

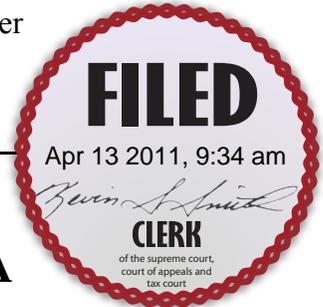
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**IN THE  
COURT OF APPEALS OF INDIANA**

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CLAUDETTE MEE and JAMES MEE, )

Appellants-Plaintiffs, )

vs. )

GEORGE ALBERS, M.D., and )  
SOUTHERN INDIANA OB/GYN, )

Appellees-Defendants. )

No. 03A01-1007-CT-339

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APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT  
The Honorable Stephen R. Heimann, Judge  
Cause No. 03C01-0710-CT-1989

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**April 13, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Claudette and James Mee appeal a judgment entered upon a jury verdict in favor of George Albers, M.D. (“Dr. Albers”) and Southern Indiana OB/GYN (“Southern Indiana”) (collectively “the Appellees”) upon the Mees’ complaint for damages arising from alleged medical malpractice. The Mees present a single issue for our review, namely, whether the trial court abused its discretion when it limited the scope of their cross-examination of an expert witness who testified on behalf of the Appellees.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On September 2, 2003, Claudette, who was approximately thirty-three weeks pregnant, was suffering severe complications of preeclampsia and sought emergency medical treatment at the hospital. By the time Claudette’s obstetrician, Dr. Albers, arrived at the hospital, the Mees’ baby had been stillborn, and Claudette was gravely ill. The Mees filed a proposed complaint for damages with the Indiana Department of Insurance. A unanimous medical review panel found that Dr. Albers had not complied with the appropriate standard of care as charged in the Mees’ complaint and that his conduct “was a factor [in causing] the resultant damages.” Appellants’ App. at 20.

Prior to trial, the Appellees filed a motion in limine whereby they sought to preclude the Mees from eliciting testimony that John Elliott, M.D., an expert witness for Dr. Albers, had previously been hired to testify in a case involving the Appellees. The trial court granted that motion. After the Mees sought clarification of the trial court’s order on that motion, the trial court issued an order stating the following:

It is hereby ordered, adjudged and decreed that, during the cross-examination of John Elliott, M.D., defendants' expert, and/or the defendants themselves, plaintiffs may not attempt to establish payment to Dr. Elliott for professional services provided by Dr. Elliott on their behalf. During the course of said examination(s), plaintiffs may not reveal or disclose that such prior and/or separate relationship involved a separate claim or lawsuit against these defendants.

Appellants' App. at 147.

At trial, during the Appellees' direct examination of Dr. Elliott, the following colloquy ensued:

- Q: Do you know Dr. Albers?  
A: No, ma'am.  
Q: Have you ever met Dr. Albers?  
A: No.  
Q: This is Dr. Albers.  
A: First time I've seen him.  
Q: Have you ever talked to him up to this very moment?  
A: I—even now I have not talked with him, no.  
Q: Do you refer patients to Dr. Albers?  
A: No.  
Q: Does he refer patients to you?  
A: No.  
Q: Do you have any professional or personal relationship with him in any way?  
A: No.

Transcript at 1181-82.

Then on cross-examination, the Mees' counsel had the following colloquy with Dr. Elliott:

- Q: Isn't it true that you've had a relationship with defendant Southern Indiana OB/GYN that's separate and unrelated to these proceedings?  
A: No.  
Q: Isn't it true that you had a relationship with Defendant Southern Indiana OB/GYN and/or Dr. Albers that's separate and unrelated to these proceedings?  
A: No.

Id. at 1219.

The Mees' counsel requested a sidebar conference, and the following colloquy occurred outside the presence of the jury:

[Mees' Counsel]: I had just asked the witness whether. . .  
Court: Whether he's had a relationship with Dr. Albers or Southern Indiana OB/GYN.  
[Mees' Counsel]: Yes. And he said, "No."  
Court: And he said, "No."  
[Mees' Counsel]: And the evidence reveals that he was hired as Southern Indiana OB/GYN's expert in a prior case. Now, Southern Indiana OB/GYN as an entity can only have [a relationship with someone] through its agents and employees. And Dr. Elliott has had a relationship with Southern Indiana OB/GYN through its agents and employees. I don't know how he can deny that he has [a] relationship or—and now, I have no choice but to expand my question by asking a more specific question because he's given an untruthful answer.  
Court: Do you have a response?  
[Defense counsel]: Yes, Your Honor. This witness has not been untruthful at all. He has no relationship with Dr. Albers and no relationship with Southern Indiana OB/GYN. He has a relationship with me which he has fully admitted. Just because a witness is asked to review records by an attorney does not establish any relationship with the author of the records. He's never—and he's clearly testified he's never met Dr. Albers, talked with Dr. Albers, referred patients to that practice, and any professional relationship with defendants whatsoever. So his testimony about whether he's had any relationship with these parties is absolutely truthful.  
Court: I assume that's what they were going to say, and that's what they said. His relationship is with the attorney.  
[Mees' Counsel]: The attorney is the agent for Southern Indiana OB/GYN. I mean, you can't have a relationship with Southern Indiana OB/GYN other than through its attorney. At that time, she's functioning as the attorney and agent for Southern Indiana OB/GYN, but it's parsing hairs in order . . . to create a false impression to the jury that he has never had any

knowledge of or relationship with Southern Indiana OB/GYN when, in fact, he was their expert in the past. And the defendant has already foreclosed me from getting in the actual description of what that relationship was. And so, now I'm using the word "relationship" so that it doesn't reveal anything that might be prejudicial to them. And now their expert wants to . . . parse hairs and say, almost like President Clinton years ago in his testimony that this wasn't a relationship thereby preventing me from making any reference to it because I can't come up with a word to properly describe it that doesn't reveal to the jury that it was a case that he—I'd like to just tell them that it was a case that he was the expert on for them there.

Court: Well, what is it you're going to be—I mean, you'd like to be able to tell them that. But I'm not clear what it is you're going to be, I mean, if he says, "Yes, I had a relationship with them."

[Mees' Counsel]: It establishes an element of bias. I mean, most experts, when they get hired. . . .

Court: Oh, yeah. But my question to you is, let's say he said, "Yes." Then where are you going?

[Mees' Counsel]: Nowhere. That's it. I'm moving on. That's what I – if he had said, "Yes, yes," then I move on. I don't go back into it any further. But unfortunately, he said, "No."

\* \* \*

Court: Right. The issue for the Court to look at is given the facts of that case as has been presented to the Court at this point, okay? I've got to look at the prejudice, okay? To the defendant versus the potential prejudice of this witness or his bias while testifying given that prior "relationship." I don't think that the connection between the last case and this case shows sufficient bias or prejudice on the part of this doctor towards this defendant versus the amount of prejudice that would go against the defendant if this came into evidence. The bias and the prejudice outweighs any benefit. The bias and prejudice against the defendants outweighs any benefit considerably, given the prior "relationship," okay? So I am going to not allow you to go into that. Okay?

Transcript at 1222-27. At the conclusion of trial, the jury entered a verdict in favor of the Appellees. This appeal ensued.

### **DISCUSSION AND DECISION**

In Reeves v. Boyd & Sons, Inc., 654 N.E.2d 864, 871 (Ind. Ct. App. 1995), trans. denied, we set out the applicable standard of review as follows:

The scope of cross-examination is “limited to the subject matter of the direct examination and matters affecting the credibility of the witness.” Ind. Evidence Rule 611(b). Judge Miller summarizes the scope of cross examination under other state and federal versions of Evidence Rule 611(b) as including “all matters reasonably related to the issues put in dispute by the direct examination and all inferences and implications arising from the testimony on direct examination.” 13 Robert Lowell Miller, Jr., *Indiana Practice* § 611.201 at 197 (1995). “Cross examination is permissible as to the subject matter covered on direct examination, including any matter which tends to elucidate, modify, explain, contradict, or rebut direct testimony.” Hicks v. State, 510 N.E.2d 676, 679 (Ind. 1987). The trial court “is allowed to control the conduct of cross-examination.” Jones v. State, 500 N.E.2d 1166, 1170 (Ind. 1986). Only a clear abuse of discretion warrants reversal. City of Indianapolis v. Swanson, 448 N.E.2d 668, 671 (Ind. 1983).

(Emphasis added).

The Mees’ primary contention on appeal is that Dr. Elliott’s testimony on direct examination was untruthful and/or created a “factual fiction” that misled the jurors and that the Mees were entitled to “expose the falsity and the fiction” through cross-examination. The Mees maintain that the trial court abused its discretion when it precluded them from doing so. We cannot agree.

The Mees’ entire argument rests on the assumption that Dr. Elliott’s testimony on direct examination was misleading or untruthful. A party may “open the door” to otherwise inadmissible evidence by presenting similar evidence that leaves the trier of

fact with a false or misleading impression of the facts related. Walker v. Cuppett, 808 N.E.2d 85, 98 (Ind. Ct. App. 2004). We begin by analyzing the content and context of Dr. Elliott’s testimony to determine whether it should be characterized as having left the jurors with a false or misleading impression of his connection to Dr. Albers. The Mees maintain that Dr. Elliott lied or misled the jury when he answered “No” to the question, “Do you have any professional or personal relationship with [Dr. Albers] in any way?” Transcript at 1182. First, even out of context, we would not characterize Dr. Elliott’s answer as dishonest or misleading. The evidence is undisputed that the two physicians do not have a personal relationship. And a professional relationship would entail some kind of interaction between the physicians and/or their respective offices, of which there is no evidence. Second, the nature of the questions leading up to the objectionable question related to whether Dr. Elliott knew Dr. Albers personally or whether either doctor referred patients to the other. To the extent the Mees see a “professional relationship” between Dr. Elliott and Dr. Albers solely based upon Dr. Elliott’s engagement by Dr. Albers’ counsel to review documents created in a prior lawsuit against Dr. Albers, we are not persuaded.<sup>1</sup>

The Mees sought to show that because of a prior relationship with Dr. Albers, Dr. Elliott was more likely to be biased in favor of Dr. Albers in his testimony. Even if the evidence did show a relationship, the suggestion of any bias resulting from that

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<sup>1</sup> Where counsel engages an expert witness in a medical malpractice action, the mere act of reviewing medical records and other documents does not establish a “relationship” between the expert witness and the litigant. All that might be said is that Dr. Elliott knows of Dr. Albers because of the prior case involvement. But knowing of a person, without more, does not establish a relationship or a particular bias. Indeed, it is typically when someone has personal interaction with another person that he may develop a genuine bias for or against that person.

relationship would be tenuous, at best. The Mees do not explain how Dr. Elliott's prior work on a case against Dr. Albers would make him any more biased in favor of Dr. Albers. See, e.g., Blankenship v. State, 462 N.E.2d 1311, 1314 (Ind. 1984) (holding that it is not reversible error to disallow cross-examination for bias if the line of questioning would not give rise to a reasonable degree of bias). Regardless, the trial court found that any indication that Dr. Elliott had reviewed a case against Dr. Albers in the past was too prejudicial to Dr. Albers to present to the jury.

Again, the trial court "is allowed to control the conduct of cross-examination," and only a clear abuse of discretion warrants reversal. Reeves, 654 N.E.2d at 871 (quoting Jones, 500 N.E.2d at 1170). Further, under Evidence Rule 403, the trial court has wide latitude in weighing the probative value of evidence against the potentially prejudicial effects of its admission. See Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). Here, during the sidebar conference, the trial court applied the balancing test under Rule 403 and concluded that the prejudicial impact of the proffered evidence of a relationship between Dr. Albers and Dr. Elliott "considerably" outweighed any probative value. Transcript at 1227. We hold that the trial court did not abuse its discretion in that determination.<sup>2</sup>

Further, even if there were error, it was harmless. Indiana Trial Rule 61 provides in relevant part that no error in either the admission or exclusion of evidence is ground for setting aside a verdict or reversal on appeal, unless refusal to take such action is

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<sup>2</sup> The Mees argue that the "factual fiction" was further supported by defense counsel's statement at closing argument that Dr. Elliott did not "know Dr. Albers from Adam." Transcript at 1323. Again, the evidence is undisputed that Dr. Elliott had never met Dr. Albers and had no personal or professional relationship with him. The challenged statement is not untruthful, and we do not find it misleading.

inconsistent with substantial justice. “The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” Id. Here, the Mees were able to conduct a thorough cross-examination of Dr. Elliott which revealed, among other things, that he: testifies exclusively on behalf of physicians, never on behalf of injured patients, in his home state of Arizona; makes approximately \$75,000 per year in expert witness fees; once gave a presentation to physicians entitled “Building a Defense Strategy Against Allegations of Malpractice”; and had provided expert testimony for Dr. Albers’ attorney on “several other cases” against physicians. Transcript at 1215, 1219. Thus, the Mees were able to show that Dr. Elliott has a professional relationship with Dr. Albers’ attorney and is largely biased in favor of physicians in medical malpractice cases. That evidence of bias is arguably much stronger than any evidence of bias related to his review of records in a single prior case against Dr. Albers.

Indeed, during the sidebar conference, when the trial court asked the Mees’ counsel what he intended to accomplish with an affirmative response from Dr. Elliott, that he did have a relationship with Dr. Albers, the Mees’ counsel answered, “That’s it. I’m moving on. . . . [I]f he had said, ‘Yes, yes,’ then I move on. I don’t go back into it any further.” Transcript at 1225. In other words, the Mees sought to inform the jury that Dr. Albers and Dr. Elliott had a relationship without explaining the nature of that relationship in any detail. That testimony, without more, would have left a false impression in the minds of the jurors since the evidence shows that the physicians did not have a relationship. And there would have been no way to explain the alleged

relationship between the two doctors without revealing that Dr. Albers had previously been sued, which, as the Mees appear to concede,<sup>3</sup> would have been improper. Any error was harmless.<sup>4</sup>

In sum, the Mees' multiple contentions in support of its argument on appeal rest on the assumption that Dr. Elliott misled or lied to the jury about his association with Dr. Albers. But we hold that Dr. Elliott's testimony was truthful and did not create a false impression in the minds of the jurors. Regardless, any error in the trial court's limitation of the Mees' cross-examination of Dr. Elliott was harmless. The Mees have not demonstrated that evidence that Dr. Elliott reviewed documents for Dr. Albers' attorney in a previous action indicate any particular bias in favor of Dr. Albers. Moreover, the Mees were able to question Dr. Elliott at length regarding his bias in favor of physicians, generally, in medical malpractice lawsuits. The Mees have not shown reversible error.

Affirmed.

DARDEN, J., and BAILEY, J., concur.

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<sup>3</sup> On the one hand, the Mees do not challenge the trial court's ruling on the motion in limine precluding that evidence at trial. Their argument on appeal is that Dr. Elliott's testimony on direct examination opened the door to evidence of a relationship between Dr. Elliott and Dr. Albers. And, again, when the trial court asked the Mees' counsel what follow up questions he would have pursued, counsel replied that he would have stopped that line of questioning after the one question. But, in their reply brief, the Mees point out that the previous case against Dr. Albers was voluntarily dismissed, and they contend that that "largely negates the 'forbidden inference' and the prejudice [of the fact of the previous case], even to the point of casting doubt as to whether that evidence even legally constitutes a prior 'bad act.'" Reply Brief at 11. We do not agree with that contention and, again, we hold that the trial court did not abuse its discretion when it excluded evidence of the previous case against Dr. Albers.

<sup>4</sup> The Mees argue that the Appellees should have been forthcoming on direct examination and asked Dr. Elliott, "You in fact reviewed some records for [the defendants] that were not connected to this case, right?" Brief of Appellants at 13. The Mees maintain that that question "would have revealed the truth . . . without revealing the [prior] claim or lawsuit." *Id.* But, to the contrary, that question would have implied that Dr. Albers had previously been sued. The Mees' assertion on this point is not well taken.