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

Jeane Whitfield,

Appellant,

v.

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

and

Patrick O'Neil, M.D. and O'Neil Plastic Surgery, LLC,

Respondents.

APPELLANT'S FINAL REPLY BRIEF TO RESPONDENTS' BRIEF

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I. The examinations conducted by Respondents' previously-retained experts were improper for reasons set forth and preserved at trial.

A. A party defendant to a medical malpractice action may not use his own previously-retained expert to conduct a physical examination of an opposing party under Rule 35, SCRCP, particularly when the experts have already been deposed, written extensive notes on their findings, reached conclusions, and rendered opinions as to the plaintiff's condition before the examination.

Respondents contend that it was proper to allow their own previously-retained experts to physically examine Mrs. Whitfield under Rule 35, SCRCP, because otherwise "Respondents had no access to Mrs. Whitfield and no way to evaluate the key damages evidence in the case." (Respondents' Initial Brief, p. 20). Respondents' argument misconstrues the issue before this Court and fails to recognize the options afforded to a medical malpractice defendant under Rule 35, SCRCP. Although not an absolute right, a defendant in such an action may seek a physical and/or mental examination of the plaintiff pursuant to the Rule. However, the physician performing an examination pursuant to a Rule 35 motion must be appointed by the Court and may not be affiliated with the defendant. "The physician **must** be selected by the court, **not the defendant**, and must be competent and disinterested." [Emphasis added] *Fairchild v. S.C. Dep't of Transp.*, 727 S.E.2d 407, 417, 398 S.C. 90, 110 (2012), quoting *Richardson v. Johnson*, 60 Tenn App. 129, 444 S.W.2d 708, 710 (1969). (See Appellant's Brief, Argument I, pp. 6-12 for a detailed analysis of the Supreme Court's finding in *Fairchild*).

Most notably in *Fairchild*, the Supreme Court held that the trial court properly exercised its discretion in barring Defendant's previously-retained expert, Dr. James Ballenger—the same defense expert in this case—from performing a mental examination of the plaintiff and, consequently, providing testimony as to the same. In rendering its decision, the Supreme Court reasoned, "Dr. Ballenger was retained as a defense witness and had reviewed not only

[Plaintiff's] medical records, but also the deposition testimony of other potential witnesses, and it was alleged that he had already formed adverse opinions regarding [Plaintiff's] injuries before the IME was requested." *Id*. 727 S.E.2d at 418, and 398 S.C. at 111.

The same set of facts exists in the present case. Defendant's plastic surgery expert, Dr. Jorge Perez, and psychiatry expert, Dr. Ballenger, had already 1) been retained and identified by Defendants as expert witnesses, 2) reviewed Mrs. Whitfield's medical records, 3) been deposed by her counsel, 4) written extensive notes on their findings, 5) reached conclusions, and 6) rendered opinions as to Mrs. Whitfield's physical and mental state prior to conducting any mental and physical examinations. (Trial Tr., R. p. 1383, line 10 -13; p. 1394, lines 1-7; p. 1507, lines 6-9; p. 1508, line 13 to p. 1509 line 9; p. 1544, lines 3-5; p. 1553, lines 8-17). Defendants had also paid their experts thousands of dollars for their time and evaluations. (Trial Tr., R. p. 1507, lines 6-18). Accordingly, these experts could not provide the unbiased assessment contemplated by Rule 35, SCRCP.

Despite having ample opportunity to seek physical and mental examinations of Mrs. Whitfield by court-appointed physicians under Rule 35, SCRCP, and being advised by Mrs. Whitfield's counsel of the precedent set in *Fairchild*, Respondents insisted on using their own previously-retained experts. (See Defendants' Rule 35 Motion for Physical and Mental Examination, R. p. 100, and Plaintiffs Memorandum in Opposition, R. p. 110). In this sense, they are the architects of their own problem. Their misguided effort to "level the playing field" has no basis in law and runs in direct contravention to the Supreme Court's holding in *Fairchild*. (See Respondent's Brief, p. 21, stating, "Respondents sought to have access to Mrs. Whitfield to level the playing field.")

B. Mrs. Whitfield properly objected to the admission of testimony regarding defense expert's examinations and did not "open the door" to the admission of their

testimony.

Mrs. Whitfield properly objected to the admission of Respondents' expert testimony at trial. Specifically, on July 17, 2019, Mrs. Whitfield filed a Motion in Limine Regarding Defense Examinations of Plaintiff, wherein she moved to prevent Respondents from introducing any evidence to the jury regarding medical examinations performed on her by Respondents' experts on the grounds that the examinations were a direct violation of the standard set forth by the South Carolina Supreme Court in *Fairchild*. (Motion, R. p. 169). As noted in Appellant's Brief, Mrs. Whitfield argued, *inter alia*, that Defendants' previously-retained experts could not aid the jury by providing the type of impartiality and independence required of a medical examiner appointed under Rule 35, SCRCP; that Plaintiff had reasonably objected to physical examination by Defendants' experts on the grounds that they had been previously-retained by Defendants, reviewed records, and are not disinterested and/or unbiased physician; and that expert witness testimony should not be allowed because *Fairchild* expressly forbids a court from compelling a Plaintiff to submit to physical examination by a witnesses from the other side. (Memo in Opp., R. p. 110; Hr'g Tr., p.404, line 4 – p. 408, line 20).

Mrs. Whitfield's counsel further noted that Defendants' psychiatric expert, James Ballenger, M.D., had been the very expert disallowed by both the South Carolina Court of Appeals and the Supreme Court in *Fairchild* from medically examining an opposing party under Rule 35, SCRCP. (Memo in Opp., R. p. 110; Hr'g Tr., R. p.404, line 4 – p. 408, line 20). See *Fairchild v. Dept. of Transp*., 683 S.E.2d 818, 826, 385 S.C. 344 (Ct. App. 2009), affirming the trial court's finding that, "independent means independent and that means no witness has previously been identified by the Plaintiff or the Defendant gives the independent medical exam."

On the first day of trial, Mrs. Whitfield's Motion in Limine was heard by the Honorable Bentley D. Price and summarily denied. (Trial Tr., R. p. 618, line 14 - p. 627, line 4,). The trial court did not make any findings or offer any legal rationale to support its ruling, but rather simply stated, "**All right. I am going to deny the motion. And you're—you [Defendants] can bring it up in your opening.**" [Emphasis added] (Trial Tr., R. p. 627, lines 3-4).

Respondents' contention that Appellant "opened the door to discussion of the examinations, first placing it in issue before the jury on her direct examination of her own witnesses" is incorrect and directly contradicted by the record. First, as noted above, the trial court had already denied Appellant's Motion and Limine and ruled that the Respondents' could introduce evidence of their experts' mental and physical examinations at trial. Further, the Court instructed Respondents' counsel that they could bring up their experts' opinions in their opening statement, which they did:

> Opening Statement by Mr. Smyth:
>
> We are also going to bring you some expert witness testimony to help you understand that. So we have hired an internationally-recognized plastic surgeon from Fort Lauderdale. His name is Dr. Perez. He's literally spoken in over twenty different countries on surgery procedures. He's been in practice more than thirty years. He does this surgery on a regular basis.
>
> He's going to come to this courtroom and he's going to tell you that he's looked at the medical records in this case, he's looked at the photographs in this case, he's examined all the evidence, he's read the deposition testimony of all the witnesses. And he's going to offer you his opinion. And I suspect that his opinion is going to support the care that Dr. Schimpf provided to Ms. Whitfield.
>
> Dr. Perez is also going to look at the causes. And he's going to evaluate the evidence and tell us what else could have caused this wound to separate besides the tension. And you're going to get to hear that information from him, as well.
>
> […]

> So we're going to bring you another expert who's one of the world's leading experts in psychiatry, Dr. James Ballenger. Dr. Ballenger founded the Institute of Psychiatry at MUSC. He lives here in Charleston and he has incredible expertise in the field of psychiatry. He's written the textbook that psychiatrists turn to when they're going to make a diagnosis.
>
> He's going to come and tell you that he's read the psychiatric records of Ms. Whitfield and he's looked at all of the records and the testimony and the evidence in the case and he's going to give you his opinion as to why that matters.
>
> How does it help us understand what happened here? How does a patient go from having a successful procedure, three or four weeks later develops a complication she was told could happen, into thinking this man (pointing) kicked her out ofher [sic] office?
>
> Which I guarantee you he's going to come on this standand tell you he's never done in his life. How do you explain that? Dr. Ballenger is going to tie those pieces together for us.

(Trial Tr., R. p. 646, line 22 to p. 647, line 15; p. 648, line 14 to p. 649, line 8).

Further, had Appellant's counsel not examined Mrs. Whitfield's psychiatrist, Dr. Sara Marcino, about her present sense impressions and medical opinion of Dr. Ballenger's examination, he would not have been able to elicit testimony from her regarding the multitude of issues plaguing the examination. (See Trial Tr., R. p. 1124, line 4 to p. 1128, line 6, wherein Dr. Marcino describes, *inter alia*, the problems that arise when there is a lack of baseline trust between an examiner and examinee.)

C. The admission of testimony by Respondents' previously-retained experts was highly prejudicial to Ms. Whitfield.

As noted above and in Appellant's brief, the admission of testimony by Respondents' previously retained experts was highly prejudicial to Ms. Whitfield because they had, *inter alia*, rendered opinions as to Mrs. Whitfield's physical and mental state prior to conducting any

mental and physical examinations. (Trial Tr., R. p. 1383, line 10 -13; p. 1394, lines 1-7; p. 1507, lines 6-9; p. 1508, line 13 – p. 1509 line 9; p. 1544, lines 3-5; p. 1553, lines 8-17) Said differently, they were biased experts who had already been paid thousands of dollars and rendered opinions before any physical or mental examinations took place. (Trial Tr., R. p. 1507, lines 6-18). Accordingly, Respondents' experts could not provide the unbiased assessment contemplated by Rule 35, SCRCP. This is the very reason why the Supreme Court rendered its decision in *Fairchild*.

"The physician must be selected by the court, not the defendant, and must be competent and disinterested. […] [I]t is clear that the power [to conduct a Rule 35 examination] 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." [Emphasis added] Fairchild v. S.C. Dep't of Transp., 727 S.E.2d at 417, 398 S.C. at 109-110, quoting *Richardson v. Johnson*, 60 Tenn.App. 129, 444 S.W.2d 708, 718 (1969). "When the court makes such an appointment [under Rule 35], [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." [Emphasis added] *Fairchild v. S.C. Dep't of Transp.*, 727 S.E.2d at 418, 389 S.C. at 110, quoting *Atkinson v. United Rys. Co.*, 286 Mo. 634, 228 S.W. 483, 485 (1921). Contrary to Respondents' contention, the inclusion of Dr. Ballenger and Dr. Perez's testimony was not harmless.

D. The evidence shows that Dr. Schimpf breached the standard of care in the performance of the surgery at issue.

Respondents' contention that "it is uncontested that Dr. Schimpf used the medically accepted and standard techniques to perform the surgeries in question" is directly contradicted by the record. Specifically, Dr. Rosenberg, Plaintiff's medical expert provided ample testimony that

Dr. Schimpf deviated from the standard of care and caused Mrs. Whitfield harm. (Trial Tr., R. p. 1016, line 2 to p. 1050 line 25). Plaintiff's psychiatric expert, Dr. Sara Marcino also testified that Dr. Schimpf breached the standard of care by performing a nonconsensual procedure on Mr. Whitfield's neck and that his medical treatment caused her psychological harm. (Trial Tr., R. p. 1122, line 21 – p. 1124, line 3).

II. Appellant properly moved to question Respondent's Office Manager regarding her compensation and ongoing sexual relationship with Respondent in order to elicit evidence of bias. <u>There was no question at trial as to the character or content of the testimony Appellant wished to elicit from Respondents' Office Manager</u>.

As noted in Appellant's brief, on August 26, 2019, Defendants' counsel filed Defendant's Motion in Limine to Seal and Exclude Certain Inadmissible Evidence, wherein they sought to preclude Mrs. Whitfield's counsel from eliciting any testimony regarding Dr. Schimpf's personal life, including any evidence of an admitted, nine-year sexual relationship with Office Manager. (Motion, R. p. 179). During her deposition on February 11, 2019, Office Manager testified that she had been engaged in a sexual relationship with Dr. Schimpf and his wife since 2010, and had engaged in sexual relations with Dr. Schimpf as recently as a week before her deposition (Depo. Tr., 2/11/19, R. p. 376, line 5 – p. 377, line 9).

Defendant's Motion in Limine was heard at trial, at which point, Defendant's counsel also argued that Mrs. Whitfield's counsel should be precluded from eliciting any testimony from Office Manager regarding the amount of money she is being paid by Dr. Schimpf, or about any of the various complementary cosmetic procedures he has performed on her throughout the years. (Trial Tr., R. p. 933, line 21 – p. 941, line 5). During her deposition, Office Manager had testified that Dr. Schimpf performed various complementary cosmetic procedures on her, including a breast augmentation, liposuction, fillers, and laser treatments. (Depo. Tr., 2/11/19, R. p. 377, line 10 to p. 385, line 22). **<u>There was no question at trial as to the character or</u>**

content of the testimony Appellant wished to elicit from Respondents' office Manager. (Tr. Transcript, R. p. 590, line 13 – p. 591, line 19; p. 602, line 9 to p. 603, line 13; p. 606, lines 4 - 13).

Mrs. Whitfield's counsel argued that Office Manager's relationship with Dr. Schimpf and the compensation she received from him were relevant for purposes of establishing bias and impeaching Office Manager's credibility. (Trial Tr., R. p. 934, line 9 – p. 941, line 5). Specifically, Plaintiff's counsel noted that Office Manager's observation regarding Dr. Schimpf's post-operative care were starkly at odds with Plaintiff's observations. (Id. at Trial Tr., R. p. 934, line 9 – p. 941, line 5). Plaintiff's counsel also noted that Office Manager had offered innocent explanations as to why the medical records had gone missing, blaming their absence on a malfunctioning recorder, and denying that she or Dr. Schimpf could have destroyed the alleged recordings. (Id. at Trial Tr., R. p. 934, line 9 – p. 941, line 5). Her account of what transpired when Plaintiff requested a copy of her medical file was also at odds with Plaintiff's testimony. (Trial Tr., R. p. 920, lines 1-13). As noted above, when asked if Dr. Schimpf was angry during his last visit with Plaint, Office Manager testified, "No. He would never be angry." (Trial Tr., R. p. 920, lines 22-25). When asked if he slammed his surgical utensils in the sink and told Plaintiff to leave, Office Manager testified, "No. Dr. Schimpf would never do that." (Trial Tr., R. p. 921, lines 1-3).

A. A proffer of the Office Manager's testimony was not necessary to preserve the issue on appeal where 1) it was clear from the record that Office Manager would have testified about her admitted ongoing sexual relationship with Dr. Schimpf and the forms of compensation that she received from him, and 2) it was clear from the record that the exclusion of the Office Manager's testimony regarding these subjects prejudiced the Appellant.

As noted above, there was no question at trial as to the character or content of the testimony. (Tr. Transcript, R. p. 590, line 13 – p. 591, line 19; p. 602, line 9 to p. 603, line 13; p.

606, lines 4 -13). During her deposition, the Office Manager admitted to an ongoing sexual relationship with Dr. Schimpf and testified as to the various forms of compensation she received from him. The Office Manager had also testified as to her salary and the numerous complimentary cosmetic procedures she received from Dr. Schimpf over the years. (Depo. Tr., 2/11/19, R. p. 377, line 10 to p. 385, line 22). Appellant's lawyers even filed the depositions for purposes of entering and preserving the testimony the record (Trial Tr., R. p. 590, line 13 – p. 591, line 19). In addition, the very purpose of Respondents' Motion in Limine, filed August 26, 2019, was to exclude the Office Manager's testimony due to the admission made by her during her deposition. (Motion, R. p. 179).

"**Generally,** a proffer of testimony is required to preserve the issue of whether that testimony was properly excluded by the trial court." *State v. King*, 623 S.E.2d 865, 868, 367 S.C. 131 (2006). [Emphasis added]. However, the South Carolina Supreme Court has carved out a clear exception to this rule where 1) the record reflects what the witness was going to testify to, and 2) it is clear from the record that the Court's failure to admit the witness's testimony prejudiced the Appellant. *Id.* 623 S.E.2d at 868, stating:

> [W]hen it is clear from the record that prejudice exists, the issue will be preserved on appeal despite the absence of a proffer. See State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990). The reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice. Id. That rule has been relaxed where the record clearly demonstrates prejudice. Id.
>
> The record reflects Thomason was going to testify to the statements Walker made in his letter to her. The record clearly indicates King would be prejudiced by the exclusion of Thomason's testimony. Therefore, the issue of whether Thomason's testimony was properly excluded is preserved for review despite the lack of a proffer.

Similarly, in the present case, it is clear that the Office Manager would have testified as

to her ongoing sexual relationship with Dr. Schimpf and the types of compensation she received from him. Exclusion of this testimony was the very subject matter of Respondent's Motion in Limine. Further, it was clear that Mrs. Whitfield was prejudiced by the exclusion of this testimony because she had no other means by which to establish the Office Manger's interest, bias, or partiality toward Dr. Schimpf and impeach her credibility. As noted in Appellant's Brief, the Office Manager gave starkly different testimony at trial than Ms. Whitfield as to what transpired when Mrs. Whitfield requested a copy of her missing medical records. (Appellant's Brief, Argument II, pp. 11-22). As argued by Appellant's counsel at trial, the Office Manager's observations regarding Dr. Schimpf's post-operative treatment of and behavior towards Mrs. Whitfield were directly at odds with Mrs. Whitfield's testimony. (Trial Tr., R. p. 934, line 9 – p. 941, line 5). It is clear from the Record that Ms. Whitfield was prejudiced by the exclusion of the testimony. Accordingly, a proffer was not necessary and the issue raised by Mrs. Whitfield as to the exclusion of the Office Manager's testimony was properly preserved for appeal.

B. Considerable latitude is allowed in the cross-examination of an adverse witness for possible bias and it was error for the trial court to conclude that such evidence was not relevant.

As noted in Appellant's Brief, "Considerable latitude is generally allowed in the cross-examination of an adverse witness for possible bias." [Emphasis added] *North Greenville College v. Sherman Const. Co*., Inc., 243 S.E.2d 441, 442, 270 S.C. 553, 556 (1978), citing *Martin v. Dunlap*, 266 S.C. 230, 222 S.E.2d 8 (1976). As noted by McCormick: "The law recognizes the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties or the self-interest of the witness in the outcome of the case. Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility." [Emphasis added] *Id*., citing McCormick on Evidence, § 40, p. 78 (1972).

Here, Office Manager's long-standing sexual relationship with Dr. Schimpf and her "emotions or feelings toward him" are likely to have "a slanting effect" upon her testimony. Her "self-interest in the outcome of the case" can be directly tied to maintaining her personal and professional relationship with Dr. Schimpf. Minimally, a fact exists which tends to show "interest, bias, or partiality of the witness."

The trial court failed to take into account the law and particular circumstances of the case, and, instead, based its ruling on the conclusory findings: "I don't' think she's biased" and "I don't think anything has been elicited as to fact that she's been untruthful in any way." (Trial Tr., R. p. 939, lines 9-12). In doing so, the trial court abused its discretion and prejudiced Mrs. Whitfield who could not otherwise demonstrate that Office Manager's testimony was clearly biased and not credible. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell.* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citing *Fontaine v. Peitz.* 291 S.C. 536, 354S.E.2d565 (1987)). Accordingly, the trial court's ruling should be reversed and the case should be remanded for a new trial on the merits.

III. The trial court erred in not granting Appellant's Motion for a Directed Verdict as to negligence per se where 1) Respondents admitted that they did not properly maintain medical records for Mrs. Whitfield as required by statute, 2) the evidence established that Respondent's failure to maintain records proximately caused harm to Mrs. Whitfield, and 3) there were no other inferences to be drawn from Respondents' failure to maintain the medical records as required by statute.

The Record directly contradicts Respondents' contention that they did not violate Section 700 of S.C. Code of Regulations 61-91, Standards for Licensing and Ambulatory Surgical Facilities, titled Patient Records. First, Respondents' assertion that Sweetgrass Plastic Surgery ("SPS") is not an "Ambulatory Surgical Facility" is in direct conflict with the Regulations definition of the same. Specifically, section 101(E) of the Regulation, defines "Ambulatory

Surgical Facility" as follows:

> 101. Definitions […]
>
> E. Ambulatory Surgical Facility: A facility organized and administered for the purpose of performing surgical procedures and/or endoscopy for which patients are scheduled to arrive, receive surgery, and be discharged on the same day.

As evidenced by the record, Respondent Sweetgrass Plastic Surgery is precisely this type of surgical facility. Mrs. Whitfield, for example, had her surgeries performed by Dr. Schimpf at SPS on June 6, 2014 and was discharged the same day. (Trial Tr., R. p. 673, lines 21-23; p. 675, line 25 to page 676, line 1).

Second, Respondents' Office Manager specifically testified that she was in charge of maintaining medical records for Sweetgrass Plastic Surgery. (Trial Tr., R. p. 900, lines 22-25). Any contention that SPS was not responsible for maintaining its own medical records is directly contradicted by her clear and unambiguous testimony.

Third, as set forth in Appellant's Brief, the Office Manager testified that Sweetgrass Plastic Surgery had failed to comply with both Sections A and B of the Regulation, which pertained to the maintenance of patient records:

> Q. Would you agree with me that Sweetgrass did not follow that section [A] with regards to Mrs. Whitfield?
> A. As I said before, we do our best.
> Q. And I understand that you've done -- you try. But what I'm specifically trying to get an answer to is did Sweetgrass comply with Section A as it pertains to Mrs. Whitfield's medical records?
> A. No. (Trial Tr., R. p. 901, line 21 – p. 902, line 3)

And

> Q. Okay. So what I'm asking you is did Sweetgrass comply with Paragraph B because of not keeping those records?
> A. The records were incomplete.
> Q. Okay. Did they comply with Paragraph B?
> A. No.

Q. Would you agree with me that Sweetgrass failed to maintain an organized record for Mrs. Whitfield?
A. Yes. But we -- we treat patients, not medical records.
Q. Are medical records important?
A. Yeah. (Trial Tr., R. p. 903, lines 8- 17)

Fourth, Respondents' assertion that Appellant made no showing that she was harmed by Respondents' failure to maintain her medical records is simply not true. Mrs. Whitfield's Medical Expert, Dr. Michael Rosenberg specifically testified that Respondents' failure to maintain medical records caused Mrs. Whitfield harm and damage. (Trial Tr., R. p. 1035, line 20 to p. 1036, line 14; p. 1037, lines 2-19).

Fifth, Respondents provide no factual or legal support for their contention that there was more than one inference available for the evidence. Again, the opposite is true: 1) SPS is by definition an Ambulatory Surgical Facility, 2) Respondents' Office Manager admitted that she was responsible for maintaining SPS's records, 3) Respondents' Office Manager admitted that SPS had failed to comply with both sections of the regulation governing maintenance of medical records, and 4) Appellant's Medical Expert testified that that Mrs. Whitfield was proximately harmed by SPS's failure to maintain its medical records.

It was an error of law to deny Plaintiff's Motion for a Directed Verdict. When evidence presented at trial yields only one conclusion concerning liability, the trial court may properly grant a motion for directed verdict. *Fairchild v. Dept. of Transp*., 683 S.E.2d 818, 385, 823 S.C. 344, 353 (Ct. App. 2009), aff'd,398 S.C. 90, 727 S.E.2d 407 (2012). Here, there are no other conclusions that could be reached or any alternate inferences that could be drawn from the evidence. Notably, in denying Mrs. Whitfield's Motion for a Directed Verdict, even the trial court did not and could not make any findings or offer any legal rationale to support its ruling,

but merely stated, "Alright. I'm going to deny the motion. And I'm not charging it either." (Trial Tr., R. p. 1561, lines 13-15). It was error for the Court deny Mrs. Whitfield's Motion for a Directed Verdict as to the negligence *per se*. Accordingly, the ruling should be reversed and the Motion for Directed verdict should be granted.

CONCLUSION

Based on the foregoing, Appellant Jeane Whitfield respectfully requests that this Court reverse the trial court's rulings and remand this case for a new trial on the merits. It was reversible error for the trial court to allow Defendants' previously-retained experts to testify to a jury about their physical and mental examination of Mrs. Whitfield. It was also reversible error for the trial court to prohibit Mrs. Whitfield's counsel from eliciting evidence of bias from the Office Manager by examining her about her compensation from and sexual relationship with Dr. Schimpf. Finally, it was error for the trial court to deny Mrs. Whitfield's Motion for a Directed Verdict as to Negligence Per Se.

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APPELLANT'S RULE 211 CERTIFICATION

The undersigned certifies that the *Final Brief of Appellant* and *Appellant's Final Reply Brief to Respondent's Brief* comply with Rule 211(b), SCACR.

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