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. 2017-CP-10-02758
Appellate Case No. 2019-001716

RECEIVED
Oct 12 2020
SC Court of Appeals

Jeane Whitfield,

Appellant,

v.

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

Respondents.

RECORD ON APPEAL – VOLUME I

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. **2017-CP-10-2758**

Jeanne Whitfield, v. Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC,

FILED
2019 JAN 16 PM 2:35
CLERK OF COURT

PLAINTIFF, DEFENDANTS.

CHECK ONE:

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

This Matter came before the Court on January 8, 2019 on Defendant's Motion for Protective Order and Motion to Seal, filed October 1, 2018. Under the South Carolina Rules of Civil Procedure, any counsel who directs a witness not to answer a question must within five (5) business days of the termination of a deposition move the Court for a protective order under Rule 26(c), SCRCP, or 30(d), SCRCP. See Rule 30(j)(3), SCRCP. "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including one or more of the following:... (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters;... (6) that a deposition after being sealed be opened only by order of the court;" Rule 26(c), SCRCP. "In determining whether a protective order is necessary, the trial judge is required to weigh the factors of whether the information sought is *relevant and necessary* evidence against any particularized harm the opposing party may suffer." Hollman v. Woolfson, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009) (emphasis added). Moreover, Rule 30(d) provides that "at any time during the taking of the deposition, on motion of a party or the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court... may limit the scope and manner of the taking of the deposition as provided in Rule 26(c)." Rule 30(d), SCRCP. There being no showing of any particularized harm, the Defendants' Motion is heard and hereby DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX **Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**		
Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
N/A		
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	2128 Judge Code	1/11/19 Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20___ and a copy mailed first class or placed in the appropriate attorney's box on this _____day of _____, 20___to attorneys of record or to parties (when appearing pro se) as follows:

Brent S. Halversen, Esq.
Daniel S. Slotchiver, Esq.

ATTORNEY FOR PLAINTIFF

Todd W. Smyth, Esq.

ATTORNEY FOR DEFENDANT

CLERK OF COURT

Court Reporter: Karen Andersen

FORM 4

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COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. **2017-CP-10-2758**

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FILED
2019 JAN 16 PM 2:35
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Circuit Court Judge	2128 **Judge Code**	1/11/19 **Date**

For Clerk of Court Office Use Only

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Andrew J. McCumber, Esq.
Daniel S. Slotchiver, Esq.
ATTORNEY FOR PLAINTIFF

Kevin R. Horton, Esq.
Todd W. Smyth, Esq.
ATTORNEY FOR DEFENDANT

CLERK OF COURT

Court Reporter: Karen Andersen

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. No.: 2017-CP-10-2758
	)	
Jeane Whitfield,	)	
	)	
Plaintiff,	)	**ORDER FOR PHYSICAL AND MENTAL EXAMINATION OF PLAINTIFF PURSUANT TO RULE 35, SCRCP**
	)	
vs.	)	
	)	
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC	)	
	)	
Defendants.	)	
	)	

FILED
2019 MAR 28 AM 11:48
JULIE J. ARMSTRONG
CLERK OF COURT

This matter came before the Court on February 27, 2019, on Defendants' Motion to have Plaintiff make herself available for medical examinations by Defendants' retained plastic surgery and psychiatry experts. For the reasons set forth below, this Court grants Defendant's Motion for Examination under Rule 35, SCRCP.

BACKGROUND

According to arguments and submissions of Counsel, this medical malpractice case arises from a set of surgeries Defendant Dr. Schimpf performed on Plaintiff on June 6, 2014. Plaintiff came to Dr. Schimpf seeking to down-size her implants and to address several other cosmetic concerns. On June 6, 2014, she underwent liposuction of the abdomen, thighs, chin, and axillae, replacement of bilateral breast implants, bilateral mastopexy, and an upper eyelid blepharoplasty. In the following weeks, Plaintiff developed wound separation at the incision on her right breast, a common complication of breast surgery. She changed doctors to another plastic surgeon, Ram Kalus, who on June 14, 2014, removed the right implant and closed her breast over a drain.

After the surgery, Plaintiff saw her psychiatrist, Dr. Sara Marcino regularly, reporting significant psychiatric issues because of what she called a "botched" surgery," her husband's ex-wife stalking her, and her mother's death. In January 2015, Plaintiff voluntarily elected to have

her left implant removed as well. In that procedure, Dr. Kalus also removed over 400 grams of tissue along with the left implant, leaving Mrs. Whitfield with a significant asymmetry in the size of her breasts. Dr. Kalus subsequently recommended and attempted fat grafting to address the asymmetry, but Plaintiff has now indicated that she would like implants again. Throughout this course of treatment, she has continued to see her psychiatrist regularly. Her psychiatrist's notes reflect Plaintiff's continued anger, irritability, depression, suicidal thoughts, and noncompliance with psychiatric medications. She has a longstanding history of psychiatric conditions and has been prescribed serious psychiatric medications for many years prior to the incident in question.

In her deposition, Dr. Marcino testified that she believes Plaintiff has developed PTSD in part because of her treatment with Dr. Schimpf, even though Plaintiff's background includes plenty of other self-reported trauma including having been raped, multiple abortions, a pit bull attack, an abusive boyfriend, family and marital discord including being stalked by her husband's ex-wife for an extensive period of time, multiple lawsuits and the subsequent deaths of her mother and sister. She also testified that Plaintiff's underlying anxiety and panic disorders have been aggravated by her course of treatment with and "disfigurement" by Dr. Schimpf. In fact, Dr. Marcino has referred Plaintiff to a trauma therapist in order to assist her in learning how to deal with her PTSD. It is clear to this Court that Plaintiff's present physical and mental condition will be the key damages issues in the trial of this matter. It also appears that Defendants' retained expert physicians, a plastic surgeon and a psychiatrist, have asked to have the opportunity to examine the Plaintiff. Plaintiff's counsel declined to make Plaintiff available for these examinations.

DISCUSSION

In medical malpractice cases, "expert testimony is often needed to aid the jury in deciding the issue[s]...because it involves questions of medical knowledge and judgment not

within the comprehension or experience of laymen." Stallings v. Ratliff, 292 S.C. 349, 353, 356 S.E.2d 414, 417 (Ct. App. 1987). Both parties therefore hire testifying experts who speak to the necessary elements of every case: duty, breach, causation, and damages. The subject matter of medical malpractice cases tends naturally to be the injuries sustained by the plaintiff, which are personal to that plaintiff and not necessarily ascertainable outside of the context of medical examination. Plaintiffs therefore hire experts to explain the nature, scope, and cause of these injuries to jurors. Sometimes, plaintiff's own treating physicians are employed to those ends, who can speak with the benefit of years of knowledge of that plaintiff and of the care and treatment they provided to that plaintiff. These physicians are especially powerful witnesses because they speak from the knowledge they have obtained through actual hands-on and face-to-face examination of the injured plaintiff.

Defendants, meanwhile, have no access to a particular plaintiff outside of the opportunity to depose that plaintiff and his or her physicians. A defendant's retained expert physician may review medical records and deposition transcripts, but as to what his own findings would be on examination, he is left to speculate. That is unless a court orders an examination under Rule 35 and permits a defendant access to the subject matter of the lawsuit – the injuries claimed by plaintiff. Rule 35, SCRCP, provides that:

> "[i]n any case in which the amount in controversy exceeds $100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made, and shall be delivered to the person or persons making the examination.

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> The physician of the party to be examined may be present at the examination. Unless the parties agree, or the court for good cause shown determines otherwise, the examination shall be in the county where the person to be examined, or his physician, resides...Upon reasonable objection to the physician designated to make the examination, and if the parties shall fail to agree as to who shall make the examination, the court may designate a physician...."

The standard therefore is that where the amount in controversy exceeds $100,000 and the physical or mental condition of the party is in controversy, the examination may be had upon "good cause shown." In the instant case, Plaintiff has asserted over $167,363.09 in special damages and has asserted that these arise from injury to her physical person and mental condition. The subject matter and amount in controversy elements of the Rule 35 standard are therefore satisfied. It only remains to consider whether the moving party has shown "good cause" for the examination.

Generally, "good cause" under the South Carolina Rules of Civil Procedure, has been interpreted to mean generally a cause that promotes or serves the interests of justice. See generally, default judgments under SCRCP 55(c), trade secrets under SCRCP 26(c)(7), and continuances under SCRCP 40(c)(3). In the instant case, there is nothing more fundamental to a fair trial than equal access to the expected evidence. That is the entire purpose behind the rules governing discovery found in our Rules of Civil Procedure.

The Court further notes that there is a paucity of case law interpreting SCRCP Rule 35. The leading case, Fairchild v. South Carolina Dept. of Transp., 398 S.C. 90, 727 S.E.2d 407 (2012), arose from a car wreck and concerned a request for an "IME." In that case, which is factually distinct from the case at hand, defendants filed a motion to have plaintiff evaluated by Dr. James Ballenger, the same psychiatrist Defendants are seeking to have examine the Plaintiff

in this matter.[1] The Court, employing the language of "independence" which is notably absent from the Rule, held that the trial court properly denied defendants' motion for evaluation because plaintiff had a reasonable objection to the use of Dr. Ballenger, namely that he was a retained defense expert and therefore could not be independent.

This Court notes however that there are a number of key distinctions between the facts of Fairchild and those of the case at hand. First, the plaintiff in that case did not oppose the medical examination outright, but Mrs. Whitfield and her attorneys in this case do. Second, Fairchild stems from an automobile collision where plaintiff was assigned a treating physician at random in the hospital. In this case, by contrast, Mrs. Whitfield has the benefit of presenting the testimony of her chosen treating physicians, who know her well and have had years of hands-on face-to-face examination and treatment of her. This level of familiarity with the subject matter of the case is fundamentally different than that available to the ER doctors assigned to the Fairchild plaintiff. In fact, Mrs. Whitfield specifically confirmed this in her deposition, testifying that she chose her subsequent treating plastic surgeon and met and consulted with him prior to undergoing any treatment. Similarly, she chose and had a long-standing relationship with her psychiatrist well before the events of this case.

As the Fairchild Court observed, other states who have examined this issue have held that "[s]o long as a plaintiff may select his own doctor to testify as this physical condition, fundamental fairness dictates that a defendant shall have the same right in the absence of an agreement by the parties as to who the examining physician will be." Fairchild 398 SC, at 109, footnote 6, *citing* Timpte v. District Court, 161 Colo. 309, 421 P. 2d 728, 729 (Colo. 1966).

[1] It is worth considering why Dr. Ballenger is an appropriate evaluator in this context. Dr. Ballenger has been responsible for editing and authoring the chapter of the Diagnostic Statistical Manual ("DSM") that concerns anxiety disorders. In fact, it is worth noting that when the U.S. District Court needed an individual to determine whether Dylann Roof could stand trial, it hired Dr. Ballenger to interview, evaluate, and assess his competency. Note that, even in that instance, Dr. Ballenger had the opportunity to evaluate and assess the individual on whom he rendered an opinion.

While Fairchild distinguished the holding in Timpte because it found that the Colorado rule was different from the South Carolina rule, the fundamental fairness argument remains persuasive. In fact, it this lack of equity and fundamental disparity in the positions of plaintiff and defendant has been clear for a very long time. In 1910, Justice Woods of the South Carolina Supreme Court wrote in dissent that "[t]o deny to either party any reasonable means of making the extent of the injury evident is unfair, for often its nature is such that the defendant has no means whatever of protecting himself from pretensive or exaggerated claims[.]" Best v. Columbia Elec St. Ry., Light & Power Co., 85, S.C. 422, 428, 67 S.E. 1 3 (1910). It would be unfair and work prejudice to Defendants ability to defend this case to prevent Defendants from employing the mechanism available in Rule 35 to have equal access to the core evidence – that core evidence being Plaintiff and her alleged injuries. Fairness dictates that Defendants have the same access to that evidence so that their physician experts can make their own professional determinations about the injuries, the extent of the claimed damages, and Plaintiff's future prognosis. Informing the jury about matters beyond their knowledge and familiarity is, after all, the reason our system is so reliant upon expert testimony. See, e.g. Stallings, 292 S.C. at 353, 356 S.E.2d at 417. It therefore makes little sense to restrict one side's expert from access to the most relevant evidence in the case, namely the mental and physical condition of Plaintiff.

It is also critical to understand that Rule 35 does not require "independence" on the part of the examiner as is often perpetuated by the colloquial reference to such exams as "IME's" or "Independent Medical Exams." The Fairchild court too is guilty of the perpetuation of this language in the context of Rule 35. In fact, neither the word "independent" nor any of its analogues appear in the text of the rule. Second, the fact that the defense experts are familiar with the case does not render them biased or warrant an assumption that they are otherwise incapable of making objective findings. To the contrary, both of the defense experts have

testified in their depositions that they have requested these examinations in order to get a better understanding of the Plaintiff's condition, treatment and prognosis. Much of a physician's assessment comes from interacting with the patient, assessing their condition with their own hands and eyes, and being able to ask pertinent questions to their evaluations. That is especially where, as here, Plaintiff is seeking to recover future damages for further surgery and care. Defendants must be able to fully evaluate these claims and there is nothing inherently biased or prejudicial in allowing defense physicians to perform their own examinations and make their own findings. In fact, the Rule requires these experts to prepare a report of their findings if requested and any concerns regarding bias can be explored with cross-examination. As is often reiterated by our trial courts, bias tends to go to the weight of the evidence and is something for the jury to decide, but the jury will not have that ability if defense physicians are barred from conducting their own examinations.

Finally, it is important to realize that Rule 35 provides patients with multiple substantial safeguards so as to minimize any inconvenience or chance of harm. First, beyond the traditional requirements of reasonable notice, the submission to examination or evaluation cannot occur until the case has a substantial value *and* until the very condition of the person to be examined is at issue. Second, that person is accorded protection in that her own physician may be present. Third, the person to be examined cannot be compelled to travel outside of her county of residence or that of her physician. Finally, special consideration as regards scheduling is to be given to the person to be examined and her physician. Plaintiff has not demonstrated prejudice that would result from these examinations sufficient to foreclose Defendants' reasonable request for examination under Rule 35.

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CONCLUSION AND ORDER

At the trial of this matter, the jury will hear from Plaintiff's experts, her treating physicians, and Defendants' retained expert physicians. Of that cast, only Defendants' physicians are barred access to the core evidence in the case – Plaintiff and her medical condition. Without such evaluation, Defendants' are prejudiced as regards the development of their trial presentation, upon which presentation the outcome of this litigation depends. Having heard and considered the arguments of the parties, their memoranda and submissions, as well as the facts and law, this Court hereby **GRANTS** Defendants' Motion and **ORDERS** that Plaintiff shall submit herself to examination pursuant to Rule 35 with Defendants' expert plastic surgeon and expert psychiatrist within 45 days from the date of this order.

IT IS SO ORDERED.

Hon. Alex Kinlaw, Jr.
Presiding Judge, 10th Judicial Circuit

March 21, 2019
Greenville, South Carolina

Record on Appeal - 0018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	C.A. No.: 2017-CP-10-2758
Jeane Whitfield,	)	
Plaintiff,	)	**ORDER DENYING PLAINTIFF'S RULE 59(e) MOTION TO ALTER OR AMEND**
vs.	)	
Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,	)	
Defendants.	)	

FILED
2019 JUN 11 AM 9:03
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter came before the Court on Plaintiff's Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP. Plaintiff's Motion challenged this Court's March 28, 2019, Order requiring Plaintiff to make herself available for examination pursuant to Rule 35, SCRCP. Having considered the written submissions of the parties, this Court hereby denies Plaintiff's Motion to Reconsider because (1) the Prior Order was a proper application of Rule 35 to the case at hand; (2) the Prior Order does not conflict with the rule of Fairchild v. S.C. Dep't of Transp.; and (3) the Prior Order permits an examination that will allow Defendants fair and reasonable access to the central evidence in this case within the strict bounds set forth by Rule 35. For the reasons set forth below, Plaintiff's Rule 59(e) Motion is denied and Defendants' expert psychiatrist and plastic surgeon will each be permitted the opportunity to examine Plaintiff in accordance with this Order.

BACKGROUND

This matter came before the Court on Defendants' Motion for Physical and Mental Examination of Plaintiff pursuant to Rule 35, SCRCP. After a hearing on February 27, 2019, this Court requested proposed orders from both parties and it ultimately entered an order on March

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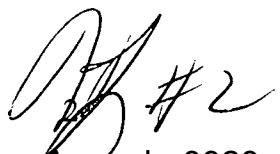
28, 2019, permitting Defendants' medical experts to examine the Plaintiff pursuant to Rule 35, SCRCP.

According to arguments and submissions of Counsel, this medical malpractice action arising from June 6, 2014, surgeries wherein Defendant Dr. Schimpf performed liposuction of the abdomen, thighs, chin, and axillae, replacement of bilateral breast implants, bilateral mastopexy, and an upper eyelid blepharoplasty. In the following weeks, Plaintiff developed wound separation at the incision on her right breast, a known complication of this type of breast surgery. She changed doctors and selected another plastic surgeon, Ram Kalus, who on June 14, 2014, removed the right implant and closed her breast over a drain. In January 2015, Plaintiff, on her own accord, elected to have her left implant removed as well. In that procedure, Dr. Kalus also removed 400 grams of tissue along with the left implant, leaving Mrs. Whitfield with a significant asymmetry in the size of her breasts. Dr. Kalus subsequently recommended and attempted fat grafting to address the asymmetry. Plaintiff has now indicated that she would like implants again bilaterally, but upon information and belief has not yet pursued this course of action. Plaintiff has asserted over $167,363.09 in special damages and claims that these damages arise from injury to her person and psyche.

Plaintiff's damages break into two primary components – the above surgical costs and expenses and her alleged psychiatric injury. Plaintiff alleges that she developed PTSD because of her treatment with Dr. Schimpf. She seeks compensation for that alleged injury in this lawsuit. Plaintiff has a longstanding prior psychiatric history and has been prescribed psychiatric medications for many years prior to the surgery in question. After that surgery, Plaintiff saw her psychiatrist, Dr. Sara Marcino, regularly. She reported significant problems that she ascribed to what she called the "botched" surgery. Meanwhile, she reported that her husband's ex-wife was



stalking her and that her mother died. Plaintiff continued to see her psychiatrist throughout her treatment with Dr. Kalus and still sees her today. Dr. Marcino's notes reflect Plaintiff's continued anger, irritability, depression, suicidal thoughts, and noncompliance with psychiatric medications.

In her deposition, Dr. Marcino testified that she believes Plaintiff developed PTSD in part because of her treatment with Dr. Schimpf, in spite of the fact that Plaintiff's background includes other self-reported trauma including having been raped, multiple abortions, a pit bull attack, an abusive boyfriend, the traumatic death of a boyfriend, longstanding family and marital discord including being stalked by her husband's ex-wife and son for an extensive period of time, multiple lawsuits and the subsequent deaths of her mother and sister. Dr. Marcino also testified that Plaintiff's underlying anxiety and panic disorders have been aggravated by her course of treatment with and "disfigurement" by Dr. Schimpf. Dr. Marcino recently referred Plaintiff to a trauma therapist in order to assist her in learning how to deal with her PTSD.

Defendant and Plaintiff have expert physicians who they will call to testify in this case. Plaintiff has both hired experts and her treating physicians. All have the opportunity to review written medical records but only Plaintiff's experts and treating physicians have the opportunity to meet with Plaintiff and to review the key evidence to this action – Plaintiff's actual medical and psychiatric condition. Due to the complex etiology of Plaintiff's condition, Defendants' expert plastic surgeon, Dr. Jorge Perez, and Defendants' expert psychiatrist, Dr. James Ballenger, have requested the opportunity to meet with and examine Plaintiff. Both would like to interview and examine Plaintiff in order to deepen their understanding of her current condition, future treatment options, and prognosis. Defendants therefore filed a Motion for Examination

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pursuant to Rule 35, and, after briefing and a hearing, this Court entered an Order requiring that Plaintiff submit herself to those examinations.

RULE 59(e) STANDARD

Rule 59(e), SCRCP, permits a party to move the court to alter or amend its judgment. Although it uses the language "alter or amend" a "motion under Rule 59(e) long has been viewed as a "motion for reconsideration" despite the absence of those words from the rule." Elam v. S.C. DOT, 361 S.C. 9, 21, 602 S.E.2d 772, 779 (2004). The "purpose of [a motion under] Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). The body of South Carolina law on Rule 59(e) looks to the federal rules of civil procedure and federal courts' interpretations of Rule 59(e) issues because "Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical." Elam, 361 S.C. at 22, 602 S.E.2d at 779. Both contain only the "alter or amend" language. "However, federal courts consider it appropriate for a party to make a "motion for reconsideration" under Rule 59(e) even though the rule mentions only a "motion to alter or amend a judgment." Id. Furthermore, "the United States Supreme Court explicitly has described a motion under federal Rule 59(e) as one which involves *reconsideration* of matters properly encompassed in a decision on the merits." Id.

In the federal context, the Fourth Circuit Court of Appeals holds that, "[i]n general 'reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.'" Pacific Ins. Co. v. American Nat'l Fire Assoc., 148 F.3d 396, 403 (4th Cir. 1998) (citing 11 Wright et al., Federal Practice and Procedure, § 2810.1, at 124 (2nd ed. 1995)). Along the same lines, the U.S. District Court for South Carolina had held that "[a] party's mere

disagreement with the court's ruling does not warrant a *Rule 59(e)* motion, and such a motion should not be used to rehash arguments previously presented or to submit evidence which should have been previously submitted." Singletary v. Beazley Ins. Co., Inc., No. 2:13-CV-1142-DCN, 2013 U.S. Dist. LEXIS 181253 at *5 (D.S.C. December 30, 2013) (internal citations omitted). The South Carolina Supreme Court has elaborated, holding that a party may file a motion under Rule 59(e) when it "believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam, 361 S.C. at 24, 602 S.E.2d at 780.

ANALYSIS

In her Rule 59(e) Motion, Plaintiff asks that this court alter or amend the Prior Order for three reasons: (1) that it "reverses" Fairchild v. S.C. Dep't of Transp. 398 S.C. 90, 727 S.E.2d 407 (2012); (2) that it contains "rulings" on issues that are disputed and were not presented to the court; and (3) that it does not comport with the requirements of Rule 35 in that it does not specify the time, place, manner, conditions, and scope restrictions of the proposed examination. This Court disagrees and finds that its Prior Order permitting examination was proper.

I. This Court Properly Ordered An Examination Under Rule 35.

First, as to the propriety of an examination under Rule 35 in this case, it is clear that two central issues for the jury will be (1) the extent, nature and origin of Plaintiff's alleged psychiatric injury and its relation to the events of this case and (2) the damages associated with Plaintiff's desired breast reconstruction. In medical malpractice claims like these, "expert testimony is often needed to aid the jury in deciding the issue[s]...because it involves questions of medical knowledge and judgment not within the comprehension or experience of laymen." Stallings v. Ratliff, 292 S.C. 349, 353, 356 S.E.2d 414, 417 (Ct. App. 1987). Both parties will

present expert witnesses who will provide testimony regarding the injuries sustained by Plaintiff, which are personal to her and are not necessarily ascertainable outside of the context of medical examination. In this case, Plaintiff has benefit of both her hired experts and her treating physicians. The treating physicians especially can speak with the benefit of years of knowledge based upon the years of care and treatment they have provided to Mrs. Whitfield. Treating physicians are powerful witnesses because they speak from the basis of their actual hands-on and face-to-face examination of Plaintiff.

Without the opportunity to examine Plaintiff under Rule 35, Defendants have no access to Plaintiff or her mental or physical condition and, therefore, the central evidence in this case. Defendants' retained experts, both of whom are practicing physicians, may read medical records and deposition transcripts, but are left to speculate as to what their findings would be on exam, had they the opportunity to examine and assess Plaintiff face-to-face, just as they would with any patient. This inequity has long been recognized in South Carolina. In 1910, Justice Woods of the South Carolina Supreme Court wrote in dissent that "[t]o deny to either party any reasonable means of making the extent of the injury evident is unfair, for often its nature is such that the defendant has no means whatever of protecting himself from pretensive or exaggerated claims[.]" Best v. Columbia Elec St. Ry., Light & Power Co., 85, S.C. 422, 428, 67 S.E. 1 3 (1910). Our modern Rules of Civil Procedure provide a remedy to this inequity: Rule 35. This Rule permits the medial examination of a Plaintiff, within certain bounds:

> "[i]n any case in which the amount in controversy exceeds $100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon

> notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made, and shall be delivered to the person or persons making the examination.
>
> The physician of the party to be examined may be present at the examination. Unless the parties agree, or the court for good cause shown determines otherwise, the examination shall be in the county where the person to be examined, or his physician, resides...Upon reasonable objection to the physician designated to make the examination, and if the parties shall fail to agree as to who shall make the examination, the court may designate a physician...."

Therefore, where the amount in controversy exceeds $100,000 and the physical or mental condition of the party is in controversy, the examination may be had upon "good cause shown." There is no question that the first two requirements have been met in this case: there is at least $167,363.09 in controversy and Plaintiff has placed both her physical and mental conditions squarely at issue. This means that the only issue for consideration is whether Defendants have shown good cause for Plaintiff's examination.

(A) Defendants have shown good cause for Rule 35 Examinations in this case.

This Court hereby finds that good cause exists to permit the examinations at issue. In the South Carolina Rules of Civil Procedure "good cause" generally means a cause that promotes or serves the interests of justice. See generally, default judgments under SCRCP 55(c), trade secrets under SCRCP 26(c)(7), and continuances under SCRCP 40(c)(3). In each of these instances, good cause exists when it is equitable to allow some relief and when the allowance of such relief will aid in the development or sharpening of the relevant issues. In the instant case, there is nothing more fundamental to a fair trial than equal access to the evidence. This is the equitable principal operating at the core of our modern Rules of Civil Procedure, which put an end to the era of trial by ambush and require that litigants use discovery to refine the issues for trial. Much

of a physician's assessment of an individual comes from his or her interaction with the patient, assessing their condition with their own hands and eyes, and being able to ask questions pertinent to their findings. In this case Plaintiff seeks to recover for future medical treatment and care, including potential reconstructive surgery. Defendants' expert physicians need access to Plaintiff in order to evaluate her claims and future options. Without such access and examination, Defendants would not be on equal footing with Plaintiff vis-à-vis the key evidence in this case.

Along with good cause, it is necessary to consider the multiple and substantial safeguards that Rule 35 affords Plaintiff. First, beyond the traditional requirements of reasonable notice, the submission to examination or evaluation cannot occur until the case has a substantial value *and* until the condition of the person to be examined is at issue. Second, that person is accorded protection in that her own physician may be present. Third, the person to be examined cannot be compelled to travel outside of her county of residence, or that of her physician. Fourth, special consideration as regards scheduling is to be given to the person to be examined and her physician. Finally, she is entitled to request that the examining experts prepare a report of their findings. This Court finds that the examinations will not work any prejudice to Plaintiff and will serve to provide Defendants access to the central evidence in this case.

(B) Examination pursuant to Rule 35 serves to promote fundamental fairness in the litigation process.

Medical malpractice actions necessarily turn on complicated medical issues. Expert testimony therefore plays an outsize role in the trial of a medical malpractice case. When the question at issue involves "medical knowledge and judgment not within the comprehension or experience of laymen," experts are necessary. Stallings, 292 S.C. at 353, 356 S.E.2d at 417. Here, Plaintiff will present the testimony of her treating physicians and hired expert(s). Defendants will present the testimony of their expert plastic surgeon, Dr. Jorge Perez, and expert

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psychiatrist, Dr. James Ballenger. Without an Order pursuant to Rule 35, these Defense witnesses would be the only medical professionals called to give testimony at trial without the benefit meeting, interviewing, and examining Plaintiff. Plaintiff and her attorneys meanwhile have the ability to sit down and discuss her claims with each physician as well as their experts. Defendants' experts meanwhile are left to parse the written records generated by Plaintiff's handpicked physicians. At base, this is inequitable, which is why in certain cases Rule 35 works to permit examination upon good cause shown. The Fairchild court recognized this inequity too, noting that other courts addressing Rule 35 have held that "[s]o long as a plaintiff may select his own doctor to testify as to his physical condition, fundamental fairness dictates that a defendant shall have the same right in the absence of an agreement by the parties as to who the examining physician will be." Id. This Court's March 28, 2019, Prior Order properly addresses this imbalance and requires that Plaintiff submit herself for examination within the safeguards established by Rule 35.

II. This Court Cannot And Did Not "Reverse" *Fairchild*, Which Is Factually Distinct From This Case and Has No Bearing On The Examination Ordered By This Court.

This Court further finds that its Prior Order properly addressed Fairchild v. South Carolina Dept. of Transp., 398 S.C. 90, 727 S.E.2d 407 (2012). In her Motion for Relief from the Prior Order, Plaintiff asserts that this Court's order is flawed because it "reverses" well-settled law set forth in Fairchild. This is mistaken on several fronts. First, Fairchild is not directly applicable to and is factually distinct from the case at hand. Second, this Court did not "reverse" any decision of the South Carolina Supreme Court. Third, Plaintiff's insistence that Fairchild requires an examiner independent of the parties is flawed in that it seeks to superimpose requirements into Rule 35 that do not comport with the text or purpose of the Rule.

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Fairchild arose from a car wreck and concerned a request for an "IME," which stands for "independent medical exam." In that case, defendants filed a motion to have plaintiff evaluated by Dr. James Ballenger, the same expert psychiatrist Defendants are seeking to have examine the Plaintiff in this matter. The Court, employing the language of "independence" (which is notably absent from the Rule) upheld the trial court's denial of defendants' motion for evaluation because plaintiff had a reasonable objection to the use of Dr. Ballenger, namely that he was a retained defense expert and was not therefore "independent." Plaintiff made the same argument in this case but has not addressed the key distinctions here that render Fairchild inapposite. The most important of these is that factually, in Fairchild, the plaintiff was taken to the hospital after an automobile accident and was assigned the on-call physician, who became her treating doctor. She had no input in his selection whatsoever, which means that she was left proving her case to a jury without resort to the testimony of a treating physician of her own selection. Here, Mrs. Whitfield had the opportunity to select her own physicians and did not have to "settle" for whatever doctor happened to be on call. In fact, Mrs. Whitfield confirmed this in her deposition testifying that she chose Dr. Kalus and went to his office for assessment prior to ever deciding to undergo any revision. She similarly chose her psychiatrist, Dr. Marcino. Both of these physicians' testimony will be crucial to the presentation of Plaintiff's case at trial. As the Fairchild court itself observed, other states who have examined Rule 35 examinations have held that "[s]o long as a plaintiff may select his own doctor to testify as to his physical condition, fundamental fairness dictates that a defendant shall have the same right in the absence of an agreement by the parties as to who the examining physician will be." Fairchild 398 SC, at 109, footnote 6, *citing* Timpte v. District Court, 161 Colo. 309, 421 P. 2d 728, 729 (Colo. 1966).

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The second key distinction between this case and Fairchild is that the Fairchild plaintiff did not oppose an IME; she opposed only Dr. Ballenger. Lastly, Fairchild narrowly concerns what constitutes a "reasonable objection" to examination, it does not fully weigh that objection against facts and circumstances that may constitute good cause for an examination. Fairchild therefore is not proscriptive – it does not set forth a test or list of elements necessary for the entry of an order permitting a Rule 35 examination. For that, all we have are the elements set forth in the text of the Rule, which are discussed above under the "good cause" analysis. These distinctions mean that Fairchild is not directly applicable to this case.

Plaintiff's reliance on Fairchild as having established a blanket rule against the use of retained experts for Rule 35 examinations is flawed in its attempt to inject a new requirement of "independence" into the Rule. In their initial brief and at the hearing, Plaintiff's counsel called the requested examination an "Independent Medical Exam." Doing so, they mimicked the language in Fairchild, but by doing so they also interjected an interpretive flaw into their reading of Rule 35– the assumption that a Rule 35 requires "independence." It is clear from the plain language of the Rule that independence is not required on the part of the examining physician. Rule 35 requires a host of concessions to a plaintiff – in the timing and location of the examination; in the right of the plaintiff to have her own physician present; in the right to request a written report of the examination; and in the right to assert an objection to the physician selected. Rule 35 however does not give the right to object to examination altogether. Here, Plaintiff has not put forth an adequate explanation of her objection to Defendants' expert Psychiatrist, Dr. James Ballenger or expert Plastic Surgeon, Dr. Jorge Perez. Both are highly experienced, capable, and credentialed physicians. Dr. Ballenger, for his part, is one of the foremost authorities on anxiety disorders and was selected by the U.S. District Court to

determine whether Dylann Roof was fit to stand trial. It is simply not reasonable to object to these individual examiners solely because they have been retained by the Defense when Plaintiff has had the benefit of selecting and working with her own treating and testifying physicians.

III. The Prior Order Did Not Adjudicate Contested Factual Issues.

In her Rule 59(e) Motion, Plaintiff argues that this Court should reconsider its Prior Order because that Order adjudicated disputed factual issues – namely whether Plaintiff was noncompliant with psychiatric medications and that Plaintiff's wound dehiscence was a "common complication of breast surgery." This Court made no such conclusive findings of fact and in fact included language indicating that the facts as presented in the body of the Order were those "according to arguments and submissions of Counsel." The Court therefore finds that these grounds are not sufficient to require it to alter or amend its prior order.

IV. The Prior Order Contained Reasonable Conditions Under Which The Examination Was To Occur.

As the final grounds supporting her Rule 59(e) Motion, Plaintiff argues that the Court should Alter or Amend its Prior Order because it did not "specify under what conditions the IME may take place" by which Plaintiff means "who may attend, where and when it will be held, what specific tests will be performed and which tests will not be performed and why, etc." In fact the Prior Order directed that the examination occur within a certain time and that Plaintiff was to be examined by Dr. James Ballenger and Dr. Jorge Perez. As to the remaining requirements, the Rule itself mandates that the examination occur in Charleston County and provides that Plaintiff's physician may attend. It is not incumbent upon this Court to micromanage the examination of any physician, and it is well within its reading of Rule 35 to permit a qualified

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physician to conduct a medical examination of Plaintiff, which is all that the Prior Order allows. However, to avoid any confusion, this Court hereby **ORDERS** that:

(1) Plaintiff shall present herself for examination in Charleston County, SC within forty-five days of the date of this order at a date and time convenient to Plaintiff and her physician, with consideration given to the availability of the examining physician.

(2) Defendants are limited to two evaluations: one conducted by a psychiatrist, Dr. James Ballenger, and one conducted by a plastic surgeon, Dr. Jorge Perez.

(3) Per the protections afforded by Rule 35, Plaintiff may be accompanied by her physician during the examinations. These examinations may occur in the offices of Plaintiff's physicians, or some other suitable medical office agreed to by the Parties.

(4) The examination may be attended by the examining physician, Plaintiff, and Plaintiff's physician only. Additionally, the plastic surgeon may be accompanied by a female nurse chaperone for the duration of his evaluation.

(5) Each examining physician shall conduct his examination as he would an ordinary patient visit. Dr. Ballenger may conduct a psychiatric interview, testing, evaluation and/or examination to investigate the nature and origin of Plaintiff's alleged psychiatric injuries, any future treatment she may require, her prognosis, and her claimed damages. Dr. Perez may interview and physically examine Plaintiff for the purposes of investigating the nature and origin of her current physical condition, her potential future treatment and/or surgical options, her prognosis, and her claimed damages.

(6) Upon request of Plaintiff or her counsel, the Defendants shall provide a detailed written report from each examining physician setting forth his findings, the results of any testing, and his diagnoses and conclusions within fifteen days from the date of the examination.

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CONCLUSION

Having considered its Prior Order of March 28, 2019, arguments and submissions of counsel, this Court hereby concludes that its Prior Order was a proper exercise of its power under Rule 35. Defendants have shown good cause for these examinations which will sharpen the issues for trial by allowing inquiry into the nature, extent, origin, and scope of Plaintiff's claimed injuries and damages. For the foregoing reasons, this Court hereby **DENIES** Plaintiff's Rule 59 Motion to Reconsider and hereby **ORDERS** that Plaintiff shall submit herself for examination as set forth above.

IT IS SO ORDERED.

Hon. Alex Kinlaw, Jr.
Presiding Judge, 10th Judicial Circuit

6/3, 2019
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. No.: 2017-CP-10-2758
	)	
Jeane Whitfield,	)	
	)	
Plaintiff,	)	**ORDER TO REMOVE DEPOSITION TRANSCRIPTS FROM PUBLIC DOCKET AND SEAL**
	)	
vs.	)	
	)	
Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,	)	
	)	
Defendants.	)	
	)	

FILED
2019 AUG 27 AM 9:35
JULIE J. ARMSTRONG
CLERK OF COURT

This matter came before the court on August 26, 2019, on Defendants' Motion to Strike Deposition Transcripts from Public Index and/or to Seal. The depositions of Dennis K. Schimpf, M.D. and Vicky Tolbert filed with the Court on August 19, 2019, are sealed until further Order of this Court, and their substance shall be removed from the public index.

The undersigned reminds the parties of their mandatory obligations to redact sensitive confidential personal information as set forth in Rule 41.2, SCRCP.

IT IS SO ORDERED.

The Honorable Bentley Price
Presiding Judge, Ninth Judicial Circuit

August 27th, 2019
Charleston, South Carolina

ELECTRONICALLY FILED - 2019 Nov 07 4:15 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1002758

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2017-CP-10-2758
JEANE WHITFIELD,	)	
Plaintiff,	)	**ORDER GRANTING NON-PARTY O'NEILL PLASTIC SURGERY'S MOTION TO COMPEL COMPENSATION**
vs.	)	
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC	)	
Defendants.	)	

This matter came before the Court on October 28, 2019 at 2:30 p.m. on Non-Party O'Neill Plastic Surgery's (hereinafter "O' Neill" and/or "Dr. O'Neill") Motion to Compel Compensation. After hearing arguments from counsel and considering the written materials, the Court hereby grants the Motion to Compel Compensation and orders Plaintiff to pay Dr. O'Neill $1,436.90 pursuant to S.C. Code §44-115-80(A)(2) and Rule 26(b)(4)(C) of the South Carolina Rules of Civil Procedure, as detailed herein.

The Court wishes to provide a brief history of this case and of Dr. O'Neill's involvement. This is a medical malpractice case involving allegations by Plaintiff that Defendants breached the standard of care during a certain medical procedure performed on Plaintiff in 2014. This action was tried before a jury the week of August 26, 2019 with Judge Bentley Price presiding. The jury returned a defense verdict on August 30, 2019. There were no allegations of wrongdoing against Dr. O'Neill, and Plaintiff was never a patient of Dr O'Neill. However, as detailed in Dr. O'Neill's Motion to Compel Compensation, the Plaintiff and her counsel expended much time and effort in seeking

ELECTRONICALLY FILED - 2019 Nov 07 4:15 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1002758

information from Dr. O'Neill. Defendants shared office space with O'Neill for a short time in 2014, during a time when Plaintiff was a patient of Defendants, and Defendants stored at least some of its own practice's medical records and other documents on O'Neill's computer system. Plaintiff asserted that certain medical records and pre-operative photographs of Plaintiff were missing and could not be located. According to Plaintiff, pre-operative photographs of her were taken and presumably were in existence at least at one point in time. The Plaintiff represented that she had no photographs of her condition before the malpractice complained of, and desired to show the jury photographs of her condition before the events complained of in the lawsuit.

Based on my review of this case, it is evident that Dr. O'Neill is entitled to reasonable compensation as follows:

(1) $236.90 pursuant to his search for and production of the medical records provided in response to Plaintiff's subpoena dated October 19, 2015 and those produced at the time of his deposition on December 17, 2018. This amount was calculated pursuant to S.C. Code §44-115-80(A)(2).[1]

(2) $1,200[2] pursuant to Rule 26(b)(4)(C) of the South Carolina Rules of Civil Procedure for Dr. O'Neill's appearance at the *de bene esse* deposition scheduled for August 20, 2019 at 6:00 p.m. at the office of counsel for Plaintiff. Dr. O'Neill spent two hours traveling to and appearing for the deposition. The deposition was initially delayed

[1] 26 pages produced in response to October 19, 2015 subpoena (26 X .65 cents = $16.90); 331 pages produced at the December 17, 2018 deposition. (.65 cents X 30 pages + .50 cents X 301 pages = $170). Additionally, Dr. O'Neill is entitled to two separate $25 search and handling fees in the total amount of $50.

[2] Dr. O'Neill is plastic surgeon whose time is certainly valuable. He provided the Court with his pre-determined hourly rates for medical-legal work as evidenced by the Attorney and Paralegal Policies and Fees scheduled included as Exhibit 1 to the Motion to Compel Compensation. His hourly rate for depositions is $600 per hour.

ELECTRONICALLY FILED - 2019 Nov 07 4:15 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1002758

because a court reporter was not present. While waiting for the court reporter, the parties ultimately agreed upon the execution of an affidavit in lieu of proceeding with the deposition. However, Dr. O'Neill had already appeared pursuant to Plaintiff's deposition notice and is entitled to be compensated as if he were deposed. While Dr. O'Neill was initially made available as a records custodian for his discovery deposition, for which he was provided a witness fee check in the amount of $32.85, Dr. O'Neill was then effectively utilized as an "expert" for the Plaintiff through his subsequent involvement, including the scheduled *de bene esse* deposition. Plaintiff required Dr. O'Neill for his expertise as a plastic surgeon in identifying whether the pictures were of patient's that were not the Plaintiff, and whether the pictures even related to the relevant procedure. Dr O'Neill's involvement in the review process was paramount as the owner of his practice and a licensed medical professional, as he is charged with maintaining the privacy of his patients. From looking at the record in this case, it is apparent that Dr. O'Neill takes his patient's privacy concerns very seriously. Again, to the Court, this level of review and involvement goes above and beyond the work that could have been performed by a mere "records custodian."

The Court hereby GRANTS Dr. O'Neill's Motion for to Compel Compensation and orders Plaintiff to pay Dr. O'Neill, within 14 days of this order, the reasonable compensation for his time and efforts in the total amount of $1,436.90.

_____

The Honorable Bentley Price, Presiding Judge

November ___, 2019

Charleston, South Carolina

ELECTRONICALLY FILED - 2019 Nov 07 4:15 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1002758

Charleston Common Pleas

Case Caption: Jeane Whitfield VS Dennis K Schimpf Md , defendant, et al

Case Number: 2017CP1002758

Type: Order/Compel

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

ELECTRONICALLY FILED - 2019 Dec 11 1:45 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1002758

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Jeane Whitfield, Plaintiff, v. Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC, Defendants.	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A No. 2017-CP-10-2758 **ORDER GRANTING DEFENDANTS' MOTION FOR COSTS**

This matter came before the Court on October 28, 2019 on Defendants' Motion for Costs. Prior to this hearing, Defendants filed an offer of Judgment on July 23, 2019, which Plaintiff did not accept, and on August 30, 2019, Defendants obtained a Defense Verdict in their favor. Having considered arguments of counsel, written submissions, and Defense Counsel's Affidavit of Costs, the Court hereby finds that, pursuant to the South Carolina Rules of Civil Procedure and S.C. Code Ann. §§ 15-37-10, et seq., the following costs are taxable and shall be awarded to Defendant:

08/16/2019	Filing fee	Motion to Quash Synovus Subpoena.	$25.00
08/16/2019	Filing fee	Motion to Quash 30(b)(6) deposition of Sweetgrass Plastic Surgery.	$25.00
08/16/2019	Filing fee	Motion to Quash L. Schimpf deposition subpoena.	$25.00
08/16/2019	Filing fee	Motion to Quash deposition of Dr. Schimpf.	$25.00
08/19/2019	Filing fee	Motion to Exclude Late Witness.	$25.00
08/21/2019	Filing fee	Motion to Strike Deposition Transcripts from Public Index.	$25.00
08/22/2019	Filing fee	Omnibus Motions in Limine.	$25.00
08/22/2019	Filing fee	Motion to Quash trial subpoena to L. Schimpf.	$25.00
08/22/2019	Filing fee	Motion in Limine to Seal and to Exclude Certain Inadmissible Evidence.	$25.00
08/16/2019	Copying	Pre-Trial Motions (59 pgs. x .10).	$5.90

08/19/2019	Copying	Pre-Trial Motion (5 pgs. x .10).	$.50
08/21/2019	Copying	Pre-Trial Motion (6 pgs. x .10).	$.60
08/22/2019	Copying	Pre-Trial Motions, Voir Dire, Pre-Trial Brief and Jury Charges (97 pgs. x .10).	$9.70
08/26-30/ 2019	Copying	One Copy of Defendants' Trial Exhibits (203 pgs. x .10).	$20.30
08/07/2019	Deposition Transcript	AWR Invoice for second discovery and trial depositions of Dr. Kalus taken on 7/24/19.	$921.45
08/07/2019	Deposition Video	AWR Invoice for video of trial deposition of Dr. Kalus taken on 7/24/19.	$160.00
08/22/2019	Deposition Transcript	Phipps Reporting Invoice for second discovery deposition of Dr. Perez taken on 08/21/19.	$404.60
		TOTAL:	**$1,748.05**

Based on the foregoing, this Court hereby GRANTS Defendant's Motion for Costs and ORDERS Plaintiff to pay Defendants their recoverable Costs, which total $1,748.05, within 14 days of the date of this order.

_____
The Honorable Bentley D. Price,
Presiding Judge

December _____, 2019
Charleston, South Carolina

ELECTRONICALLY FILED - 2019 Dec 11 1:45 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1002758

ELECTRONICALLY FILED - 2019 Dec 11 1:45 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1002758

Charleston Common Pleas

Case Caption: Jeane Whitfield VS Dennis K Schimpf Md , defendant, et al

Case Number: 2017CP1002758

Type: Order/Costs

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-10-2758

JEANE WHITFIELD	DENNIS K. SCHIMPF, M.D. AND SWEETGRASS PLASTIC SURGERY, LLC
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: The Honorable Bentley D. Price	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☒ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2019 SEP 11 AM 10:09
JULIE J. ARMSTRONG
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow)

Verdict for the Defense.

ORDER INFORMATION

This order X ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2766 **Judge Code**	08/30/2019 **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Verdict for the Defense. /

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 2017-CP-10-2758
JEANE WHITFIELD, Plaintiff, vs. DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC Defendants.	)	**VERDICT FORM**

FILED
2019 SEP 11 AM 10:09
JULIE J. ARMSTRONG
CLERK OF COURT

VERDICT FORM

1. Did the Plaintiff prove by a greater weight or preponderance of the evidence that the Defendants deviated from the standard of care?

____ YES.

X NO.

If your answer to Question 1 is NO, you are finished. You have found for the Defendants. Please stop and notify the bailiff. If your answer is YES, please continue to Question 2.

2. Did the Plaintiff prove by a greater weight or preponderance of the evidence that the Defendants deviation from the standard of care was the proximate cause of Plaintiff's injuries?

____ YES.

____ NO.

If your answer to Question 2 is NO, you are finished. You have found for the Defendants. Please stop and notify the bailiff. If your answer is YES, please continue to Question 3.

3. Did the Defendants prove by the greater weight or preponderance of the evidence that the Plaintiff, Jeane Whitfield, was also negligent?

_____ YES – ***Go to Question 4.***

_____ NO – ***Go to Question 7.***

4. Did the Defendants prove by the greater weight or preponderance of the evidence that the Plaintiff's negligence was the proximate cause of Plaintiff's injuries?

_____ YES – ***Go to Question 5.***

_____ NO – ***Go to Question 7.***

5. Considering the combined negligence that proximately caused the Plaintiff's injuries as 100%, what percentage of that negligence is attributable to the Plaintiff and what percentage is attributable to the Defendants? [The percentages must add up to 100%].

Plaintiff: _____ %
Defendants: _____ %

6. Was the Plaintiff's negligence greater than 50%?

_____ YES – ***You are finished. Please stop your deliberations and notify the bailiff.***

_____ NO – ***Go to Question 7.***

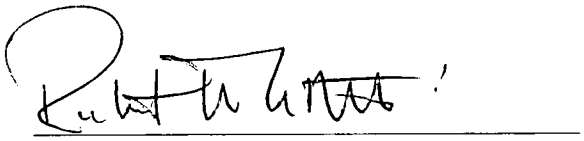
7. State the amount of actual damages, if any, sustained by the Plaintiff. [DO NOT reduce the Plaintiff's total damages based on the percentage of negligence by any party. You are to determine ***only*** the total amount of the Plaintiff's damages and enter that amount below.]

$_____Actual Damages (to include: pain and suffering, loss of enjoyment of life, mental suffering, and prospective damages)

8. State the amount of punitive damages, if any, sustained by the Plaintiff. You may award punitive damages only if you awarded actual damages in response to Question 7 above and only if you find by clear and convincing evidence that Defendants' actions harmed Plaintiff and were willful, wanton, or reckless. [DO NOT reduce the Plaintiff's total damages based on the percentage of negligence by any party. You are to determine only the total amount of the Plaintiff's damages and enter that amount below.]

$ _____ Punitive Damages

I certify this decision was the unanimous decision of the jury.



Foreperson
August 30, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-
	)	
JEANE WHITFIELD	)	
	)	
	)	
	)	**COMPLAINT**
DENNIS K. SCHIMPF, MD and	)	
SWEETGRASS PLASTIC SURGERY, LLC,	)	JURY TRIAL DEMANDED
	)	
Defendants.	)	

FILED
2017 MAY 30 PM 4:27
JEREMY RABUNS
CLERK OF COURT
BY

Plaintiff, Jeane Whitfield, complaining of Defendants herein named, respectfully allege unto this Court the following:

1. The Plaintiff Jeane Whitfield (hereinafter, "Plaintiff") is a resident of the County of Charleston, State of South Carolina.

2. Upon information and belief, Dennis K. Schimpf, MD (hereinafter, "Defendant" or "Defendant Schimpf") is a resident of the County of Berkeley, State of South Carolina.

3. Defendant Sweetgrass Plastic Surgery, LLC (hereinafter, "Sweetgrass") is a limited liability company organized, existing, and doing business in the State of South Carolina with legal responsibility for the claims of the Plaintiff. At all times mentioned herein, this Defendant Sweetgrass operated, managed and/or controlled a physician's office and surgical center. At all times mentioned, this Defendant Sweetgrass had a doctor/patient relationship by and through its employees, agents, and/or servants with the Plaintiff. Sweetgrass is vicariously liable for the acts and omissions described herein through its agent, Defendant Schimpf.

4. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum.

5. In 2013 Plaintiff was evaluated by her gastroenterologist Dr. Aaron Domm who recommended removal of scar tissue by a plastic surgeon.

6. Sometime in 2014, Plaintiff saw Defendant Schimpf who told her he could remove her scarring and encapsulation. He also discussed with her the reduction of the size of breast implants she had implanted earlier and agreed to lower the size of her implants to a "C" size. Additionally, Defendant Schimpf offered to perform surgery on her eyes, neck, and belly. Plaintiff recalls Defendant. Schimpf taking photographs and measurements of her body at the time of her initial visit. It was agreed that Dr. Schimpf would perform removal of the scarring and reduction of Plaintiff's breasts.

7. On Friday, June 6, 2014 Defendant Schimpf performed the agreed upon surgeries on the Plaintiff. Plaintiff was told to come back on Tuesday, June 10, 2014 for a follow up visit to have her eye sutures removed and her incisions checked. Plaintiff was concerned at this time about the tape looking dark and that the seam around the areola appeared unsecure. Defendant Schimpf put Vaseline and new bandages on Plaintiff's breasts and told her, "Don't worry we can tweak it". Plaintiff was instructed to use no soap and no direct water in shower and use only Vaseline, and to cover with clean gauze to protect. Plaintiff complied with Defendant Schimpf's recommendations. At the time Plaintiff presented to Defendant Schimpf on Tuesday, June 10, 2014, her right breast appeared as is shown in the below photograph:

8. On Wednesday, June 11, 2014 the seam in Plaintiff's right breast was coming open. The tape on her breast appeared to be black, but Defendant Schimpf told Plaintiff again, "Don't worry, we can tweak it." He told Plaintiff this was a normal part of the healing process.

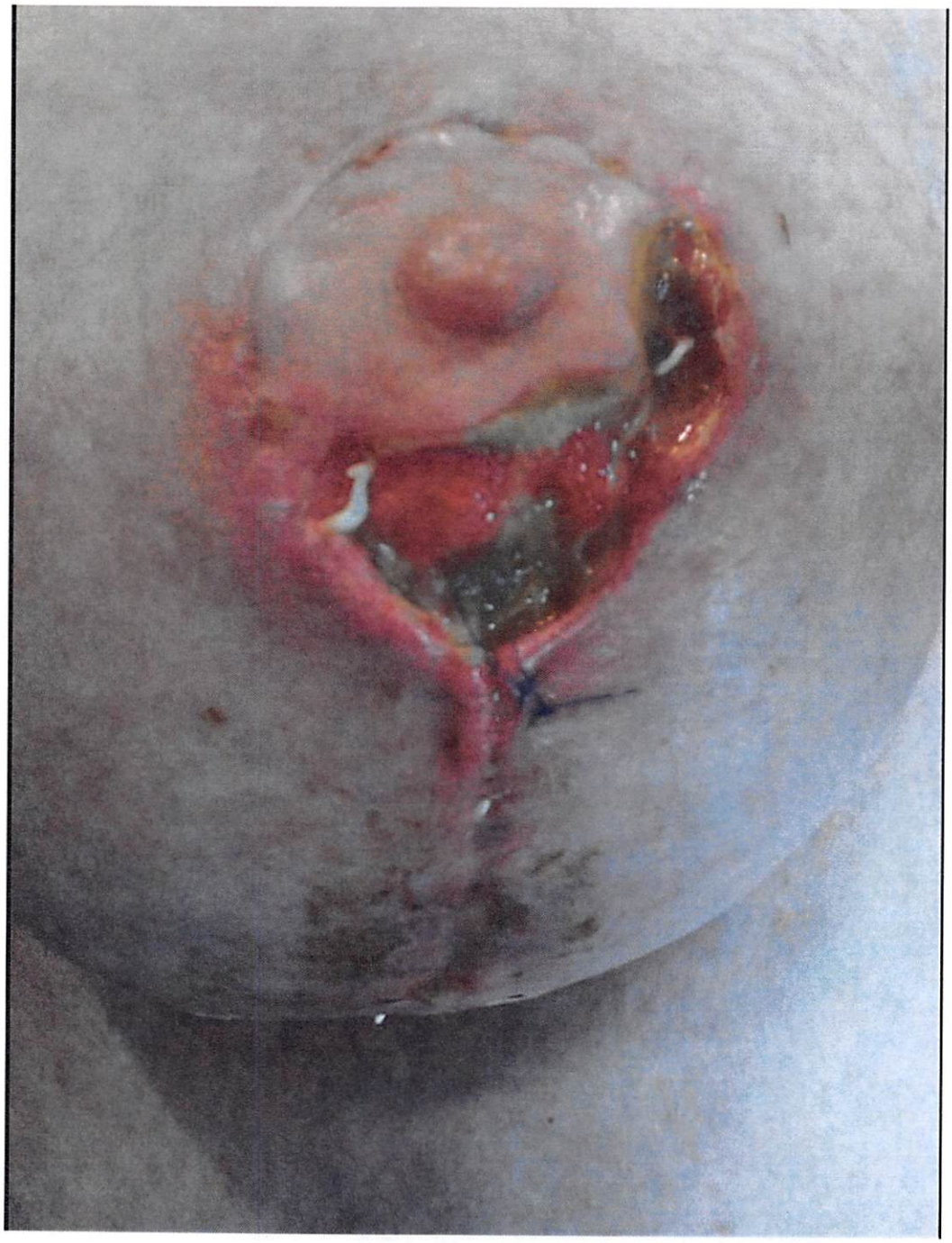
9. On Wednesday, June 18, 2014 the wound had not gotten any better, it smelled, pus was starting to exude from her right breast, and she was in pain. Plaintiff called Defendant Sweetgrass and told them of the condition.

10. On Thursday, June 19, 2014, having not heard back from them, Plaintiff called Defendant Sweetgrass alerting them again that something was wrong, that her chest was hurting and that her wound was opening more. Plaintiff sent a picture of her breast at this time to "Vicki" at Defendant Sweetgrass so "Vicki" could show Defendant Schimpf as he was in surgery all day. "Vicki" called Plaintiff back and told her, "Schimpf said everything was fine."

11. On Friday, June 20, 2014, Plaintiff was in excruciating pain and went to Roper Hospital. After a cardiac event was ruled out, Plaintiff was discharged and told that her pain was likely related to the breast reduction surgery and advised to follow up with her surgeon if the pain persisted. She called Sweetgrass the same day she was released and told Defendants that she felt like she was ripping open.

12. On Monday, June 23, 2014 Plaintiff called Dawn at Defendant Sweetgrass crying in pain. She was told that Defendant Schimpf had an, "important meeting with investors in Washington D.C.," but that he could see Plaintiff the next day.

13. On either Monday, June 23, 2014 or Tuesday, June 24, 2014 Plaintiff presented to Defendant Shimpf with green and yellow pus exuding from her right breast. Defendant Schimpf placed 2 stiches in the right breast at this time and changed the bandages. Defendant Schimpf was visibly unhappy and hostile stating he, "had to miss an investor meeting in Washington, D.C." At the time Plaintiff presented to Defendant Schimpf on June 23rd or 24th, her right breast was in the below condition:



14. On Wednesday, July 2, 2014 Plaintiff called Defendant Sweetgrass and told them something was wrong, she was feverish, the incision was opening more, that she was bleeding, there was a bad smell emanating from the wound, and that she was in pain. Plaintiff was told over the telephone that, "this was all normal."

15. By Sunday, July 6, 2014 the stitches Defendant Schimpf placed had torn away.

16. On Wednesday, July 9, 2014, Plaintiff located Dr. Ram Kalus to seek a second opinion on her condition and called for an appointment. On July 10, 2014 Plaintiff went to see Dr. Kalus. Dr. Kalus told Plaintiff there was MERSA and gangrene present in her right breast, noted dehiscence and necrosis of the right breast. Dr. Kalus cleaned the right breast wound, and urged Plaintiff to go back to Defendant Schmipf. According to Dr. Kalus's records, Dr. Kalus called Defendant Schimpf and told him of his clinical findings and noted that, "he will see the patient later today."

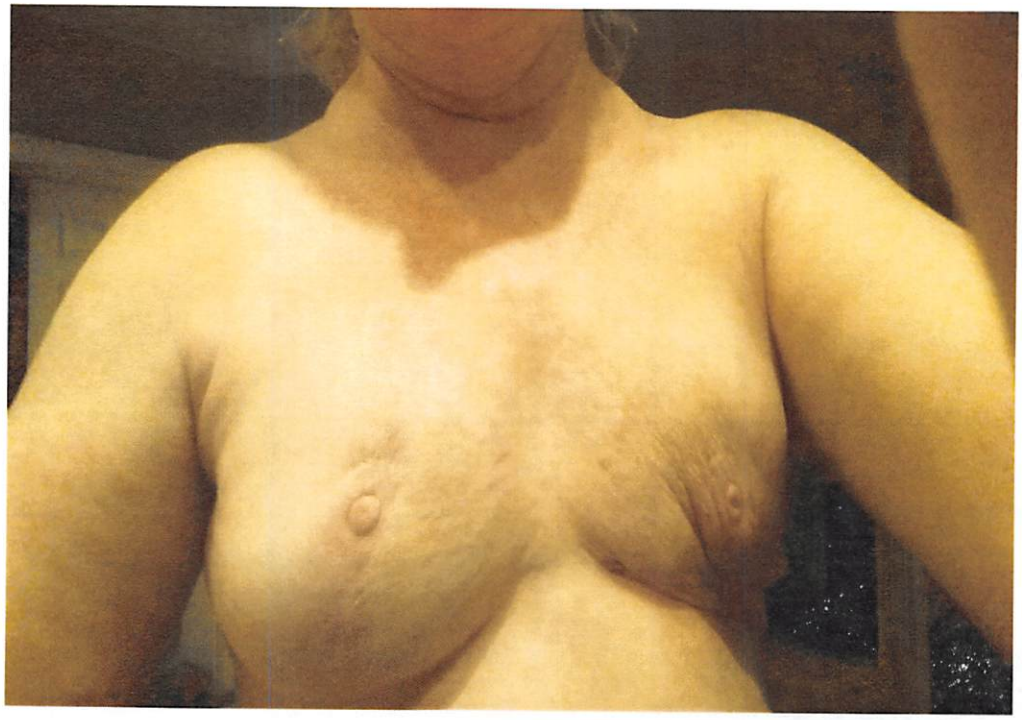
17. Plaintiff returned to see Defendant Schimpf on the following day, July 11, 2014, per Dr. Kalus's instructions. Defendant Schimpf was visibly angry that Plaintiff went to see another physician. Defendant Schimpf said at this visit, "I guess we'll put in a few more stiches." Defendant Schimpf used no antiesthetic despite Plaintiff's voicing of pain, and while he was stitching Plaintiff said, "you can't feel it, it's just fat." At the time Plaintiff presented to Defendant Schimpf on July 11, 2014, her breast was in the following condition:

18. On July 13, 2014, while feeling faint in the shower, her breast opened and blood poured out. On this day, her right breast was in the below condition:

Plaintiff called Dr. Kalus who told her to go to Roper hospital immediately. Dr. Kalus met Plaintiff at Roper hospital, the right breast wound could not be surgically closed, and it became necessary to remove the right implant. Dr. Kalus also debrided and surgically closed the left breast which he also noted had delayed healing. Plaintiff was discharged from the hospital two days later, on July 15, 2014. This was the condition of her left and right breasts after the July 14, 2014 surgeries:

19. On March 11, 2015, Plaintiff had another corrective surgery by Dr. Kalus to further remove necrotic tissue from her right breast area and remove the left breast implant. This was the

condition her breasts after this point in time:



20. On October 26, 2015 Plaintiff underwent a grafting surgery to harvest tissue to rebuild both left and right breasts. This was the condition of her breasts after the surgery:

21. Below is the present condition of Plaintiff's breasts, in May of 2017. Dr. Kalus has opined that a future surgery is necessary to achieve symmetry of her breasts.

FOR A FIRST CAUSE OF ACTION
(Negligence/Medical Malpractice)

22. Plaintiff realleges each and every of the aforesaid allegations of the Complaint as if stated herein verbatim.

23. Plaintiff's counsel has requested that Dr. Schimpf produce to her a complete copy of her medical records. In the records produced, however, there were no photographs, results of physical examinations, surgical notes, documentation of visits, documentation of care provided, assessments, plans, or diagnostic materials were not provided. Some of this information would have existed at the time Plaintiff was being treated (Plaintiff knows photographs were taken of her); therefore, the information has either been destroyed or lost.

24. S.C. Code of Regulations R. 61-16 and SC Code §40-47-110 mandates that these records, shall be kept. Here, the records were either not kept or have been destroyed. Either scenario is a breach of the mandates of the law and the standard of care.

25. As it is shown by the Affidavit incorporated herein and attached hereto as Exhibit 1, Plaintiff's expert Dr. Rosenberg states this failure to keep records in and of itself is a breach of the standard of care. Dr. Rosenberg has opined about his grave concerns relating to the surgery, and post-operative care of Plaintiff. Even without these medical records Dr. Rosenberg is able to find specific breaches of the applicable standard of care as to Defendant Schimpf's performance of the breast reduction surgery as well as his deviation from the standard of care post-operatively of Plaintiff.

¶Defendant Sweetgrass and Defendant Schimpf are under duties to maintain and keep all records of treatment by South Carolina Law. Without these records, pursuant to South Carolina law, Plaintiff is entitled to an adverse inference through a specific jury instruction as was done in *Stokes v. Spartanburg Reg'I Med. Ctr.*, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006) or an order striking the Defendants' pleadings and defenses as in *QZO. Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d (Ct. App. 2004).

26. The aforesaid inference, the records, documents and testimony of Plaintiff and Dr. Rosneberg show multiple breaches in the standard of care. The requirement to maintain these vital records, coupled with the spoliation charge and the expert's opinion that said missing documents are vital to a determination, constitutes *negligence per se.*

27. Defendants were negligent, careless, willful, wanton, reckless, and grossly negligent in rendering the care to Plaintiff in at least one of the following particulars, as set forth in specific detail according to the Affidavit of Michael Rosenberg, attached hereto as Exhibit 1:

a. Dr. Schimpf's pre-operative office notes are completely inadequate as there is no documented discussion of the patient's complaints, there is no documentation of that any physical examination was performed, and there is no assessment of the patient's condition and no indication of a surgical plan and the rational for that plan. There is also no documentation of direct measurements of Mrs. Whitfield's breasts, or photographs;
b. There is no written documentation by the surgeon of how the procedure was performed, and exactly what was done, There is no documentation of the type of Mastopexy performed and the extent of tension on the wound, and there is no description of the size and type of implant that was used. There was too much tension placed surgically on the incision which led to inadequate blood flow, ischemia, and dehiscence of the wound margins, fat necrosis, and ultimately infection of the right

breast. This ultimately led to loss of the implant and the need for multiple corrective surgeries;

c. Post operatively there was a failure to recognize the development if tension on the wound, loss of tissue and infection, and failure to adequately intervene in the developing problems. There is no written documentation of post-operative assessment, wound care, and treatment by Dr. Schimpf of any of these developing problems. Early intervention would more likely than not have prevented development of these multiple problems;

d. By attempting to close the wound dehiscence without the benefit of wound cultures and in the face of dehiscence in an office setting, Dr. Schimpf significantly increased the severity of the problem which ultimately required more surgeries to correct;

e. Dr. Schimpf ignored the urgent request of Dr. Kalus that Dr. Schimpf evaluate and treat his patient's developing surgical complications which further delayed her treatment and exacerbated the problem;

f. In failing to exercise that degree of skill and care in treatment of Plaintiff as would be in accordance of the standards of practice among members of the medical profession in general;

g. In failing to exercise reasonable care and diligence in the application of their knowledge, skill and ability in the care and treatment of Plaintiff;

h. In failing to exercise best judgment in the care and treatment of Plaintiff;

i. In failing to properly and safely perform surgery;

j. In failing to properly monitor Plaintiff after surgery;

k. In failing to properly respond to patient complaints of deteriorating condition and effectively provide proper follow-up care;

l. In failing to properly care and treat Plaintiff;

m. In failing to properly assess Plaintiff's condition post-surgery to determine an alternative treatment plan;

n. In compounding and exacerbating conditions that should never have been present to begin with;

o. In failing to keep, protect, and secure Plaintiff's vital medical records;

p. In failing to properly train agents, staff and/or employees;

q. In failing to implement the proper policies and procedures regarding the care and treatment of patients;

r. In failing to properly manage the treatment of Plaintiff;

28. As a direct and proximate result of the acts and omissions of Defendants, Plaintiff

sustained physical injuries and caused unnecessary additional surgical procedures, medical expenses, physical pain and suffering, scarring, disfigurement, shame, humiliation, mental anguish, emotional distress, and will continue to suffer these damages.

WHEREFORE, Plaintiff is entitled to and prays for a judgment against the Defendants to compensate her for her past, present, and future losses suffered as a result of Defendants' conduct, including actual damages, consequential, special damages, costs, as well as a separate punitive award in an amount deemed sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future.

DEMAND FOR JURY TRIAL

Mrs. Whitfield demands a jury trial on all counts stated above.

Respectfully submitted,

HALVERSEN & ASSOCIATES, LLC

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Charleston, SC 29401
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-and-

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Attorneys for Plaintiff

Charleston, SC
May 30, 2017

AFFIDAVIT OF MICHAEL H. ROSENBERG, M.D.
REGARDING DEVIATIONS FROM THE STANDARD OF CARE
BY DENNIS SCHIMPF, M.D. IN THE CARE AND
TREATMENT OF JEAN WHITFIELD

STATE OF NEW YORK

COUNTY OF WESTCHESTER

On this day, personally appeared before me, the undersigned authority, Michael H. Rosenberg, M.D., who, after being duly sworn, deposes and states as follows:

1. I am Michael H. Rosenberg, M.D. I am a medical doctor licensed in the state of New York. I have personal knowledge of the facts or information contained herein, and I am legally authorized to make this *Verified Opinion*.

2. I am board certified by the American Board of Plastic Surgery, and the America Board of Surgery. In my practice as a medical doctor and surgeon, I specialize in plastic surgery including, among other things, reconstructive and aesthetic breast surgeries. A copy of my current *Curriculum Vitae* is attached and incorporated by reference as **Exhibit "A."**

3. By virtue of my education, training and experience in medicine, and more particularly in plastic and reconstructive surgery, I am familiar with the issues of this case and the standard of care applicable for plastic and reconstructive surgeons such as Dennis Schimpf, M.D.

4. I have reviewed the following pertinent materials of Jean Whitfield (date of birth, October 14, 1960), including the following:

a. Medical records of Dennis Schimpf, MD 12/19/2013 through 07/23/2014;

b. Post-operative photograph of Jean Whitfield

c. Records from Roper Hospital

d. Medical records of Ram Kalus, MD 07/10/2014 through 12/15/2015

e. Statement of Ms. Whitfield regarding her care

5. On December 10, 2013, Ms. Whitfield first presented for a consultation to Dennis Schimpf, M.D. In the "on line plastic surgery consultation form" she completed that day she

reported she was there to discuss "(an) abdominal" issue. There is no office note for this date, and no pre-operative photographs, although Dr. Schimpf apparently prepared a surgical cost estimate for "Liposuction of Abdomen, Mastopexy, Exchange of Implants, and Silicone Implants" for the total cost of $7,830.00. Of note, Ms. Whitfield reports that pre-operative photographs were indeed taken but they have not been produced by Dr. Schimpf to date, despite multiple requests. With no office note, it is impossible to determine what if any complaints were made by Ms. Whitfield, what Dr. Schimpf's findings were after a physical examination, and what discussion occurred regarding a plan of care.

6. On June 06, 2014 the patient apparently underwent Liposuction of the Abdomen, thighs, chin and axillae, replacement of bilateral breast implants, bilateral Mastopexy, and upper eyelid blepharoplasty. This information is evident in the Anesthesia record, which apparently is the only record of what occurred at surgery, as there is no surgical note from Dr. Schimpf.

7. There is very little evidence of any post-operative care provided by Dr. Schimpf, other than a log of visits by Ms. Whitfield that were either made or cancelled. There is however, no written documentation by the surgeon of how Ms. Whitfield was recovering from surgery, and what if any problems she was having post-operatively.

8. Indeed Ms. Whitfield was having multiple problems following her surgery and was seen in the emergency room at Roper Hospital with complaint of chest pain following her surgery on June 20, 1014. She was seen, ruled out for a myocardial infarction and then released from the Emergency Room with the diagnosis of "chest pain likely from her breast reduction surgery".

9. Ms. Whitfield states that following her visit to the Roper Hospital Emergency room, she went back to Dr. Schimpf. At that time, despite the wound having been open for many days, he failed to take any cultures and under local anesthesia placed sutures to close the wound.

10. There continues to be no documentation by her surgeon of any post-operative problems, until she sees Dr. Ram Kalus for a second opinion on July 10, 2014. He noted the patient reported a one week history of a breast infection with intermittent fevers. On his examination he noted erythema on the right breast with partial dehiscence and necrosis of the periareolar area on the right side with a wound measuring 2.5 by 1 cm on the right side. There was fat necrosis in the subareolar location and there is purulent drainage emanating from the vertical incision and several INSORB staples were exposed and removed. Silvadine was applied to the wound and Dr. Kalus spoke to Dr. Schimpf who stated he would see the patient later that day.

11. The next day Ms. Whitfield was seen by Dr. Schimpf, and this time he attempted to close the chronically open wound without cultures, and failed to use any local anesthetic. When Ms. Whitfield complained of pain at the site, she was told that the tissue was fat and there should be no pain.

12. Ms. Whitfield was then admitted to Roper Hospital by Dr. Kalus on July 13, 2014 with the presenting complaint of right breast surgical infection. She was started on antibiotics and taken to surgery the next day by Dr. Kalus for Debridement of both right and left breast wounds, and explantation of the right breast implant. She was discharged from the Hospital on July 15, 2014 and all of her subsequent care is provided by Dr. Kalus.

13. Ms. Whitfield ultimately required two more surgeries to correct the breast deformities which occured on March 11, 2015, and October 20, 2015. The last record I reviewed

was an office visit with Dr. Kalus on December 18, 2015 in which Ms. Whitfield was advised one more surgery may be needed to correct her appearance.

14. Based upon my education, training, experience, review of the records in this case, as well as the photograph and narrative provided by Ms. Whitfield, it is my opinion within a reasonable degree of medical probability that Dennis Schimpf, M.D. fell below the applicable standard of care in the treatment of Ms. Whitfield between December 19, 2013, and July 13, 2014, in one or more of the following respects:

A. Dr. Schimpf's pre-operative office notes are completely inadequate. In Dr. Schimpf's records there is no documented discussion of the patient's complaints, there is no documentation that any physical examination was performed, and there is no assessment of the patient's condition and no indication of a surgical plan and the rationale for that plan. There is also no documentation of direct measurements of Ms. Whitfield's breasts, and no pre-operative photographs were taken.

B. There is no written documentation by the surgeon of how the procedure was performed, and exactly what was done. There is no documentation of the type of Mastopexy performed and the extent of tension on the wound, and there is no description of the size and type of implant that was used. Clearly there was too much tension placed surgically on the incision which led to inadequate blood flow, ischemia and dehiscence of the wound margins, fat necrosis, and ultimately infection of the right breast. This ultimately led to loss of the implant and the need for multiple corrective surgeries.

C. Post-operatively there is failure to recognize the development of tension on the wound, loss of tissue and infection, and failure to adequately intervene in the

developing problems. There is no written documentation of post-operative assessment, wound care, and treatment by Dr. Schimpf of any of these developing problems. Early intervention would more likely than not have prevented development of these multiple problems.

D. By attempting to close the wound dehiscence without the benefit of wound cultures and in the face of dehiscence in an office setting, Dr. Schimpf significantly increased the severity of the problem which ultimately required more surgeries to correct.

E. Dr. Schimpf ignored the urgent request of Dr. Kalus that Dr. Schimpf evaluate and treat his patient's developing surgical complications which further delayed her treatment and exacerbated the problem.

15. Specifically, the deviations from the standard of care by Dr. Dennis Schimpf included failure to properly assess and evaluate his patient pre-operatively, performance of a surgical procedure in a manner below the standard of care, failure to document an operative procedure he performed, failure to document post-operative care of his patient, failure to recognize and treat a post-operative wound infection with delay in treatment, improper treatment of a wound infection with failure to obtain wound cultures and closure of an ischemic and potentially infected wound.

16. It is my opinion within a reasonable degree of medical probability that the above-referenced deviations from the standard of care by her surgeon, Dr. Dennis Schimpf, directly caused bodily injury to Ms. Jean Whitfield with resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, and aggravation of previously existing conditions.

17. The above opinions are subject to addition or amendment pending the production of additional records, depositions, or testimony in this matter.

18. No expert opinion of mine has been disqualified by any court of law.

UNDER PENALTIES OF PERJURY, I DECLARE THAT I HAVE READ THE FOREGOING AND THAT THE FACTS STATED IN IT ARE TRUE.

FURTHER AFFIANT SAYETH NAUGHT.

Date Oct 31, 2016

Michael H. Rosenberg, M.D.

STATE OF NEW YORK
COUNTY OF Westchester

Before me, the undersigned authority, personally appeared Michael H. Rosenberg, M.D., who deposes and says that he executed the above document and the information contained therein is true and correct to the best of his knowledge, information and belief. Such person ✓ did or _____ did not take an oath and (*notary must check applicable statement*):

✓ is personally known to me;
_____ produced a current _____ driver's license; or
_____ produced _____ as identification.

WITNESS my hand and seal this 31st day of October, 2016.

NOTARY PUBLIC, State of New York at large
Commission Number: 01MA6038155
My Commission expires: 03-06-2018

Marina Marente
Notary Public, State of New York
Registration #01MA6038155
Qualified in Westchester County
My Commission Expires March 6, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10- 2758
	)	
JEANE WHITFIELD	)	
	)	
	)	
	)	**SUMMONS**
DENNIS K. SCHIMPF, MD and SWEETGRASS PLASTIC SURGERY, LLC,	)	
	)	JURY TRIAL DEMANDED
Defendants.	)	

FILED
2017 MAY 30 PM 6:26
JULIE J. ARMSTRONG
CLERK OF COURT
BY

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the below subscribed attorney at their office of 171 Church Street, Suite 330, Charleston, SC 29401, or 44 State Street, Charleston, SC 29401 within thirty (30) days from the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

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Attorneys for Plaintiff

-and-

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Attorneys for Plaintiff

Charleston, SC
May 30, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2017-CP-10-2758
	)	
JEANE WHITFIELD,	)	
	)	
Plaintiff,	)	
	)	**AMENDED COMPLAINT**
vs.	)	JURY TRIAL DEMANDED
	)	
DENNIS K. SCHIMPF, MD and SWEETGRASS PLASTIC SURGERY, LLC,	)	
	)	
Defendants.	)	

2017 MAY 30 PM 2:26
BY

Plaintiff, Jeane Whitfield, complaining of Defendants herein named, respectfully allege unto this Court the following:

1. The Plaintiff Jeane Whitfield (hereinafter, "Plaintiff") is a resident of the County of Charleston, State of South Carolina.

2. Upon information and belief, Dennis K. Schimpf, MD (hereinafter, "Defendant" or "Defendant Schimpf") is a resident of the County of Berkeley, State of South Carolina.

3. Defendant Sweetgrass Plastic Surgery, LLC (hereinafter, "Sweetgrass") is a limited liability company organized, existing, and doing business in the State of South Carolina with legal responsibility for the claims of the Plaintiff.

4. At all times mentioned herein, this Defendant Sweetgrass operated, managed and/or controlled a physician's office and surgical center.

5. At all times mentioned, this Defendant Sweetgrass had a doctor/patient relationship by and through its employees, agents, and/or servants with the Plaintiff.

6. Sweetgrass is vicariously liable for the acts and omissions described herein through its agent, Defendant Schimpf.

7. This Honorable Court has jurisdiction over all subject matter alleged herein and over

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all parties hereto, and venue is proper in this forum.

8. In 2013 Plaintiff was evaluated by her gastroenterologist Dr. Aaron Domm who recommended removal of scar tissue by a plastic surgeon.

9. Sometime in 2014, Plaintiff saw Defendant Schimpf who told her he could remove her scarring and encapsulation. He also discussed with her the reduction of the size of breast implants she had implanted earlier and agreed to lower the size of her implants to a "C" size. Additionally, Defendant Schimpf offered to perform surgery on her eyes, neck, and belly.

10. Defendant Schimpf took photographs and measurements of her body at the time of her initial visit.

11. It was agreed that Dr. Schimpf would perform removal of the scarring and reduction of Plaintiff's breasts.

12. On Friday, June 6, 2014 Defendant Schimpf performed the agreed upon surgeries on the Plaintiff. Plaintiff was told to come back on Tuesday, June 10, 2014 for a follow up visit to have her eye sutures removed and her incisions checked.

13. Plaintiff was concerned at her follow up visit on June 10, 2014 about the tape looking dark and that the seam around the areola appeared unsecure. Defendant Schimpf put Vaseline and new bandages on Plaintiff's breasts and told her, "Don't worry we can tweak it".

14. Plaintiff was instructed to use no soap and no direct water in shower and use only Vaseline, and to cover with clean gauze to protect. Plaintiff complied with Defendant Schimpf's recommendations.

15. At the time Plaintiff presented to Defendant Schimpf on Tuesday, June 10, 2014, her right breast was in the condition shown in "**Exhibit A**".

16. On Wednesday, June 11, 2014 the seam in Plaintiff's right breast was coming open. The tape on her breast appeared to be black, but Defendant Schimpf told Plaintiff again, "Don't

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worry, we can tweak it." He told Plaintiff this was a normal part of the healing process.

17. On Wednesday, June 18, 2014 the wound had not gotten any better, it smelled, pus was starting to exude from her right breast, and she was in pain. Plaintiff called Defendant Sweetgrass and told them of the condition.

18. On Thursday, June 19, 2014, having not heard back from them, Plaintiff called Defendant Sweetgrass alerting them again that something was wrong, that her chest was hurting and that her wound was opening more.

19. Plaintiff sent a picture of her breast at this time to "Vicki" at Defendant Sweetgrass so "Vicki" could show Defendant Schimpf as he was in surgery all day. "Vicki" called Plaintiff back and told her, "Schimpf said everything was fine."

20. On Friday, June 20, 2014, Plaintiff was in excruciating pain and went to Roper Hospital.

21. After a cardiac event was ruled out, Plaintiff was discharged and told that her pain was likely related to the breast reduction surgery and advised to follow up with her surgeon if the pain persisted.

22. Plaintiff called Sweetgrass the same day she was released, June 20, 2014, and told Defendants that she felt like she was ripping open.

23. On Monday, June 23, 2014 Plaintiff called Dawn at Defendant Sweetgrass crying in pain. She was told that Defendant Schimpf had an, "important meeting with investors in Washington D.C.," but that he could see Plaintiff the next day.

24. On either Monday, June 23, 2014 or Tuesday, June 24, 2014 Plaintiff presented to Defendant Schimpf with green and yellow pus exuding from her right breast. Defendant Schimpf placed 2 stiches in the right breast at this time and changed the bandages. Defendant Schimpf was visibly unhappy and hostile stating he, "had to miss an investor meeting in Washington, D.C."

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25. At the time Plaintiff presented to Defendant Schimpf on June 23rd or 24th, her right breast was in the condition shown in "**Exhibit B**".

26. On Wednesday, July 2, 2014 Plaintiff called Defendant Sweetgrass and told them something was wrong, she was feverish, the incision was opening more, that she was bleeding, there was a bad smell emanating from the wound, and that she was in pain.

27. Subsequent to the allegations set forth in Paragraph 26, Plaintiff was told over the telephone that, "this was all normal."

28. By Sunday, July 6, 2014 the stitches Defendant Schimpf placed had torn away.

29. On Wednesday, July 9, 2014, Plaintiff located Dr. Ram Kalus to seek a second opinion on her condition and called for an appointment.

30. On July 10, 2014 Plaintiff went to see Dr. Kalus. At that time, there was MRSA and gangrene present in her right breast, as well as noted dehiscence and necrosis of the right breast. Dr. Kalus cleaned the right breast wound, and urged Plaintiff to go back to Defendant Schimpf.

31. That same day, July 10, 2014, Dr. Kalus called Defendant Schimpf and told him of his clinical findings and noted that, "he will see the patient later today."

32. Plaintiff returned to see Defendant Schimpf on the following day, July 11, 2014.

33. Defendant Schimpf was visibly angry that Plaintiff went to see another physician. Defendant Schimpf said at this visit, "I guess we'll put in a few more stiches."

34. Defendant Schimpf used no anesthetic despite Plaintiff's voicing of pain, and while he was stitching Plaintiff said, "you can't feel it, it's just fat."

35. At the time Plaintiff presented to Defendant Schimpf on July 11, 2014, her breast was in the condition shown in "**Exhibit C**".

36. On July 13, 2014, while feeling faint in the shower, her breast opened and blood poured out. On this day, her right breast was in the condition shown in "**Exhibit D**".

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37. Plaintiff called Dr. Kalus on July 13, 2014 who told her to go to Roper hospital immediately.

38. When Dr. Kalus met Plaintiff at Roper hospital on July 13, 2014, the right breast wound could not be surgically closed, and it became necessary to remove the right implant.

39. Dr. Kalus also debrided and surgically closed the left breast, which he also noted had delayed healing, on July 13, 2014.

40. Plaintiff was discharged from the hospital two days later, on July 15, 2014.

41. Her left and right breasts after the July 14, 2014 surgeries were in the condition shown in "**Exhibit E**".

42. On March 11, 2015, Plaintiff had another corrective surgery by Dr. Kalus to further remove necrotic tissue from her right breast area and remove the left breast implant.

43. The condition Plaintiff's breasts after the March 11, 2015 surgery is shown in "**Exhibit F**".

44. On October 26, 2015 Plaintiff underwent a grafting surgery to harvest tissue to rebuild both left and right breasts.

45. Her breasts after the surgery were in the condition shown in "**Exhibit G**".

46. The present condition of Plaintiff's breasts, as of May 2017, is shown in "**Exhibit H**".

47. As opined by Dr. Kalus, a future surgery is necessary to achieve symmetry of her breasts.

FOR A FIRST CAUSE OF ACTION
(Negligence/Medical Malpractice)

48. Plaintiff realleges each and every of the aforesaid allegations of the Complaint as if stated herein verbatim.

49. During the course of Plaintiff's treatment with Dr. Schimpf, photographs were taken

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stated herein verbatim.

49. During the course of Plaintiff's treatment with Dr. Schimpf, photographs were taken of her.

50. In response to Plaintiff's request that Dr. Schimpf produce to her a complete copy of her medical records, there were no photographs, results of physical examinations, surgical notes, documentation of visits, documentation of care provided, assessments, plans, or diagnostic materials provided.

51. Upon information or belief, the requested records referenced in Paragraph 50 have either been destroyed or lost.

52. S.C. Code of Regulations R. 61-16 and SC Code §40-47-110 mandates that these records shall be kept. Here, the records were either not kept or have been destroyed. Either scenario is a breach of the mandates of the law and the standard of care.

53. As it is shown by the Affidavit incorporated herein and attached hereto as "**Exhibit I**", Plaintiff's expert Dr. Rosenberg states this failure to keep records in and of itself is a breach of the standard of care.

54. Defendant Sweetgrass and Defendant Schimpf are under duties to maintain and keep all records of treatment by South Carolina Law.

55. Without these records, pursuant to South Carolina law, Plaintiff is entitled to an adverse inference through a specific jury instruction as was done in *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006) or an order striking the Defendants' pleadings and defenses as in *QZO. Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d (Ct. App. 2004).

56. The aforesaid inference, the records, documents and testimony of Plaintiff and Dr. Rosenberg show multiple breaches in the standard of care. The requirement to maintain these vital records, coupled with the spoliation charge and the expert's opinion that said missing documents are

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vital to a determination, constitutes *negligence per se.*

57. Defendants were negligent, careless, willful, wanton, reckless, and grossly negligent in rendering the care to Plaintiff in at least one of the following particulars, as set forth in specific detail according to the Affidavit of Michael Rosenberg, attached hereto as **"Exhibit I"**:

a. Dr. Schimpf's pre-operative office notes are completely inadequate as there is no documented discussion of the patient's complaints, there is no documentation of that any physical examination was performed, and there is no assessment of the patient's condition and no indication of a surgical plan and the rational for that plan. There is also no documentation of direct measurements of Mrs. Whitfield's breasts, or photographs;

b. There is no written documentation by the surgeon of how the procedure was performed, and exactly what was done, There is no documentation of the type of Mastopexy performed and the extent of tension on the wound, and there is no description of the size and type of implant that was used. There was too much tension placed surgically on the incision which led to inadequate blood flow, ischemia, and dehiscence of the wound margins, fat necrosis, and ultimately infection of the right breast. This ultimately led to loss of the implant and the need for multiple corrective surgeries;

c. Post operatively there was a failure to recognize the development if tension on the wound, loss of tissue and infection, and failure to adequately intervene in the developing problems. There is no written documentation of post-operative assessment, wound care, and treatment by Dr. Schimpf of any of these developing problems. Early intervention would more likely than not have prevented development of these multiple problems;

d. By attempting to close the wound dehiscence without the benefit of wound cultures and in the face of dehiscence in an office setting, Dr. Schimpf significantly increased the severity of the problem which ultimately required more surgeries to correct;

e. Dr. Schimpf ignored the urgent request of Dr. Kalus that Dr. Schimpf evaluate and treat his patient's developing surgical complications which further delayed her treatment and exacerbated the problem;

f. In failing to exercise that degree of skill and care in treatment of Plaintiff as would be in accordance of the standards of practice among members of the medical profession in general;

g. In failing to exercise reasonable care and diligence in the application of their knowledge, skill and ability in the care and treatment of Plaintiff;

h. In failing to exercise best judgment in the care and treatment of Plaintiff;

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i. In failing to properly and safely perform surgery;

j. In failing to properly monitor Plaintiff after surgery;

k. In failing to properly respond to patient complaints of deteriorating condition and effectively provide proper follow-up care;

l. In failing to properly care and treat Plaintiff;

m. In failing to properly assess Plaintiff's condition post-surgery to determine an alternative treatment plan;

n. In compounding and exacerbating conditions that should never have been present to begin with;

o. In failing to keep, protect, and secure Plaintiff's vital medical records;

p. In failing to properly train agents, staff and/or employees;

q. In failing to implement the proper policies and procedures regarding the care and treatment of patients; and

r. In failing to properly manage the treatment of Plaintiff.

58. As a direct and proximate result of the acts and omissions of Defendants, Plaintiff sustained physical injuries and caused unnecessary additional surgical procedures, medical expenses, physical pain and suffering, scarring, disfigurement, shame, humiliation, mental anguish, emotional distress, and will continue to suffer these damages.

WHEREFORE, Plaintiff is entitled to and prays for a judgment against the Defendants to compensate her for her past, present, and future losses suffered as a result of Defendants' conduct, including actual damages, consequential, special damages, costs, as well as a separate punitive award in an amount deemed sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future.

DEMAND FOR JURY TRIAL

Mrs. Whitfield demands a jury trial on all counts stated above.

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Respectfully submitted,

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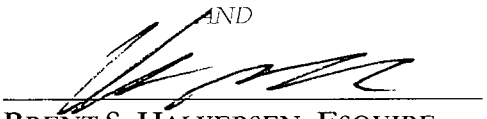

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Charleston, South Carolina
May 30, 2017

EXHIBIT
I

**AFFIDAVIT OF MICHAEL H. ROSENBERG, M.D.
REGARDING DEVIATIONS FROM THE STANDARD OF CARE
BY DENNIS SCHIMPF, M.D. IN THE CARE AND
TREATMENT OF JEAN WHITFIELD**

STATE OF NEW YORK

COUNTY OF WESTCHESTER

On this day, personally appeared before me, the undersigned authority, Michael H. Rosenberg, M.D., who, after being duly sworn, deposes and states as follows:

1. I am Michael H. Rosenberg, M.D. I am a medical doctor licensed in the state of New York. I have personal knowledge of the facts or information contained herein, and I am legally authorized to make this *Verified Opinion*.

2. I am board certified by the American Board of Plastic Surgery, and the America Board of Surgery. In my practice as a medical doctor and surgeon, I specialize in plastic surgery including, among other things, reconstructive and aesthetic breast surgeries. A copy of my current *Curriculum Vitae* is attached and incorporated by reference as **Exhibit "A."**

3. By virtue of my education, training and experience in medicine, and more particularly in plastic and reconstructive surgery, I am familiar with the issues of this case and the standard of care applicable for plastic and reconstructive surgeons such as Dennis Schimpf, M.D.

4. I have reviewed the following pertinent materials of Jean Whitfield (date of birth, October 14, 1960), including the following:

   a. Medical records of Dennis Schimpf, MD 12/19/2013 through 07/23/2014;

   b. Post-operative photograph of Jean Whitfield

   c. Records from Roper Hospital

   d. Medical records of Ram Kalus, MD 07/10/2014 through 12/15/2015

   e. Statement of Ms. Whitfield regarding her care

5. On December 10, 2013, Ms. Whitfield first presented for a consultation to Dennis Schimpf, M.D. In the "on line plastic surgery consultation form" she completed that day she

reported she was there to discuss "(an) abdominal" issue. There is no office note for this date, and no pre-operative photographs, although Dr. Schimpf apparently prepared a surgical cost estimate for "Liposuction of Abdomen, Mastopexy, Exchange of Implants, and Silicone Implants" for the total cost of $7,830.00. Of note, Ms. Whitfield reports that pre-operative photographs were indeed taken but they have not been produced by Dr. Schimpf to date, despite multiple requests. With no office note, it is impossible to determine what if any complaints were made by Ms. Whitfield, what Dr. Schimpf's findings were after a physical examination, and what discussion occurred regarding a plan of care.

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8. Indeed Ms. Whitfield was having multiple problems following her surgery and was seen in the emergency room at Roper Hospital with complaint of chest pain following her surgery on June 20, 1014. She was seen, ruled out for a myocardial infarction and then released from the Emergency Room with the diagnosis of "chest pain likely from her breast reduction surgery".

9. Ms. Whitfield states that following her visit to the Roper Hospital Emergency room, she went back to Dr. Schimpf. At that time, despite the wound having been open for many days, he failed to take any cultures and under local anesthesia placed sutures to close the wound.

10. There continues to be no documentation by her surgeon of any post-operative problems, until she sees Dr. Ram Kalus for a second opinion on July 10, 2014. He noted the patient reported a one week history of a breast infection with intermittent fevers. On his examination he noted erythema on the right breast with partial dehiscence and necrosis of the periareolar area on the right side with a wound measuring 2.5 by 1 cm on the right side. There was fat necrosis in the subareolar location and there is purulent drainage emanating from the vertical incision and several INSORB staples were exposed and removed. Silvadine was applied to the wound and Dr. Kalus spoke to Dr. Schimpf who stated he would see the patient later that day.

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13. Ms. Whitfield ultimately required two more surgeries to correct the breast deformities which occured on March 11, 2015, and October 20, 2015. The last record I reviewed

was an office visit with Dr. Kalus on December 18, 2015 in which Ms. Whitfield was advised one more surgery may be needed to correct her appearance.

14. Based upon my education, training, experience, review of the records in this case, as well as the photograph and narrative provided by Ms. Whitfield, it is my opinion within a reasonable degree of medical probability that Dennis Schimpf, M.D. fell below the applicable standard of care in the treatment of Ms. Whitfield between December 19, 2013, and July 13, 2014, in one or more of the following respects:

A. Dr. Schimpf's pre-operative office notes are completely inadequate. In Dr. Schimpf's records there is no documented discussion of the patient's complaints, there is no documentation that any physical examination was performed, and there is no assessment of the patient's condition and no indication of a surgical plan and the rationale for that plan. There is also no documentation of direct measurements of Ms. Whitfield's breasts, and no pre-operative photographs were taken.

B. There is no written documentation by the surgeon of how the procedure was performed, and exactly what was done. There is no documentation of the type of Mastopexy performed and the extent of tension on the wound, and there is no description of the size and type of implant that was used. Clearly there was too much tension placed surgically on the incision which led to inadequate blood flow, ischemia and dehiscence of the wound margins, fat necrosis, and ultimately infection of the right breast. This ultimately led to loss of the implant and the need for multiple corrective surgeries.

C. Post-operatively there is failure to recognize the development of tension on the wound, loss of tissue and infection, and failure to adequately intervene in the

developing problems. There is no written documentation of post-operative assessment, wound care, and treatment by Dr. Schimpf of any of these developing problems. Early intervention would more likely than not have prevented development of these multiple problems.

D. By attempting to close the wound dehiscence without the benefit of wound cultures and in the face of dehiscence in an office setting, Dr. Schimpf significantly increased the severity of the problem which ultimately required more surgeries to correct.

E. Dr. Schimpf ignored the urgent request of Dr. Kalus that Dr. Schimpf evaluate and treat his patient's developing surgical complications which further delayed her treatment and exacerbated the problem.

15. Specifically, the deviations from the standard of care by Dr. Dennis Schimpf included failure to properly assess and evaluate his patient pre-operatively, performance of a surgical procedure in a manner below the standard of care, failure to document an operative procedure he performed, failure to document post-operative care of his patient, failure to recognize and treat a post-operative wound infection with delay in treatment, improper treatment of a wound infection with failure to obtain wound cultures and closure of an ischemic and potentially infected wound.

16. It is my opinion within a reasonable degree of medical probability that the above-referenced deviations from the standard of care by her surgeon, Dr. Dennis Schimpf, directly caused bodily injury to Ms. Jean Whitfield with resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, and aggravation of previously existing conditions.

17. The above opinions are subject to addition or amendment pending the production of additional records, depositions, or testimony in this matter.

18. No expert opinion of mine has been disqualified by any court of law.

UNDER PENALTIES OF PERJURY, I DECLARE THAT I HAVE READ THE FOREGOING AND THAT THE FACTS STATED IN IT ARE TRUE.

FURTHER AFFIANT SAYETH NAUGHT.

Date Oct 31, 2016

Michael H. Rosenberg, M.D.

STATE OF NEW YORK
COUNTY OF Westchester

Before me, the undersigned authority, personally appeared Michael H. Rosenberg, M.D., who deposes and says that he executed the above document and the information contained therein is true and correct to the best of his knowledge, information and belief. Such person ✓ did or _____ did not take an oath and (*notary must check applicable statement*):

✓ is personally known to me;
_____ produced a current _____ driver's license; or
_____ produced _____ as identification.

WITNESS my hand and seal this 31st day of October 2016.

NOTARY PUBLIC, State of New York at large
Commission Number: 01MA6038155
My Commission expires: 03-06-2018

Marina Marente
Notary Public, State of New York
Registration #01MA6038155
Qualified in Westchester County
My Commission Expires March 6, 2018

17-2758

Exhibits

Sealed

3 complaint amended

* See order dated 9/7/17.

2017-CP-10-2758

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2017-CP-10-02758

FILED
2017 SEP -7 PM 12:27
CLERK OF COURT

Jeane Whitfield	**Dennis K. Schimpf, MD, et al.**
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

Defendant's Motion to Strike Plaintiff's Complaint is granted. Plaintiff shall revise the Complaint with exhibits under seal. Plaintiff shall file the revised Complaint within 20 days. Filing will date back to the original date of filing for purpose of the statute of limitations.

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled**
		$
		$
		$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Al Rhett Lee **Judge Code** 2118 **Date** 9/6/2017

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 _____ to attorneys of record or to parties (when appearing pro se) as follows:

_____ _____

ATTORNEY(S) FOR THE PLAINTIFF(S) **ATTORNEY(S) FOR THE DEFENDANT(S)**

Court Reporter _____

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. No.: 2017-CP-10-2758
	)	
Jeane Whitfield,	)	
	)	
Plaintiff,	)	**DEFENDANTS' AMENDED ANSWER TO PLAINTIFF'S AMENDED COMPLAINT**
	)	
vs.	)	
	)	
Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,	)	
	)	
Defendants.	)	
	)	

FILED
2017 OCT -4 PM 1:37
JULIE J. ARMSTRONG
CLERK OF COURT

NOW COMES Defendant Dennis K. Schimpf, M.D. (herein "Defendant Schimpf") and Defendant Sweetgrass Plastic Surgery, LLC, (herein "Defendant Sweetgrass"), (herein collectively "Defendants") in the above- styled action and hereby Answers the allegations of the Plaintiff's Amended Complaint as follows:

1. Defendants deny each and every allegation of Plaintiff's Amended Complaint not hereinafter specifically admitted. Further, all pictures included as exhibits to the Amended Complaint are herein denied and proper authentication and proof is strictly demanded.
2. As to the allegations of Paragraph 1 of Plaintiff's Amended Complaint, the Defendants, upon information and belief, admit the same.
3. As to the allegations of Paragraph 2 of Plaintiff's Amended Complaint, the Defendants admit the same.
4. As to the allegations of Paragraphs 3 and 4 of Plaintiff's Amended Complaint, the Defendants admit only that Sweetgrass Plastic Surgery, LLC is a limited liability company organized, existing, and doing business in the State of South Carolina and it

is a physician's office and surgical center. The Defendants deny any liability as to the Plaintiff.

5. As to the allegations of Paragraph 5 of Plaintiff's Amended Complaint, the Defendants deny the same and state that the physician patient relationship existed only between Dr. Dennis Schimpf and the Plaintiff.

6. As to the allegations of Paragraph 6 of Plaintiff's Amended Complaint, this allegation calls for a legal conclusion for which no answer is needed. To the extent a response is required, the Defendants deny the same and demand strict proof thereof.

7. As to the allegations of Paragraph 7 of Plaintiff's Amended Complaint, the Defendants admit the same.

8. As to the allegations of Paragraph 8 of Plaintiff's Amended Complaint, the Defendants are aware from their "Patient Registration Form" that Dr. Domm recommended Plaintiff to Dr. Schimpf for an "abdominal issue" and, therefore, upon information and belief, admit the same.

9. As to the allegations of Paragraph 9 of Plaintiff's Amended Complaint, the Defendants admit that the patient initially consulted with Dr. Schimpf in 2014 for bilateral upper blepharoplasty, liposuction of the abdomen, liposuction of the legs, a bilateral mastopexy, open capsulotomy – silicone implant exchange and bilateral scar revision. All other inconsistent allegations are denied.

10. As to the allegations of Paragraph 10 of Plaintiff's Amended Complaint, the Defendants deny the same.

11. As to the allegations of Paragraphs 11 and 12 of Plaintiff's Amended Complaint, the Defendants admit that Dr. Schimpf performed surgery on June 6, 2014 of the

Plaintiff. The Defendants further admit that she was scheduled for a follow up to remove sutures from her upper blepharoplasty, at which point her wounds were clean, dry and intact and her nipples were viable bilaterally. There was no evidence of cellulitis, induration or infection at this point. All other inconsistent allegations are herein denied.

12. As to the allegations of Paragraphs 13 of Plaintiff's Amended Complaint, the Defendants deny the same.

13. As to the allegations of Paragraphs 14 of Plaintiff's Amended Complaint, the Defendants are without knowledge sufficient to admit or deny whether the Plaintiff followed the Defendant's instructions but admit that the Defendant did appropriately instruct the Plaintiff on the care of her surgical wounds.

14. As to the allegations of Paragraph 15 of Plaintiff's Amended Complaint, the Defendants deny the same.

15. As to the allegations of Paragraphs 16 through 19 of Plaintiff's Amended Complaint, the Defendants admit only that the Plaintiff began to experience wound separation of the right breast, she was seen multiple times in the office, and she was given an appointment timely any time she called. All other allegations are denied, as written, and strict proof is demanded.

16. As to the allegations of Paragraphs 20 and 21 of Plaintiff's Amended Complaint, the Defendants are without information sufficient to admit or deny and, therefore, this answer has the effect of a denial.

17. As to the allegations of Paragraphs 22 through 27 of Plaintiff's Amended Complaint, the Defendants deny the same and demand strict proof thereof.

18. As to the allegations of Paragraphs 28 through 30 of Plaintiff's Amended Complaint, the Defendants are without information sufficient to admit or deny and, therefore, this answer has the effect of a denial.

19. As to the allegations of Paragraph 31 and 32 of Plaintiff's Amended Complaint, the Defendants admit Dr. Schimpf and Dr. Kalus consulted. Further answering, the Defendants offered the Plaintiff an appointment that day in Summerville but she wanted to wait until the next day and be seen on Daniel Island.

20. As to the allegations of Paragraphs 33 through 36 of Plaintiff's Amended Complaint, the Defendants deny and demand strict proof thereof.

21. As to the allegations of Paragraphs 37 through 47 of Plaintiff's Amended Complaint, the Defendants are without information sufficient to admit or deny and, therefore, this answer has the effect of a denial.

First Cause of Action
(Negligence / Medical Malpractice)

22. As to the allegations of Paragraph 47 of Plaintiff's Amended Complaint, the Defendants repeat each and every answer of the aforesaid paragraphs as if stated herein verbatim.

23. As to the allegations of Paragraph 49 of Plaintiff's Amended Complaint, the Defendants deny the same.

24. As to the allegations of the Second Paragraph 49 of Plaintiff's Amended Complaint, the Defendants deny the same.

25. As to the allegations of Paragraphs 50 and 51 of Plaintiff's Amended Complaint, the Defendants admit that unknown to the Defendants at the time of the Plaintiff's care, some of the post-operative notes and the June 6th photographs have not been located.

However, the Defendant immediately dictated a summary note to provide in response to the medical records request to memorialize his memory of the events of the Plaintiff's post-operative care and will further be able to testify to the same. The Defendants deny that any medical records were intentionally lost or destroyed. Further, the Defendants did provide various notes, including surgical notes, documentation of visits, documentation of care provided, plans and informed consent document and deny any inconsistent allegation.

26. As to the allegations of 52 through 56 of Plaintiff's Amended Complaint, these allegations call for legal conclusion for which no response is necessary. To the extent a response is required, the Defendants deny the same and demand strict proof thereof. Further, the Defendants' deny that all records were lost or destroyed.

27. As to the allegations of 57, including subparts (a) through (r), and 58 of Plaintiff's Amended Complaint, the Defendants deny the same and demand strict proof thereof.

WHEREFORE, having fully responded to the allegations of Plaintiff's Amended Complaint, Defendant Schimpf and Defendant Sweetgrass assert the following additional defenses:

ADDITIONAL DEFENSES

1. Plaintiff's Complaint fails to state a claim upon which relief can be granted against this Defendant and, therefore, should be dismissed with prejudice pursuant to Rule 12(b)(6) and of the South Carolina Rules of Civil Procedure. The Care and treatment administered by Defendants conformed to and was in full compliance with recognized standards of medical Care that would be exercised by health Care providers in the same specialty under the same circumstances. At no time did

Defendants deviate from the applicable standards of Care while attending to the Plaintiffs. Accordingly, the Plaintiffs are barred from recovery against Defendants.

2. Plaintiff's injuries, if any, were caused in whole or in part by the acts or omissions of others for whose conduct Defendants is not responsible and/ or resulted from conditions unrelated to any conduct of Defendants as may be proven through discovery and /or at trial.
3. Plaintiff's alleged injuries and damages may have been the result of an independent, intervening, and superseding cause over which Defendants had no control. Any alleged action or alleged omission on the part of Defendants was not the proximate cause of the alleged damages.
4. Plaintiff's suffered from one or more significant medical conditions and the injuries complained of herein are the result of a natural disease process and/ or recognized complication of said process and, therefore, the Plaintiff are not entitled to any recovery from Defendants.
5. Any recovery by the Plaintiff must be reduced or offset by amounts Plaintiff have received or will receive from others for the same injuries to Plaintiff claimed in this lawsuit.
6. Plaintiff's claims are barred because Defendants did not breach any legal duty owed to the Plaintiffs.
7. Plaintiff's claims are barred because the Plaintiff's alleged injuries, if any, are a known complication that can and does occur in the absence of negligence.
8. Plaintiff's, alleged injuries, if any, were caused in whole or in part by Plaintiff and/ or their representatives' own comparative/ contributory negligence as may be proven in

discovery and/ or at trial and, therefore, the alleged injuries and claim for damages should be diminished proportionally according to Plaintiff's culpable conduct.

9. With respect to Plaintiff's demands for punitive damages, Defendants assert their conduct, as alleged herein, does not rise to the level required to sustain a claim for punitive damages. Further, the award or assessment of punitive damages as prayed for by Plaintiff would violate Defendants constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution and, therefore, may not be awarded to Plaintiff, in that:

   a) The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees.

   b) Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

   c) Any award of punitive damages based on the wealth of Defendants violates due process guarantees;

   d) The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards, is arbitrary, promotes grossly excessive awards and is inconsistent with due process guarantees.

   e) Assuming arguendo that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and

f) The Plaintiff's claim for punitive damages violates the Equal Protection Clause of the 14th Amendment of the United States Constitution and Article I Section 3 of the South Carolina Constitution in that the amount of punitive damages is based on the wealth of Defendants.

Defendants specifically incorporates by reference all standards of limitations regarding the determination and enforceability of punitive damage awards contained in the decisions of Exxon Shipping Co. v. Baker, U.S. Supreme Court Op. No. 07-219 (June 25, 2008); State Farm v. Campbell, 538 U.S. 408 (2003); BMW of North America v. Gore, 517 U.s. 559 (1996) and Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), together with all such standards applicable under state law.

10. The award of punitive damages is a punishment, a quasi criminal sanction for which Defendants have not been afforded the specific procedural safeguards prescribed in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and in the Constitution of South Carolina.

11. That even if Defendants were negligent as alleged in the Complaint, which is specifically denied, the acts of Defendants are not the direct and proximate cause of Plaintiff's alleged injuries and damages, so as to bar the Plaintiff from recovery against Defendants.

12. The Plaintiff had an ongoing duty to mitigate their damages and, to the extent they failed to do so, their recovery if any should be reduced accordingly.

13. To the extent allowed by the law, Defendants hereby invokes the protections afforded by law regarding the limitations on non-economic damages as set forth in the S.C. Code §15-32-220 et seq. and associated provisions.

14. To the extent allowed by law, Defendants hereby invokes the protections afforded by law regarding the limitations on joint and several liability as set forth in the S.C. Code §15-38-10 et seq. and associated provisions.

15. Defendants hereby gives notice that it intends to rely on such other defenses as may become available or appear through discovery or otherwise, and hereby reserve the right to amend their Amended Answer to assert any such defenses.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint and asserted the foregoing defenses, this Defendant respectfully requests:

(1) A trial by jury of twelve;

(2) This Court to dismiss this matter with prejudice as to Defendants and enter judgment in its favor and against Plaintiffs; and

(3) This Court to award Defendants its costs and expenses, including attorney's fees incurred in this matter and grant whatever additional relief this Court deems appropriate.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,

SMYTH WHITLEY, LLC

Joshua S. Whitley, Esquire
Kevin R. Horton, Esquire
126 Seven Farms Drive
First Citizens Plaza, Suite 150
Charleston, South Carolina 29492
Tel.: (843) 606-5635
Fax: (843) 654-4095

Attorneys for the Defendants

Charleston, South Carolina
October 2, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. No.: 2017-CP-10-2758
	)	
Jeanne Whitfield,	)	
	)	
Plaintiff,	)	**DEFENDANTS' NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER AND MOTION TO SEAL**
	)	
vs.	)	
	)	
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC	)	
	)	
Defendants.	)	
	)	

FILED
2018 OCT -1 PM 1:48
JEAN H. ARMSTRONG
CLERK OF COURT
10/1/18

TO: BRENT HALVERSEN, ESQUIRE AND DANIEL SLOTCHIVER, ESQUIRE, ATTORNEYS FOR PLAINTIFF,

PLEASE TAKE NOTICE that Defendants Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC (hereinafter "Defendants"), by and through undersigned counsel, will move the Court, pursuant to Rules 26(c), 30(d) and 30(j)(3) of the South Carolina Rules of Civil Procedure, for a protective order from the Court to prohibit and/or limit Plaintiff from conducting discovery into the personal matters of individuals who are not parties to this case and which are wholly unrelated to the allegations of Plaintiff's Complaint. The Defendants further move to seal the deposition testimony of Ms. Tolbert pertaining to these issues, as well as all responses and filings related to these issues pursuant to SCRCP, Rule 26(c).

By way of background, this is a medical malpractice case in which Plaintiff asserts that Dr. Schimpf was medically negligent in failing to diagnose and treat post-operative wound complications following a cosmetic breast reduction surgery. On September 24, 2018, Plaintiffs counsel took the deposition of Victoria Tolbert, the office manager for Defendant Sweetgrass Plastic Surgery, LLC. Near the end of the deposition, Plaintiff's counsel began to ask several questions prying into the personal and confidential information about Ms. Tolbert's private life,

and the lives of other employees of the practice. In response, counsel for the Defendants objected and instructed Ms. Tolbert not to answer such questions. Thereafter, Defendants timely filed the instant motion as required by SCRCP, Rule 30.

The areas of inquiry at issue seek details about three (3) issues that are wholly unrelated to the case: (1) Ms. Tolbert's personal relationships, (2) Ms. Tolbert's confidential medical information, and (3) the confidential medical information of other staff members at Sweetgrass. Ms. Tolbert is not a party to the case and is not a medical provider, so she provided none of the medical care that is at issue in the Plaintiff's Complaint. Her personal relationships have no bearing whatsoever on the care and treatment Plaintiff received. Likewise, the personal and confidential medical information of Ms. Tolbert and the other staff members is also wholly unrelated. Moreover, privacy laws and statutes, including but not limited to HIPAA, strictly protect an individual's healthcare information from just this type of improper invasion.

The legal bases for this Motion are that the requested information has absolutely no bearing on the facts of this case, does not tend to prove the allegations of Plaintiff's Complaint, calls for confidential, protected health information of non-parties, is beyond the scope of permissible discovery set forth in Rule 26, and is intended solely for harassment, embarrassment, oppression, annoyance of non-parties. There is simply no colorable justification for permitting discovery into any of these personal matters, but rather it appears to be a thinly veiled attempt to gain leverage in the case at the personal expense of individuals unrelated to the allegations. Rule 26(c) was written precisely to prevent such misuses of the discovery process. Accordingly, the Defendants request a Protective Order prohibiting discovery into these and all related issues.

Further, because the areas of inquiry call for sensitive, personal and confidential information of non-parties to the case, the Defendant seeks an Order sealing the portion of Ms.

Tolbert's deposition concerning these issues, as well as all responses, replies and all other potentially public filings related to this issue pursuant to SCRCP Rules 26(c) and 30.

This Motion is supported by the applicable rules, case law and memorandum filed by the Defendants in advance of a hearing on this matter. For all of the foregoing reasons as well as those set forth in any subsequent filings, the Defendants hereby respectfully request an Order prohibiting Plaintiff from conducting discovery into these issues and sealing all related documents, filings or other responses from the public domain.

Respectfully submitted,

SMYTH WHITLEY, LLC

Todd W. Smyth, Esquire
Kevin R. Horton, Esquire
126 Seven Farms Drive, Suite 150
Charleston, SC 29492
Phone: 843-606-5635
Fax: 843-654-4095
tsmyth@smythwhitley.com

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

September 27, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. No.: 2017-CP-10-2758
	)	
Jeanne Whitfield,	)	
	)	
Plaintiff,	)	**DEFENDANTS' NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER AND MOTION TO SEAL**
	)	
vs.	)	
	)	
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC	)	
	)	
Defendants.	)	
	)	

FILED
2018 OCT 24 AM 11:51
JULIE J. ARMSTRONG
CLERK OF COURT

TO: BRENT HALVERSEN, ESQUIRE AND DANIEL SLOTCHIVER, ESQUIRE, ATTORNEYS FOR PLAINTIFF,

PLEASE TAKE NOTICE that Defendants Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC (hereinafter "Defendants"), by and through undersigned counsel, will move the Court, pursuant to Rules 26(c), 30(d) and 30(j)(3) of the South Carolina Rules of Civil Procedure, for a protective order from the Court to prohibit and/or limit Plaintiff from conducting discovery into the personal matters of Defendant which are not relevant and are wholly unrelated to the allegations of Plaintiff's Complaint. The Defendants further move to seal the deposition testimony of Defendant pertaining to these issues, as well as all responses and filings related to these issues pursuant to SCRCP, Rule 26(c).

By way of background, this is a medical malpractice case in which Plaintiff asserts that Dr. Schimpf was medically negligent in failing to diagnose and treat post-operative wound complications following a cosmetic breast reduction surgery. On October 17, 2018, Plaintiffs counsel took the deposition of Defendant Dennis K. Schimpf, M.D. In the middle of the deposition, Plaintiff's counsel began a line of questioning regarding Dr. Schimpf's personal private life and relationships. In response, counsel for the Defendants objected and instructed

Defendant Dennis K. Schimpf, M.D. not to answer such questions. Thereafter, Defendants timely filed the instant motion as required by SCRCP, Rule 30.

The area of inquiry at issue sought details about Defendant's personal relationship with another individual, which is wholly unrelated to this case. While Dr. Schimpf is a party to this case, his private relationships are not a proper subject for inquiry. They have no bearing on whether or not he complied with or deviated from the standard of care in this case and they have no bearing whatsoever on the care and treatment Plaintiff received.

The legal bases for this Motion are that the requested information has absolutely no bearing on the facts of this case, it does not tend to prove the allegations of Plaintiff's Complaint, it is beyond the scope of permissible discovery set forth in Rule 26, SCRCP, and it is intended solely for harassment, embarrassment, oppression, annoyance of non-parties. There is simply no colorable justification for permitting discovery into these personal matters, but rather it appears to be a thinly veiled attempt to gain leverage in the case at the personal expense of individuals unrelated to the allegations. Rule 26(c) was written precisely to prevent such misuses of the discovery process. Accordingly, the Defendants request a Protective Order prohibiting discovery into this and any related issues.

Further, because this areas of inquiry calls for sensitive, personal and confidential information, the Defendant seeks an Order sealing the portion of Dr. Schimpf's deposition as well as all responses, replies, and all other potentially public filings related to this issue pursuant to SCRCP Rules 26(c) and 30.

This Motion is supported by the applicable rules, case law, and a memorandum to be filed by the Defendants in advance of a hearing on this matter. For all of the foregoing reasons as well as those set forth in any subsequent filings, the Defendants hereby respectfully request an

Order prohibiting Plaintiff from conducting discovery into these issues and sealing all related documents, filings, or other responses from the public domain.

Respectfully submitted,

SMYTH WHITLEY, LLC

Todd W. Smyth, Esquire
Kevin R. Horton, Esquire
126 Seven Farms Drive, Suite 150
Charleston, SC 29492
Phone: 843-606-5635
Fax: 843-654-4095
tsmyth@smythwhitley.com

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

October 22, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. No.: 2017-CP-10-2758
	)	
Jeane Whitfield,	)	
	)	
Plaintiff,	)	**DEFENDANTS' NOTICE OF MOTION AND MOTION FOR PHYSICAL AND MENTAL EXAMINATION OF PLAINTIFF**
	)	
vs.	)	
	)	
Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,	)	
	)	
Defendants.	)	
	)	

FILED
2017 DEC 14 AM 11:18
CHARLESTON COUNTY
CLERK OF COURT

TO: BRENT HALVERSEN, ESQ., AND DANIEL SLOTCHIVER, ESQ., ATTORNEYS FOR PLAINTIFF, ESQUIRE

Please take notice that pursuant to Rule 35 of the South Carolina Rules of Civil Procedure, Defendants, by and through their undersigned counsel, hereby request that the Plaintiff, Jeane Whitfield, make herself available for a medical examination by Defendant's plastic surgery expert and for a mental examination by Defendant's psychiatry expert.

Counsel for the undersigned Defendant confirms that Plaintiff has put her physical and medical conditions squarely at issue in this case, that the amount in controversy requirement is satisfied and that justice so requires and that good cause exists to conduct these examinations so that the Defendants may have equal access to information relevant to the case and be allowed to properly assess the Plaintiff's claimed damages and current physical and mental condition. The Defendants agree to conduct the examinations at a date, time and location in Charleston County, SC as may be mutually agreed upon and that the scope of the examination will be limited to the field of expertise of the two respective experts.

This motion is supported by the pleadings, discovery responses, documents exchange during discovery, deposition testimony, medical records, and any memorandum of law to be supplemented prior to the hearing.

Pursuant to SCRCP Rule 11, the undersigned affirms that prior to filing the instant motion, they have communicated with opposing counsel and have attempted in good faith to resolve the matter contained herein, but that no mutually acceptable resolution could be reached.

Respectfully Submitted,

SMYTH WHITLEY, LLC

Todd W. Smyth, Esquire
Kevin R. Horton, Esquire
126 Seven Farms Drive
First Citizens Plaza, Suite 150
Charleston, South Carolina 29492
Tel.: (843) 606-5635
Fax: (843) 654-4095

Attorneys for the Defendants

Charleston, South Carolina
December 11, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. No.: 2017-CP-10-2758
	)	
Jeane Whitfield,	)	
	)	
Plaintiff,	)	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR PHYSICAL AND MENTAL EXAMINATION OF PLAINTIFF**
	)	
vs.	)	
	)	
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC	)	
	)	
Defendants.	)	
	)	

FILED
2019 FEB 27 PM 2:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Pursuant to Rule 35, SCRCP, Defendants Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC, individually (hereinafter "these Defendants"), respectfully submit this Memorandum of Law in Support of their Motion to have Plaintiff make herself available for a medical examination by Defendant's plastic surgery expert and for a mental examination by Defendant's psychiatry expert. This Motion is made upon the fact that there is good cause for this Court to require that Plaintiff submit herself to such examination and because Defendants' ability to defend this matter is prejudiced without equal access to Plaintiff, who has placed her physical and mental condition into controversy.

FACTS

This is a medical malpractice action arises from a set of surgeries Defendant Dr. Schimpf performed on Plaintiff on June 6, 2014. Plaintiff initially came to Dr. Schimpf seeking to down-size her implants and to address several other cosmetic concerns. On June 6, 2014, she underwent liposuction of the abdomen, thighs, chin, and axillae, replacement of bilateral breast implants, bilateral mastopexy, and an upper eyelid blepharoplasty. In the following weeks, Plaintiff developed wound separation at the incision on her right breast, a common complication

of breast surgery. She changed doctors to another plastic surgeon, Ram Kalus, who on June 14, 2014, removed the right implant and closed her breast over a drain.

After the surgery, Plaintiff saw her psychiatrist, Dr. Sara Marcino regularly, reporting significant psychiatric issues because of the "botched" surgery," her husband's ex-wife stalking her, and her mother's death. In January 2015, Plaintiff voluntarily elected to have her left implant removed as well. In that procedure, Dr. Kalus also removed over 400 grams of tissue along with the left implant, leaving Mrs. Whitfield with a significant asymmetry in the size of her breasts. Dr. Kalus subsequently recommended and attempted fat grafting to address the asymmetry, but Plaintiff has now indicated that she would like implants again. Throughout this course of treatment, she has continued to see her psychiatrist regularly. Her psychiatrist's notes reflect Plaintiff's continued anger, irritability, depression, suicidal thoughts, and noncompliance with psychiatric medications. She has a longstanding history of psychiatric conditions and has been prescribed serious psychiatric medications for many years prior to the incident in question.

In her deposition, Dr. Marcino testified that she believes Plaintiff has developed PTSD in part because of her treatment with Dr. Schimpf, even though Plaintiff's background includes plenty of other self-reported trauma including having been raped, multiple abortions, a pit bull attack, an abusive boyfriend, family and marital discord including being stalked by her husband's ex-wife for an extensive period of time, multiple lawsuits and the subsequent deaths of her mother and sister. She also testified that Plaintiff's underlying anxiety and panic disorders have been aggravated by her course of treatment with and "disfigurement" by Dr. Schimpf. In fact, Dr. Marcino has referred Plaintiff to a trauma therapist in order to assist her in learning how to deal with her PTSD.

In short, it is clear that Plaintiff's present physical and mental condition will be the key damages issues in the trial of this matter. Because of this and because of the complexity of Plaintiff's presentation, Plaintiff's experts, who are expected to provide expert analysis for the jury's consideration at trial, have asked to have the opportunity to examine the Plaintiff. Plaintiff's counsel has refused to make Plaintiff available for these examinations, and Defendants therefore filed the instant motion.

LAW AND ANALYSIS

Rule 35, SCRCP, is not often employed and is worth consideration in detail and at length. The text provides:

> "[i]n any case in which the amount in controversy exceeds $100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made, and shall be delivered to the person or persons making the examination.
>
> The physician of the party to be examined may be present at the examination. Unless the parties agree, or the court for good cause shown determines otherwise, the examination shall be in the county where the person to be examined, or his physician, resides...Upon reasonable objection to the physician designated to make the examination, and if the parties shall fail to agree as to who shall make the examination, the court may designate a physician...."

So the standard is, therefore, that where the amount in controversy exceeds $100,000 and the physical or mental condition of the party is in controversy, the examination may be had upon "good cause shown." In the instant case, Plaintiff has asserted well over $100,000 in claimed

damages and her two primary elements of damage involve her physical and mental condition, so the first two elements are not at issue. The question of "good cause" is the only remaining element that needs to be addressed. In this case and in other contexts under the South Carolina Rules of Civil Procedure, "good cause" has been interpreted to mean generally a cause that promotes or serves the interests of justice. See generally, default judgments under SCRCP 55(c), trade secrets under SCRCP 26(c)(7), and continuances under SCRCP 40(c)(3). In the instant case, there is nothing more fundamental to a fair trial than equal access to the expected evidence. That is the entire purpose behind the discovery rules found in our Rules of Civil Procedure.

There is a paucity of South Carolina case law interpreting SCRCP Rule 35. The leading case, Fairchild v. South Carolina Dept. of Transp., 398 S.C. 90, 727 S.E.2d 407 (2012), arose from a car wreck, concerned a request for an "IME." In that case, defendants filed a motion to have plaintiff evaluated by Dr. James Ballenger, the same psychiatrist Defendants are seeking to have examine the Plaintiff in this matter.[1] The Court, employing the language of "independence" which is notably absent from the Rule, held that the trial court properly denied defendants' motion for evaluation because plaintiff had a reasonable objection to the use of Dr. Ballenger, namely that he was a retained defense expert and therefore could not be independent.

Because Dr. Ballenger is one of the experts in this case, it is anticipated that at least part of Plaintiff's opposition to the instant motion will rely on the Fairchild decision and will argue that the defense experts are not "independent" because they are familiar with the case and as

[1] It is worth considering why Dr. Ballenger is an appropriate evaluator in the legal context. His credentials are impeccable as one of the world's leading experts in anxiety disorders. He happens to work and live in Charleston, where he has been instrumental in building MUSC's psychiatric residency training program into one of the finest in the country. He has been responsible for editing and authoring the chapter of the Diagnostic Statistical Manual ("DSM") that concerns anxiety disorders. There are not any more qualified individuals in existence to examine Plaintiff. In fact, it is worth noting that when the U.S. District Court needed an individual to determine whether Dylann Roof could stand trial, it hired Dr. Ballenger to interview, evaluate, and assess Mr. Roof's competency. Note that, even in that instance, however, Dr. Ballenger had the opportunity to evaluate and assess the individual on whom he rendered an opinion. He has not had that opportunity in this present action.

such that makes them bias and constitutes a "reasonable objection" to the physician designated to perform the examinations.

However, there are a number of key distinctions in this case from the facts of Fairchild. First, the Plaintiff in that case did not oppose the medical examination, but Mrs. Whitfield and her attorneys in this case, for some reason, do. Second, unlike in Fairchild, Mrs. Whitfield did have the opportunity to choose her own physician and did not have to simply settle on whatever physician happened to be on-call at a hospital. In fact, Mrs. Whitfield specifically confirmed this in her deposition, and testified that she chose him specifically and went to his office for assessment prior to ever deciding to undergo any revision. As the Fairchild Court observed, other states who have examined this issue have held that "So long as a plaintiff may select his own doctor to testify as this physical condition, fundamental fairness dictates that a defendant shall have the same right in the absence of an agreement by the parties as to who the examining physician will be. Fairchild 398 SC, at 109, footnote 6, *citing* Timpte v. District Court, 161 Colo. 309, 421 P. 2d 728, 729 (Colo. 1966). While the Fairchild distinguished the holding in Timpte because it found that the Colorado rule was different from the South Carolina rule, the fundamental fairness argument remains. The Plaintiff simply cannot demonstrate any prejudice that would result by these two examinations by two well-qualified experts, and fairness dictates that the Defendants be given the same right to allow their expert witnesses access to the Plaintiff so that they can make their own professional determinations about the injuries, extent of the claimed damages as well as future prognosis. After all, informing the jury about matters beyond their knowledge and familiarity is the primary reason we have experts and it makes no sense to restrict only one side's expert from access to potentially the most relevant issue in the case beyond the question of liability, namely the mental and physical condition of the Plaintiff.

It is also critical to understand that Rule 35 does not require "independence" on the part of the examiner as is often perpetuated by the colloquially reference to such exams as "IME's" or "Independent Medical Exams." However, neither the word "independent" nor any of its analogues appear in the text at all. Second, the mere fact that the defense experts are familiar with the case does not render them biased or warrant an assumption that they are otherwise incapable of making objective findings. To the contrary, both of the defense experts have testified in their depositions that they have requested these examinations in order to get a better understanding of the Plaintiff's condition, treatment and prognosis. Much of a physician's assessment comes from interacting with the patient, assessing their condition with their own hands and eyes, and being able to ask pertinent questions to their evaluations. That is especially true in this case where the Plaintiff is seeking to recover for future damages, more surgery and more care. The Defendants need to be able to fully evaluate these claims and there is nothing inherently biased or prejudicial in allowing the defense experts to perform their own examinations and make their own findings on these issues. In fact, the Rule requires these experts to prepare a report of their findings if requested and any concerns over their asserted bias can be fully explored during cross-examination. As is often reiterated by our trial courts, issues of claimed bias tends to go to the weight of the evidence and is something for the jury to ultimately decide, but the jury will not have that ability if the defense experts cannot conduct their own examinations.

Finally, it is important to realize that Rule 35 already provides patients with multiple and substantial safeguards so as to minimize any inconvenience. First, beyond the traditional requirements of reasonable notice, the submission to examination or evaluation cannot occur until the case has a substantial value *and* until the very condition of the person to be examined is at issue. Second, that person is accorded protection in that her own physician may be present.

[redacted]

Third, the person to be examined cannot be compelled to travel outside of her county of residence or that of her physician. Finally, special consideration as regards scheduling is to be given to the person to be examined and her physician.

CONCLUSION

At the trial of this matter, the jury will hear from Plaintiff's experts, her treating physicians, and Defense experts. Out of that group, only one has no access to the Plaintiff absent the ability to make their own evaluation, perform their own examinations and form their own conclusions based on direct answers from the Plaintiff herself. Plaintiff and her attorneys meanwhile have the ability to sit down and discuss the full picture of her claims with each physician as well as their experts. Defendant's experts then, at trial, are left to rely only on the written records and printed deposition transcripts of her selected physicians. Here, unless the Defendant's motion is granted, that door remains closed to the Defendants and they have no opportunity to evaluate Plaintiff. This lack of equity and fundamental disparity in position of the plaintiff and defendant was clear in 1910 – writing in dissent in *Best*, Justice Woods wrote that "[t]o deny to either party any reasonable means of making the extent of the injury evident is unfair, for often its nature is such that the defendant has no means whatever of protecting himself from pretensive or exaggerated claims[.]" Best v. Columbia Elec St. Ry., Light & Power Co., 85, S.C. 422, 428, 67 S.E. 1 3 (19110). This is exactly why Defendants have requested the opportunity to evaluate Plaintiff under Rule 35 and exactly why good cause exists in this case to allow these two examinations. Without such evaluation, Defendants' are prejudiced and at a disadvantage relative to Plaintiff as regards the development of their trial presentation regarding the nature, extent, origin, and scope of her claimed injuries, which are the primary elements of her claimed damages.

For the foregoing reasons, Defendants respectfully requests that, pursuant to Rule 35, SCRCP, this Court Order Plaintiff to make herself available for examination by Drs. Jorge Perez and James Ballenger.

Respectfully submitted,

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February 25, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2017-CP-10-2758
JEANE WHITFIELD,	)	
	)	
Plaintiff,	)	
	)	**MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PHYSICAL AND MENTAL EXAMINATION OF PLAINTIFF**
vs.	)	
	)	
	)	
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC	)	
	)	
	)	
Defendants.	)	
	)	

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2019 FEB 27 AM 9:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY

On December 14, 2018 the Defendants filed a motion to have their medical experts perform a plastic surgery "examination" and psychiatric "examination" of the Plaintiff, Mrs. Whitfield. The Plaintiff objected. For the reasons stated herein, the Defendants requests for examinations must be denied. The subject of Mrs. Whitfield's lawsuit is a botched breast reduction.

The starting point for analysis of the Defendants' request is Rule 35. The Rule states, in pertinent part:

PHYSICAL AND MENTAL EXAMINATIONS

> **(a) Order for Examination**. In any case in which the amount in controversy exceeds $100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. **The order may be made only on motion for good cause shown** and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made, and shall be delivered to the person or persons making the examination.

SCRCP 35(a) (emphasis added).

Accordingly, Defendants must show good cause as to why they need a physician to examine Mrs. Whitfield's intimate body parts for the damages she has claimed in this lawsuit. Mrs. Whitfield has alleged her breasts were disfigured and scarred at the hands of Dr. Schimph, and, that she will need future corrective surgery to correct the appearance of her breasts. Bluntly, this can be determined by a cursory review of the photographs.

The Defendant's plastic surgery expert, Dr. Jorge Perez of Ft. Lauderdale (who is in possession of the photographs of Plaintiff's current condition), agrees that she has been left with a poor aesthetic outcome and will need future surgery. Dr. Perez offered limited reasons why he wanted to evaluate Mrs. Whitfield:

> I know that I had asked to have an opportunity to examine the patient, but I believe that your office has declined this, and that is pending before the judge, some of those issues.
>
> Q. What is it that you would like to --what examination would you like to perform on Mrs. Whitfield?
>
> A. Well, I would like to do what's typically referred to as an IME or CME where I can have an opportunity to speak to the patient, examine her, touch her, as we would in a typical consultation, photograph her, take measurements, if necessary, those kinds of thing.
>
> Q. Okay. Would it be to assess what kind of procedure she may need in the future?
>
> A. Yes.
>
> Q. Aesthetically?
>
> A. Yes, sir.

(Dep. of J. Perez, P. 14, L. 6-19)

Dr. Perez has Mrs. Whitfield's photographs of her current condition and should be able to opine on what procedures (i.e., another augmentation) may benefit her aesthetically.

There is no articulable and justifiable reason for Dr. Perez to examine Mrs. Whitfield in person to opine on what Mrs. Whitfield's claimed damages are, particularly where – as here- the Defendants agree the Plaintiff needs a future surgery. As referenced above, Dr. Perez conceded Mrs. Whitfield needs plastic surgery to improve her physical appearance. The only reason set forth by Dr. Perez is that he needs to examine her to determine what kind of procedure she may need. There has been no showing of why the lack of a physical examination, handicaps the defenses' ability to dispute the Plaintiff's claimed damages.

Not only is there no good cause that has been shown, or can be shown, it is well settled law in South Carolina that an adversary's listed expert witness may not perform an IME on the opposing party. *See* Fairchild v. S.C. Dep't of Transp., 385 S.C. 344, 359, 683 S.E.2d 818, 826 (Ct. App. 2009), aff'd, 398 S.C. 90, 727 S.E.2d 407 (2012)("independent means independent and that means no witness has previously been identified by the Plaintiff or the Defendant gives the independent medical exam"). Accordingly, Dr. Perez and Dr. James Ballenger are barred from examining Mrs. Whitfield-- in any event.

In Fairchild, the Defendants also sought to have Dr. James Ballenger perform a psychiatric IME on the Plaintiff in that case. The Court affirmed the trial court's refusal to let Dr. Ballenger examine the Plaintiff stating:

> Here, we find Fairchild had a reasonable basis to object to Dr. Ballenger because he had a pre-existing relationship with Palmer. Dr. Ballenger was listed as an expert witness for the defense and had reviewed Fairchild's medical records. We believe such a role and his previous involvement warrants a reasonable objection for the trial court to sustain.

Id. at 360.

As in Fairchild, Dr. Ballenger has been retained as an expert witness for the Defendants in this case and billed the Defendants $14,110.00 for his review of Mrs. Whitfield's records.

No good cause can be shown for the Defendants to have a physical examination of Plaintiff's intimate body parts. No good cause can be shown as to why she should have a mental examination. Mrs. Whitfield's psychological records have been fully disclosed to the Defendants' expert psychiatrist, Dr. Ballenger, and he has already formed his opinions. Forcing Mrs. Whitfield to sit for a mental examination against her choosing is inherently problematic for the reason of a lack of trust between the examiner and the patient. More probable, the request is designed to intimidate and harass Mrs. Whitfield- which has already achieved its desired objectives. As indicated above, the Defendants' experts in this case are precluded from evaluating Mrs. Whitfield, and there is no good cause Defendants can show as to why these examinations are needed, or the lack thereof is prejudicial to their defense.

WHEREFORE, having fully responded to the Defendants Motion for Physical and Mental Examination, Plaintiff respectfully requests this Court DENY the Defendants motion in full.

Respectfully submitted,

By: _____

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2/22, 2019.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	
		CASE NO. 2017-CP-10-2758
JEANE WHITFIELD,	)	
	)	
Plaintiff,	)	
	)	**MOTION TO ALTER OR AMEND COURT'S ORDER FILED MARCH 28, 2019 PURSUANT TO RULE 59(e)**
vs.	)	
	)	
	)	
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC	)	
	)	
	)	
Defendants.	)	
	)	

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CHARLESTON
CLERK OF COURT

4/3/19

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiff, Jeane Whitfield, respectfully moves the Court, to alter or amend its recent Order filed of record on March 28, 2019 (hereinafter, "the Order").

In the Order, the Court granted the Defendants' motion for a physical and mental examination of the Plaintiff **by the Defendants' own listed expert witnesses**. The Court notified the parties of its decision to grant the motion on March 28, 2019. At the hearing on the matter, on February 27, 2019, the Court reserved its ruling and asked the parties to submit proposed orders. The undersigned submitted a proposed order on March 8, 2019 (See attached Exhibit "A"). The Court chose to enter the Defendants' proposed order and the Defendants' order was filed of record on March 28, 2019. The Plaintiff received written notification of entry of the Order on March 28, 2019 from the Court via electronic mail.

The Court's Order must be altered or amended for any one of the following reasons, but most importantly, the first:

1) The Court's decision to enter the Defendants proposed order, if not altered or amended, reverses the well-settled law set forth by the South Carolina Supreme Court in Fairchild v. S.C. Dep't of Transp., 398 S.C. 90, 727 S.E.2d 407 (2012) **that a party may not use his or her own expert to perform an Independent Medical Exam**. The Defendants argued at the hearing of this matter that the South Carolina Supreme Court, "in Fairchild gets it wrong," and that the Court "didn't read Rule 35 closely." (Hearing Transcript, P. 7, L. 22-23, attached hereto as Exhibit "B." If this Order is left to stand, the Court will have adopted the Defendants' position that the South Carolina Supreme Court's decision handed down seven years ago should be overturned.
2) The Order signed by the Court included rulings on issues that were never presented to the Court in the prior hearing and contains findings of fact on disputed issues;
3) The Order signed by the Court is facially defective because it fails to comply with the clear mandates of Rule 35 because it does not specify the time, place, manner, conditions, and scope restrictions of the proposed examination if such examination is ordered;
4) Pursuant to Rule 11, unfortunately, consultation with opposing counsel to resolve this motion would probably not serve a useful purpose.

Grounds for Motion

A party may file a motion to reconsider and alter or amend an order when it believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

> **Ground 1**: The Court's decision to enter the Defendants proposed order, if not altered or amended, reverses the well settled law set forth by the South Carolina Court of Appeals in Fairchild v. S.C. Dep't of Transp., 398 S.C. 90, 727 S.E.2d 407 (2012).

Although the Court may order an IME, the Defendant **cannot** select the doctors to be used when a reasonable objection has been made- **only** the Court. Our Supreme Court has held:

> **Under the plain language of Rule 35(a), the defendant clearly does not have the right to unilaterally select the examining physician; rather, the court alone has the right to make the appointment**. The rule contemplates that the parties will confer on this point to make suggestions, **but where a "reasonable objection" has been interposed and the parties cannot agree, the court will make the selection**.

Fairchild v. S.C. Dep't of Transp., 398 S.C. 90, 109, 727 S.E.2d 407, 417 (2012)(emphasis added).

Accordingly, if this Court believes the Defendants have established good cause for a mental and physical examination of Mrs. Whitfield, (which burden the Plaintiff believes was not met for the reasons set forth in its previously filed Memorandum, copy attached hereto as Exhibit "C"), the Defendants cannot use their own expert witnesses after the Plaintiff has made a "reasonable objection," and the physician must be appointed by the Court, not the Defendants. As set forth in detail below, the rule in Fairchild is that a party

has set forth a "reasonable objection" if the opponent proposes to use their own expert witness as the examiner for an Independent Medical Examination. That is what happened in this case when the Defendants proposed to Use Dr. Ballenger and Dr. Perez (their own expert witnesses) to examine Mrs. Whitfield.

The Defendants in this case argued that the rule in Fairchild should not apply to Mrs. Whitfield because she had the benefit of choosing her treating medical providers while the Plaintiff in the Fairchild case was assigned her physician at random by the hospital. Nowhere in the Fairchild case does the Court ever ground its decision (in preventing the Defendants' expert witness from performing an IME on the Plaintiff) because of a stated notion in fairness that because the Plaintiff did not get to choose her physician to treat her injuries, the Defendants would not be allowed to choose their expert witness to examine the Plaintiff in litigation, after a lawsuit was filed. The only concern of the Supreme Court's in Fairchild was the fundamental unfairness in allowing a physician previously aligned with a particular party to perform the IME in litigation. Instead of indicating any concern about the Plaintiff's ability to choose her treating physicians, the Court based its decision to forbid a party's retained expert witness from performing the IME specifically on the impartiality and independence (thus, IME **I**ndependent **M**edical **E**xamination) of the examiner:

> "The purpose of the rule for an IME is to materially aid the jury, not just the defendant, in evaluating the actual damages sustained and arriving at a just verdict. This purpose was recognized long before South Carolina law permitted such examinations. *See Best v. Columbia Elec. St. Ry., Light *110 & Power Co.*, 85 S.C. 422, 428, 67 S.E. 1, 3 (1910) (Woods, J., dissenting) (stating nothing can be more helpful to the jury in reaching a just estimate of the damages in a personal injury suit than knowledge of the true nature of the injury, and whenever it appears to the circuit court that **an examination by impartial experts would materially aid the jury, the circuit court should order such examination to be made by disinterested experts**). **Thus, the better rule is that the physician should not be affiliated with either party** in order to serve the purposes of Rule 35.In

> *Richardson v. Johnson,* 60 Tenn.App. 129, 444 S.W.2d 708, 710 (1969), the Tennessee court, echoing these sentiments, listed a series of guidelines regarding court-ordered physical examinations, including, "**The physician must be selected by the court, not the defendant, and must be competent and disinterested.**" The court stated "it is clear that the power so vested in the court is a discretionary power, and not an absolute right in the applicant, **and that the physician or physicians so appointed act as officers of the court, and not as agents of either party.**" *Id.* at 712. The court further observed that where claims concern injuries or disabilities that are based upon the subjective complaints of the plaintiff, "an impartial physician may have objective means of testing the subjective claims of the plaintiff [.]" *Id.* As is further explained in a case from a Missouri court: The law invests the trial court with authority to appoint physicians to make [a] physical examination of the plaintiff in a physical injury suit. The defendant cannot demand it as a matter of right, but the court in its discretion may do it in the furtherance of justice. **When the court makes such an appointment, [it] does so because [it] determines in [its] discretion that the case calls for the opinion of *disinterested and unbiased physicians, not friends of either parties,* whose testimony is likely to be biased.** *Atkinson v. United Rys. Co.,* 286 Mo. 634, 228 S.W. 483, 485 (1921) (emphasis added) (internal citations omitted). The Missouri court also recognized that a **"court could not compel [a] plaintiff to submit to [a physical] examination by the witnesses for the other side,"** and "[t]he physicians appointed in such cases are the officers of the court." *Id.*

Fairchild v. S.C. Dep't of Transp., 398 S.C. 90, 109–10, 727 S.E.2d 407, 417–18 (2012)(emphasis added in bold, emphasis in original in italics).

There is not a shred of suggestion in the Fairchild case that the outcome would have been any different had the Plaintiff in Fairchild been able to select their treating physician at the hospital, rather being assigned a physician at random. As stated above, our Supreme Court was concerned with the bias of a party's own hired gun in providing an "Independent Medical Examination." Not only is the use of a litigant's expert to perform an IME on the adversary expressly forbidden by Fairchild, but the Defendants in this case *are proposing to use the very same expert* that the Court of Appeals and the Supreme Court disallowed in the Fairchild case, Dr. James Ballenger:

> **Dr. Ballenger was listed as an expert witness for the defense and had reviewed Fairchild's medical records. We believe such a role and his previous involvement warrants a reasonable objection for the trial court to sustain.**

Fairchild v. S.C. Dep't of Transp., 385 S.C. 344, 360, 683 S.E.2d 818, 827 (Ct. App. 2009), aff'd, 398 S.C. 90, 727 S.E.2d 407 (2012)

Like Fairchild, Dr. Ballenger was listed as an expert witness for the Defendants *in this case*, and has reviewed Mrs. Whitfield's medical records. His previous involvement here too is a "reasonable objection" of Mrs. Whitfield's to be the examiner, under Fairchild. Accordingly, the Court must select the examiner, again, if it believes good cause has been shown which the Plaintiff submits it has not.

> **Ground 2**: The Order signed by the Court included rulings on issues that were never presented to the Court in the prior hearing and contains findings of fact on disputed issues.

The Order adjudicates the following facts in its Order which are highly disputed. Notably the Order states that the Plaintiff's wound was, "a common complication of breast surgery, "that she had, "noncompliance with psychiatric medications." These are factual issues that are to be decided by the jury, not the Court in deciding whether the Defendants have met the good cause requirement to force the Plaintiff to undergo a mental and physical examination. (See Deposition testimony of Plaintiff's treating and expert physicians, Drs. M. Rosenberg, R. Kalus, S. Marcino).

> **Ground 3**: The Order signed by the Court is facially defective because it fails to comply with the clear mandates of Rule 35 because it does not specify the time, place, manner, conditions, and scope restrictions of the proposed examination.
>
> Rule 35 states:
>
> (a) Order for Examination. In any case in which the amount in controversy exceeds $100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good

> cause shown and upon notice to the person to be examined and to all parties **and shall specify the time, place, manner, conditions and scope of the examination** and the person or persons by whom it is to be made, and shall be delivered to the person or persons making the examination.

SCRCP 35(a) (Emphasis Added).

Nowhere in the Order does it state under what conditions the IME may take place (who may attend, where and when it will be held, what specific tests will be performed, which tests will not be performed and why, etc.). As stated above, the present law expressly forbids the Defendants' experts to be the examining witnesses, but if the Court believes that good cause has been established for an Independent Medical Examination, the Court must select its own physicians to perform the IME- then there **must** be a criteria established in order to perform the IME per Rule 35, above. The Order contains no indication of what type(s) of examinations are allowed under the Order, or what type(s) of test(s) the examining physician is to perform. The Order has does not specify any "manner, conditions, or scope of the examination," required by Rule 35(a). Presumably, if the Defendants *could* show good cause as to why an IME is needed they would be able to specifically state what piece(s) of missing information they need to evaluate Mrs. Whitfield's claimed damages and what tests need to be performed. Whatever tests or evaluations that the Defendants claim they needed presumably would be part of their tests to be performed in the IME. The Order is silent on what test(s) or evaluations are to be performed, despite the clear dictates of Rule 35 that the order, "shall specify the time, place, manner, conditions and scope of the examination."

As stated at the hearing on this matter, there is nothing for a physical or mental examination to add to the Defendants' expert witness opinions. Mrs. Whitfield's claimed

physical damages are aesthetic in nature and of are of no disagreement to the Defendants' own proposed examining physician, Dr. Perez, *who agreed she was left with a poor aesthetic outcome and needed future surgeries*. Dr. Perez also has the benefit of current photographs of Mrs. Whitfield's naked breasts. Nowhere has there been any proffer to this Court as to what information or data Dr. Perez is missing in order to give an opinion beyond that which he has already given: he has all of her medical records and her photographs: *What could placing his cold hands on her private parts reveal that which he does not already know*[1] ? Mrs. Whitfield's claimed mental damages are exacerbations of previous mental conditions. Dr. Ballenger already reviewed all of Mrs. Whitfield's psychiatric records and testified at length as to what his opinions were.

Summary

The Court cannot allow the Defendants to use their own experts as examining physicians under current law set forth in 2012 by the South Carolina Supreme Court in the Fairchild case. If the Court has determined that good cause exists for the requested IME's (which the Plaintiff asserts such good cause has not been met for the reasons stated herein, as well as Plaintiff's filed Memorandum in Opposition, and at Hearing) – then the Court must select the physicians to perform the requested IME's- not the Defendants.

[1] To preserve the issue for appeal, the Plaintiff asserts that the current law forbidding an adversary's retained expert witness from performing an Independent Medical Examination created a reasonable expectation of privacy of Mrs. Whitfield's under the South Carolina Constitution.

By:_____

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-And-

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Attorneys for Petitioners

4/3, 2019.

2017-CP-10-2758

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Alter or mend under Rule 59(e) upon all counsel of record by email and affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 3rd day of April, 2019.

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FILED
2019 APR -3 AM 10: 42
CHARLESTON COUNTY
CLERK OF COURT

Mount Pleasant, SC
April 3, 2019

Brent Halversen

From: Brent Halversen
Sent: Friday, March 08, 2019 2:04 PM
To: 'Katie Rhodes'; akinlawj@sccourts.org
Cc: akinlawlc@sccourts.org; akinlawsc@sccourts.org; Dan; paralegal@slotchiverlaw.com; Todd Smyth; Kevin Horton
Subject: RE: 2017-CP-10-2578 Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC
Attachments: Proposed Order Denying Motion to Examine Plaintiff.docx

Judge Kinlaw,

Judge Kinlaw,

We came before your Honor on February 27, 2019 at 10:30 AM on the Defendant's Motion for a Physical and Mental Exam. You heard arguments from counsel and instructed both parties to submit proposed orders.

Attached please find the Plaintiff Jeane Whitfield's proposed order denying the Defendants' motion.

Thank you for your time and consideration,

Brent

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*****PLEASE NOTE OUR NEW ADDRESS EFFECTIVE AUGUST 1, 2018*****

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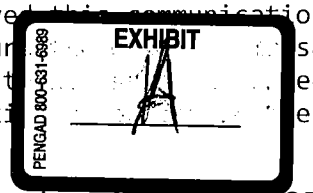

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2017-CP-10-2758
JEANE WHITFIELD,	)	
	)	
Plaintiff,	)	
	)	**ORDER DENYING DEFENDANTS' MOTION FOR PHYSICAL AND MENTAL EXAMINATION OF PLAINTIFF**
vs.	)	
	)	
	)	
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC	)	
	)	
	)	
Defendants.	)	
	)	

This matter came before the Court on February 27, 2019 at 10:30 A.M. Present on behalf of the Plaintiff were Daniel S. Slotchiver, Esq. and Brent S. Halversen, Esq.. Present on behalf of the Defendants was Kevin Horton, Esq. On December 14, 2018 the Defendants filed a motion to have their medical experts perform a plastic surgery examination and psychiatric examination of the Plaintiff, Mrs. Whitfield pursuant to Rule 35(a) of the SCRCP. The Plaintiff argued that the motion should be denied because, *inter -alia*, the Defendants' experts were biased and not independent, and that they had already previously formed their opinions in deposition testimony without an examination of the Plaintiff. The Defendants argued at hearing that they have shown good cause under Rule 35(a) because the Defendants' experts have not had the opportunity for their experts physically and mentally lay hands or examine the Plaintiff, and that it is fundamentally unfair to allow the Plaintiff's treating physicians to have the benefit of being allowed to

physically and mentally examine the Plaintiff while the Defendants' experts do not have that same opportunity.

Assuming, without deciding Defendants' argument constitutes good cause, the well-settled law in South Carolina that an adversary's listed expert witness may not perform an IME on the opposing party. *See* Fairchild v. S.C. Dep't of Transp., 385 S.C. 344, 359, 683 S.E.2d 818, 826 (Ct. App. 2009), aff'd, 398 S.C. 90, 727 S.E.2d 407 (2012)("independent means independent and that means no witness has previously been identified by the Plaintiff or the Defendant gives the independent medical exam"). The Court finds no material factual difference advanced by the Defendants in this case that would change the outcome of Fairchild, which bars a party from using their own expert witness from performing a medical examination of the Plaintiff under Rule 35.

Accordingly, the Defendants motion in DENIED.

_____

The Honorable Alex Kinlaw, Jr.,Presiding Judge

March ___, 2019

Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Jeane Whitfield,	)	CASE NO. 2017-CP-10-02758
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	CERTIFIED COPY
	)	
Dennis K. Schimpf, MD, et al.,	)	
	)	
DEFENDANTS.	)	
	)	

February 27, 2019

Charleston, South Carolina

B E F O R E:

The Honorable Alex Kinlaw, Jr.

A P P E A R A N C E S:

Brent S. Halversen, Esquire
For the Plaintiff

Daniel Scott Slotchiver, Esquire
For the Plaintiff

Kevin R. Horton, Esquire
For the Defense - Dr. Schimpf and his practice

John Radeck, Esquire
For Dr. O'Neill

Certified Transcript Provided For: Brent Halversen

EXHIBIT B

PENGAD 800-631-6989

Phyllis Norton, CVR-Master, Nationally [illegible] Reporter
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I N D E X

HEARING MOTIONS:

Physical & Mental Examination of Plaintiff -- 05

Motion to Quash -- 16

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT -- 36

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

THE COURT: All right. This next matter before the court is captioned Jean Whitfield versus Dennis K. Schimpf. Am I pronouncing that correctly?

DR. SCHIMPF: Schimpf.

THE COURT: Schimpf. And Sweetgrass Plastic Surgery. This case is Case Number 2017-CP-10-2578. I have got a number of lawyers that's on the roster, so I am going to go through them. I don't know any of you, so you will have to identify yourselves.

For the plaintiffs I have got -- I tell you what, I will let you identify who you are and who you represent.

MR. HORTON: I represent the defendants, Your Honor. That will be Schimpf and the practice.

THE COURT: What is your name?

MR. HORTON: Kevin Horton.

THE COURT: Kevin Horton.

MR. HORTON: I work from the law firm of Smith Whitley, and I am the only one here for that aspect of the defense.

THE COURT: All right. You represent who?

MR. HORTON: The defendants, Your Honor.

THE COURT: All right. Kevin Horton?

MR. HORTON: Yes, Your Honor. Kevin Richard Horton. Okay. All right.

THE COURT: Who else have we got?

MR. SLOTCHIVER: Your Honor, Dan Slotchiver. I represent Jeane Whitfield, together with Brent Halversen is to my left.

THE COURT: Okay. Gotcha. Okay.

All right. And I think you wanted to put on the record -- or, we have got one -- somebody else.

MR. RADEK: Judge, I am John Radeck. I represent a nonparty, Dr. O'Neill. And I filed a motion to quash plaintiff's motion for an inspection.

THE COURT: All right. Has that motion been resolved or is that still ---

MR. RADECK: That is still going forward.

THE COURT: That is still going forward. Okay. All right. You were going to put on the record something?

MR. HORTON: Yes, Your Honor, the second motion is withdrawn. The motion to compel the -- I guess it was the expert's deposition is there -- that has been made moot by the scheduling.

THE COURT: All right. So that has been resolved. So we are going forward on the motion to quash and the other one?

MR. HORTON: Yes, sir, and my motion for an exam under Rule 35.

THE COURT: Okay. All right. Counselor, is that your understanding that those are the two motions that we

are going forward on?

MR. SLOTCHIVER: Yes, Your Honor.

THE COURT: Okay. All right. And this gentleman in the back, who is that -- who is sitting right back -- who is this?

MR. ABRAMS: I am an attorney, but I am also a forensic examiner. My name is Steve Abrams.

THE COURT: Okay. All right.

MR. SLOTCHIVER: Your Honor, he is here with reference to the second motion, the motion to quash.

THE COURT: Okay.

MR. SLOTCHIVER: And he may come up later on depending on how it goes.

THE COURT: Okay. All right. Then will go forward on your motion first.

MR. HORTON: Thank you, Your Honor. It is good to be in front of you today. I have a somewhat unusual motion for you. This is a motion under Rule 35 for the examination of plaintiff. We don't use 35 a lot. It doesn't come up very often.

There is one case on it that we are going to hear a lot about today called Fairchild that on the face of it looks like it is square against us.

So Rule 35 permits the examination of a plaintiff within a couple of boundaries. It provides some

protections to the plaintiff.

First we have to show good cause for the examination. Good cause generally in other areas of the law means that the examination would promote the interest of justice or something like that. It has not been defined under Rule 35 context.

Second it's puts some guard rails on the examination itself. It can only be held in the -- it has -- consideration has to be given to the plaintiff's scheduling. It can only be held in the plaintiff's county of residence or that of her physician. She can have her physician there with her.

And most importantly, there has to be a $100,000 in controversy. That is a pretty high bar, and that's above the federal court diversity limit. And I would represent to you that there are over $100,000 of controversy in this case. I think our medical specials are in the 140's. I have got that number written down somewhere. At least. So we have passed all of those thresholds.

So let me tell you about good cause then. Generally plaintiffs of course have the ability to select their physicians, to work with their physicians; and to help prepare them for their depositions, examinations, etc.

Defendants don't have access to those individuals other than in the context of a deposition. Defendant's

physicians, therefore, that we hired to defend the cases, we have two in this case; a plastic surgeon named Jorge Perez and Dr. James Ballenger, a psychiatrist here in Charleston, are left to have to take -- yes, they have to take a leap. Because they can read the plaintiff's medical records but they don't have the opportunity to meet with and examine the plaintiff other than in the context of a Rule 35 examination.

Both of these gentlemen are practicing physicians. They form diagnoses, plans, by meeting with individuals, by examining them, by discussing their condition, their history. That is essential to how medicine is practiced.

Both of these gentlemen are practicing physicians. And without the opportunity to examine plaintiff they are -- evaluations are left somewhat half complete if that's -- that is kind of how I am looking at it.

So under Fairchild that case specifically dealt with my expert, Dr. James Ballenger. In that case the Department of Transportation wanted to have Dr. Ballenger examine plaintiff.

Now Fairchild doesn't directly apply to this case. First off, the court in Fairchild gets it wrong. They didn't read Rule 35 very closely. They talked throughout Fairchild about an IME as an independent medical examiner. Rule 35 nowhere in it contains the language of

independence. There is simply no requirement that the examining physician be independent of the parties. So that is my first point as to Fairchild.

Secondly, in Fairchild the actual physician, the plaintiff's physician in that case, was assigned to her in the emergency room. She didn't have the option -- not she, but -- excuse me, didn't have the option of selecting her own -- their own physician. Ms. Whitfield in this case has had that option. So that makes that case factually distinct.

In that case the plaintiff had not had that ability to work with her physicians. Now ultimately the court in Fairchild decided that the examination of Dr. Ballenger shouldn't go forward because of a, quote, reasonable objection by the plaintiff's counsel in that case. The reasonable objection was determined that the -- that Ballenger was basically the hired gun, he was the expert of the defendants.

I don't believe that that is a reasonable objection. There is bias inherent in the way in which we hire experts and employ experts in these cases. The difference though is that the playing field isn't level. Defendants do not have the ability to meet with and examine a plaintiff, whereas the plaintiff's physicians do.

This inequity is inherent in the relationship. And it has been understood for a long time. In my brief I quoted you a 1910 case which pointed out that it is inequitable to defendants to allow plaintiffs to select their physicians and then bar defendants from access to that examination.

And even the Fairchild court looked at that. There is a case that they review in their called Timpte out of Colorado which says that so long as the plaintiff may select his own doctor to testify as this physical condition -- as to the physical condition, fundamental fairness dictates that a defendant shall have the same right in the absence of an agreement of the parties as to who the examining physician will be.

All that we ask, Your Honor, is for you to level the playing field and allow our experts the opportunity to meet with and examine Ms. Whitfield in the context of the security of being with her doctors. There is no prejudice to the plaintiff in allowing this examination.

And it is crucial to this case, because it involves complex medical issues. It is not -- the plaintiffs say in their brief this is just a botched breast surgery. It is not. This was a breast lift with exchange of implants. There was wound separation.

And plaintiff then switched horses. She chose a new

doctor, and that doctor has treated her for two years. He has removed her other implant. He has left her with asymmetry in her breasts. The plastic surgery end of it is complicated. He has attempted fat grafting. Now she wants implants again. That is kind of up in the air.

And on the psychiatric side of the case she has a long psychiatric history. She -- her own treating doctor who is named Marcino, her psychiatrist, opined in her deposition that the events of this case have aggravated her psychiatric condition, including PTSD which she would relate to the events of this case and which crucially, Your Honor, is one of the central elements of her damages.

That is why we have named Dr. Ballenger in this case. He is one of the world's foremost experts in anxiety disorders. He authored that portion of the diagnostic statistical manual, the DSM that all of the psychiatrists use.

The federal court when it needed somebody to examine Dylann Roof chose him. His credentials are as gold plated as they come. Yes, he does expert witness work. We have him against us in another case right now. I mean he appears on both sides.

We would ask, Your Honor, that you level the playing field and allow the defendants the opportunity to examine

Ms. Whitfield under Rule 35.

THE COURT: All right.

MR. HORTON: Thank you.

MR. SLOTCHIVER: Your Honor, we have submitted a brief and sent it to your law clerk. I don't know if you have had a chance to see that ---

THE COURT: I did.

MR. SLOTCHIVER: --- or review it beforehand.

THE COURT: I did.

MR. SLOTCHIVER: So I will talk briefly about that. First, this is a medical malpractice case. And we have already -- the defendants have listed their experts.

Their experts include Dr. Perez and Dr. Ballenger. The exact same experts who now they wish to move forward and perform -- and have them perform an IME.

I will let the court know that in their depositions both of these doctors have already given their opinions. They have reviewed the literature, and they have already given their opinions. They certainly had no issue giving an opinion despite the fact that they have not performed an IME.

It is important to look at the case -- and I brought a copy if you would like it, Judge, if you don't have it, the Verata (ph) case.

THE COURT: Yeah, I have got it.

MR. SLOTCHIVER: Okay. You have it. But the Verata case is the standard. And it is very clearly -- and it just coincidentally happens to deal with Dr. Ballenger, probably because he has testified so many times in so many cases. But in the Verata case it addresses the exact -- this exact argument very clearly. And it is the law of the land.

And trying to change it is trying to get you, Your Honor, to rule against what the courts have ruled. And in particular there's a couple of sections I will reference.

Under what is called the independent medical examination section of the order it says Dr. Ballenger cannot perform the exam because he had -- because he was an expert witness for the defendant and had reviewed the defendant's medical records.

It says the court denied the defendant's motion to have Dr. Ballenger perform an IME, and at trial the court again stated that the motion for Ballenger to perform the IME was denied not because of his qualifications or whether he was biased but because he was listed as an expert witness in the trial.

The court said independent means independent, and that means no witness has previously been identified by -- and that means no witness previously identified by

the parties can give an independent medical exam.

So this has been addressed by the court. It is not a surprise. So we believe that the law is very clear. We believe that this case sets forth the standard and it is not an independent medical exam for one of the defendant's expert witnesses who have reviewed the records, even opined on them, to be able to give an independent medical examination.

Furthermore, Your Honor, with reference to Dr. Perez, for example, he is a doctor licensed in the state of Florida. He is not licensed in the state of South Carolina.

For him to come to South Carolina and do a medical examination would be the court allowing a doctor to practice medicine without a license in the state of South Carolina. He is not licensed here.

So even if the court were to award it he can't do it because it is a medical examination, by its very nature an independent medical examination.

As to Dr. Ballenger, he has given a lengthy deposition. He has articulated all of his opinions. And he in fact has acknowledged that were he to do an evaluation he understands that my client by the nature of what happened to her has -- and by the nature of the complaints of the psychological issues would very well

not be willing to talk to him.

So the question then becomes what is the examination that was to be performed. Because we don't know what they wanted to do. We don't know what they plan to ask. And we don't know the nature of how they are going to ask it in order to get an unbiased opinion.

You know, it is not as if you could say I want my own doctor to do an MRI or to examine some of the records or to see how you lay in response to certain things. But a mental evaluation is an entirely different thing, are they looking to do a new deposition essentially by the use of their doctor.

So we believe, Your Honor, that the court is very clear in Fairchild. This has been ruled upon. It has gone up the ladder from the circuit court all the way up. And the law is clear.

And the fact that the defendants don't like it, well, there is a reason they don't like it. They want to choose their own experts who will give them an opinion that supports their case so they can have their experts have an opportunity to examine my client.

As to Dr. Perez I don't know what his examination will show. She already had the injuries. She has already been partially repaired. At most he would be able to testify as to what he thinks she needs in the

future for a breast augmentation. But he could really do that through photographs.

So I don't believe there is good cause to have anybody examine her under either situation. But to the extent that there is good cause I think the law in Fairchild is very clear on this point, and we would ask you to deny their motion.

THE COURT: All right. Anything else?

MR. HORTON: Your Honor, I would like to point out that the independence aspect that counsel is pointing to is nowhere present in the rule.

And my other point is that both of our experts have requested the opportunity to examine her because they believe that that would support their opinions.

Thank you, Your Honor.

THE COURT: All right. Anything else?

MR. SLOTCHIVER: Only, Your Honor, that the rules are oftentimes interpreted by case law. And in the case law is what happened in the Fairchild case, and the Fairchild case is clear and right on point ---

THE COURT: All right.

MR. SLOTCHIVER: --- and it goes to it.

THE COURT: All right.

MR. SLOTCHIVER: Nothing else. Thank you.

THE COURT: All right. As it relates to that motion

I want both lawyers to submit me something within ten days. Submit me a proposed order in ten days.

Make reference to Fairchild in both of the proposed orders distinguishing which is applicable or not applicable. Send it to me in ten days to my law clerk in Greenville, okay?

MR. SLOTCHIVER: Yes, sir.

MR. HORTON: Thank you, Your Honor.

THE COURT: All right. What have we got next?

MR. RADECK: Your Honor, once again for the record, John Radeck here with the Hood Law Firm.

THE COURT: Spell your last name.

MR. RADECK: Radeck. R-A-D-E-C-K. And I represent a gentleman named Dr. Joseph O'Neill. And just to give you a little bit of background, he is obviously not a party to this medical malpractice case involving a plastic surgery procedure.

THE COURT: Right.

MR. RADECK: Some time in 2014 Dr. Schimpf actually shared office space with Dr. O'Neill and utilized some of Dr. O'Neill's computer systems.

So at some point during the litigation in this case Dr. Schimpf testified in his deposition that there may have been preoperative photographs of the plaintiff, his patient. My doctor never saw or treated this patient at

all.

Efforts were then undertaken by plaintiff's counsel to locate these photographs. They sent a letter to Dr. O'Neill asking for any photographs that still remained in his practice or on his computer system related to this patient. He provided a response to that with the documents that he had in his possession. That was back in 2015.

Later Dr. O'Neill actually received a subpoena from the defense counsel and provided a subpoena response for the records that he had found on his system related to the patient.

If that wasn't enough, he then received a deposition notice from plaintiff's counsel seeking to take his personal deposition and the custodian deposition of his practice.

Obviously we've thought long and hard about whether to quash that notice for deposition, after the documents were produced twice already.

We agreed to go forward. This was in December of last year. And he was deposed. Dr. O'Neill was -- agreed to voluntarily be deposed. He was deposed for nearly two hours after hours at his practice. And as part of appearing at that deposition he had taken to be sure extra efforts to find any documents that might

relate to the plaintiff.

Judge, I just want to briefly pause and say did you receive my memo in support?

THE COURT: I did.

MR. RADECK: Okay. And attached to that memo was two affidavits, one by Dr. O'Neill himself and one by his IT consultant named Mr. Nienstedt.

He and Mr. Nienstedt sat down for around three hours prior to the deposition performing searches of all the servers, all of the backups to the servers, everything, and brought what they found, nearly 300 documents, to the deposition. Those were provided to counsel.

The morning after the deposition he receives the present subpoena to actually come and inspect his servers, without consulting us at all.

And so at this point we just simply cannot allow this intrusion into his practice to search for documents that they have been provided probably three times now.

And it is really as to a collateral issue in this litigation, involving preoperative photos. And I am not sure how it is relevant in the case.

And to be quite honest, Judge, plaintiff's counsel they already have an inference that the records have been destroyed by Dr. Schimpf. So they have the benefit of that. I am not sure what this whole exercise is for.

Obviously the basis of our motion is Rule 45 and primarily under the undue influence standard -- not undue influence, undue burden standard, Your Honor.

And so the point is no matter how narrowly tailored their search is, no matter how sure they think that they can perform this analysis of his servers, it is going to be an intrusion that would necessarily and most likely seep out to the community that a non-party to a litigation is being forced to have his servers inspected when the entire practice involves obviously very sensitive cosmetic plastic surgery procedures. There's, you know, hundreds of thousands of patients with pictures of their sensitive body parts all throughout the system.

And so, you know, there's obviously apart from the HIPPA concerns about them seeing images of other patients, which is a real concern and which is another basis for our motion, there is a concern that if his patients find out that there are other third parties coming in and had the ability to see their photos that is a problem. And that's -- and according to Dr. O'Neill that would irreparably harm his business going forward.

And so, you know, and there is really no way to work it, I don't think, that you can avoid the HIPPA violation; because if there is a violation, if their expert views any of these photographs, Dr. O'Neill has a

duty to notify his patients that someone viewed their photos. And that is going to be damaging.

So, Your Honor, that is the gist of our motion. We have had some discussions trying to narrow down what they are looking for. It seems to be the issue now all comes down to a MacBook computer.

So you have the main server, you have another medical program, and then you have a MacBook computer. The only issue now is they want to have their expert Mr. Abrams come in, perform some analysis using the specialized programs, to make a copy of the image, take it away off site, take weeks to perform some inspection, bring it back to try to find metadata to show whether or not there is any pictures of this woman in the system.

So there is nothing there. They are looking for whether or not something was there that was deleted. And so our problem is we can't let them take something off site. We can't let him come in, obviously spent two weeks at a practice, to intrude upon his private business.

And you know we can't -- I mean it would just chill -- it would chill his business, Your Honor.

And so Mr. Abrams he is experienced at doing this at MUSC and hospitals, but this is obviously a private ---

THE COURT: Right.

MR. RADECK: --- plastic surgery office. I'll sit down now and hear what they have to say.

THE COURT: All right.

Yes, sir?

MR. HALVERSEN: Your Honor, forgive me; I am real hoarse. I have got a little bit of a cold this morning but ---

THE COURT: And you are Mr. Halversen, right?

MR. HALVERSEN: Yes, sir.

THE COURT: Okay.

MR. HALVERSEN: So -- and I represent Jeane Whitfield. So Dr. Schimpf, the defendant, shared office space with Dr. O'Neill.

THE COURT: Okay.

MR. HALVERSEN: He was using his medical records, computers, to house his information.

So pre-suit I sent a request for medical records to Dr. O'Neill's office, and they gave me about 214 pages and said that is all we have.

We go forward in time. There is they admit -- the defendants have admitted there is missing medical records. They say they are missing. They have also affirmatively said in the pleadings that we didn't destroy anything, okay.

So I -- we are still getting documents. As late as

three weeks ago the defendants found a medical record of ours that is pertinent to the issues in the case. So there is a major issue with sloppiness of medical records that were -- that have been kept by the defendant.

Fast forward to December. I sent a subpoena to their office to depose Dr. O'Neill about how did Dr. Schimpf use your system to keep his medical records.

THE COURT: Right.

MR. HALVERSEN: He brought to that deposition 330 pages of information. So I just want to set for the record that what was represented pre-suit as complete was not.

But notwithstanding that, Your Honor, our client said photographs were taken of her before the procedure. And we have gotten this long-winded explanation from the defendants about how the medical records were lost, about how they were transcribed and they went to a dictation person and they came back and these tapes were blank.

As far as the photographs -- and we have whittled down what we are arguing about right now about as to photographs.

Because we learned last night from Mr. Radeck's office that the way the information is kept the stuff that we wanted to examine on the medical records for the practice, Dr. O'Neill's practice, is no longer -- we

can't even do it because the information wasn't preserved.

So what we are left with is one laptop where they used to put Dr. -- the defendant's -- Dr. Schimpf would take photographs.

And Dr. O'Neill testified that when photographs were taken of patients preoperatively they would automatically sync into this Apple program. So he'd take a picture and it automatically syncs into this computer program.

So there should never be an issue of a missing photograph. And Dr. O'Neill testified, I have never lost a photograph.

So we have got our client said -- she is here today. And she testified that the photographs were taken of her preoperatively.

And we don't have them. So we have got -- so we want to see from Mr. Abrams, have him evaluate this laptop.

Which it is my understanding from Mr. Radeck that they don't even use this laptop with their current practices because it is from, you know, years ago and they have changed their systems.

So we have got a laptop that is off line. Mr. Abrams has been appointed by this court before as a HIPPA certified compliance officer to examine hospitals, you

name it, medical records, and sort through electronic data and segregate what is not at issue.

We don't want to find any of their other patient's records. We have no interest in that. We have offered to sign a confidentiality order. We have offered to sign a nondisclosure agreement, if anything were to be inadvertently encountered. Mr. Abrams can speak to that.

But basically what he has said is I am not going to even look at any of these images. He -- there is a way he can look -- he can find what might be on the computer related to Mrs. Whitfield, he can then give that to them and they can identify whether it is our client or not.

And that is it, Your Honor. I don't know what other safeguards -- you know, Mr. Radeck before the hearing expressed some concerns about that it would be intrusive.

You know, he can -- our expert can come to their office after hours. He can run a search on the laptop with his forensic software.

We are paying for this, Your Honor. We are doing it for a reason. There should be adequate safeguards to protect their concerns about the integrity of their data. He is not going to harm their data in any way that is on this laptop. It will be preserved.

If there is anything that he has working, when he is done it will be destroyed. These are procedures he

follows all the time with local hospitals.

Mr. Abrams, is there anything I left out in terms of that process for you to do to ensure confidentiality amongst other patients or the integrity of their systems?

MR. ABRAMS: I don't believe so, no.

MR. HALVERSEN: Okay.

Your Honor, that is all I have to say. The photographs we -- why there are important, Your Honor, you may be asking yourself. So these were pictures of what she looked like before, naked.

THE COURT: Right.

MR. HALVERSEN: We don't have that. And she testified she was happy with the appearance of her breast before this happened.

THE COURT: Right.

MR. HALVERSEN: So it is important. We already have an adverse inference. That is true. But if they are there Mr. Abrams can determine in his forensic analysis if they were deleted.

That's a lot different than saying there's an adverse inference that there was something harmful, if he determines that they are there and they are deleted.

But notwithstanding that, Your Honor, we want the records because it is helpful for our case.

THE COURT: Thank you, counselor.

Anything in reply?

MR. RADECK: I do. Yes, Judge. There is no duty -- my client had no duty to preserve -- to preserve any -- there was no -- so he made a comment about how we didn't preserve records. I mean there was no duty of my client to preserve anything.

Obviously Dr. Schimpf kind of was just kind of came and went for a short period of time at his practice. So there was no duty to preserve anything. We've provided everything we've had.

Mr. Halverson said that, you know, pictures were taken and then they were automatically uploaded into the Mac. Well, they would have been -- that would have been uncovered.

We have -- we had an affidavit, sworn testimony, from our IT expert who works at Charleston Tech support, has over 20 years IT experience, who performed a three-hour search; and there is nothing there. So, again, they are looking for something that doesn't exist.

And that is the problem we have. We don't know -- we don't have parameters, okay. So Mr. Abrams represented to me before the hearing that he doesn't know how long this exercise he is proposing is going to take. We don't know exactly what it is. He is going to come to Dr. O'Neill's practice for how long? He is going to --

he wants to take stuff away for how long; weeks, I think is what he told them.

And so it is not enough to say, hey, we have an order here that says I am not going to look at any of these images from other patients. That is not enough.

The harm is there that he -- that some third party is coming into his practice, disrupting him for hours, weeks, having to deal with this, when he has gone above and beyond, given two-hour deposition testimony and was paid $32 for it and that was his witness fee when he is a plastic surgeon.

And so any concerns that they may have had that we weren't giving them the complete records is completely gone when we have two affidavits on file from Dr. O'Neill himself and his IT expert.

And so, again, the point is -- what is the point? They have the adverse interest. They want pictures of what she looked like before the surgery. I mean, you know, Your Honor, we simply can't consent to this intrusion.

MR. HALVERSEN: Can I just ---

THE COURT: Yes, sir.

MR. HALVERSEN: --- respond real very briefly, Your Honor?

THE COURT: Yes, sir.

MR. HALVERSEN: He is correct, the first thing he said about them having a duty to preserve; I believe that is correct as it applies to Dr. O'Neill.

It is also -- it is our position that when the defendant was on notice of the medical records issue he should have contacted their office to say, hey, I have got an issue here, preserve these things. Which now we don't have.

Just for the record.

Mr. Abrams has tools that he believes that they are IT -- with all due respect to their IT department, Mr. Abrams is a forensic criminal examiner. He has tools that cost tens of thousands of dollars in software that we are confident they don't have.

So there is an analysis that Mr. Abrams can do that they cannot do. We have -- we have asked them can you guys do what this -- what Mr. Abrams is going to do, are you going to use this kind of software. We haven't been affirmed -- told affirmatively that they have done that.

We really respectfully doubt that, because it's an IT department. With all due respect, Mr. Abrams is a forensic expert.

And again, the last point, Your Honor, this is a hypothetical harm they are talking about. There is adequate assurances we have given them with Mr. Abrams

actually coming to the facility, if that would satiate their concerns. Any order that you are going to enter, Your Honor, is going to set forth any HIPPA concerns. Everything I have already addressed, Your Honor.

THE COURT: All right. Anything else?

All right ---

MR. RADECK: Judge, I'm sorry ---

THE COURT: Go ahead

MR. RADECK: I would just comment that there is no evidence that anything was destroyed from my client's practice. And if there were photographs, Dr. Schimpf would have them and he would give them to them.

And so, again, going through this extreme measure to my client based on what we know is -- does not outweigh the undue burden that it causes him. Thank you.

THE COURT: All right. I am going to go ahead and deny your motion to quash.

I am going to ask that once examination -- once the examination is done that it is done as expeditiously as possible and, secondly, that all of the safeguards are put in place. And when you couch an order sending it to me make that order as inclusive as possible regarding that and send a copy to counsel.

MR. HALVERSEN: I will, Your Honor. And I will get Mr. Abrams' input on that order. So it should have

all ---

THE COURT: So -- yes. Yes, sir?

MR. RADECK: I just request an opportunity to review his order before it is submitted.

THE COURT: Oh, absolutely.

MR. HALVERSEN: Sure.

THE COURT: Absolutely. And I will give you a 20-day window; or do you need more time than that, a 20-day -- to give me the order?

MR. HALVERSEN: To do -- to do the order?

THE COURT: Yes.

MR. HALVERSEN: Oh, we will get the order to you in ten days. That is fine.

THE COURT: Okay, ten days. Okay. Very good. Okay.

MR. RADECK: Judge, and I am sorry; is there any way -- we don't know how long -- I mean Mr. Abrams submitted an affidavit, but he doesn't have any -- he hasn't given any assurance of how long this whole process is going to take. I mean there has got to be some parameters set.

THE COURT: Well, you know, and I understand, counsel. And I tried to use the word expeditious. The reason I did that was because I didn't -- do you want to respond to that?

I think -- Mr. Abrams, he is there. Raise your right hand. I know you spoke a little while ago. Do you swear to tell the truth?

MR. ABRAMS: Yes, sir.

THE COURT: All right. You know, there is some concern about how long this is going to take.

MR. ABRAMS: Right. So the problem is, is that Macs are very slow as far as forensics are concerned. So typically to image the MacBook it is going to take somewhere between five and seven hours of actual just copying the data. And then the analysis is always slow because it is a different file system than Windows uses, and so it is a slow conversion.

The last MacBook that I analyzed, the software took about two weeks until I got to the point where I could produce the data. So I am estimating it is going to take about two weeks once I have the data.

THE COURT: All right. So ---

MR. ABRAMS: And that is not me sitting at the computer. That is the computer just working in the background.

THE COURT: So a total of four weeks?

MR. ABRAMS: No, no. It is probably going to take a total of two weeks and then maybe a day more for me to produce the data onto a hard drive that I can bring back.

THE COURT: So within a three-week span?

MR. ABRAMS: Yes, Your Honor. That would be fine.

MR. RADECK: But, Judge, the point is he is taking -- all -- he is proposing to take all of the data to -- after he runs this whatever five, eight-hour copying, he then is taking the data for two weeks. And all of that data includes images of people's body parts that aren't here and that live all across this area. And so if that happens we have to give notice to all of those people.

THE COURT: Let me ask you something. I thought I heard some language in the colloquy between the two of you that you are able to segregate ---

MR. ABRAMS: So -- that is correct, Your Honor. The way ---

THE COURT: Am I using the correct terminology?

MR. ABRAMS: Yes. So the way that the software works is I am not like pulling up the images and looking at the images. I am actually going to pull all of the deleted images from everything else and then I am going to run keyword searches on date and Ms. Whitfield's name to see if any of those key words came up in the header of the deleted files. Those are the only files I am interested in.

THE COURT: Right, I thought that is what I heard.

MR. ABRAMS: All of the other files are going to get segregated back, and the only files that I am going to produce are going to be the files that might have something to do with Ms. Whitfield. And I don't need to look at any of the images in the file.

THE COURT: That is what I thought.

MR. ABRAMS: And one more thing.

THE COURT: Yes.

MR. ABRAMS: If I do look at the images there is an audit trail that is running on the software and they can go in behind me and make sure that I haven't looked at anything.

MR. RADECK: Judge, all it takes is him to click on the data to view the image. And there is no assurance -- I mean he is telling us that we have to spend time going through an audit trail just to know whether or not -- I mean the fact is that they are there, that they are gone.

It would be a totally different story if he can perform his short analysis at the practice where they are never leaving the practice. But he is taking them to some site -- I don't know where he works, who works with him. I mean it is too open-ended, Your Honor.

THE COURT: Where would you take them?

MR. ABRAMS: I would take them back to my office which is at my home. There is no one who works there

besides myself, and the only one that would have access to the room except myself and my wife. And my wife is a doctor herself so. I don't think that that is an issue.

THE COURT: So your concern is taking them off site; is that ---

MR. RADECK: It is, Your Honor. And I think technically we would have to notify every patient of his practice ---

MR. HALVERSEN: Your Honor ---

MR. RADECK: --- that someone has taken nude photographs of them off-site.

THE COURT: Mr. Halverson.

MR. HALVERSEN: If there is a data breach he would be correct; if there's a data breach if it would mandate that he contact people whose records were affected. There is no data breach. This is done in the auspice of a court-sanctioned inspection; again, providing the assurances that Mr. Abrams routinely gives in these cases.

MR. RADECK: That is his interpretation of it. That is not documented.

THE COURT: Well, let's try it. If there's some issues you just come back before the court and address them at that time if there are some concerns.

But let's -- the only thing I am requiring the -- I

mean Mr. Abrams to do is to try to do this as expeditiously as possible, and I need an order that as much as possible safeguards the process. And I think you can get me that.

MR. HALVERSEN: We can, Your Honor. And if it allays some concerns, that he actually goes to their facility to do as much of this as possible, then Mr. Abrams has indicated he is happy to do that.

THE COURT: Okay. And put that in the order that he will go there and do as much as possible at the facility.

MR. HALVERSEN: I will, Your Honor.

THE COURT: All right. Okay.

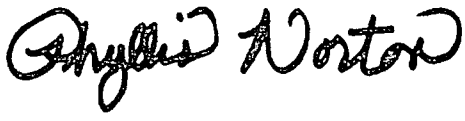
(WHEREUPON, the hearing adjourned.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.*)*

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on February 27, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



PHYLLIS NORTON, CVR

Date: April 2, 2019

Certified Transcript Provided For: Brent Halversen
Certification Reference #2019-0402 Certified Copy

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2017-CP-10-2758
JEANE WHITFIELD,	)	
Plaintiff,	)	**MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PHYSICAL AND MENTAL EXAMINATION OF PLAINTIFF**
vs.	)	
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC	)	
Defendants.	)	

FILED
2019 FEB 27 AM 9:33
JULIE J. ARMSTRONG
CLERK OF COURT
BY

On December 14, 2018 the Defendants filed a motion to have their medical experts perform a plastic surgery "examination" and psychiatric "examination" of the Plaintiff, Mrs. Whitfield. The Plaintiff objected. For the reasons stated herein, the Defendants requests for examinations must be denied. The subject of Mrs. Whitfield's lawsuit is a botched breast reduction.

The starting point for analysis of the Defendants' request is Rule 35. The Rule states, in pertinent part:

PHYSICAL AND MENTAL EXAMINATIONS

> **(a) Order for Examination**. In any case in which the amount in controversy exceeds $100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. **The order may be made only on motion for good cause shown** and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made, and shall be delivered to the person or persons making the examination.

EXHIBIT
C
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SCRCP 35(a) (emphasis added).

Accordingly, Defendants must show good cause as to why they need a physician to examine Mrs. Whitfield's intimate body parts for the damages she has claimed in this lawsuit. Mrs. Whitfield has alleged her breasts were disfigured and scarred at the hands of Dr. Schimph, and, that she will need future corrective surgery to correct the appearance of her breasts. Bluntly, this can be determined by a cursory review of the photographs.

The Defendant's plastic surgery expert, Dr. Jorge Perez of Ft. Lauderdale (who is in possession of the photographs of Plaintiff's current condition), agrees that she has been left with a poor aesthetic outcome and will need future surgery. Dr. Perez offered limited reasons why he wanted to evaluate Mrs. Whitfield:

> I know that I had asked to have an opportunity to examine the patient, but I believe that your office has declined this, and that is pending before the judge, some of those issues.
>
> Q. What is it that you would like to --what examination would you like to perform on Mrs. Whitfield?
>
> A. Well, I would like to do what's typically referred to as an IME or CME where I can have an opportunity to speak to the patient, examine her, touch her, as we would in a typical consultation, photograph her, take measurements, if necessary, those kinds of thing.
>
> Q. Okay. Would it be to assess what kind of procedure she may need in the future?
>
> A. Yes.
>
> Q. Aesthetically?
>
> A. Yes, sir.

(Dep. of J. Perez, P. 14, L. 6-19)

Dr. Perez has Mrs. Whitfield's photographs of her current condition and should be able to opine on what procedures (i.e., another augmentation) may benefit her aesthetically.

There is no articulable and justifiable reason for Dr. Perez to examine Mrs. Whitfield in person to opine on what Mrs. Whitfield's claimed damages are, particularly where – as here- the Defendants agree the Plaintiff needs a future surgery. As referenced above, Dr. Perez conceded Mrs. Whitfield needs plastic surgery to improve her physical appearance. The only reason set forth by Dr. Perez is that he needs to examine her to determine what kind of procedure she may need. There has been no showing of why the lack of a physical examination, handicaps the defenses' ability to dispute the Plaintiff's claimed damages.

Not only is there no good cause that has been shown, or can be shown, it is well settled law in South Carolina that an adversary's listed expert witness may not perform an IME on the opposing party. *See* Fairchild v. S.C. Dep't of Transp., 385 S.C. 344, 359, 683 S.E.2d 818, 826 (Ct. App. 2009), aff'd, 398 S.C. 90, 727 S.E.2d 407 (2012)("independent means independent and that means no witness has previously been identified by the Plaintiff or the Defendant gives the independent medical exam"). Accordingly, Dr. Perez and Dr. James Ballenger are barred from examining Mrs. Whitfield-- in any event.

In Fairchild, the Defendants also sought to have Dr. James Ballenger perform a psychiatric IME on the Plaintiff in that case. The Court affirmed the trial court's refusal to let Dr. Ballenger examine the Plaintiff stating:

> Here, we find Fairchild had a reasonable basis to object to Dr. Ballenger because he had a pre-existing relationship with Palmer. Dr. Ballenger was listed as an expert witness for the defense and had reviewed Fairchild's medical records. We believe such a role and his previous involvement warrants a reasonable objection for the trial court to sustain.

Id. at 360.

As in Fairchild, Dr. Ballenger has been retained as an expert witness for the Defendants in this case and billed the Defendants $14,110.00 for his review of Mrs. Whitfield's records.

No good cause can be shown for the Defendants to have a physical examination of Plaintiff's intimate body parts. No good cause can be shown as to why she should have a mental examination. Mrs. Whitfield's psychological records have been fully disclosed to the Defendants' expert psychiatrist, Dr. Ballenger, and he has already formed his opinions. Forcing Mrs. Whitfield to sit for a mental examination against her choosing is inherently problematic for the reason of a lack of trust between the examiner and the patient. More probable, the request is designed to intimidate and harass Mrs. Whitfield- which has already achieved its desired objectives. As indicated above, the Defendants' experts in this case are precluded from evaluating Mrs. Whitfield, and there is no good cause Defendants can show as to why these examinations are needed, or the lack thereof is prejudicial to their defense.

WHEREFORE, having fully responded to the Defendants Motion for Physical and Mental Examination, Plaintiff respectfully requests this Court DENY the Defendants motion in full.

Respectfully submitted,

By: _____

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2/22, 2019.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS CASE NO. 2017-CP-10-2758
JEANE WHITFIELD, Plaintiff, vs. DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC Defendants.	)	**MOTION IN LIMINIE REGARDING DEFENSE EXAMINATIONS OF PLAINTIFF**

FILED
2019 JUL 17 PM 12:48
JULIE J. ARMSTEAD
CLERK OF COURT

Plaintiff files this motion in liminie to prevent the Defendants from introducing any evidence to the jury regarding the defense's plastic surgery and psychological examinations of Plaintiff, Mrs. Whitfield. The grounds for the motion are that the well-settled law set forth by the South Carolina Supreme Court in Fairchild v. S.C. Dep't of Transp., 398 S.C. 90, 727 S.E.2d 407 (2012) which establishes **that a party may not use his or her own expert to perform an Independent Medical Exam:** ("independent means independent and that means no witness has previously been identified by the Plaintiff or the Defendant gives the independent medical exam"). In this case, the Defendants are utilizing their own medical experts to perform the examinations.

Argument

Although the Court may order an IME, the Defendant **cannot** select the doctors to be used when a reasonable objection has been made- **only** the Court. Our Supreme Court has held:

> **Under the plain language of Rule 35(a), the defendant clearly does not have the right to unilaterally select the examining physician; rather, the court alone has the right to make the appointment**. The rule contemplates that the parties will confer on this point to make suggestions, **but where a "reasonable objection" has been interposed and the parties cannot agree, the court will make the selection**.

Fairchild v. S.C. Dep't of Transp., 398 S.C. 90, 109, 727 S.E.2d 407, 417 (2012)(emphasis added).

The Defendants cannot use their own expert witnesses after the Plaintiff has made a "reasonable objection," and the physician must be appointed by the Court, not the Defendants. As set forth in detail below, the rule in Fairchild is that a party has set forth a "reasonable objection" **if the opponent proposes to use their own expert witness as the examiner for an Independent Medical Examination**. That is what happened in this case when the Defendants proposed to use Dr. Ballenger and Dr. Perez (their own expert witnesses) to examine Mrs. Whitfield.

The Court in Fairchild based its decision to forbid a party's retained expert witness from performing the IME specifically on the impartiality and independence (thus, IME Independent **M**edical **E**xamination) of the examiner:

> "The purpose of the rule for an IME is to materially aid the jury, not just the defendant, in evaluating the actual damages sustained and arriving at a just verdict. This purpose was recognized long before South Carolina law permitted such examinations. *See Best v. Columbia Elec. St. Ry., Light *110 & Power Co.,* 85 S.C. 422, 428, 67 S.E. 1, 3 (1910) (Woods, J., dissenting) (stating nothing can be more helpful to the jury in reaching a just estimate of the damages in a personal injury suit than knowledge of the true nature of the injury, and whenever it appears to the circuit court that **an examination by impartial experts would materially aid the jury, the circuit court should order such examination to be made by disinterested experts**). **Thus, the better rule is that the physician should not be affiliated with either party** in order to serve the purposes of Rule 35.In *Richardson v. Johnson,* 60 Tenn.App. 129, 444 S.W.2d 708, 710 (1969), the Tennessee court, echoing these sentiments, listed a series of guidelines regarding court-ordered physical examinations, including, "**The physician must be selected by the court, not the defendant, and must be competent and disinterested**." The court stated "it is clear that the power so vested in the court is a discretionary power, and not an absolute right in the applicant, **and that the physician or physicians so appointed act as officers of the court, and not as agents of**

> **either party**." *Id.* at 712. The court further observed that where claims concern injuries or disabilities that are based upon the subjective complaints of the plaintiff, "an impartial physician may have objective means of testing the subjective claims of the plaintiff [.]" *Id.* As is further explained in a case from a Missouri court: The law invests the trial court with authority to appoint physicians to make [a] physical examination of the plaintiff in a physical injury suit. The defendant cannot demand it as a matter of right, but the court in its discretion may do it in the furtherance of justice. **When the court makes such an appointment, [it] does so because [it] determines in [its] discretion that the case calls for the opinion of *disinterested and unbiased physicians, not friends of either parties,* whose testimony is likely to be biased**. *Atkinson v. United Rys. Co.,* 286 Mo. 634, 228 S.W. 483, 485 (1921) (emphasis added) (internal citations omitted). The Missouri court also recognized that a **"court could not compel [a] plaintiff to submit to [a physical] examination by the witnesses for the other side,"** and "[t]he physicians appointed in such cases are the officers of the court." *Id.*

Fairchild v. S.C. Dep't of Transp., 398 S.C. 90, 109–10, 727 S.E.2d 407, 417–18 (2012)(emphasis added in bold, emphasis in original in italics).

As stated above, our Supreme Court was concerned with the bias of a party's own hired gun in providing an "Independent Medical Examination." Not only is the use of a litigant's expert to perform an IME on the adversary expressly forbidden by Fairchild, but the Defendants in this case *are proposing to use the very same expert* that the Court of Appeals and the Supreme Court disallowed in the Fairchild case, Dr. James Ballenger:

> **Dr. Ballenger was listed as an expert witness for the defense and had reviewed Fairchild's medical records. We believe such a role and his previous involvement warrants a reasonable objection for the trial court to sustain.**

Fairchild v. S.C. Dep't of Transp., 385 S.C. 344, 360, 683 S.E.2d 818, 827 (Ct. App. 2009), aff'd, 398 S.C. 90, 727 S.E.2d 407 (2012)

Like Fairchild, Dr. Ballenger was listed as an expert witness for the Defendants *in this case*, and has reviewed Mrs. Whitfield's medical records. His previous involvement here too is a "reasonable objection" of Mrs. Whitfield's to be the examiner, under Fairchild. Accordingly, the Court cannot allow the admission of evidence into the trial from the

medical examinations as the Defendants unfortunately chose to utilize their own listed experts for the examination instead of having an independent physician appointed by the Court for the IME's.

By:_____

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Attorneys for Petitioners

7/16, 2019.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. No.: 2017-CP-10-2758
	)	
Jeane Whitfield,	)	
	)	**DEFENDANTS DENNIS K. SCHIMPF, M.D. AND SWEETGRASS PLASTIC SURGERY, LLC'S OFFER OF JUDGMENT**
Plaintiff,	)	
	)	
vs.	)	
	)	
Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,	)	
	)	
Defendants.	)	
	)	

FILED
2019 JUL 23 PM 4:44
JULIE J. ARMSTRONG
CLERK OF COURT

TO: BRENT S. HALVERSEN, ESQ. AND DANIEL S. SLOTCHIVER, ESQ., ATTORNEYS FOR PLAINTIFF

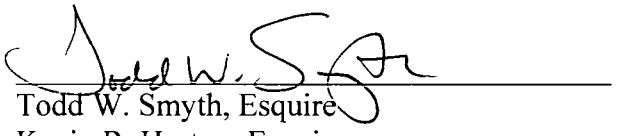
PLEASE TAKE NOTICE that the Defendants, by and through their undersigned counsel and pursuant to Rule 68 of the South Carolina Rules of Civil Procedure, hereby offer the sum of One Hundred thousand dollars and no cents ($100,0000.00) and to allow judgment to be taken against them collectively in this amount. In making said offer, the Defendants do not admit liability or wrongdoing of any sort. Rather, the decision to attempt to compromise a case is reflective of the economic practicalities pertaining to the costs of litigation and is not an admission that any of the Defendants failed to meet the applicable standard of care, were in any way negligent or were the cause of the asserted injuries or damages.

Please be further advised that pursuant to SCRCP Rule 68, the Plaintiff has twenty (20) days from the date below to accept this offer. If written notice of acceptance is not given by the Plaintiff within the twenty (20) days specified, then the offer will be considered rejected and evidence thereof is not admissible. If the offer is rejected and the Plaintiff fails to obtain a verdict in excess of the Defendants' offer, the Defendants shall recover their respective administrative, filing and all other costs allowed from the date of the offer until the entry of the

judgment and shall also be entitled to a reduction from the judgment or award of eight percent (8%) interest computed on the amount of the verdict or award from the date of the offer to the entry of the judgment.

Respectfully submitted,

SMYTH WHITLEY, LLC



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Attorneys for Defendants

July 23, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
Jeane Whitfield,	)	C/A No. 2017-CP-10-2758
	)	
Plaintiff,	)	
	)	**DEFENDANTS' MOTION TO REMOVE DEPOSITION TRANSCRIPTS FROM PUBLIC INDEX AND/ OR TO SEAL**
v.	)	
	)	
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC,	)	
	)	
Defendants.	)	

2019 AUG 22 AM 11:22
JANE J. ARMSTRONG
CLERK OF COURT

TO: BRENT S. HALVERSEN, ESQ., AND DANIEL S. SLOTCHIVER, ESQ., ATTORNEYS FOR PLAINTIFF.

PLEASE TAKE NOTICE THAT the Defendants, Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, (hereinafter "Defendants"), by and through undersigned counsel, will move before the presiding judge for the Charleston County Court of Common Pleas at a time and place set by the Court for an Order removing the Discovery Deposition transcripts of Dennis K. Schimpf, M.D. and Mrs. Vicky Tolbert from the Public Index. The basis for this motion is that these discovery depositions have been filed by Plaintiff's counsel in an attempt to make a public record outside of what will be admissible during the trial of this matter, which is only three days away, and further is that the transcripts contain the sensitive and private information of the deponents, their families, and information regarding patients who are not party to this lawsuit. In short, there is no legal justification for the filing and it is clearly an attempt to gain leverage over the Defendants or to paint them in a negative light in a public forum.

Defendants are preparing and will file Motions in Limine concerning certain inflammatory allegations in this case and believe that Plaintiffs are attempting to make information available to the jury that may not be admitted at trial. This is at least the second time Plaintiff has done so during the pendency of this case. At the outset of this litigation, Plaintiff filed an improper Complaint chock-full of images and other inflammatory materials that were not "averments" – which are all that the Rules of Civil Procedure allow in a Complaint. When Plaintiff refused to Amend her Complaint, Defendants went to a hearing and Judge Alison Lee struck Plaintiff's Complaint, ordered Plaintiff to go back and re-write it, and mandated that if Plaintiff file any images, she do so as exhibits and file them under seal.

It is clear from this prior history that the contents of the Public Index have been a central issue in the case from the outset. Plaintiff now attempts to inhibit Defendants from having a fair trial by publishing five discovery deposition transcripts and possibly tainting potential jurors. Plaintiff gave Defense Counsel no notice whatsoever of their intentions to file these depositions presumably to deprive Defendants of the opportunity to object or respond. These transcripts contain numerous objections to the form of Plaintiff's questions, which objections have not yet been ruled upon by the Court. On that basis alone, the transcripts should not be published to the Public Index on the eve of trial. Furthermore, as the Court well knows, the scope of questioning permitted in a discovery deposition is broad. See Rule 26(b)(1), SCRCP (permitting discovery into "any matter, not privileged, which is relevant to the subject matter involved in the pending action" and further providing

"[i]t is not a ground for objection that the information sought will be inadmissible at the trial."). The permissible scope of a discovery deposition is in fact so much broader than that of trial testimony that South Carolina lawyers are ethically prohibited from making lengthy speaking objections in discovery depositions. See In re Anonymous Member of the South Carolina Bar, 346 S.C. 177, 552 S.E.2d 10 (2001). Discovery is a different animal than trial and Plaintiff should not be allowed to circumvent the forthcoming evidentiary rulings of the Court by publishing Defendants' discovery depositions to the Public Index three days before trial.

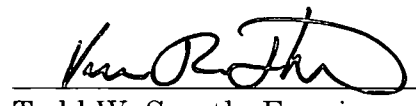
Finally, Defendants move to remove and / or seal the transcripts pursuant to Rule 41.1, SCRCP, in order to ensure a fair trial, to protect confidences, due to the public and professional significance of the lawsuit, the harm that may result to the Defendants' families by disclosure. These transcripts contain names, addresses, birthdays, biographical details, deponents children's names, ages, addresses, and intimate details regarding the deponents' home lives. Mrs. Tolbert is not a party to this case and is left particularly exposed by the publication of her deposition transcript online to the Public Index. Anyone with a computer, tablet or smart phone, anywhere in the world, with any type of motivation can now browse onto the Clerk of Court's website and read all of these details. The internet has changed the calculus here in a fundamental way that our Rules of Court have yet to reflect. The world of electronic case filing is different than it was in days past, when one had to travel downtown, find parking, find the Clerk of Court, and request the appropriate case file

in order to read any particular document. Even then, that document was in paper form, it cost money to reproduce, and it was not electronically word-searchable.

There is no legal justification for this stunt and publication of the discovery deposition transcripts should not be allowed here on grounds of ensuring a fair trial. This publication is all the more odious in that it appears to have been a calculated attempt to gain some type of perceived leverage. Such unfounded tactics are beneath our profession, serve no valid purpose, and these transcripts should therefore be stricken from the Public Index or, in the alternative, sealed pursuant to Rule 41.1, SCRCP. This motion is further supported by the Rules of Civil Procedure, applicable statutory and common law of the State of South Carolina, and may further be supported by a memorandum and/or affidavits.

Respectfully submitted,

SMYTH WHITLEY, LLC



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

August 21, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
Jeane Whitfield,	)	C/A No. 2017-CP-10-2758
	)	
Plaintiff,	)	
	)	**DEFENDANTS' MOTION IN LIMINE TO SEAL AND TO EXCLUDE CERTAIN INADMISSIBLE EVIDENCE**
v.	)	
	)	
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC,	)	
	)	
Defendants.	)	

FILED
2019 AUG 26 PM 1:56
CHARLESTON COUNTY
CLERK OF COURT

TO: THE HONORABLE ROGER M. YOUNG, SR., JUDGE FOR THE NINTH JUDICIAL CIRCUIT:

Defendants Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, (hereinafter "Defendants"), by and through undersigned counsel, will move before the presiding Judge, for an Order in Limine precluding Plaintiff's counsel from eliciting testimony, publishing former testimony, or introducing information and evidence to the jury regarding Defendant's personal life. Plaintiff's counsel have indicated on numerous occasions that they will seek to elicit testimony and present evidence regarding this information at trial. Defendants vociferously object to this underhanded attempt to disgrace, embarrass and discredit Dr. Schimpf before the jury because: (1) under Rules 401 and 402, SCRE, this information is not relevant and is not admissible; (2) under Rule 403, SCRE, even if evidence of Defendant's personal life was somehow deemed to be relevant, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and its introduction would constitute an undue delay and a

waste of the Court's time and resources; (3) under Rule 404, SCRE, evidence of Defendant's private life is not "character evidence" and no exception applies; and, furthermore, (4) under Rule 608(c), this information is not proper impeachment bias evidence in accordance with that Rule as interpreted and applied by our Courts. Finally, for good cause shown, namely the toxic potential of the subject matter of this motion as regards Defendants' ability to get a fair trial, for the professional significance of this lawsuit, and for the protection of nonparties (including the Defendant's family) from harm upon the public disclosure of the subject of this motion, Defendants move to seal this motion and any associated responses of Plaintiff's counsel and further filings regarding the subject pursuant Rule 41.1, SCRCP.

FACTS

This medical malpractice action arises out of a set of elective cosmetic surgeries Defendants Dennis K. Schimpf, M.D., and Sweetgrass Plastic Surgery performed on Plaintiff on June 6, 2014. Plaintiff came to Sweetgrass seeking to downsize her implant and to address several other cosmetic concerns. After consultation with Dr. Schimpf, Plaintiff elected to undergo a set of cosmetic plastic surgeries including a bilateral breast lift ("mastopexy") with exchange of implants, liposuction of her abdomen, thighs, chin, and axillae, and an upper eyelid lift ("blepharoplasty"). Approximately, three weeks after the procedure, Plaintiff developed a separation ("dehiscence") of the surgical incision line on her right breast, which is a recognized complication of mastopexy accompanied by the replacement of implant. This opening exposed fatty yellow breast tissue, which

alarmed Plaintiff. She therefore went to the hospital and picked a new plastic surgeon who took over her care. This new plastic surgeon, Dr. Ram Kalus, then removed Plaintiff's right implant, leaving her with a deflated right breast, and, eight months later, removed the left implant too, even though the left breast was well-healed.

Plaintiff filed this lawsuit alleging that the dehiscence resulted from Dr. Schimpf's negligence and alleging that he is responsible for all of the medical and psychiatric treatment she thereafter received. Plaintiff further alleges that Dr. Schimpf performed liposuction under her chin without consent. Finally, Plaintiff seeks punitive damages because although Dr. Schimpf has a medical chart that documents the preoperative process and operation itself, that chart lacks preoperative photographs and the notes from her post-operative visits to Sweetgrass Plastic Surgery. As to the preoperative photographs, the nurse employee of the O'Neill Plastic Surgery, the practice with whom Dr. Schimpf shared space, in charge of taking them died of cancer prior to being able to testify. Plaintiff hired a forensic investigator who searched the computer system utilized by Defendants in 2013 / 2014 and his search failed to uncover any photographs or evidence of the destruction of photographs. As to the office notes, Defendants have repeatedly explained that they also had sporadic trouble with their dictation equipment around the time of Plaintiff's treatment. They took the faulty equipment out of service. Plaintiff contends, against all evidence and reason, that Defendants intentionally destroyed these particular of her medical records.

STANDARD

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)[1]. The threshold inquiry for the introduction of evidence is relevancy. See State v. Clasby, 385 S.C. 148, 682 S.E.2d 892, 895 (2009). 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. Note that 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.

Relevant evidence however is frequently excluded when that evidence is unfairly prejudicial, confusing to the jury, or when its introduction use 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, the 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

[1] Citing Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000); Gamble v. International Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996).

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.

Rule 608(c), SCRE, unique to the South Carolina Rules of Civil Procedure, is the basis for Plaintiff's attempts to introduce testimony regarding the information at issue. This Rule 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), SCRCP. The right to present this 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 not permitting, on relevancy grounds, the cross examination of a key witness, the officer who took criminal defendant's confession to homicide, on the subject of his romantic relationship with the prosecutor who handled the case).[2] Furthermore, the only reported instances of the allowance of Rule 608(c) cross examination concern potential animus between witnesses, not the alignment of their interests. See, e.g. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000) (assigning error for trial court's disallowance of cross examination, in death penalty homicide trial, of the state's first witness, the former girlfriend of the decedent, regarding her romantic

[2] Defendants further note that the Court of Appeals upheld the trial court's determination here even it the face of the robust Sixth Amendment right of a criminal defendant to confront his accusers, which right does not exist in a civil action, and if it did, it would belong to Dr. Schimpf, who is one being accused by Plaintiff.

relationship with the decedent). Note further that the only cases interpreting the modern iteration of Rule 608(c) are criminal matters where the right to question the bias of witness exists not only in Rule 608(c), but in the Sixth Amendment's confrontation clause, which of course does not apply to this action (see Note 2, above). Finally, prior to the adoption of Rule 608(c), the right to cross examine on bias existed in the common law of South Carolina. It however was also focused on animus between witnesses. See, e.g. North Greenville College v. Sherman Constr. Co., 270 S.C. 553, 243 S.E.2d 441 (1978) (holding that trial court should have allowed cross examination on prior litigation between the parties because such litigation could be cause for bias). In sum, Rule 608(c) allows the impeachment of a witness on bias grounds, but bias has been interpreted in the law and animus, and even then, Rule 608(c) does not create an absolute right to cross examine regarding bias, because it is subject to relevancy-based strictures of Rules 401, 402, and 403.

ARGUMENT

I. THE PERSONAL LIFE OF THE DEFEDANT IS NOT RELEVANT AND HAS NO PROBATIVE VALUE TO PLAINTIFF'S CLAIMS OF MEDICAL MALPRACTICE.

The information that is the subject of this motion is not relevant to the determination of this medical malpractice action. In order to determine this action, Plaintiff must prove the standard of care, that Defendants deviated from the standard of care, and that the deviation was the proximate cause of her injuries. The facts of consequence to the determination of this action therefore relate to what risks Plaintiff was informed of during the presurgical informed consent process, to the surgical technique employed, and to the appropriateness of Defendants'

postsurgical care. That is all. The personal life of the Defendant does not make it any more or less likely that he appropriately closed the incision line on Plaintiff's right breast. It does not make it any more or less likely that Plaintiff read and signed the presurgical consent forms. It does not make it more or less likely that Defendants' dictation equipment malfunctioned. It does not make the dollar figure amount of Plaintiff's damages any more or less likely. In sum, evidence, presentation, and testimony regarding this information are not relevant and should not be introduced under Rules 401 and 402, SCRE.

II. EVEN IF RELEVANT, EVIDENCE OR TESTIMONY REGARDING THE INFORMATION SHOULD BE EXCLUDED UNDER RULE 403, SCRE.

Even if this Court finds that the information is somewhat relevant, evidence regarding it should nonetheless be excluded under the Rule 403 balancing test which provides the Court with the discretion to exclude evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

A. Admission of the Information is Unfairly Prejudicial.

Introducing evidence of the Defendant's personal life to the jury presents a danger of inflaming unfair prejudice that far outweighs any minimal probative value it may have. It stands to reason that much of the evidence lawyers introduce at trial is prejudicial to one party or another. What Rule 403 prohibits however is the introduction of evidence whose probative value is substantially outweighed by its unfairly prejudicial nature. This is a fine point of evidentiary law and the

application of Rule 403 in "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 result will generally turn on the facts of each case. Id. "Unfair prejudice is an undue tendency 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). Here, that is exactly what the use of evidence regarding the information will promote: a verdict rendered on an improper basis – the emotions and perhaps the private moral condemnation of the jurors.

B. Admission of the Information Will Confuse the Issues and Mislead the Jury.

If the Court allows the admission of this information, the issues in the present case will become confused. Because there is no adequate reason for introducing the information either as relevant evidence or for impeachment purposes (Defendant never denied the information), the jury will be misled away from the real issues at hand and will likely assume that the information has some relevancy to the present lawsuit. Once the jury hears the information, the jury will become distracted from the actual medical issues at hand. Finally, because of the highly emotional reactions that evidence regarding an individual's personal life may evoke, there truly is no way to determine whether or not the jury has or will become misled, confused, and ultimately tainted by the evidence. This very uncertainty creates the imbalance that Rule 403 was intended to prevent, and therefore evidence concerning the information should not be admissible.

III. PLAINTIFF HAS NO LEGITIMATE REASON TO PRESENT THE INFORMATION TO THE JURY.

Plaintiff claims that she seeks to introduce this evidence so that she may establish bias. To be clear, they are seeking to establish that a witness would therefore *lie* for the Defendant while under oath. This is absurd and should not be allowed. In fact, Plaintiff's own deposition testimony gives lie to the attempts of her counsel to besmirch the witness. She testified that Dr. Aaron Domm suggested she see a plastic surgeon to address her concerns. Then, upon leaving his office that day "I walked into the hallway into the lobby, I looked to my left and there was [name omitted]. I knew her from years back. She was upstanding, kind, sweet and she lent him her credibility, because if I wouldn't have seen her, I would have come out here to Mount Pleasant and found a real surgeon." Depo. Jeane Whitfield, 11/26/18, 58:3-8. It is clear from Plaintiff's own testimony that she considers the witness to be a credible person, and, in fact, was the reason she chose him as her surgeon.

If Plaintiff wishes to establish that the witness may be loyal to Dr. Schimpf, or that their interests are aligned, she is entitled to do so and will do so by examining her regarding other reasons aside from the Defendant's private personal life. Of note, neither the Defendant or the witness have ever denied information at issue, and, therefore, there is nothing to impeach.

It is clear therefore that Plaintiff seeks to introduce the information for one purpose alone: to elicit prejudice, to besmirch the Defendant and witness, and to elicit the moral condemnation of the jury.[3] Plaintiff's only motive to introduce the information is to taint the jury, upset and distract Defendants, and mislead the jury

[3] See State v. Hawes, 423 S.C. at 129 (Ct. App. 2018) citing State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000).

by confusing the issues and evoking contempt and hatred for the Defendant and witness regarding a matter that has nothing to do with the case at hand. As such, this information has no probative value and should be excluded.

CONCLUSION

Defendants therefore respectfully request the Court ensure their right to a fair and impartial trial and prohibit the Plaintiff and her counsel from referring to, insinuating, or presenting evidence in any way relating to the personal life of the Defendant. For the foregoing reasons, the Defendants respectfully request the Court issue an Order *in Limine* excluding such evidence, testimony, and argument, and prohibiting such examination by Plaintiff's counsel and sealing any response to this Motion that refers to the information directly and thereby seeks to avoid the forthcoming evidentiary rulings of this Court.

Respectfully submitted,

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

August 22, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
Jeane Whitfield, *Plaintiff,*	)	C/A No. 2017-CP-10-2758
Versus	)	**NOTICE OF MOTION AND MOTION TO COMPEL COMPENSATION TO NON-PARTY WITNESS PATRICK O'NEILL, MD**
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC, *Defendants.*	)	

TO: BRENT S. HALVERSEN AND DANIEL S. SLOTCHIVER, ATTORNEYS FOR PLAINTIFF

By his undersigned counsel, Patrick O'Neill, MD (hereinafter "Dr. O'Neill) moves under Rule 26(b)(4)(C) of the South Carolina Rules of Civil Procedure (SCRCP) for an Order from this Court requiring the Plaintiff to compensate the above-named non-party physician for his time and services pursuant to his fee schedule, previously provided to counsel for the Plaintiff (Exhibit 1). In accordance with Rule 11 of the SCRCP, the undersigned attempted in good faith to resolve this matter with Plaintiff's counsel to no avail.

FILED
2019 AUG 22 PM 4:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Dr. O'Neill is a licensed medical doctor and is Board Certified in General Surgery and Plastic Surgery and has been in practice in Charleston, South Carolina for over twenty years. The only connection Dr. O'Neill has to this matter is that he shared his office space and computer with the Defendant, Dr. Schimpf, for a period of time in 2014. Because of this, Plaintiff's counsel has served him with over five subpoenas in connection with this case. It began with a letter and subpoena dated October 19, 2015 to O'Neill Plastic Surgery, requesting the medical records in his possession for Plaintiff. By letter dated October 28, 2015, Dr. O'Neill responded by providing a PDF binder of all of the electronic records of Plaintiff in his possession.

On or about November 5, 2018, the Plaintiff served Dr. O'Neill with subpoenas for his deposition individually and for the records custodian for O'Neill Plastic Surgery. (Exhibit 2) Dr. O'Neill, individually, had no professional interaction with the Plaintiff and was not involved in

her care and treatment. The purpose of the deposition was to determine if any records or photos of the Plaintiff had been deleted by the Defendant. After obtaining counsel, Dr. O'Neill appeared on December 17, 2018 and provided testimony for a two-hour deposition, for a witness fee of $32.85, in his capacity as the records custodian for his practice. (Exhibit 3). Dr. O'Neill brought over three hundred documents retrieved from his search for Plaintiff's records including an audit trail of the Plaintiff's records to the deposition. Plaintiff's counsel asked Dr. O'Neill numerous questions related to the record keeping practices of his business, along with other questions not relevant to the records of Plaintiff. At his deposition, Dr. O'Neill confirmed that there were no files, photographs, or other electronic data of Plaintiff that he had not already produced. Dr. O'Neill explained in great detail that he personally performed extensive searches in his system, multiple times, using every keyword, meta data, date of birth and dates of service he could think of in order to find any "missing" records. There was effort and expense associated with complying with the deposition notices, and Plaintiff should pay Dr. O'Neill's reasonable charges pursuant to his fee schedule.

Incredibly, the very next day after Dr. O'Neill's two hour deposition testimony, without consulting Dr. O'Neill or his attorneys, Plaintiff's counsel served Dr. O'Neill with yet another subpoena commanding him to produce any and all office computers, hard drives, servers or storage devices owned or in possession by O'Neill Plastic Surgery. (Exhibit 4). Due to patient confidentiality and privacy concerns of Dr. O'Neill's patients and his practice, the undersigned counsel filed a Motion to Quash the subpoena. By Orders dated March 11, 2019 and April 29, 2019, Judge Kinlaw ordered the forensic examination for "missing" records under limited conditions. (Exhibits 5 and 6) On Saturday June 16, 2019 and Sunday June 17, 2019, Dr. O'Neill met with the Plaintiff's forensic examiner, Steve Abrams, to extract data from his computers. Dr. O'Neill was there for two hours on June 15 and thirty minutes on June 16, 2019.

On Saturday, July 20, 2019, Dr. O'Neill and his counsel again met with Abrams, to review the deleted images taken from the O'Neill Plastic Surgery's laptop computer. The purpose of the forensic review was to determine if any photographs of the Plaintiff were ever on the computer and if data was ever deleted from the computer. Over the course of approximately three and a half hours, Dr. O'Neill reviewed in excess of eleven thousand images provided by Plaintiff's forensic examiner, finding none of them to be that of the Plaintiff and finding no evidence that any records or photographs pertaining to Plaintiff were altered, deleted, or destroyed.

By letter dated August 2, 2019, the undersigned counsel wrote to Plaintiff's counsel seeking compensation for Dr. O'Neill's time on July 20, 2019. (Exhibit 7). Plaintiff's counsel have refused to compensate Dr. O'Neill for any of his time.

Subsequently, Plaintiff's counsel indicated their intent to call Dr. O'Neill to appear at trial ***as a records custodian*** for the sole purpose of establishing that no photos of the plaintiff were found in eleven thousand images produced from the forensic examination. In lieu of appearing, however, plaintiff's counsel Brent Halverson suggested an affidavit from Dr. Dr. O'Neill would suffice. Dr. O'Neill provided an affidavit to plaintiff's counsel (Exhibit 8). Plaintiff's counsel, however, did not accept the affidavit produced by Dr. O'Neill and served the subpoena for his appearance at trial (Exhibit 9). The undersigned counsel for Dr. O'Neill conferred with counsel to seek a resolution but ultimately filed a Motion to Quash the subpoena. (Exhibit 10). Counsel for the plaintiff then agreed to conduct a *de bene esse* deposition in lieu of compelling Dr. O'Neill's appearance at trial. (Exhibit 11). The parties agreed on the *de bene esse* deposition scheduled for August 20, 2019 at 6:00PM take place at Mr. Slotchiver's office. Although parties had agreed this would be a *de bene esse* deposition, Plaintiff's counsel served a regular notice of deposition, and advised counsel that they took the position they were entitled to "re-depose" Dr. O'Neill based on "new information". (Exhibit 12). Plaintiff's counsel took this position despite failing to seek leave of court to re-open his deposition and without asking parties to agree to the same. By the time

Plaintiff's counsel eventually sent a *de bene esse* deposition notice, they did so via email while Dr. O'Neill was already at their office. (Exhibit 13). Furthermore, although this was a planned deposition that Plaintiff's counsel insisted take place at their office, there was no court reporter or videographer present. Ultimately, the parties agreed upon an affidavit executed by Dr. O'Neill in lieu of taking his *de bene esse* deposition. (Exhibit 14). This could have and should have been accomplished without demanding Dr. O'Neill travel to their office for a deposition they had agreed to, but apparently never planned to conduct. Dr. O'Neill spent two hours traveling to and appearing for the deposition. He appeared pursuant to Plaintiff's deposition notice and is entitled to be compensated as if he were deposed.

Despite Dr. O'Neill's services to the Plaintiff on June 15, June 16, and July 20, Plaintiff's counsel has indicated that they will not compensate him according to his fee schedule, claiming he was acting in a records custodian capacity. Dr. O'Neill has rearranged his schedule with patients and opened up his office on weekends to accommodate Plaintiff's ongoing demands throughout this matter (to which he is a non-party) and he is entitled to be compensated for his time and services. Further, he was acting as the owner of O'Neill Practice surgery protecting his patients' privacy. A records custodian could not have performed his function as a plastic surgeon with his professional knowledge.

It is well settled law that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery. See SCRCP 26(b)(4)(C). The court has the discretion to determine the amount of a reasonable fee due an expert. Black v. Roche Biomed. Labs., 315 S.C. 223, 230, 433 S.E.2d 21, 25 (Ct.App.1993). In determining a reasonable expert witness fee, the court should consider: (1) area of expertise, (2) education and training, (3) prevailing rates for comparable experts, (4) nature, quality and complexity of opinions expressed, (5) the fee the expert is charging the party who retained him, (6) fee traditionally charged by experts for similar services, and (7) any other factors likely to be of assistance to the court in balancing the interests implicated.

Here, Dr. O'Neill's fee schedule is reasonable for the work he did in meeting with Plaintiff's attorneys and forensic examiner to review thousands of records. In like manner, the rates set forth are consistent with the rates of like experts in the same field of specialty. A records custodian could not have done what Dr. O'Neill did for the Plaintiff with his professional knowledge, and he was clearly acting in the capacity of a plastic surgery expert. The Plaintiff's attempt at finding a loophole to avoid fair compensation by designating Dr. O'Neill a "records custodian" while benefitting from his knowledge and expertise is not an appropriate approach to litigation and sets an unacceptable precedent. Plaintiff's counsel compensated Mr. Abrams, the forensic examiner for being present yet they refuse to compensate Dr. O'Neill for his expertise, which is clearly inequitable.

In regards to Plaintiff's refusal to pay Dr. O'Neill for his deposition testimony, it also goes against the well-recognized practice adopted by the Charleston County Bar and the Charleston County Medical Society, that where a physician is requested to testify as to his expert opinions, whether via deposition or in court, he should receive reasonable compensation for his time. Dr. O'Neill is a physician whose expertise goes above and beyond a records custodian, and he should be reasonably compensated for his time sitting for the December 18, 2018 deposition, as well as his time appearing for the *de bene esse* deposition on August 22 that Plaintiff noticed but was unprepared to conduct.

Whereby Dr. Patrick O'Neill by his undersigned counsel respectfully moves this Court for an Order requiring Plaintiff to compensate Dr. O'Neill for

- Six (6) hours of forensic record review on June 15, June 16, and July 20, at $500 per hour for a total of $3000.00 pursuant to Dr. O'Neill's fee schedule,
- Two hours for his appearance at the duly noticed and agreed upon *de bene esse* deposition at $600 per hour for a total of $1200.00 pursuant to Dr. O'Neill's fee

schedule,

- and ordering Plaintiff to compensate Dr. O'Neill for the three and three quarters hours (3.75) he spent complying with Plaintiff's December 18, 2018 deposition notices.

Wherefore, Dr. O'Neill respectfully requests the Court to enter an Order compelling the Plaintiff to compensate the above-named non-party physician for his time and services pursuant to his fee schedule, previously provided to counsel for the Plaintiff.

This Motion may be supported by memoranda and/or affidavits and is supported by the common law of South Carolina.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435 / Fax: (843) 722-1630
Email: Info@hoodlaw.com

Barbara W. Showers (SC #65489)
Maryrose L. Pritchard (SC #102804)
Julia A. Bradshaw (SC #103767)

Attorneys for Patrick O'Neill, MD and O'Neill Plastic Surgery

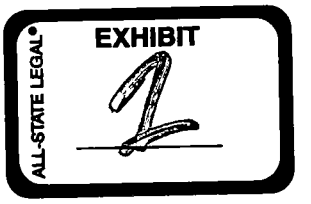
August 27th, 2019
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the **NOTICE OF MOTION AND MOTION TO COMPEL COMPENSATION TO NON-PARTY WITNESS PATRICK O'NEILL, MD** was served on each party or counsel of record by ☐ NEF electronic filing, ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 27th day of August, 2019.

PATRICK J. O'NEILL, MD
PLASTIC SURGERY
COSMETIC, RECONSTRUCTIVE, & HAND



Attorney and Paralegal Policies and Fees

All appointments with attorneys and/or paralegals will be scheduled through the office. Once scheduled, the estimated fees will be due immediately. Since each appointment is held for only that purpose, no refund will be made for changes to the date and/or time of the appointment after the time noted below.

	Appointment Type	When Scheduled	Fee	Minimum time	Increment	No refund if court is canceled:
	Court appearance	30 days in advance	$3,000/day	1 day	1 day	7 days before date given
		14 days in advance	$4,000/day	1 day	1 day	7 days before date given
		7 days in advance	$6,000/day	1 day	1 day	7 days before date given
		5 days in advance	$10,000/day	1 day	1 day	5 days before date given
		< 3 days in advance	$20,000/day	1 day	1 day	3 days before date given
	Video deposition		$700/hour	2 hours	1 hour	7 days before date given
	Non-Video deposition		$600/hour	2 hours	1 hour	7 days before date given
	Office conference		$500/hour	1 hour	1 hour	4 days before date given
	Phone conference		$400/hour	1 hour	15 minutes	3 days before date given
	Record review		$350/hour	1 hour	15 minutes	N/A
	Reports and Letters		$350/hour	30 minutes	15 minutes	N/A
	Impairment rating		$750	flat rate	N/A	N/A
	Clerical/Admin time		$10/minute	6 minutes	6 minutes	N/A
	Life care planning form		$500	flat rate	N/A	N/A
	Postage		Actual	N/A	N/A	N/A
	Wait/Travel time (MD)		$300/hour	1 hour	15 minutes	N/A

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF CHARLESTON

Jeane Whitfield., Plaintiff

v.

Dennis K. Schimpf and Sweetgrass Plastic Surgery

SUBPOENA IN A CIVIL CASE

Case Number: 2017-CP-10-2758

Pending in Charleston County

TO: Records Custodian

O'Neill Plastic Surgery, P.A.

705 Cunningham Street

Daniel Island, SC 29492

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Slotchiver and Slotchiver, LLP 751 Johnnie Dodds Blvd. Mount Pleasant, SC 29464	Wednesday, November 28, 2018, 9:00 AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

Any and all medical records and photographs in your possession regarding patient Jeane Whitfield; DOB [redacted]; SS# [redacted]

PLACE	DATE AND TIME
	, AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
	, AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

SCCA 254 (10/04)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

DATE 11/5/2018

ATTORNEY/ISSUING OFFICER'S SIGNATURE (INDICATE IF ATTORNEY FOR PLAINTIFF ~~OR~~ DEFENDANT)

CLERK OF COURT/ISSUING OFFICER SIGNATURE | DATE | Brent S. Halvorsen PRINT NAME

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY Brent S. Halversen , Esq.		TITLE Attorney

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

_____
SIGNATURE OF SERVER

_____

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

i. fails to allow reasonable time for compliance; or

ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

iv. subjects a person to undue burden.

(B) If a subpoena:

i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or

ii. requires disclosure of an unretained expert=s opinion or information not describing specific events or occurrences in dispute and resulting from the expert=s study made not at the request of any party, or

iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 2017-CP-10-2758
JEANE WHITFIELD, Plaintiff, vs. DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC Defendants.	)	**NOTICE OF DEPOSITION DUCES TECUM OF RECORDS CUSTODIAN FOR O'NEILL PLASTIC SURGERY**

TO: TODD SMYTH, ATTORNEY FOR DEFENDANTS

YOU WILL PLEASE TAKE NOTICE that on Wednesday, November 28, 2018, 9:00 AM at Slotchiver and Slotchiver, LLP, 751 Johnnie Dodds Blvd., Mount Pleasant, SC 29464, the attorneys for the Plaintiff will take the records custodian deposition for O'Neill Plastic Surgery on oral examination, pursuant to South Carolina Circuit Court Rule No. 30 before a Notary Public, or before some other officer authorized by law to take depositions, said deposition to continue from day to day until completed. You are invited to attend and take such part as is fit and proper.

The deponent is commanded to bring with to the deposition a copy of all medical records of the Plaintiff's in the deponent's possession.

BRENT SOUTHER HALVERSEN, LLC

By:_____

Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-813-6453
Email: brent@halversenlaw.com

Attorney for the Plaintiff

November 5, 2018
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I certify that I served the foregoing Notice of Deposition upon all counsel of record by email and affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 5th day of November, 2018.

BRENT SOUTHER HALVERSEN, LLC

By:_____

Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-813-6453
Email: brent@halversenlaw.com

Mount Pleasant, SC
November 5, 2018

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF CHARLESTON

Jeane Whitfield., Plaintiff

v.

Dennis K. Schimpf and Sweetgrass Plastic Surgery

SUBPOENA IN A CIVIL CASE

Case Number: 2017-CP-10-2758

Pending in Charleston County

TO: Patrick O'Neill, M.D.

O'Neill Plastic Surgery, P.A.

705 Cunningham Street

Daniel Island, SC 29492

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Slotchiver and Slotchiver, LLP 751 Johnnie Dodds Blvd. Mount Pleasant, SC 29464	Wednesday, November 28, 2018, 9:30 AM

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

PLACE	DATE AND TIME
	, AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
	, AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

DATE 11/5/2018

SCCA 254 (10/04)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

ATTORNEY/ISSUING OFFICER'S SIGNATURE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

	11/5/2018	Blent S. Halvorsen
CLERK OF COURT/ISSUING OFFICER SIGNATURE	DATE	PRINT NAME

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐ NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY Brent S. Halversen , Esq.		TITLE Attorney

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

_____
SIGNATURE OF SERVER

_____

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

i. fails to allow reasonable time for compliance; or

ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

iv. subjects a person to undue burden.

(B) If a subpoena:

i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or

ii. requires disclosure of an unretained expert-s opinion or information not describing specific events or occurrences in dispute and resulting from the expert-s study made not at the request of any party, or

iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

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SCCA 254 (10/04)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2017-CP-10-2758
JEANE WHITFIELD,	)	
Plaintiff,	)	
vs.	)	**NOTICE OF DEPOSITION FOR PATRICK O'NEILL M.D.**
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC	)	
Defendants.	)	

TO: TODD SMYTH, ATTORNEY FOR DEFENDANTS

YOU WILL PLEASE TAKE NOTICE that on Wednesday, November 28, 2018, 9:30 AM at Slotchiver and Slotchiver, LLP, 751 Johnnie Dodds Blvd., Mount Pleasant, SC 29464, the attorneys for the Plaintiff will take the records custodian deposition for O'Neill Plastic Surgery on oral examination, pursuant to South Carolina Circuit Court Rule No. 30 before a Notary Public, or before some other officer authorized by law to take depositions, said deposition to continue from day to day until completed. You are invited to attend and take such part as is fit and proper.

The deponent is commanded to bring with to the deposition a copy of all medical records of the Plaintiff's in the deponent's possession.

BRENT SOUTHER HALVERSEN, LLC

By:_____

Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-813-6453
Email: brent@halversenlaw.com

Attorney for the Plaintiff

November 5, 2018
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

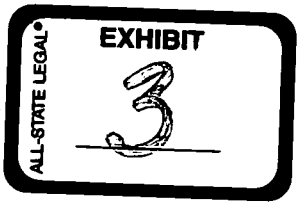
I certify that I served the foregoing Notice of Deposition upon all counsel of record by email and affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 5th day of November, 2018.

BRENT SOUTHER HALVERSEN, LLC

By: _____

Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-813-6453
Email: brent@halversenlaw.com

Mount Pleasant, SC
November 5, 2018



In the Matter Of:

Jeane Whitfield vs Dennis K. Schimpf, M.D., et al

PATRICK O'NEILL. M.D.

December 17, 2018

SPECTRUM
COURT REPORTING SERVICES

www.spectrumcourtreporting.com
814 Johnnie Dodds Blvd., Suite B
Mount Pleasant, SC 29464
spectrumaaa@gmail.com
843.849.0133

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

DEPOSITION OF PATRICK O'NEILL, MD

JEANE WHITFIELD,
Plaintiff,
vs. CASE NO. 2017-CP-10-2758
DENNIS K. SCHIMPF, M.D., and SWEETGRASS PLASTIC SURGERY, LLC,

Defendants.

DEPONENT: PATRICK O'NEILL, MD
DATE: December 17, 2018
TIME: 4:14 p.m. - 5:52 p.m.
LOCATION: Hood Law Firm, LLC
172 Meeting Street
Charleston, SC 29401

REPORTED BY: SARAH GACIOCH

A P P E A R A N C E S

FOR THE PLAINTIFF:

BRENT SOUTHER HALVERSEN, LLC
BY: BRENT S. HALVERSEN, ESQ.
751 Johnnie Dodds Boulevard, Suite 200
Mt. Pleasant, SC 29464
(843)284-5790
BRENT@HALVERSENLAW.COM

FOR THE DEFENDANTS:
SMYTH WHITLEY, LLC
BY: TODD SMYTH, ESQ.
126 Seven Farms Drive, Suite 150
Charleston, SC 29492
(843)606-5635
TSMYTH@SMYTHWHITLEY.COM

FOR PATRICK O'NEILL, MD:
HOOD LAW FIRM, LLC
BY: BARBARA W. SHOWERS, ESQ.
172 Meeting Street
Charleston, SC 29401
(843)577-1207
BARBARA.SHOWERS@HOODLAW.COM

I N D E X

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TODD SMYTH	62-62
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E X H I B I T S

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PATRICK O'NEILL, MD, having been first duly sworn, testified as follows:

E X A M I N A T I O N

BY MR. HALVERSEN:

Q. Good afternoon, Doctor. I just introduced myself. My name is Brent Halversen. I represent a woman named Jeane Whitfield, who was a patient of Dr. Schimpf's in 2014, and as I assume you're probably aware, Ms. Whitfield has filed a lawsuit against Dr. Schimpf and his practice alleging medical malpractice.

We're here today to take your deposition as a records custodian for O'Neill Plastic Surgery; is that your understanding?

A. Yes.

Q. And could you please state your full name for the record?

A. Patrick Joseph O'Neill.

Q. And what is your -- what is your relationship with O'Neill Plastic Surgery?

A. I'm the owner.

Q. Owner, okay. Are there any other owners?

A. No.

Q. Just you?

A. Just me.

Page 5

Q. So just before the deposition began, your counsel -- I guess this is a set of documents you brought with you to the deposition today. We'll mark this as Plaintiff's Exhibit 1 to your deposition, and there is a stack of -- it's been Bates labeled by Ms. Showers' office, and it looks like it goes to 0331. So it looks like approximately 331 pages that you brought here today in response to the subpoena and the deposition notice that's been provided to you; is that accurate?

A. Yes. I don't know how many pages, but yes.

Q. Okay. Her office, I think, put the Bates label on. You didn't put the label on, correct?

A. Correct.

(PLAINTIFF'S EXHIBIT NO. 1
WAS MARKED FOR IDENTIFICATION)

Q. Okay, great. And how did you go about collecting and retrieving these exhibits that we've marked as Exhibit 1?

A. Well, I mean, I got them from the electronic medical record. There are --

MS. SHOWERS: Those are not Bates

Page 6

labeled though. You marked it as 1. That's the original.

MR. HALVERSEN: Oh.

BY THE WITNESS: I don't have --

MR. HALVERSEN: You only Bates labeled the copies?

MS. SHOWERS: I made two copies. I guess she should have done three with the labelling on it, but I wanted you to see the original as well.

MR. HALVERSEN: Okay. This is mine. The original is the same as the Bates, correct?

MS. SHOWERS: Yes.

MR. HALVERSEN: Okay. I think --

MS. SHOWERS: He's not going have a page number to go by.

MR. HALVERSEN: Yeah. So what we will just do, we'll take this top page of your original --

MS. SHOWERS: If you want another copy, she can run it.

MR. HALVERSEN: That's all right. We don't need to do that. We can share. There won't be too many questions on this.

Q. So what has been Bates labeled number -- Plaintiff's 1 has Bates labels to 331, is a

Page 7

photostatic copy of the original documents you brought here today; is that your understanding?

A. Yes.

Q. All right. And how did you go about collecting and retrieving these documents?

A. So the vast majority of this is just straight from the -- the -- our recordkeeping system, which is a Nextech, full practice management EMR software. So the -- there are several, obviously, sections. One of which is the EMR section, which there are only a couple of documents from, and then there's the history file, which that contains most of it, and most of these are consents, and what may account for differences in numbers is that some of these consents were -- are double entered. The blank one's entered, and then it's printed, and then the patient signs it and it gets scanned back in.

There is also a -- in addition to the appointment list, which is generatable as a printout from the E -- from the practice management portion of the software, I have a screenshot that has a little bit more information on it than what automatically prints out when you hit print on it, and then I have an audit trail from here that is generated by the system. It's -- it's generated as

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a CSV file that is obviously opened in Excel, and -- and then, of course, doesn't bode well in printing, but it's all printed out here.

Q. Okay. You just gave us a lot of information. I just want to kind of break it down and unpack some of it. So let's start with -- let's go from the end and work our way backwards. The audit trail, which is -- has CSV, separated values, what does that represent? What information is in that?

A. Well, so it's the first patient I've run an audit trail on, but it basically has every time a value is changed in Nextech or even if somebody views the record, it's just recorded.

Q. Let me take a look at that, if you don't mind. It's the first time I've seen it, so just give me a minute.

A. Yeah. I -- again, it doesn't -- it's not designed for an 8 and a half by 11 printer, so the columns are on separate sheets.

Q. Okay. So the subsequent columns -- and you see what I'm looking at here, and just for the record, it's a column that says different items, view patient records, all kinds of stuff. So those are separate columns from the beginning sheets that have the, looks like, date and timestamps?

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A. That would be first, second, third, fourth, fifth, sixth, seventh columns on the page, and then the next columns would be -- eight, nine, and ten would be on another page, et cetera.

Q. Okay. Is there a way to produce these -- the audit trail in a full Excel spreadsheet, such that it shows --

A. Yes.

Q. You know what I'm going to say. So you can follow from one column to the next?

A. Right.

Q. Is that something if your attorney asks you to send, you could send to her?

A. Yes.

Q. And you know how to retrieve it in Excel format?

A. Yes. It is in Excel format.

Q. Okay, great. So you just printed this from Excel?

A. Yes.

Q. Okay. So I understand that. And so just to break it down a little bit further, let's try looking at the first -- it looks like first page of the columns, which is on Bates stamp No. 5, it looks like -- just, for example, we could just do the top

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so I can have an understanding of how to read it.

So first column it looks like it says 12/19/23 [sic], which I assume is the date of December 19th, 2013. It says T17:38:46.000-05:00, and then it says, O'Neill Plastic Surgery, Daniel Island, Kyle, 5700, 4215 Whitfield, Jean. That's the time, obviously, and date that there was first an entry into Nextech for this patient?

A. Well, and I don't -- I printed it as it pulled out, and I noticed that it wasn't necessarily exactly in chronological order.

Q. Oh, okay. Well, that's good to know. But it looks like appears roughly -- more or less, it looks like it is a little out of sequence at some points.

A. It's definitely out of sequence.

Q. Is there a reason it's out of sequence?

A. I did not want to change the sequence. I did not --

Q. Okay.

A. -- re-sort it.

Q. That's just the way it came out?

A. That's the way it came out.

Q. And the way you printed it, is that the way -- if you recall, the way it was projecting when you had it in the computer?

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A. I didn't check. I just printed it, made sure the print screen was correct, and hit print, and then I gave it to you.

Q. Gotcha.

A. Or gave it to my lawyer.

Q. If Ms. Showers asked you to send this to her in Excel format, could you also see if there's a way -- not disturbing the integrity of the data, but just to see if there's a way to sequence it, or if this is the way it comes?

A. Well, if you look at it, it's problematic in that it will sort by year and by month, but after that, it would sort by ones, the first digit, and, for example, it won't necessarily be in perfect order.

Q. Okay.

A. But you certainly can take the file and sort it.

Q. Okay. All right.

A. I'm happy to sort it for you. I can do that, but it's not -- it is still not going to be in absolute chronological order.

Q. So is that the only way you can do it is manually?

A. I'm not that facile with it, but yes, I think

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that would be the only way to do it.

Q. So where it says -- going back to the top line, it looks like it's timestamp, and it says, Kyle, 5700. Who is Kyle?

A. So Kyle was a front desk person at my office, and she has moved on out of the practice.

Q. Okay.

A. The 5700 is an internal database number, and the 4215 is our -- is the patient number.

Q. Okay. So obviously the patient number --

A. It's a medical record number.

Q. -- has changed, and then it looks like --

A. Her name did change at some point from Jean to Jeane.

Q. Oh, I see, but the patient number never changed, it doesn't look like, correct?

A. Correct.

Q. What about -- what does 5700 mean?

A. It's an internal database number that I've never seen before.

Q. Okay. And it looks like that number never changed either?

A. It appears that way.

Q. Okay. Let me just go through these people. We talked about Kyle. Who is Vicky?

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A. That would be Vicky Tolbert.
Q. Okay. And she was not an employee of Sweetgrass Plastic Surgery?
A. She was an employee of Sweetgrass Plastic Surgery, yes.
Q. Was she ever employed by O'Neill Plastic Surgery?
A. Yes, she was.
Q. When was she employed by O'Neill?
A. When she first came out -- when Dr. Schimpf and she came out into our office, initially they -- she was an employee of O'Neill Plastic Surgery. In other words, got her paycheck through us.
Q. Okay. And how long did that last?
A. I am not exactly sure, but -- I don't really know the answer to that.
Q. Okay.
A. A year or year and a half, maybe. It may be less than that. I just don't know.
Q. Okay. Was that before Dr. Schimpf left O'Neill Plastic Surgery's facilities?
A. It should correlate with that time, but I don't know if that's exactly --
Q. In other words -- sorry, I don't want to cut you off.

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A. So I don't know when she stopped being paid --
Q. Okay.
A. -- by us.
Q. All right.
A. By O'Neill Plastic Surgery.
Q. Dawn is Dawn Trusdale?
A. Her name is Truslow.
Q. Truslow, sorry, and she was your employee?
A. Correct.
Q. Continuously?
A. Yes.
Q. Was Vicky Tolbert the only person that was your employee and then also was working with Dr. Schimpf?
A. No. There was Shannon Driggers as well.
Q. And that would be S. Driggers as in here?
A. I believe so.
Q. In Exhibit 1. What about -- what is -- who is Candler?
A. Probably Chandler.
Q. Chandler?
A. She's a current employee of mine. Was not an employee during this time. We have had to look at the records a number of times because of requests.

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Q. Okay.
A. So I haven't seen what she did.
Q. Right, and I understand there's been a lot of requests for these records over the last few years.
So what about Biggers?
A. That would be Megan Biggers. She's a PA of mine. She's not currently working.
Q. But still employed by you or not?
A. No. She's on an extended leave of absence due to health issues of her family.
Q. Okay. Dr. O'Neill, we know who that is. Marie Price, it looks like.
A. Marie Price.
Q. Who is she?
A. Business manager.
Q. Still employed by you?
A. Yes.
Q. Kaitlyn?
A. Mary Price was very shortly employed also by Sweetgrass when he moved out to help them transition.
Q. Thanks for that explanation. Kaitlyn?
A. Uh-huh. Kaitlyn Francis, she's currently an employee of mine and had just started in 2014 at some point.

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Q. Okay. Still your employee or --
A. Yes.
Q. And when did Dr. Schimpf leave the O'Neill Plastic Surgery facility?
A. So we separated businesses almost exclusively at the end of 2014, but he still used my operating room for a number of months after that.
Q. Okay. So your facility is an ambulatory surgical facility?
A. We have a fully accredited surgery suite, yes, and that's what he was using.
Q. And it has always been in that status since he was performing procedures there in what I believe was 2014 or maybe earlier?
A. Yes. It has been there since 2009, and has been fully accredited since that time --
Q. Okay.
A. -- continuously.
Q. All right. Krista with a K, I don't think we mentioned her; who is she?
A. She's my office manager.
Q. Okay. Presently?
A. Uh-huh. Yes. Go ahead.
Q. Was she employed in 2014 as well?
A. She was. Had just arrived in 2014 as an

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employee.
Q. Okay. Did we say Megan Gross? I can't remember.
A. No. She was functioning as a medical assistant and scribe. She's now in medical school.
Q. Was she assisting as a medical scribe to you or to Dr. Schimpf?
A. To me.
Q. Okay. Is there a reason she was not working as a scribe for Sweetgrass or Dr. Schimpf? Any reason you may know of?
A. No. I don't know the answer to that.
Q. Okay. So just for the record, you don't know why she was working as a scribe for you but not for him?
A. She was hired as a scribe for me.
Q. Okay.
A. And I just don't think she ever scribed for him. I don't know the answer to that.
Q. No reason why -- you don't know why? You shared medical record systems is my gathering.
A. Right.
Q. But no reason why the scribe was never shared?
A. I don't know. I don't think he wanted to use

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a scribe at that point. I just don't know. I don't know the answer.
Q. Okay. You mentioned Dawn, correct?
A. Yes.
Q. And I understand Dawn passed away.
A. She did.
Q. When did she pass?
A. In January of last year -- oh, of this year, sorry. 11 months ago.
Q. '18? '17?
A. January of '18.
Q. January, okay. R. C-O-B-L-E, who is that?
A. Rebecca Coble, she was an employee, laser tech esthetician, and medical -- and she would, you know, take care of the phones as well.
Q. And --
A. She does not work with us any longer.
Q. And were all these people accessing these records in some kind of administrative function, or was there a reason for them to be looking at these records or --
A. Well, you can look and see what they were doing, but, yeah, most of it was administrative, yes.
Q. And that's because the -- at the end of the

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columns it has a description somewhat of what their function is at that time or not?
A. What happened during -- you know, what they were doing.
Q. Gotcha, okay. And then, obviously, the program puts out what the description is?
A. Yes.
Q. Okay. All right. If you look at the Bates label that's not -- look at this, 12, it mentioned some PDFs there. Do you know what those are?
A. Yes. Those PDFs are what was in the history file here.
Q. Okay. As long as they're in here.
A. They are.
Q. Okay. A lot of these columns say, viewed patient record, viewed patient record a lot. Is there any way to tell from these column headings if anything was changed when any one of these entries happened?
A. Well, I didn't write the program for the audit trail. You'd have to ask the Nextech company, but it's my assumption that if it says "viewed," someone looked at the record and didn't make any changes. It does say there frequently, changed value, and then it will say what the value was.

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Q. There's no column heading, at least on this sheet. On the Excel is there a column heading?
A. No.
Q. No?
A. I printed it as is.
Q. Okay. Well, the far right -- it looks like the far right column, at least on this page, I'm referring to Bates stamp 16, it says, Patient Prescription Queue status changed. Prescription status for Bactrim DS incomplete. Do you know what that means?
A. I don't know why it's marked incomplete, but, you know, it looks like a prescription was written for those medications, but I didn't -- I didn't write the prescription, so I don't know.
Q. Right, but do you have an understanding if on that document it says incomplete, does that mean it was, you know, prescribed but not filled or any reason to -- based on your experience of what incomplete means with regard to this program or this audit trail?
A. I do not.
Q. Is it accurate to say that this audit trail just is one way that Nextech is representing a lot of the information that's put in printed form from

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what Nextech generates, such as operative report or anesthesia form?

A. Not sure I understand the question. It doesn't generate an operative note, but it -- in my understanding of an audit is that it records every time anything is done inside the chart.

Q. Okay. I understand what you're saying.

Okay. So we talked about the audit trail, and then you also said that there's a -- the screenshot, which it appears to be on the top two pages -- or top -- it looks like on the first and fourth page -- or the first and fourth page. I just can't read it, it's so small, but is the first and fourth the same page, or do you recall?

A. It is the same.

Q. Okay. And with the caveat that I can't read it. Is there anything -- and Mr. Showers, before the deposition, said she could shoot me a legible copy electronically.

MR. HALVERSEN: Oh, thanks.

MS. SHOWERS: You can spread it just on the screen if you want to make it bigger.

BY MR. HALVERSEN:

Q. And I think you kind of alluded to this when we first started, but just to clarify, is there any

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information in this screenshot that's not in the appointment ledger?

A. Yes. That's why I printed it. It just has who -- it has who was the login, when it was modified, who it was modified by, and what location it was done from, but otherwise it's the same.

Q. Okay, I see.

A. When you're on this screen on the EMR, and you hit print, it gives you this.

Q. Okay, so there might be a little more information on the screenshot.

A. Just wanted to make sure that I complied with the subpoena to have everything we could.

Q. No. I appreciate it, and I think that's what the subpoena calls for.

So we can go through an example on the top screenshot, and if you can't read it, I can share the screen. It says, July 23rd, 2014, Wednesday, start 4:30 p.m. Notes four week follow-up, status pending. Do you see that entry?

A. Yes.

Q. And then there's an input, day modified, and modified by. Where it says status, when it says "pending," what does that mean to you on the system?

A. Well, the -- when an appointment is created, it's immediately put into a pending status, and then if the appointment is canceled, it should be changed to canceled. If the patient has been seen and has left, it should be changed to out.

Sometimes the pending doesn't get updated for various reasons, but that's -- what it would mean is, at least ideally, that the patient -- the appointment was made but not -- but the status was never changed. That's what it means, the status was never changed. Why it wasn't changed could be that the patient didn't show up or something, or we just didn't change it -- somebody didn't change the status.

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Q. Where it says "out," what does that mean to you?

A. It means generally that the patient was seen, and once the patient has left for the -- from that appointment, the status should be changed to out.

Q. Okay. Let's look -- okay. It looks to me like everything in the screenshot contains the same information that's in printed appointment ledgers, with the exception of it shows who inputted it and who modified it and who, looks like, canceled it, if it was canceled, and the location of the entry; is that accurate?

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A. That sounds accurate.

Q. Okay. Thanks.

MR. HALVERSEN: Yeah. Barbara, if you could shoot me that screenshot, I would appreciate it.

Q. Okay. So we talked about the audit trail, talked about the screenshot. The -- what is -- you mentioned the history file, what is the history file part of this Exhibit 1?

A. It's part of the record of the EMR system that contains documents that are attached to the system, not typed into the system. If you look on the screenshot, there are tabs at the top that have multiple things on them. We're looking at the appointment tab, but there's also a history tab, which is four tabs to the right.

MR. HALVERSEN: Sorry, Barbara, can I see your laptop again? I can't read it.

Q. Okay. I see the history tab, and then in the history tab would be what kind of -- what types of documents that are in Exhibit 1?

A. Anything that is -- that comes from outside the EMR, either electronically or on paper, obviously, are scanned in. And so, for example, consents that are hand signed would then be scanned

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into a PDF file, would then be attached in the history file. The EMR file, a true electronic medical record, doesn't have anything that's brought in. It's created in the system.

Q. Right.

A. So the history file is anything that's brought in from outside in electronic format and attached to the record.

Q. Okay. So, for example, signed consent forms would be in this history file?

A. Correct.

Q. And when you clicked on the history tab, did it just drop down and have all the items that were scanned in?

A. Yes.

Q. And were they, like, PDF formats?

A. Yes.

Q. So in Exhibit 1 you've got scans, a signed consent form, it appears, correct?

A. Yes.

Q. That are initialed. It looks like there are unsigned consent forms. Would those be generated -- were those in the history tab as well?

A. As I mentioned previously, the consent forms when they -- when they are generated are pushed to

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the history file and then printed. The patient signs them, and then we scan them back in. Therefore, they end up being duplicated; one unsigned copy, one signed copy. And just to be -- just to say I've given you everything, I have given you everything.

Q. Okay. I appreciate that, and that's what you're supposed to do.

What about the operative record, that was in the history part --

A. Correct.

Q. -- I understand from your testimony? Yes?

A. Yes.

Q. Is there a way of determining how the operative record got into the --

A. Yes. It's in the audit trail.

Q. Okay.

A. But I don't know where it is.

Q. Is that something you can determine from looking at it right now, or is it too difficult because they are all columns, they are segmented?

A. It would take some time, but...

Q. It's near the beginning. It's, like, 30 pages -- 33 pages deep into it before the consents.

A. I thought there might be a table of contents

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in here for the history file, but I don't see it. I don't think there is.

Q. Okay. Is that something that there is a table of contents?

A. It would just be a screenshot of that.

Q. Of what's in there?

A. Uh-huh. Not really part of the record.

Q. I understand.

Let's go to behind the appointment ledger. Is there a -- why is there not a -- there's a financial ledger that says O'Neill Plastic Surgery at the top, and I'm -- I'm not sure -- it's in here somewhere.

MR. SMYTH: What is it we're looking for?

MR. HALVERSEN: It's a financial ledger. It says O'Neill Plastic Surgery.

A. It's in here somewhere.

Q. I don't see it in Exhibit 1, but I've got it somewhere else.

A. That's it.

MS. SHOWERS: This is from the stack that you had.

MR. HALVERSEN: Right.

A. Okay.

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Q. It's not in the stack you gave to me today.

A. I can get you an updated copy, but it's right there in what you already have.

Q. Okay. We will discuss that in a second.

So we've talked about the audit trail, the screenshot, the history file there in the tab on the screenshot, and then the other component you identified to Exhibit 1, was the EMR section. So I imagine that would be the preprinted forms where it's got, for example, the anesthesia or the OR record; is that what the EMR section is?

A. The EMR isn't really preprinted, but there is some templates that help us -- or guide us to fill them out, and the OR record is one of those. The anesthesia record is separate and is part of the history file.

Q. Okay. So what would be in the EMR section?

A. Anything that is performed electronically in the EMR itself. Everything else is in the history file.

Q. Okay. So in Exhibit 1, what documents would that correspond to?

A. It corresponds to the OR record primarily and one other document, which I'll have to -- the online patient surgery consultation history. Those are the

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only two items in this electronic medical record.
Q. Okay. Now, let's mark this stack of documents, which I brought here today, which I'll represent to you were medical records that I requested pre-suit, and I think the request form from my office is in Exhibit 1, and then we'll mark that as Exhibit 2 to your deposition.

(PLAINTIFF'S EXHIBIT NO. 2
WAS MARKED FOR IDENTIFICATION)

Q. And if you go near the end, you will find this financial ledger. It looks like that.
A. I got it.
Q. And, actually, let's just rewind before we get there. Look at the top page of this exhibit, and it's a letter from you to me. Is that your signature at the bottom?
A. Yes.
Q. It says, you're in receipt of my letter dated October 19th, 2015. It says, please find the enclosed electronic medical records for Dr. Schimpf's patient, Jeane Whitfield. This PDF binder represents all information that exists for this patient stored by O'Neill Plastic Surgery. All of

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this information is in our electronic medical records system. There's no information stored at O'Neill Plastic Surgery, PA, for this patient outside of our electronic medical records system. Just want to ask you about that sentence right there. Did you have a chance or were you shown the deposition testimony of Dr. Schimpf?
A. Yes.
Q. Did you review it in its entirety?
A. No.
Q. Did you review the parts where he discussed the medical records?
A. Yes.
Q. And I'll represent to you, and if you've read it, correct me if I'm wrong, but I believe what his testimony was, was that you had this Nextech system that was cumbersome and difficult, but he tried to use it, but he also kept certain documents in a folder file somewhere on one of your computers. Do you recall that?
A. I recall that in his testimony.
Q. Do you know what he was talking about in terms of this, that he made -- I'm pretty sure testified that was outside of the Nextech system; do you know what he was talking about?

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A. He had a login to our network, which had a standard Windows file system. He had a documents folder that he could store things in. I think this sentence is still true, because I've searched the entire server for the patient's first name, last name, date of birth, and haven't found anything else.
Q. Okay. So you're aware of what he said was accurate, that there was some separate folders that he used to house -- store patient data. Do you know what he was talking about?
A. Honestly, I was a little confused by the testimony. At times I thought he was referring to the photograph -- the photo system we had, which had folders in it as well.
So there's two -- there's only three places anything could be. It's either Nextech, in our Windows file system, which is a standard Windows system, and in the -- our photo database.
Q. I'm sorry, the Nextech system, the Windows database?
A. Just a normal server that was set up by a professional group. Everybody has their own personal folder system. So all -- all data is stored on the server, not on their independent

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computers, and he had his own place to store them.
Q. On the server?
A. Yes, but that's not where we store electronic medical records. We store electronic medical records in Nextech, but he had access to it. Just like any Windows computer has a folder file system, that was present on our system.
Q. Okay. There was a folder file system that he used on --
A. I don't know if he used it or not. That folder is currently empty, his file folder. Let me -- let me -- I'm not sure of that last statement. I don't know if it's empty.
I did find on a full search through our system that there was a folder with photographs that had been taken out of our photo systems and put into a folder, and I believe those are the ones that he then took with him to his office.
Q. Okay.
A. And left them in a separate folder, but that's not where, you know, we store our information typically.
Q. Okay. So just trying to understand what you're telling me, and I think I do, when he left your -- not your practice, but when he left whatever

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your office arrangement was, he dragged the photos from the other database into a folder, and those are still present there? You could still see those there?

A. Yes.

Q. Okay. And was that in, like, a master folder that used to contain information?

A. I'm not sure I understand the question. It was within his or Vicky's, I'm not sure. I searched for that, and I found the folder that I didn't know existed of patient photographs on our server. It appears to be the photographs that he collected to then copy to his system up in Summerville. I don't know that for sure, but it did not include any photographs of this patient.

Q. Okay. How do you know what this patient's photographs would have looked like?

A. Well, all of those photographs had metadata on them, including names and dates of visit, dates the photographs were taken, and none of them matched.

Q. Okay. And when you just found that file with the pictures on it, was that in response to coming here for this deposition, or was that previously?

A. It was in response to this deposition. I found it a few weeks ago.

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Q. Okay. And so just to be clear, was that -- that folder, though, had already been -- was already set up -- and let me just back up. So not getting too down in details, but I assume you have more than one computer in the office?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. And so can anyone internal access the same information because it's living on your server?

A. No.

Q. Okay.

A. It is a standard Windows File Server system where everybody has access to their stuff and any folder that we chose to share with them on an administrative level. So everyone has their own folder that nobody else can look at except an administrator, and in that case, it would be me, and it takes me an effort to get to that folder. I can't just scroll to it and point and click and open it. I've got to do a little bit of work on the server to get to it because it's not mine.

Q. Okay. So there's some kind of permissions-based system --

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A. Absolutely.

Q. -- to get to wherever data is on all these different terminals?

A. Absolutely, yes.

Q. So this folder was living where, if you had to describe where it was?

A. You know, I don't remember exactly where it was, but it was on our server, and it came up on a search that I was doing.

Q. Okay.

A. And I don't know exactly what sub folder it was in. It could have been in his personal sub folder or Vicky's personal sub folder, and he could have stashed it somewhere in our shared folder that nobody would ever look, but I don't know where that is.

Q. And then how did you find it? Like what -- before that, let me ask you, was there a name for the folder? Did it have a name, or how did you identify it to know to look into it?

A. I don't recall exactly, but it probably said photos, and I was looking through their personal folders that I wouldn't normally look in in response to all of this to try to find things.

Q. Okay. So their personal folders, does it say

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DKS, his initials, or Schimpf, or Sweetgrass? What are the names of those folders?

A. They are personal, so it would be -- you know, for their personal documents it would be -- I don't know what it's called, Dennis Schimpf -- Dennis K. Schimpf, whatever, and then Vicky Tolbert. It would be their login.

Q. Their login user credentials?

A. Yes.

Q. Is that how you found this photo sub file?

A. Looking -- I don't know. I can't remember if they -- what file they were in. It's been a couple weeks ago that I looked at it, but I did find it when I was looking through their folder system to make sure we didn't have anything. I was trying to make sure we didn't have anything that, you know, I didn't know about. Obviously, I gave you everything I knew about at the time here, and I found those photos.

Q. Was there any other data in the -- their personal folder files? When I mean "their," I mean Vicky's or Dr. Schimpf's.

A. I'd have to go back and look. I was really looking for, you know, photographs and such. There -- one of their's was empty, and one of their's had

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data in it, but I can't remember which was which.
Q. MP?
A. Empty.
Q. Empty, okay. Is it your understanding that those folders ever had data, or did they ever use it to house --
A. I have no knowledge of that, whether they did or didn't.
Q. Okay. When I first asked you about these folders that existed independent of the Nextech, you thought that there was -- that those were currently empty; those were, I believe, the words you used.
A. Right, and then I wanted to correct myself and say, I'm not sure.
Q. Okay.
A. But I think that one of them had files in it and one of them didn't. I didn't -- you know, I don't have that information. None of that was relating to this case.
Q. I understand, and so just to kind of -- kind of zoom out for a minute as to what we're talking about, I think Ms. Tolbert testified that, for lack of a better term, that you all shared the facilities and the medical record -- the EMR. Obviously, he had his own practice to set up. Is that a fair

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descriptio, that they were still responsible for inputting the information and taking the information down, it just so happened to be your equipment and your software that they were using?
A. Yes.
Q. Okay. Did you use any of the -- did you read Vicky Tolbert's deposition by chance?
A. Yes.
Q. Did you happen to use any of the dictation systems that Dr. Schimpf and Sweetgrass used to record their patient encounters?
A. No.
Q. Is there a reason why he used that for his operation and you did not?
MR. SMYTH: Object to the form.
BY THE WITNESS: You're going to have to ask him that question. That was a business decision on his part, and you know, I suppose he preferred dictating and having somebody put it in the chart.
BY MR. HALVERSEN:
Q. Okay. Was there a way for him to use either your software or your hardware to record patient encounters?
A. Yes.
Q. And what would that have been?

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A. Well, the Nextech EMR, he could have -- anybody who uses it can type directly into it or upload a document into the history file.
Q. Okay. So there's nothing preventing him from using it to record patient encounters?
A. No.
Q. Did you have an understanding of whether he was using Nextech EMR to record patient encounters?
A. I don't know. He certainly had access to it, and I know he didn't like it.
Q. Do you know why he didn't like it?
A. You'd have to ask him that question. He -- he said he thought it was cumbersome.
Q. Before Dr. Schimpf left -- not really left, but after he stopped sharing facilities with you, which I understand was in 2014, according to his testimony; does that sound right?
A. Yes. Again, we, more or less -- he stopped using my office in late 2014, except for the OR, which continued into early 2015.
Q. Okay. That's right. You already told us that. I'm sorry.
So were you aware before he left that he had any kind of issues or problems with maintaining patient's records?

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A. Yes. I became aware of a few records that weren't present.
Q. Was that before he left or after he left?
A. Before he left, but I wasn't in the business of going behind him to check to see if he did records.
Q. Okay. So how did you become aware that there was -- there were issues?
A. Just when -- on occasion when I would see his patients, there wouldn't be a note on occasion.
Q. And so I understand, were there some patients that you guys shared?
A. A few, mostly DIEP, stands for Deep Inferior Epigastric Perforator breast reconstructions. Those we typically done with two surgeons, and we did them frequently together.
Q. Is that a situation where he would rely on your expertise for that particular procedure?
A. We were co-surgeons, so we relied on each other, yes.
Q. In those instances where you saw there was a -- a lack of a medical record, did you bring that to his attention?
A. I never saw a lack of a medical record on a DIEP patient.

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Q. Okay. And then just moving back a little bit. I thought you said there were times, before he left, where you would become involved in a patient's care with him that you would see that there was a medical records issue.

A. We cross covered for each other, and occasionally I would look in the record when I would see a patient.

Q. And did you ask him why there was not a medical record in that particular instance?

A. Perhaps not specifically for each episode.

Q. I understand. Were you ever given an explanation as to why there was not a medical record in these instances?

A. Not that I recall.

Q. Did you ever become aware of -- before you left, of an instance or issue with the medical records with regard to this patient?

A. No. Not to my recollection.

Q. Okay. When did you first become aware that there was an issue with the medical records with regards to this patient?

A. Upon receipt of the records request.

Q. Okay. Not this year though?

A. No. So just to clarify, you know, from a

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HIPAA standpoint, I don't have access -- or I shouldn't access records that I don't need to see, and so I don't go looking through records, and I didn't get in until we had a records request, probably, specifically, you know, ones asking for more records.

Q. Right. I think I know what you're referencing, which is in Exhibit 1 there's a letter from a lawyer that was addressed to you and to Dr. Schimpf about incomplete records; is that fair?

A. Yes.

Q. And I apologize if I asked this. Did you have a system -- you were using Nextech to record your patient encounters; is that right?

A. Yes.

Q. And how were -- how were your patient encounters -- how did your patient encounters make it to -- what device or system were you using to get your patient encounters into Nextech, like a Dragon based system or something else?

A. As I mentioned earlier, I had a scribe, and so she took notes that I would then sign, or I would type them, or I would use Dragon.

Q. Were you using those different systems in 2014?

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A. Yes.

Q. Scribe?

A. Yes.

Q. Dragon?

A. Yes.

Q. Or yourself performing -- writing the note?

A. Yes.

Q. And do you know if -- have any explanation as to why Dr. Schimpf or Sweetgrass wasn't using those systems?

MR. SMYTH: Object to the form.

BY THE WITNESS: I don't. That was his business decision.

BY MR. HALVERSEN:

Q. Okay. Did he ever ask you to share those systems with him, the scribe or Dragon software?

A. Not to my recollection.

Q. Okay. Ms. Tolbert, I'll represent to you, testified there was no way for patient's complaints to make its way to the chart in 2014. Was there any logistical reason in your building -- or the electronic or communications systems that your office employed, where there wouldn't be a technical -- there's a technical reason why if a patient called with a complaint, that, that information

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would not find its way to Nextech?

A. Well, you know, I can't speak for Sweetgrass' business practices, but Nextech does have a feature called a to do list that -- and we have phone call templates that the front desk can type out what the person is calling about and then assign it to somebody, then pops up on my to do list or whoever's to do list.

Q. Okay.

A. For more urgent things they can come find us or call us.

Q. Do you know if -- I guess you don't know based on what you're telling me whether Sweetgrass was using those functionalities at that time?

A. I do not really know that.

Q. I think I know the answer to this question, I just need to ask it for the record. Was Jeane Whitfield ever a patient of O'Neill Plastic Surgery?

A. No. She was a patient of Dr. Schimpf's. I did not see her nor interact with her at all.

Q. At your office how long were you using the Dragon system and the scribe?

A. I've used Dragon continuously since, I don't know when, 2011, best guess, but I used it intermittently for years before that.

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Q. Okay. How about the scribe?
A. Megan Gross was my first scribe. We've identified her earlier today, and she came on board -- I don't know exactly when, maybe 2013 would be a guess.
Q. Okay. Let's look at this. We kind of went off on a tangent, but I think we got through a lot of my questions there. But we were beginning to look at the financial ledger, which we marked as -- is in Exhibit 2 to your deposition. It's near the back.
A. All right.
Q. You got it?
A. Yes.
Q. Okay. Can you tell -- are you familiar with this printout?
A. You mean this one for this patient?
Q. No. With -- for the format of it. So is this -- I mean, it sounds like from your testimony you still use Nextech, right?
A. Yes.
Q. And this document came out of Nextech?
A. Yes.
Q. And so is it a practice management software for physicians where it's all in one? It's got

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anything, including the financial --
A. Yes.
Q. -- capabilities?
So is this kind of an internal audit document run, or I mean, where would you -- how would you do this, get this data?
A. It would be on the financials -- or the billing tab on the same front page that we have looked at before. It would be in the billing tab, and it's a drop down of charges and payments.
Q. And so my question to you is, where it says -- let's go to the second page. At the top it says, December 19th, 2013, charge, cosmetic sub consult, Dennis Schimpf, $50.00, cosmetic consult. On the audit trail, would there be a -- show who was putting that data in?
A. It should. I don't know if it covers the financial section, but it should.
Q. Okay. Are you aware of what their practice was for entering in when they would bill a patient for a charge under this software?
A. No, not exactly.
Q. Okay. Did it generate a document with a bill to the customer -- patient associated with the software or --

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A. Well, certainly the software can generate a quote, and it can also generate a bill to the patient, and it can generate a bill to an insurance company.
Q. Okay. So it can, but did it? I guess we don't have a bill for December 19th, 2013 or else we would -- I would have seen it, or I don't know. I'm asking you the question.
A. So that generally wouldn't have been printed. If there was a fee for that visit, which it looks like there was, the patient would be asked to pay it. In this case it looks like it was adjusted off, not paid, and so an actual invoice or bill would not be generated.
Q. Okay.
A. Bills are generated for -- for delinquent payments.
Q. I understand. Where it says adjustment under that entry, your understanding that there was no payment made for that? Is that how you read this document?
A. Yes.
Q. On the first page, or also, on the second page where it says above there, a charge for cosmetic consult, $50.00, is there any way to

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determine whether those charges were paid? And that goes for anywhere through the first page for a cosmetic consult.
A. Well, under the payments columns would be payments made. Under the adjustments column would be write offs.
Q. Okay. So that means it was made, okay.
Ms. Tolbert testified that you could upload dictations to Nextech, which is consistent with what you've told us here this afternoon. Do you know why there's no dictations for this patient that were -- that you found in Nextech?
A. I do not know.
Q. Do you know if any of the records were destroyed?
A. I do not believe so.
Q. And what leads you to that conclusions?
A. The audit trail.
Q. The audit trail?
A. The audit that we went through at the beginning.
Q. Okay. Because that would show --
A. If anything was deleted.
Q. Okay. And that's on the assumption that the record was put into Nextech, correct?

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A. Well, yes, because I don't think you can delete it unless it was put in there, right?

Q. All right. Is there a way to see if data was deleted out of the personal folders?

A. No.

Q. You're not aware of any?

A. Not to my knowledge. I'm not an IT expert though.

Q. Was there anything in the Tolbert or Schimpf depositions you disagreed with with regard to the medical records maintenance or policies that they testified to?

MR. SMYTH: Object to the form.

MS. SHOWERS: Object to the form. It's an improper question.

BY MR. HALVERSEN:

Q. You still have to answer.

A. I read them quickly, so I -- you know, I don't think that there was anything that was specifically and blatantly wrong, no.

Q. Was there anything generally wrong?

MS. SHOWERS: Object to the form.

MR. SMYTH: Same objection.

BY THE WITNESS: No, just I don't think Neztech's that hard to use.

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BY MR. HALVERSEN:

Q. Okay.

A. And the systems aren't that hard to use, but that's just my opinion.

Q. My grandfather said, all we have is opinions. Dr. Schimpf also testified that most of your staff couldn't use the EMR correctly; is that accurate?

MR. SMYTH: Object to the form.

MS. SHOWERS: Objection. That's pitting the witnesses.

MR. HALVERSEN: You can object to the form.

MS. SHOWERS: I can do more than that if you go outside the scope of a records custodian.

MR. HALVERSEN: I believe it is germane to the issue of the recordkeeping.

MS. SHOWERS: I'm not going to let it go much further.

MR. SMYTH: I object as well. It is an improper question.

MR. HALVERSEN: Your objection is noted for the record.

A. So to answer that question, we reviewed our Nextech EMR just recently in trying to decide if we should move it from server-based to cloud-based, and if so, should we change to a different system, and everybody in the office that I asked wanted to keep Nextech and thought that it was quite usable compared to the others out there.

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Q. You've had no problems with Nextech?

A. I've had problems with it, but, no, not -- it's -- I have learned it. It is moderately complex, as almost all these records systems are. You do have to spend some time with it. You do have to get to know it. We know it, and it works for us.

Q. Okay. The last area I want to cover with you and then we'll be done is the photographs. And I'm glad you read the deposition, because it's going to shortcut a lot of my questions.

So there was testimony from either Dr. Schimpf or Ms. Tolbert that the -- that the photographs were stored on an Apple database. They used an Apple database; is that accurate? Did you have an Apple database at the time?

A. Yes. So at the time and for years before, and for a couple years after, we used an Apple program called Aperture, which has been rolled into their program called Photo now. And the reason we used it was that one could take a picture, and the system was tethered so that that picture went directly into the database. Once you've plugged in the name and other basic demographics on the patient, you could take the pictures and they immediately uploaded. So they were automatically there filed correctly. And so we used it for quite some time, and we have switched to an industry standard database now from Canfield called Mirror.

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Q. Okay. At the time in 2014, for this patient, was your office using Aperture?

A. Yes.

Q. And then it migrated to a program called Photo?

A. Yes. Apple converted its iPhoto program and Aperture together into one program called Photo.

Q. Okay. Do you know when that transition happened?

A. No.

Q. Was it your understanding that, that was an automatic transition where they just upload -- changed the software and all the data stayed where it was and it was all transition automatically, or was there some kind of update or any transition issues?

A. I never transitioned to the new system

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because it lost the ability to tether and changed the folder system so that it wouldn't be as easily searchable.

Q. All right. The program Photo lost the ability to tether?

A. Correct. The program Photo does not have the ability to tether.

Q. Okay.

A. Which is why I moved to an industry standard database for photos.

Q. All right. In 2014 was -- was your office using -- or was it still working under the Aperture software?

A. Yes.

Q. Okay. And according to what you started to tell us, I believe what you said is that there would be an automatic linking of the patient's data, and that was the tethering process, meaning the pictures were taken in the camera, and then with a couple clicks it would code it and send it to a place that was identified for that patient; is that accurate, or if it's not and I'm misstating it then --

A. More or less, yes, but the tethering did not have to occur. You could take a photograph and then upload it by other means.

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Q. Okay. It was, I believe -- I can't remember which one it was, whether it was Dr. Schimpf or Ms. Tolbert, but I believe Dr. Schimpf said that it was Dawn who was responsible -- or took on that responsibility for them to upload or get the pictures either taken or migrated to some kind of a home where the data lived on -- on your systems; is that accurate or no?

A. That's my understanding of what he said, yes.

Q. Okay. Do you have a -- any knowledge as to whether or not that was what was occurring, or was there supposed to be a different thing that he was supposed to do with photographs?

A. No. He had access to all my systems, including the Aperture photo system, which is designed as a photographic database, and I do believe that he used Dawn to take photographs on occasion.

Q. So he had your permission to use her in that capacity to store photographs?

A. I didn't object to it. I don't know that I knew that he was doing that to start with, but it's absolutely fine with me.

Q. Okay. But at some point you knew that he was using Dawn or using your Aperture program to store

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his patient photographs, fair?

A. Yes. It was the intention that he use the Aperture program, and at some point I knew that he was having Dawn take the photos.

Q. Okay. So if this patient was -- had her procedure done, I'll submit to you, June 6th, 2014, do you have any explanation of how -- in considering the fact that she indicated she alleges she had pictures taken of her pre-operatively, do you have any explanation as to why those photographs did not -- were not found, given that Dr. Schimpf or Sweetgrass was using the Aperture system?

MS. SHOWERS: Object to the form.

MR. SMYTH: Object to the form.

BY THE WITNESS: I do not know why there were not photographs.

BY MR. HALVERSEN:

Q. Okay. And I believe you -- you did say that Aperture does tether, with the caveat that it could also be that the -- the user would have to -- or could manually upload them into the Aperture database; is that accurate?

A. That is accurate.

Q. Okay. And I believe -- would you still have the database for Aperture for 2014 patients?

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A. Absolutely. I've got the full database.

Q. Okay. And I imagine you've already done the search to see if there's photographs for this patient?

A. Multiple times using every keyword and metadata, including date of service I could do.

Q. And you actually physically did it? You didn't have somebody else do it?

A. I did it.

Q. You did the search?

A. Several times.

Q. Was that in one particular computer or a different computer or --

A. It's all on the same computer. It never left that computer, except for, you know, HIPAA complaint and backup reasons.

Q. Could you say that again?

A. The data was outside of the server and the network. It was on that computer, with the exception of the backup of that data --

Q. Oh, I understand.

A. -- which was in a HIPAA compliant form.

Q. Was it being backed up in 2014?

A. Yes.

Q. Do you know what software vendor was doing

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the backup in 2014?
A. Yes.
Q. Who was that?
A. Carbonite Pro.
Q. Did you try to figure out if Carbonite had a backup for it?
A. I don't use Carbonite anymore, so they don't have the backup, but those backups are not -- they're rolling backups, and Carbonite was a rolling backup. So I'm not sure they would have it, even if I still used them.
Q. What does that mean "rolling backup"?
A. It saves several generations of changes but not indefinitely.
Q. Okay. Before Dr. Schimpf left your -- using your facilities, did he have access to the Aperture program?
A. Yes.
Q. Do you have any knowledge as to whether Dr. Schimpf used the Aperture program?
A. I know he's -- you know, he's used it and looked at it previously, and there are patients of his on that Aperture database. How much he used it, I don't know. I didn't follow him around the office.

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Q. Is this the only medical records issue you're aware of with regards to this patient as it pertains to the Aperture systems?
A. With this patient? Well, I mean, I don't have any record of whether there were photographs or not with this patient.
Q. I'm sorry, my question wasn't clear. Did this happen on a different occasion with regard to another patient with regard to the Aperture system?
A. There were reports that photographs were missing. No photograph that I know of that I took with the tethered system was lost. At least the majority of the patient's photographs who we were looking for we could find with the metadata, as we referenced earlier.
Q. Were those reports of missing photographs, was that with Dr. Schimpf's practice or with your practice?
A. I am -- I'm not sure. It may have been both. I don't know.
Q. You read his testimony. Do you recall him saying that there could have been an issue with other photographs?
A. Yes.
Q. Do you have any knowledge as to what that

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statement was he was referring to?
MR. SMYTH: Object to the form.
BY THE WITNESS: Just what he said. He thinks there's other missing photographs.
BY MR. HALVERSEN:
Q. Right. My question to you is, do you have any information about what he was talking about?
A. I don't have any information about specifically what he's talking about, other than on occasion I would get reports saying they can't find photographs, but we were able to find at least most of them.
Q. "They" being his people?
A. The staff. I don't know.
Q. Somebody?
A. Yeah.
Q. Could have been a patient of his, could have been a patient of yours?
A. Yes. The database functions, we've got lots of photographs in them.
Q. And I believe he testified that he had an IT person come to your office; is that accurate?
A. I read that. I have no knowledge that, that occurred. I certainly wouldn't have let an IT person in that I don't know without a business

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associate's agreement, because there are lots of pictures of people. It may have happened, and for a while we were using the same IT person. So he could have looked for it, but I have no knowledge of that.
Q. Who would that IT person have been?
A. Joe Ninastat.
Q. How do you spell that, best of your ability?
A. It's Charleston Tech Support.
Q. Okay.
A. Joe at Charleston Tech Support.
Q. So save and except working with Joe to do something, you don't have any knowledge of him doing any kind of audit on Aperture to see if there were any photographs of this patient?
A. I'm sorry, who would do an audit? Joe or --
Q. Yeah. Joe, who's with Charleston --
A. Charleston Tech Support.
Q. -- Tech Support.
So save and except Joe at Charleston Tech Support, you don't have any knowledge of an audit being performed on the Aperture system regarding --
A. That's correct.
Q. -- retrieval and photograph records for this patient?
A. That's correct, and although I don't know

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everything about the program, I don't know that there's an audit system on it.

Q. Okay. Well, I understand what you're saying. You did some kind of a search on the system.

A. I did a search, but that's not really an audit.

Q. Okay. I understand. So save and except Joe from Charleston Tech Support doing a search on the Aperture database for this patient, you're not aware of anybody else doing any kind of tech -- any tech person or IT person doing any kind of examination on that database to look for our patient's medical records?

A. I was not aware of that.

Q. And my last question I -- Dr. Schimpf testified there were multiple problems with O'Neill Plastic Surgery's server. Do you know what he's speaking about there?

MR. SMYTH: Object to the form.

BY THE WITNESS: We have IT technical challenges every now and then, and they did exist. They -- they were fixed when we, you know, reported them. The system was set up by a professional group, and it's been maintained by an IT group the entire time.

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BY MR. HALVERSEN:

Q. I gotcha. Let me ask you this. Are you aware of any reason why a problem with your server explains why there's incomplete medical records for this patient for Dr. Schimpf?

A. Not that I'm aware.

MR. HALVERSEN: Okay. I appreciate your time. That's all the questions I have for you.

E X A M I N A T I O N

BY MR. SMYTH:

Q. Doctor, I just have one question for you.

A. Okay.

Q. I'm Todd Smyth. I represent Dr. Schimpf and his practice. Are you aware, after all of the searching that you've done, of any evidence that would suggest that Dr. Schimpf or anyone under his control, any employee or anybody at his behest, did anything to destroy or alter any of Ms. Whitfield's medical records?

A. No.

MR. SMYTH: Thank you.

MS. SHOWERS: And the witness check that was brought here is incorrect.

MR. HALVERSEN: How's that, Barbara?

MS. SHOWERS: The witness is entitled to

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mileage, which is 13.9 miles from his office to here, times two, times -- I've done the math at .545, which equals $15.15, plus the witness fee of $25.00. So it should be $40.15.

MR. HALVERSEN: Well, since you're bringing it up as an issue, I believe the calculation was 14.4 miles from the registered agent's address on file with the Secretary of State. I'd be happy to double-check that, and if there's an error in the calculation, I would be happy to submit any balance that was not owed.

MS. SHOWERS: That's how I calculated it, the distance from -- and I even took the shortest one.

MR. HALVERSEN: I used the registered agent's address for Sweetgrass Plastic Surgery [sic], which is the Cunningham Drive, which is on the check.

BY THE WITNESS: I would say that Sweetgrass better not be registered at my home address.

MR. HALVERSEN: You should change it, if you want.

BY THE WITNESS: O'Neill Plastic Surgery should be. I think you misspoke.

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MR. HALVERSEN: O'Neill Plastic Surgery.

BY THE WITNESS: You said Sweetgrass.

MR. HALVERSEN: Oh, yeah, no, not Sweetgrass, I apologize.

Barbara, if there's a discrepancy in the witness fee, I would be more than happy to, but I'm telling you the basis of how I calculated it.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

I, Sarah Gacioch, Certified Shorthand Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the witness in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and location therein stated; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing is a full, complete and true record of the testimony of the witness and of all objections made at the time of the examination; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself/herself of the opportunity to sign or the signature has been waived.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 9th day of January, 2019, at Charleston, Charleston County, South Carolina.

_____
Sarah Gacioch
My Commission Expires:
October 15, 2025

E R R A T A S H E E T

RE: JEANE WHITFIELD vs. DENNIS K. SCHIMPF, M.D., and SWEETGRASS PLASTIC SURGERY, LLC

DEPOSITION OF: PATRICK O'NEILL, MD

Please read this original deposition with care, and if you find any corrections or changes you wish made, list them by page and line number below. DO NOT WRITE IN THE DEPOSITION ITSELF. Return the deposition to this office after it is signed. We would appreciate your prompt attention to this matter.

To assist you in making any such corrections, please use the form below. If supplemental or additional pages are necessary, please furnish same and attach them to this errata sheet.

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_____ day of _____, 2019

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Notary Public

My Commission expires:_____

Errata Sheet

NAME OF CASE: Jeane Whitfield vs Dennis K. Schimpf, M.D., et al

DATE OF DEPOSITION: 12/17/2018

NAME OF WITNESS: Patrick O'Neill. M.D.

Reason Codes:

1. To clarify the record.

2. To conform to the facts.

3. To correct transcription errors.

Page _____ Line _____ Reason _____

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Exhibits

O'Neil- Exhibit 1 3:16 5:4,17,22 14:19 24:9,21 25:18 27:19 28:8,21 29:6 42:8

O'Neil- Exhibit 2 3:17 29:7,9 45:10

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STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF CHARLESTON

Jeane Whitfield., Plaintiff

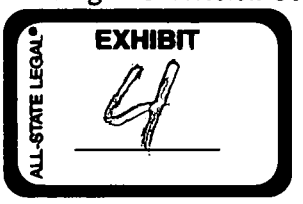
v.

SUBPOENA IN A CIVIL CASE

Dennis K. Schimpf and Sweetgrass Plastic Surgery

Case Number: 2017-CP-10-2758

Pending in Charleston County



TO: Records Custodian

O'Neill Plastic Surgery, P.A.

705 Cunningham Street

Daniel Island, SC 29492

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION 4	DATE AND TIME , AM

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

PLACE	DATE AND TIME , AM

☒ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES O'Neill Plastic Surgery, P.A. 245 Seven Farms Drive #210 Daniel Island, SC 29492 See Attached Exhibit "A"	DATE AND TIME Wednesday, December 26, 2018, 9:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

SCCA 254 (10/04)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

DATE 12/18/2018

ATTORNEY/ISSUING OFFICER'S SIGNATURE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

CLERK OF COURT/ISSUING OFFICER SIGNATURE	DATE	PRINT NAME

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE Attorney

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

_____
SIGNATURE OF SERVER

_____

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

i. fails to allow reasonable time for compliance; or

ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

iv. subjects a person to undue burden.

(B) If a subpoena:

i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or

ii. requires disclosure of an unretained expert=s opinion or information not describing specific events or occurrences in dispute and resulting from the expert=s study made not at the request of any party, or

iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

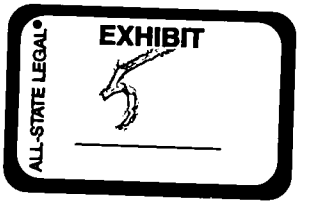
(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, Case No. 2017-CP-10-2758

EXHIBIT "A"

You are commanded to produce for inspection and analysis, by forensic mirror imaging, any and all office computers, hard drives, servers, or storage devices owned or in possession of the O'Neill Plastic Surgery that stored Jeane Whitfield photographs, and, the Dr. Schimph and Vicky Tolbert Personal Files as testified to by Dr. Patrick O'Neill on December 17, 2018, and Dr. Dennis K. Schimpf.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2017-CP-10-2758
JEANE WHITFIELD,	)	
Plaintiff,	)	**ORDER DENYING NON-PARTY O'NEILL PLASTIC SURGERY MOTION TO QUASH SUBPOENA**
vs.	)	
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC	)	
Defendants.	)	



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JULIE J. ARMSTRONG
CLERK OF COURT

This matter came before the Court on February 27, 2019 at 10:30 A.M. Present on behalf of the Plaintiff were Daniel S. Slotchiver, Esq. and Brent S. Halversen, Esq. Present on behalf of the non-party O'Neill Plastic Surgery (hereinafter, "O'Neill") was John Radeck, Esq. On December 21, 2018 O'Neill filed a motion to quash a subpoena for a forensic inspection of its hard drives and servers. The subpoena was served by Plaintiff.

According to Plaintiff, Defendants and stipulated by O'Neill, the Defendants utilized O'Neill's medical practice to store their medical records for the period of time when Plaintiff was a patient of Defendants. The Defendants have conceded that certain medical records and pre-operative photographs of Plaintiffs are missing and cannot be located. According to Plaintiff, pre-operative photographs of her were taken and presumably were in existence at least at one point in time. The Plaintiff has represented that she has no photographs of her condition before the malpractice complained of, and desires to show the jury photographs of her condition before the events complained of in the lawsuit.

According to O'Neill and stipulated by Defendants, any such photographs would have been contained on O'Neill's MacBook Pro, such device no longer being utilized by O'Neill to store its current data and is otherwise offline. The Plaintiff have proposed to utilize Steve Abrams, Esq. of Abrams Cyber Forensics to inspect the MacBook Pro utilizing forensic software which may be able to locate the photographs and/or determine if the data was ever deleted from the laptop computer.

Mr. Abrams has represented to the Court that the inspection process should be able to be accomplished in three weeks, that the integrity of the data on the MacBook Pro will be unaffected by the search, that he will retain none of the data, that he will not view any of the photographs employed in the search, and that his search will be performed in a secure environment. Mr. Abrams represented that the process of reviewing and indexing of the data should take about three weeks and he will perform this process at his office and bring the indexed data back to O'Neill's premises to search. The Court orders Mr. Abrams to complete the inspection as expeditiously as possible. O'Neill expressed a concern at the hearing about the patient data being physically removed from its premises. Mr. Abrams can alleviate any potential concern of O'Neill's by being allowed access to O'Neill's office to accommodate his search on its premises, as described above.

Any hit results of Mr. Abrams that have any positive markers (names, date of birth, social security number, etc.) for the identity of Mrs. Whitfield may be delivered directly to counsel for Plaintiff and Defendants. Any hit results of Mr. Abrams that have no positive markers for the identity of Mrs. Whitfield but fit the designed search criteria will be delivered to O'Neill, who is the present custodian of the data, to identify the patient in the photographs. The results of O'Neill's determination as to the patient's identity, in this

circumstance, shall be produced to counsel for Plaintiff and Defendants simply by identifying the particular photograph with the date of birth corresponding to the patient depicted in the photograph. If after inspection and reasonable inquiry O'Neill cannot determine the identify of the person in the photograph, and the parties cannot agree on a procedure to rule in or rule out Plaintiff's identity, the Court will retain jurisdiction of this matter to hear any such dispute.

Mr. Abrams can also execute any non-disclosure agreement, consent protective order, and/or HIPAA Business Associate Agreement (BAA) to satisfy any privacy concerns that O'Neill may have concerning the confidentiality of its data.

Accordingly, the Defendants motion in DENIED, as stated herein.

The Honorable Alex Kinlaw, Jr., Presiding Judge

March 11, 2019

Charleston, South Carolina

State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

Alex Kinlaw, Jr.
Judge

Greenville County Courthouse
305 East North Street, Suite 213
Greenville , SC 29601
Phone: (864) 467-8043
Fax: (864) 467-8035
akinlawj@sccourts.org

March 11, 2019

Charleston County Clerk of Court
Court of Common Pleas
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2258

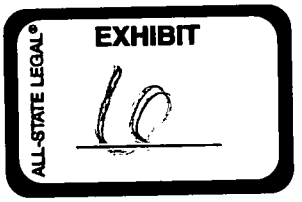
Re: Jean Whitfiled vs. Dennis Schimpf, M.D. and
Sweetgrass Plastic Surgery LLC
2017-CP-10-2758

Dear Clerk:

Enclosed herewith is The original and two (2) copies of the order in the above styled matter. Please file the same and facilitate copies to counsel on both sides.

Thanking you, I am,

Shannon Thurman
Administrative Assistant to Judge Alex Kinlaw, Jr.



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JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	FOR THE NINTH JUDICIAL CIRCUIT
Jeane Whitfield,)	C/A No. 2017-CP-10-2758
Plaintiff,)	
)	**SUPPLEMENTAL CONSENT ORDER ON NON-PARTY PATRICK O'NEILL, MD AND O'NEILL PLASTIC SURGERY'S MOTION TO QUASH SUBPOENA**
Versus)	
)	
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC,)	
Defendants.)	

The parties and non-party Patrick O'Neill, MD and O'Neill Plastic Surgery have hereby agreed to the following supplemental parameters to address privacy concerns with the previous Order of this Court filed on March 14, 2019.

The parties and non-party have agreed that the previous Order be modified to reflect that the "positive markers" for the search by Mr. Abrams be limited to the Plaintiff's "name, date of birth and social security number and date of her office visit." Further, any **images containing** positive markers that are identified during the search should be sent only to Dr. O'Neill at his practice to identify the patient rather than to counsel for the Plaintiff and counsel for the Defendant. **Any deleted images that do not match with the "positive markers" will be scored by a software algorithm to tag the filenames with the percentage of skin tones in the image. The deleted images that are at least 75% skin tone shall be separately sent only to Dr. O'Neill for visual inspection to determine if the images are of the Plaintiff or not.** Any images of the Plaintiff would then be produced by Dr. O'Neill to Plaintiff and Defendants. This procedure will protect other patient's highly private and sensitive photographs from being forwarded to counsel for the Plaintiff and counsel for the Defendant which would be a HIPAA violation and a breach of information that requires notice to the patient. Counsel for the Plaintiff has agreed to provide photographs of the Plaintiff to Dr. O'Neill for comparison purposes.

The parties have also agreed that during the inspection by Steve Abrams, Esquire at O'Neill Plastic Surgery, Mr. Abrams will make two identical copies of the data he extracts to be analyzed during his forensic review and provide one copy to Dr. O'Neill before Mr. Abrams leaves the premises with the second identical copy.

IT IS THEREFORE ORDERED that the Order of March 14, 2019 be modified specifically to identify the "positive markers" per the above; that all positive markers be sent to Dr. O'Neill for identification; that the search be done as much as possible on the premises at O'Neill Plastic Surgery; and that during the inspection by Steve Abrams, Esquire at O'Neill Plastic Surgery, Mr. Abrams will make two identical copies of the data he extracts to be analyzed during his forensic review and provide one copy to Dr. O'Neill before Mr. Abrams leaves the premises with the second identical copy.

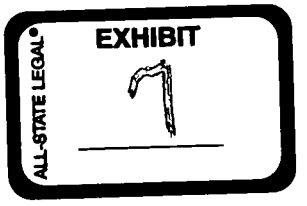
The Honorable Alex Kinlaw, Jr.
Presiding Judge

4/24, 2019
Cville, SC

HOOD
LAW FIRM
LLC

BARBARA WYNNE SHOWERS
Partner
(SC, TN, PA & NJ)
DIRECT DIAL: (843) 577-1207
EMAIL: barbara.showers@hoodlaw.com

AUGUST 2, 2019



Via E-Mail & U.S. Mail
Brent S. Halversen, Esquire
Brent Souther Halversen, LLC
751 Johnnie Dodds Blvd., Ste. 200
Mount Pleasant, SC 29464

Re: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC
C/A No. and Jurisdiction: 2017-CP-10-02758, Charleston CP
HLF File No. 84.066

Dear Brent:

As you know, Dr. O'Neill met with your expert Steve Abrams on July 20, 2019 at his office concerning the above-referenced matter. Dr. O'Neill spent three and half hours reviewing in excess of 10,000 photographs provided by your expert Dr. Steve Abrams. Dr. O'Neill's hourly rate is $500 an hour for a total of $1,750.00 for his services on July 20, 2019.

Kindly forward a check to my attention at your earliest convenience. If you have any questions or comments, please do not hesitate to contact me.

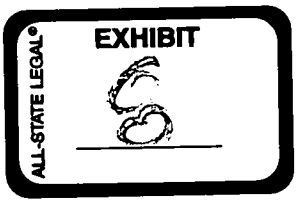
Kind regards,

Yours truly,

Barbara Wynne Showers

BWS/mde
cc: Todd W. Smyth, Esquire [*Via E-Mail*]
Stephen M. Slotchiver, Esquire [*Via E-Mail*]

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	) CASE NO. 2017-CP-10-2758
JEANE WHITFIELD, Plaintiff,	)
vs.	) **AFFIDAVIT OF PATRICK O'NEILL, MD AS OWNER AND RECORDS CUSTODIAN FOR O'NEILL PLASTIC SURGERY, P.A.**
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC, Defendants	)



Patrick O' Neill, MD, personally appearing before me, who being duly sworn, states the following:

1. My name is Patrick O' Neill, MD, I am over the age of eighteen, and have personal knowledge of the facts stated herein.

2. I am a medical doctor licensed in South Carolina and I am board certified by the American Board of Surgery and the American Board of Plastic Surgery.

3. I am the owner of O'Neill Plastic Surgery and records custodian for O'Neill Plastic Surgery in the above referenced matter.

4. I spent several weekend days at my office with Steve Abrams, a forensic examiner hired by counsel for the plaintiff, to facilitate a forensic review the photographs contained on the laptop computer of O'Neill Plastic Surgery where such photographs were stored. During the time of the treatment of the plaintiff in this matter, Dr. Schimpf was authorized to store his patient's photographs on the laptop computer when we shared office space. The purpose of the forensic review was to determine if any photographs of the plaintiff were ever on the laptop computer and/or determine if data was ever deleted from the laptop computer.

5. The forensic review by Mr. Abrams produced approximately 11,606 images/photographs for me to review.

6. Over the course of approximately three and a half (3.5) hours I reviewed the approximately 11,606 images.

7. None of the photographs Mr. Abrams provided to me as part of his search appeared to be that of the Plaintiff in this matter and there was no evidence that any records or photographs pertaining to Ms. Whitfield were altered, deleted or destroyed.

FURTHER AFFIANT SAYETH NOT.

Patrick O' Neill, MD, Records Custodian
for O'Neill Plastic Surgery, P.A.

SWORN TO before me this 16th **day of August, 2019.**

Notary Public for South Carolina
My Commission Expires: 10/27/2026

DANIELLE CIOS
Notary Public, State of South Carolina
My Commission Expires 10/27/2026

BRENT SOUTHER HALVERSEN, L.L.C.

RECEIVED AUG 1 9 2019

BRENT S. HALVERSEN*
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brent@halversenlaw.com

751 JOHNNIE DODDS BOULEVARD
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*ALSO ADMITTED IN FLORIDA

ALL-STATE LEGAL® EXHIBIT

August 19, 2019

VIA BY HAND DELIVERY

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., Ste 106
Charleston, SC 29401-2258

RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, Case No. 2015-CP-18-615

Dear Ms. Armstrong,

Enclosed please find an original trial subpoena for the Records Custodian for O'Neill Plastic Surgery, P.A. By copy of this correspondence, I am serving O'Neill Plastic Surgery, P.A.'s counsel of Record, Ms. Barbara Showers.

If you have any questions or comments, please do not hesitate to me.

Sincerely yours,

Brent S. Halversen

BSH/ak
Enclosure(s)

cc: Mr. Todd Smyth (Via E-Mail and U.S. Mail Only)
Ms. Barbara Showers (Via E-Mail, By-Hand Delivery, and U.S. Mail)

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF CHARLESTON

Jeane Whitfield., Plaintiff

v.

SUBPOENA IN A CIVIL CASE

Dennis K. Schimpf and Sweetgrass Plastic Surgery

Case Number: 2017-CP-10-2758

Pending in Charleston County

TO: Records Custodian

O'Neill Plastic Surgery, P.A.

245 Seven Farms Drive, Suite 210

Daniel Island, SC 29492

☒ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM Courtroom of Hon. Roger Young
Charleston County Circuit Court 100 Broad Street Charleston, SC 29401	DATE AND TIME Thursday, August 29, 2019, TBD PM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , PM

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

PLACE	DATE AND TIME , AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

DATE 8/19/2019

ATTORNEY/ISSUING OFFICER'S SIGNATURE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

	8/19/2019	Brent S. Halvorson
CLERK OF COURT/ISSUING OFFICER SIGNATURE	DATE	PRINT NAME

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐ NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY Brent S. Halversen , Esq.		TITLE Attorney

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

_____
SIGNATURE OF SERVER

_____

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

i. fails to allow reasonable time for compliance; or

ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

iv. subjects a person to undue burden.

(B) If a subpoena:

i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or

ii. requires disclosure of an unretained expert=s opinion or information not describing specific events or occurrences in dispute and resulting from the expert=s study made not at the request of any party, or

iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

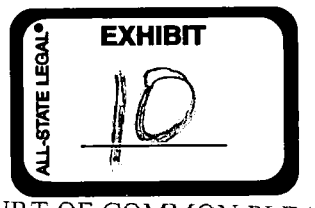
the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
Jeane Whitfield,	)	C/A No. 2017-CP-10-2758
Plaintiff,	)	
	)	
Versus	)	**NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA TO NON-PARTY PATRICK JOSEPH O'NEILL, MD**
	)	
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC,	)	
Defendants.	)	

TO: BRENT S. HALVERSEN AND DANIEL S. SLOTCHIVER, ATTORNEYS FOR PLAINTIFF

PLEASE TAKE NOTICE that the undersigned attorneys for Patrick O'Neill, MD and O'Neill Plastic Surgery (collectively "Dr. O'Neill), hereby move this Honorable Court for an Order quashing Plaintiff's August 19, 2019, subpoena to Dr. O'Neill, a copy of which is attached hereto as Exhibit A.

This Motion is made on the following grounds: (1) Plaintiff's counsel violated Rule 45(c)(1), which requires the attorney responsible for issuing the subpoena to take reasonable steps to avoid imposing undue burden or expense upon the person subject to that subpoena; (2) Pursuant to Rule 45(c)(3)(A)(iv), the court shall quash or modify the subpoena if it subjects a person to undue burden. Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure (SCRCP), the undersigned attempted to resolve this matter with Plaintiff's counsel to no avail.

In violation of SCRCP 45(c)(1), Plaintiff's attorneys have not taken reasonable steps to avoid imposing undue burden upon Dr. O'Neill. Prior to issuing the subpoena, Plaintiff's counsel agreed that Dr. O'Neill's affidavit would be sufficient in lieu of trial testimony if Defense counsel agreed, which she did. After reviewing the affidavit proposed by Plaintiff's counsel, Dr. O'Neill made some changes to the document's language in accordance with the Court's prior rulings governing the forensic review and executed the Affidavit attached hereto as Exhibit B. This was

not acceptable to Plaintiff's counsel, who responded that Dr. O'Neill could either sign their proposed affidavit or they would subpoena him for trial. Despite repeated attempts to ask Plaintiff's counsel to confer with the Defense and come up with mutually agreeable affidavit language, Plaintiff's counsel responded that Defense counsel had not responded to his follow-up inquiry, and that they would be serving a trial subpoena for Dr. O'Neill to appear for trial the next week. This surely does not qualify as a "reasonable step," to avoid imposing undue burden upon Dr. O'Neill.

SCRCP Rule 45(c)(3)(A)(iv) states that the court shall quash a subpoena where it subjects a person to undue burden. Dr. O'Neill will be subjected to undue burden if he complies with Plaintiff's subpoena to appear in Court on August 29. Dr. O'Neill is a busy surgeon with previously-scheduled surgeries all day. Further, he is a non-party to this action who has never seen the Plaintiff and was not involved in her care. Despite this, Dr. O'Neill has continuously accommodated Plaintiff's demands and has acted in good faith producing all of the documents in his possession throughout the litigation of this matter.

Dr. O'Neill has made considerable efforts to comply with Plaintiff's counsel throughout this matter, even though he has never even seen, let alone treated Plaintiff. The only connection Dr. O'Neill has to this matter is that he shared his office space and computer with Dr. Schimpf for a period of time in 2014. Because of this, Plaintiff's counsel sent O'Neill Plastic Surgery a letter dated October 19, 2015, requesting the medical records in his possession for Plaintiff. By letter dated October 28, 2015, Dr. O'Neill responded by providing a PDF binder of all of the electronic records of Plaintiff in his possession. All of this patient's information was stored electronically only, so there was no other information stored outside of the electronic records at Dr. O'Neill's practice.

Dr. O'Neill later received a subpoena for the production of records for Plaintiff from Dr. Schimpf's attorney. Dr. O'Neill's office executed a records custodian affidavit on October 27, 2017, again producing all of the records of Plaintiff in his possession. On or about November 5, 2018, Dr. O'Neill received a notice and subpoena for his personal deposition and a notice and subpoena for the records custodian of O'Neill Plastic Surgery from Plaintiff's attorney. The notices and subpoenas compel Dr. O'Neill to bring a copy of all medical records of Plaintiff in his possession.

After obtaining counsel, Dr. O'Neill appeared on December 17, 2018 and provided testimony for a two-hour deposition, for a witness fee of $32.85, in his capacity as the records custodian for his practice. See Exhibit C. Dr. O'Neill brought with him to the deposition over three hundred documents retrieved from his search for Plaintiff's records **including an audit trail of the Plaintiff's records.** Plaintiff's counsel asked Dr. O'Neill numerous questions related to the record keeping practices of his business, along with other questions not relevant to the records of Plaintiff. Dr. O'Neill confirmed to him that there were no files, photographs, or other electronic data of Plaintiff that he had not already produced. Dr. O'Neill explained in great detail that he personally performed extensive searches in his system, multiple times, using every keyword, meta data, date of birth and dates of service he could think of in order to find any "missing" records.

The day after Dr. O'Neill's deposition, without consulting Dr. O'Neill or his attorneys, Plaintiff's counsel served Dr. O'Neill with yet another subpoena commanding him to produce any and all office computers, hard drives, servers or storage devices owned or in possession by O'Neill Plastic Surgery. Due to patient confidentialiy and privacy concerns, the undersigned counsel filed a Motion to Quash the subpoena. By Orders dated March 11, 2019 and April 29, 2019, Judge Kinlaw ordered the forensic search for "missing" records. (Attached as Exhibits D and E) On

Saturday June 16, 2019 and Sunday June 17, 2019, Dr. O'Neill met with the Plaintiff's forensic examiner, Steve Abrams, to extract data from his computers. On Saturday, July 20, 2019, Dr. O'Neill and his counsel again met with Steve Abrams, to review the deleted images taken from the O'Neill Plastic Surgery's laptop computer. The purpose of the forensic review was to determine if any photographs of the Plaintiff were ever on the computer and if data was ever deleted from the computer. Over the course of approximately three and a half hours, Dr. O'Neill reviewed in excess of eleven thousand images provided by Plaintiff's forensic examiner, finding none of them to be that of the Plaintiff and finding no evidence that any records or photographs pertaining to Plaintiff were altered, deleted, or destroyed.

Dr. O'Neill has now been subpoenaed more than ***five*** (5) times in this case. This is bordering on harassment, especially for a records custodial matter involving a patient Dr. O'Neill has never seen nor treated and allegations of which he has no knowledge. Dr. O'Neill is a busy surgeon and has spent countless, heretofore uncompensated, hours cooperating with this search. Requiring him to comply with Plaintiff's latest subpoena would not only unduly burden Dr. O'Neill and his practice but could also adversely impact his patients' lives if he is forced to cancel their surgeries to appear in court.

Dr. O'Neill's affidavit articulates exactly what his testimony would be at trial and accurately reflects his prior deposition testimony. The information Plaintiff seeks can be admitted into evidence through Dr. O'Neill's affidavit, and it is neither necessary nor proper to subpoena him for trial testimony. Dr. O'Neill has surgeries and appointments with patients scheduled throughout the week of trial, including August 29. Dr. There is no justification for compelling a

non-party to incur the burden of canceling long-scheduled surgeries to appear in person when such appearance would accomplish the same result as admitting his affidavit, especially when Dr. O'Neill has complied in good faith despite the great burden upon him and his practice during the litigation of this matter.

Wherefore, Dr. O'Neill respectfully requests the Court to enter an Order quashing Plaintiff's subpoena requiring his attendance at trial on August 29, 2019. The undue burden placed upon Dr. O'Neill, his practice, and his patients greatly outweighs Plaintiff's preference for Dr. O'Neill's trial testimony.

This Motion may be supported by memoranda and/or affidavits and is supported by the common law of South Carolina.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Ph: (843) 577-4435 / Fax: (843) 722-1630
Email: Info@hoodlaw.com

Barbara W. Showers

Barbara W. Showers (SC #65489)
Maryrose L. Pritchard (SC #102804)
Julia A. Bradshaw (SC #103767)

Attorneys for Patrick O'Neill, MD

August 21st, 2019
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the **NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA TO NON-PARTY PATRICK JOSEPH O'NEILL, MD** was served on each party or counsel of record by ☐ NEF electronic filing, ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 21 day of August, 2019.

Melanie L. Tarr

BRENT SOUTHER HALVERSEN, L.L.C.

BRENT S. HALVERSEN*
Direct Line: (843) 284-5790
brent@halversenlaw.com

751 JOHNNIE DODDS BOULEVARD
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www.halversenlaw.com

*ALSO ADMITTED IN FLORIDA

August 19, 2019

VIA BY HAND DELIVERY

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad St., Ste 106
Charleston, SC 29401-2258

RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, Case No. 2015-CP-18-615

Dear Ms. Armstrong,

Enclosed please find an original trial subpoena for the Records Custodian for O'Neill Plastic Surgery, P.A. By copy of this correspondence, I am serving O'Neill Plastic Surgery, P.A.'s counsel of Record, Ms. Barbara Showers.

If you have any questions or comments, please do not hesitate to me.

Sincerely yours,

Brent S. Halversen

BSH/ak
Enclosure(s)

cc: Mr. Todd Smyth (Via E-Mail and U.S. Mail Only)
Ms. Barbara Showers (Via E-Mail, By-Hand Delivery, and U.S. Mail)

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF CHARLESTON

Jeane Whitfield., Plaintiff

v.

Dennis K. Schimpf and Sweetgrass Plastic Surgery

SUBPOENA IN A CIVIL CASE

Case Number: 2017-CP-10-2758

Pending in Charleston County

TO: Records Custodian

O'Neill Plastic Surgery, P.A.

245 Seven Farms Drive, Suite 210

Daniel Island, SC 29492

☒ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM Courtroom of Hon. Roger Young
Charleston County Circuit Court 100 Broad Street Charleston, SC 29401	DATE AND TIME Thursday, August 29, 2019, TBD PM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , PM

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

PLACE	DATE AND TIME , AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

SCCA 254 (10/04)

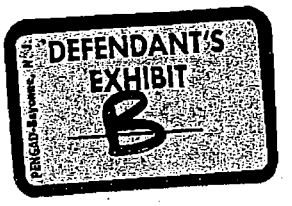
(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

DATE 8/19/2019

ATTORNEY/ISSUING OFFICER'S SIGNATURE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

	8/19/2019	Brent S. Halvorsen
CLERK OF COURT/ISSUING OFFICER SIGNATURE	DATE	PRINT NAME

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NO. 2017-CP-10-2758



JEANE WHITFIELD,
Plaintiff,

vs.

DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC,
Defendants

AFFIDAVIT OF PATRICK O'NEILL, MD AS OWNER AND RECORDS CUSTODIAN FOR O'NEILL PLASTIC SURGERY, P.A.

Patrick O' Neill, MD, personally appearing before me, who being duly sworn, states the following:

1. My name is Patrick O' Neill, MD, I am over the age of eighteen, and have personal knowledge of the facts stated herein.

2. I am a medical doctor licensed in South Carolina and I am board certified by the American Board of Surgery and the American Board of Plastic Surgery.

3. I am the owner of O'Neill Plastic Surgery and records custodian for O'Neill Plastic Surgery in the above referenced matter.

4. I spent several weekend days at my office with Steve Abrams, a forensic examiner hired by counsel for the plaintiff, to facilitate a forensic review the photographs contained on the laptop computer of O'Neill Plastic Surgery where such photographs were stored. During the time of the treatment of the plaintiff in this matter, Dr. Schimpf was authorized to store his patient's photographs on the laptop computer when we shared office space. The purpose of the forensic review was to determine if any photographs of the plaintiff were ever on the laptop computer and/or determine if data was ever deleted from the laptop computer.

5. The forensic review by Mr. Abrams produced approximately 11,606 images/photographs for me to review.

6. Over the course of approximately three and a half (3.5) hours I reviewed the approximately 11,606 images.

7. None of the photographs Mr. Abrams provided to me as part of his search appeared to be that of the Plaintiff in this matter and there was no evidence that any records or photographs pertaining to Ms. Whitfield were altered, deleted or destroyed.

FURTHER AFFIANT SAYETH NOT.

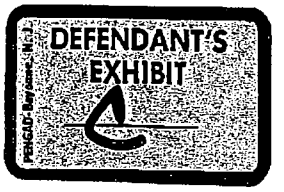
Patrick O' Neill, MD, Records Custodian
for O'Neill Plastic Surgery, P.A.

SWORN TO before me this 16th **day of August, 2019.**

Danielle Cios

Notary Public for South Carolina
My Commission Expires: 10/27/2026

DANIELLE CIOS
Notary Public, State of South Carolina
My Commission Expires 10/27/2026



In the Matter Of:

Jeane Whitfield vs Dennis K. Schimpf, M.D., et al

PATRICK O'NEILL. M.D.

December 17, 2018

SPECTRUM
COURT REPORTING SERVICES

www.spectrumcourtreporting.com
814 Johnnie Dodds Blvd., Suite B
Mount Pleasant, SC 29464
spectrumaaa@gmail.com
843.849.0133

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

DEPOSITION OF PATRICK O'NEILL, MD

JEANE WHITFIELD,
Plaintiff,
vs. CASE NO. 2017-CP-10-2758
DENNIS K. SCHIMPF, M.D., and SWEETGRASS PLASTIC SURGERY, LLC,
Defendants.

DEPONENT: PATRICK O'NEILL, MD
DATE: December 17, 2018
TIME: 4:14 p.m. - 5:52 p.m.
LOCATION: Hood Law Firm, LLC
172 Meeting Street
Charleston, SC 29401

REPORTED BY: SARAH GACIOCH

APPEARANCES

FOR THE PLAINTIFF:

BRENT SOUTHER HALVERSEN, LLC
BY: BRENT S. HALVERSEN, ESQ.
751 Johnnie Dodds Boulevard, Suite 200
Mt. Pleasant, SC 29464
(843)284-5790
BRENT@HALVERSENLAW.COM

FOR THE DEFENDANTS:

SMYTH WHITLEY, LLC
BY: TODD SMYTH, ESQ.
126 Seven Farms Drive, Suite 150
Charleston, SC 29492
(843)606-5635
TSMYTH@SMYTHWHITLEY.COM

FOR PATRICK O'NEILL, MD:

HOOD LAW FIRM, LLC
BY: BARBARA W. SHOWERS, ESQ.
172 Meeting Street
Charleston, SC 29401
(843)577-1207
BARBARA.SHOWERS@HOODLAW.COM

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TODD SMYTH	62-62
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EXHIBITS

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Plaintiff's Exhibit No. 1	5
Plaintiff's Exhibit No. 2	29

PATRICK O'NEILL, MD, having been first duly sworn, testified as follows:

EXAMINATION

BY MR. HALVERSEN:

Q. Good afternoon, Doctor. I just introduced myself. My name is Brent Halversen. I represent a woman named Jeane Whitfield, who was a patient of Dr. Schimpf's in 2014, and as I assume you're probably aware, Ms. Whitfield has filed a lawsuit against Dr. Schimpf and his practice alleging medical malpractice.

We're here today to take your deposition as a records custodian for O'Neill Plastic Surgery; is that your understanding?

A. Yes.

Q. And could you please state your full name for the record?

A. Patrick Joseph O'Neill.

Q. And what is your -- what is your relationship with O'Neill Plastic Surgery?

A. I'm the owner.

Q. Owner, okay. Are there any other owners?

A. No.

Q. Just you?

A. Just me.

Page 5

Q. So just before the deposition began, your counsel -- I guess this is a set of documents you brought with you to the deposition today. We'll mark this as Plaintiff's Exhibit 1 to your deposition, and there is a stack of -- it's been Bates labeled by Ms. Showers' office, and it looks like it goes to 0331. So it looks like approximately 331 pages that you brought here today in response to the subpoena and the deposition notice that's been provided to you; is that accurate?

A. Yes. I don't know how many pages, but yes.

Q. Okay. Her office, I think, put the Bates label on. You didn't put the label on, correct?

A. Correct.

(PLAINTIFF'S EXHIBIT NO. 1
WAS MARKED FOR IDENTIFICATION)

Q. Okay, great. And how did you go about collecting and retrieving these exhibits that we've marked as Exhibit 1?

A. Well, I mean, I got them from the electronic medical record. There are --

MS. SHOWERS: Those are not Bates

Page 6

labeled though. You marked it as 1. That's the original.

MR. HALVERSEN: Oh.

BY THE WITNESS: I don't have --

MR. HALVERSEN: You only Bates labeled the copies?

MS. SHOWERS: I made two copies. I guess she should have done three with the labelling on it, but I wanted you to see the original as well.

MR. HALVERSEN: Okay. This is mine. The original is the same as the Bates, correct?

MS. SHOWERS: Yes.

MR. HALVERSEN: Okay. I think --

MS. SHOWERS: He's not going have a page number to go by.

MR. HALVERSEN: Yeah. So what we will just do, we'll take this top page of your original --

MS. SHOWERS: If you want another copy, she can run it.

MR. HALVERSEN: That's all right. We don't need to do that. We can share. There won't be too many questions on this.

Q. So what has been Bates labeled number -- Plaintiff's 1 has Bates labels to 331, is a

Page 7

photostatic copy of the original documents you brought here today; is that your understanding?

A. Yes.

Q. All right. And how did you go about collecting and retrieving these documents?

A. So the vast majority of this is just straight from the -- the -- our recordkeeping system, which is a Nextech, full practice management EMR software. So the -- there are several, obviously, sections. One of which is the EMR section, which there are only a couple of documents from, and then there's the history file, which that contains most of it, and most of these are consents, and what may account for differences in numbers is that some of these consents were -- are double entered. The blank one's entered, and then it's printed, and then the patient signs it and it gets scanned back in.

There is also a -- in addition to the appointment list, which is generatable as a printout from the E -- from the practice management portion of the software, I have a screenshot that has a little bit more information on it than what automatically prints out when you hit print on it, and then I have an audit trail from here that is generated by the system. It's -- it's generated as

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a CSV file that is obviously opened in Excel, and -- and then, of course, doesn't bode well in printing, but it's all printed out here.

Q. Okay. You just gave us a lot of information. I just want to kind of break it down and unpack some of it. So let's start with -- let's go from the end and work our way backwards. The audit trail, which is -- has CSV, separated values, what does that represent? What information is in that?

A. Well, so it's the first patient, I've run an audit trail on, but it basically has every time a value is changed in Nextech or even if somebody views the record, it's just recorded.

Q. Let me take a look at that, if you don't mind. It's the first time I've seen it, so just give me a minute.

A. Yeah. I -- again, it doesn't -- it's not designed for an 8 and a half by 11 printer, so the columns are on separate sheets.

Q. Okay. So the subsequent columns -- and you see what I'm looking at here, and just for the record, it's a column that says different items, view patient records, all kinds of stuff. So those are separate columns from the beginning sheets that have the, looks like, date and timestamps?

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A. That would be first, second, third, fourth, fifth, sixth, seventh columns on the page, and then the next columns would be -- eight, nine, and ten would be on another page, et cetera.

Q. Okay. Is there a way to produce these -- the audit trail in a full Excel spreadsheet, such that it shows --

A. Yes.

Q. You know what I'm going to say. So you can follow from one column to the next?

A. Right.

Q. Is that something if your attorney asks you to send, you could send to her?

A. Yes.

Q. And you know how to retrieve it in Excel format?

A. Yes. It is in Excel format.

Q. Okay, great. So you just printed this from Excel?

A. Yes.

Q. Okay. So I understand that. And so just to break it down a little bit further, let's try looking at the first -- it looks like first page of the columns, which is on Bates stamp No. 5, it looks like -- just, for example, we could just do the top

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so I can have an understanding of how to read it.

So first column it looks like it says 12/19/23 [sic], which I assume is the date of December 19th, 2013. It says T17:38:46.000-05:00, and then it says, O'Neill Plastic Surgery, Daniel Island, Kyle, 5700, 4215 Whitfield, Jean. That's the time, obviously, and date that there was first an entry into Nextech for this patient?

A. Well, and I don't -- I printed it as it pulled out, and I noticed that it wasn't necessarily exactly in chronological order.

Q. Oh, okay. Well, that's good to know. But it looks like appears roughly -- more or less, it looks like it is a little out of sequence at some points.

A. It's definitely out of sequence.

Q. Is there a reason it's out of sequence?

A. I did not want to change the sequence. I did not --

Q. Okay.

A. -- re-sort it.

Q. That's just the way it came out?

A. That's the way it came out.

Q. And the way you printed it, is that the way -- if you recall, the way it was projecting when you had it in the computer?

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A. I didn't check. I just printed it, made sure the print screen was correct, and hit print, and then I gave it to you.

Q. Gotcha.

A. Or gave it to my lawyer.

Q. If Ms. Showers asked you to send this to her in Excel format, could you also see if there's a way -- not disturbing the integrity of the data, but just to see if there's a way to sequence it, or if this is the way it comes?

A. Well, if you look at it, it's problematic in that it will sort by year and by month, but after that, it would sort by ones, the first digit, and, for example, it won't necessarily be in perfect order.

Q. Okay.

A. But you certainly can take the file and sort it.

Q. Okay. All right.

A. I'm happy to sort it for you. I can do that, but it's not -- it is still not going to be in absolute chronological order.

Q. So is that the only way you can do it is manually?

A. I'm not that facile with it, but yes, I think

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that would be the only way to do it.

Q. So where it says -- going back to the top line, it looks like it's timestamp, and it says, Kyle, 5700. Who is Kyle?

A. So Kyle was a front desk person at my office, and she has moved on out of the practice.

Q. Okay.

A. The 5700 is an internal database number, and the 4215 is our -- is the patient number.

Q. Okay. So obviously the patient number --

A. It's a medical record number.

Q. -- has changed, and then it looks like --

A. Her name did change at some point from Jean to Jeane.

Q. Oh, I see, but the patient number never changed, it doesn't look like, correct?

A. Correct.

Q. What about -- what does 5700 mean?

A. It's an internal database number that I've never seen before.

Q. Okay. And it looks like that number never changed either?

A. It appears that way.

Q. Okay. Let me just go through these people. We talked about Kyle. Who is Vicky?

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A. That would be Vicky Tolbert.
Q. Okay. And she was not an employee of Sweetgrass Plastic Surgery?
A. She was an employee of Sweetgrass Plastic Surgery, yes.
Q. Was she ever employed by O'Neill Plastic Surgery?
A. Yes, she was.
Q. When was she employed by O'Neill?
A. When she first came out -- when Dr. Schimpf and she came out into our office, initially they -- she was an employee of O'Neill Plastic Surgery. In other words, got her paycheck through us.
Q. Okay. And how long did that last?
A. I am not exactly sure, but -- I don't really know the answer to that.
Q. Okay.
A. A year or year and a half, maybe. It may be less than that. I just don't know.
Q. Okay. Was that before Dr. Schimpf left O'Neill Plastic Surgery's facilities?
A. It should correlate with that time, but I don't know if that's exactly --
Q. In other words -- sorry, I don't want to cut you off.

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A. So I don't know when she stopped being paid --
Q. Okay.
A. -- by us.
Q. All right.
A. By O'Neill Plastic Surgery.
Q. Dawn is Dawn Trusdale?
A. Her name is Truslow.
Q. Truslow, sorry, and she was your employee?
A. Correct.
Q. Continuously?
A. Yes.
Q. Was Vicky Tolbert the only person that was your employee and then also was working with Dr. Schimpf?
A. No. There was Shannon Driggers as well.
Q. And that would be S. Driggers as in here?
A. I believe so.
Q. In Exhibit 1. What about -- what is -- who is Candler?
A. Probably Chandler.
Q. Chandler?
A. She's a current employee of mine. Was not an employee during this time. We have had to look at the records a number of times because of requests.

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Q. Okay.
A. So I haven't seen what she did.
Q. Right, and I understand there's been a lot of requests for these records over the last few years. So what about Biggers?
A. That would be Megan Biggers. She's a PA of mine. She's not currently working.
Q. But still employed by you or not?
A. No. She's on an extended leave of absence due to health issues of her family.
Q. Okay. Dr. O'Neill, we know who that is. Marie Price, it looks like.
A. Marie Price.
Q. Who is she?
A. Business manager.
Q. Still employed by you?
A. Yes.
Q. Kaitlyn?
A. Mary Price was very shortly employed also by Sweetgrass when he moved out to help them transition.
Q. Thanks for that explanation. Kaitlyn?
A. Uh-huh. Kaitlyn Francis, she's currently an employee of mine and had just started in 2014 at some point.

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Q. Okay. Still your employee or --
A. Yes.
Q. And when did Dr. Schimpf leave the O'Neill Plastic Surgery facility?
A. So we separated businesses almost exclusively at the end of 2014, but he still used my operating room for a number of months after that.
Q. Okay. So your facility is an ambulatory surgical facility?
A. We have a fully accredited surgery suite, yes, and that's what he was using.
Q. And it has always been in that status since he was performing procedures there in what I believe was 2014 or maybe earlier?
A. Yes. It has been there since 2009, and has been fully accredited since that time --
Q. Okay.
A. -- continuously.
Q. All right. Krista with a K, I don't think we mentioned her; who is she?
A. She's my office manager.
Q. Okay. Presently?
A. Uh-huh. Yes. Go ahead.
Q. Was she employed in 2014 as well?
A. She was. Had just arrived in 2014 as an

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employee.
Q. Okay. Did we say Megan Gross? I can't remember.
A. No. She was functioning as a medical assistant and scribe. She's now in medical school.
Q. Was she assisting as a medical scribe to you or to Dr. Schimpf?
A. To me.
Q. Okay. Is there a reason she was not working as a scribe for Sweetgrass or Dr. Schimpf? Any reason you may know of?
A. No. I don't know the answer to that.
Q. Okay. So just for the record, you don't know why she was working as a scribe for you but not for him?
A. She was hired as a scribe for me.
Q. Okay.
A. And I just don't think she ever scribed for him. I don't know the answer to that.
Q. No reason why -- you don't know why? You shared medical record systems is my gathering.
A. Right.
Q. But no reason why the scribe was never shared?
A. I don't know. I don't think he wanted to use

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a scribe at that point. I just don't know. I don't know the answer.
Q. Okay. You mentioned Dawn, correct?
A. Yes.
Q. And I understand Dawn passed away.
A. She did.
Q. When did she pass?
A. In January of last year -- oh, of this year, sorry. 11 months ago.
Q. '18? '17?
A. January of '18.
Q. January, okay. R. C-O-B-L-E, who is that?
A. Rebecca Coble, she was an employee, laser tech esthetician, and medical -- and she would, you know, take care of the phones as well.
Q. And --
A. She does not work with us any longer.
Q. And were all these people accessing these records in some kind of administrative function, or was there a reason for them to be looking at these records or --
A. Well, you can look and see what they were doing, but, yeah, most of it was administrative, yes.
Q. And that's because the -- at the end of the

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columns it has a description somewhat of what their function is at that time or not?
A. What happened during -- you know, what they were doing.
Q. Gotcha, okay. And then, obviously, the program puts out what the description is?
A. Yes.
Q. Okay. All right. If you look at the Bates label that's not -- look at this, 12, it mentioned some PDFs there. Do you know what those are?
A. Yes. Those PDFs are what was in the history file here.
Q. Okay. As long as they're in here.
A. They are.
Q. Okay. A lot of these columns say, viewed patient record, viewed patient record a lot. Is there any way to tell from these column headings if anything was changed when any one of these entries happened?
A. Well, I didn't write the program for the audit trail. You'd have to ask the Nextech company, but it's my assumption that if it says "viewed," someone looked at the record and didn't make any changes. It does say there frequently, changed value, and then it will say what the value was.

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Q. There's no column heading, at least on this sheet. On the Excel is there a column heading?
A. No.
Q. No?
A. I printed it as is.
Q. Okay. Well, the far right -- it looks like the far right column, at least on this page, I'm referring to Bates stamp 16, it says, Patient Prescription Queue status changed. Prescription status for Bactrim DS incomplete. Do you know what that means?
A. I don't know why it's marked incomplete, but, you know, it looks like a prescription was written for those medications, but I didn't -- I didn't write the prescription, so I don't know.
Q. Right, but do you have an understanding if on that document it says incomplete, does that mean it was, you know, prescribed but not filled or any reason to -- based on your experience of what incomplete means with regard to this program or this audit trail?
A. I do not.
Q. Is it accurate to say that this audit trail just is one way that Nextech is representing a lot of the information that's put in printed form from

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what Nextech generates, such as operative report or anesthesia form?

A. Not sure I understand the question. It doesn't generate an operative note, but it -- in my understanding of an audit is that it records every time anything is done inside the chart.

Q. Okay. I understand what you're saying.

Okay. So we talked about the audit trail, and then you also said that there's a -- the screenshot, which it appears to be on the top two pages -- or top -- it looks like on the first and fourth page -- or the first and fourth page. I just can't read it, it's so small, but is the first and fourth the same page, or do you recall?

A. It is the same.

Q. Okay. And with the caveat that I can't read it. Is there anything -- and Mr. Showers, before the deposition, said she could shoot me a legible copy electronically.

MR. HALVERSEN: Oh, thanks.

MS. SHOWERS: You can spread it just on the screen if you want to make it bigger.

BY MR. HALVERSEN:

Q. And I think you kind of alluded to this when we first started, but just to clarify, is there any

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information in this screenshot that's not in the appointment ledger?

A. Yes. That's why I printed it. It just has who -- it has who was the login, when it was modified, who it was modified by, and what location it was done from, but otherwise it's the same.

Q. Okay, I see.

A. When you're on this screen on the EMR, and you hit print, it gives you this.

Q. Okay, so there might be a little more information on the screenshot.

A. Just wanted to make sure that I complied with the subpoena to have everything we could.

Q. No. I appreciate it, and I think that's what the subpoena calls for.

So we can go through an example on the top screenshot, and if you can't read it, I can share the screen. It says, July 23rd, 2014, Wednesday, start 4:30 p.m. Notes four week follow-up, status pending. Do you see that entry?

A. Yes.

Q. And then there's an input, day modified, and modified by. Where it says status, when it says "pending," what does that mean to you on the system?

A. Well, the -- when an appointment is created,

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it's immediately put into a pending status, and then if the appointment is canceled, it should be changed to canceled. If the patient has been seen and has left, it should be changed to out.

Sometimes the pending doesn't get updated for various reasons, but that's -- what it would mean is, at least ideally, that the patient -- the appointment was made but not -- but the status was never changed. That's what it means, the status was never changed. Why it wasn't changed could be that the patient didn't show up or something, or we just didn't change it -- somebody didn't change the status.

Q. Where it says "out," what does that mean to you?

A. It means generally that the patient was seen, and once the patient has left for the -- from that appointment, the status should be changed to out.

Q. Okay. Let's look -- okay. It looks to me like everything in the screenshot contains the same information that's in printed appointment ledgers, with the exception of it shows who inputted it and who modified it and who, looks like, canceled it, if it was canceled, and the location of the entry; is that accurate?

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A. That sounds accurate.

Q. Okay. Thanks.

MR. HALVERSEN: Yeah. Barbara, if you could shoot me that screenshot, I would appreciate it.

Q. Okay. So we talked about the audit trail, talked about the screenshot. The -- what is -- you mentioned the history file, what is the history file part of this Exhibit 1?

A. It's part of the record of the EMR system that contains documents that are attached to the system, not typed into the system. If you look on the screenshot, there are tabs at the top that have multiple things on them. We're looking at the appointment tab, but there's also a history tab, which is four tabs to the right.

MR. HALVERSEN: Sorry, Barbara, can I see your laptop again? I can't read it.

Q. Okay. I see the history tab, and then in the history tab would be what kind of -- what types of documents that are in Exhibit 1?

A. Anything that is -- that comes from outside the EMR, either electronically or on paper, obviously, are scanned in. And so, for example, consents that are hand signed would then be scanned

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into a PDF file, would then be attached in the history file. The EMR file, a true electronic medical record, doesn't have anything that's brought in. It's created in the system.

Q. Right.

A. So the history file is anything that's brought in from outside in electronic format and attached to the record.

Q. Okay. So, for example, signed consent forms would be in this history file?

A. Correct.

Q. And when you clicked on the history tab, did it just drop down and have all the items that were scanned in?

A. Yes.

Q. And were they, like, PDF formats?

A. Yes.

Q. So in Exhibit 1 you've got scans, a signed consent form, it appears, correct?

A. Yes.

Q. That are initialed. It looks like there are unsigned consent forms. Would those be generated -- were those in the history tab as well?

A. As I mentioned previously, the consent forms when they -- when they are generated are pushed to

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the history file and then printed. The patient signs them, and then we scan them back in. Therefore, they end up being duplicated; one unsigned copy, one signed copy. And just to be -- just to say I've given you everything, I have given you everything.

Q. Okay. I appreciate that, and that's what you're supposed to do.

What about the operative record, that was in the history part --

A. Correct.

Q. -- I understand from your testimony? Yes?

A. Yes.

Q. Is there a way of determining how the operative record got into the --

A. Yes. It's in the audit trail.

Q. Okay.

A. But I don't know where it is.

Q. Is that something you can determine from looking at it right now, or is it too difficult because they are all columns, they are segmented?

A. It would take some time, but...

Q. It's near the beginning. It's, like, 30 pages -- 33 pages deep into it before the consents.

A. I thought there might be a table of contents

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in here for the history file, but I don't see it. I don't think there is.

Q. Okay. Is that something that there is a table of contents?

A. It would just be a screenshot of that.

Q. Of what's in there?

A. Uh-huh. Not really part of the record.

Q. I understand.

Let's go to behind the appointment ledger. Is there a -- why is there not a -- there's a financial ledger that says O'Neill Plastic Surgery at the top, and I'm -- I'm not sure -- it's in here somewhere.

MR. SMYTH: What is it we're looking for?

MR. HALVERSEN: It's a financial ledger. It says O'Neill Plastic Surgery.

A. It's in here somewhere.

Q. I don't see it in Exhibit 1, but I've got it somewhere else.

A. That's it.

MS. SHOWERS: This is from the stack that you had.

MR. HALVERSEN: Right.

A. Okay.

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Q. It's not in the stack you gave to me today.

A. I can get you an updated copy, but it's right there in what you already have.

Q. Okay. We will discuss that in a second.

So we've talked about the audit trail, the screenshot, the history file there in the tab on the screenshot, and then the other component you identified to Exhibit 1, was the EMR section. So I imagine that would be the preprinted forms where it's got, for example, the anesthesia or the OR record; is that what the EMR section is?

A. The EMR isn't really preprinted, but there is some templates that help us -- or guide us to fill them out, and the OR record is one of those. The anesthesia record is separate and is part of the history file.

Q. Okay. So what would be in the EMR section?

A. Anything that is performed electronically in the EMR itself. Everything else is in the history file.

Q. Okay. So in Exhibit 1, what documents would that correspond to?

A. It corresponds to the OR record primarily and one other document, which I'll have to -- the online patient surgery consultation history. Those are the

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only two items in this electronic medical record.
Q. Okay. Now, let's mark this stack of documents, which I brought here today, which I'll represent to you were medical records that I requested pre-suit, and I think the request form from my office is in Exhibit 1, and then we'll mark that as Exhibit 2 to your deposition.

(PLAINTIFF'S EXHIBIT NO. 2
WAS MARKED FOR IDENTIFICATION)

Q. And if you go near the end, you will find this financial ledger. It looks like that.
A. I got it.
Q. And, actually, let's just rewind before we get there. Look at the top page of this exhibit, and it's a letter from you to me. Is that your signature at the bottom?
A. Yes.
Q. It says, you're in receipt of my letter dated October 19th, 2015. It says, please find the enclosed electronic medical records for Dr. Schimpf's patient, Jeane Whitfield. This PDF binder represents all information that exists for this patient stored by O'Neill Plastic Surgery. All of

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this information is in our electronic medical records system. There's no information stored at O'Neill Plastic Surgery, PA, for this patient outside of our electronic medical records system. Just want to ask you about that sentence right there. Did you have a chance or were you shown the deposition testimony of Dr. Schimpf?
A. Yes.
Q. Did you review it in its entirety?
A. No.
Q. Did you review the parts where he discussed the medical records?
A. Yes.
Q. And I'll represent to you, and if you've read it, correct me if I'm wrong, but I believe what his testimony was, was that you had this Nextech system that was cumbersome and difficult, but he tried to use it, but he also kept certain documents in a folder file somewhere on one of your computers. Do you recall that?
A. I recall that in his testimony.
Q. Do you know what he was talking about in terms of this, that he made -- I'm pretty sure testified that was outside of the Nextech system; do you know what he was talking about?

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A. He had a login to our network, which had a standard Windows file system. He had a documents folder that he could store things in. I think this sentence is still true, because I've searched the entire server for the patient's first name, last name, date of birth, and haven't found anything else.
Q. Okay. So you're aware of what he said was accurate, that there was some separate folders that he used to house -- store patient data. Do you know what he was talking about?
A. Honestly, I was a little confused by the testimony. At times I thought he was referring to the photograph -- the photo system we had, which had folders in it as well.
So there's two -- there's only three places anything could be. It's either Nextech, in our Windows file system, which is a standard Windows system, and in the -- our photo database.
Q. I'm sorry, the Nextech system, the Windows database?
A. Just a normal server that was set up by a professional group. Everybody has their own personal folder system. So all -- all data is stored on the server, not on their independent

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computers, and he had his own place to store them.
Q. On the server?
A. Yes, but that's not where we store electronic medical records. We store electronic medical records in Nextech, but he had access to it. Just like any Windows computer has a folder file system, that was present on our system.
Q. Okay. There was a folder file system that he used on --
A. I don't know if he used it or not. That folder is currently empty, his file folder. Let me -- let me -- I'm not sure of that last statement. I don't know if it's empty.
I did find on a full search through our system that there was a folder with photographs that had been taken out of our photo systems and put into a folder, and I believe those are the ones that he then took with him to his office.
Q. Okay.
A. And left them in a separate folder, but that's not where, you know, we store our information typically.
Q. Okay. So just trying to understand what you're telling me, and I think I do, when he left your -- not your practice, but when he left whatever

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your office arrangement was, he dragged the photos from the other database into a folder, and those are still present there? You could still see those there?

A. Yes.

Q. Okay. And was that in, like, a master folder that used to contain information?

A. I'm not sure I understand the question. It was within his or Vicky's, I'm not sure. I searched for that, and I found the folder that I didn't know existed of patient photographs on our server. It appears to be the photographs that he collected to then copy to his system up in Summerville. I don't know that for sure, but it did not include any photographs of this patient.

Q. Okay. How do you know what this patient's photographs would have looked like?

A. Well, all of those photographs had metadata on them, including names and dates of visit, dates the photographs were taken, and none of them matched.

Q. Okay. And when you just found that file with the pictures on it, was that in response to coming here for this deposition, or was that previously?

A. It was in response to this deposition. I

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found it a few weeks ago.

Q. Okay. And so just to be clear, was that -- that folder, though, had already been -- was already set up -- and let me just back up. So not getting too down in details, but I assume you have more than one computer in the office?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. And so can anyone internal access the same information because it's living on your server?

A. No.

Q. Okay.

A. It is a standard Windows File Server system where everybody has access to their stuff and any folder that we chose to share with them on an administrative level. So everyone has their own folder that nobody else can look at except an administrator, and in that case, it would be me, and it takes me an effort to get to that folder. I can't just scroll to it and point and click and open it. I've got to do a little bit of work on the server to get to it because it's not mine.

Q. Okay. So there's some kind of permissions-based system --

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A. Absolutely.

Q. -- to get to wherever data is on all these different terminals?

A. Absolutely, yes.

Q. So this folder was living where, if you had to describe where it was?

A. You know, I don't remember exactly where it was, but it was on our server, and it came up on a search that I was doing.

Q. Okay.

A. And I don't know exactly what sub folder it was in. It could have been in his personal sub folder or Vicky's personal sub folder, and he could have stashed it somewhere in our shared folder that nobody would ever look, but I don't know where that is.

Q. And then how did you find it? Like what -- before that, let me ask you, was there a name for the folder? Did it have a name, or how did you identify it to know to look into it?

A. I don't recall exactly, but it probably said photos, and I was looking through their personal folders that I wouldn't normally look in in response to all of this to try to find things.

Q. Okay. So their personal folders, does it say

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DKS, his initials, or Schimpf, or Sweetgrass? What are the names of those folders?

A. They are personal, so it would be -- you know, for their personal documents it would be -- I don't know what it's called, Dennis Schimpf -- Dennis K. Schimpf, whatever, and then Vicky Tolbert. It would be their login.

Q. Their login user credentials?

A. Yes.

Q. Is that how you found this photo sub file?

A. Looking -- I don't know. I can't remember if they -- what file they were in. It's been a couple weeks ago that I looked at it, but I did find it when I was looking through their folder system to make sure we didn't have anything. I was trying to make sure we didn't have anything that, you know, I didn't know about. Obviously, I gave you everything I knew about at the time here, and I found those photos.

Q. Was there any other data in the -- their personal folder files? When I mean "their," I mean Vicky's or Dr. Schimpf's.

A. I'd have to go back and look. I was really looking for, you know, photographs and such. There -- one of their's was empty, and one of their's had

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data in it, but I can't remember which was which.
Q. MP?
A. Empty.
Q. Empty, okay. Is it your understanding that those folders ever had data, or did they ever use it to house --
A. I have no knowledge of that, whether they did or didn't.
Q. Okay. When I first asked you about these folders that existed independent of the Nextech, you thought that there was -- that those were currently empty; those were, I believe, the words you used.
A. Right, and then I wanted to correct myself and say, I'm not sure.
Q. Okay.
A. But I think that one of them had files in it and one of them didn't. I didn't -- you know, I don't have that information. None of that was relating to this case.
Q. I understand, and so just to kind of -- kind of zoom out for a minute as to what we're talking about, I think Ms. Tolbert testified that, for lack of a better term, that you all shared the facilities and the medical record -- the EMR. Obviously, he had his own practice to set up. Is that a fair

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descriptio, that they were still responsible for inputting the information and taking the information down, it just so happened to be your equipment and your software that they were using?
A. Yes.
Q. Okay. Did you use any of the -- did you read Vicky Tolbert's deposition by chance?
A. Yes.
Q. Did you happen to use any of the dictation systems that Dr. Schimpf and Sweetgrass used to record their patient encounters?
A. No.
Q. Is there a reason why he used that for his operation and you did not?
MR. SMYTH: Object to the form.
BY THE WITNESS: You're going to have to ask him that question. That was a business decision on his part, and you know, I suppose he preferred dictating and having somebody put it in the chart.
BY MR. HALVERSEN:
Q. Okay. Was there a way for him to use either your software or your hardware to record patient encounters?
A. Yes.
Q. And what would that have been?

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A. Well, the Nextech EMR, he could have -- anybody who uses it can type directly into it or upload a document into the history file.
Q. Okay. So there's nothing preventing him from using it to record patient encounters?
A. No.
Q. Did you have an understanding of whether he was using Nextech EMR to record patient encounters?
A. I don't know. He certainly had access to it, and I know he didn't like it.
Q. Do you know why he didn't like it?
A. You'd have to ask him that question. He -- he said he thought it was cumbersome.
Q. Before Dr. Schimpf left -- not really left, but after he stopped sharing facilities with you, which I understand was in 2014, according to his testimony; does that sound right?
A. Yes. Again, we, more or less -- he stopped using my office in late 2014, except for the OR, which continued into early 2015.
Q. Okay. That's right. You already told us that. I'm sorry.
So were you aware before he left that he had any kind of issues or problems with maintaining patient's records?

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A. Yes. I became aware of a few records that weren't present.
Q. Was that before he left or after he left?
A. Before he left, but I wasn't in the business of going behind him to check to see if he did records.
Q. Okay. So how did you become aware that there was -- there were issues?
A. Just when -- on occasion when I would see his patients, there wouldn't be a note on occasion.
Q. And so I understand, were there some patients that you guys shared?
A. A few, mostly DIEP, stands for Deep Inferior Epigastric Perforator breast reconstructions. Those we typically done with two surgeons, and we did them frequently together.
Q. Is that a situation where he would rely on your expertise for that particular procedure?
A. We were co-surgeons, so we relied on each other, yes.
Q. In those instances where you saw there was a -- a lack of a medical record, did you bring that to his attention?
A. I never saw a lack of a medical record on a DIEP patient.

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Q. Okay. And then just moving back a little bit. I thought you said there were times, before he left, where you would become involved in a patient's care with him that you would see that there was a medical records issue.

A. We cross covered for each other, and occasionally I would look in the record when I would see a patient.

Q. And did you ask him why there was not a medical record in that particular instance?

A. Perhaps not specifically for each episode.

Q. I understand. Were you ever given an explanation as to why there was not a medical record in these instances?

A. Not that I recall.

Q. Did you ever become aware of -- before you left, of an instance or issue with the medical records with regard to this patient?

A. No. Not to my recollection.

Q. Okay. When did you first become aware that there was an issue with the medical records with regards to this patient?

A. Upon receipt of the records request.

Q. Okay. Not this year though?

A. No. So just to clarify, you know, from a HIPAA standpoint, I don't have access -- or I shouldn't access records that I don't need to see, and so I don't go looking through records, and I didn't get in until we had a records request, probably, specifically, you know, ones asking for more records.

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Q. Right. I think I know what you're referencing, which is in Exhibit 1 there's a letter from a lawyer that was addressed to you and to Dr. Schimpf about incomplete records; is that fair?

A. Yes.

Q. And I apologize if I asked this. Did you have a system -- you were using Nextech to record your patient encounters; is that right?

A. Yes.

Q. And how were -- how were your patient encounters -- how did your patient encounters make it to -- what device or system were you using to get your patient encounters into Nextech, like a Dragon based system or something else?

A. As I mentioned earlier, I had a scribe, and so she took notes that I would then sign, or I would type them, or I would use Dragon.

Q. Were you using those different systems in 2014?

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A. Yes.

Q. Scribe?

A. Yes.

Q. Dragon?

A. Yes.

Q. Or yourself performing -- writing the note?

A. Yes.

Q. And do you know if -- have any explanation as to why Dr. Schimpf or Sweetgrass wasn't using those systems?

MR. SMYTH: Object to the form.

BY THE WITNESS: I don't. That was his business decision.

BY MR. HALVERSEN:

Q. Okay. Did he ever ask you to share those systems with him, the scribe or Dragon software?

A. Not to my recollection.

Q. Okay. Ms. Tolbert, I'll represent to you, testified there was no way for patient's complaints to make its way to the chart in 2014. Was there any logistical reason in your building -- or the electronic or communications systems that your office employed, where there wouldn't be a technical -- there's a technical reason why if a patient called with a complaint, that, that information would not find its way to Nextech?

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A. Well, you know, I can't speak for Sweetgrass' business practices, but Nextech does have a feature called a to do list that -- and we have phone call templates that the front desk can type out what the person is calling about and then assign it to somebody, then pops up on my to do list or whoever's to do list.

Q. Okay.

A. For more urgent things they can come find us or call us.

Q. Do you know if -- I guess you don't know based on what you're telling me whether Sweetgrass was using those functionalities at that time?

A. I do not really know that.

Q. I think I know the answer to this question, I just need to ask it for the record. Was Jeane Whitfield ever a patient of O'Neill Plastic Surgery?

A. No. She was a patient of Dr. Schimpf's. I did not see her nor interact with her at all.

Q. At your office how long were you using the Dragon system and the scribe?

A. I've used Dragon continuously since, I don't know when, 2011, best guess, but I used it intermittently for years before that.

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Q. Okay. How about the scribe?
A. Megan Gross was my first scribe. We've identified her earlier today, and she came on board -- I don't know exactly when, maybe 2013 would be a guess.
Q. Okay. Let's look at this. We kind of went off on a tangent, but I think we got through a lot of my questions there. But we were beginning to look at the financial ledger, which we marked as -- is in Exhibit 2 to your deposition. It's near the back.
A. All right.
Q. You got it?
A. Yes.
Q. Okay. Can you tell -- are you familiar with this printout?
A. You mean this one for this patient?
Q. No. With -- for the format of it. So is this -- I mean, it sounds like from your testimony you still use Nextech, right?
A. Yes.
Q. And this document came out of Nextech?
A. Yes.
Q. And so is it a practice management software for physicians where it's all in one? It's got

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anything, including the financial --
A. Yes.
Q. -- capabilities?
So is this kind of an internal audit document run, or I mean, where would you -- how would you do this, get this data?
A. It would be on the financials -- or the billing tab on the same front page that we have looked at before. It would be in the billing tab, and it's a drop down of charges and payments.
Q. And so my question to you is, where it says -- let's go to the second page. At the top it says, December 19th, 2013, charge, cosmetic sub consult, Dennis Schimpf, $50.00, cosmetic consult. On the audit trail, would there be a -- show who was putting that data in?
A. It should. I don't know if it covers the financial section, but it should.
Q. Okay. Are you aware of what their practice was for entering in when they would bill a patient for a charge under this software?
A. No, not exactly.
Q. Okay. Did it generate a document with a bill to the customer -- patient associated with the software or --

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A. Well, certainly the software can generate a quote, and it can also generate a bill to the patient, and it can generate a bill to an insurance company.
Q. Okay. So it can, but did it? I guess we don't have a bill for December 19th, 2013 or else we would -- I would have seen it, or I don't know. I'm asking you the question.
A. So that generally wouldn't have been printed. If there was a fee for that visit, which it looks like there was, the patient would be asked to pay it. In this case it looks like it was adjusted off, not paid, and so an actual invoice or bill would not be generated.
Q. Okay.
A. Bills are generated for -- for delinquent payments.
Q. I understand. Where it says adjustment under that entry, your understanding that there was no payment made for that? Is that how you read this document?
A. Yes.
Q. On the first page, or also, on the second page where it says above there, a charge for cosmetic consult, $50.00, is there any way to

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determine whether those charges were paid? And that goes for anywhere through the first page for a cosmetic consult.
A. Well, under the payments columns would be payments made. Under the adjustments column would be write offs.
Q. Okay. So that means it was made, okay.
Ms. Tolbert testified that you could upload dictations to Nextech, which is consistent with what you've told us here this afternoon. Do you know why there's no dictations for this patient that were -- that you found in Nextech?
A. I do not know.
Q. Do you know if any of the records were destroyed?
A. I do not believe so.
Q. And what leads you to that conclusions?
A. The audit trail.
Q. The audit trail?
A. The audit that we went through at the beginning.
Q. Okay. Because that would show --
A. If anything was deleted.
Q. Okay. And that's on the assumption that the record was put into Nextech, correct?

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A. Well, yes, because I don't think you can delete it unless it was put in there, right?
Q. All right. Is there a way to see if data was deleted out of the personal folders?
A. No.
Q. You're not aware of any?
A. Not to my knowledge. I'm not an IT expert though.
Q. Was there anything in the Tolbert or Schimpf depositions you disagreed with with regard to the medical records maintenance or policies that they testified to?
MR. SMYTH: Object to the form.
MS. SHOWERS: Object to the form. It's an improper question.
BY MR. HALVERSEN:
Q. You still have to answer.
A. I read them quickly, so I -- you know, I don't think that there was anything that was specifically and blatantly wrong, no.
Q. Was there anything generally wrong?
MS. SHOWERS: Object to the form.
MR. SMYTH: Same objection.
BY THE WITNESS: No, just I don't think Neztech's that hard to use.

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BY MR. HALVERSEN:
Q. Okay.
A. And the systems aren't that hard to use, but that's just my opinion.
Q. My grandfather said, all we have is opinions. Dr. Schimpf also testified that most of your staff couldn't use the EMR correctly; is that accurate?
MR. SMYTH: Object to the form.
MS. SHOWERS: Objection. That's pitting the witnesses.
MR. HALVERSEN: You can object to the form.
MS. SHOWERS: I can do more than that if you go outside the scope of a records custodian.
MR. HALVERSEN: I believe it is germane to the issue of the recordkeeping.
MS. SHOWERS: I'm not going to let it go much further.
MR. SMYTH: I object as well. It is an improper question.
MR. HALVERSEN: Your objection is noted for the record.
A. So to answer that question, we reviewed our Nextech EMR just recently in trying to decide if we should move it from server-based to cloud-based, and if so, should we change to a different system, and everybody in the office that I asked wanted to keep Nextech and thought that it was quite usable compared to the others out there.
Q. You've had no problems with Nextech?
A. I've had problems with it, but, no, not -- it's -- I have learned it. It is moderately complex, as almost all these records systems are. You do have to spend some time with it. You do have to get to know it. We know it, and it works for us.
Q. Okay. The last area I want to cover with you and then we'll be done is the photographs. And I'm glad you read the deposition, because it's going to shortcut a lot of my questions.
So there was testimony from either Dr. Schimpf or Ms. Tolbert that the -- that the photographs were stored on an Apple database. They used an Apple database; is that accurate? Did you have an Apple database at the time?
A. Yes. So at the time and for years before, and for a couple years after, we used an Apple program called Aperture, which has been rolled into their program called Photo now. And the reason we used it was that one could take a picture, and the

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system was tethered so that that picture went directly into the database. Once you've plugged in the name and other basic demographics on the patient, you could take the pictures and they immediately uploaded. So they were automatically there filed correctly. And so we used it for quite some time, and we have switched to an industry standard database now from Canfield called Mirror.
Q. Okay. At the time in 2014, for this patient, was your office using Aperture?
A. Yes.
Q. And then it migrated to a program called Photo?
A. Yes. Apple converted its iPhoto program and Aperture together into one program called Photo.
Q. Okay. Do you know when that transition happened?
A. No.
Q. Was it your understanding that, that was an automatic transition where they just upload -- changed the software and all the data stayed where it was and it was all transition automatically, or was there some kind of update or any transition issues?
A. I never transitioned to the new system

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because it lost the ability to tether and changed the folder system so that it wouldn't be as easily searchable.

Q. All right. The program Photo lost the ability to tether?

A. Correct. The program Photo does not have the ability to tether.

Q. Okay.

A. Which is why I moved to an industry standard database for photos.

Q. All right. In 2014 was -- was your office using -- or was it still working under the Aperture software?

A. Yes.

Q. Okay. And according to what you started to tell us, I believe what you said is that there would be an automatic linking of the patient's data, and that was the tethering process, meaning the pictures were taken in the camera, and then with a couple clicks it would code it and send it to a place that was identified for that patient; is that accurate, or if it's not and I'm misstating it then --

A. More or less, yes, but the tethering did not have to occur. You could take a photograph and then upload it by other means.

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Q. Okay. It was, I believe -- I can't remember which one it was, whether it was Dr. Schimpf or Ms. Tolbert, but I believe Dr. Schimpf said that it was Dawn who was responsible -- or took on that responsibility for them to upload or get the pictures either taken or migrated to some kind of a home where the data lived on -- on your systems; is that accurate or no?

A. That's my understanding of what he said, yes.

Q. Okay. Do you have a -- any knowledge as to whether or not that was what was occurring, or was there supposed to be a different thing that he was supposed to do with photographs?

A. No. He had access to all my systems, including the Aperture photo system, which is designed as a photographic database, and I do believe that he used Dawn to take photographs on occasion.

Q. So he had your permission to use her in that capacity to store photographs?

A. I didn't object to it. I don't know that I knew that he was doing that to start with, but it's absolutely fine with me.

Q. Okay. But at some point you knew that he was using Dawn or using your Aperture program to store

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his patient photographs, fair?

A. Yes. It was the intention that he use the Aperture program, and at some point I knew that he was having Dawn take the photos.

Q. Okay. So if this patient was -- had her procedure done, I'll submit to you, June 6th, 2014, do you have any explanation of how -- in considering the fact that she indicated she alleges she had pictures taken of her pre-operatively, do you have any explanation as to why those photographs did not -- were not found, given that Dr. Schimpf or Sweetgrass was using the Aperture system?

MS. SHOWERS: Object to the form.

MR. SMYTH: Object to the form.

BY THE WITNESS: I do not know why there were not photographs.

BY MR. HALVERSEN:

Q. Okay. And I believe you -- you did say that Aperture does tether, with the caveat that it could also be that the -- the user would have to -- or could manually upload them into the Aperture database; is that accurate?

A. That is accurate.

Q. Okay. And I believe -- would you still have the database for Aperture for 2014 patients?

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A. Absolutely. I've got the full database.

Q. Okay. And I imagine you've already done the search to see if there's photographs for this patient?

A. Multiple times using every keyword and metadata, including date of service I could do.

Q. And you actually physically did it? You didn't have somebody else do it?

A. I did it.

Q. You did the search?

A. Several times.

Q. Was that in one particular computer or a different computer or --

A. It's all on the same computer. It never left that computer, except for, you know, HIPAA complaint and backup reasons.

Q. Could you say that again?

A. The data was outside of the server and the network. It was on that computer, with the exception of the backup of that data --

Q. Oh, I understand.

A. -- which was in a HIPAA compliant form.

Q. Was it being backed up in 2014?

A. Yes.

Q. Do you know what software vendor was doing

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the backup in 2014?
A. Yes.
Q. Who was that?
A. Carbonite Pro.
Q. Did you try to figure out if Carbonite had a backup for it?
A. I don't use Carbonite anymore, so they don't have the backup, but those backups are not -- they're rolling backups, and Carbonite was a rolling backup. So I'm not sure they would have it, even if I still used them.
Q. What does that mean "rolling backup"?
A. It saves several generations of changes but not indefinitely.
Q. Okay. Before Dr. Schimpf left your -- using your facilities, did he have access to the Aperture program?
A. Yes.
Q. Do you have any knowledge as to whether Dr. Schimpf used the Aperture program?
A. I know he's -- you know, he's used it and looked at it previously, and there are patients of his on that Aperture database. How much he used it, I don't know. I didn't follow him around the office.

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Q. Is this the only medical records issue you're aware of with regards to this patient as it pertains to the Aperture systems?
A. With this patient? Well, I mean, I don't have any record of whether there were photographs or not with this patient.
Q. I'm sorry, my question wasn't clear. Did this happen on a different occasion with regard to another patient with regard to the Aperture system?
A. There were reports that photographs were missing. No photograph that I know of that I took with the tethered system was lost. At least the majority of the patient's photographs who we were looking for we could find with the metadata, as we referenced earlier.
Q. Were those reports of missing photographs, was that with Dr. Schimpf's practice or with your practice?
A. I am -- I'm not sure. It may have been both. I don't know.
Q. You read his testimony. Do you recall him saying that there could have been an issue with other photographs?
A. Yes.
Q. Do you have any knowledge as to what that

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statement was he was referring to?
MR. SMYTH: Object to the form.
BY THE WITNESS: Just what he said. He thinks there's other missing photographs.
BY MR. HALVERSEN:
Q. Right. My question to you is, do you have any information about what he was talking about?
A. I don't have any information about specifically what he's talking about, other than on occasion I would get reports saying they can't find photographs, but we were able to find at least most of them.
Q. "They" being his people?
A. The staff. I don't know.
Q. Somebody?
A. Yeah.
Q. Could have been a patient of his, could have been a patient of yours?
A. Yes. The database functions, we've got lots of photographs in them.
Q. And I believe he testified that he had an IT person come to your office; is that accurate?
A. I read that. I have no knowledge that, that occurred. I certainly wouldn't have let an IT person in that I don't know without a business

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associate's agreement, because there are lots of pictures of people. It may have happened, and for a while we were using the same IT person. So he could have looked for it, but I have no knowledge of that.
Q. Who would that IT person have been?
A. Joe Ninastat.
Q. How do you spell that, best of your ability?
A. It's Charleston Tech Support.
Q. Okay.
A. Joe at Charleston Tech Support.
Q. So save and except working with Joe to do something, you don't have any knowledge of him doing any kind of audit on Aperture to see if there were any photographs of this patient?
A. I'm sorry, who would do an audit? Joe or --
Q. Yeah. Joe, who's with Charleston --
A. Charleston Tech Support.
Q. -- Tech Support.
So save and except Joe at Charleston Tech Support, you don't have any knowledge of an audit being performed on the Aperture system regarding --
A. That's correct.
Q. -- retrieval and photograph records for this patient?
A. That's correct, and although I don't know

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everything about the program, I don't know that there's an audit system on it.

Q. Okay. Well, I understand what you're saying. You did some kind of a search on the system.

A. I did a search, but that's not really an audit.

Q. Okay. I understand. So save and except Joe from Charleston Tech Support doing a search on the Aperture database for this patient, you're not aware of anybody else doing any kind of tech -- any tech person or IT person doing any kind of examination on that database to look for our patient's medical records?

A. I was not aware of that.

Q. And my last question I -- Dr. Schimpf testified there were multiple problems with O'Neill Plastic Surgery's server. Do you know what he's speaking about there?

MR. SMYTH: Object to the form.

BY THE WITNESS: We have IT technical challenges every now and then, and they did exist. They -- they were fixed when we, you know, reported them. The system was set up by a professional group, and it's been maintained by an IT group the entire time.

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BY MR. HALVERSEN:

Q. I gotcha. Let me ask you this. Are you aware of any reason why a problem with your server explains why there's incomplete medical records for this patient for Dr. Schimpf?

A. Not that I'm aware.

MR. HALVERSEN: Okay. I appreciate your time. That's all the questions I have for you.

EXAMINATION

BY MR. SMYTH:

Q. Doctor, I just have one question for you.

A. Okay.

Q. I'm Todd Smyth. I represent Dr. Schimpf and his practice. Are you aware, after all of the searching that you've done, of any evidence that would suggest that Dr. Schimpf or anyone under his control, any employee or anybody at his behest, did anything to destroy or alter any of Ms. Whitfield's medical records?

A. No.

MR. SMYTH: Thank you.

MS. SHOWERS: And the witness check that was brought here is incorrect.

MR. HALVERSEN: How's that, Barbara?

MS. SHOWERS: The witness is entitled to

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mileage, which is 13.9 miles from his office to here, times two, times -- I've done the math at .545, which equals $15.15, plus the witness fee of $25.00. So it should be $40.15.

MR. HALVERSEN: Well, since you're bringing it up as an issue, I believe the calculation was 14.4 miles from the registered agent's address on file with the Secretary of State. I'd be happy to double-check that, and if there's an error in the calculation, I would be happy to submit any balance that was not owed.

MS. SHOWERS: That's how I calculated it, the distance from -- and I even took the shortest one.

MR. HALVERSEN: I used the registered agent's address for Sweetgrass Plastic Surgery [sic], which is the Cunningham Drive, which is on the check.

BY THE WITNESS: I would say that Sweetgrass better not be registered at my home address.

MR. HALVERSEN: You should change it, if you want.

BY THE WITNESS: O'Neill Plastic Surgery should be. I think you misspoke.

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MR. HALVERSEN: O'Neill Plastic Surgery.

BY THE WITNESS: You said Sweetgrass.

MR. HALVERSEN: Oh, yeah, no, not Sweetgrass, I apologize.

Barbara, if there's a discrepancy in the witness fee, I would be more than happy to, but I'm telling you the basis of how I calculated it.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

I, Sarah Gacioch, Certified Shorthand Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the witness in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and location therein stated; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing is a full, complete and true record of the testimony of the witness and of all objections made at the time of the examination; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself/herself of the opportunity to sign or the signature has been waived.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 9th day of January, 2019, at Charleston, Charleston County, South Carolina.

_____
Sarah Gacioch
My Commission Expires:
October 15, 2025

E R R A T A S H E E T

RE: JEANE WHITFIELD vs. DENNIS K. SCHIMPF, M.D., and SWEETGRASS PLASTIC SURGERY, LLC

DEPOSITION OF: PATRICK O'NEILL, MD

Please read this original deposition with care, and if you find any corrections or changes you wish made, list them by page and line number below. DO NOT WRITE IN THE DEPOSITION ITSELF. Return the deposition to this office after it is signed. We would appreciate your prompt attention to this matter.

To assist you in making any such corrections, please use the form below. If supplemental or additional pages are necessary, please furnish same and attach them to this errata sheet.

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My Commission expires: _____

Errata Sheet

NAME OF CASE: Jeane Whitfield vs Dennis K. Schimpf, M.D., et al
DATE OF DEPOSITION: 12/17/2018
NAME OF WITNESS: Patrick O'Neill. M.D.
Reason Codes:

1. To clarify the record.
2. To conform to the facts.
3. To correct transcription errors.

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Exhibits

O'Neil- Exhibit 1 3:16 5:4,17,22 14:19 24:9,21 25:18 27:19 28:8,21 29:6 42:8

O'Neil- Exhibit 2 3:17 29:7,9 45:10

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2017-CP-10-2758

JEANE WHITFIELD,

Plaintiff,

vs.

DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC

Defendants.

DEFENDANT'S EXHIBIT D

ORDER DENYING NON-PARTY O'NEILL PLASTIC SURGERY MOTION TO QUASH SUBPOENA

FILED
2019 MAR 14 PM 12:4
JULIE J. ARMSTRONG
CLERK OF COURT

This matter came before the Court on February 27, 2019 at 10:30 A.M. Present on behalf of the Plaintiff were Daniel S. Slotchiver, Esq. and Brent S. Halversen, Esq. Present on behalf of the non-party O'Neill Plastic Surgery (hereinafter, "O'Neill") was John Radeck, Esq. On December 21, 2018 O'Neill filed a motion to quash a subpoena for a forensic inspection of its hard drives and servers. The subpoena was served by Plaintiff.

According to Plaintiff, Defendants and stipulated by O'Neill, the Defendants utilized O'Neill's medical practice to store their medical records for the period of time when Plaintiff was a patient of Defendants. The Defendants have conceded that certain medical records and pre-operative photographs of Plaintiffs are missing and cannot be located. According to Plaintiff, pre-operative photographs of her were taken and presumably were in existence at least at one point in time. The Plaintiff has represented that she has no photographs of her condition before the malpractice complained of, and desires to show the jury photographs of her condition before the events complained of in the lawsuit.

According to O'Neill and stipulated by Defendants, any such photographs would have been contained on O'Neill's MacBook Pro, such device no longer being utilized by O'Neill to store its current data and is otherwise offline. The Plaintiff have proposed to utilize Steve Abrams, Esq. of Abrams Cyber Forensics to inspect the MacBook Pro utilizing forensic software which may be able to locate the photographs and/or determine if the data was ever deleted from the laptop computer.

Mr. Abrams has represented to the Court that the inspection process should be able to be accomplished in three weeks, that the integrity of the data on the MacBook Pro will be unaffected by the search, that he will retain none of the data, that he will not view any of the photographs employed in the search, and that his search will be performed in a secure environment. Mr. Abrams represented that the process of reviewing and indexing of the data should take about three weeks and he will perform this process at his office and bring the indexed data back to O'Neill's premises to search. The Court orders Mr. Abrams to complete the inspection as expeditiously as possible. O'Neill expressed a concern at the hearing about the patient data being physically removed from its premises. Mr. Abrams can alleviate any potential concern of O'Neill's by being allowed access to O'Neill's office to accommodate his search on its premises, as described above.

Any hit results of Mr. Abrams that have any positive markers (names, date of birth, social security number, etc.) for the identity of Mrs. Whitfield may be delivered directly to counsel for Plaintiff and Defendants. Any hit results of Mr. Abrams that have no positive markers for the identity of Mrs. Whitfield but fit the designed search criteria will be delivered to O'Neill, who is the present custodian of the data, to identify the patient in the photographs. The results of O'Neill's determination as to the patient's identity, in this

circumstance, shall be produced to counsel for Plaintiff and Defendants simply by identifying the particular photograph with the date of birth corresponding to the patient depicted in the photograph. If after inspection and reasonable inquiry O'Neill cannot determine the identify of the person in the photograph, and the parties cannot agree on a procedure to rule in or rule out Plaintiff's identity, the Court will retain jurisdiction of this matter to hear any such dispute.

Mr. Abrams can also execute any non-disclosure agreement, consent protective order, and/or HIPAA Business Associate Agreement (BAA) to satisfy any privacy concerns that O'Neill may have concerning the confidentiality of its data.

Accordingly, the Defendants motion in DENIED, as stated herein.

The Honorable Alex Kinlaw, Jr., Presiding Judge

March 11, 2019

Charleston, South Carolina

State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

Alex Kinlaw, Jr.
Judge

Greenville County Courthouse
305 East North Street, Suite 213
Greenville , SC 29601
Phone: (864) 467-8043
Fax: (864) 467-8035
akinlawj@sccourts.org

March 11, 2019

Charleston County Clerk of Court
Court of Common Pleas
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2258

Re: Jean Whitfiled vs. Dennis Schimpf, M.D. and
Sweetgrass Plastic Surgery LLC
2017-CP-10-2758

Dear Clerk:

Enclosed herewith is The original and two (2) copies of the order in the above styled matter. Please file the same and facilitate copies to counsel on both sides.

Thanking you, I am,

Shannon Thurman
Administrative Assistant to Judge Alex Kinlaw, Jr.

FILED

2019 MAY -3 PM 12:38

JULIE J. ARMSTRONG
CLERK OF COURT

BY _____

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	FOR THE NINTH JUDICIAL CIRCUIT
Jeane Whitfield,)	C/A No. 2017-CP-10-2758
Plaintiff,)	
)	**SUPPLEMENTAL CONSENT ORDER ON NON-PARTY PATRICK O'NEILL, MD AND O'NEILL PLASTIC SURGERY'S MOTION TO QUASH SUBPOENA**
Versus)	
)	
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC,)	
Defendants.)	

The parties and non-party Patrick O'Neill, MD and O'Neill Plastic Surgery have hereby agreed to the following supplemental parameters to address privacy concerns with the previous Order of this Court filed on March 14, 2019.

The parties and non-party have agreed that the previous Order be modified to reflect that the "positive markers" for the search by Mr. Abrams be limited to the Plaintiff's "name, date of birth and social security number and date of her office visit." Further, any **images containing** positive markers that are identified during the search should be sent only to Dr. O'Neill at his practice to identify the patient rather than to counsel for the Plaintiff and counsel for the Defendant. **Any deleted images that do not match with the "positive markers" will be scored by a software algorithm to tag the filenames with the percentage of skin tones in the image. The deleted images that are at least 75% skin tone shall be separately sent only to Dr. O'Neill for visual inspection to determine if the images are of the Plaintiff or not.** Any images of the Plaintiff would then be produced by Dr. O'Neill to Plaintiff and Defendants. This procedure will protect other patient's highly private and sensitive photographs from being forwarded to counsel for the Plaintiff and counsel for the Defendant which would be a HIPAA violation and a breach of information that requires notice to the patient. Counsel for the Plaintiff has agreed to provide photographs of the Plaintiff to Dr. O'Neill for comparison purposes.

The parties have also agreed that during the inspection by Steve Abrams, Esquire at O'Neill Plastic Surgery, Mr. Abrams will make two identical copies of the data he extracts to be analyzed during his forensic review and provide one copy to Dr. O'Neill before Mr. Abrams leaves the premises with the second identical copy.

IT IS THEREFORE ORDERED that the Order of March 14, 2019 be modified specifically to identify the "positive markers" per the above; that all positive markers be sent to Dr. O'Neill for identification; that the search be done as much as possible on the premises at O'Neill Plastic Surgery; and that during the inspection by Steve Abrams, Esquire at O'Neill Plastic Surgery, Mr. Abrams will make two identical copies of the data he extracts to be analyzed during his forensic review and provide one copy to Dr. O'Neill before Mr. Abrams leaves the premises with the second identical copy.

The Honorable Alex Kinlaw, Jr.
Presiding Judge

4/29, 2019
Cville, SC

State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

Alex Kinlaw, Jr.
Judge

Greenville County Courthouse
305 East North Street, Suite 213
Greenville , SC 29601
Phone: (864) 467-8043
Fax: (864) 467-8035
akinlawj@sccourts.org

April 30, 2019

Charleston County Clerk of Court
Court of Common Pleas
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2258

Re: Velma Osborne
vs.
Bon Secure St. Francis Hospital
2017-CP-10-0924

Dear Madam Clerk:

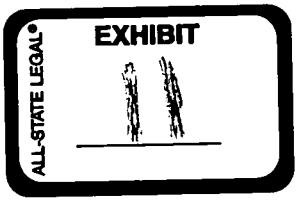
Please find enclosed the original of the order in the above styled matter. Please facilitate a copy to counsel on both sides.

Thanking you I am,

Shannon Thurman
Administrative Assistance to Judge Kinlaw, Jr.

Barbara Showers

From: Daniel S Slotchiver <dan@slotchiverlaw.com>
Sent: Wednesday, August 21, 2019 5:41 PM
To: Barbara Showers
Cc: Brent Halversen; tsmyth@smythwhitley.com; krhodes@smythwhitley.com; Kimberly Draper
Subject: Re: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF# 84.066



Sure. Lets make it 6, address below. See you then.

Daniel S Slotchiver
Slotchiver & Slotchiver LLP
751 Johnnie Dodds Blvd Suite 100
Mt Pleasant SC 29464
(o)843-577-6531
(f)843-577-0261
dan@slotchiverlaw.com

Please note that we have moved and adjust future mailings accordingly

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On Aug 21, 2019, at 5:32 PM, Barbara Showers <barbara.showers@hoodlaw.com> wrote:

> --_000_42407522553a48cc8068710daf152780hoodlawcom_
> Content-Type: text/plain; charset="us-ascii"
> Content-Transfer-Encoding: quoted-printable
>
> Yes-I checked with him and he can do 6 or 630 tomorrow. Will that work?
>
> From: Brent Halversen <Brent@halversenlaw.com>
> Sent: Wednesday, August 21, 2019 4:57 PM
> To: Melanie Hall <melanie.hall@hoodlaw.com>; dan@slotchiverlaw.com; tsmyth@=
> smythwhitley.com; krhodes@smythwhitley.com
> Cc: Barbara Showers <barbara.showers@hoodlaw.com>; Maryrose Pritchard <mary=
> rose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>
> Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plas=
> tic Surgery, LLC, HLF#84.066
>
> Barbara,
>
> Are you still offering to having Dr. O'Neill be deposed or no ?

Brent

Brent Souther Halversen, LLC
Attorney-At-Law
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, South Carolina 29464
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brent@halversenlaw.com<mailto:brent@halversenlaw.com>
www.halversenlaw.com<http://www.halversenlaw.com/>
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e may contain legally privileged and confidential information intended only=
for the use of the individual

Barbara Showers

From: Katie Rhodes <krhodes@smythwhitley.com>
Sent: Wednesday, August 21, 2019 5:52 PM
To: Daniel S Slotchiver; Barbara Showers
Cc: Brent Halversen; Todd Smyth; Kimberly Draper
Subject: Re: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF# 84.066

Tomorrow at 6pm works for Todd.

Thanks,

Katie

Katie Rhodes, Paralegal
Smyth Whitley, LLC

***Please Note Our New Suite Number**

126 Seven Farms Drive
First Citizens Plaza, Suite 260
Charleston, SC 29492

Phone: 843.606.5635
Direct: 843.606.5627
Fax: 843.654.4095
Email: krhodes@smythwhitley.com

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From: Daniel S Slotchiver <dan@slotchiverlaw.com>
Sent: Wednesday, August 21, 2019 5:40 PM
To: Barbara Showers <barbara.showers@hoodlaw.com>
Cc: Brent Halversen <Brent@halversenlaw.com>; Todd Smyth <tsmyth@smythwhitley.com>; Katie Rhodes <krhodes@smythwhitley.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>
Subject: Re: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Sure. Lets make it 6, address below. See you then.

Daniel S Slotchiver
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On Aug 21, 2019, at 5:32 PM, Barbara Showers <barbara.showers@hoodlaw.com> wrote:

> --_000_42407522553a48cc8068710daf152780hoodlawcom_
> Content-Type: text/plain; charset="us-ascii"
> Content-Transfer-Encoding: quoted-printable
>
> Yes-I checked with him and he can do 6 or 630 tomorrow. Will that work?
>
> From: Brent Halversen <Brent@halversenlaw.com>
> Sent: Wednesday, August 21, 2019 4:57 PM
> To: Melanie Hall <melanie.hall@hoodlaw.com>; dan@slotchiverlaw.com; tsmyth@=
> smythwhitley.com; krhodes@smythwhitley.com
> Cc: Barbara Showers <barbara.showers@hoodlaw.com>; Maryrose Pritchard <mary=
> rose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>
> Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plas=
> tic Surgery, LLC, HLF#84.066
>
> Barbara,
>
> Are you still offering to having Dr. O'Neill be deposed or no ?
>
> Brent

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for the use of the individual

Record on Appeal - 0300

Barbara Showers

From: Daniel S Slotchiver <dan@slotchiverlaw.com>
Sent: Wednesday, August 21, 2019 2:28 PM
To: Barbara Showers
Cc: Brent Halversen; tsmyth@smythwhitley.com; Kevin Horton; Susan Maulden; Katie Rhodes; Kimberly Draper; Julia Bradshaw
Subject: Re: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF# 84.066

Barbara,

We are happy to convene for a de bene esse deposition of the records custodian of Dr O'Neill's office, but we are slammed preparing for this trial and based on our limited available time we will require it be done at my office. As Dr O'Neill is located on DI, it should be more convenient anyway. We expect it would last no more than 15 minutes.

Assuming both you and Todd are agreeable, let us know a time and place for tomorrow or Friday and we will do our best to accommodate it.

Dan

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(f)843-577-0261
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On Aug 21, 2019, at 1:34 PM, Barbara Showers <barbara.showers@hoodlaw.com> wrote:

> Dear all—While I take the position that the affidavit is sufficient, I neglected to offer that a de bene esse deposition be scheduled this week or next. Dr. O'Neill can be available in the evening after office hours here at our office. That way patient surgeries would not need to be cancelled. Please let me know what dates work for you.
> Thanks
> Barbara
>
> ---
>
> **From:** Barbara Showers
> **Sent:** Wednesday, August 21, 2019 10:14 AM

To: 'Brent Halversen' <Brent@halversenlaw.com>
Cc: dan@slotchiverlaw.com; 'tsmyth@smythwhitley.com' <tsmyth@smythwhitley.com>; 'Kevin Horton' <khorton@smythwhitley.com>; Susan Maulden <paralegal@slotchiverlaw.com>; Katie Rhodes <krhodes@smythwhitley.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>; Julia Bradshaw <julia.bradshaw@hoodlaw.com>
Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066
Importance: High

Brent—as the attached email indicates, I informed you that we were making changes to the affidavit and no objection was raised. Everything in the affidavit is true and correct. Dr. O'Neill is not just a records custodian, he is a board certified Plastic surgeon, which I added to the affidavit. I also used the language of the Order to clarify what the process was and why it was done. I also added the conclusion-- after spending several hours and finding no pictures of the plaintiff in the deleted images produced in the forensic search—also part of the Order. I know that neither you nor Dan attended the three and half hour review of the deleted images on Saturday July 20th with me, Dr. O'Neill, Steve Abrams and Kevin Horton, but if you are aware of evidence that photos of the plaintiff were identified from the search of deleted images, please let me know, because Dr. O'Neill did not see any.
Dr. O'Neill's affidavit it correct and Todd has agreed to it's admissibility. Dr. O'Neill is a busy surgeon and has spent countless hours cooperating with this search. His patients who have surgeries scheduled next week should not have their lives turned upside down and potentially adversely impact their health if he has to cancel surgery to appear pursuant to your subpoena.
If you will not agree to use the affidavit, I will need to file a Motion to Quash the subpoena.
Thanks
Barbara

From: Brent Halversen <Brent@halversenlaw.com>
Sent: Tuesday, August 20, 2019 9:14 AM
To: Barbara Showers <barbara.showers@hoodlaw.com>
Cc: dan@slotchiverlaw.com; 'tsmyth@smythwhitley.com' <tsmyth@smythwhitley.com>; 'Kevin Horton' <khorton@smythwhitley.com>; Susan Maulden <paralegal@slotchiverlaw.com>; Katie Rhodes <krhodes@smythwhitley.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>
Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Barbara,

You need to be talking to Todd. I think you and I are on the same page. We have really tried to resolve this with you, even went so far as to prepare the attached affidavit based on what we all agree are pretty vanilla uncontested facts. As previously addressed, you altered the proposed affidavit and included information far and beyond what is necessary, which needs further explanation that can only be accomplished by testimony. Not sure why this was done, but we are not in a position to waive addressing same.

If Todd can't agreement to the basic information in attached affidavit, and its admissibility, then we have no choice but to bring him to trial unfortuantely.

Brent

Attorney-At-Law
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, South Carolina 29464
(843) 284-5790 tel.
(864) 326-4844 fax.
brent@halversenlaw.com
www.halversenlaw.com

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From: Barbara Showers <barbara.showers@hoodlaw.com>
Sent: Tuesday, August 20, 2019 8:58 AM
To: Brent Halversen <Brent@halversenlaw.com>
Cc: dan@slotchiverlaw.com; 'tsmyth@smythwhitley.com' <tsmyth@smythwhitley.com>; 'Kevin Horton' <khorton@smythwhitley.com>; Susan Maulden <paralegal@slotchiverlaw.com>; Katie Rhodes <krhodes@smythwhitley.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>
Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Brent—I am out of the office trying to take a couple of days off so I have not seen the subpoena yet but am writing to ask that you please reconsider this subpoena. The affidavit of Dr. O'Neill states exactly what his testimony will be at trial and reflects his prior deposition testimony. Todd has agreed to the admissibility of the affidavit and there is really no reason to drag a busy surgeon to trial for the purpose of saying there were no photographs of the plaintiff. Dr. O'Neill has full days of surgery scheduled on Monday, Tuesday and Thursday and it would be extremely burdensome and disruptive to his practice to appear at trial on this collateral matter. He has never seen the plaintiff and was not involved in her care. Kindly allow this to serve as my Rule 11 consultation.
Thanks
Barbara

From: Brent Halversen <Brent@halversenlaw.com>
Sent: Monday, August 19, 2019 1:54 PM
To: Barbara Showers <barbara.showers@hoodlaw.com>
Cc: dan@slotchiverlaw.com
Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Barbara,

Todd has not responded to us, after my follow-up inquiry to him, so today we are serving a trial subpoena on you as counsel of record for the practice for the OPS records custodian to appear for trial next week. Sorry, I tried. Perhaps Todd will change his mind.

Brent

Brent Souther Halversen, LLC
Attorney-At-Law
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Mount Pleasant, South Carolina 29464
(843) 284-5790 tel.
(864) 326-4844 fax.
brent@halversenlaw.com
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<image002.png>

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From: Barbara Showers <barbara.showers@hoodlaw.com>
Sent: Saturday, August 17, 2019 5:00 PM
To: Brent Halversen <Brent@halversenlaw.com>; Daniel S Slotchiver <dan@slotchiverlaw.com>
Cc: Melanie Hall <melanie.hall@hoodlaw.com>; tsmyth@smythwhitley.com;

krhodes@smythwhitley.com; Maryrose Pritchard <maryrose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>; steve@abramsforensics.com; Susan Maulden <paralegal@slotchiverlaw.com>
Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Brent—Please consult with Todd and Kevin on a *mutually* agreeable affidavit and I will have him sign it.
Thanks
Barbara

From: Brent Halversen <Brent@halversenlaw.com>
Sent: Saturday, August 17, 2019 4:54 PM
To: Barbara Showers <barbara.showers@hoodlaw.com>; Daniel S Slotchiver <dan@slotchiverlaw.com>
Cc: Melanie Hall <melanie.hall@hoodlaw.com>; tsmyth@smythwhitley.com; krhodes@smythwhitley.com; Maryrose Pritchard <maryrose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>; steve@abramsforensics.com; Susan Maulden <paralegal@slotchiverlaw.com>
Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Barbara,

I agree. I believe my proposed Affidavit was as simple as you and I would like it. Attached. This is what I sent you weeks ago. It was changed without my input , or agreement, and Todd wants the affidavit to have favorable testimony for him. I could put in some favorable testimony from his depo for our client as well, such as 1. Dr. O'Neill never had any problems working with his EMR, and 2. Dr. O'Neill encountered missing medical records on patients he shared with Dr. Shrimp.

I left that stuff out to make this as non-debatable and nuetral as possible and simply to have an evidentiary foundation that the photos were not found by O'Neill- as you suggest below. If Todd and Kevin won't agree to my affidavit (with no positioning by either side) then I have no choice but to subpoena him for trial, to cross him on the representations he put into the affidavit you all had him sign, and get in the favorable testimony above for us I referenced above.

Brent

From: Barbara Showers <barbara.showers@hoodlaw.com>
Sent: Saturday, August 17, 2019 4:38 PM
To: Brent Halversen <Brent@halversenlaw.com>; Daniel S Slotchiver <dan@slotchiverlaw.com>
Cc: Melanie Hall <melanie.hall@hoodlaw.com>; tsmyth@smythwhitley.com; krhodes@smythwhitley.com; Maryrose Pritchard <maryrose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>; steve@abramsforensics.com; Susan Maulden <paralegal@slotchiverlaw.com>
Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Brent—there is absolutely no legitimate reason to serve yet another subpoena on my client to appear at a trial to say no photos of the plaintiff were found. If you all cannot just stipulate that no photos of the plaintiff were found on the computer and need an affidavit from him stating that—please get together with Todd and Kevin and agree on the language for the affidavit and I will have Dr. O'Neill sign it.
Thanks
Barbara
PS—Steve—I am also awaiting your affidavit that all O'Neill Plastic surgery materials have been returned. Thanks

From: Brent Halversen <Brent@halversenlaw.com>
Sent: Friday, August 16, 2019 9:09 PM
To: Barbara Showers <barbara.showers@hoodlaw.com>; Daniel S Slotchiver <dan@slotchiverlaw.com>
Cc: Melanie Hall <melanie.hall@hoodlaw.com>; tsmyth@smythwhitley.com; krhodes@smythwhitley.com; Maryrose Pritchard <maryrose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>; steve@abramsforensics.com; Susan Maulden <paralegal@slotchiverlaw.com>
Subject: Re: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Barbara,

This is not the affidavit that we asked the records custodian to sign. In fact, it goes well beyond and makes representations that I have no understanding and will need to be explored. If the records custodian will not sign the affidavit we proposed, you can produce the records custodian for deposition voluntarily next week or we will subpoena him for trial. If I don't hear from you one way or another I will issue a subpoena on Monday for his attendance at trial. In the meantime I am happy to discuss.

Brent

Get Outlook for iOS

From: Barbara Showers <barbara.showers@hoodlaw.com>

Sent: Friday, August 16, 2019 7:40 PM

To: Daniel S Slotchiver

Cc: Brent Halversen; Melanie Hall; tsmyth@smythwhitley.com; krhodes@smythwhitley.com; Maryrose Pritchard; Kimberly Draper; steve@abramsforensics.com; Susan Maulden

Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Please find attached Dr. O'Neill's affidavit.

Thanks

Barbara

From: Daniel S Slotchiver <dan@slotchiverlaw.com>

Sent: Friday, August 16, 2019 11:20 AM

To: Barbara Showers <barbara.showers@hoodlaw.com>

Cc: Brent Halversen <Brent@halversenlaw.com>; Melanie Hall <melanie.hall@hoodlaw.com>; tsmyth@smythwhitley.com; krhodes@smythwhitley.com; Maryrose Pritchard

<maryrose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>; steve@abramsforensics.com; Susan Maulden <paralegal@slotchiverlaw.com>

Subject: Re: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Kevin and Todd, please advise if you will consent to the affidavit coming in, or stipulate to the facts contained therein, without the necessity of us needing to subpoena Dr O'Neil.

Daniel S Slotchiver
Slotchiver & Slotchiver LLP
751 Johnnie Dodds Blvd Suite 100
Mt Pleasant SC 29464
(o)843-577-6531
(f)843-577-0261
dan@slotchiverlaw.com

Please note that we have moved and adjust future mailings accordingly

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On Aug 16, 2019, at 11:03 AM, Barbara Showers <barbara.showers@hoodlaw.com> wrote:

> I communicated with Dr. O'Neill yesterday and expect to receive the signed affidavit today.
>
> Barbara Wynne Showers
>
> On Aug 16, 2019, at 10:54 AM, Daniel S Slotchiver <dan@slotchiverlaw.com> wrote:
>
> > Barbara, as we have not heard back we can only presume that we will need to subpoena Dr O'Neill for trial testimony. Please advise if he

would prefer to have his trial deposition taken next week. Alternatively we will need to schedule him to appear at the trial of this case. His testimony should be short and we will do what we can to accommodate his schedule.

Dan

Daniel S Slotchiver
Slotchiver & Slotchiver LLP
751 Johnnie Dodds Blvd Suite 100
Mt Pleasant SC 29464
(o)843-577-6531
(f)843-577-0261
dan@slotchiverlaw.com

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On Aug 14, 2019, at 12:55 PM, Daniel S Slotchiver <dan@slotchiverlaw.com> wrote:

> Thanks for your prompt response. So that we are on the same page, we are only agreeable to the affidavit in lieu of testimony if Defendants will agree to its admissibility. Alternatively, we will still need to

subpoena him to trial as the records custodian who did the search.

Please refrain from unwarranted accusations. There are no threats here. After your arguments with the court he was ordered to perform the search and as such he is a witness.

Please let us know where we stand .

Daniel S Slotchiver
Slotchiver & Slotchiver LLP
751 Johnnie Dodds Blvd Suite 100
Mt Pleasant SC 29464
(o)843-577-6531
(f)843-577-0261
dan@slotchiverlaw.com

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On Aug 14, 2019, at 12:48 PM, Barbara Showers <barbara.showers@hoodlaw.com> wrote:

> Brent—We made a couple of changes to the affidavit and I am waiting to hear back from Dr. O'Neill before I send to you. Dr. O'Neill has been more than accommodating to you and your client and there is no reason to continue to threaten him.
> Barbara
>
> ---
>
> **From:** Brent Halversen <Brent@halversenlaw.com>
> **Sent:** Wednesday, August 14, 2019 12:45 PM
> **To:** Barbara Showers <barbara.showers@hoodlaw.com>; Melanie Hall <melanie.hall@hoodlaw.com>
> **Cc:** dan@slotchiverlaw.com; tsmyth@smythwhitley.com; krhodes@smythwhitley.com; Maryrose Pritchard <maryrose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>;steve@abramsforensics.com
> **Subject:** RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066
>
> Barbara,

Have not heard from you in a week. If Dr. O'Neil is unwilling or unable to sign the Affidavit, which we believe is a considerable accommodation for him, we will go ahead and subpoena him.

Brent

Brent Souther Halversen, LLC
Attorney-At-Law
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Mount Pleasant, South Carolina 29464
(843) 284-5790 tel.
(864) 326-4844 fax.
brent@halversenlaw.com
www.halversenlaw.com
<image001.png>

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From: Brent Halversen

Sent: Wednesday, August 07, 2019 4:40 PM

To: Barbara Showers <barbara.showers@hoodlaw.com>; Melanie Hall <melanie.hall@hoodlaw.com>

Cc: dan@slotchiverlaw.com; tsmyth@smythwhitley.com; krhodes@smythwhitley.com; Maryrose Pritchard <maryrose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>;steve@abramsforensics.com

Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Barbara,

Please see attached Affidavit.

As for your request for Dr. O'Neill to be paid by us, we have been down this road before. We have stated our position below. Also, I would also note that Dr. O'Neill was appointed by the Court to fulfill the duties specified not by virtue of our contracting with him.

Brent

Brent Souther Halversen, LLC

Attorney-At-Law

751 Johnnie Dodds Blvd., Suite 200

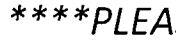
Mount Pleasant, South Carolina 29464

(843) 284-5790 tel.

(864) 326-4844 fax.

brent@halversenlaw.com

www.halversenlaw.com



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From: Barbara Showers <barbara.showers@hoodlaw.com>

Sent: Wednesday, August 07, 2019 11:48 AM

To: Brent Halversen

<Brent@halversenlaw.com>; Melanie Hall <melanie.hall@hoodlaw.com>

Cc: dan@slotchiverlaw.com; tsmyth@smythwhitley.com; krhodes@smythwhitley.com; Maryrose Pritchard <maryrose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>;steve@abramsforensics.com

Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Brent—Dr. O'Neill spent two weekends dealing with this search. The "skin tone" search turned up 11,000 images—the majority of which were not even human—which took hours to review. He is entitled to be compensated for his time. Kindly allow this to serve as my Rule 11 consultation. As far as the affidavit—please send me your proposed affidavit.

Thanks

Barbara

From: Brent Halversen <Brent@halversenlaw.com>

Sent: Tuesday, August 6, 2019 4:46 PM

To: Melanie Hall <melanie.hall@hoodlaw.com>

Cc: dan@slotchiverlaw.com; tsmyth@smythwhitley.com; krhodes@smythwhitley.com; Barbara

Showers <barbara.showers@hoodlaw.com>; Maryrose Pritchard <maryrose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>;steve@abramsforensics.com

Subject: RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Barbara,

We made no agreement to pay Dr. O'Neil to review records to which he is the custodian. The fact that Dr. O'Neil had to spend his time to determine which records may have been responsive to our requests for her medical records is really his own issue and/or between him and Dr. Schimpf. Let us know if an affidavit from him will suffice in lieu of deposing him as to the recent review of his records.

Brent

From: Melanie Hall <melanie.hall@hoodlaw.com>

Sent: Tuesday, August 6, 2019 4:16 PM

To: Brent Halversen <Brent@halversenlaw.com>

Cc: dan@slotchiverlaw.com; tsmyth@smythwhitley.com;

krhodes@smythwhitley.com; Barbara Showers <barbara.showers@hoodlaw.com>; Maryrose Pritchard <maryrose.pritchard@hoodlaw.com>; Kimberly Draper <kimberly.draper@hoodlaw.com>;steve@abramsforensics.com

Subject: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, HLF#84.066

Melanie D. (Hall) Exum

Secretary to Barbara Wynne Showers, Esquire

<image002.jpg>

172 Meeting Street (29401)
P.O. Box 1508
Charleston, SC 29402

Main: (843) 577-4435
Fax: (843) 722-1630

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SLOTCHIVER & SLOTCHIVER, L.L.P.
ATTORNEYS AT LAW
EST. 1959

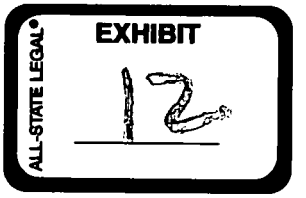
IRVIN J. SLOTCHIVER
DANIEL S. SLOTCHIVER
STEPHEN M. SLOTCHIVER

ANDREW J. McCUMBER

751 JOHNNIE DODDS BLVD, SUITE 100
MOUNT PLEASANT, SC 29464

TELEPHONE (843) 577-6531
FACSIMILE (843) 577-0261

August 23, 2019



BY US MAIL AND EMAIL

Barbara Showers, Esquire
Hood Law Firm
172 Meeting Street
Charleston, SC 29401
Barbara.Showers@hoodlaw.com

RE: Jeane Whitfield v. Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery
Civil Action No.: 2017-CP-10-2578

Dear Mr. Smyth:

Enclosed please find the Notice of Deposition of the records custodian of O'Neill Plastic Surgery scheduled for today at 6:00 P.M. at our office in Mt. Pleasant.

Should you have any questions or concerns, please feel free to contact our office at any time.

Very truly yours,

Susan C. Mauldin
Paralegal to Attorney
Daniel S. Slotchiver

/scm

Attachement(s) as stated.

cc: Brent S. Halversen, Esquire (*VIA EMAIL ONLY*)
Daniel S. Slotchiver, Esquire (*VIA EMAIL ONLY*)

RECEIVED AUG 2 6 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2017-CP-10-2758
JEANE WHITFIELD,	)	
	)	
Plaintiff,	)	
	)	**NOTICE OF DEPOSITION OF RECORDS CUSTODIAN FOR O'NEILL PLASTIC SURGERY**
vs.	)	
	)	
	)	
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC	)	
	)	
	)	
Defendants.	)	
	)	

TO: TODD SMYTH, ATTORNEY FOR DEFENDANTS

YOU WILL PLEASE TAKE NOTICE that on Thursday, August 22, 2019, 6:00 PM at Slotchiver and Slotchiver, LLP, 751 Johnnie Dodds Blvd., Mount Pleasant, SC 29464, the attorneys for the Plaintiff will take the records custodian deposition for O'Neill Plastic Surgery on oral examination, pursuant to South Carolina Circuit Court Rule No. 30 before a Notary Public, or before some other officer authorized by law to take depositions, said deposition to continue from day to day until completed. You are invited to attend and take such part as is fit and proper.

The deponent is commanded to bring with to the deposition a copy of all medical records of the Plaintiff's in the deponent's possession.

BRENT SOUTHER HALVERSEN, LLC

By:_____

Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-813-6453
Email: brent@halversenlaw.com

Attorney for the Plaintiff

August 22, 2019
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I certify that I served the foregoing Notice of Deposition upon all counsel of record by email and affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 22nd day of August, 2019.

BRENT SOUTHER HALVERSEN, LLC

By:_____

Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-813-6453
Email: brent@halversenlaw.com

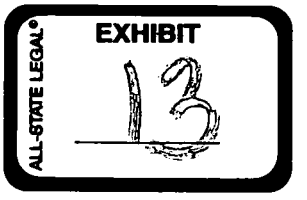
Mount Pleasant, SC
August 22, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2017-CP-10-2758
JEANE WHITFIELD,	)	
	)	
Plaintiff,	)	
	)	**NOTICE OF DE BENNE ESSE DEPOSITION OF RECORDS CUSTODIAN FOR O'NEILL PLASTIC SURGERY**
vs.	)	
	)	
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC	)	
	)	
Defendants.	)	
	)	

TO: TODD SMYTH, ATTORNEY FOR DEFENDANTS

YOU WILL PLEASE TAKE NOTICE that on Thursday, August 22, 2019, 6:00 PM at Slotchiver and Slotchiver, LLP, 751 Johnnie Dodds Blvd., Mount Pleasant, SC 29464, the attorneys for the Plaintiff will take the records custodian deposition for O'Neill Plastic Surgery on oral examination, pursuant to South Carolina Circuit Court Rule No. 30 before a Notary Public, or before some other officer authorized by law to take depositions, said deposition to continue from day to day until completed. You are invited to attend and take such part as is fit and proper.

The deponent is commanded to bring with to the deposition a copy of all medical records of the Plaintiff's in the deponent's possession.



BRENT SOUTHER HALVERSEN, LLC

By:_____

Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-813-6453
Email: brent@halversenlaw.com

Attorney for the Plaintiff

August 22, 2019
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I certify that I served the foregoing Notice of Deposition upon all counsel of record by email and affixing same with proper postage placing same with the United States Postal Service addressed to the parties and counsel's last known address on this 22nd day of August, 2019.

BRENT SOUTHER HALVERSEN, LLC

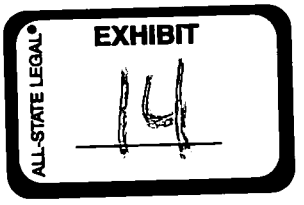
By:_____

Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-813-6453
Email: brent@halversenlaw.com

Mount Pleasant, SC
August 22, 2019

7. None of the photographs

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2017-CP-10-2758
JEANE WHITFIELD,	)	
Plaintiff,	)	
vs.	)	**AFFIDAVIT OF RECORDS CUSTODIAN FOR O'NEILL PLASTIC SURGERY, P.A.**
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC	)	
Defendants.	)	



Patrick O' Neill, MD, personally appearing before me, who being duly sworn, states the following:

1. My name is Patrick O' Neill, MD, I am over the age of eighteen, and have personal knowledge of the facts stated herein.

2. I am a medical doctor licensed in South Carolina and I am board certified by the American Board of Surgery and the American Board of Plastic Surgery.

3. I am the owner of O'Neill Plastic Surgery and records custodian for O'Neill Plastic Surgery in the above captioned matter.

4. I spent several weekend days at my office with Steve Abrams, a forensic examiner hired by counsel for the plaintiff, to facilitate a forensic review of the photographs contained on the laptop computer of O'Neill Plastic Surgery where such photographs were stored. During the time of the treatment of the Plaintiff in this matter, Dr. Schimpf was authorized to store his patient's photographs on the laptop computer when we shared office space. The purpose of the forensic review was to determine if any photographs of

the Plaintiff were ever on the laptop computer when we shared office space. The purpose of the forensic review was to determine if any photographs were ever on the laptop computer and/or determine if data was ever deleted from the laptop computer.

5. The forensic review by Mr. Abrams produced approximately 11,606 images/photographs for me to review.

6. Over the course of approximately three and a half (3.5) hours I reviewed the approximately 11,606 images.

7. None of the photographs Mr. Abrams provided to me as part of his search appeared to be that of the Plaintiff in this matter. I found no evidence of the existence of Mrs. Whitfield's photographs or of their deletion. Previously, I reviewed the Nextech EMR system for Mrs. Whitfield and I found no evidence the records contained within that system had been altered, deleted, or destroyed (See "audit trail" attached hereto as Exhibit "A"). I also examined the Windows based system Dr. Schimpf utilized occasionally and found no additional medical record or pictures pertaining to Mrs. Whitfield.

FURTHER AFFIANT SAYETH NOT.

Patrick O' Neill, MD, Records Custodian
for O'Neill Plastic Surgery, P.A.

SWORN TO before me this
22nd day of August, 2019.

Nancy E. Tierney
Notary Public for South Carolina
My Commission Expires: 6-12-2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
Jeane Whitfield,	)	C/A No. 2017-CP-10-2758
	)	
Plaintiff,	)	
	)	**DEFENDANTS' MOTION FOR COSTS**
v.	)	
	)	
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC,	)	
	)	
Defendants.	)	
	)	

FILED
2019 SEP 16 PM 1:36
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PLEASE TAKE NOTICE that, pursuant to Rules 54 and 68 of the South Carolina Rules of Civil Procedure, Defendants, by and through their undersigned counsel, will move the Court within ten days or at such time and place as set by the Court for an Order Awarding Costs. The bases for this Motion are (1) the Offer of Judgment previously filed by these Defendants on July 23, 2019, which Plaintiff did not accept; (2) the Verdict in Favor of Defendants obtained on August 30, 2019; and (3) the Affidavit detailing Defendants' Costs, attached hereto as Exhibit A. Based on the foregoing, Defendants respectfully request the Court insert into the judgment an Award of it Costs taxable to Plaintiff.

[Signature Page to Follow]

[Signature Page – Defendants' Motion for Costs]

Respectfully submitted,

SMYTH WHITLEY, LLC

Todd W. Smyth, Esquire
Kevin R. Horton, Esquire
126 Seven Farms Drive, Suite 260
Charleston, SC 29492
Phone: 843-606-5635
Fax: 843-654-4095
tsmyth@smythwhitley.com
khorton@smythwhitley.com

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

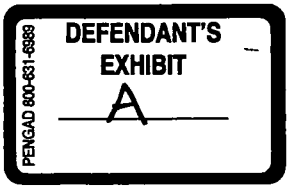
September 12, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. No.: 2017-CP-10-2758
	)	
Jeane Whitfield,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF TODD W. SMYTH
	)	(with Itemized Costs)
vs.	)	
	)	
Dennis K. Schimpf, MD and Sweetgrass Plastic Surgery, LLC	)	
	)	
Defendants.	)	

PERSONALLY APPEARED BEFORE ME Todd W. Smyth, who, being duly sworn, deposes and states as follows:

1. I am an attorney at Smyth Whitley, LLC and we represent Defendants in the above-captioned matter. I am over 18 years of age and fully competent to make this affidavit.
2. I have personal knowledge of the facts stated in this affidavit and the information stated herein is true and accurate to the best of my knowledge.
3. Defendants incurred Costs of Two Thousand Seven Hundred Sixty Two Dollars and 51/100 ($5,931.46). My review of firm records and my personal involvement confirms that the costs incurred are as stated herein.
4. The associated Costs are itemized and attached as Exhibit A.
5. I certify and acknowledge that I am signing this affidavit under oath and under penalty of perjury.

FURTHER AFFIANT SAYETH NOT.



Todd W. Smyth , Esquire

SUBSCRIBED AND SWORN TO BEFORE ME

on this 12th day of September, 2019

Notary Public in and for

the State of South Carolina

My Commission Expires: 11/16/2022

Exhibit A to Affidavit of Todd W. Smyth

Date	Type	Description	Cost
08/16/2019	Clerk of Court Fees	Filing fee for Motion to Quash Synovus Subpoena.	$25.00
08/16/2019	Clerk of Court Fees	Filing fee for Motion to Quash 30(b)(6) deposition of Sweetgrass Plastic Surgery.	$25.00
08/16/2019	Clerk of Court Fees	Filing fee for Motion to Quash L. Schimpf deposition subpoena.	$25.00
08/16/2019	Clerk of Court Fees	Filing fee for Motion to Quash deposition of Dr. Schimpf.	$25.00
08/19/2019	Clerk of Court Fees	Filing fee for Motion to Exclude Late Witness.	$25.00
08/21/2019	Clerk of Court Fees	Filing fee for Motion to Strike Deposition Transcripts from Public Index.	$25.00
08/22/2019	Clerk of Court Fees	Filing fee for Omnibus Motions in Limine.	$25.00
08/22/2019	Clerk of Court Fees	Filing fee for Motion to Quash trial subpoena to L. Schimpf.	$25.00
08/22/2019	Clerk of Court Fees	Filing fee for Motion in Limine to Seal and to Exclude Certain Inadmissible Evidence.	$25.00
08/16/2019	Copying	Pre-Trial Motions (59 pgs. x .10).	$5.90
08/19/2019	Copying	Pre-Trial Motion (5 pgs. x .10).	$.50
08/21/2019	Copying	Pre-Trial Motion (6 pgs. x .10).	$.60
08/22/2019	Copying	Pre-Trial Motions, Voir Dire, Pre-Trial Brief and Jury Charges (97 pgs. x .10).	$9.70
08/26/2019 – 08/30/2019	Copying	Defendants' Trial Exhibits (203 pgs. x .10).	$20.30
08/07/2019	Deposition Transcript	AWR Invoice for second discovery and trial depositions of Dr. Kalus taken on 7/24/19.	$921.45
08/07/2019	Deposition Video	AWR Invoice for video of trial deposition of Dr. Kalus taken on 7/24/19.	$160.00
08/22/2019	Deposition Transcript	Phipps Reporting Invoice for second discovery deposition of Dr. Perez taken on 08/21/19.	$404.60
08/30/2019	Trial Testimony	Rosen LTC Invoice for production of Dr. Kalus video trial deposition cuts and trial presentation.	$2,087.50
08/30/2019	Trial Exhibits	ProLegal Invoice for blow-up trial exhibit boards.	$2,095.91
		TOTOAL:	$5,931.46

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. Bentley D. Price, Circuit Court Judge

Case No. 2017-CP-10-~~2578~~ 2758
App. Case No.: Not yet assigned.

FILED
2019 OCT -8 PM 2:14
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Jeane Whitfield ..... *Appellant*

v.

Dennis K. Schimpf, M.D. and
Sweetgrass Plastic Surgery ..... *Respondents.*

NOTICE OF APPEAL

Jeane Whitfield, the Plaintiff in the above-referenced civil action hereby notices all Counsel of Record of their intent to Appeal the judgment in this matter, entered on September 11, 2019. Written notice of entry of this order was mailed to Plaintiffs on or about September 16, 2019. (A copy of the Order of Judgment is attached hereto.)

Respectfully submitted this **8th** day of **October, 2019**.

By: _____

Andrew J. McCumber, Esquire
Daniel S. Slotchiver, Esquire
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Blvd., Suite 100
Mount Pleasant, South Carolina 29464
Telephone: (843) 577-6531
Facsimile: (843) 577-0261

(additional counsel of record on the following page)

COPY

Brent S. Halversen, Esquire
Brent Souther Halversen, LLC
751 Johnnie Dodds Blvd, Suite 200
Mount Pleasant, SC 29464
Telephone: (843) 284-5790
Facsimile: (864) 326-4844
*Admitted *pro hac vice*

COUNSEL FOR THE APPELLANT

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-10-2758

JEANE WHITFIELD
PLAINTIFF(S)

DENNIS K. SCHIMPF, M.D. AND SWEETGRASS PLASTIC SURGERY, LLC
DEFENDANT(S)

Submitted by: The Honorable Bentley D. Price	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☒ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2019 SEP 11 AM 10:09
CHARLESTON COUNTY CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow)

Verdict for the Defense.

ORDER INFORMATION

This order X ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2766 **Judge Code**	08/30/2019 **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Verdict for the Defense. /

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 2017-CP-10-2758
JEANE WHITFIELD, Plaintiff, vs. DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC Defendants.	**VERDICT FORM**

FILED
2019 SEP 11 AM 10:09
JULIE J. ARMSTRONG
CLERK OF COURT

VERDICT FORM

1. Did the Plaintiff prove by a greater weight or preponderance of the evidence that the Defendants deviated from the standard of care?

____ YES.

X NO.

If your answer to Question 1 is NO, you are finished. You have found for the Defendants. Please stop and notify the bailiff. If your answer is YES, please continue to Question 2.

2. Did the Plaintiff prove by a greater weight or preponderance of the evidence that the Defendants deviation from the standard of care was the proximate cause of Plaintiff's injuries?

____ YES.

____ NO.

If your answer to Question 2 is NO, you are finished. You have found for the Defendants. Please stop and notify the bailiff. If your answer is YES, please continue to Question 3.

3. Did the Defendants prove by the greater weight or preponderance of the evidence that the Plaintiff, Jeane Whitfield, was also negligent?

_____ YES – ***Go to Question 4.***

_____ NO – ***Go to Question 7.***

4. Did the Defendants prove by the greater weight or preponderance of the evidence that the Plaintiff's negligence was the proximate cause of Plaintiff's injuries?

_____ YES – ***Go to Question 5.***

_____ NO – ***Go to Question 7.***

5. Considering the combined negligence that proximately caused the Plaintiff's injuries as 100%, what percentage of that negligence is attributable to the Plaintiff and what percentage is attributable to the Defendants? [The percentages must add up to 100%].

Plaintiff: _____ %
Defendants: _____ %

6. Was the Plaintiff's negligence greater than 50%?

_____ YES – ***You are finished. Please stop your deliberations and notify the bailiff.***

_____ NO – ***Go to Question 7.***

7. State the amount of actual damages, if any, sustained by the Plaintiff. [DO NOT reduce the Plaintiff's total damages based on the percentage of negligence by any party. You are to determine ***only*** the total amount of the Plaintiff's damages and enter that amount below.]

$_____Actual Damages (to include: pain and suffering, loss of enjoyment of life, mental suffering, and prospective damages)

8. State the amount of punitive damages, if any, sustained by the Plaintiff. You may award punitive damages only if you awarded actual damages in response to Question 7 above and only if you find by clear and convincing evidence that Defendants' actions harmed Plaintiff and were willful, wanton, or reckless. [DO NOT reduce the Plaintiff's total damages based on the percentage of negligence by any party. You are to determine only the total amount of the Plaintiff's damages and enter that amount below.]

$ _____ Punitive Damages

I certify this decision was the unanimous decision of the jury.

Foreperson
August 30, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. Bentley D. Price, Circuit Court Judge

Case No. 2017-CP-10-~~2578~~ 2758
App. Case No.: Not yet assigned.

FILED
2019 OCT -8 PM 2:14
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Jeane Whitfield ..... *Appellant,*

v.

Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery ..... *Respondents.*

PROOF OF SERVICE

I certify that I have served the **Notice of Appeal** on the **Respondents Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery**, by depositing a copy of same in the United States Mail, on **October 8, 2019**, addressed to their counsel of record, **Todd Smyth, Esquire & Kevin Horton, Esquire**, of the firm **Smyth Whitley, LLC** at their offices located at **126 Seven Farms Drive, First Citizens Plaza, Suite 150, Charleston, SC 29492**.

Respectfully submitted this **8th** day of **October, 2019**.

By: _____

Andrew J. McCumber, Esquire
Daniel S. Slotchiver, Esquire
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Blvd., Suite 100
Mount Pleasant, South Carolina 29464
Telephone: (843) 577-6531
Facsimile: (843) 577-0261

COUNSEL FOR THE APPELLANT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2017-CP-10-2758
JEANE WHITFIELD,	)	
	)	
Plaintiff,	)	
	)	**PLAINTIFF'S SUPPLEMENTAL ANSWERS TO FIRST SET OF INTERROGATORIES TO DEFENDANT DENNIS K. SCHIMPF, M.D.**
vs.	)	
	)	
DENNIS K. SCHIMPF, M.D. and SWEETGRASS PLASTIC SURGERY, LLC	)	
	)	
Defendants.	)	
	)	

TO: JOSHUA S. WHITLEY, ATTORNEY FOR DEFENDANTS

Comes now Plaintiff, Phillip Jefferson, by and through their undersigned attorneys and serves this her Supplemental Answers to Defendants' First Set of Interrogatories, served on or about September 21, 2016, stating the following:

GENERAL OBJECTIONS

1. Plaintiff objects to the Interrogatories to the extent that they are vague, ambiguous, overly broad, unduly burdensome, and not relevant to the subject matter involved in the pending action.

2. Plaintiff objects to the Interrogatories to the extent that they seek documents protected from discovery by the attorney-client privilege, work-product doctrine, or any other privilege or exemption from discovery permitted under law.

3. Plaintiff objects to the Interrogatories to the extent that the information requested is known to Defendant, to the extent that the Interrogatories require the identification or production of documents, writing, records, or publications in the public domain or information that is equally available to or already in the possession of Defendant or that seek information that can be obtained from third parties with less burden and expense than obtaining them from Plaintiff.

4. Plaintiff objects to the Interrogatories to the extent that they call for or require disclosure of information that is not in Plaintiff's possession, custody, or control.

5. Plaintiff objects to the Interrogatories to the extent they seek proprietary or other confidential business and/or commercial information.

6. Plaintiff reserves the right to take appropriate measures to protect the privacy of individuals or parties not involved in this litigation.

7. Plaintiff is continuing their investigation and reserve the right to rely on any facts, documents, or other evidence it may develop or that may come to its attention at a later time. Plaintiff's answers to these Interrogatories are based on information known at this time. Plaintiff specifically reserves the right to supplement or amend its answers to the Interrogatories at any time before trial.

Supplemental Answers to Interrogatories

1. Sara L. Marcino, M.D.
Still Point Professional Building
1012 Anna Knapp Blvd.
Mount Pleasant, SC 29464

Dr. Marcino is Plaintiff's treating psychiatrist. Dr. Marcino will testify as to the effects of Defendants' surgery on Plaintiff's life.

2. See Number 1 above.

8. Sara L. Marcino, M.D. (Psyhchiatry)
Still Point Professional Building
1012 Anna Knapp Blvd.
Mount Pleasant, SC 29464

Dr. Marcino is Plaintiff's treating psychiatrist. Dr. Marcino will testify as to the effects of Defendants' surgery on Plaintiff's life.

13. See Number 1 above.

20. See Number 1 above.

By:_____

Daniel S. Slotchiver, Esquire
SLOTCHIVER & SLOTCHIVER, LLP
751 Johnnie Dodds Blvd, Suite 100
Mount Pleasant, SC 29464
(843) 577-6531 ext 207
(843) 577-0261 (fax)
dan@slotchiverlaw.com
S.C. Bar No. 15129

-And-

By:_____

Brent S. Halversen, Esquire
Brent Souther Halversen, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com
S.C. Bar No. 76495

Attorneys for Petitioners

9/10, 2018.

CERTIFICATE OF SERVICE

I certify that I served the Supplemental Answers to Defendants First Interrogatories upon all counsel of record by email on this 10th day of September, 2018.

BRENT SOUTHER HALVERSEN, LLC

By: _____

Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-813-6453
Email: brent@halversenlaw.com

Charleston, SC
September 10, 2018

In the Matter Of:

Jeane Whitfield vs.

Dennis K Schimpf, MD, et al

Vicky Tolbert

February 11, 2019

A. William Roberts, Jr. & Associates

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

JEANE WHITFIELD,

Plaintiff,

vs. CASE NO. 2017-CP-10-2758

DENNIS K. SCHIMPF, M.D., AND SWEETGRASS PLASTIC SURGERY, LLC,

Defendants.

VIDEO

DEPOSITION OF: VICKY TOLBERT

DATE: February 11, 2019

TIME: 9:00 a.m.

LOCATION: Smyth Whitley, LLC
126 Seven Farms Drive
Suite 150
Charleston, SC

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: KAREN NELLIUS, RPR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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Hilton Head, SC (843) 785-3263
Myrtle Beach, SC (843) 839-3376
Columbia, SC (803) 731-5224
Greenville, SC (864) 234-7030
Charlotte, NC (704) 573-3919
Asheville, NC (828) 785-5699

APPEARANCES OF COUNSEL:

ATTORNEYS FOR PLAINTIFF
JEANE WHITFIELD:

SLOTCHIVER & SLOTCHIVER, LLP
BY: DANIEL S. SLOTCHIVER
751 Johnnie Dodds Boulevard
Suite 100
Mt. Pleasant, SC 29464
843-577-6531
Dan@slotchiverlaw.com

ATTORNEYS FOR DEFENDANTS
DENNIS K. SCHIMPF, M.D., AND SWEETGRASS
PLASTIC SURGERY, LLC:

SMYTH WHITLEY, LLC
BY: TODD W. SMYTH
126 Seven Farms Drive
Suite 150
Charleston, SC 29492
843-606-5635
Tsmyth@smythwhitley.com

ALSO PRESENT:

Michael D. Roberts, Legal Videographer

(INDEX AT REAR OF TRANSCRIPT)

THE VIDEOGRAPHER: We are now on the record. Today's date is February 11th, 2019. The time is approximately 9:03 a.m.

This is the video deposition of Vicky Tolbert. The location is 126 Seven Farms Drive, Suite 150, Charleston, South Carolina 29492.

My name is Michael Roberts, legal videographer, representing A. William Roberts, Jr., & Associates. This deposition is taken in the matter of Jeane Whitfield versus Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC, case number 2017-CP-10-2758.

Counsel, please introduce yourselves for the record.

MR. SLOTCHIVER: Dan Slotchiver for the plaintiff.

MR. SMYTH: Todd Smyth for the defendants.

THE VIDEOGRAPHER: Would the court reporter please swear in the witness.

VICKY TOLBERT,

being first duly sworn, testified as follows:

EXAMINATION

BY MR. SLOTCHIVER:

Q. Ms. Tolbert, my name is Dan Slotchiver, and I'm going to be taking -- or resuming the deposition that was taken several months ago. As it's a continuation of a deposition, I don't need to go through all of the preamble warnings about how to respond, but if you would like me to, I'm happy to do it.

MR. SLOTCHIVER: And, Todd, if you would like me to do it, I'm happy to do it.

MR. SMYTH: I think she understands.

BY MR. SLOTCHIVER:

Q. Fair enough.

What I would like to do first is to ask you some questions about a document that we have received over the weekend from your counsel. If I can hand this to you.

MR. SLOTCHIVER: We're going to mark it as an exhibit.

(PLF. EXH. 1, HISTORY AND PHYSICAL, was marked for identification.)

BY MR. SLOTCHIVER:

Q. Is -- are you familiar with this document?

A. Yes.

Q. Would you agree with me that this is

not a document that Jeane Whitfield or her counsel would have received upon request of Dr. Schimpf and Sweetgrass to provide all medical records related to the treatment of Jeane Whitfield?

A. Yes.

Q. And would you agree that this not a document that we would have received in discovery until this weekend?

A. Yes.

Q. And we would not have had this at the time of the deposition taken several months ago?

A. Yes.

Q. Okay. Could you first tell me what this document is?

A. It's, like, an H&P.

Q. What is an H&P?

A. History and physical.

Q. Okay. And is this a document created specifically by Sweetgrass Plastic Surgery?

A. Yes.

Q. Tell me, please, where it was that you located -- or let's strike that -- who it was that located this document and able to present it to us?

A. It was me.

Q. Okay. And where did you locate this

document?

A. It was in my office.

Q. And specifically where in your office?

A. In a cabinet.

Q. Okay. And what else would be contained in that cabinet?

A. There is some employee files, there is, like, extra folders, card stock, some other things.

Q. Are there -- are there other records that would -- medical records that would belong to Jeane Whitfield or other patients contained in that cabinet in your office?

A. There were some other patients in there as well.

Q. Okay. How many other patients' records -- I'm not going to ask you the name of the patient. But how many other different patients' records were contained in that cabinet?

A. I didn't count them. Sorry.

Q. Do you know why patients' records would have been contained in your filing cabinet in your office as opposed to in the medical files and records maintained in the normal course of business?

A. I believe that somebody was supposed to

scan them and they probably got put in another stack, or something, and then they just got put away, thinking that -- because they were in between some papers.

Q. Is -- is that mere speculation on your part?

A. Yes.

Q. Okay.

A. I'm not sure how they got into the cabinet. But they were between -- they were between some things.

Q. And it's not the only set of medical records that were also mistakenly placed in your office, obviously, based on your previous testimony today?

A. Yes. There was a couple of other papers in there as well.

Q. Is a couple less than 10?

A. I -- I didn't count them. I mean, there was -- like, I mean, I was looking through everything to try and see -- I was trying to reorganize, and I came across it.

Q. Did you anticipate finding medical records in your cabinet?

A. No.

Q. Is this a cabinet in your personal office?

A. Yes.

Q. And who besides you has access to your personal office?

A. Most employees.

Q. Is it the pattern or practice of Sweetgrass to file records in your personal office or are those things that you normally would do?

A. No. Patient records would never be stored in my office. Like I said, they were between some other papers. So, I have a feeling that when someone was cleaning up one day, or something, they must have gotten, like, put in there, and somebody must have put them in the cabinet. Because they were with card stock, and that kind of stuff.

Q. What -- what were the documents on the other sides of this paper?

A. On the other side of the paper?

Q. What I'm talking about is, within your file cabinet, if it was stuck in between some other documents, what were the other types of documents it would have been stuck in between?

A. It was a couple of these H&Ps.

Q. Okay. For this and other patients?
A. Yes.
Q. Okay. And was all -- were those documents -- a couple of H&Ps, were they all within a folder or were they looseleaf placed inside the cabinet?
A. They were in a stack of other papers in the cabinet.
Q. Everything in that stack of papers would have been an H&P; is that correct?
A. I didn't look through every single one of them, but the ones that I saw because I was just -- specifically happened to see her name and so I grabbed it out.
Q. Are the rest of them still inside your cabinet now?
A. Yes.
Q. You haven't made any effort to put them into the correct files at this point?
A. I just found it.
Q. When?
A. Thursday. Friday. Somewhere around there. And I immediately sent it over.
Q. Does -- while the office staff may have access to your personal office, is it your -- is it

your practice to allow other people to put documents into your personal filing cabinets or is that something that you generally would do?

A. No. Sometimes -- I mean, as they are cleaning up, they will go and say, hey, I'm going to store this here, or do you have any room in your cabinet to put this here, or something like that.

Q. So they would just store random things inside your cabinet?

A. There is a lot of office supplies, and things like that, in there, yes.

Q. Well, obviously an H&P record would not be an office supply?

A. No. I'm aware of that, yes.

Q. And there was a stack of H&Ps, based on your testimony, that was in your cabinet?

A. Yes.

Q. Is it your testimony that a member of your staff or Sweetgrass' staff may have confused a stack of H&P documents as office supplies?

A. Yes. They were in a stack with, like, card stock, and other things.

Q. What does card stock mean?

A. Card stock is like thicker paper.

Q. Was there -- was it printed thicker

paper?

A. No. It's, like, blank ones.

Q. So there was blank printed paper, and in between blank printed papers were the H&P forms?

A. There were. There is pink card stock, there is green card stock, there is yellow card stock, and in that stack of stuff was a few documents, yes.

Q. What was it that made you decide to look within the -- well, first, was this pink, green, yellow, white card stock? What color was it?

A. It's all different colors.

Q. So, the card stock you're -- that was found that encompassed the H&P forms would have been all different colors?

A. Yes.

Q. What made you decide to look within the card stock to see if anything was there that didn't --

A. Because it was all --

Q. If I could just finish.

A. Okay.

Q. -- that didn't appear to belong within that stack?

A. Like I said, I was trying to organize. And so when you have a stack of stuff that's not all right, or whatever, you tend to, I guess, kind of look through it as you are trying to straighten it, and I happened to see some stuff with writing on it.

Q. How thick -- if you can demonstrate for me, how thick was this pack of information?

A. I mean, the cabinet is probably this tall.

Q. Okay.

A. And it was probably close to the height of the shelf.

Q. So the papers were about the height of the shelf?

A. Yes.

Q. And you went through all of the papers and started looking at them one by one?

A. No. They were -- I mean, really you are going to be that nit-picky? There was a -- I mean, the cabinet --

Q. Ms. Tolbert, I'm trying to understand how it is that within the confines of stock paper of all different colors you decided to -- randomly decided to search through it and found these

documents that are relative to this case and other people's medical records. What stood out that made you believe that there was something in them, other than the fact --

A. I didn't think there was -- I had no idea there was anything in them.

Q. You just decided to skim through this stockpile in order to see if there was anything in it?

A. When I was trying to straighten it, I took the whole stack out, and as I was trying to straighten it and go through and make sure that, you know, everything was nice and neat, I saw some things that had writing on them.

Q. Where is the original?

A. The original? At our office.

Q. Where?

A. I'm not sure. It's probably sitting -- still sitting on my desk.

Q. Is the one that you had an original or is the one you had in your office a copy?

A. I would have to go back and look at it. I didn't look that closely.

Q. What would be a telltale sign for you whether it was an original or a copy?

A. I mean, I think you would be able to look at the signature and the writing on it to see if it's a copy or if it -- you know, if somebody actually, like, wrote that on that specific sheet of paper.

Q. Well, you would agree that in today's world of photocopies being as good as they are, you can't always tell, correct?

A. Yeah. True. But, I mean, I would think that you would try to be able to.

Q. Okay. So whether or not -- there is no -- would it be fair to say there is no stamp or other indicia on a document in the office to confirm if it is or is not an original?

A. No. We don't do anything like that.

Q. Okay. Do you -- do you recall what color ink was on the one inside your office?

A. No.

Q. Is your printer a color printer or your scanner a color scanner?

A. It can scan in both, yeah.

Q. Without going into communications you had with counsel, would it be fair to say that you either scanned it or e-mailed it to counsel --

A. Yes.

Q. -- once you received it?
A. Uh-huh.
Q. Which one?
A. I scanned it in and e-mailed it.
Q. When you scan and e-mail a document with color ink, does the color ink pass?
A. I believe so. I mean, it depends on the last person probably to use the scanner. But I think the majority of the time it does scan in color.
Q. So if it was a color document, it would have come out color when it was arrived -- when it arrived at counsel's office?
A. Most likely, yeah.
Q. Okay. Is it fair to say the copy --
MR. SLOTCHIVER: Let's go off the record for a second.
THE VIDEOGRAPHER: We are now off the record. The time is approximately 9:16 a.m.
(Off-the-record conference.)
THE VIDEOGRAPHER: We are now back on the record. The time is approximately 9:17 a.m.
BY MR. SLOTCHIVER:
Q. How often do you look in your cabinets to straighten it out or review what's inside the

file cabinets?

A. Once or twice a year.

Q. Did you have a chance to look at the dates of the other H&P forms?

A. I did not. I didn't look that closely. I couldn't even tell you another patient's name that was in there.

Q. Would you agree with me that in order to have -- well, let's back it up.

Is the practice when the H&P forms are created, is it normal to take the form and stick it into the file?

A. It normally goes with the OR chart.

Q. Okay. And then it goes into the file?

A. Uh-huh.

Q. Okay. So what's the date on this form?

A. 2014.

Q. All right. So -- and this is June of 2014?

A. Uh-huh.

Q. Okay. Almost five years ago.

So if you are correct in your speculation that somebody mistakenly grabbed a stack and put it there, then would you agree that the other papers would have also had to have been

around the same timeframe in 2014?

A. They may have likely been. Like I said, I didn't specifically look at them.

Q. Well, if they were, for example, from 2015 or 2016, how would that be possible in light of the fact that this form was 2014?

MR. SMYTH: Object to the form.

THE WITNESS: Without going back and specifically looking at the dates, I can't -- I mean, I can't say that they were '15 or '16 or '14. I mean, you would think that, yes, they would all have been around the same date range.

BY MR. SLOTCHIVER:

Q. Okay.

A. Without specifically looking, I can't give you that information.

Q. Is -- are these forms relatively accessible to you?

A. What do you mean?

Q. The other forms that you found in your office cabinet when you were reviewing your cabinet last week.

A. Yes.

Q. Okay. Is there any reason why you could not make a copy of those forms and provide

them to counsel for my review, understanding that before you would provide them you would delete the name of the patient for which I would not be entitled to?

A. If they want me to do that, then I'm happy to do that.

Q. Okay. You would agree that if you were to do that, then we could see the timeframe in which they -- they were kept?

A. Uh-huh.

Q. Then would you agree that if, in fact, there were forms from multiple years, that would mean that Jeane Whitfield's form must have been sitting around somewhere for a long period in order to be added to other forms?

A. I don't understand what you are asking.

Q. I'll move on.

What is the purpose of an H&P form?

A. So the physician knows the history and physical of the patient.

Q. How often are these forms filled out with patients, and starting with when they first come into the office all the way through surgery? Is it a one-time form or is it a routine form filled out numerous times?

A. It's just filled out for surgery.
Q. Okay. And that when -- when in conjunction with surgery is it filled out?
A. Usually the day of surgery.
Q. Okay. Is it filled out before the surgery or after the surgery?
A. I believe they fill it out before. I'm not the one who completes it, so I'm not sure.
Q. Is your writing on this document?
A. No.
Q. Okay. Do you know whose writing is on this document?
A. No, I don't.
Q. And you're the office manager, correct?
A. Uh-huh.
Q. And you were the office manager in June of 2014, correct?
A. Yes.
Q. Is there any writing on this form that you can identify?
A. I mean, I can read it. What do you mean is there --
Q. Well, that you can identify the originator of it, that you can tell this is --
A. I mean, I know that's Dr. Schimpf's

signature.

Q. You are looking at under the physician's signature. Anywhere else that looks to be Dr. Schimpf's handwriting or anybody else's handwriting?

A. Not that I recognize.

Q. Do you know if it was filled out before the surgery or after the surgery?

A. I don't.

Q. Whose job would it be to fill out the form?

A. The nurse and Dr. Schimpf.

Q. Which nurse?

A. What do you mean, which nurse? We only had one nurse at the time, and that's Dawn.

Q. So, then, this would have been Donna's signature or Dr. Schimpf's signature? Excuse me. This would have been Donna's handwriting or Dr. Schimpf's handwriting?

A. Dawn. Not Donna.

Q. Dawn. Nobody else, correct?

A. Not that I can think of. We didn't have a PA at the time, or anything.

Q. Okay. And I notice under intended procedures, it is -- there is handwriting filling

out I take it what the intended procedures are?

A. Uh-huh.

Q. Would that be the doctor's handwriting or would that be the nurse's handwriting?

A. That's definitely not Dr. Schimpf's handwriting.

Q. Okay. And what's the purpose of writing down the intended procedure?

A. You would have to ask the doctor. I don't deal with H&Ps. I'm not a clinician.

Q. Well, you are the office manager?

A. Yeah. But I'm not clinical.

Q. I'm asking on the form -- what the purpose of the form is. If it says intended procedure and people fill out a blank, what's -- is it the purpose of that to fill out what the intended procedures are to be?

MR. SMYTH: Objection. Form and foundation.

THE WITNESS: I mean, that's answering the question on the paper. I mean, it's asking the intended procedure so they are putting in the procedure. Just like it says date of surgery, and they put in the date of surgery.

BY MR. SLOTCHIVER:

Q. Okay. So, then, from your position as the manager, what you fill in under the category of intended procedure is what the intended procedures are to be?

A. Yes.

Q. Okay. And would you please read what the intended procedures are.

A. Bilateral upper bleph, lipo to abdomen and legs, silicone implant exchange.

Q. You testified that the signature is, in fact, Dr. Schimpf's signature?

A. Yes.

Q. Does the date next to it -- what's the date?

A. June 6, '14.

Q. And there is a time next to it?

A. Yes. 3:40 p.m.

Q. So, would this form have been filled out after the procedure, if the procedure had taken place before 3:40 p.m.?

A. I -- I don't know. Sometimes they fill it out before. Sometimes they fill it out after. I'm not really sure when he actually signed it.

Q. Well, would your doctor sign a form with a date -- with a date and time before he had

done the procedure?

A. Uh-huh. You sign consents before you go in to have a procedure.

Q. Okay. If I was to represent to you that the procedure of Jeane Whitfield were on June the 6th of 2014 in the a.m. hours --

A. Uh-huh.

Q. -- and had been completed before 3:40 in the afternoon, would that indicate to you that the doctor must have signed the document after the procedure?

A. Not necessarily.

Q. So, he could have randomly chosen 3:40 in the afternoon?

A. If somebody went back and, you know, added a time for him or a date for him.

Q. Was it a normal practice to alter records that have been signed by the doctor after they have been sign?

A. That's not altering the record.

Q. Okay. Is it a common procedure to add information to a document signed by the doctor, Dr. Schimpf, or anybody at Sweetgrass Plastic Surgery, after it had been signed?

A. I -- I don't know. I mean, there is

plenty of times that we, you know, fill in information for Dr. Schimpf so that he can just sign it and he doesn't have to worry about having -- take the time to write a date or a time or, you know, a patient's date of birth like on a prescription, or something like that. So we will take the liberty to help him out to do those things, and then he will be able to sign off on it.

Q. On what -- on what type of documents -- on what type of documents --

My daughter.

On what type of documents does Sweetgrass routinely fill out information for the doctor so that he doesn't have to worry about taking the time to do it?

MR. SMYTH: Object to the form.

THE WITNESS: I mean, we will -- you know, like I said, like prescriptions, and stuff like that, we'll go -- he'll say the patient needs a prescription for, you know, whatever.

BY MR. SLOTCHIVER:

Q. Okay.

A. And, you know, our PA or our nurse will write out the prescription.

Q. Okay.

A. And then he can review it and sign it.
Q. Any other thing besides prescriptions that you can think of?
A. Yes. Some of the OR documents, and things like that. I know that they go through, and, you know, they will go and ask the patient all the questions. The medical assistant will go through it, and then he'll review it with the patient and sign off on it.
Q. Okay.
A. But they have gone in and completed the form.
Q. But that's done before he goes over it with them and before he signs it, correct?
A. Yes. Usually.
Q. Okay. I'm asking under what situation is it that Sweetgrass would fill in the information after the doctor signed a form?
A. I guess if it didn't get completed beforehand. But, I mean, it should be completed beforehand.
Q. Okay. So, if it should be completed beforehand, then would it be logical to say that the timestamp, the 3:40 p.m., on this form that is in front of you that's been marked as plaintiff's

exhibit would have been something filled in commensurate with the doctor's signature?

MR. SMYTH: Object to the form.

THE WITNESS: I -- I don't know the answer to that. I don't know at what point he signed it, and I don't know at what point that time was put in, so I don't know if he signed it initially and then they put in the time after or if he signed it at the same time. I don't know the answer to that. I'm sorry.

BY MR. SLOTCHIVER:

Q. I was asking you for examples of a form or a scenario wherein --

A. And I don't know of any. I'm sorry.

Q. If I can finish. I was asking you for examples of a form or a scenario wherein the medical practice would fill in information on a form after the doctor had signed it.

A. And I don't know of any examples.

Q. Okay. Are you aware of this happening on a routine basis?

A. No, sir.

Q. Okay. Any reason to believe, then, that this time is not accurate?

A. I mean, if they put that time, then I

would believe that that's the correct time.

Q. Okay. And any reason to believe that this is not -- that this time is not consistent with the time that the doctor would have signed the form, based on the fact that his signature is next to a date and next to a time?

A. I -- you are asking if -- ask me again, please.

Q. Would you agree with me, based on the discussions we have had, that -- and the questions that -- and responses that we've -- that you've given that I've asked if there is any reason to believe that the time referenced on the form, this 3:40 p.m. --

A. Uh-huh.

Q. -- is not the time that the doctor signed it, being as much as his signature is next to a date and next to a time?

A. I don't know what time that he signed the document and what time -- the time was put on there.

Q. Is there any reason that we should not assume that it was actually signed and stamped at the same time that he would of -- that the document reflects?

A. There is no way to know that.
Q. Okay. So if it's not so, then this document is actually false --
MR. SMYTH: Object to the form.
BY MR. SLOTCHIVER:
Q. -- and misleading. Would that be fair to say?
MR. SMYTH: Object to the form.
THE WITNESS: I guess so.
BY MR. SLOTCHIVER:
Q. Okay. Can you tell me where on the form there is any reference to liposuction on the chin of Jeane Whitfield?
A. I don't see it stated on there.
Q. Is it the practice of Sweetgrass and the doctor to accurately fill out medical forms, such as the one in front of you right now, this exhibit?
A. Yeah.
Q. And assuming that the time listed next to the date and the doctor's signature is correct as to when he signed this form, would you agree that the lack of any reference on the form to the liposuction of the chin is concerning?
MR. SMYTH: Object to the form.

THE WITNESS: I -- I assume that you are asking me that because she must have had liposuction to the chin? I don't even know what she had. I assume that she had these procedures that are stated here.

BY MR. SLOTCHIVER:

Q. Well, if she did have liposuction to the chin, it certainly isn't listed on the form as we have discussed, correct?

A. That's correct.

Q. And the procedure is any procedure that was intended to be done should have been listed on the form, correct?

A. Yes.

Q. And if the form was signed when it was purported to be signed, at 3:40 p.m., after the procedures were done, certainly the doctor should have accurately or the staff should have accurately reflected what procedures were done in filling out this form?

A. Correct.

Q. Okay. At the last time that we met for your deposition, there was a question asked and objected to, and I'm going to go into that area right now, as the Court has ruled that we can ask

you about it. So the question before you is not -- is just factfinding for us. It's not meant to embarrass, or anything, but it's part of the evidence that we need to understand.

Have you at anytime had a sexual relationship with Dr. Schimpf?

A. Yes. With him and his wife.

Q. With him and his wife?

A. Yes.

Q. Okay. And how far back does that go?

A. 2010.

Q. In 2010 was he still working at the Medical University?

A. Yes.

Q. Is it an ongoing or is it an off-and-on or is it over completely?

A. It's been off and on.

Q. And is it still off and on even today?

A. Yes.

Q. Approximately how frequently?

A. How frequently what?

Q. How frequently would -- would you and the doctor or you and the doctor and his wife engage in sexual relations?

A. Sometimes weekly. Sometimes monthly.

Depending. Sometimes it didn't happen for a few months. Sometimes it did. I mean, it's been off and on.

Q. When is the last time?

A. Two -- one week ago.

Q. I understand at one point the doctor and his wife were separated. Did it continue during that time period?

A. Yes.

Q. The other area that I wanted to ask you about was -- pertains to plastic surgery that you yourself have had performed at or by Dr. Schimpf. What is the -- have you had plastic surgery performed by Dr. Schimpf?

A. Yes.

Q. And over what time period?

A. What do you mean over what time period?

Q. Okay. I can ask it differently.

What type of procedures have you had done with Dr. Schimpf?

A. I have had breast augmentation, hernia repair.

Q. I'm sorry?

A. Hernia.

Q. Okay.

A. And I've had some liposuction, and I've had fillers, and Botox, and my eyes, laser treatments.

Q. All of those -- and excuse me. I don't know the whole realm of plastic surgery. But is hernia repair within the normal confines of a plastic surgeon of what they do?

A. They will do it, yes, because they are all certified in general surgery as well as plastic surgery usually.

Q. Okay.

A. So that when they do abdominoplasty, things like that, they are able to fix those problems.

Q. Over what time period have you had these procedures performed?

A. In the last six years.

Q. What is the most recent?

A. Laser procedure.

Q. When was the most recent time you had that done?

A. Last week. But it was not performed by Dr. Schimpf.

Q. Was it performed at Sweetgrass?

A. Yes.

Q. Are you charged for the procedures that you undergo?

A. No. Originally when we were with Dr. O'Neill, we were.

Q. Okay. When you shared space with Dr. O'Neill?

A. Uh-huh.

Q. Do you pay for the costs of the procedures, separate from his billing, but do you pay the costs of whatever procedure is done?

A. Well, I mean, it depends on what it is. Like lasers, there is no disposable cost.

Q. For example, breast augmentation. You've got a surgical center, correct?

A. Yes.

Q. Do you pay for the cost of that?

A. When we were with Dr. O' Neal, I had to pay for all the facility fees.

Q. How about now with Dr. Schimpf?

A. No. He does not require it.

Q. Okay. Which procedures did you have done while with Dr. O'Neill versus those with Dr. Schimpf?

A. Breast aug, eyes, and hernia.

Q. Do you receive any -- have you received

any end-of-the-year tax forms for the benefits that you've received separate from the wages you receive?

A. No.

Q. Have you declared these benefits on your tax returns?

A. No.

Q. When you were sharing space with Dr. O'Neill --

A. Uh-huh.

Q. -- would the office charge you a discounted rate or a full rate?

A. They charged the full rate for facilities and supplies.

Q. Okay. And were you charged anything for the doctor's time?

A. No.

Q. When you were sharing space with Dr. O'Neill, did you receive any end-of-the-year tax documents to file --

A. No.

Q. -- regarding the benefits that you received without compensating?

A. No.

Q. Do you know the average value of the

procedures, what the cost would have been had you paid for it, for example, on the augmentation?

A. They're around 5,700.

Q. And the hernia repair?

A. Probably 2,100, or so. But when you do them in conjunction with one another, it decreases the price.

Q. The liposuction that you've had?

A. Probably maybe 3,500, 4,000.

Q. Where was that to?

A. Inner and outer thighs.

Q. And I take it those three were all done one time and one time only?

A. I have had an implant exchange.

Q. Okay. And that was done with O'Neill's practice or that was done --

A. At Sweetgrass.

Q. At Sweetgrass. And you weren't charged for that?

A. No. The company donates the implants.

Q. Are the fillers, are they -- that's more than once, correct?

A. Yes. And they are donated as well.

Q. They are donated?

A. Uh-huh.

Q. By who?
A. By the company.
Q. They are donated for purposes of being used on staff?
A. Uh-huh. They have a special staff night where they provide all of the products.
Q. Well, the liposuction isn't donated by a company, is it?
A. No.
Q. And the augmentation isn't donated by a company?
A. The implants are.
Q. And the replacements?
A. Yes.
Q. What company?
A. Mentor.
Q. Your eyes you've had done once?
A. Yes.
Q. No donation with that, correct?
A. (Shakes head.)
Q. And laser treatment, is that more than a one-time thing?
A. Uh-huh. I've had a couple.
Q. Is that donated?
A. Well, I mean, there is no disposable

cost, or anything, for it. There is not really anything that can be donated.

Q. If a customer were to come and seek laser treatment, what would that cost?

A. For a full smart skin package, it's $3,250.

Q. Is that the equivalent of what you've had done?

A. Yes.

Q. Once or more?

A. Well, we either do three strong treatments or we can break it up and do, like, five or six smaller treatments. They are not quite as aggressive. So I've had the less aggressive ones.

Q. When you've had procedures done on yourself, are there records maintained of the procedures?

A. Yes.

Q. Do you maintain them yourself or are they maintained at Sweetgrass?

A. No. I mean, they are contained in the EMR.

Q. Okay. And when did you convert to EMR?

A. We have had an EMR the whole time.

Q. All right. EMR is electronic medical

records, correct?

A. Uh-huh.

Q. You've had EMR records keeping since Sweetgrass was opened?

A. Uh-huh. Well, we used Su Casa, and then we have our regular EMR.

Q. Okay. Have you looked in the EMR to see if the exhibit was contained in it?

A. I haven't.

Q. Any reason it would not have been contained in it?

A. If it didn't get scanned in.

Q. Did you look in the EMR in order to provide your counsel with -- and Ms. Whitfield with the requested information that she had originally asked for?

A. Yeah. We --

Q. So if --

A. Everything that was in there was given.

Q. Is it fair to say that the only document that -- that has been located other than those documents previously provided to us would have been this Exhibit 1?

A. Yes.

Q. You testified that the augmentation,

the hernia repair, and the liposuction were all done while he -- while Dr. Schimpf was still sharing space with Dr. O'Neill, correct?

A. The lipo was not done at that time.

Q. When was the lipo done, approximately?

A. 2016, probably.

Q. And when were the fillers done?

A. Off and on for the past couple of years.

Q. Your eyes?

A. They were done at O'Neill's.

Q. I'm sorry?

A. They were done at O'Neill's.

Q. At O'Neill. Sorry.

The laser treatment?

A. They have been done at Sweetgrass. So in the past couple of years.

Q. Are these benefits that you've been provided without cost, are they offered to all of the employees at Sweetgrass?

A. Yes. It's common practice in our business.

Q. You've worked in two different facilities during your tenure working for doctors, correct?

A. Uh-huh.

Q. One was at the Medical University and one is at Sweetgrass?

A. Yes. But when we were with the Medical University, we dealt with all of the other plastic surgery practices as well.

Q. Did the Medical University provide free services to its employees?

A. If a patient had wanted -- or if an employee had wanted to undergo, then the doctor would not have charged them, but they would have been charged facility and anesthesia fees because we didn't have a surgical suite so it would have had to have been done like at East Cooper Hospital, or something.

Q. And the implant exchange, what year was that?

A. 2016. With the lipo.

MR. SLOTCHIVER: Let's go off the record for just a moment. I think we're done. Let me take a quick look.

THE VIDEOGRAPHER: We are now off the record. The time is approximately 9:47 a.m.

(A recess transpired.)

THE VIDEOGRAPHER: We are now back on

the record. The time is approximately 9:50 a.m.
BY MR. SLOTCHIVER:
Q. Ms. Tolbert, have all the answers you've given to us today been truthful to the best of your abilities?
A. Uh-huh.
Q. Is there anything that I've not asked you about the exhibit in front of you that would be relevant to Ms. Whitfield's case or anything on that document that refreshed your recollection about anything on Ms. Whitfield's case?
A. No.
Q. Okay. Would you be so kind when we conclude the deposition to make a copy of the other records, the other H&P forms that you found within the stack of documents in your cabinet drawer, and provide them to your counsel so he can -- so that we can -- he and I can discuss whether or not he can provide those to us in a redacted form?
A. Okay.
Q. Is that something you can do today?
A. Uh-huh. Oh, today?
Q. Or -- or within the next couple of days.
A. Yes.

Q. Okay. And -- and when you provide that, would you be so kind as to also provide him -- or to confirm with him if the document that you have appears to be an original, if you believe it is, under which case we would like an opportunity to -- to see it.

MR. SMYTH: Exhibit 1?

MR. SLOTCHIVER: Exhibit 1.

MR. SMYTH: Okay.

BY MR. SLOTCHIVER:

Q. Otherwise, we -- or if it's in color, in which case we would like to see it. Is that something that you can do also in the next couple of days?

A. Uh-huh.

MR. SLOTCHIVER: Okay. Well, thank you very much. I've got nothing further.

MR. SMYTH: Just one followup question for clarification.

EXAMINATION

BY MR. SMYTH:

Q. You were asked a number of questions about Exhibit 1, as to who filled it out and when they filled it out. Do you have firsthand knowledge of any of that information?

A. No.

Q. Okay. And you are not saying that Dr. Schimpf or any of the staff that was involved in filling this form out either provided false or misleading information in that document, are you?

A. No.

MR. SMYTH: Okay. Those are all my questions. Thank you.

THE VIDEOGRAPHER: This concludes the video deposition of Vicky Tolbert. The time is approximately 9:52 a.m. We are now off the record.

(The witness, after having been advised of her right to read and sign this transcript, does not waive that right.)

(The deposition was concluded at 9:52 a.m.)

SIGNATURE OF DEPONENT

DEPONENT: VICKY TOLBERT
DEPOSITION DATE: FEBRUARY 11, 2019
REPORTER: KAREN NELLIUS
CASE CAPTION: JEANE WHITFIELD vs. DENNIS K. SCHIMPF, M.D., AND SWEETGRASS PLASTIC SURGERY, LLC

(Please return both Signature of Deponent pages)

I, the undersigned, VICKY TOLBERT, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT (CONTINUED)

DEPOSITION DATE: FEBRUARY 11, 2019
REPORTER: KAREN NELLIUS
CASE CAPTION: JEANE WHITFIELD vs. DENNIS K. SCHIMPF, M.D., AND SWEETGRASS PLASTIC SURGERY, LLC

PAGE	LINE	CHANGE	REASON

_____

VICKY TOLBERT Date

I, Karen Nellius, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent pages within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

Karen A. Nellius NOTARY PUBLIC SOUTH CAROLINA

Karen Nellius

_____

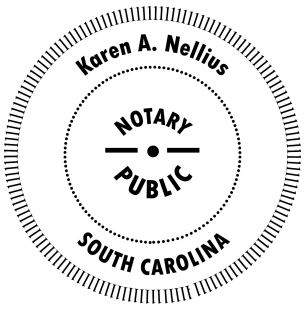
Karen Nellius, RPR
My Commission expires
November 14, 2024

CERTIFICATE OF REPORTER

I, Karen Nellius, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 13th day of February, 2019 at Charleston, Berkeley County, South Carolina.



Karen Nellius, RPR
My Commission Expires
November 14, 2024

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(No requested information.)

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Jeane Whitfield,	)	CASE NO. 2017-CP-10-02758
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	CERTIFIED COPY
	)	
Dennis K. Schimpf, MD, et al.,	)	
	)	
DEFENDANTS.	)	
	)	

February 27, 2019

Charleston, South Carolina

B E F O R E:

The Honorable Alex Kinlaw, Jr.

A P P E A R A N C E S:

Brent S. Halversen, Esquire
For the Plaintiff

Daniel Scott Slotchiver, Esquire
For the Plaintiff

Kevin R. Horton, Esquire
For the Defense – Dr. Schimpf and his practice

John Radeck, Esquire
For Dr. O'Neill

Certified Transcript Provided For: Brent Halversen

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I N D E X

HEARING MOTIONS:

Physical & Mental Examination of Plaintiff -- 05

Motion to Quash -- 16

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT -- 36

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

THE COURT: All right. This next matter before the court is captioned Jean Whitfield versus Dennis K. Schimpf. Am I pronouncing that correctly?

DR. SCHIMPF: Schimpf.

THE COURT: Schimpf. And Sweetgrass Plastic Surgery. This case is Case Number 2017-CP-10-2578. I have got a number of lawyers that's on the roster, so I am going to go through them. I don't know any of you, so you will have to identify yourselves.

For the plaintiffs I have got -- I tell you what, I will let you identify who you are and who you represent.

MR. HORTON: I represent the defendants, Your Honor. That will be Schimpf and the practice.

THE COURT: What is your name?

MR. HORTON: Kevin Horton.

THE COURT: Kevin Horton.

MR. HORTON: I work from the law firm of Smith Whitley, and I am the only one here for that aspect of the defense.

THE COURT: All right. You represent who?

MR. HORTON: The defendants, Your Honor.

THE COURT: All right. Kevin Horton?

MR. HORTON: Yes, Your Honor. Kevin Richard Horton. Okay. All right.

THE COURT: Who else have we got?

MR. SLOTCHIVER: Your Honor, Dan Slotchiver. I represent Jeane Whitfield, together with Brent Halversen is to my left.

THE COURT: Okay. Gotcha. Okay.

All right. And I think you wanted to put on the record -- or, we have got one -- somebody else.

MR. RADEK: Judge, I am John Radeck. I represent a nonparty, Dr. O'Neill. And I filed a motion to quash plaintiff's motion for an inspection.

THE COURT: All right. Has that motion been resolved or is that still ---

MR. RADECK: That is still going forward.

THE COURT: That is still going forward. Okay. All right. You were going to put on the record something?

MR. HORTON: Yes, Your Honor, the second motion is withdrawn. The motion to compel the -- I guess it was the expert's deposition is there -- that has been made moot by the scheduling.

THE COURT: All right. So that has been resolved. So we are going forward on the motion to quash and the other one?

MR. HORTON: Yes, sir, and my motion for an exam under Rule 35.

THE COURT: Okay. All right. Counselor, is that your understanding that those are the two motions that we

are going forward on?

MR. SLOTCHIVER: Yes, Your Honor.

THE COURT: Okay. All right. And this gentleman in the back, who is that -- who is sitting right back -- who is this?

MR. ABRAMS: I am an attorney, but I am also a forensic examiner. My name is Steve Abrams.

THE COURT: Okay. All right.

MR. SLOTCHIVER: Your Honor, he is here with reference to the second motion, the motion to quash.

THE COURT: Okay.

MR. SLOTCHIVER: And he may come up later on depending on how it goes.

THE COURT: Okay. All right. Then will go forward on your motion first.

MR. HORTON: Thank you, Your Honor. It is good to be in front of you today. I have a somewhat unusual motion for you. This is a motion under Rule 35 for the examination of plaintiff. We don't use 35 a lot. It doesn't come up very often.

There is one case on it that we are going to hear a lot about today called Fairchild that on the face of it looks like it is square against us.

So Rule 35 permits the examination of a plaintiff within a couple of boundaries. It provides some

protections to the plaintiff.

First we have to show good cause for the examination. Good cause generally in other areas of the law means that the examination would promote the interest of justice or something like that. It has not been defined under Rule 35 context.

Second it's puts some guard rails on the examination itself. It can only be held in the -- it has -- consideration has to be given to the plaintiff's scheduling. It can only be held in the plaintiff's county of residence or that of her physician. She can have her physician there with her.

And most importantly, there has to be a $100,000 in controversy. That is a pretty high bar, and that's above the federal court diversity limit. And I would represent to you that there are over $100,000 of controversy in this case. I think our medical specials are in the 140's. I have got that number written down somewhere. At least. So we have passed all of those thresholds.

So let me tell you about good cause then. Generally plaintiffs of course have the ability to select their physicians, to work with their physicians; and to help prepare them for their depositions, examinations, etc.

Defendants don't have access to those individuals other than in the context of a deposition. Defendant's

physicians, therefore, that we hired to defend the cases, we have two in this case; a plastic surgeon named Jorge Perez and Dr. James Ballenger, a psychiatrist here in Charleston, are left to have to take -- yes, they have to take a leap. Because they can read the plaintiff's medical records but they don't have the opportunity to meet with and examine the plaintiff other than in the context of a Rule 35 examination.

Both of these gentlemen are practicing physicians. They form diagnoses, plans, by meeting with individuals, by examining them, by discussing their condition, their history. That is essential to how medicine is practiced.

Both of these gentlemen are practicing physicians. And without the opportunity to examine plaintiff they are -- evaluations are left somewhat half complete if that's -- that is kind of how I am looking at it.

So under Fairchild that case specifically dealt with my expert, Dr. James Ballenger. In that case the Department of Transportation wanted to have Dr. Ballenger examine plaintiff.

Now Fairchild doesn't directly apply to this case. First off, the court in Fairchild gets it wrong. They didn't read Rule 35 very closely. They talked throughout Fairchild about an IME as an independent medical examiner. Rule 35 nowhere in it contains the language of

independence. There is simply no requirement that the examining physician be independent of the parties. So that is my first point as to Fairchild.

Secondly, in Fairchild the actual physician, the plaintiff's physician in that case, was assigned to her in the emergency room. She didn't have the option -- not she, but -- excuse me, didn't have the option of selecting her own -- their own physician. Ms. Whitfield in this case has had that option. So that makes that case factually distinct.

In that case the plaintiff had not had that ability to work with her physicians. Now ultimately the court in Fairchild decided that the examination of Dr. Ballenger shouldn't go forward because of a, quote, reasonable objection by the plaintiff's counsel in that case. The reasonable objection was determined that the -- that Ballenger was basically the hired gun, he was the expert of the defendants.

I don't believe that that is a reasonable objection. There is bias inherent in the way in which we hire experts and employ experts in these cases. The difference though is that the playing field isn't level. Defendants do not have the ability to meet with and examine a plaintiff, whereas the plaintiff's physicians do.

This inequity is inherent in the relationship. And it has been understood for a long time. In my brief I quoted you a 1910 case which pointed out that it is inequitable to defendants to allow plaintiffs to select their physicians and then bar defendants from access to that examination.

And even the Fairchild court looked at that. There is a case that they review in their called Timpte out of Colorado which says that so long as the plaintiff may select his own doctor to testify as this physical condition -- as to the physical condition, fundamental fairness dictates that a defendant shall have the same right in the absence of an agreement of the parties as to who the examining physician will be.

All that we ask, Your Honor, is for you to level the playing field and allow our experts the opportunity to meet with and examine Ms. Whitfield in the context of the security of being with her doctors. There is no prejudice to the plaintiff in allowing this examination.

And it is crucial to this case, because it involves complex medical issues. It is not -- the plaintiffs say in their brief this is just a botched breast surgery. It is not. This was a breast lift with exchange of implants. There was wound separation.

And plaintiff then switched horses. She chose a new

doctor, and that doctor has treated her for two years. He has removed her other implant. He has left her with asymmetry in her breasts. The plastic surgery end of it is complicated. He has attempted fat grafting. Now she wants implants again. That is kind of up in the air.

And on the psychiatric side of the case she has a long psychiatric history. She -- her own treating doctor who is named Marcino, her psychiatrist, opined in her deposition that the events of this case have aggravated her psychiatric condition, including PTSD which she would relate to the events of this case and which crucially, Your Honor, is one of the central elements of her damages.

That is why we have named Dr. Ballenger in this case. He is one of the world's foremost experts in anxiety disorders. He authored that portion of the diagnostic statistical manual, the DSM that all of the psychiatrists use.

The federal court when it needed somebody to examine Dylann Roof chose him. His credentials are as gold plated as they come. Yes, he does expert witness work. We have him against us in another case right now. I mean he appears on both sides.

We would ask, Your Honor, that you level the playing field and allow the defendants the opportunity to examine

Ms. Whitfield under Rule 35.

THE COURT: All right.

MR. HORTON: Thank you.

MR. SLOTCHIVER: Your Honor, we have submitted a brief and sent it to your law clerk. I don't know if you have had a chance to see that ---

THE COURT: I did.

MR. SLOTCHIVER: --- or review it beforehand.

THE COURT: I did.

MR. SLOTCHIVER: So I will talk briefly about that. First, this is a medical malpractice case. And we have already -- the defendants have listed their experts.

Their experts include Dr. Perez and Dr. Ballenger. The exact same experts who now they wish to move forward and perform -- and have them perform an IME.

I will let the court know that in their depositions both of these doctors have already given their opinions. They have reviewed the literature, and they have already given their opinions. They certainly had no issue giving an opinion despite the fact that they have not performed an IME.

It is important to look at the case -- and I brought a copy if you would like it, Judge, if you don't have it, the Verata (ph) case.

THE COURT: Yeah, I have got it.

MR. SLOTCHIVER: Okay. You have it. But the Verata case is the standard. And it is very clearly -- and it just coincidentally happens to deal with Dr. Ballenger, probably because he has testified so many times in so many cases. But in the Verata case it addresses the exact -- this exact argument very clearly. And it is the law of the land.

And trying to change it is trying to get you, Your Honor, to rule against what the courts have ruled. And in particular there's a couple of sections I will reference.

Under what is called the independent medical examination section of the order it says Dr. Ballenger cannot perform the exam because he had -- because he was an expert witness for the defendant and had reviewed the defendant's medical records.

It says the court denied the defendant's motion to have Dr. Ballenger perform an IME, and at trial the court again stated that the motion for Ballenger to perform the IME was denied not because of his qualifications or whether he was biased but because he was listed as an expert witness in the trial.

The court said independent means independent, and that means no witness has previously been identified by -- and that means no witness previously identified by

the parties can give an independent medical exam.

So this has been addressed by the court. It is not a surprise. So we believe that the law is very clear. We believe that this case sets forth the standard and it is not an independent medical exam for one of the defendant's expert witnesses who have reviewed the records, even opined on them, to be able to give an independent medical examination.

Furthermore, Your Honor, with reference to Dr. Perez, for example, he is a doctor licensed in the state of Florida. He is not licensed in the state of South Carolina.

For him to come to South Carolina and do a medical examination would be the court allowing a doctor to practice medicine without a license in the state of South Carolina. He is not licensed here.

So even if the court were to award it he can't do it because it is a medical examination, by its very nature an independent medical examination.

As to Dr. Ballenger, he has given a lengthy deposition. He has articulated all of his opinions. And he in fact has acknowledged that were he to do an evaluation he understands that my client by the nature of what happened to her has -- and by the nature of the complaints of the psychological issues would very well

not be willing to talk to him.

So the question then becomes what is the examination that was to be performed. Because we don't know what they wanted to do. We don't know what they plan to ask. And we don't know the nature of how they are going to ask it in order to get an unbiased opinion.

You know, it is not as if you could say I want my own doctor to do an MRI or to examine some of the records or to see how you lay in response to certain things. But a mental evaluation is an entirely different thing, are they looking to do a new deposition essentially by the use of their doctor.

So we believe, Your Honor, that the court is very clear in Fairchild. This has been ruled upon. It has gone up the ladder from the circuit court all the way up. And the law is clear.

And the fact that the defendants don't like it, well, there is a reason they don't like it. They want to choose their own experts who will give them an opinion that supports their case so they can have their experts have an opportunity to examine my client.

As to Dr. Perez I don't know what his examination will show. She already had the injuries. She has already been partially repaired. At most he would be able to testify as to what he thinks she needs in the

future for a breast augmentation. But he could really do that through photographs.

So I don't believe there is good cause to have anybody examine her under either situation. But to the extent that there is good cause I think the law in Fairchild is very clear on this point, and we would ask you to deny their motion.

THE COURT: All right. Anything else?

MR. HORTON: Your Honor, I would like to point out that the independence aspect that counsel is pointing to is nowhere present in the rule.

And my other point is that both of our experts have requested the opportunity to examine her because they believe that that would support their opinions.

Thank you, Your Honor.

THE COURT: All right. Anything else?

MR. SLOTCHIVER: Only, Your Honor, that the rules are oftentimes interpreted by case law. And in the case law is what happened in the Fairchild case, and the Fairchild case is clear and right on point ---

THE COURT: All right.

MR. SLOTCHIVER: --- and it goes to it.

THE COURT: All right.

MR. SLOTCHIVER: Nothing else. Thank you.

THE COURT: All right. As it relates to that motion

I want both lawyers to submit me something within ten days. Submit me a proposed order in ten days.

Make reference to Fairchild in both of the proposed orders distinguishing which is applicable or not applicable. Send it to me in ten days to my law clerk in Greenville, okay?

MR. SLOTCHIVER: Yes, sir.

MR. HORTON: Thank you, Your Honor.

THE COURT: All right. What have we got next?

MR. RADECK: Your Honor, once again for the record, John Radeck here with the Hood Law Firm.

THE COURT: Spell your last name.

MR. RADECK: Radeck. R-A-D-E-C-K. And I represent a gentleman named Dr. Joseph O'Neill. And just to give you a little bit of background, he is obviously not a party to this medical malpractice case involving a plastic surgery procedure.

THE COURT: Right.

MR. RADECK: Some time in 2014 Dr. Schimpf actually shared office space with Dr. O'Neill and utilized some of Dr. O'Neill's computer systems.

So at some point during the litigation in this case Dr. Schimpf testified in his deposition that there may have been preoperative photographs of the plaintiff, his patient. My doctor never saw or treated this patient at

all.

Efforts were then undertaken by plaintiff's counsel to locate these photographs. They sent a letter to Dr. O'Neill asking for any photographs that still remained in his practice or on his computer system related to this patient. He provided a response to that with the documents that he had in his possession. That was back in 2015.

Later Dr. O'Neill actually received a subpoena from the defense counsel and provided a subpoena response for the records that he had found on his system related to the patient.

If that wasn't enough, he then received a deposition notice from plaintiff's counsel seeking to take his personal deposition and the custodian deposition of his practice.

Obviously we've thought long and hard about whether to quash that notice for deposition, after the documents were produced twice already.

We agreed to go forward. This was in December of last year. And he was deposed. Dr. O'Neill was -- agreed to voluntarily be deposed. He was deposed for nearly two hours after hours at his practice. And as part of appearing at that deposition he had taken to be sure extra efforts to find any documents that might

relate to the plaintiff.

Judge, I just want to briefly pause and say did you receive my memo in support?

THE COURT: I did.

MR. RADECK: Okay. And attached to that memo was two affidavits, one by Dr. O'Neill himself and one by his IT consultant named Mr. Nienstedt.

He and Mr. Nienstedt sat down for around three hours prior to the deposition performing searches of all the servers, all of the backups to the servers, everything, and brought what they found, nearly 300 documents, to the deposition. Those were provided to counsel.

The morning after the deposition he receives the present subpoena to actually come and inspect his servers, without consulting us at all.

And so at this point we just simply cannot allow this intrusion into his practice to search for documents that they have been provided probably three times now.

And it is really as to a collateral issue in this litigation, involving preoperative photos. And I am not sure how it is relevant in the case.

And to be quite honest, Judge, plaintiff's counsel they already have an inference that the records have been destroyed by Dr. Schimpf. So they have the benefit of that. I am not sure what this whole exercise is for.

Obviously the basis of our motion is Rule 45 and primarily under the undue influence standard -- not undue influence, undue burden standard, Your Honor.

And so the point is no matter how narrowly tailored their search is, no matter how sure they think that they can perform this analysis of his servers, it is going to be an intrusion that would necessarily and most likely seep out to the community that a non-party to a litigation is being forced to have his servers inspected when the entire practice involves obviously very sensitive cosmetic plastic surgery procedures. There's, you know, hundreds of thousands of patients with pictures of their sensitive body parts all throughout the system.

And so, you know, there's obviously apart from the HIPPA concerns about them seeing images of other patients, which is a real concern and which is another basis for our motion, there is a concern that if his patients find out that there are other third parties coming in and had the ability to see their photos that is a problem. And that's -- and according to Dr. O'Neill that would irreparably harm his business going forward.

And so, you know, and there is really no way to work it, I don't think, that you can avoid the HIPPA violation; because if there is a violation, if their expert views any of these photographs, Dr. O'Neill has a

duty to notify his patients that someone viewed their photos. And that is going to be damaging.

So, Your Honor, that is the gist of our motion. We have had some discussions trying to narrow down what they are looking for. It seems to be the issue now all comes down to a MacBook computer.

So you have the main server, you have another medical program, and then you have a MacBook computer. The only issue now is they want to have their expert Mr. Abrams come in, perform some analysis using the specialized programs, to make a copy of the image, take it away off site, take weeks to perform some inspection, bring it back to try to find metadata to show whether or not there is any pictures of this woman in the system.

So there is nothing there. They are looking for whether or not something was there that was deleted. And so our problem is we can't let them take something off site. We can't let him come in, obviously spent two weeks at a practice, to intrude upon his private business.

And you know we can't -- I mean it would just chill -- it would chill his business, Your Honor.

And so Mr. Abrams he is experienced at doing this at MUSC and hospitals, but this is obviously a private ---

THE COURT: Right.

MR. RADECK: --- plastic surgery office. I'll sit down now and hear what they have to say.

THE COURT: All right.

Yes, sir?

MR. HALVERSEN: Your Honor, forgive me; I am real hoarse. I have got a little bit of a cold this morning but ---

THE COURT: And you are Mr. Halversen, right?

MR. HALVERSEN: Yes, sir.

THE COURT: Okay.

MR. HALVERSEN: So -- and I represent Jeane Whitfield. So Dr. Schimpf, the defendant, shared office space with Dr. O'Neill.

THE COURT: Okay.

MR. HALVERSEN: He was using his medical records, computers, to house his information.

So pre-suit I sent a request for medical records to Dr. O'Neill's office, and they gave me about 214 pages and said that is all we have.

We go forward in time. There is they admit -- the defendants have admitted there is missing medical records. They say they are missing. They have also affirmatively said in the pleadings that we didn't destroy anything, okay.

So I -- we are still getting documents. As late as

three weeks ago the defendants found a medical record of ours that is pertinent to the issues in the case. So there is a major issue with sloppiness of medical records that were -- that have been kept by the defendant.

Fast forward to December. I sent a subpoena to their office to depose Dr. O'Neill about how did Dr. Schimpf use your system to keep his medical records.

THE COURT: Right.

MR. HALVERSEN: He brought to that deposition 330 pages of information. So I just want to set for the record that what was represented pre-suit as complete was not.

But notwithstanding that, Your Honor, our client said photographs were taken of her before the procedure. And we have gotten this long-winded explanation from the defendants about how the medical records were lost, about how they were transcribed and they went to a dictation person and they came back and these tapes were blank.

As far as the photographs -- and we have whittled down what we are arguing about right now about as to photographs.

Because we learned last night from Mr. Radeck's office that the way the information is kept the stuff that we wanted to examine on the medical records for the practice, Dr. O'Neill's practice, is no longer -- we

can't even do it because the information wasn't preserved.

So what we are left with is one laptop where they used to put Dr. -- the defendant's -- Dr. Schimpf would take photographs.

And Dr. O'Neill testified that when photographs were taken of patients preoperatively they would automatically sync into this Apple program. So he'd take a picture and it automatically syncs into this computer program.

So there should never be an issue of a missing photograph. And Dr. O'Neill testified, I have never lost a photograph.

So we have got our client said -- she is here today. And she testified that the photographs were taken of her preoperatively.

And we don't have them. So we have got -- so we want to see from Mr. Abrams, have him evaluate this laptop.

Which it is my understanding from Mr. Radeck that they don't even use this laptop with their current practices because it is from, you know, years ago and they have changed their systems.

So we have got a laptop that is off line. Mr. Abrams has been appointed by this court before as a HIPPA certified compliance officer to examine hospitals, you

name it, medical records, and sort through electronic data and segregate what is not at issue.

We don't want to find any of their other patient's records. We have no interest in that. We have offered to sign a confidentiality order. We have offered to sign a nondisclosure agreement, if anything were to be inadvertently encountered. Mr. Abrams can speak to that.

But basically what he has said is I am not going to even look at any of these images. He -- there is a way he can look -- he can find what might be on the computer related to Mrs. Whitfield, he can then give that to them and they can identify whether it is our client or not.

And that is it, Your Honor. I don't know what other safeguards -- you know, Mr. Radeck before the hearing expressed some concerns about that it would be intrusive.

You know, he can -- our expert can come to their office after hours. He can run a search on the laptop with his forensic software.

We are paying for this, Your Honor. We are doing it for a reason. There should be adequate safeguards to protect their concerns about the integrity of their data. He is not going to harm their data in any way that is on this laptop. It will be preserved.

If there is anything that he has working, when he is done it will be destroyed. These are procedures he

follows all the time with local hospitals.

Mr. Abrams, is there anything I left out in terms of that process for you to do to ensure confidentiality amongst other patients or the integrity of their systems?

MR. ABRAMS: I don't believe so, no.

MR. HALVERSEN: Okay.

Your Honor, that is all I have to say. The photographs we -- why there are important, Your Honor, you may be asking yourself. So these were pictures of what she looked like before, naked.

THE COURT: Right.

MR. HALVERSEN: We don't have that. And she testified she was happy with the appearance of her breast before this happened.

THE COURT: Right.

MR. HALVERSEN: So it is important. We already have an adverse inference. That is true. But if they are there Mr. Abrams can determine in his forensic analysis if they were deleted.

That's a lot different than saying there's an adverse inference that there was something harmful, if he determines that they are there and they are deleted.

But notwithstanding that, Your Honor, we want the records because it is helpful for our case.

THE COURT: Thank you, counselor.

Anything in reply?

MR. RADECK: I do. Yes, Judge. There is no duty -- my client had no duty to preserve -- to preserve any -- there was no -- so he made a comment about how we didn't preserve records. I mean there was no duty of my client to preserve anything.

Obviously Dr. Schimpf kind of was just kind of came and went for a short period of time at his practice. So there was no duty to preserve anything. We've provided everything we've had.

Mr. Halverson said that, you know, pictures were taken and then they were automatically uploaded into the Mac. Well, they would have been -- that would have been uncovered.

We have -- we had an affidavit, sworn testimony, from our IT expert who works at Charleston Tech support, has over 20 years IT experience, who performed a three-hour search; and there is nothing there. So, again, they are looking for something that doesn't exist.

And that is the problem we have. We don't know -- we don't have parameters, okay. So Mr. Abrams represented to me before the hearing that he doesn't know how long this exercise he is proposing is going to take. We don't know exactly what it is. He is going to come to Dr. O'Neill's practice for how long? He is going to --

he wants to take stuff away for how long; weeks, I think is what he told them.

And so it is not enough to say, hey, we have an order here that says I am not going to look at any of these images from other patients. That is not enough.

The harm is there that he -- that some third party is coming into his practice, disrupting him for hours, weeks, having to deal with this, when he has gone above and beyond, given two-hour deposition testimony and was paid $32 for it and that was his witness fee when he is a plastic surgeon.

And so any concerns that they may have had that we weren't giving them the complete records is completely gone when we have two affidavits on file from Dr. O'Neill himself and his IT expert.

And so, again, the point is -- what is the point? They have the adverse interest. They want pictures of what she looked like before the surgery. I mean, you know, Your Honor, we simply can't consent to this intrusion.

MR. HALVERSEN: Can I just ---

THE COURT: Yes, sir.

MR. HALVERSEN: --- respond real very briefly, Your Honor?

THE COURT: Yes, sir.

MR. HALVERSEN: He is correct, the first thing he said about them having a duty to preserve; I believe that is correct as it applies to Dr. O'Neill.

It is also -- it is our position that when the defendant was on notice of the medical records issue he should have contacted their office to say, hey, I have got an issue here, preserve these things. Which now we don't have.

Just for the record.

Mr. Abrams has tools that he believes that they are IT -- with all due respect to their IT department, Mr. Abrams is a forensic criminal examiner. He has tools that cost tens of thousands of dollars in software that we are confident they don't have.

So there is an analysis that Mr. Abrams can do that they cannot do. We have -- we have asked them can you guys do what this -- what Mr. Abrams is going to do, are you going to use this kind of software. We haven't been affirmed -- told affirmatively that they have done that.

We really respectfully doubt that, because it's an IT department. With all due respect, Mr. Abrams is a forensic expert.

And again, the last point, Your Honor, this is a hypothetical harm they are talking about. There is adequate assurances we have given them with Mr. Abrams

actually coming to the facility, if that would satiate their concerns. Any order that you are going to enter, Your Honor, is going to set forth any HIPPA concerns. Everything I have already addressed, Your Honor.

THE COURT: All right. Anything else?

All right ---

MR. RADECK: Judge, I'm sorry ---

THE COURT: Go ahead

MR. RADECK: I would just comment that there is no evidence that anything was destroyed from my client's practice. And if there were photographs, Dr. Schimpf would have them and he would give them to them.

And so, again, going through this extreme measure to my client based on what we know is -- does not outweigh the undue burden that it causes him. Thank you.

THE COURT: All right. I am going to go ahead and deny your motion to quash.

I am going to ask that once examination -- once the examination is done that it is done as expeditiously as possible and, secondly, that all of the safeguards are put in place. And when you couch an order sending it to me make that order as inclusive as possible regarding that and send a copy to counsel.

MR. HALVERSEN: I will, Your Honor. And I will get Mr. Abrams' input on that order. So it should have

all ---

THE COURT: So -- yes. Yes, sir?

MR. RADECK: I just request an opportunity to review his order before it is submitted.

THE COURT: Oh, absolutely.

MR. HALVERSEN: Sure.

THE COURT: Absolutely. And I will give you a 20-day window; or do you need more time than that, a 20-day -- to give me the order?

MR. HALVERSEN: To do -- to do the order?

THE COURT: Yes.

MR. HALVERSEN: Oh, we will get the order to you in ten days. That is fine.

THE COURT: Okay, ten days. Okay. Very good. Okay.

MR. RADECK: Judge, and I am sorry; is there any way -- we don't know how long -- I mean Mr. Abrams submitted an affidavit, but he doesn't have any -- he hasn't given any assurance of how long this whole process is going to take. I mean there has got to be some parameters set.

THE COURT: Well, you know, and I understand, counsel. And I tried to use the word expeditious. The reason I did that was because I didn't -- do you want to respond to that?

I think -- Mr. Abrams, he is there. Raise your right hand. I know you spoke a little while ago. Do you swear to tell the truth?

MR. ABRAMS: Yes, sir.

THE COURT: All right. You know, there is some concern about how long this is going to take.

MR. ABRAMS: Right. So the problem is, is that Macs are very slow as far as forensics are concerned. So typically to image the MacBook it is going to take somewhere between five and seven hours of actual just copying the data. And then the analysis is always slow because it is a different file system than Windows uses, and so it is a slow conversion.

The last MacBook that I analyzed, the software took about two weeks until I got to the point where I could produce the data. So I am estimating it is going to take about two weeks once I have the data.

THE COURT: All right. So ---

MR. ABRAMS: And that is not me sitting at the computer. That is the computer just working in the background.

THE COURT: So a total of four weeks?

MR. ABRAMS: No, no. It is probably going to take a total of two weeks and then maybe a day more for me to produce the data onto a hard drive that I can bring back.

THE COURT: So within a three-week span?

MR. ABRAMS: Yes, Your Honor. That would be fine.

MR. RADECK: But, Judge, the point is he is taking -- all -- he is proposing to take all of the data to -- after he runs this whatever five, eight-hour copying, he then is taking the data for two weeks. And all of that data includes images of people's body parts that aren't here and that live all across this area. And so if that happens we have to give notice to all of those people.

THE COURT: Let me ask you something. I thought I heard some language in the colloquy between the two of you that you are able to segregate ---

MR. ABRAMS: So -- that is correct, Your Honor. The way ---

THE COURT: Am I using the correct terminology?

MR. ABRAMS: Yes. So the way that the software works is I am not like pulling up the images and looking at the images. I am actually going to pull all of the deleted images from everything else and then I am going to run keyword searches on date and Ms. Whitfield's name to see if any of those key words came up in the header of the deleted files. Those are the only files I am interested in.

THE COURT: Right, I thought that is what I heard.

MR. ABRAMS: All of the other files are going to get segregated back, and the only files that I am going to produce are going to be the files that might have something to do with Ms. Whitfield. And I don't need to look at any of the images in the file.

THE COURT: That is what I thought.

MR. ABRAMS: And one more thing.

THE COURT: Yes.

MR. ABRAMS: If I do look at the images there is an audit trail that is running on the software and they can go in behind me and make sure that I haven't looked at anything.

MR. RADECK: Judge, all it takes is him to click on the data to view the image. And there is no assurance -- I mean he is telling us that we have to spend time going through an audit trail just to know whether or not -- I mean the fact is that they are there, that they are gone.

It would be a totally different story if he can perform his short analysis at the practice where they are never leaving the practice. But he is taking them to some site -- I don't know where he works, who works with him. I mean it is too open-ended, Your Honor.

THE COURT: Where would you take them?

MR. ABRAMS: I would take them back to my office which is at my home. There is no one who works there

besides myself, and the only one that would have access to the room except myself and my wife. And my wife is a doctor herself so. I don't think that that is an issue.

THE COURT: So your concern is taking them off site; is that ---

MR. RADECK: It is, Your Honor. And I think technically we would have to notify every patient of his practice ---

MR. HALVERSEN: Your Honor ---

MR. RADECK: --- that someone has taken nude photographs of them off-site.

THE COURT: Mr. Halverson.

MR. HALVERSEN: If there is a data breach he would be correct; if there's a data breach if it would mandate that he contact people whose records were affected. There is no data breach. This is done in the auspice of a court-sanctioned inspection; again, providing the assurances that Mr. Abrams routinely gives in these cases.

MR. RADECK: That is his interpretation of it. That is not documented.

THE COURT: Well, let's try it. If there's some issues you just come back before the court and address them at that time if there are some concerns.

But let's -- the only thing I am requiring the -- I

mean Mr. Abrams to do is to try to do this as expeditiously as possible, and I need an order that as much as possible safeguards the process. And I think you can get me that.

MR. HALVERSEN: We can, Your Honor. And if it allays some concerns, that he actually goes to their facility to do as much of this as possible, then Mr. Abrams has indicated he is happy to do that.

THE COURT: Okay. And put that in the order that he will go there and do as much as possible at the facility.

MR. HALVERSEN: I will, Your Honor.

THE COURT: All right. Okay.

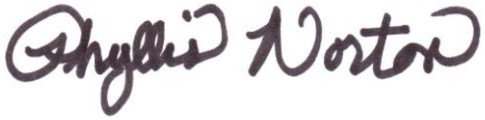
(WHEREUPON, the hearing adjourned.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.*)*

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on February 27, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



PHYLLIS NORTON, CVR

Date: April 2, 2019

Certified Transcript Provided For: Brent Halversen
Certification Reference #2019-0402 Certified Copy

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

JEANE WHITFIELD,

Plaintiff,

vs. CASE NO. 2017-CP-10-2758

DENNIS K. SCHIMPF, M.D.,
AND SWEETGRASS PLASTIC SURGERY, LLC,

Defendants.

TELECONFERENCE
AND VIDEO
DEPOSITION OF: RAM KALUS, M.D.

DATE: July 24, 2019

TIME: 2:12 p.m.

LOCATION: A. William Roberts, Jr., & Associates
234 Seven Farms Drive
Suite 210
Daniel Island, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: KAREN NELLIUS, RPR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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ALSO PRESENT:

Mitchell Coopersmith,
Legal Videographer (via teleconference)

(INDEX AT REAR OF TRANSCRIPT)

VIDEOGRAPHER: We are now on the record. Today's date is July 24th, 2019. The time is approximately 9:12 p.m. This is the videotaped deposition of Ram Kalus, M.D. The location is 10 Kahila (phonetic) Valencia Street, Tel Aviv, Israel.

My name is Mitchell Coopersmith, legal videographer, representing A. William Roberts, Jr., & Associates. I'm familiar with the provisions of Rule 30 pertaining to videotaped depositions.

This deposition is taken in the matter of Jeane Whitfield versus Dennis K. Schimpf, M.D., et al., case number 2017-CP-10-2578.

Will counsel please introduce themselves.

MR. SLOTCHIVER: Dan Slotchiver on behalf of Jeane Whitfield.

MR. SMYTH: Todd Smyth on behalf of Dr. Dennis Schimpf and Sweetgrass Plastic Surgery.

THE VIDEOGRAPHER: In accordance with Rule 30, the witness has the right to be shown the videotaped deposition unless waived by the witness and the parties.

Will the court reporter please affirm

the witness.

RAM KALUS, M.D.,

being first duly sworn, testified as follows:

EXAMINATION

BY MR. SLOTCHIVER:

Q. Dr. Kalus, this is Dan Slotchiver. Thank you for joining us today. I understand that you are in Tel Aviv, Israel, as we speak and that you have a practice in both Mt. Pleasant, South Carolina, and in Tel Aviv; is that correct?

A. That is correct.

Q. Okay. We'll go through your background in a moment. I also understand that you will not be available to testify. You will not be in the country when the trial goes forward, and, therefore, we've made arrangements via subpoena to take your deposition via video while you are in Tel Aviv today for purposes of use at trial, and we will show this to the jury at trial. Do you understand that?

A. I do.

Q. Okay. Doctor, can you start by telling us a little bit about your background, your education, your training.

A. Sure. So I went to college and medical

school in Boston University, and that was seven years combined undergraduate and graduate education, resulting in a bachelors in psychology and a medical degree.

And after that, I did my four years of general surgery training at Hartford Hospital and the University of Connecticut, followed by specializing in the various aspects of plastic surgery, including hand surgery, with a fellowship, maxillofacial surgery and microsurgery, in Dartmouth, Hanover, New Hampshire, followed by my core general plastic surgery residency at the University of Massachusetts in Worcester, and cranial, facial, and esthetic surgery fellowship in Paris, France.

Q. Approximately how long have you been practicing as a physician -- as a licensed physician?

A. It's going on 30 years.

Q. Thank you, Doctor.

And what brought you to South Carolina?

A. It was my first official position after completing my residency training. I joined as a clinical assistant and then clinical associate professor at the University of South Carolina in

Columbia, and I was there for six years. And then I was invited to develop and open a pediatric plastic surgery unit at a new children's hospital that was built in Tel Aviv, outside Tel Aviv, in 1996, and I went to Israel for a year at that time. And then I came back to Columbia to start a private practice. And a few years after that, I moved my practice to Charleston -- to Mt. Pleasant, South Carolina.

Q. And what is the name of your practice in South Carolina?

A. Plastic Surgery of the Carolinas.

Q. Okay. And where is it located?

A. In Mt. Pleasant, South Carolina.

Q. Doctor, are you a member of any boards or societies as a physician?

A. I am. I'm a fellow of the American College of Surgeons. I'm certified by the American Board of Plastic Surgery. I'm a member of the American Society For Esthetic Plastic Surgery and the American Society of Plastic Surgeons.

Q. Thank you, sir.

A. And --

Q. Go ahead. I'm sorry.

A. The South Carolina -- I'm sorry. The

South Carolina Society of Plastic Surgeons and the Southeastern Society of Plastic Surgeons and the Israeli Society of Plastic Surgeons.

Q. And do you have privileges at any hospitals?

A. I do. I have privileges at Roper Hospital, East Cooper Hospital, the Charleston Surgery Center, and then I have privileges here in several hospitals in Israel.

Q. Do you specialize in the field of plastic surgery?

A. I do.

Q. And do you have familiarity with breast augmentation surgery?

A. Yes, I do.

Q. Approximately how many cases in breast augmentation would you do a year?

A. For a straightforward cosmetic bilateral breast augmentation, I probably do about a hundred a year, but I do a lot of additional breast surgery for breast reconstruction, breast lift, augmentation, revision breast surgery, etc.

Q. And is that true both in -- in the Charleston area and in Israel?

A. Well, in Israel the practice is mostly

a teaching hospital based, and there I'm doing mostly breast reconstruction after breast cancer. And in the private practice, it's just beginning so it's pretty hard to comment on the volume.

Q. At this point we would have -- we would move to have you qualified as an expert in the field of plastic surgery.

MR. SMYTH: No objections.

BY MR. SLOTCHIVER:

Q. Doctor, in preparation for your testimony today and as a basis for any opinions you plan to render, could you please tell the ladies and gentlemen of the jury what documents you have reviewed.

A. I've reviewed depositions of Jeane Whitfield, of Dr. Schimpf, of Dr. Rosenberg, my own deposition that I've given previously, and of Dr. Jorge Perez.

Q. Have you had a chance to review any medical records?

A. Yes. I've reviewed some of the medical records that were -- or the medical records that were provided to me reflecting Dr. Schimpf's care of Ms. Whitfield.

Q. And are you, Doctor, a treating

physician for Jeane Whitfield as opposed to a hired expert for Jeane Whitfield?

A. Yes. I became a treating physician for her on the date that she first consulted me, which would be -- let's see. Sorry. I'm just looking.

Q. Take your time.

A. July 10th, 2014 --

Q. About --

A. -- was when I first met her.

Q. About five years ago?

A. Yes.

Q. Doctor, would you please tell the ladies and gentlemen of the jury about your familiarity with Jeane Whitfield.

A. Ms. Whitfield is a lovely woman who I've gotten to know quite well over the last few years. She had some complications related to surgery, and we took care of her to the best of our ability, and I think she is appreciative and grateful that she has gone on to successfully heal all of her surgery thus far. She still has some postsurgical issues that need addressing with additional surgery in the future.

Q. Okay. And let's just back up for a moment. How is it that you came to meet her or to

treat her?

A. Well, about four and a half weeks after surgery by Dr. Schimpf, she was having wound healing issues, and she was distraught and wanted a second opinion on how to proceed with her treatment, and she sought my opinion.

Q. Did you ultimately treat her?

A. I did.

Q. And prior to treating her, did you have an opportunity to review any operating or postoperative notes from Dr. Schimpf?

A. I don't believe I did prior to treating her. I had an opportunity to speak with Dr. Schimpf the day I first met Ms. Whitfield in my office. When I saw her, I evaluated her wounds and recommended that she follow up with Dr. Schimpf, who was most familiar with her surgery and treatment up until that point. And she indicated that she was willing to follow up with Dr. Schimpf. And while she was still in my office, I called Dr. Schimpf and spoke to him about the fact that she was in my office seeing me for a second opinion.

Q. Subsequent to that she came back to you; is that correct?

A. That is correct.

Q. Would it be fair to say that you have never had an opportunity to review any postoperative notes from Dr. Schimpf?

A. I think that's correct. I don't think I was presented with any.

Q. Doctor, is maintain -- is maintaining postoperative notes a medical requirement?

A. You know, that's a great question. I'm not sure if it's a medical requirement. But in terms of good patient care, I would call it a necessity.

Q. Well, let's change the terminology. Is it -- is it a -- is it a standard of care in the medical profession to maintain medical records?

A. Yes, it is.

Q. And do you have an opinion as to whether the failure to maintain medical records is a deviation from the standard of care?

A. In my opinion it is.

Q. And, Doctor, is that opinion to the degree of most probably and to a reasonable degree -- excuse me.

Is that opinion most probably to a -- to a reasonable degree of medical certainty?

A. Yes.

Q. When Jeane Whitfield came to see you, can you please describe what signs she had of problems?

A. She had undergone a breast augmentation with breast implants simultaneous with a breast lift. And that surgery was revision surgery from a previous breast augmentation that she had with another surgeon in town, and -- not Dr. Schimpf and not me. A third plastic surgeon.

And my understanding was that the reason she ended up going to see Dr. Schimpf was because she was having pain I believe within her right breast. But esthetically she was apparently very pleased with her result. I did not obviously have any opportunity to see her before the day that I met her for the first time so I don't have any either photographs or medical records reflecting what her breasts either looked like or -- other than the information I just shared with you, that she was apparently esthetically pleased with her breasts but was having pain on one side.

And -- and so what I saw was a breakdown of wounds on both breasts, right more so than left, with some depth to the wound on the

right side, with exposed fat, and some drainage that appeared to be pus, purulent drainage. She had reported a foul odor from her wound. I don't recall specifically sensing a foul odor in the wound, but I was quite alarmed by the wound because when you see a wound break down and you know that there is a breast implant at the bottom of that wound, that is a -- essentially a surgical -- I would describe it as a surgically urgent matter to be corrected. Because a breast implant is a foreign body, and a foreign body is by definition at risk of becoming infected. So an open wound is a situation that clearly predisposes to a risk of infection with a foreign body very close by. So in plastic surgery terms, a wound breakdown with a breast implant or any foreign body underneath it is a very, very worrisome and urgent matter that needs to be addressed immediately.

Q. Is a wound breakdown the same thing as a separation or is that different?

A. Yes. Well, no. Those are -- those are nonmedical terms. But, yes. Effectively, you know, an intact wound -- a recent surgical wound that is intact has the two edges together, either with stitches that are internal or external, but

the two edges are together and there is a scar in between. That's an intact wound or a scar that is forming. If that wound falls apart and you see the underlying tissue, whether it's the underneath of the underlayer of the skin or the fat or a tendon or even a bone, that's an open wound. That's a separation. And that's not -- we deal -- in plastic surgery we deal with a lot of open wounds, whether they are from trauma or an operation that went badly and the wound opened up due to infection or due to a blood collection called a hematoma. There are many reasons why a wound can open. But an open wound with a breast implant underneath it is a very worrisome clinical picture because the implant is in danger of getting either exposed or infected, and, therefore, would require removal, and that would basically define the failure of the intended operation.

Q. Doctor, with regard to Ms. Whitfield, was this a large separation?

A. It was a fairly large separation. I believe it was about two and a half centimeters in maximal dimension on the right breast and on the left breast I think it was closer to about one centimeter. But the evaluation of the wound at the

time led me to believe that the tissue was not in good shape, that it was undergoing underneath with the exposed fat, the fat did not look healthy. It's a term that we call fat necrosis. Which necrosis is the medical term for dead tissue or dying tissue. And the fat underneath looked like it was in the process of dying. In layman's terms, we think of words like gangrene. Gangrene is another terminology that describes dead tissue. There was no gangrene in this wound, but there was wound -- there was tissue that was clearly in trouble. It didn't look healthy.

Q. Do you know how long she had those signs of necrosis prior to coming to see you?

A. I don't know specifically exactly how long, but I believe it was on the order of at least a couple of weeks. I was seeing her approximately four and a half to five weeks after her day of surgery. So I don't specifically recall exactly when she reported that her wound started having trouble or breaking down.

Q. In your opinion, was the necrosis that you saw a surgically urgent matter that needed to be taken care of?

A. Yes. Without a doubt.

Q. Doctor, what is imminent risk of exposure?

A. So when a breast undergoes a breast lift, when a plastic surgeon performs a breast lift, what he or she is doing is reshaping the breast and removing extra loose skin in order to make the breast tight and lift the nipples to a more proper esthetic position. So if the jury members think about a sagging or a drooping breast, that would be the indication for a breast lift in order to make it look esthetically more pleasing and more youthful, and that's what women seeking a breast lift are hoping to accomplish.

When that is done, it's done in several layers of stitching. But underneath all of those layers of stitching, if one is choosing to make the breast larger at the same time as correcting the droopiness or sagging, one can put a breast implant in there, and that's called an augmentation/mastopexy, or a breast lift and a breast augmentation both at the same time.

And imminent exposure of the implant means that if the wound is in trouble and it's breaking down, exposure of the implant is almost without exception a medical and surgical indication

to remove that implant because by definition it's contaminated and soon to be infected. So you leave a foreign body exposed in an open wound, that is a recipe for an infection that could spread from a local problem to a systemic problem with fever and sepsis and so on. So that could be potentially life-threatening. So imminent exposure of a breast implant is a surgical emergency in order to correct the imminent surgical problem that is before us and certainly to prevent a worse problem from developing.

Q. As it applies to Mrs. Whitfield, did you have a belief as to whether or not the implant was at imminent risk of exposure?

A. I believe that the implant was indeed at imminent risk of exposure by virtue of this wound that I was evaluating.

Q. And if it was untreated, what was the likelihood that she would develop an infection if she didn't already have one?

MR. SMYTH: Object to the form.

THE WITNESS: Very high.

MR. SMYTH: Calls for speculation.

BY MR. SLOTCHIVER:

Q. Is that based on your opinion having

served -- or having practiced medicine for the last 30 years, your opinion and experience?

A. Let me -- let me expand on that a little bit in light of the objection. I think the concern of an infection needs to be very, very high. The likelihood that she would develop an infection I agree is speculative. She may not develop an infection, but the concern that she would develop an infection is very, very serious -- very high. I think that's a more proper and precise way to describe my concern about it.

Q. Fair enough.

Would the concern that she would develop an infection give way to the medical necessity of going forward and having a medical treatment quickly?

A. Yes. A surgical intervention to remove the implant if it were infected, that would be the proper treatment.

Q. And is -- would the failure to expeditiously move forward to treat it surgically, would that be a deviation from the standard of care?

A. In my opinion it would be.

Q. And is that opinion, like the previous

opinion, most probably to a reasonable degree of medical certainty?

A. Yes.

Q. I believe you stated earlier, Doctor, that after first meeting with Jeane Whitfield before you took her on as a patient, you sent her back to Dr. Schimpf, referred her back to Dr. Schimpf, and you actually called Dr. Schimpf. Was that correct?

A. That is correct.

Q. Could you tell us about the conversation you had with him?

A. It was very cordial. It was very collegial. Dr. Schimpf and I have known each other for quite a few years. We are on a first name basis. And I explained to him that the patient was in my office. I described to him the findings, and I recommended to him, and to the patient for that matter, that she head over to be evaluated by him from my office directly. I believe -- I have no -- no specific knowledge of whether that was decided against by the patient or by Dr. Schimpf's availability. I was under the presumption that that would occur, but my understanding subsequently was that she was seen the next morning, not -- not

that afternoon.

Q. Is it your custom and practice when a patient from another practice comes to see you that you would send them back to that practice to try to have them go back to the original doctor before you took them on?

A. I think that is fairly common and customary. You know, any busy surgeon or plastic surgeon can have complications. Surgery is not always an exact science, and there are variables that result potentially in complications. The vast majority of physicians really want to take care of their patients from beginning to end, whether it went well or there was a complication. But more specifically, if there is a complication, we usually want to try to help the patient get through it by being very active in caring for the patient and holding on to that patient. So the answer is a long-winded yes, we like to hold on to our patients.

And when we refer back to a surgeon that -- the treating physician -- when we see a patient who is under the care of another physician, as a general rule we try to reach out to that physician to see as a courtesy if he or she would

like to continue the care of that patient and perhaps resolve the concern of why that patient sought a second opinion.

Q. Would it be fair to say there is only a small amount of plastic surgeons throughout the state of South Carolina?

A. Yeah. I don't know the exact number in South Carolina, but I'm guessing it's probably around -- somewhere between 30 and 50.

Q. So your effort would try to be cordial with the other plastic surgeons if you can?

A. Yes. Absolutely.

Q. Doctor, can you explain to the ladies and gentlemen of the jury the term undue tension and how it applies to a wound in general.

A. So I think the correct general statement is that excess tension or undue tension is something we want to avoid whenever we close a wound, and that's really in many ways the basis of plastic surgery. What plastic surgery addresses is complex wounds and how to get them closed, and one of the principles of wound closure is to avoid excess tension. The way I would define undue tension or excess tension is where the wound edges are so taut that you are worried that the blood

supply to the very edge of the skin is going to be compromised. So if there is a lot of tension on a wound, the blood supply won't get to the very edges of that wound and that will result in poor healing or wound breakdown.

Q. Then from the wound breakdown, I believe you spoke earlier about that it could lead to infections and other problems; is that correct?

A. That is correct.

MR. SMYTH: Objection. Calls for speculation.

BY MR. SLOTCHIVER:

Q. Okay. What -- what is the -- I'll rephrase it.

If you have wound breakdown, what can that lead to?

A. It can lead to infection, it can lead to exposure of vital structures, and it can lead to exposure of a foreign body, such as a breast implant, which, in fact, will almost certainly be at risk for getting infected. It won't necessarily become an infection.

But standard care of an exposed implant is to remove it. There is certainly an acceptable standard of care that with proper intervention and

proper irrigation and proper treatment with antibiotics you may be able to salvage an exposed implant and get the wound closed and hopefully healed without an infection, but as a general rule, the standard of care for an exposed implant is its removal and to possibly reinsert it at another day many weeks or months later.

Q. Is -- based on your training and your experience, is there a way to tell if a wound is too tight? Are there indicators?

A. The most common way is what I would refer to as the surgeon's judgment. Evaluating a wound, looking to see if the skin color is right -- if the skin is blanched, that might be an indication that it's too tight. If you see kind of a band effect from where the stitches have been placed such that it almost looks like a tourniquet effect, that could be a suggestion -- an indentation of the skin, that could be an indication that there is too much tension.

So it's clinical judgment. It's the amount of force literally in one's hand to tie the knot, and -- and then looking at the wound once the knot is tied to see if that skin looks healthy and looks like it's going to be okay in terms of the

blood supply.

Q. You may have answered this a few moments ago. I'm not sure if it's the same response. But if a procedure is performed with a miscalculation or a misjudgment by the doctor as it applies to the tension, what can occur?

A. If there has been a misjudgment and, in fact, there is too much tension --

And I'm going to define too much tension by -- as I just did. It's compromising the blood supply. There is not a robust blood supply at the skin edges, not enough to make the wound heal.

-- then one can predict that the wound may break down.

And -- and it's not only the blood supply to the skin. Because in the breast, the breast consists of skin, breast tissue, and fatty tissue. There is normally some proportion of fatty tissue and breast tissue, and it's going to vary in different women. So one of the tissues that is most vulnerable to ischemia -- and ischemia is the medical term for a poor blood supply. One of the tissues most vulnerable to poor blood supply is the fatty component. And if the fat is sort of starved

of its blood supply, that will undergo fat necrosis. And necrosis, again, is the medical term for dying, basically. Dying tissue or dead tissue.

Q. Is it your opinion, Doctor, that the -- that the separation -- or do you have an opinion as to whether or not the separation that occurred to Ms. Whitfield was caused by too much tension on the wound?

A. In my opinion that was the resulting cause of the breakdown, too much extension or poor blood supply for other reasons. And what else could cause a poor blood supply underneath the skin if it's not tension? Well, it depends a lot on the technique used in the breast lift. We know the anatomy of the breast and we know the anatomy of the blood supply to the breast. And depending on the technique used in the breast lift tightening procedure, if the stitches are too tight on the inside below the skin, that could choke off some of the blood supply to the fat and that can result in tissue death.

So whether the undue tension was at the skin level or beneath the skin level, I'm not sure. But I do know that the wound was breaking down because there was too much tension, and that too

much tension relates to the amount of skin or tissue that is covering the underlying implant. And when one does a breast lift, one is basically taking the inner half and the outer half of the skin edges and putting them together -- as well as the breast tissue, putting them together and making them meet in the middle. And if there is too much tension over an implant that is pushing out against that closure, that could be a recipe for poor blood supply and poor healing.

Q. Thank you, sir. I'm -- I'm going to ask you -- well, let me rephrase that.

I'm not asking you to opine as to whether or not it was intentional or a mistake, but do you have an opinion as to whether or not the excess tension that we have just spoken about as to Ms. Whitfield was caused by a miscalculation or a misjudgment by Dr. Schimpf and/or his practice?

A. My opinion is -- is retrospective. In other words, there is wound breakdown, and it's my medical opinion that the wound breakdown was due to tension in the wound, be it deep in the wound --

MR. SMYTH: Object to this testimony. I want to put an objection on the record.

Excuse me, Doctor.

I believe this is improper testimony. It violates the res ipsa loquitur rule, in that he is using a result to look back in time, which is against the Rules of Evidence and inadmissible.

MR. SLOTCHIVER: We are going to go forward and let his testimony come forward.

BY MR. SLOTCHIVER:

Q. But I'll rephrase it first, Doctor. Why don't you answer your question and then I'll ask you a followup.

MR. SMYTH: Subject to my objection.

THE WITNESS: Can you -- can you repeat the question, please?

BY MR. SLOTCHIVER:

Q. I will repeat it. Are you -- and I'll rephrase it.

Are you aware of any -- or do you have an opinion as to whether or not the separation that occurred to Ms. Whitfield, which we just spoke about a few moments ago, was related to a miscalculation or a misjudgment from Dr. Schimpf and/or his practice in performing the surgery, regardless of intention?

A. It's my opinion that the resulting wound was due to too much tension in the closure,

and my only presumption is that that would have resulted from an error in judgment --

MR. SMYTH: Objection.

THE WITNESS: -- at the time of surgery.

MR. SMYTH: Objection. Move to strike. Speculative.

MR. SLOTCHIVER: If he could please complete the answer before you speak only because of the video. I just want to have a clear video, and then you are welcome to put whatever objection you want.

MR. SMYTH: As long as it's clear that no objection is being waived.

MR. SLOTCHIVER: I understand. We are agreeing no objection is being waived. I just want him to have an opportunity to give a full answer so it's clear so if the court agrees with us, we don't have the objection speaking over him while he is speaking. Okay?

BY MR. SLOTCHIVER:

Q. If you could answer one more time, Doctor. I apologize.

A. So in my opinion, the wound complications were as a result of a misjudgment of

the tension applied in the wound closure at the time of surgery.

MR. SMYTH: Same objection.

BY MR. SLOTCHIVER:

Q. Okay. And is that opinion, Doctor, to a -- to -- is that opinion most probably to a reasonable degree of medical certainty?

A. Yes.

Q. Is -- Doctor, is the -- is a severe breakdown in the tissue related to a surgery a known complication?

A. Yes.

Q. Is a severe breakdown in the breast tissue related to undue tension being placed on the wound, is that a common complication?

A. I would -- I would call it a recognized complication. There is literature to support percentages of complications. I can't quote those numbers for you right off the bat. But I will tell you that augmentation/mastopexy, I have heard and understood that this is one of the most litigated operations that results in poor outcomes and unhappy patients. So this operation is known to be somewhat treacherous if not performed precisely and accurately with a higher complication rate than we

would like to see.

Q. As a result of the -- of the complex nature of this surgery, when you perform one of these surgeries, do you -- do you treat it differently than an average routine plastic surgery? And how so?

A. Well, I am aware of the increased risk associated with an augmentation/mastopexy, but I would not characterize the approach that I would use in that operation as any different from any operation I ever perform. I try to perform every operation with the utmost care and attention.

Q. And when you do one of these surgeries, do you -- do you test it once for tension, twice for tension, or do you repeatedly double-check to make sure that you have done everything you can to protect the patient?

A. Well, my technique involves the use of sizers, and I -- that sizer is adjustable, and I adjust the volume at the time of surgery to determine exactly what final implant size is most suitable, in my opinion, to be able to get the desired outcome with the most acceptable amount of tension.

Now, an augmentation/mastopexy, by

definition, is going to have a little bit of tension in it. But a little bit of tension is a very subjective description. In other words, what's a little bit and what's a lot? Well, that's the clinical judgment of the surgeon. And a little bit of tension is what we expect because we want that breast to be tightened and lifted, but we want to make sure that that little bit of tension is going to get us the desired outcome with a high likelihood of a successful outcome and good wound healing. And that's -- that's where the clinical judgment comes in of how much tension is the right amount of tension.

And so when you ask me what care I exercise in performing this operation, I tend to use small implants and I tend to be quite conservative with an augmentation/mastopexy. And I think the literature will support the fact that the larger the implant with an augmentation/mastopexy, the higher the complication rate.

Q. Doctor, when -- when you do one of these surgeries --

I'm going to use layman's terms for a moment.

-- at the end of the procedure, you've

got to stitch the patient up, correct?

A. That's true.

Q. And the stitching you do is what creates the tension to some extent; is that correct?

A. The stitching that we do creates the tension. I think that the tension left in the wound is as a result of the judgment that we made on how big an implant to put in and how much skin to remove in order to correct the drooping.

Q. Okay.

A. And so yes. The final tension is going to be determined by the actual placement of the sutures, the stitches. That is true.

Q. Doctor, if Jeane Whitfield had been your patient at the time that she presented to you the way that she did in July of '14 when you first saw her, what would you have done?

A. I would have scheduled her for surgery very shortly thereafter, whether it would be that evening or the following day or within 48 hours.

Q. And what would the purpose of the surgery be?

A. The purpose of the surgery would be to remove all poorly healing tissue. That might

include skin and fat; a careful, controlled exploration of the wound to make sure that the implant was not imminently exposed; and a determination of whether or not we can safely close that wound in the operating room as it is or downsize her implant to a smaller implant that would alleviate some of the tension or remove the implant altogether to get the wound closed with the least likelihood of additional future complications. Because if my original operation was to try to wash everything out and keep the implant, which would certainly be the desired outcome in order to not reverse the intended goal of the original operation, the goal is certainly to try to keep the implant in place, but that would inherently involve some additional risk that after this period of time with an exposed wound and an implant underneath that wound that that implant could still get infected.

So a part of the informed consent that I discussed with Ms. Whitfield was if we try to keep the implant, you may be at risk of needing additional surgery if our efforts were unsuccessful. And I recall her saying to me: No, please just remove the implant, and let's see if we

can get through this as quickly as possible with the highest likelihood of success. And it was my judgment that the only way to accomplish that goal, the way she described her wishes, was to remove the implant.

Q. And that would have been subsequent to your first meeting with her. That would have been after your initial meeting, and then you sent her back to Dr. Schimpf, and then she came back to you subsequent to that when you would have done your procedure; is that right?

A. Yes. I believe that actually my next encounter with her after referring her back to Dr. Schimpf was a couple of days later when she presented to the emergency room at Roper Hospital.

Q. And I was going to ask you about that next. Tell me what you know about the emergency room. Was her condition the same when she presented there as when she had seen you?

A. I think it was similar, but that the wound had broken down further, and I think she -- what prompted her to go to the emergency room, if I'm not mistaken --

I'd have to refer back to the record.

-- I believe it was her concern about a

foul smell and her concern that the condition is overall deteriorating.

Q. And when you say it had broken down further, do you mean it had separated further?

A. Yes.

Q. The skin tissue had opened up?

A. The skin and the fatty tissue underneath -- that the wound dimensions overall were wider or larger.

Q. So you are actually looking at an open wound at this pint?

A. I looked at an open wound from the first time I met her. That was the reason she came to me. She had open wounds in both breasts.

Q. Doctor, do you have any knowledge about Mrs. Whitfield getting stitches by Dr. Schimpf after she saw you?

A. I would have to review the record to know if that actually happened. I don't have any direct knowledge of that. If she saw Dr. Schimpf after my initial visit and had additional stitching placed, I'm not immediately aware of that. I know that there were -- I believe there were two separate attempts by Dr. Schimpf in the office setting to stitch her wounds closed. So if one of

them was after she saw me, that's certainly possible.

Q. Do you have any medical opinions about the -- whether or not it was the standard of care to attempt to sew up the separated wounds?

MR. SMYTH: Objection. Mischaracterization of what occurred.

THE WITNESS: Based on the wound --

BY MR. SLOTCHIVER:

Q. Okay. Well, let's rephrase it.

A. I'm sorry.

Q. Sure. I'll rephrase it.

Are you familiar with where Dr. Schimpf would have stitched Jeane Whitfield subsequent to coming to see you?

A. No, not -- not offhand. I'd have to go refer back to my records. I -- I don't. I'm assuming it would be the widest portion of separation, but I'm not sure.

Q. Would you like to take a moment to refer to your records?

A. Well, I don't have -- I'm not -- I don't have those available in front of me.

Q. If it were represented to you that Dr. Schimpf stitched the opening -- or stitched the

open wounds subsequent to the time that Jeane Whitfield presented to you, would that be an appropriate medical procedure --

MR. SMYTH: Objection.

BY MR. SLOTCHIVER:

Q. -- in your opinion?

MR. SMYTH: Objection. Calls for speculation.

THE WITNESS: Again, in my opinion, based on the wounds that I evaluated, that would not have been my treatment plan.

BY MR. SLOTCHIVER:

Q. And you testified earlier that your treatment plan would have been to progress with the procedure to stop infections or possible infections and to start again fresh down the road; is that correct?

A. Well, again, it would be to, in a controlled surgical environment in the operating room under sterile conditions, operate on this wound and try to get the wound closed and -- and see if we can keep the implant protected or, alternatively, remove the implant in order to get the wound closed definitively.

And -- and let me -- let me address

that a little bit further. Because an open wound is by definition a contaminated wound. So in the office setting, it's my judgment that it's very difficult to get bacteriologic control of an open wound unless you have a true operating room facility. I think it needs to be irrigated copiously with antibiotic irrigation. It needs to be surgically debrided. And all of that would hurt if it's done without anesthesia because it's surgery and the patient would be wide awake. So my judgment was that -- to treat this wound appropriately, it needed to be done in an operating room setting or certainly with some local anesthesia injected. And to properly perform surgery on this wound I felt required an operating room setting.

Q. Would stitching up the open wound instead of operating on it --

And I'll represent to you that the facts will bear that the testimony is that it was stitched both before and after she came to see you.

-- would that in your opinion be a deviation from the standard of care?

MR. SMYTH: Objection. Leading.

Assumes facts not in evidence. Calls for speculation.

BY MR. SLOTCHIVER:

Q. You can answer the question.

A. Again, the wounds that I saw in my opinion should not have been stitched together. And the stitching that occurred before I saw Ms. Whitfield for the first time, I can't really venture a strong opinion about it because I hadn't seen her prior to that. So I don't know that I can confidently question the judgment used in trying to stitch the wound before I met her. But choosing to stitch the wound closed after I met her, the wound that I saw, that would absolutely not be my treatment for that wound, and I suspect that very few of my colleagues would have used that treatment plan.

Q. Would you consider that to be poor judgment?

A. Yes, I would.

MR. SMYTH: Objection. Move to strike.

BY MR. SLOTCHIVER:

Q. What was Ms. Whitfield's mental status when she came to see you? Happy? Sad? Pain? Carefree? How would you describe it?

A. Anxious. Distraught. Tearful. Very, very stressed. Not -- not in a good state. Very, very upset.

Q. Would that be true for both the first time you saw her and the time you saw her when she came to you as a patient?

A. The first time I saw her and then subsequently you are asking me as she became my patient?

Q. Yes, sir.

A. I think -- I think Ms. Whitfield was pretty distraught through much of the process, but she was very much relieved as we started getting control of the situation.

Q. Do you have any information about surgery performed on Ms. Whitfield's chin?

A. I understand that she had liposuction under her chin. That's called submental liposuction. And that's all I know. I understand that that was performed as part of her surgery. I think she also had eyelid surgery at the same time as her breast augmentation/mastopexy, and that's my understanding from the operative note.

Q. Doctor, what is a consent form?

A. A consent form is a form that's used to

obtain consent or permission from the patient after a discussion regarding what is proposed, the risks and benefits of the proposed procedure, and ultimately the patient and the doctor and sometimes a third person, a witness, will sign and date that form documenting that everything has been discussed and explained, that the patient is willing to proceed with the proposed treatment plan.

Q. Is -- is the reason that the doctor and the patient would sign that form to avoid any confusion or complication down the road about what was supposed to be done and what was not?

MR. SMYTH: Objection. Leading.

BY MR. SLOTCHIVER:

Q. I'll rephrase it. I'll rephrase it.

A. Yeah. Sure.

Q. What is the reason, Doctor, for a consent form being signed by the patient and the doctor?

A. I think any patient would reasonably -- should reasonably be informed about their treatment plan and the risks and benefits of that treatment plan and why it's being recommended. And we do our best to educate our patients. We don't want our patients to undergo a treatment that they may not

have been fully educated about and, God forbid, have a complication that they had no idea might occur. Because if they were fully informed about the risks and benefit, they may conclude that the risks outweighed the benefit and they will choose not to proceed with the treatment, which is absolutely their right.

Q. Does a consent form also delineate what procedures are to be done?

A. Yes. A typical consent form will include the treating physician's name, and a statement describing exactly what is being planned, and a paragraph or two or three describing the risks and benefit of that treatment, and a statement documenting that this has all been discussed with the patient and that the patient is willfully proceeding with this procedure, and that's what his or her signature and date and time is reflecting.

Q. Is -- is it a standard of care to delineate what procedures are to be done on the consent form?

A. Yes.

Q. And is that, in part, because it -- it provides written documentation that's agreed upon

as to what will -- what will be done by the doctor?

MR. SMYTH: Objection. Leading.

THE WITNESS: Correct.

BY MR. SLOTCHIVER:

Q. Is the failure or is -- is the -- excuse me. Is -- the failure to provide and have signed a consent form indicating all of the procedures to be done, is that a deviation from the standard of care?

A. In my opinion it is.

Q. And is that opinion most probably to a reasonable degree of medical certainty?

A. Yes.

Q. Is it fair to say that plastic surgeons in South Carolina are generally pretty busy?

A. Some are. Some aren't. I guess it depends on the individual practice.

Q. When you've got a busy practice, do the documents such as the consent form work as your journal to make sure you are doing what you are supposed to be doing?

A. Can you rephrase the question?

Q. Sure. Is one of the benefits of a consent form delineating what procedures are to be done, is one of the benefits that you have a

document to look at to make sure you are doing the procedures you are supposed to be doing --

A. Yes.

Q. -- as opposed to acting by memory?

A. Yes. And part -- part of the procedural steps in performing surgery that has been instituted in most hospitals and operating rooms is something called timeout. And in a timeout, everyone stops what they are doing just before the procedure is about to begin and a designated person is calling out the patient's name, any identifying number, the procedure that is about to be performed, who is about to perform the procedure, an outline of any risks that would prohibit us from proceeding, a review of the patient's allergies, a discussion of whether or not the checklist has been reviewed, including preoperative antibiotics, that their consent has been signed, etc., and once the timeout is consented to and agreed upon by everyone in the room, the surgery begins.

Q. If a client -- is the patient part of the timeout?

A. The patient -- it's interesting you ask that. In the United States, the patient -- if it's

under anesthesia, the patient is usually asleep. But in Israel, over here, the timeout is with the patient wide awake and hearing everything so that he or she can -- can agree.

Q. Are you aware of whether or not Mrs. Whitfield desired to have the procedure performed on her chin?

A. I have no knowledge of that.

Q. You ultimately performed surgery on Ms. Whitfield, correct?

A. I did.

Q. Can you tell the ladies and gentlemen of the jury why you performed the surgery and what the goal was.

A. So my initial surgery was to get her wounds closed, and my judgment in surgery after discussions -- excuse me. My judgment before and during surgery after discussions with the patient was that we were only going to be able to get the right breast wound closed by removing her implant, which was done, and on the left breast I believe we were able to get the wound closed but retain her implant initially with the first operation.

Q. How many operations did you perform on her?

A. Now, I would have to check my records, but I believe it's two. It might have been three. You might have that. Again, I don't have her medical record with me because it's back in my office in South Carolina.

Q. That's okay. You ultimately removed the other implant; is that correct?

A. I did.

Q. Okay. And why was that?

A. That was at the patient's request. She wasn't happy with her asymmetry, and she felt at that point that she was ready to say good-bye to her implant. She felt that she had too much trouble with all of the surgeries that she underwent.

Q. Doctor, what opinions, if any, do you have as to stress and anxiety related to corrective surgery as opposed to her initial surgery?

A. Are you speaking specifically about this patient or are you speaking in general terms?

Q. Let's talk in general terms.

A. In general terms, surgery is a very stressful undertaking for most patients, and that's reasonable because most patients don't have the medical knowledge that we physicians have so there

are a lot of unknowns. They are scared to lose control, which you would lose control under anesthesia. You are putting essentially your life in the hands of those who are treating you. So that's a pretty scary proposition. Most of us like to be in control of our lives at all times. And then just knowing conceptually that someone is about to cut on you, that's a pretty scary thing for a lot of patients. So it's very common to have stress and anxiety for any person with surgery. You know, we do our very best to educate our patients, to answer all their questions, because a lot of the anxiety comes from what's unknown. So we try to leave as little unknown as possible for the patient and answer all their questions, calm them, give them a reassuring hand. And usually it's a very common practice just before surgery for the anesthesiologist to actually administer some intravenous medication in the form of Valium or Valium-type medication just to calm their nerves a little bit. So sometimes patients can be very anxious and trembling and tearful. Sometimes they can just kind of smile at you and say I'm really nervous. So it's just a spectrum.

Q. Is there a difference in the stress and

anxiety related to an initial surgery as opposed to a subsequent followup surgery where the initial surgery has problems and defects or deficiencies or a bad result, however you want --

A. Yeah.

Q. -- to quantify it?

A. I think -- I think one can reasonably expect that anytime that a surgical outcome was undesirable or a poor outcome or a complication occurred that in general that's going to result in a heightened state of stress and anxiety for the patient.

Q. In speaking about Ms. Whitfield herself, Jeane Whitfield, were there any signs of these stresses and anxiety viewed in her?

A. Yes. I would say that she -- her overall demeanor was anxious. As I think I mentioned to you previously, she was intermittently tearful. She would not relax. This was a stressed, anxious patient for sure in quite a bit of distress.

Q. We spoke earlier about necrosis. Did Mrs. Whitfield develop necrosis?

A. Yes. She developed skin breakdown and fat necrosis both.

Q. Where?

A. In the area of surgery, in the incisions and deeper. Fat necrosis clinically is a diagnosis that can be made -- when I say clinically, I mean by examining the patient or looking at the tissues in surgery. And it doesn't look like normal fat. It can look sort of like a duller yellow, sometimes a little whitish, and it can have a consistency that is sometimes grittier, almost rock-like when it's well-established fat necrosis from a long time ago, like maybe months ago or years ago. It can mimic a pebble.

And one of the reasons we like to address fat necrosis oftentimes after breast surgery is that by examining the patient, if a third -- if a separate new doctor examined that patient's breast or if she had a mammogram, a lump or a tumor that could be fat necrosis can be mistaken for a breast cancer. And in that event, that may result in a whole bunch of treatments and interventions that would ultimately prove to be unnecessary, not to mention the anxiety level associated with making somebody think they have got a tumor which could be a cancer but it's not; it's just fat necrosis. So we don't like to leave

tumors or nodules in the breast, even though clinically we think they are fat necrosis. Sometimes we do, and we educate the patient. And then if a patient sees another doctor, we ask her to make sure that that doctor gets in touch with us to verify that this is a known area of fat necrosis. But if there is any question, it can be biopsied.

But the point is that in general we want the breast examination to be what we refer to as benign. A benign breast exam means the breast is normal, no one needs to worry about anything, come back in a year, or sooner if there is a question or a problem.

MR. SMYTH: Objection.

THE WITNESS: And --

MR. SMYTH: I'm sorry. Are you finished?

THE WITNESS: Yes.

MR. SMYTH: Okay. I object and move to strike as nonresponsive.

BY MR. SLOTCHIVER:

Q. Is this another reason, Doctor, why it's so important to have medical records maintained by a practice for purposes of future

doctors that may need to look at them and see how they effect them into the future?

A. Yes.

Q. In cases like Mrs. Whitfield's, what is the standard for treatment on necrosis?

A. Well, I don't know that that could be answered so simply. But basically necrosis by definition needs to be addressed by removing any dead tissue, and getting whatever tissue is left behind, ensuring that it's healthy so that it can be stitched back together so that there is no more open wound.

Q. Did she have necrosis in both her left and her right breasts?

A. Yes.

Q. And do you have an opinion to a reasonable degree of medical certainty as to whether or not most probably the necrosis to her left and her right breast were related to the surgery performed by Dr. Schimpf?

A. Yes.

Q. And is that opinion affirmative?

A. Yes.

Q. I'm sorry. I asked it in a poor way. I'm just trying to make sure that the answer is

clear. But thank you, sir.

Did she have complaints to her left breast as well as her right?

A. I think she was complaining of pain in both breasts, if I recall correctly. And she had an open wound in both breasts. The left breast was a smaller open wound than the right. So both of those would constitute complaints or concerns for the patient.

Q. Have -- have you and Jeane Whitfield had an opportunity to discuss her plans for new implants versus being un-augmented or no implants?

A. Yes. Yes. We have talked about the different options on how to restore her breasts to be as proportionate and symmetrical for her as possible.

Q. And what is the plan that -- that -- you -- that she has come up with -- or that you and her have discussed and that she plans to go forward with, if there is one?

A. It's not decided definitively yet, but the simplest solution would be to -- to be re-augmented once again. But she has been fairly vocal about the fact that she was trying to avoid implants in the future.

Q. And how would you avoid the implants in the future?

A. Well, you would have to reduce the larger breast to make it the same size as the smaller breast, and then ultimately she would be relatively small breasted and need to be satisfied with that breast size.

Q. Have you discussed with her something called fat grafting?

A. Yes.

Q. And --

A. Fat grafting is an alternative method of increasing the size of the breast, but it's not quite as efficient or predictable as a breast implant. Fat grafting involves liposuction harvesting or collecting fat from another part of the body, usually the tummy or the hips, and reprocessing it, and it is all in the sterile technique reinjecting it with a very specific surgical technique into the breast.

Q. What would you recommend to Mrs. Whitfield to make her -- to get her better than where she is today?

A. Well, if she wanted to avoid implants, we would have to do a series of fat grafting

operations in order to try to get her to be more even, and it may also involve reducing the larger breast to make her more even. We may not be able to get the smaller breast to totally catch up with the larger breast just with fat grafting. So maybe a little bit of both. And the alternative, of course, would be -- and in many ways the simpler approach would be to put in variable -- asymmetric, that means two different implant sizes, in order to try to get her even. A smaller implant into the larger breast and a larger implant into the smaller breast.

Q. Just a few more questions, Doctor, and I want to finish up.

Are you -- is it a standard of practice in the medical field of plastic surgery to take and retain photographs of patients?

A. That would be pretty common, yes.

Q. Is -- are you aware -- is part of the reason for maintaining the photographs to be able to document not only for your own records as to how things have evolved but also for future potential doctors if there are issues to be looked at so you can see before and after?

A. Yes. There are several reasons to take

photographs. Photographs are probably one of the most helpful teaching tools for us as plastic surgeons because we can actually study our own results. We can also plan our surgery if we have photographs. We can think about what the operative plan would be. I personally use photographs in the operating room at the time of surgery, and I refer to them while I'm operating. Because once you start operating, things are changing. So sometimes it's very helpful to see where you started after it's already in the process of changing, and -- and so photographs are a very useful tool both for us to learn and reevaluate our own treatment, they are also useful to communicate with other physicians, and they are also very useful to communicate with the patient. Because sometimes the patient will have concerns that maybe this didn't look the way it did before and you can show them on their pre-operative photographs how they actually looked and verify that this might have been there before, even though they didn't think it was.

Q. Is the failure to maintain -- to take and maintain photographs a deviation from the standard of care?

A. No. I would not characterize it as a

deviation from the standard of care.

Q. Okay. Doctor, we have talked about a lot of different procedures today from the corrective multiple procedures that you performed, to the ER room, to the planned protocol to try to help give Ms. Whitfield a better ultimate result. What we haven't discussed is how those things physically affect somebody from a pain threshold. Is -- is breast augmentation a painful procedure? And I'm going to ask you -- I will tell you I'm going to ask you to compare it to the corrective procedures and I'm going to ask you to compare it to the fat grafting ultimately so I can have an understanding and the jury can have an understanding of that.

A. I think of the three operations you described, fat grafting is probably the least painful. And it depends on the technique used in the breast augmentation. If -- we are most commonly placing the implant under the chest muscle, the pectoralis muscle. That can be painful, but it also, again, depends on the way the procedure is done. Because we can actually perform the administration of a long-acting local anesthetic, which I do routinely on all my cases,

so that the process is ultimately almost painless. Now, that pain medicine will wear off, and after a day or two, the patient is definitely going to be experiencing some pain that will almost always require at the very least something like Tylenol or something stronger. But the vast majority of patients who undergo a straightforward breast augmentation are resuming normal activities other than exercise within a week.

In terms of fat grafting, the area of soreness is more likely where the fat was removed from in the liposuction portion of the procedure, and if it came from the tummy or the hip area, that can be a little bit sore. But if you ask me which of those two procedures is more or less painful, it really does greatly depend on the individual patient. You know, the pain response from patients is very, very variable. And you can have patients in extreme pain from relatively minor surgery and you can have patients having major surgery who look like you didn't do anything to them. So it's just a wide spectrum.

Q. Okay. Doctor, were the procedures that you performed on Ms. Whitfield --

I know that you've said you don't have

your records in front of you, but you said there were two or three procedures.

-- were they reasonably necessitated by the procedure performed by Dr. Schimpf in June of 2014?

A. I think the procedures that I performed on Ms. Whitfield were indicated to correct the complications that resulted from her original surgery.

Q. They were causally connected to it, then?

MR. SMYTH: Object to the form.

BY MR. SLOTCHIVER:

Q. Let's rephrase that. But for the procedures performed by Dr. Schimpf, would you have had to do the procedures that you performed on Mrs. Whitfield?

MR. SMYTH: Objection. Calls for speculation.

BY MR. SLOTCHIVER:

Q. You can answer the question.

A. Well, I don't know that I would have ever met Ms. Whitfield if she hadn't had her wound complication because that's the way I met her.

Q. Let's rephrase it.

A. Sure.

Q. If she had --

The types of procedures that you performed -- I'll rephrase it.

Would the types of procedures that you performed on Ms. Whitfield have been necessary had she not had wound separation?

A. No.

Q. I believe you testified earlier that the wound separation that she had was as a result of the procedures performed on her by Dr. Schimpf?

A. Yes.

Q. Okay.

A. They were a complication of the surgery that she had undergone by Dr. Schimpf.

Q. Is there a way to quantify the procedure that was performed by Dr. Schimpf in June of 2014, you know, such as a success, a failure, a disaster? Is there a way to quantify it?

A. It was clearly an operation that had complications. I would describe it that way. In terms of subjective words like a disaster, I think that that is a very individual case. I think it caused a lot of anxiety and stress in this particular patient. I think in general if you

perform an elective augmentation/mastopexy and you have this kind of a complication, it's a serious complication because the patient, you know, met you hoping to be improved and, in fact, the final result may have been the opposite. So from an emotional standpoint, it could be very troublesome and distressing to the patient to have complications after any surgery, but certainly after cosmetic surgery.

Q. Doctor, just -- give me just one moment. I think I'm done. And then we'll resume, okay? About two-minute break, okay?

MR. SLOTCHIVER: We can go off the record.

THE VIDEOGRAPHER: Going off the record at 10:30.

(A recess transpired.)

THE VIDEOGRAPHER: Going back on the record at 10:34.

BY MR. SLOTCHIVER:

Q. Doctor, one more followup question. In -- I recall asking you -- or I recall you testifying in your first deposition when asked about whether or not separation is a common occurrence, and I believe you said it's -- it can

happen but it's very rare. Do you recall that? I believe you said: And it should be.

A. I -- I think I would rephrase it as it should be rare. I can't give you a specific percentage of the incidence, but that -- those numbers are out there in the literature. Any wound separation in any elective operation should be a rare complication.

Q. And as it applies to the wound separation that Jeane Whitfield exhibited, had you ever seen a wound separation that large in your practice?

A. Up until that point, I had seen some wound separations that were that large or larger but in different circumstances: Patients with medical risks that predispose them to poor wound healing, be it autoimmune disease, diabetes, other vascular issues. I'm talking about in my experience overall in my 30 years. In my own personal private practice, I had one or two cases, they were usually breast reductions, where large-breasted women have a breast reduction and sometimes there can be some wound separations, and they could have been that big, certainly.

So the short answer is yes. I never

saw a wound separation that big in an augmentation/mastopexy in my own practice. And then I saw one unfortunately even bigger in another patient that was referred to me by Ms. Whitfield.

Q. And not asking who the patient was, but who had done the procedure on that patient?

MR. SMYTH: Objection. Move to strike. Relevance.

BY MR. SLOTCHIVER:

Q. You can answer.

A. I believe that was also a patient of Dr. Schimpf's.

MR. SLOTCHIVER: Doctor, thank you very much. And I'm going to turn you over to defense counsel now to answer any questions he has.

MR. SMYTH: Let's go off the record for just a second, please.

(Off-the-record conference.)

THE VIDEOGRAPHER: Going off -- going off the record at 10:37.

(A recess transpired.)

THE VIDEOGRAPHER: Going back on record at 10:37.

EXAMINATION

BY MR. SMYTH:

Q. Dr. Kalus, this is Todd Smyth. I represent Dr. Schimpf and his medical practice in this case.

You've previously given a deposition in this case in December of 2018, correct?

A. Yes.

Q. All right. And at the time of that deposition, it had been roughly four years since you had first become involved with Ms. Whitfield, correct?

A. Correct.

Q. And I asked you that question at the time of your deposition four years later whether you believe that Dr. Schimpf was medically negligent or breached the standard of care in this case, and your answer at that time was no. Is that correct?

MR. SLOTCHIVER: Objection. Objection. I don't believe it's appropriate to try to impeach somebody on a deposition until they have said something different than what they said in the deposition. And I don't believe you can even ask them or read the deposition or reference it until they said something different than they said in the deposition.

MR. SMYTH: I can ask him what he said in his first deposition.

MR. SLOTCHIVER: I believe you have to first ask him a question, and if he differs from what he said in his deposition, then you can use the deposition.

MR. SMYTH: I think you did ask that in the direct examination, but we'll let the judge sort that out if that's a problem.

BY MR. SMYTH:

Q. Will you answer the question, please, Doctor.

MR. SLOTCHIVER: Well, I object to this line. I want the record to be clear that I object to this line of questions.

MR. SMYTH: Your objection is preserved. No more talking objections.

MR. SLOTCHIVER: There is talking objections. This is a trial. This is the trial testimony, and I'm putting -- I'm putting it on the record that I object to it.

MR. SMYTH: You've done that.

BY MR. SMYTH:

Q. Doctor, will you please answer the question. Did you --

A. Certainly.

Q. Did you testify previously that Dr. Schimpf did not breach the standard of care in this case?

A. I believe I did.

Q. Okay. And you were under oath when you did that?

MR. SLOTCHIVER: Objection.

THE WITNESS: Yes.

MR. SLOTCHIVER: Mischaracterizes his testimony.

BY MR. SMYTH:

Q. And you have not seen Jeane Whitfield from December 15th until March of 2019; is that correct?

A. That is correct.

Q. So a period of almost three and a half, four years?

A. Correct.

Q. All right. And yet in March of 2019, she returned to your office for the first time in three and a half to four years and asked you to evaluate her for more surgery; is that correct?

A. Yes.

Q. And you have also been asked to change

your testimony in this case; is that correct?

MR. SLOTCHIVER: Objection. Objection. This is not evidence in the record. This is a mischaracterization, and it's inappropriate. You have to first ask --

BY MR. SMYTH:

Q. You can answer -- you can answer the question, Doctor.

A. I don't believe I've been asked to change my testimony. I have been asked additional questions after being presented with additional material.

Q. Right. And when -- when you gave your first deposition, you didn't ask for any additional material at that time, did you?

A. I wasn't aware that there was additional material, and I certainly didn't ask for any.

Q. And you haven't asked for any of that material to date, correct?

A. I have not asked for any additional material.

Q. All right. That material was provided to you by the attorney for Ms. Whitfield, correct?

MR. SLOTCHIVER: Objection.

Irrelevancy.

THE WITNESS: That is correct.

BY MR. SMYTH:

Q. And that was just recently, right, before we were about to try this case?

A. Yes.

Q. And you are now being paid as a retained expert witness in this case as of last week, correct?

MR. SLOTCHIVER: Objection. That is a mischaracterization of the testimony. He is not a retained witness for us. He is an expert.

MR. SMYTH: You can let the witness answer the question.

THE WITNESS: I am being paid for my time that I'm devoting to provide testimony in this trial, yes.

BY MR. SMYTH:

Q. All right. Because I asked you this question during your discovery deposition, and you said you are being paid as an expert; is that correct?

A. I consider myself an expert, yes.

Q. All right. And you are being paid a thousand dollars an hour as we sit here for this

video deposition, correct?

MR. SLOTCHIVER: Objection to the relevancy of the amount of money he is being paid. He is not my expert. He is an expert.

BY MR. SMYTH:

Q. Are you --

MR. SLOTCHIVER: And a treating physician.

BY MR. SMYTH:

Q. Are you being paid a thousand dollars an hour for you to give your testimony here today on behalf of Ms. Whitfield?

A. Yes.

Q. And you have not reviewed any additional medical records since you gave your first deposition in this case; is that correct?

A. I have not reviewed any additional medical records. I've reviewed legal documents, depositions, and such.

Q. Right. Have you ever been provided with the medical records of Ms. Whitfield from O'Neill Plastic Surgery?

A. I may have, but I don't think so. I don't recall reviewing them. Perhaps I can get some clarification because it's been a while. If I

have reviewed them, I certainly wouldn't disagree with it, but I don't recall doing so.

Q. Thus far, when I asked you these questions in your discovery deposition, you did not identify having reviewed Dr. O'Neill's records, did you?

MR. SLOTCHIVER: Objection. I believe you have to first show him the deposition, read it with him, before you can try to impeach him on his testimony.

MR. SMYTH: As you know the deposition just finished 30 minutes ago so we do not have a transcript of that.

MR. SLOTCHIVER: That was your choice. The rules still apply. We offered other dates, and they didn't work for you, and, therefore, we're here today.

BY MR. SMYTH:

Q. Dr. Kalus, do you have any specific recollection of reviewing O'Neill Plastic Surgery medical records for Ms. Whitfield?

A. I don't have any specific recollection of that.

Q. All right. Have you reviewed any of Mrs. Whitfield's psychiatric providers' medical

records?

A. I have not.

Q. Have you asked to do that?

A. I have not.

Q. Have you spoken to any of Ms. Whitfield's psychiatric providers directly?

A. No. I don't recall that I have. I don't believe that I have.

Q. Doctor, you agree that necrosis and wound breakdowns are recognized complications of the type of procedure that Ms. Whitfield underwent with Dr. Schimpf in June of 2014, correct?

A. Correct.

Q. And recognized complications are things that can happen and do happen without the doctor doing anything that was negligent or below the standard of care, correct?

A. Correct.

Q. All right. And you agree that there are risks associated with every surgery you as a plastic surgeon perform, aren't there?

A. Correct.

Q. And you understand that complications can and do occur even when you as the doctor act appropriately?

A. Correct.

Q. All right. And that is one of the reasons that you tell your patients about the potential risks and complications associated with a procedure, correct?

A. Correct.

Q. And you would agree that no surgery, whether it's an augmentation/mastopexy like Ms. Whitfield had or any other surgery, is a risk-free proposition?

A. I would agree with that statement.

Q. All right. Is it your testimony that Dr. Schimpf fell below the standard of care in terms of the informed consent process that he had with Ms. Whitfield for the June 6, 2014 surgery?

A. Well, my understanding subsequently was that one portion of the procedure did not receive informed consent and that was the submental liposuction. So if any portion of the procedure was performed without consent, I would characterize that as a deviation from the standard of care.

Q. Do you have personal knowledge as to whether that procedure was discussed by the doctor with the patient?

A. I do not.