whitfield now contends that this portion of the procedure occurred without her consent, that she was "happy with the chin and neck [she] had," that she "never spoke to [Dr. Schimpf] about my neck and chin." (TT. 90:18-20). On cross examination however, Respondents demonstrated that she signed an additional consent form for liposuction that references the face and neck, wrote in her journal that after her initial consultation that she had discussed "neck," and further that her prior medical records demonstrate that she regularly sought and received nine treatments designed to tighten her neck and chin in the year and a half leading up to the procedure at issue. (TT. p. 209 – 213:6; Def. Exs. 8, 9, 14; Pl. Ex. 25).

Dr. Schimpf saw Mrs. Whitfield postoperatively on June 10 and June 19, 2014 and he or his office spoke to her on the telephone on June 9, 16, and 18, 2014. (Pl. Ex. 28; Def. Ex. 43, TT. 672-73). At trial, Mrs. Whitfield insisted that no one from Sweetgrass would call her back on June 16 and 17, and that, when she did speak with the office manager on June 18, she was told that her discomfort was simply a result of the natural healing process. (TT. 236:7-16). Respondents however refuted these allegations at trial with the Appellant's telephone records, which proved otherwise. (Def. Ex. 42). Mrs. Whitfield further testified that because no one would help her, she had to go to the hospital on June 20 because her "breast was ripping open from the inside out." (TT. 236: 2-3; 240:10-11). On cross examination, Respondents established that she called an ambulance because she thought she was having a heart attack. (TT. 235:14 – 237:20; Def. Ex. 17, 18). Mrs. Whitfield received a full cardiac workup, was hospitalized for three days, never received any treatment whatsoever for her breasts, and was sent home without any cardiac or other findings. (TT. 237:18 – 240:14). Yet she submitted this bill, for $21,000 as damages to the jury. (*Id.*; Pl. Ex. 23). At trial, Defendants' expert psychiatrist, Dr. James Ballenger, placed this episode in context, explaining that it was a panic attack, characteristic of and driven by Mrs. Whitfield's preexisting severe panic disorder. (TT. 786:21 – 790:15). Further, Dr. Schimpf explained that, as of June 25, 2014, according to a time-stamped photograph in Dr. Kalus' chart, her skin was healing well, 19 days after surgery. (TT. 678:14-682:4, Def. Exs. 35 (Kalus 6-25-14 text photo) and 36 (Schimpf Text Photo)).

Mrs. Whitfield called for Dr. Schimpf on June 30 and was seen in the office the next day, July 1. (Def. Exs. 42, 39; TT. 674:5-9). Appellant had drainage and a small opening of the incision line on her right breast, so Dr. Schimpf placed two small stitches and changed her bandages, prescribed prophylactic antibiotics, and attempted to reassure her that she was healing

appropriately. (TT. 119:18-120:15). Over the Fourth of July weekend, Appellant became increasingly concerned about her right breast incision line. She called the office, and, according to her testimony, begged to be seen, stating, "I feel like I'm ripping open, please, God, somebody just see me, see me." (TT. 121:9-10). She went to the office and was given prescriptions. (TT. 120:18 – 121:20). She testified that she went home and cried, laid in bed, and believed she was "just getting so sick." (TT. 121:21-24). Mrs. Whitfield then turned to Google and found Dr. Ram Kalus, a plastic surgeon with a practice in Mt. Pleasant. (Pl. Ex. 25; TT. 121:25 – 122:4).

She saw Dr. Kalus on July 10, 2014. The implant was not exposed. (Kalus *De Bene Esse*, 100:17-19). He did not rush her to surgery. (*Id.* l. 25). He did not diagnose an infection. (*Id.* p. 101:11-13). He did not administer antibiotics or take wound cultures. (*Id.* p. 101:18-20). He diagnosed her with a wound dehiscence (a separation), which he explained is a common complication of the breast procedure at issue. (*Id.* p. 101:13; 102:3-4). Dr. Kalus then "strongly encouraged" Mrs. Whitfield to return to Dr. Schimpf and called Dr. Schimpf to inform him that he had seen Mrs. Whitfield. (*Id.* p. 102:14-16; 10:20-23).

Mrs. Whitfield returned to Sweetgrass on July 11, 2014. In her trial testimony, she dramatically recounted that Dr. Schimpf was "so angry" that he "stitched her up" without any anesthetic and that she started "screaming," begging for him to stop. (TT. 124:3-21). She further recounted that Dr. Schimpf was angry that she had gone to another plastic surgeon, and that when he was finished, "he was so incensed with me he threw the tray into the sink" and said "get out of here." (TT. 124-:22 – 125:8). The evidence in fact shows that Mrs. Whitfield was healing appropriately and does not support her fantastical assertions. (*See* Def. Ex. 43, p. 117 (noting "2.5 x 1 cm superficial [opening] with no undermining or tunneling. The granulation tissue was present at base w/ no implant exposure…placed suture…to take tension off incision line and prevent

further dehiscence.); *see also* TT. 878:7-16 (discussing granulation tissue as a sign of wound healing visible in preoperative photographs taken three days later on July 14, 2014)). Mrs. Whitfield testified that she "could not believe that just happened to me" and that she "went home, got in the bed, and cried my eyes out." (TT. 125:14-15).

The next day, July 12, 2014, Mrs. Whitfield's mother died unexpectedly. (TT. 125:19-22). Then, on July 13, 2014, when she was in the shower, she became dizzy, saw black, and saw blood pooling around her feet. (TT. 126:2 – 15, 246:25 – 247:15). She contends that she did not fall, did not bump or scrape anything, but was in and out of consciousness, and then, her "breast blew open all the way through" and her "areola [was] eaten away." (TT. 247:16 – 248:1). On direct, Mrs. Whitfield said that her daughter "helped [her] out of the shower." (TT. 126:15). On cross, Defense Counsel impeached her with her deposition testimony regarding the same event, in which she had testified that "my daughter dragged me out of the shower where blood was pooling around my feet." (TT. 284:2-11, 251:5-8). At trial, Mrs. Whitfield would not concede that she had to be "dragged" out of the shower, but only that her daughter had to help her out after she became dizzy. It was clear at trial however that her breast was not bleeding before she got into the shower. (TT. 252:18-19).

Mrs. Whitfield's daughter called Dr. Kalus' office. (TT. 267:3). He saw Mrs. Whitfield in the emergency room at Roper St. Francis Hospital and planned to perform a debridement of the incision line the next day. (TT. 877:14-20). During the course of this procedure, as Dr. Kalus was probing the wound with his finger, the implant became inadvertently exposed. (Kalus *De Bene Esse*, 108:19-23). Because he exposed the implant, he had to remove it. (*Id.* 108:24 – 109:2). Dr. Kalus therefore removed the implant and closed the breast to allow it to heal, diagnosing Mrs. Whitfield with delayed healing. (Kalus *De Bene* Esse, 103:15-20; 106:4-7). He did not encounter

any pus or purulence during the procedure and further agreed that her lab work did not reveal evidence of a systemic infection. (*Id.* 106:8-11; 105:7-22). Significantly, neither Dr. Kalus nor any other provider treated Mrs. Whitfield for infection during this hospitalization. (*Id.* 105:24-106:3). She insisted at trial however that Dr. Kalus had to remove the implant and to go into her breast and "clean it out" because it "was full of infection and necrosis." (TT. 175:22-23).

On July 29, 2014, Mrs. Whitfield resumed regular appointments with her psychiatrist, Dr. Sara Marcino, reporting that she was not taking her medications, that she could not sleep or function, was anxious, depressed, and felt like Frankenstein. (Def. Ex. 28). She became angry and fixated on the surgery, lumping blame onto it for her problems, which had been treated by Dr. Marcino since at least 2013. (Def. Exs. 26 – 30, TT. 576:16 – 579:4). Her diary entries thereafter reflect her attributing her problems to the procedure as well. (Pl. Ex. 25). Mrs. Whitfield has continued to receive psychiatric treatment from Dr. Marcino for the same problems she had for years before this procedure and, in her First Supplemental Answers to Interrogatories, designated Dr. Marcino as one of her expert witnesses for trial. (Def. Ex. 31-32; TT. 190-191, First Supp. ATI, 9/10/18). Dr. Marcino appeared and provided expert testimony contending that Mrs. Whitfield's preexisting psychiatric condition was exacerbated by the events of this case. (*See, e.g.* TT. 579:14-15).

In the meantime, instead of having Dr. Kalus re-augment her right breast and although her left breast had healed appropriately, Mrs. Whitfield curiously chose to have her left implant removed. (Kalus *De Bene Esse* 111:13-25, TT. 502:4-8). Unfortunately for her, along with the implant removal, Dr. Kalus also took an additional 490 grams of native breast tissue from the left side, leaving Mrs. Whitfield with significant asymmetry. (Kalus *De Bene Esse* 115; TT. 920:22-24; *see also* Def. Exs. 24 and 25, which illustrate her condition before and after Dr. Kalus'

intervention on the left side). In order to repair the defect he created, and because Appellant said she no longer desired implants, Dr. Kalus attempted fat grafting, seeking to add volume back to the breast to address the asymmetry, but it was not successful. (Kalus *De Bene Esse* 121:8-12). His course of treatment, and especially his decision to remove 490 grams of breast tissue from the well-healed left breast, was criticized at trial and identified as the actual source of Mrs. Whitfield's current physical complaints. (TT. 881:24 – 883:10). Mrs. Whitfield continued to seek treatment from Dr. Kalus and her most recent pretrial records reflected her desire to have implants again, even larger than those she originally asked Dr. Schimpf downsize. (Kalus *De Bene Esse* 52:10-16 and 121:18 – 122:4; Def. Ex. 4 to Kalus *De Bene Esse*; Estimate of Dr. Kalus, Pl. Ex. 23). Mrs. Whitfield has not undergone any such surgery. (Kalus *De Bene Esse* 52:10-23). In the months prior to trial and in spite of not being interested in additional surgery, Whitfield returned to Dr. Kalus for the first time in four and a half years to get a quote for additional surgery, retained him as an expert witness, and noticed his *De Bene Esse* deposition for trial, for which she paid him $1,000 per hour. (*Id.* 65:2-68:13). In that deposition, Dr. Kalus changed his prior sworn testimony, now offering a negative standard of care opinion as to Dr. Schimpf, on which he was thoroughly cross-examined. (*Id.* p. 63:1 – 133:16). On cross examination, Dr. Kalus admitted under oath that he had previously testified that he was not critical of Dr. Schimpf's care, that Appellant's wound separation was a known complication of the procedure that can and does occur in the absence of negligence, that he removed excess tissue from the left side, that her breasts were asymmetric, that his own informed consent forms were inconsistent and inaccurate, and that there was no evidence that he treated Mrs. Whitfield for infection. (*Id.* p. 70:9 – 71:1; 79:9-88:13; 101:11-13, 102:3-6, 105:13-106:7).

B. Recordkeeping

Appellant contends that Dr. Schimpf failed to keep a complete and accurate medical record and argues that she was entitled to a directed verdict on negligence per se due to these failures. The evidence presented at trial showed that Dr. Schimpf was transitioning to a new practice and, as a result, Mrs. Whitfield's records were contained in part on two separate medical records systems. Dr. Schimpf opened his practice in 2013. (TT. 292:20-23). He had an office in Summerville and also shared space with another plastic surgeon on Daniel Island, Dr. Pat O'Neill. (TT. 292:22 – 293:7). The entities were separate, but, at Dr. O'Neill's office, Dr. Schimpf used O'Neill's electronic medical record system. (TT. 293:9-14). If Dr. Schimpf saw the patient at his office, it went onto his electronic medical record system. If he saw the patient at Dr. O'Neill's office, he used Dr. O'Neill's system and stored any associated photographs on that system. (*Id.*). In discovery, Appellant pursued an extensive and costly forensic evaluation of Dr. O'Neill's computer system, which turned up no evidence that records had been deleted, altered, or destroyed. (*See, e.g.* TT. 367:18 – 372:21; Pl. Ex. 35, Affidavit of Dr. O'Neill).

Dr. Schimpf dictated his patient notes with handheld recorders / dictation devices, which dictations were transcribed and entered into the patient's chart. (TT. 293:15 – 294:9). Around the time of Mrs. Whitfield's treatment, the transcriptionist returned some tapes to the office saying that she could not transcribe them, because it appeared that dictation had been attempted but that the recorder did not pick up usable material. (TT. 299:6 – 301:10). The transcriptionist would erase the tapes and return them to the office so that they might be re-used. (TT. 300:10-17). The practice ultimately determined that there were problems with the recorders. (TT. 301:5 – 302:15). The faulty equipment was thrown away. (TT. 302:25 – 303:1). In her testimony, the office manager admitted further that is was theoretically possible that the challenged notes were never dictated or were lost. (TT. 308:21 – 309:1). She did not discover that there were missing records until 2015,

when Mrs. Whitfield requested her chart. (TT. 311:8-12). Ultimately however, Dr. Kalus, Mrs. Whitfield's subsequent plastic surgeon and retained expert, testified that the existence or non-existence of records did not delay or impair his treatment of Mrs. Whitfield. (Kalus *De Bene Esse*, 89:15-21).

II. PROCEDURAL HISTORY

Mrs. Whitfield filed this medical malpractice action against Respondents on May 30, 2017. (Compl.). Respondents challenged defects in the initial pleadings and filed their Answer to the Amended Complaint on October 4, 2017, in which, amongst other defenses, they denied liability and asserted that Appellant's injuries were the result of knowns complication of the procedures about which she was properly informed at the outset. (Amended Answer). Thereafter, the case proceeded into discovery.

During the September 24, 2018, deposition of the office manager for Sweetgrass Plastic Surgery, Appellant's counsel questioned the office manager regarding her personal relationships and the confidential medical and surgical history of her and of other practice employees. Respondents objected and moved for a protective order. (Mot. for P. Order, 9/27/18). During the deposition of Dr. Schimpf on October 17, 2018, Appellant's counsel again engaged in a line of questioning regarding Dr. Schimpf's private life and relationships. Respondents objected and again moved for a protective order. (Mot. for P. Order, 10/22/18). The Trial Court heard argument and denied the motions on January 16, 2019, allowing Appellant's counsel to further explore these topics in continued depositions, which developed no evidence related to Mrs. Whitfield's care and treatment. (Orders denying M.P.O.s, 1/16/19).

As noted above, prior to trial, Appellant designated her treating physicians, Dr. Kalus and Dr. Marcino, her plastic surgeon and psychiatrist, as experts. Both had the benefit of examining Mrs. Whitfield multiple times and treating her over the course of a number of years. Her physical

and mental condition was the central issue in the case. Because of a number of then-unanswered questions regarding the etiology and causal relation of Mrs. Whitfield's claimed and future damages, respondents sought to have their expert plastic surgeon and expert psychiatrist examine Appellant pursuant to Rule 35, SCRCP. (Motion for Rule 35 Exam, 2/14/18; Memorandum in Support, 2/27/19). After the Court determined that Motion was proper and denied Appellant's subsequent Motion to Reconsider, Mrs. Whitfield complied with the order and attended the examinations. These examinations were held in her physicians' offices and in the presence of her physicians, Drs. Kalus and Marcino. (Order for R. 35 Exams, 3/28/19; Order Denying Appellant Mot. to Reconsider, 6/11/19). After the examinations, Appellant deposed Respondents' experts regarding their conclusions. Prior to trial, Appellant filed a motion in limine seeking to exclude Respondent's experts' testimony because the exams had occurred. (*See, e.g.* TT. 48:13 – 49:18).

One month before trial, Respondents entered an offer of judgment in the amount of $100,000. (OOJ, 7/23/19). Appellant did not accept the offer. (*See* Mot. for Costs, 9/16/19). On August 19, 2019, one week prior to trial, Appellant filed the transcripts from the depositions of Dr. Schimpf and his office manager, *in toto*, with the Court. (*See* Mot. to Remove Deposition Transcripts and / or to Seal, 8/22/19). Appellant did not redact personal information, including information regarding minor children, from the transcripts as required by Rule 41.2, SCRCP. (*Id.*). Appellant also proceeded to have Dr. Schimpf's wife personally served with a subpoena for appearance at trial although she had never been identified as a witness by either side in the five years leading up to the trial and had no involvement in Appellant's care. Respondents filed motions challenging these maneuvers, contending that Appellant had undertaken them so that she might try to smear and embarrass Respondents with potentially scandalous and unfairly prejudicial subject matter that had absolutely no relevance to the medical malpractice claims before the jury.

Appellant argued then and argues now that she has broad latitude, unchecked by any limits, to question witnesses so that she might show bias. Similarly, Respondents filed motions in limine seeking to limit Appellant from presenting evidence or argument concerning the personal relationships contending such evidence and presentation was not relevant to any issue in the case and furthermore presented a substantial risk of unfair prejudice under Rule 403, SCRCP. In these motions, Respondents contended that Appellant's efforts were undertaken so that she might explore scandalous and unfairly prejudicial subject matter that had absolutely no relevance to the medical malpractice claims at issue.

During pretrial arguments on August 26, 2019, the Court granted Respondents' Motion to Strike the Transcripts from the Public Index and / or to Seal and entered an Order sealing the transcripts and removing the substance of the documents from the public index. (Order to Remove Deposition Transcripts, 8/27/19). Furthermore, the Court, questioning Appellant's counsel as to what possible relevance Mrs. Schimpf's testimony might have since she had no involvement in Appellant's care at all, released her from the trial subpoena. (TT. 31:16, 22-23). The Court considered Respondent's Motion in Limine regarding evidence of the personal relationship between Dr. Schimpf and his office manager and issued a preliminary ruling excluding it under Rule 403, SCRE, barring some showing during the testimony that the relationship was the cause of the office manager trying to "cover up" for Dr. Schimpf in reference to missing records. (TT. 27:14 – 28:7).

The parties tried the case to a jury from August 26 – 30, 2019. At the end of the trial, Appellant moved for a directed verdict on negligence per se contending that Respondents lacked complete documentation of their interactions with Appellant. (TT. 983-985). The Trial Court denied these motions. (TT. 985:13-14). The jury returned a complete and unanimous verdict for

Respondents. (TT. 1076:13-19; Verdict Form; Form 4 Judgment filed 9-11-19). Appellant filed her notice of appeal on October 8, 2019. (Notice of Appeal, 10-8-19). Respondents then moved for costs related to their previously-filed offer of judgment. (Motion for Costs, 9-16-19).[3] After a hearing, the Court entered an order awarding recoverable costs to Respondents on December 11, 2019. (Order Granting Dr. O'Neill's Motion for Compensation; Order Granting Respondents' Motion for Costs). Appellant timely filed an additional Notice of Appeal as to this order. After multiple extensions, Appellant filed her amended initial brief on July 30, 2020. Appellant did not address either the award of costs to Respondents in her initial brief.[4]

STANDARD OF REVIEW

On appeal from a case at law tried to a jury, the authority of the appellate court is restricted to correcting errors of law. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). The jury's findings of fact therefore will not be disturbed unless "the record discloses that there is no evidence which reasonably supports the jury's findings." *Id.* In this appeal, Mrs. Whitfield challenges (1) the admission of certain expert testimony, (2) the exclusion of testimony regarding a personal relationship between Respondent and his office manager, and (3) the Trial Court's denial of Whitfield's motion for directed verdict.

Admission or Exclusion of Evidence

[3] Dr. O'Neill, a nonparty, was compelled to provide services to Appellant during discovery, having to participate in a forensic examination of his electronic medical records system, which did not turn up any discoverable information, and for which Appellant refused to pay him. He filed a motion for compensation, which was granted. Appellant appealed that order as well. This issue was part of this case until recently, and, when Appellant failed to raise the issue in her Initial Brief, she consented to Dr. O'Neill's dismissal from this Appeal.

[4] Because Appellant did not address the issues in her Initial Brief, and because she never filed a separate, brief, pleading, or motion regarding the Order for Compensation or Order for Costs, Respondents contend that the issues have been waived, abandoned, and deserted and her Notice of Appeal as to the December 11, 2019, order awarding costs should be dismissed. *See* Rule 208(b)(1)(B), SCACR; *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011); and *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993).

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, 632 S.E.2d 845 (2006). 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 v. Reg'l Med. Ctr.*, 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 v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. at 408, 764 S.E.2d at 251 (quoting

Fields v. Reg'l Med Ctr.); *see also State v. Fuller*, 452 S.C. at 479, 822 S.E.2d at 915 (same) (quoting *State v. White*, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007)).

Directed Verdict

When deciding a motion for directed verdict, "the trial court is concerned only with the existence or non-existence of evidence." *Enos v. Doe*, 380 S.C. 295, 300-01, 66 S.E.2d 619, 621 (Ct. App. 2008) (citing *Corbett v. Weaver*, 380 S.C. 288, 292-93, 669 S.E.2d 615, 617 (Ct. App. 2008) (quoting *Sims v. Giles*, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001)). This means that, when considering the motion, "when the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Id.* (quoting *Howard v. Roberson*, 376 S.C. 143, 150, 654 S.E.2d 877, 880 (Ct. App. 2007)). The task of the appellate court is to:

> [D]etermine whether a verdict for the party opposing the motion would be reasonably possible under the facts as liberally construed in his or her favor. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006); *Erickson v. Jones St. Publishers*, L.L.C., 368 S.C. 444,463, 629 S.E.2d 653, 663 (2006). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 292, 628 S.E.2d 496, 503 (Ct. App. 2006). A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability. *Huffines Co. v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Wright v. Craft*, 372 S.C. 1, 19,640 S.E.2d 486, 496 (Ct. App. 2006) (citing *Erickson*, 368 S.C. at 463, 629 S.E.2d at 663).

Id.

Issue Preservation

Finally, in South Carolina, 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 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, a proffer. *Ellis by Ellis v. Oliver*, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996). Furthermore, "a proffer that is confusing or incomplete will not provide grounds for the appellate court to find prejudice." Jean Hoefer Toal, et al. *Appellate Practice in South Carolina* 200 (3d ed. 2016) (contrasting *Designer Showrooms, Inc. v. Kelley*, 304 S.C. 478, 405 S.E.2d 417 (Ct. App. 1991)).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ADMISSION OF RESPONDENT'S EXPERTS' TESTIMONY BECAUSE IT WAS RELEVANT AND USEFUL TO THE JURY AND WAS NOT SUBJECT TO EXCLUSION MERELY BECAUSE RESPONDENT'S EXPERTS EXAMINED PLAINTIFF PURSUANT TO A COURT ORDER.

"The admission or exclusion of evidence is within the circuit court's discretion, and the circuit court's ruling on the admissibility of evidence is not subject to reversal on appeal absent a showing of a clear abuse of that discretion." *Turner v. Med. Univ. of S.C.*, Op. No. 5723 (S.C. Ct. App. filed May 6, 2020) (Shearouse Adv. Sh. No. 18, at 119) (citing *Haselden v. Davis*, 341 S.C. 486, 497, 534 S.E.2d 295, 301 (Ct. App. 2000), *aff'd*, 353 S.C. 481, 579 S.E.2d 293 (2003)). Rule 702, SCRE, permits the admission of expert testimony when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." "Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." *Watson v. Ford Motor Co.*, 389

S.C. 434, 445, 699 S.E.2d 169, 175 (2010). At base, evidence is admissible under Rule 702, SCRE, where (1) it aids the jury in its determination of some fact in issue and (2) where its probative value is not outweighed by its prejudicial effect in confusing the jury. *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

Prior to trial, Appellant moved in limine to prevent Respondents' expert plastic surgeon, Dr. Jorge Perez, and Respondents' expert psychiatrist, Dr. James Ballenger, from giving testimony, contending that *Fairchild v. S.C. Dep't of Transp*., 398 S.C. 90, 727 S.E.2d 407 (2012), established a rule providing that a party is absolutely prohibited from using his or her own expert to perform an independent medical exam. (*See, e.g.* TT. p. 42:15 – 44:25). In pretrial argument, Appellants employed their motion in limine as an opportunity to re-litigate the propriety of the Circuit Court's prior ruling ordering Appellant to attend the examination. (*Id.*). Despite having three of her own experts examine her, Appellant argued, reading language into Rule 35, SCRCP, that appears nowhere in the Rule, that a previously retained expert cannot perform a Rule 35 medical examination because that expert is not "independent." (*Id.*). The Trial Court, weighing *Fairchild*, the prior procedural history, and the prior order of the Circuit Court, denied Appellant's motion to exclude the testimony. (TT. 46:17 – 51:3). Now, on appeal, Appellant challenges that decision of the Trial Court to permit the testimony, <u>*not*</u> the underlying decision of the Circuit Court to permit the examinations in the first place. (*See* Initial Brief of Appellant, Issues Presented, Numeral I, "The trial court erred in admitting testimony from Respondents' Psychiatric and Plastic Surgery Experts Regarding Their Examinations of Appellant."). Appellant made no argument below regarding the admissibility of the testimony under the appropriate Rule 702 standard, instead, she contended that it was not admissible because the examinations themselves had, in her view, violated *Fairchild*. This argument was misplaced then and it is misplaced now.

Appellant contends that *Fairchild* stands for the proposition that a retained defense expert may never perform an "independent medical examination" of a plaintiff under Rule 35, SCRCP. This is simply not the case. First, Rule 35, SCRCP does not require that the court-appointed examiner be independent nor does it employ the concept, borrowed from Workers' Compensation law, of an "IME" or "Independent Medical Examination." Appellant had her own physicians, Drs. Kalus and Marcino, serve as her experts in the case. As discussed above, both had the opportunity of treating her over many years. Furthermore, Mrs. Whitfield's retained expert plastic surgeon, Dr. Rosenberg, was also able to meet with her prior to his testimony and to consider the evidence with her and her lawyers. (*See, e.g.* TT. p. 479, 490). Respondents sought examinations under Rule 35 so that their experts' opinions might also have the benefit of first-hand evaluation. The court-ordered examinations took place in the offices of Mrs. Whitfield's physicians and that Mrs. Whitfield never suggested an alternate examiner to the Court below – she simply argued that the examinations could not occur because of *Fairchild*. (Hearing Transcript, 2/27/19, p. 1-16). Moreover, she never presented evidence at trial tending to show that the examinations themselves involved anything improper or were anything other than normal medical examinations.

Finally, *Fairchild* is not controlling here because (1) the portion concerning Rule 35 examinations is dicta and (2), *Fairchild* is factually distinct from the case at bar. Unlike *Fairchild*, in this case, Mrs. Whitfield had her own treating physicians serving as her experts, both of whom had benefit of their knowledge of her and longstanding relationship with her. Their testimony played a major role in Mrs. Whitfield's presentation to the jury. Absent a Rule 35 examination, Respondents had no access to Mrs. Whitfield and no way to evaluate the key damages evidence in the case. Mrs. Whitfield told the jury that she was physically deformed and psychiatrically injured, and she presented those claims for damages through the very experts who treated her for those

conditions and who had a vested interest in continuing to treat her for those conditions. One of her own experts, Dr. Kalus, was further identified as the source of her alleged physical deformities because, as noted above, he removed nearly 500 grams of native breast tissue from her left side without sufficient medical justification. Facing this unique circumstance, Respondents sought to have access to Mrs. Whitfield to level the playing field and the Court, in its discretion, allowed the examinations, ensuring that all of the Rule 35 safeguards were employed. Lastly, the *Fairchild* plaintiff challenged the identity of the examiner. Here, Appellant challenged the occurrence of the examinations altogether and did not propose any reasonable alternative. (Hearing Transcript, 2/27/19, p. 1-16). Concluding that an examination was reasonable, the Court allowed Defendant's experts to examine Appellant under Rule 35, subject to the conditions and protections contained in the Rule. This case is not *Fairchild*.

A. The Court Properly Admitted the Testimony of Respondents' Experts Under Rule 703, SCRE, and Appellant Interposed No Contemporaneous Objection to the Testimony of Either Expert.

As noted above, expert testimony is admissible where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and where it is not unfairly prejudicial. Rule 702, SCRE; *State v. Council*, 335 S.C. at 20, 515 S.E.2d at 518. "The qualification of expert witnesses and the admissibility of their testimony is largely within the discretion of the trial court." *Walker v. Bluffs Apartments*, 324 S.C. 350, 353, 477 S.E.2d 472, 473 (Ct. App. 1996) (citation omitted). An appellate court "will not disturb a trial court's ruling to exclude or admit expert testimony absent a clear abuse of discretion." *Id.* (citation omitted). An expert will be qualified and his testimony admitted when the proponent shows that the witness has "acquired by reason of study or experience or both suck knowledge and skill in a business, profession, or science that he is better qualified than the jury to form an opinion

on the particular subject of his testimony." *Id.* (citing *Botehlo v. Bycura*, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984)).

At trial, Mrs. Whitfield did not object to Respondents calling either expert to the stand. (*See* TT. 834-5 (Respondents call Dr. Perez to the stand and begin direct examination without objection) and 769-70, (Respondents call Dr. Ballenger to the stand and begin direct examination without objection)). In each examination, Respondents laid a foundation, demonstrating in turn that Dr. Ballenger is one the world's foremost experts in psychiatry generally and anxiety disorders specifically and that Dr. Perez is appropriately credentialed and very experienced in the field of cosmetic and reconstructive surgery. (*See* TT. 769-79 regarding Dr. Ballenger and 835-39 regarding Dr. Perez). Each physician possesses the scientific, technical, or other specialized knowledge required by Rule 702 and Appellant did not object to the qualification of either as an expert, nor does she do so in the present appeal. (*See* TT. 779, 839).

In his testimony, Dr. Perez discussed the technical performance of the procedure at issue, discussed the causes of and treatments available for wound separation, scrutinized the treatment of Dr. Schimpf and Dr. Kalus, and evaluated the etiology of the damages claimed by Mrs. Whitfield. (*See, eg.* TT. 940:15 – 942:20; 872:19 – 879:24; 872: 11-16, 883:2 – 888:9). This testimony, based on the underlying sources of evidence typically employed by expert physicians in their specialties, including medical records, testimony, and in-person examinations, is textbook expert testimony, i.e. it is that which might aid or assist the jury in understanding the evidence and determining the facts in issue. *See, e.g. Watson v. Ford Motor Co.*, 389 S.C. at 445, 699 S.E.2d at 175 (referring to Rule 702, SCRE and holding that, "[s]tated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge."). Similarly, Dr. Ballenger's testimony discussed the nature of certain psychiatric

disorders from a clinical perspective, including panic disorders and other related anxiety disorders, and then assessed how those likely effect Mrs. Whitfield and inform her ability to cope with postoperative complications. (*See, e.g.* TT. 787-89, discussing the practical effect of a panic disorder). This is not a subject matter within the general purview of a juror's knowledge. Furthermore, Dr. Ballenger, a renowned expert in panic disorder, is inarguably well-qualified to assist the jury in its evaluation of Mrs. Whitfield's damages. Therefore, expert testimony was properly admitted by the Trial Court under Rule 702, SCRE.

B. Appellant Waived Her Argument Against the Admission of Testimony Regarding Defense Expert's Examinations Because She "Opened the Door" and Also Failed to Make a Contemporaneous Objection to Their Testimony.

At trial, Appellant "opened the door" to discussion of the examinations, first placing it in issue before the jury on her direct examination of her own witnesses. During Appellant's direct examination of her treating / expert psychiatrist, Dr. Marcino, Mrs. Whitfield's counsel elicited testimony from her regarding her role during Dr. Ballenger's examination, which took place in her office. (TT. 548:4-6 "Q: Were you present for when the defense psychology expert, Dr. Ballenger, performed his examination of Mrs. Whitfield? A: Yes, I was."). This was the first the jury heard of the examinations. She discussed Mrs. Whitfield's alleged aversion to the evaluation, Dr. Ballenger's approach to the session, and asserted that Dr. Ballenger made Mrs. Whitfield nervous. (TT. 548-51). Finally, Dr. Marcino suggested that there was no trust between Mrs. Whitfield and Dr. Ballenger so therefore Mrs. Whitfield was not entirely forthcoming in her responses. (TT. 549-51).

In spite of having put the topic in issue and used it to attempt to garner sympathy from the jury, Appellant now contends that this Court should give her a new trial because the Trial Court permitted discussion of the evaluations. This is not reasonable nor is it the law in this state. In order to have an appellate court consider an issue, it must be preserved. "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*, 372 S.C. at 301-02, 641 S.E.2d at 907. Not only did Appellant put the evaluations in issue, she did not object to Respondents calling or qualifying either expert witness. Similarly, Appellant failed to lodge a contemporaneous objection to each expert's discussion of his examination of Appellant. On direct examination, Dr. Ballenger discussed his appointment with Mrs. Whitfield, replying to Dr. Marcino's negative gloss on his session with her patient:

> Q. "And were you also given an opportunity to meet with Ms. Whitfield and perform your own evaluation?
>
> A. I did. And we did. And we met for about three hours in Dr. Marcino's office, actually with Dr. Marcino sitting almost beside her in that office. And as I said, we met for about three hours.
>
> Q. And is that a fairly common thing for you to do, to interview patients in the forensic world?
>
> A. I like to do it every time that it's possible. …
>
> Q. And you mentioned that Dr. Marcino was present for this evaluation. There was some testimony yesterday that Dr. Marcino appeared to question whether Ms. Whitfield was able to give reliable answers during your evaluation. What was your impression of that?
>
> A. Well, Ms. Whitfield is certainly smart and capable and quite verbal and can do that. She didn't want to do the interview, was afraid of me. And I think that's fair to say. Certainly distrusted me because I was from the other side and that I would be not nice to her. …
>
> So it's become my pattern over the last probably maybe ten years, maybe, to ask people afterwards how was it, because of those reasons. I mean did I -- was I nice to you. Ms. Whitfield said, yes, you were very nice. And was I respectful? Yes, very respectful. And then she went on to say, yes, it was not -- essentially it wasn't traumatic, it wasn't anywhere near as bad as I thought it would be. And as I was walking out, she stopped me to thank me; again, saying you made it actually a pleasant experience.

(TT. 781:16 – p. 782:25). Dr. Ballenger then continued to explain his conclusions and diagnoses of Appellant's condition. Appellant failed to lodge a single objection to this colloquy and thereby

failed to preserve the admission of his testimony for consideration on appeal. Similarly, Appellant did not object to the discussion of Dr. Perez's evaluation of Appellant, which was a standard plastic surgery evaluation held in the presence and at the offices of Mrs. Whitfield's plastic surgeon, Dr. Kalus. (*See* TT. 841:10-24). Because Appellant did not make a contemporaneous objection, this issue is not preserved for review.

C. Assuming That the Trial Court Erred in the Admission of Testimony Regarding the Examinations of Appellant by Drs. Perez and Ballenger, Such Error was Harmless.

The admission of the Defense experts' testimony, both generally and as to their examinations of Appellant, was proper under the Rules of Evidence. Further, and although the issue is not directly before this Court because Appellant appealed only the admission of the defense experts' testimony and not the underlying March 28, 2019 Order requiring Appellant to attend the examinations, those examinations were appropriate under Rule 35, SCRCP. However, assuming *arguendo* that the Trial Court erred in the admission of testimony regarding the examinations, any error that resulted was harmless and would not support reversal. First, Appellant can point to no improper prejudice that the admission of this evidence had on her case, especially when all three of her retained experts examined and met with her themselves and then testified on the basis of their findings. The record is also clear that Appellant's counsel had a full and fair opportunity to depose each expert regarding their examinations and to challenge the evaluations on cross examination and, further, did in fact challenge the examinations through their examinations of Appellant's treating physician experts, having them testify about the process as well as Appellant's alleged begging and pleading that the examinations not go forward. Moreover, these examinations did not comprise a significant part of either of the Defense experts' testimony. Simply put, the admission of evidence regarding the examinations did not change anything in the outcome of the trial.

i. Legal Standard Governing Harmless Error and Additional Sustaining Grounds.

In South Carolina, harmless error is not a proper grounds for reversal of a trial court:

> Whether an error is harmless depends on the circumstances of the particular case. *In re Harvey*, 355 S.C. 53, 63, 584 S.E.2d 893, 897 (2003). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Mitchell*, 286 S.C. 572, 573,336 S.E.2d 150, 151 (1985). Error is harmless where it could not reasonably have affected the result of the trial. *Harvey*, 355 S.C. at 63, 584 S.E.2d at 897. Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991).

Judy v. Judy, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009). Where a claimed error would not have changed a jury's verdict, it is not a proper basis for reversal on appeal. Similarly, "[u]nder the present rules, a respondent - the "winner" in the lower court - may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

i. The Purported Error of Admitting Defense Expert's Testimony Did Not Affect the Verdict Because there are Multiple Alternate Sustaining Grounds for the Verdict.

Contrary to Appellant's arguments, the overwhelming evidence presented at trial does not support Appellant's contention that Respondents breached a duty of care to Mrs. Whitfield or that Respondents proximately caused her claimed damages. This is true with or without the very small portion of challenged testimony from Respondents' experts. As such, this Court should therefore affirm the jury's verdict under the doctrines of harmless error and alternate sustaining grounds.

The elements of a claim for medical malpractice are well-settled under South Carolina law:

> To establish a cause of action for medical malpractice, the plaintiff must prove the following facts by a preponderance of the evidence: (1) The presence of a doctor-patient relationship between the parties; (2) Recognized and generally accepted standards, practices, and procedures which are exercised by competent physicians

> in the same branch of medicine under similar circumstances; (3) The medical or health professional's negligence, deviating from generally accepted standards, practices, and procedures; (4) Such negligence being a proximate cause of the plaintiff's injury; and (5) An injury to the plaintiff.

See Brouwer v. Sisters of Charity Providence Hosps, 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014). Because "South Carolina does not recognize the doctrine of res ipsa loquitur," Appellant must affirmatively prove each of the above elements via expert testimony. *See Fletcher v. Med. Univ. of S.C.*, 390 S.C. 458, 463, 702 S.E.2d 372, 374 (Ct. App. 2010). The same is not necessarily true for a medical malpractice defendant, who will prevail if he or she convinces the jury in his or her favor on any single one of the above elements. Furthermore, a defendant in a professional negligence action is generally competent to provide testimony as to the standard of care alone, without an expert.

Contrary to Appellant's innuendo, there is no evidence that Dr. Schimpf breached the standard of care in the performance of the surgery at issue. At best, Appellant's expert speculated that he placed too much tension on the incision line, but, even then, there is no proof of the same. (See, e.g. TT. 496:8 – p. 497:4). Looking to Dr. Schimpf's own testimony, without that of his experts, the jury could very reasonably have concluded that Dr. Schimpf was not negligent. Specifically, Dr. Schimpf denied liability and confirmed that he performed the procedure according to universally accepted techniques. Dr. Schimpf explained how the wound separation was not tension-related; had it been, it would have manifested within a number of hours or days, not weeks. (TT. 662:16 – 663:1 – 19, 679:23 – 680:11, 685:19-20, 701:6-9). He explained that wound separation was in fact a known complication of any such procedure, which Appellant and her experts conceded as well. (TT. 230:4-8; 638:22 – 640:7; 496:24 – 497:7; Kalus *De Bene Esse* p. 29:9-12). Dr. Schimpf testified that Dr. Kalus' preoperative photographs show a healing wound, with granulation tissue in the wound bed. (TT. 694). Dr. Schimpf testified that he could not

understand how this was the "worst wound" Dr. Kalus had seen and explained the size of the wound in context. (TT. 681:14 – 683:7). Finally, Dr. Schimpf testified that the conservative approach he would have taken, aimed at preserving the implant, would have been successful had she stayed the course and worked with him to preserve the implant. (TT. 686:18-24). As to her damages, he contended that had Mrs. Whitfield continued to treat with him, he would likely have been able to preserve her right implant, preventing her from undergoing the process of having Dr. Kalus remove one implant, then the other, plus nearly five hundred grams of additional tissue, and then having failed fat grafting to address that defect. (*See, e.g.* TT. 701:2 – 702:24).

This discussion of Dr. Kalus' role generally reveals the fact that, even without defense experts' testimony, the jury could have concluded that Dr. Kalus, and not Dr. Schimpf, was responsible for Mrs. Whitfield's damages. It also could have concluded that she herself was responsible due to whatever may have happened that resulted in her being dragged out of the shower on July 13, 2014. Lastly, Appellant's own experts admitted that wound separation is a known complication, meaning it can and does happen in the absence of negligence. All of these issues offer grounds for sustaining the verdict alternative to the testimony of Respondents' experts.

II. THE TRIAL COURT PROPERLY LIMITED THE PRESENTATION OF EVIDENCE THAT WAS NOT RELEVANT AND UNFAIRLY PREJUDICIAL DURING APPELLANT'S EXAMINATION OF RESPONDENTS' OFFICE MANAGER.

Appellant contends that she should have been permitted at trial to examine Sweetgrass Plastic Surgery's office manager on the subject of that individual's relationship with Dr. Schimpf because the office manager "gave starkly different testimony than Appellant as to what transpired when Mrs. Whitfield requested a copy of her medical file and as to Dr. Schimpf's treatment and behavior towards the [sic] Mrs. Whitfield once complications arose." (App. Initial Brief, p. 12). She argues that the Trial Court erred in excluding this evidence because "on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." (*Id.* at 22).

In so arguing, Appellant is putting several carts before the proverbial horse – not only does she ignore the requirements of relevancy, but she confuses the process for examining a witness for purposes of revealing bias, interest, or prejudice under Rule 608(c), SCRE, with the process for impeachment on the basis of a prior inconsistent statement under Rule 613, SCRE.

A. Appellant Has Not Preserved this Issue for Appeal.

After the Trial Court limited Appellant from examining Respondent's office manager regarding her personal life, including her relationship with Dr. Schimpf, Appellant failed to make any proffer of what that excluded evidence would have shown. (*See* TT. 364-65 (Trial Court ruling) and 366, (Appellant's counsel stating that he has no further questions for the witness and Trial Court excusing witness). In order to preserve an issue for appeal as to evidence excluded at trial, the proponent of that testimony must generally make an offer of proof or proffer. *Ellis by Ellis v. Oliver*, 323 S.C. at 132, 473 S.E.2d at 799. Furthermore, "a proffer that is confusing or incomplete will not provide grounds for the appellate court to find prejudice." Jean Hoefer Toal, et al. *Appellate Practice in South Carolina* 200 (3d ed. 2016) (contrasting *Designer Showrooms, Inc. v. Kelley*, 304 S.C. 478, 405 S.E.2d 417).

Appellant made no proffer. Without one, this Court is left without a reliable means for determining the substance of the excluded testimony. Because the Court cannot recreate this testimony post-facto, it cannot measure the probative value of the testimony relative to the record and it therefore is left without the ability to measure the prejudice, if any, that the exclusion of this testimony caused to Appellant. For instance, this Court cannot know whether Appellant would have been able to impeach the office manager with her deposition testimony or whether the question as to any relationship would simply have produced a one-word admission from the witness. Not knowing, the Court cannot now weigh the excluded testimony, which is why South Carolina has strict preservation rules. "It is well settled that a reviewing court may not consider

error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been." *State v. Roper*, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979). Because Appellant failed to make a proffer and preserve the issue for appeal, it is now moot.

B. Assuming that Appellant Has Preserved this Issue for Appeal, the Trial Court Properly Excluded Evidence Regarding the Personal Life of Respondent's Office Manager Such Evidence is Not Relevant, is Unfairly Prejudicial, and Because it Was Not Proper Impeachment Evidence in the Context of This Trial.

i. Standard for Relevancy and Impeachment.

The Trial Court has broad discretion in determining whether or not evidence shall be admitted at trial. *Parker v. Spartanburg Sanitary Sewer Dist.,* 362 S.C. 276, 287, 607 S.E.2d 711, 717 (Ct. App. 2005) (citing *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000) and *Gamble v. International Paper Realty Corp.*, 323 S.C. 367, 474 S.E.2d 438 (1996)). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). The threshold determination is "whether the proffered evidence is relevant as required under Rule 401 of the South Carolina Rules of Evidence." *Id.* Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Therefore, evidence regarding a fact *not* of consequence to the determination of the action is not relevant, and, under Rule 402, SCRE: "[e]vidence which is not relevant is not admissible." If the evidence is relevant, it is admissible, unless some exception applies. *See* Rule 402, SCRE. Here there is nothing whatsoever linking the proposed testimony to the alleged acts of malpractice—i.e. such testimony has nothing to do with the amount of tension the surgeon used to close the incision.

Relevant evidence however is frequently excluded when that evidence is unfairly prejudicial, confusing to the jury, or when its introduction would waste the time of the court and jury. Rule 403, SCRE, therefore provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." When analyzing probative value under Rule 403, a trial court "considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Lee*, 399 S.C. 521, 527-28, 732 S.E.2d 225, 228 (Ct. App. 2012). Evidence is unfairly prejudicial under Rule 403 when it has a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228-29 (2010); *see also State v. Lee*, 399 S.C. at 528, 732 S.E.2d at 228. When evidence is unfairly prejudicial, it should be excluded. The unfair prejudice of the proposed evidence in this case is obvious – a personal attack designed only to smear Respondents, which has nothing to do with the patient's surgery, is precisely the kind of evidence Rule 403 was designed to preclude.

Rule 608(c) SCRE, unique to the South Carolina Rules of Evidence, is the basis for Appellant's attempts to introduce testimony regarding the information at issue. This Rule preserves South Carolina common law precedent and allows the impeachment of a witness by the introduction of character evidence regarding that witness's "bias, prejudice or any motive to misrepresent." Rule 608(c), SCRE. *See also State v. Jones*, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001). The ability to present evidence, including impeachment evidence, is however subject to the relevancy and probative value restrictions set forth by Rules 401, 402, and 403 of the South Carolina Rules of Evidence. *See, e.g., State v. Dial*, 405 S.C. 247, 256, 746 S.E.2d 495, 499-500

(Ct. App. 2013) (upholding trial court's decision to disallow, on relevancy grounds, the cross examination of a key witness, the officer who took criminal Respondent's confession to homicide, on the subject of his relationship with the solicitor who initially handled the case). Finally, the only reversals for disallowing examination as to bias arise out of the criminal context and are primarily based on the Confrontation Clause of the Sixth Amendment, which "guarantees a Respondent this right to a meaningful cross-examination of adverse witnesses." *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000) (reversing trial court's limitation of examination on basis of Confrontation Clause and Rule 608(c) where, in capital murder trial, state's primary witness against accused had a romantic relationship with the victim). As indicated above, this proposed line of inquiry cannot survive the threshold requirements of either Rules 401 or 403, SCRE.

Rule 613, SCRE, permits the examination and impeachment of a witness on the basis of the prior sworn testimony of that witness. It "does not provide for the admission of prior statements, but rather sets forth the conditions under which such statements may be admitted." *Hunter v. Staples*, 335 S.C. 93, 99, 515 S.E.2d 261, 265 (Ct. App. 1999). The prerequisite for impeachment under Rule 613, is that *the witness* must make a statement inconsistent with *his or her prior testimony*. *See* Rule 613, SCRE (providing "[in] examining a witness concerning a prior statement *made by the witness*...")(emphasis added) and *Hunter*, 335 S.C. at 99, 515 S.E.2d at 265 (holding "[i]n order to have an inconsistent statement, there must be a statement with which to compare it."). In the case at bar, there was no prior inconsistent statement with which to impeach and Appellant was not entitled to impeach the office manager solely because she disagreed with the testimony or offered alternate testimony herself.

In sum, there is no evidentiary rule, not even Rule 608(c) that creates an absolute right to present evidence simply because one party disagrees with or dislikes the substance of another witness' trial testimony.

ii. Evidence and Presentation Regarding The Non-party Office Manager's Personal Life was Not Relevant and was Therefore Properly Excluded.

Appellant contends that she should have been permitted to examine Respondents' office manager on the subject of her relationship with Dr. Schimpf at trial because her account diverged from that of Appellant. The threshold inquiry is not whether evidence might be harmful to an opponent, but instead, is whether that evidence is relevant. Information concerning the office manager's personal life is in no way relevant to the determination of a medical malpractice action. In order to prevail in a medical malpractice action, a plaintiff must prove the standard of care, that defendant deviated from the standard of care, and that the deviation was the proximate cause of damages to Appellant. (*See* Section I(C)(i) above for discussion of the elements with citation to relevant authority). The relevant evidence or "facts of consequence" to these elements in this case are how Respondents performed the surgery at issue, how they took care of their patient thereafter, and whether Appellant was injured as the result of any substandard care on the part of Respondents.

The personal life of the office manager does not make it any more or less likely that Dr. Schimpf appropriately closed the incision line on Appellant's right breast. It does not make Appellant's claimed damages and more or less likely. It does not make it any more or less likely that Appellant read and signed the informed consent forms. It does not make it more or less likely

that Respondents' dictation equipment malfunctioned.[5] Evidence is not automatically relevant because it may show bias. The office manager's personal life is not relevant to the elements of a medical malpractice claim and therefore this evidence was properly excluded by the Trial Court.

iii. The Trial Court Properly Excluded Evidence Regarding the Personal Life of Respondents' Office Manager under Rule 403 Because The Danger of Unfair Prejudice Substantially Outweighed Its Probative Value.

While all evidence is prejudicial to one party or the other, Rule 403 prohibits the introduction of evidence whose probative value is substantially outweighed by its *unfairly* prejudicial nature. Unfair prejudice is the undue tendency of certain evidence to suggest "[a] decision on an improper basis." *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). "The determination of prejudice must be based on the entire record." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). Furthermore, "the [determination] will generally turn on the facts of each case. *Id.*

The evidence challenged here by Appellant involves a textbook application of Rule 403, SCRE. Not only does Rule 403 apply to prohibit unfairly prejudicial evidence, it serves to exclude evidence that would cause undue delay or waste of time and serves to prevent the needless presentation of cumulative evidence. Appellant sought to examine a nonparty about her personal relationships solely to embarrass the witness and to attempt to inflame the jury against Respondents. As noted above, medical malpractice actions involve discrete questions of duty, breach, and causation. Not one of these elements has anything to do with this nonparty office manager's personal relationships. Appellant sought to make office manager's personal life into an

[5] Which the office manager admitted on the stand was the most likely explanation. It is not clear what more Appellant could have wanted from this witness in terms of material admissions relating to her theories of recovery regarding recordkeeping, nor would the personal life evidence conceivably make the disputed lines of questioning Appellant wished to pursue at all relevant. Finally, Appellant spent time and money running down 'missing' records and her own forensic expert never concluded that records had been altered, deleted, or destroyed. That being the case, it is apparent that the office manager had nothing to lie about in the first place.

issue but had no avenue to do so at trial because no testimony opened a door to admission of the information. Moreover, because Respondents never denied the information in their depositions, there was no legally sufficient basis for its potential service as impeachment evidence. Because the information was not relevant and was offered for the improper purpose of smearing Respondents, its attempted introduction presented a substantial risk that the jury would be misled and encouraged to decide the case on an improper emotional basis. The Trial Court properly exercised its discretion to exclude this information and its ruling should be affirmed.

iv. Appellant Had No Proper Purpose for Seeking to Introduce the Evidence.

Where there is no proper purpose for introducing evidence, it should be excluded because it is not relevant. Rule 608(c) permits only the presentation of evidence that has a "legitimate tendency" to cast light on the motivations of a witness. Rule 608(c), SCRE. Further, evidence "calculated to arouse the sympathies or prejudices of the jury" may be irrelevant and should be excluded. *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). Appellant claims that she should be permitted to introduce this evidence so that she might establish bias. It is clear from Appellant's argument, however, that she actually sought to introduce the evidence to smear the office manager's credibility and to try to argue to the jury later that she *might* therefore lie for Dr. Schimpf. (*See, e.g.* TT. 25:5-6 "so it goes to credibility about what took place" and 363:19-20 "She's got a motive to say something, to cover for him."). However, none of this is borne out by the record – Appellant took two depositions of the office manager and still had nothing to impeach her with at trial. The Trial Court, addressing truthfulness, found that office manager responded truthfully to Appellant's questioning: "I don't think that she's testified to anything contrary than she has in her deposition. Every question that you've asked her you've either moved on from or she's been able to say that's what I said or that's how I said it and let me clarify as to what I meant." (TT. 363:16-21). There is a mechanism for impeaching a witness on prior sworn testimony, and

that mechanism is set forth in Rule 613, SCRE (see below). Appellant was not able to impeach the office manager however, so Appellant sought to besmirch her credibility through the presentation of wholly irrelevant avenues of questioning.

The excluded questioning was not probative of any fact at issue in the case and the Court properly excluded it under Rules 701, 702, and 703, SCRE. Appellant sought to introduce the information for an illicit purpose: to engender prejudice, to besmirch the witnesses, and to hopefully garner some condemnation from the jury. These are not permissible uses of evidence at trial. *See, e.g. State v. Johnson*, 338 S.C. at 128, 525 S.E.2d at 526 (holding that unfairly prejudicial evidence is that which "create[s] a tendency to suggest a decision on an improper basis, commonly though not necessarily, and emotional one."). Because Appellant attempted to introduce evidence for the purpose of suggesting a decision on an improper basis, the information was properly excluded. Finally, even had the Trial Court erred in failing to admit the evidence, it was harmless at best. Even if admitted, the evidence still had nothing to do with the treatment at issue, causation, or damages. As argued above, there plentiful additional supporting grounds in the record that would have allowed the jury to reach the same conclusion with or without this evidence.

v. Appellant Confuses Available Means of Impeachment.

Finally, note that Appellant contends, in essence, that she should have been permitted to impeach the credibility of Respondents' office manager because the office manager's testimony conflicted with Appellant's own testimony. This is not how impeachment works. At trial, Appellant's counsel, adopting the framework of Rule 613, argued that he should be permitted to impeach the office manager with evidence of her relationship with Dr. Schimpf and her compensation paid by the practice because her testimony was "squarely at odds with what Ms. Whitfield has testified to." (TT. 359:21-2). Again, Rule 613 sets the framework for impeachment upon prior sworn testimony and it applies only to prior statements made by the witness being

examined. *See* Rule 613, SCRE ("[i]n examining a witness concerning a prior statement made by the witness…") and *Hunter*, 335 S.C. at 99, 515 S.E.2d at 265 (holding "[i]n order to have an inconsistent statement, there must be a statement with which to compare it.").

The Trial Court heard argument from Appellant's counsel and properly concluded that Appellant had not in fact demonstrated the existence of an inconsistent statement. (TT. 362). It noted that the office manager had already admitted that the practice had an incomplete medical record and then declined to allow Appellant to drag the office manager's personal life into the courtroom, determining that the evidence was more prejudicial than probative. (TT. 22-23). Not giving up, Appellant's counsel then again attempted to have leeway to impeach the office manager simply because her testimony differed from that of Mrs. Whitfield: "I understand you ruling…But what about the testimony about the inconsistencies she's saying about what Mrs. Whitfield testified to? She's offered these explanations …" and again, the Trial Court properly limited the examination because it was not relevant and because it was not proper frounds for impeachment under the Rules of Evidence. (TT. 364). Accordingly, the verdict should be affirmed.

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S APPLICATION FOR A DIRECTED VERDICT FOR NEGLIGENCE PER SE BECAUSE THE EVIDENCE WAS CAPABLE OF MORE THAN ONE INFERENCE AND BECAUSE APPELLANT HAD NOT PROVEN CAUSATION OR DAMAGES ARISING FROM MISSING MEDICAL RECORDS.

Lastly, Appellant contends that she was entitled to a directed verdict on her Negligence Per Se theory because Respondents' office manager admitted that Respondents' medical chart was incomplete due to the reasons discussed above. That admission, however, is not the end of the inquiry. To make out a cause of action for negligence per se, a plaintiff must prove that the defendant owed him a duty of care, that the defendant failed to exercise due care, and furthermore that the violation of the statute was the proximate cause of some injury to the Appellant. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 53, 410 S.E.2d 251, 252 (1991). In order to establish the first element,

a duty of care, a plaintiff must show "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Id.* He or she then must show that the defendant failed to exercise due care, but, "[v]iolation of the statute…is not conclusive of liability." *Id.*, 306 S.C. at 54, 410 S.E.2d at 253.

Furthermore, not all violations of statues rise to the level of failure to exercise due care. *See, e.g. Trivelas v. S.C. DOT*, 348 S.C. 125, 134, 558 S.E.2d 271, 275 (Ct. App. 2001) (holding that the violation of a statue "under explanatory or excusatory circumstances" "does not constitute negligence per se") (citing *Davis v. Boyd*, 262 S.C. 679, 207 S.E.2d 101 (1974) and *Myers v. Evans*, 225 S.C. 80, 81 S.E.2d 32 (1954)). Lastly, as to causation, "it is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence. *Trivelas v. S.C. DOT*, 348 S.C. 125, 136, 558 S.E.2d 271, 276 (Ct. App. 2001). The Appellant's burden on proximate cause is clear:

> Proximate cause requires proof of both causation in fact, and legal cause. Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence. Legal cause is proved by establishing foreseeability. The standard by which foreseeability is determined is that of looking to the 'natural and probable consequences' of the complained of act. Furthermore, legal cause is ordinarily a question of fact for the jury. Only when the evidence is susceptible to only one inference does it become a matter of law for the court.

Trivelas, 348 S.C. at 135-36, 558 S.E.2d at 276 (Ct. App. 2001) (internal quotations omitted). Appellant did not meet this burden.

A. Appellant Did Not Establish that the Regulation At Issue Created a Duty of Care to Appellant.

At trial and in her Brief, Appellant argues that Respondents violated the requirements set forth in S.C. Code Ann. Regs. 61-91, Standards for Licensing Ambulatory Surgery Facilities. Respondents challenged her ability to examine the office manager on these regulations, contending

that they do not apply to Respondents. Respondents pointed out that Dr. Schimpf was not the "licensee" within the meaning of the Regulation, explaining that if anyone, the licensee was Dr. Pat O'Neill, the individual with whom Dr. Schimpf shared office space, on whose EMR system he kept records, and in whose office-based operating room he performed the surgery at issue.[6] Respondents further contended that a licensing statute cannot serve as an appropriate basis for establishing the standard of care because the essential purpose of a licensing statue is licensing, not the affirmative proscription of a standard of care. The Trial Court ultimately permitted the examination of the office manager on the regulations, but it properly denied Appellant's motion for directed verdict and arrived at the appropriate result as to the applicability of the regulations by refusing to charge them to the jury.

As noted above, to make out a case for negligence per se, a Appellant must show that (1) that the essential purpose of the statute is to protect from the kind of harm the Appellant has suffered; and (2) that he is a member of the class of persons the statute is intended to protect. Whitlaw v. Kroger Co., 306 S.C. 51, 53, 410 S.E.2d 251, 252 (1991). There is no evidence that S.C. Reg. 61-91 has an *essential purpose* of protecting the public from the type of harm that Appellant claimed to have suffered in this case. They are in fact "Standard for Licensing Ambulatory Surgery Facilities" not standards for the practice of medicine. Furthermore Appellant is not a member of a class of persons to be protected by the regulations because she did not undergo

[6] Although Respondents contended that the regulation did not apply to them below, the clearest basis for that fact is that Respondents nor Dr. O'Neil operate a DHEC-inspected or DHEC-licensed Ambulatory Surgery Facility. Ambulatory Surgery Facilities are those larger standalone facilities run by hospitals and other organizations who must first obtain a certificate of need to operate. See, for example, the DHEC listing of accredited Ambulatory Surgery Facilities at https://www.scdhec.gov/sites/default/files/docs/Health/docs/LicensedFacilities/hrasc.pdf. These are not individual medical practices. Respondents, like most private practice physicians, operate an office-based operating room under the authority of the South Carolina Board of Medical Examiners. This means, as argued below, that S.C. Reg. 61-91 has no application to Respondents and therefore cannot serve as a basis for proving their duty of care owed Appellant. Appellant simply did not carry her burden of proving that the DHEC ASF regulations applied to Respondents.

treatment at an Ambulatory Surgery Facility but instead had her surgery at an office-based operating room regulated by the S.C. Medical Board. Simply put, S.C. Reg. 61-91 is inapplicable to the matter at hand and therefore cannot serve as a basis for negligence per se.

B. Appellant Did Not Establish that the Purported Violation of S.C. Reg. 61-91 Rose to the Level of Negligence Per Se.

Violation of a statue "under explanatory or excusatory circumstances" may not be sufficient proof of the lack of due care. *See Trivelas*, 348 S.C. at 134, 558 S.E.2d at 275 (explaining that simply because a traffic statute exists and it was violated does not meant that a Respondent failed to exercise due care). At trial, Appellant questioned Respondents' office manager extensively regarding recordkeeping. She admitted that Appellant's medical chart was missing some dictated office notes and further that it was missing preoperative photographs. (TT. 291-2, 327). She explained that Respondents had a periodic issue with malfunctioning dictation recorder by which they lost office notes. (*See, e.g.* TT. 330, 337-340). She explained that Respondents did not realize contemporaneously to the treatment that the recorder was malfunctioning. (TT. 340). She explained that when Respondents discovered the missing notes in July, 2015, Dr. Schimpf dictated a summary of Mrs. Whitfield's treatment. (TT. 337). She explained that someone in Dr. O'Neill's office would have taken preoperative photographs of Mrs. Whitfield on the morning of surgery and that these would have been maintained by Dr. O'Neill's office exclusively. (TT. 342-43, 292). Dr. O'Neill performed an extensive evaluation of his records and determined that there was no evidence that they had been altered, deleted, or destroyed. (Pl. Ex. 35).

In *Trivelas*, the defendant S.C. DOT driver caused the crash at issue when he slowed on the interstate to drive across the median, thereby violating the letter of the statute that prohibits slowing and another that prohibits driving across the median. 348 S.C. at 132-33, 558 S.E.2d at 274-75. He explained that he did so at the direction of a police officer, which Appellant disputed. 348 S.C. at

133, 558 S.E.2d at 275. The Court of Appeals reversed the trial court's conclusion that these actions constituted negligence as a matter of law because the evidence regarding the purported violations was disputed and because the violation of a statute under explanatory or excusatory circumstances may not rise to the level of negligence per se. In the case at hand, Respondents kept a medical chart that totaled 146 pages. (Def. Ex. 43, 2-7, 11, 12). Respondents had a reasonable explanation for the records that were missing, and they furthermore addressed the issue by creating a summary note when the issue came to their attention. Medical records exist to document the care and to provide subsequent doctors with information to enable continuity of care. Appellant's own subsequent treating physician and expert admitted the missing items in no way prevented him from providing care to Mrs. Whitfield. Appellant had a very full and fair opportunity to conduct discovery into the recordkeeping in this matter, collecting and analyzing audit trails and even going to the trouble and expense of hiring a digital forensic examiner. That examiner, Mr. Abrams, wrote a program and spent hours examining Dr. O'Neill's computer system for patient photographs, ultimately finding no evidence that Appellant's records had been deleted or destroyed. (*See* TT. 367:18 – 372:11). Similarly, Dr. O'Neill found no evidence that records had been deleted or destroyed. (Pl. Ex. 35). Respondent's conduct simply does not evince a lack of due care and the totality of the record reflects that Appellant was not able to prove otherwise.

C. Appellant Did Not Establish that the Purported Violation of S.C. Reg. 61-91 was the Proximate Cause of Her Alleged Injuries.

Even were Appellant capable of proving the violation of a statue intended to protect her, she must further show the violation of the statute was causally linked, both in fact and law, to the injury. *Whitlaw*, 306 S.C. at 55, 410 S.E.2d 253. As the *Whitlaw* court explained:

> Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Legal cause is proved by establishing foreseeability. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the

> actor should have contemplated the particular event which occurred. The defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence.

Id. At trial, Appellant made no showing that her alleged injuries were the natural and probable consequence of Respondents' violation of any statute. She also makes no such showing in her Initial Brief, instead stating in a conclusory fashion that "[b]ecause there was an admitted violation of a statue and there can be only one conclusion concerning liability" the Trial Court should have granted her motion for directed verdict. (Initial Brief of Appellant, p. 26). That is not so.

The evidence presented at trial demonstrated absolutely zero connection between records and the separation of the incision line on Appellant's right breast. In fact, the evidence on this subject is clear: Dr. Kalus, Appellant's expert and treating plastic surgeon testified that when he first saw Mrs. Whitfield on July 10, 2014, he was able to formulate his opinion and make treatment recommendations without medical records and further that the subsequent lack of records in the case did not prohibit him from taking proper care of Mrs. Whitfield. (Kalus *De Bene Esse* 89). Likewise, Appellant's retained expert, Dr. Rosenberg, agreed that Dr. Kalus was able to get in touch with Dr. Schimpf and was able to get any specific information he may have needed to treat Mrs. Whitfield. (TT. 483:4-484:13). It is axiomatic that "[i]n South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 249, 626 S.E.2d 1, 4 (2006). Appellant is not permitted to assume liability, causation, or damages as a result of allegedly missing medical records when she could not present evidence tending to show *how* she was allegedly harmed.

D. The Trial Court Appropriately Denied Appellant's Motion for Directed Verdict Because There Was More than One Inference Available from the Evidence.

When deciding a motion for directed verdict, "the trial court is concerned only with the existence or non-existence of evidence." *Enos v. Doe*, 380 S.C. 295, 300-01, 66 S.E.2d 619, 621 (Ct. App. 2008) (citing Corbett v. Weaver, 380 S.C. 288, 292-93, 669 S.E.2d 615, 617 (Ct. App. 2008)). This means that, in considering the motion, "when the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Id.* At trial, the evidence regarding recordkeeping was inarguably susceptible to more than one inference. As noted above, it was not clear from the evidence presented that the regulation complained of applied to Respondents, that any volitional act or omission of Respondents lead to missing records, or that Appellant sustained any damages whatsoever as a result of missing records. Furthermore, when considering a motion for directed verdict, the trial court is directed to liberally construe the facts in the light most favorable to the non-moving party (the Respondents). *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) (holding that the task of the trial court is to "determine whether a verdict for the party opposing the motion would be reasonably possible under the facts as liberally construed in his or her favor."). This is a high bar and Appellant fell well short. Because she did not carry her burden, the Trial Court appropriately denied Appellant's motion for directed verdict and should be affirmed.

CONCLUSION

At base, this Court is left with a straightforward decision. None of the issues presented by Appellant warrant the reversal of the Trial Court, which exercised its discretion and made proper, well-considered decisions to admit and exclude testimony and to deny a motion for directed verdict. The jury spent a week hearing the evidence and promptly returned a verdict for Respondents. The rulings of the Trial Court challenged here did no prejudice to Appellant, who

was able to present her entire case. Because there is no indication in this record that the Trial Court abused its discretion, this Court should affirm the verdict below.

Respectfully submitted,

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August 31, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2019-001716
Lower Court Case No. 2017-CP-10-2758

Jeane Whitfield,

Appellant,

v.

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

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of Respondents' Initial Brief by electronic submission to OneDrive and by email to counsel of record on August 31, 2020, addressed to the attorneys of record.

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