

I. INTRODUCTION & STATEMENT OF INTEREST

The Georgia Defense Lawyers Association (“GDLA”) is an association of approximately 900 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice. Though its members are diverse, they share a common interest in ensuring that well-reasoned, longstanding principles of Georgia law that apply to personal injury litigation are applied consistently and predictably for the benefit of the clients its members serve.

A significant part of ensuring fairness to all civil litigants lies in ensuring that all sources and modes of potential bias are set out for the jury’s consideration at trial. Determining the credibility of witnesses has long been held to be the exclusive province of the jury, and only if the jury is informed of the various reasons that a particular witness may be biased against or in favor one party or another can the jury properly pass on the witness’s credibility. As such, defendants in civil lawsuits filed

in Georgia have a strong interest in ensuring that jurors at the trials of those lawsuits will be informed of all potential sources of bias of all witnesses in the case.

The GDLA hereby respectfully submits this Amicus Curiae Brief to demonstrate the error in two evidentiary rulings by the trial court at the trial of the case below. By improperly excluding relevant, admissible evidence regarding bias of the plaintiff's orthopedic surgeon, the trial court improperly interfered with the jury's right and duty to determine the credibility of witnesses in rendering a verdict. Accordingly, the judgment below must be reversed, and the improperly excluded evidence regarding the potential bias of the plaintiff's treating orthopedist should be presented for the jury's consideration.

II. ARGUMENT & CITATION OF AUTHORITY

A) THE TRIAL COURT INCORRECTLY EXCLUDED EVIDENCE THAT APPELLEE'S OWN ATTORNEY WAS THE REFERRAL SOURCE FOR HER MEDICAL TREATMENT WITH JAMES CHAPPUIS, MD.

It is clear that testimony of a treating physician, such as Dr. Chappuis in this case, is subject to impeachment on grounds of bias. Rule 622 of the Georgia Rules of Evidence allows a party to attack a witness's credibility regarding bias. "The state of a witness's feelings toward the parties and the *witness's relationship to the parties*

may *always be proved for the consideration of the jury.*” O.C.G.A. § 24-6-622 (2018) (emphases added). Such evidence is relevant because it “make[s] the existence of [the facts and opinions to which the witness will testify] more probable or less probable than it would be without the evidence.” § 24-4-401; see also United States v. Abel, 469 U.S. 45, 52 (1984) (“Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’s testimony.”). “And ‘[t]he purpose of cross-examination is to provide a searching test of the intelligence, memory, accuracy, and veracity of the witnesses, and *it is better for cross-examination to be too free than too much restricted. Wherever the purpose is to impeach or discredit the witness, great latitude should be allowed by the court in cross examinations.*” Bolden v. Ruppenthal, 286 Ga. App. 800, 807 (2007) (emphasis added) (quoting Letlow v. State, 222 Ga. App. 339, 342 (1996) (internal citations omitted)).

As a result, it is well settled that issues of bias go to the weight, and not the admissibility, of the witness’s testimony. See e.g., Gottschalk v. Gottschalk, 311 Ga. App. 304, 310 (2011). Thus, a treating physician, like Dr. Chappuis, is subject to impeachment based on potential bias.

More specifically, the Northern District of Georgia recently held that evidence regarding attorney referrals to treating physicians is, indeed, admissible to prove bias. In Moyer v. New Prime, Inc., 2017 WL 5644375, **2-3 (N.D. Ga., May 30, 2017) (unpublished), the court considered the plaintiffs' motion in limine seeking to exclude any reference to the fact that the plaintiffs' own attorneys referred them to their treating physicians. Id. at **1, 3. The district court *denied* the motion, reasoning that "[e]vidence that an attorney referred a patient to a physician in anticipation of litigation to establish that the physician has a stake in the outcome of the litigation is relevant to show bias." Id. at *3 (emphasis added). See also Magbegor v. Triplette, 2016 WL 6562920, *3 (N.D. Ga., Mar. 16, 2016) (unpublished) ("Evidence that an attorney referred a patient to a physician in anticipation of litigation to establish that the physician has a stake in the outcome of the litigation is relevant to show bias.").

Courts in other jurisdictions have similarly ruled. For example, in Fullam v. Miller Brothers, the plaintiff obtained a treating physician's name from her attorney for use as an expert witness in the case. Fullam v. Miller Bros., 33 Pa. D. & C.5th 101, *4 (Pa. Ct. Com. Pl., Jul. 22, 2013). The Court upheld the trial court's ruling that the defendant had the right to cross-examine the plaintiff's physician-expert about his relationship with her counsel: "The Defendant was well within its rights to cross-

examine him as an expert to reveal interests and biases based upon his relationship with Plaintiff's attorney." Id. See also Ernestine v. Hi-Vac LLC, 2016 WL 5936883, *4 (S.D. Miss., Oct. 12, 2016) (unpublished) ("Defendant will be allowed to introduce evidence that Plaintiff's attorney referred him to his physicians").

Georgia law establishes that a witness's bias—potentially demonstrated by referral of a patient from an attorney, as opposed to a fellow medical colleague in the normal course of the practice of medicine—is fair game. A defendant has a right to introduce evidence that could establish to a jury that an attorney-referral is an incentive for the treating physician to provide analyses and care favorable to the patient solely in order to secure future attorney-referrals and income stream. In addition, and equally as important, a defendant has a right to introduce evidence that could establish to a jury that the genesis of the plaintiff's medical care with a particular treating physician is a non-medical, attorney recommendation—not another medical provider based upon that provider's clinical judgment that the patient could benefit from the treating physician's clinical expertise.

Waits v. Hardy, 214 Ga. 41 (1958), cited by Appellee, actually makes clear that the evidence at issue in this case *should* have been admitted. In *Waits*, the defendant's attorney, during opening remarks, stated “that movant [the plaintiff] did not even go to

a doctor until he employed G. Seals Aiken as his attorney, that the said Mr. Aiken then sent movant [the plaintiff] to a doctor and that this is a ‘trumped-up’ law suit.” Id. at 42. The Supreme Court of Georgia held those statements did *not* amount to reversible error, reasoning that the trial court generally should not restrain attorneys in their arguments and that the arguments made by the defense attorney were within the bounds of reasonableness. Id. at 44. The Court only stated in *dicta* that “it would seem that a lawyer in accepting employment in a personal injury case would logically tell his client to be examined by a doctor before he proceeds with the case, so that he may know whether his client has suffered any injury or damage; otherwise, he might have a case of clear liability where there is no injury or damage sustained.” Id. However, the Court went on to warn that “[t]rial courts should not restrain counsel so long as their arguments are kept within reasonable and proper bounds, and they should also be careful not to usurp the functions of the jury in accepting or in disregarding what the counsel have to say in their arguments to the jury.” Id. (internal citations omitted; emphasis supplied).

Similarly, this Court has recognized the unique role of the jury as follows:

It being the exclusive province of the jury to determine the credibility of all witnesses, when an effort is made by any of the methods pointed out

by law to impeach a witness, the jury then becomes the triors [sic] of the credibility, respectively, of the witness sought to be impeached, and of the witness or witnesses by whose testimony the impeachment is attempted; and, accordingly, they have the right, under all the attendant circumstances and conditions, to determine whether credit shall be given to the witness whose credibility has been attacked, or to the witness or witnesses by whose testimony such attack is made, and thereupon decide whether the witness has or has not been impeached.

McNeely v. Wal-Mart Stores, Inc., 246 Ga. App 852, 853 (2000).

Appellee also incorrectly argues that any testimony relating to the treating physician's referral by her own counsel is protected by the attorney-client privilege. To the contrary, the attorney-client privilege attaches to communications only if: (1) there is an attorney-client relationship; (2) the communications in question relate to the matters on which legal advice was sought; (3) the communications have been maintained in confidence; and (4) no exceptions to privilege are applicable. St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 293 Ga. 419, 423 (2013).

By contrast, “[t]he fact of a client referral and the date on which one occurred is not protected by the attorney-client privilege” Norfolk v. Comparato, No. 11-18820-Civ, Slip Copy at 1-2 (S.D. Fla., Aug. 27, 2014) (emphasis added). Asking Appellee who referred her to her treating physician is a question of fact and not an inquiry into any substantive communications with her attorney. See Upjohn Co. v. U.S., 449 U.S. 383, 395 (1981) (“The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”); Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962) (“[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communications to his attorney.”).

In the case below, the trial court should not have excluded evidence or argument pertaining to the manner in which the plaintiff was referred to her treating orthopedic surgeon. By doing so, the trial court improperly removed evidence of potential bias from the jury’s consideration in determining the doctor’s credibility.

B) THE TRIAL COURT INCORRECTLY EXCLUDED EVIDENCE THAT DR. CHAPPUIS'S MEDICAL FEES WERE SECURED BY A "LIEN" WITH HIS PATIENT.

Likewise, the trial court should have permitted the jury to hear evidence regarding the *manner* in which the plaintiff's treating orthopedic surgeon agreed to be paid for his treatment of the plaintiff. By agreeing to take on a financial stake in the outcome of his patient's lawsuit, Dr. Chappuis obviously exposed himself to the argument of bias in his subsequent testimony *at the trial of that very lawsuit*. Faced with a similar situation and argument, the United States Court of Appeals for the Eleventh Circuit recently issued an opinion which is instructive here. On February 7, 2018, in ML Healthcare Services, LLC v. Publix Super Markets, 881 F. 3d 1293, the Eleventh Circuit Court of Appeals held that evidence even of collateral benefits may be admissible for the purpose of showing bias. There, and not dissimilar to the "Lien" Appellee entered into with Dr. Chappuis in the instant case, the evidence at issue in *Publix* involved the following contracts:

ML Healthcare matches injured, uninsured plaintiffs who have viable tort claims with treating doctors. It then purchases at a discounted rate the medical bills these doctors generate. To recoup its investment and make a profit, its contract with the plaintiffs permits ML Healthcare to

recover the full amount of these bills from any tort damages recovered by the plaintiffs. *The contract also provides that the referred plaintiffs will personally repay ML Healthcare {Dr. Chappuis} the full amount of the bills if they recover no damages or if there are insufficient damages to cover the bills.* In short, the contract allows ML Healthcare to recover the difference between the discounted bills it pays treating doctors and what those doctors say is the full value of those medical services: either from the plaintiffs themselves or from any tort recovery the plaintiffs receive. *Nonetheless, a plaintiff who recovers insufficient damages to pay back ML Healthcare {Dr. Chappuis} may be unable or unwilling to repay her debt, meaning that, absent a recovery by the plaintiff in such cases, ML Healthcare {Dr. Chappuis} will be out not only its investment, but also any hoped-for profit. Thus, for its business model to flourish, ML Healthcare {Dr. Chappuis} needs the plaintiffs whom it subsidizes to win their lawsuits.*

Id. at 1302 (emphases added) (internal, bracketed references added).

In affirming the admission into evidence of ML's contract for a jury's consideration, the Eleventh Circuit reasoned:

The district court did not abuse its discretion in crediting this argument, and thus permitting evidence of ML Healthcare's *{Dr. Chappuis's}* payment arrangement to be admitted for the limited purpose of showing bias on the part of the doctors *{Dr. Chappuis}* who testified in this case. First, the evidence was relevant. Indeed, proof of bias will typically be relevant. . . . The fact that the evidence also implicates the collateral source rule does not render it irrelevant for impeachment purposes.

Plaintiff points out that none of her doctors admitted to bias while testifying in the case. That is true, but hardly a surprising revelation. A witness's *{Dr. Chappuis's}* refusal to admit bias does not bar the opposing party from introducing evidence that might contradict such a protestation. At any rate, Defendant does not need to be able to prove a premeditated plan of deceit in order to probe potential bias. . . . Instead, Defendant needed only to show that ML Healthcare's *{Dr. Chappuis's}* payment arrangement had "any tendency" to make bias more probable than it would be without the evidence. . . . That requirement is easily satisfied here. A jury might infer that Plaintiff's doctors *{Dr. Chappuis}*

were incentivized by ML Healthcare's {*Dr. Chappuis's*} referral and payment arrangement to provide testimony that was more favorable to Plaintiff than it otherwise would have been. If so, the jury would have found bias, which is clearly a relevant consideration in evaluating a witness's credibility.

Id. at 1302-3 (emphases added) (internal citations omitted) (internal, bracketed references added).

In this case, as in the *Publix* case, the defendant sought to present evidence at trial from which a jury certainly could have found bias on the part of the plaintiff's treating physician. Since the jury was deprived of its right and duty to be the sole arbiter of the credibility of witnesses, the trial court's exclusion of the potential bias evidence was improper and requires reversal of the jury's verdict.

III. CONCLUSION

For the above-stated reasons, the GDLA respectfully contends that the trial court erred in excluding evidence intended to show potential bias on the part of the plaintiff-appellee's treating orthopedic surgeon, Dr. Chappuis. The evidence in question and related argument should have been permitted to allow the jury to make an unfettered and informed determination as to the credibility of a chief witness at

trial. Accordingly, this Court should **REVERSE** the trial court's two rulings as detailed above.

It is hereby certified that this submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted, this 28th day of MARCH, 2018.

BENDIN SUMRALL & LADNER, LLC



KRISTIN L. PIERSON

Georgia Bar No. 259570

PAIGE E. MCKINNEY, ESQ.

Georgia Bar No. 926474

*On Behalf of The Georgia Defense
Lawyers Association*

One Midtown Plaza, Suite 800
1360 Peachtree Street, NE
Atlanta, Georgia 30309
404-671-3100

**GEORGIA DEFENSE LAWYERS
ASSOCIATION**

Sarah B. Akins, President

Martin A. Levnison, Chair

Amicus Curiae Brief Committee

P.O. Box 8558

Atlanta, Georgia 31106

(404) 816-9455

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** upon all parties in this matter by *e-file* and by depositing a true and correct copy of same in the U.S. Mail, in a properly addressed envelope with adequate postage to counsel of record as follows:

ATTORNEYS FOR APPELLANT-PLAINTIFF:

Jeffrey Yashinsky, Esq.
Suite 610
295 West Crossville Road
Roswell, Georgia 30075


Charles M. Cork, III, Esq.
P.O. Box 2594
Decatur, Georgia 30031

ATTORNEYS FOR APPELLEE-DEFENDANT:

Michael J. Rust, Esq.
Nicole C. Leet, Esq.
GRAY, RUST, ST. ARMAND, MOFFETT, & BRIESKE
1700 Atlanta Plaza
950 East Paces Ferry Road
Atlanta, Georgia 30326

Michael D. Newton, Esq.
Robert A. Butler, Esq.
Charles G. Hoey, Esq.
LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, PLLC
200 Ashford Center North
Suite 305
Atlanta, Georgia 30338

This 28th day of MARCH, 2018.



KRISTIN L. PIERSON
Georgia Bar No. 259570

BENDIN SUMRALL & LADNER, LLC
One Midtown Plaza, Suite 800
1360 Peachtree Street NE
Atlanta, Georgia 30309
404-671-3100

*On Behalf of The Georgia Defense
Lawyers Association*