IN THE SUPREME COURT OF THE STATE OF DELAWARE

A. DIANE MCCRACKEN, M.D., and ALL

ABOUT WOMEN OF CHRISTIANA

CARE, INC., : No.: 161,2013

Defendants Below,

Appellants,

Appeal from the Superior Court of

the State of Delaware in and for New

Castle County

LAURA COONEY-KOSS and JEROME

V.

KOSS, : C.A. No. N10C-10-230 WCC

Plaintiffs Below,

Appellees.

LAURA COONEY-KOSS and JEROME

KOSS,

No.: 162,2013

Plaintiffs Below-

Appellants,

.

v. : Appeal from the Superior Court of

the State of Delaware in and for New

JENNIFER H. BARLOW, M.D., : Castle County

.

Defendants Below- : C.A. No. N10C-10-230 WCC

Appellees.

PLAINTIFFS BELOW-APPELLEES/CROSS APPELLANTS LAURA COONEY-KOSS AND JEROME KOSS' ANSWERING BRIEF/OPENING BRIEF ON CROSS APPEAL

SHELSBY & LEONI

/s/ Robert J. Leoni

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DATE: September 23, 2013

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NATURE OF PROCEEDINGS

On October 22, 2010 Plaintiffs-Below Appellees/Cross-Appellants, Laura Cooney-Koss ("Ms. Koss") and Jerome Koss ("Mr. Koss") (collectively Plaintiffs) filed a medical negligence action against Defendants-Below Appellants, A. Diane McCracken, M.D. ("Dr. McCracken"), All About Women of Christiana Care, Inc. ("AAW") (collectively "Defendants"), against Defendant-Below Cross-Appellee, Jennifer Barlow, M.D. ("Dr. Barlow") and against Christiana Care Health Services, Inc ("Christiana Care"). The action alleged that the Defendants were negligent and caused injury and damages to Plaintiffs arising from the C-Section birth of their first child on April 22, 2010, and a hysterectomy performed on Ms. Koss by Dr. McCracken on May 2, 2010. On February 7, 2012, stipulated to dismiss all claims against Christiana Care.

On July 31, 2012, Plaintiffs filed a Motion in Limine to preclude certain testimony of fact witness Tak Liu, M.D, the anesthesiologist for the May 2, 2010 hysterectomy surgery. On August 15, 2012, the Trial Court granted Plaintiff's Motion in Limine as to certain testimony of Dr. Liu.

On July 31, 2012, Dr. Barlow sought Summary Judgment as to claims against her. On August 29, 2012, the Trial Court issued an Opinion and Order granting summary judgment to Dr. Barlow. The Opinion and Order sought to be reviewed in the Cross-Appeal is attached as Exhibit "A".

The Trial Court conducted a detailed Pre-Trial Conference on August 30, 2012. At the Pre-Trial Conference, various issues were addressed by the Trial Court on the record. The Trial Court made other rulings which were documented by notations on the Pre-Trial Stipulation.

On September 6, 2012, eleven days before trial, Defendants filed a Motion to add a new expert in the field of hematology for trial. On September 10, 2012, the Superior Court denied the Motion to add a new expert.

Trial started on September 17, 2012. At the close of Plaintiffs case on September 24, 2012, Defendants sought Judgment as a Matter of Law on various claims in Plaintiffs' Complaint. At that point however, Defendants agreed, in two separate statements, that Plaintiffs had submitted sufficient evidence and expert testimony supporting Plaintiffs' claims that Dr. McCracken failed to exhaust appropriate conservative measures and performed an unnecessary hysterectomy. (A1034, 1039). At the close of all evidence on September 26, 2012, Defendants now sought to "re-raise" a Motion for Judgment asserting that Plaintiffs' expert Dr. Spellacy conceded that if conservative measures failed then a hysterectomy would be appropriate. (A1400). The Trial Court denied the Motion finding that Plaintiffs' expert did indeed testify that Dr. McCracken was negligent in failing to perform the appropriate conservative measures to avoid an unnecessary hysterectomy. (A1401)

On September 27, 2012, the jury returned a verdict in favor of Mr. and Mrs. Koss in the aggregrate amount of \$500,000.00.

On October 5, 2012, Defendants filed a Renewed Motion for Judgment or in the alternative Motion for New Trial. Plaintiffs filed a response on October 15, 2012. The Court denied Defendants Motion by a written Opinion and Order issued on February 28, 2013.

Defendants filed a Notice of Appeal on March 28, 2013. Plaintiffs filed a separate Notice of Appeal of the dismissal of claims against Dr. Barlow on March 28, 2013, and filed a Notice of Cross-Appeal on March 29, 2013. The Supreme Court consolidated the appeals on May 3, 2013.

Defendants filed their Opening Brief on August 19, 2013.

This is Plaintiffs Answering Brief/Opening Brief on Cross-Appeal.

SUMMARY OF ARGUMENT

- I. Denied. The Trial Court properly excluded the speculative testimony of Tak Liu, M.D. Dr. Liu had no memory of the surgery of Plaintiff, and of any conversations with Dr. McCracken.
- II. Denied. The Superior Court properly excluded the evidence of prior and subsequent blood transfusions of Ms. Koss for an unrelated ulcerative colitis condition. All defendant experts agreed that all testing of Plaintiff for a bleeding disorder was negative and no disorder could be identified.
- III. Denied. The Trial Court correctly precluded the Defendants from cross-examining Plaintiff's medical expert, William Spellacy, M.D., on medical literature which was ordered to be disclosed prior to trial and which was not disclosed prior to trial.
- IV. Denied. The Trial Court properly denied Defendants' Motion for Judgment. Plaintiff's medical expert, Dr. Spellacy, clearly testified that Dr. McCrackin breached the standard of care in multiple ways during the several hours that she was responsible for Ms. Koss' care and treatment. Dr. Spellacy further testified in detail regarding the causation issues in the case.
- V. Denied. The Trial Court properly denied Defendants' Motion for a New Trial based on alleged improper comments of counsel in closing argument. Defendants failed to make a contemporaneous objection, failed to object after summations, and failed to request a jurative instruction. Therefore, the issue is waived on appeal. To any extent, the comments were not improper and, if so, then do not rise to the level of plain error.

STATEMENT OF FACTS

Plaintiffs brought this medical negligence action against Defendants alleging that Defendants failed to properly use conservative measures to control postpartum bleeding, and alleging that Defendant Dr. McCracken negligently performed an unnecessary hysterectomy and removed Ms. Koss' womb. (A019-A024) After a trial, the jury returned a verdict in favor of Ms. Koss for \$450,000 and Mr. Koss for \$50,000. (A1515)

Ms. Koss was an OB/GYN patient of Defendants when she went to their practice in 2009. Ms. Koss was pregnant and treated with Defendants for her pregnancy through childbirth on April 22, 2010. On April 22, 2010, Dr. Barlow performed a C-Section delivery on Ms. Koss at Christiana Care. (A1044-A1046)

On the morning of Sunday, May 2, 2010, Ms. Koss had vaginal bleeding which was more than the normal postpartum vaginal bleeding. (A497-A498) Plaintiff called Defendants' practice and ultimately spoke with Dr. McCracken. (A498) Shortly after that telephone call, Ms. Koss called an ambulance and was taken to the Christiana Care OB/GYN triage at Christiana Hospital. (A503-A504) Ms. Koss received on dose of the medication Cytotec, which is intended to conrtact the uterus and stop or slow the bleeding, at 11:18 a.m. while in triage. (A505) Ms. Koss testified that at that time, she asked when Dr. McCracken was coming in was

told by the triage personnel that they called Dr. McCracken and she would be in shortly. (A506-A506)

Dr. McCracken testified that she received a telephone call from Dr. Estelle Whitney at Christiana Hospital at some point after the Cytotoec was given to Ms. Koss at 11:18 a.m. (A587) Dr. McCracken agreed that during that telephone call, she made a decision to perform a D&E on Plaintiff, and that was before the order was entered into the hospital computer system. (A588-A590) Therefore, sometime before 11:42 a.m., Dr. McCracken was on her way to the hospital. (A590-A591)

To any extent, no later than 12:20 p.m. Dr. McCracken met with the Plaintiffs. (A617) Dr. McCracken agreed that as of the telephone call that she had with Dr. Whitney between 11:18 a.m. and 11:42 a.m., Dr. McCracken was responsible for Ms. Koss' care and responsible for her plan of care. (A600)

During the time that she was responsible for Ms. Koss' plan of care and treatment, Dr. McCracken was aware of the various medications available to treat a women's postpartum bleeding uterus to stop the bleeding and save the womb. (A613-A614) Dr. McCracken was also aware of the various manual and surgical techniques available to treat a postpartum hemorrhage including a Uterine Artery Ligation and other techniques. (A615-A616)

Dr. McCracken agreed that Ms. Koss received no further medication for her uterus from 11:18 a.m. through the time of the D&E procedure at 12:52 p.m. (A617) Dr. McCracken testified that as far as she knew, she is not aware of any massage that was performed on Ms. Koss' uterus before the D&E procedure. (A764) Dr. McCracken admitted that during the time after Plaintiff received her first dose of medication, if more medicine was given to Ms. Koss to help contract her uterus, there would have been no harm to Ms. Koss and it would have been reasonable to give the medicine. (A621)

At 1:05 p.m., during the D&E procedure, Dr. McCracken gave one dose of Methergine, another medication intended to the uterus, in attempt to contract Plaintiff's uterus. (A621-A622) At 1:10 p.m., Dr. McCracken stopped the D&E procedure and ordered the procedure to be converted to an open procedure so she could go to Ms. Koss' uterus. (A622) Dr. McCracken then left the room to go and speak to Mr. Koss. *Id.* The open procedure started at 1:26 p.m., 16 minutes after the D&E procedure was stopped, and during that 16 minutes, Dr. McCracken did not order any further medicines or massage to treat Ms. Koss' uterus. (A622, A626) Dr. McCracken testified that during this time more medicine would not have harmed Ms. Koss. (A625)

After the open procedure was started, Dr. McCracken gave no further medication for Ms. Koss' uterus. (A628-A630) Dr. McCracken does not know

how long she had been at the Plaintiff's uterus before she decided to remove the uterus, but it could have been as much as 20 minutes. (A610) And during that time, no further medications were used and no surgical techniques short of the hysterectomy were used. (A628-A630)

Speculative Testimony of Tak Liu, M.D.

Dr. McCracken testified in deposition that there was some discussion with the anesthesia team that Ms. Koss was unstable and continuing to bleed, and there was a concern. (A150-A151) However, Dr. McCracken does not know who from the anesthesia team had the discussion, and does not know any specifics of the conversation other than concern was conveyed to her. *Id*.

Before trial and in accordance with the Trial Scheduling Order, Plaintiffs filed a Motion *In Limine* to exclude certain testimony of Tak Liu, M.D. Dr. Liu was the anesthesiologist assigned to Ms. Koss' case for the first May 2, 2010 D&E procedure which ended in the hysterectomy. (A090) Dr. Liu was deposed during discovery and he admitted that he had no memory whatsoever of Ms. Koss or the surgery. (A089)

Dr. Liu was present in the operating room during the induction of anesthesia for the Plaintiff which started sometime after 12:45 p.m. (A098) Dr. Liu put his initials in the chart at approximately 1:15 p.m. or 1:20 p.m., which means he was in the operating room at that point. (A099) Dr. Liu believed that he left the

operating room at some point after the procedure was started. (A098-A099) There was a nurse anesthetist who is part of the anesthesia team, and the nurse anesthetist is with the patient during the entire procedure. (A090)

Dr. Liu testified that he could not remember any conversation with or statements made to Dr. McCracken. (A108) Dr. Liu stated that looking at the record, a blood loss of 1 liter was noted on the record at 1:30 p.m. which could have been of concern. *Id.* As to the issue of what information or statements he may have made to Dr. McCracken, Dr. Liu testified that, if he was in the room at the time that Ms. Koss' 1 liter blood loss was called, the "best that I can come up with is I --I would probably tell her that I would be concerned that we had a liter of blood loss in a short period of time." *Id.*

Dr. Liu testified during deposition that, looking back at the anesthesia record the one thing that "alarms me greatly" was the one liter of blood loss in 30 minutes. (A108) However, Dr. Liu reiterated multiple times that he did not know whether he had any conversation with Dr. McCracken regarding the blood loss. (A108-A109) When asked if the concern would be that Ms. Koss was unstable, Dr. Liu stated "with a liter of blood loss, that's a possibility." (A109) Dr. Liu also testified that he had turned the case over to another anesthesiologist at some point during the procedure. (A099).

The anesthesia record for Ms. Koss' procedures is devoid of any notation or

documentation that Dr. Liu or any other member of the anesthesia team in any way communicated a concern with the stability or blood loss of the patient. (A119-A121) The "Anesthesia Post-Operative Assessment" is also devoid of any documentation of any operative problems, concerns or observations by the anesthesia team. (A124-A123) There is no testimony from Dr. Liu concerning his routine practice.

Defendants sought to present Dr. Liu to testify at trial that, in spite of the fact that Dr. Liu did not remember the case, did not remember any discussions with Dr. McCracken, did not know if he was in the operating room, and did not know if he made any comment to Dr. McCrackn, that Dr. Liu looking at the record now is of the opinion that the blood loss is greatly alarming. (A168) Dr. Liu was never identified as an expert by Defendants, however, Defendants did have two anesthesia experts in the case.

The Trial Court held that Dr. McCracken would be permitted to testify that the anesthesiologist conveyed concern to Dr. McCracken regarding Ms. Koss. (A169-A170) The Trial Court further ruled that if Dr. McCracken was attacked on cross-examination by Plaintiffs' Counsel as to the fact that Dr. Liu conveyed concern, then the Trial Court would permit Dr. Liu to testify that he would have been conveyed concern to Dr. McCracken. *Id*.

At trial, Plaintiffs' Counsel did not in any way attack or even question any

assertion that could have been made that the anesthesia team conveyed concern. In fact, Defendants' Counsel questioned Dr. McCracken regarding the fact that conversations occurred in the operating room, the "overall flavor" of the conversation, and the information that was conveyed by the anesthesia team regarding Ms. Koss' blood loss and hemoglobin levels. (A711-A713) Per the Trial Court's order, Dr. McCracken was free to testify that the anesthesia team said they were concerned about Ms. Koss.

Interestingly, the Defendants presented Robert Mesrobian, M.D., a Board Certified Anesthesiologist, to testify as an expert in the case. (A1200) Dr. Mesrobian gave the opinion that, if at the time the blood products were started on Ms. Koss (1:27 p.m. when the open procedure started), and the anesthesia team did absolutely nothing (e.g., did not even start infusing blood products as they did), then Ms. Koss would have run into difficulties in an hour or hour and a half. (A1258-A1259).

Plaintiffs also presented expert opinion testimony from a Board Certified Anesthesiologist, Rafael Cartagena, M.D. (A835-A920) Dr. Cartagena gave the opinion, along the timing given by Defendants' expert Dr. Mesrobian, that in review of the anesthesia record that Ms. Koss was not in immediate danger of decompensating. (A837) Dr. Cartagena testified upon questioning in direct examination that the 1000 ml of blood loss in the 30 minute time frame was a

significant amount of blood loss. (A858)

Dr. Cartagena testified that it was a large amount of blood loss and in no way would he minimize the fact that there was ongoing bleeding, however, given the interventions of the anesthesia team and all of Ms. Koss' vital signs, Ms. Koss was handling the situation without much difficulty. (A858-A859) Defendants' Counsel confirmed with Dr. Cartagena on cross-examination that an anesthesiologist would find the 1,000 ml blood loss to be significant and concerning. (A900)

After Dr. Cartagena's opinion testimony, Defendants sought to present the testimony of Dr. Liu. (A927) The Trial Court, having heard the testimony of Dr. McCracken and Plaintiffs' anesthesia expert, determined that Dr. Liu's testimony would be speculative and not admissible.

Testimony of Nurse Anesthetist

The anesthesia record from the D&E/hysterectomy surgery was hand-written. (A119-A120) As noted by the Trial Court, the record was challenging to read. (A832) Alphonsine Sahou, CRNA was the nurse anesthetist who was present for the entire procedures and who wrote most of the anesthesia record. Nurse Sahou testified at trial regarding what was being monitored and to read the entries in the anesthesia record. (A739-A832)

Defendants objected to any questions regarding whether the vital signs went

out of the normal range, or any questions as to "normalcy and stability" for the testimony of Nurse Sahou. (A807) The Plaintiffs agreed that Nurse Sahou would simply read her handwriting on the document. (A807-A808) Nurse Sahou then read the entries nearly line by line. (A810-A823). This reading of the entries into the record served the purpose of ensuring that there were no misunderstandings about what was written on the record.

Evidence of Ms. Koss' Prior and Subsequent Blood Transfusions

Ms. Koss had an unrelated gastrointestinal condition, chronic ulcerative colitis since about 1999, and on one occasion about 10 years prior to 2010, Ms. Koss required blood transfusions. Defendants were aware of the chronic colitis during the time that they treated Plaintiff for her pregnancy in 2010.

The medical records indicate that when Ms. Koss came to Christiana Care OB/GYN Triage on May 2, 2010 due to her postpartum bleeding, she told them of her past history of "multiple transfusions due to ulcerative colitis" and that was documented in the record. (B17) Defendants did not disclose any expert opinions during discovery regarding the effect or relevancy of Ms. Koss' need for blood transfusions 10 years prior to the 2010 postpartum bleeding which resulted in the unnecessary removal of Ms. Koss' womb.

In May 2012, 2 years after the hysterectomy performed by Dr. McCracken, Ms. Koss was hospitalized for rectal bleeding, caused by a flare up of her colitis.

(A1562) Three days after admission to the hospital, Ms. Koss agreed to have a procedure to have part of her colon removed. (A1567)

Plaintiffs promptly notified Defendants of the recent condition and surgery. Defendants assert that they requested and obtained the records of the May 2012 hospitalization in June/early July 2012. Thereafter, at no time did Defendants directly inform Plaintiffs that any of their experts had new opinions that would have stemmed from the May 2012 hospitalization or records.

Defendants' first OB/GYN experts, James Christmas, M.D. testified at deposition on August 13, 2012 specifically as to the records from the recent hospitalization. (A312) Dr. Christmas specifically testified that the records did not impact his opinions and he would not be testifying at trial regarding the records. *Id.* Dr. Christmas confirmed that as a result of the May 2012 admission, Plaintiff was fully and thoroughly evaluated for any type of blood disorder and nothing was found. *Id.*

After Dr. Christmas' deposition Defendants did not directly identify any further expert opinions regarding a claim that Ms. Koss had a blood disorder that would make Ms. Koss' prior or subsequent blood transfusions relevant. However, on August 17, 2012, defense expert Janice Bird, M.D. was deposed. Plaintiffs' Counsel explored Dr. Bird's opinions in great detail during the deposition. (A177-A221) At the end of the deposition Plaintiffs first learned, through questioning by

Defendants' Counsel, that Dr. Bird would attempt to express a new opinion that Ms. Koss had some unknown, unidentified propensity to bleeding which could not be known. (A222).

Dr. Bird admitted that Ms. Koss had been tested extensively for a bleeding disorder by a hematologist (who specializes in blood disorders) and the testing revealed no blood disorder. (A222) Dr. Bird confirmed that the treating hematologist for Ms. Koss specifically found no evidence of a coagulopathy problem in Ms. Koss. (A222-A225). Nevertheless, Defendants proposed to have Dr. Bird proposed given an opinion at trial that there "seems to be something about her genetic biochemistry, whatever you want to call it, over which she has no control, the way she is put together, that seems to cause her to have a propensity to bleed." *Id*

Shortly after Dr. Bird's deposition, the parties filed the Pre-Trial Stipulation in which Plaintiff specifically objected to any evidence, testimony or argument that Plaintiff had some unknown and undiagnosed blood disorder or bleeding condition. (A270-A285) At the Pre-Trial Conference on August 30, 2012, the Court ruled that Defendants could not argue or admit evidence that Ms. Koss some unknown blood disorder which had been ruled out by testing by specialists on three different occasions, because Defendants' experts could in no way identify the alleged blood disorder. (A230, A233)

The Trial Court specifically held, however, that Defendants were permitted to admit records of Ms. Koss' May 2012 colon removal surgery, and that Defendants were permitted to cross-examine Ms. Koss regarding the colon surgery, the pain and suffering from the surgery, and how that may diminish the pain and suffering from the unnecessary hysterectomy by Dr. McCracken. (A233) However, the Trial Court ruled that it was too prejudicial to the Plaintiffs to allow cross-examination of the Ms. Koss regarding blood transfusions from her unrelated colon condition and treatment. (A 234).

Defendants asserted they would be substantially prejudiced because Defendant did not have an expert who could specifically address a bleeding disorder. (A234) The Trial Court directed Defendant to seek relief, and the Trial Court indicated that a continuance of the trial would be permitted if the Defendants informed the Trial Court that there was a reasonable expectation there would be an expert on the issue of a bleeding disorder. (A235). Defense counsel confirmed to the Court an understanding of the Defendants options which included "abandon this issue, go with the Court's ruling, or elect to request a continuance of the trial date in order to seek more information from an expert witness in that particular area, specialty of medicine..." (A236).

Seven days later on September 6, 2012, Defendants filed a Motion to Supplement their Rule 26(b) expert disclosures and with that produce a report from

A hematology expert, Lawrence Lessin, M.D. dated September 5, 2012. (A 286-A305). Defendants specifically and intentionally did not seek continuance of the trial which was due to start in ten (10) days to allow them time to add the expert and allow Plaintiffs time to depose the expert and get a rebuttal expert. *Id.* Defendants simply requested the Court to allow them to present the new expert and his opinions at trial. *Id*

On September 10, 2012, the Trial Court held a telephonic hearing on the Motion to Supplement, and Defendants did not request a continuance of the trial. In ruling to deny the Motion, the Trial Court noted that the proposed expert, Dr. Lessin, confirmed in his report that he was unable to state the name of the blood disorder. (A324) The Trial Court found that there was no support for the opinions of Dr. Lesson. *Id.* The Trial Court ruled that the Defendants would not be permitted to present the expert at trial. (A341). In denying Defendants' Motion for New Trial, the Trial Court confirmed that the Trial Court did give Defendants an opportunity to seek a continuance of the trial and Defendants chose not to avail themselves of that opportunity. (A1552)

During the testimony of Dr. McCracken at trial, Defendants sought to bring in evidence of subsequent blood transfusions. (A669) The Trial Court held that Dr. McCracken was permitted to testify that she received information from that the patient revealed that she had a prior incident with her colon and had blood

transfusions. (A671) However, such testimony would open the door for Plaintiffs to put into evidence the Triage Record containing the history of Ms. Koss' prior colitis and blood transfusions. (A674) Therefore, the Trial Court took the extraordinary measure of allowing Dr. McCracken, while under oath, to go into a private meeting with Defense Counsel to discuss the issue and make a decision of whether they wanted to present the evidence and open the door regarding the Triage Record. (A677) This was because the Trial Court wanted to ensure that Dr. McCracken understand that the evidence would not "spin real favorably for the doctor." (A677-A678) Defendants then waived the issue of admitting evidence of prior and subsequent blood transfusions, which precluded Plaintiffs from cross-examining Dr. McCracken on the fact that the prior transfusions were indeed disclosed in the Triage Record. (A682-A683).

Use of medical literature not produced prior to trial

During discovery, Plaintiffs issued written requests for production of documents to Dr. McCracken, Dr. Barlow, and All About Women which were filed with the Complaint on October 22, 2010. Request for Production number 16 specifically requested "all treatise or text authority upon which you intend to rely at trial or which you will use in examining or cross-examining any witness at trial." Defendants responded to Plaintiffs' Request for Production on March 17, 2011. (B1-B16)

Plaintiffs identified an objection in the Pre-Trial Stipulation to the use of medical literature at trial which was not produced in discovery or identified at some point before trial starts. (A270) The Trial Court and the parties had a substantial discussion at the Pre-Trial Conference regarding the use of medical literature at trial. Specifically, the Trial Court ordered the parties to identify and produce any literature to be used at trial one week prior to the start of the trial. *Id.* The Trial Court made a written notation on the Pre-Trial Stipulation which was executed by the Trial Judge. *Id.*

The Trial Court went on the record for only part of the pre-trial conference (A228-A252). While on the record, the parties went through the Defendants' list of exhibits, Plaintiffs' Counsel raised the issue of medical literature and confirmed what was discussed off the record regarding medical literature. (A245) The Defendants confirmed that there was not any literature identified for use at trial except for literature that would be used by defense expert William Curtain, M.D. (who was ultimately not called at trial). *Id*.

During trial, when Plaintiff's OB/GYN expert William Spellacy, M.D. ("Dr. Spellacy") was testifying, defense counsel attempted to cross-examine Dr. Spellacy on medical literature and publications which were never identified, disclosed or produced to Plaintiffs' counsel as required by the Court's Pre-Trial rulings. (A998) Plaintiffs objected to the use of that literature which was never identified

or produced. *Id*. For the first time in the litigation, Defendant asserted that there was no obligation to identify or produce literature Defendant intended to use to cross-examine Plaintiffs' experts at any time prior to the cross-examination of Dr. Spellacy. (A999)

Defendant intended to cross-examine Dr. Spellacy on statements contained in three different large medical textbooks, which the Trial Court characterized from looking at the books as being "thousands of pages long. (A999, A1021) The Trial Court confirmed on the record the understanding of both Plaintiff and the Trial Court that it was agreed at the Pre-Trial Conference that all literature intended to be used at trial would be identified or produced before the start of trial. (A1000) The Trial Court later commented again that there was no question at the Pre-Trial Conference the Court ordered the literature to be identified or produced by Defendants. (A1005-A1006)

Defendants apparently knew at the Pre-Trial Conference that there was a possibility that they would use the textbooks to cross-examine Dr. Spellacy. (A1007) Defendants did not inform the Trial Court or Plaintiffs of the possibility of use of the textbooks on cross-examination or of the fact that Defendants believed that identification of that literature would not be required, even in the face of the Trial Court's order. *Id*.

Regardless, the Trial Court permitted Defendants to conduct voir dire of Dr.

Spellacy regarding the questions that would be asked from the books. (A1009-A1020) After the *voir dire*, the Trial Court noted that Defendants were taking one or two sentences out of each large text, however, the Trial Court permitted Defendants to question Dr. Spellacy on the subject matter in the textbooks without reference to the textbooks. (A1022)

Substantive Testimony of Plaintiffs' Expert William Spellacy, M.D.

Plaintiffs presented Dr. Spellacy as an OB/GYN expert to testify on the issues of standard of care and causation. (A928-A1029) Dr. Spellacy is a practicing Board Certified OB/GYN who routinely performs C-Section childbirth procedures and deals with postpartum issues including hemmorrhage, and has done so since 1963. (A930-A931;B38-B85) Dr. Spellacy is highly qualified having served on the Board that certified OB/GYN doctors such as Dr. McCracken, was on the Board that certified residency training programs, is a reviewer of the *New England Journal of Medicine*, and was on the FDA and the National Institute of Health. (A932-A934) Dr. Spellacy practices medicine full-time and still delivered babies, having done 7 C-Section and 6 other deliveries the week before he testified at trial. (A935)

Dr. Spellacy explained to the jury the various medications, compression and surgical techniques that are available to avoid the drastic procedure of removing a womb in a 34 year old woman who desires continued childbearing. (A938-A947)

These techniques are well known in the medical community and taught to all OB/GYN doctors. (A948)

Dr. Spellacy confirmed Dr. McCracken's testimony that she was responsible for the care of Ms. Koss and the plan of care for Ms. Koss no later than 11:40 a.m. (A953) Dr. Spellacy confirmed Dr. McCracken's testimony that during the 72 minute time period from 11:40 a.m. to the start of the D&E procedure at 12:52 p.m., Ms. Koss had received no further medication or massage for her uterus. (A954) Dr. Spellacy testified that Dr. McCracken breached the standard of care by not ordering medicine or massage during that 72 minutes. (A955-A956) Dr. Spellacy testified that had Dr. McCracken ordered medicine and massage during that time, then Ms. Koss' bleeding from her uterus would have returned to normal postpartum bleeding. (A957)

Dr. Spellacy testified that the standard of care required Dr. McCracken to give Plaintiff continuous medication for her uterus for the 13 minute period 12:52 p.m. (start of the D&E) until 1:05 p.m. when Ms. Koss finally received one more dose of medicine for her uterus. (A958-A959) During the 16 minutes from the time the D&E procedure stopped to the time that the open procedure started (1:10 p.m. - 1:26 p.m.) Dr. McCracken breached the standard of care by failing to give more medication to Ms. Koss or order ongoing massage of Ms. Koss' uterus. (A959-A960)

Dr. Spellacy testified that during these various times that medication should have been continuously used, the additional medicine would not have caused any harm to Ms. Koss and was required to stop Ms. Koss' bleeding. (A961) Indeed, Dr. Spellacy confirmed that the single dose of medicine given to Ms. Koss had had some effect to contract down Ms. Koss uterus, showing that ongoing medications would have worked to contract Ms. Koss' uterus. (A968)

Dr. Spellacy further testified that after the open procedure was started at 1:26 p.m. Ms. Koss still received no further medication, however, the standard of care required more medication including injections directly into the uterus. (A963) Furthermore, the standard of care required Dr. McCracken to apply the well known and recognized techniques of compression of the uterus including Uterine Artery Ligation (UAL) and B-Lynch stitching procedures. (A964-A965) The UAL is a simple procedure which does not take long to complete. (A967) Indeed, Dr. McCracken had to ligate the uterine arteries as part of the hysterectomy procedure. (A950)

Finally, Dr. Spellacy testified as to causation, opining that if Dr. McCracken had taken the steps explained above each step of the way, then Ms. Koss' bleeding would have stopped, the drastic hysterectomy procedure would have been avoided, and Ms. Koss would still have her womb. (A970-A971) Dr. Spellacy testified that had the standard of care been followed, Ms. Koss would have gone on to more

childbearing with normal pregnancies. (A975)

On cross-examination, Dr. Spellacy disputed the notion that if the doctor attempts to treat a hemorrhage conservatively then hysterectomy should be considered. (A985) He testified that if the conservative measures included the medications he had described, and the surgical procedures he described then he would agree. (A985) A hysterectomy is the last option a doctor should use and then only after all conservative measures have been used. (A988)

ARGUMENT

I. THE SUPERIOR COURT PROPERLY EXCLUDED CERTAIN SPECULATIVE TESTIMONY OF TAK LIU, M.D.

A. QUESTIONS PRESENTED

Did the Trial Court properly exclude certain speculative testimony of Tak Liu, M.D. from being presented at trial?

Issue preservation pursuant to Supreme Court Rule 8 refers to the preservation of issues by Appellants, not Appellees. Appellees note that the issue was originally raised in Appellees' Motion *In Limine*. (A082)

B. SCOPE OF REVIEW

This Court reviews the Trial Court's decision to admit or exclude evidence under an abuse of discretion standard. *Harbor v. State*, 970 A.2d 199, 201 (Del. 2009). An abuse of discretion occurs when a Court has exceeded the boundaries in view of the circumstances or so ignored recognized rules of law or practice to produce injustice. *Culp v. State*, 766 A.2d 486 (Del. 2001), citing, *Firestone Tire and Rubber, Co. v. Adams*, 541 A.2d 567, 571 (Del. 1988). Reversal of the lower Court's evidentiary decision is warranted only when there is a clear abuse of discretion by the Court. *Culp*, 766 A.2d at 489.

C. MERITS OF ARGUMENT

The Superior Court properly determined that Dr. Liu would not be permitted to give speculative testimony at trial. (A169, A927) As detailed above, Dr. Liu

did not remember Ms. Koss, the surgery, the anesthesia administration, any discussions or conversations during the surgery, or anything else about Ms. Koss' case. Therefore, Dr. Liu was only able to speculate that the "best that I can come up with is I --I would probably tell her that I would be concerned that we had a liter of blood loss in a short period of time." (A108)

Since Dr. Liu is clear that he does not recall the case and does not recall any conversations with Dr. McCracken or anyone else concerning the case, he can only attempt to rely on what is in the medical record to give testimony. As stated above, the medical record is devoid of any comment or statement that Dr. Liu was greatly alarmed or conveyed any concerns to Dr. McCracken. Dr. Liu was never identified as an expert to give opinion testimony based upon his review of the record.

The Trial Court correctly permitted the nurse anesthetist Nurse Sahou because she merely reported what was in her handwriting on the anesthesia record. If Defendants wanted Dr. Liu to testify to read his handwriting on the records, that would have been permissible as well. However, Defendants wanted Dr. Liu to read the record and give speculative testimony.

Defendants assert that Dr. Liu's speculative testimony was based upon his routine practice and therefore is admissible pursuant to Delaware Rules of Evidence (DRE) 406. First, Dr. Liu did not testify specifically as to the specifics

of his routine medical practices. Second, DRE 406 only permits evidence of specific 'semi-automatic' conduct that is capable of consistent repetition to prove conformity with that habit on a particular occasion. *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 243 (Del. 2001); *Brett v. Berkowitz*, 706 A.2d 509, 516 (Del. 1998)

To be admissible under Rule 406, the routine must be relatively simple, involve little judgment, and not be "susceptible to too much variation, e.g., always getting consent forms signed, always taking the same bus home. *Id.* To be probative, evidence of Rule 406 evidence. Dr. Liu's testimony clearly entailed judgment and decision making and susceptible to too much variation to be admitted as habit evidence. *Brett*, 706 A.2d 516.

The Trial Court did not fail to abide by its prior ruling regarding testimony of Dr. Liu. The Trial Court specifically held that if in cross-examination, Plaintiffs attacked the assertion by Dr. McCracken that the anesthesia folks conveyed to her concerns regarding Ms. Koss, then Dr. Liu may be permitted to testify. (A170) Plaintiffs did not in any way dispute Dr. McCracken's claim that Dr. Liu or the anesthesia team told Dr. McCracken that they were concerned about Ms. Koss. Therefore, after hearing Dr. McCracken's testimony and the testimony of Plaintiffs' anesthesia expert, the Trial Court considered its prior order, and held that nothing happened at trial to that point to change the Court's opinion excluding the

testimony. (A927) Although additional expert witnesses testified at trial after that holding, Defendants never requested the Court to allow Dr. Liu's testimony.

The Trial Court did not abuse its discretion in determining that Dr. Liu's testimony was speculative and would be precluded at trial.

II. THE SUPERIOR COURT PROPERLY EXCLUDED EVIDENCE OF MS. KOSS' BLOOD TRANSFUSIONS FROM AN UNRELATED MEDICAL CONDITION

A. QUESTIONS PRESENTED

Did the Trial Court properly exclude evidence of Ms. Koss' prior episodes of bleeding and blood transfusions due to her colon condition when the trial was focused on whether Defendants performed an unnecessary hysterectomy on Ms. Koss 10 days after she delivered her first child by C-Section?

Issue preservation pursuant to Supreme Court Rule 8 refers to the preservation of issues by Appellants, not Appellees.

B. SCOPE OF REVIEW

This Court reviews the Trial Court's decision to admit of exclude evidence to determine if the Trial Court has abused its discretion. an abuse of discretion occurs when a Court has exceeded the boundaries in view of the circumstances or so ignored recognized rules of law or practice to produce injustice. *Culp v. State*, 766 A.2d 486 (Del. 2001), citing, *Firestone Tire and Rubber, Co. v. Adams*, 541 A.2d 567, 571 (Del. 1988). Reversal of the lower Court's evidentiary decision is warranted only when there is a clear abuse of discretion and the Trial Court has exceeded the boundaries in view of the circumstances or so ignored recognized rules of law or practice to produce injustice. *Culp*, 766 A.2d at 489.

C. MERITS OF ARGUMENT

When deciding whether to admit evidence, for credibility or damages purposes, the Trial Court may exclude evidence which is not relevant pursuant to Delaware Rules of Evidence (DRE) 401 and 402. However, if the evidence is deemed relevant, the Trial Court may still exclude the evidence, pursuant to DRE 403, if the prohibitive value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. *In Re Servino v. Medical Center of Delaware Inc.*, 1997 WL 528037 (DelSuper.)

First, the Trial Court correctly excluded evidence of Plaintiff's prior blood transfusions 10 years before the hysterectomy and subsequent blood transfusion 2 years after the hysterectomy, both as a result of Plaintiff's unrelated colon condition. While Defendants sought to make a connection between Plaintiff's rectal bleeding from her colon condition to Plaintiff's postpartum bleeding from childbirth, all defense experts agreed that the treating hematologist had worked up Ms. Koss extensively after each incident and determined that she had no blood disorder. The Trial Court, using the balancing analysis of Rule 403, found that the evidence was outweighed by the substantial risk of unfair prejudice, confusion of the issues and misleading of the jury. In addition, the medical records in question have not been shown to be a material attack on Ms. Koss' credibility.

As to the issue of damages, the Trial Court specifically ruled that Defendants would be permitted to admit evidence of Plaintiff's colitis condition and her subsequent colon removal surgery for damages issues. (A233) Because of that ruling, Ms. Koss testified in direct examination regarding her chronic ulcerative colitis, the colon removal surgery in May 2012, and the fact that she was living with a colostomy bag. (A444, A451-A453) The Defendants chose not to ask any questions of Ms. Koss regarding her ulcerative colitis condition and her colostomy surgery in May 2012. (A529-A549) However, the Defendants did confirm with Ms. Koss on cross-examination that the ulcerative colitis and colectomy in 2012 was separate and apart from the hysterectomy in 2010. (A549)

Therefore, any relevant damages evidence regarding the ulcerative colitis and colostomy bag was brought out in evidence before the jury. Therefore, the jury was free to evaluate that information in coming to its damages award. Plaintiffs in no way attempted to portray a "rosier" picture and actually directly brought out the fact that Plaintiff had chronic ulcerative colitis, had part of her colon removed, and now lived with a colostomy bag.

The Trial Court correctly determined that since all experts agreed that every time Plaintiff was evaluated by treating physicians for a bleeding disorder, there was no admissible opinion or evidence that Plaintiff had a bleeding disorder. The operative report from the 2012 colectomy surgery indicates that the surgeon saw

the patient and suggested that she undergo surgery and Ms. Koss agreed. (A1568) The colectomy and colostomy bag was an eventuality that Ms. Koss knew would come about because of her ulcerative colitis. (A452)

Defendants' OB/GYN expert, Dr. Bird, failed to give qualified supportable expert testimony as to a bleeding disorder because she agreed that all of the testing indicated Plaintiff did not have a blood disorder, and she agreed that she did not know the cause of the alleged bleeding disorder. (A223-A225) The Trial Court properly excluded the testimony of the hematology expert, Dr. Lawrence Lessin which came ten (10) days prior to trial. Although Dr. Lessin was a hematology expert, he could not provide a basis to support his claim that Plaintiff had some unknown and unnameable bleeding disorder. Although Defendants were told at the Pre-Trial Conference that they could seek a continuance, Defendants voluntarily chose not to do so when Dr. Lessin's testimony was excluded.

Defendants were ultimately given the option of presenting evidence of blood transfusions during trial. (A682-A683) However, that would have opened Dr. McCracken to criticism for not reading the triage record where the prior transfusions where disclosed. *Id.* Defendants then waived the right to admit evidence of blood transfusions. *Id.*

III. THE TRIAL COURT CORRECTLY PRECLUDED DEFENDANTS FROM CROSS-EXAMINING PLAINTIFFS' EXPERT WITH MEDICAL LITERATURE NOT DISCLOSED PRIOR TO TRIAL

A. QUESTIONS PRESENTED

Did the Trial Court properly preclude Defendants from cross-examining Plaintiffs' medical expert, Dr. Spellacy, with medical textbooks which were not disclosed or produced to Plaintiffs prior to trial as ordered by the Court?

Issue preservation pursuant to Supreme Court Rule 8 refers to the preservation of issues by Appellants, not Appellees.

B. SCOPE OF REVIEW

A trial judge has discretion to exercise reasonable control over the mode of the interrogation of witnesses and this Court reviews trial management decisions for an abuse of discretion. *Christiana Care Health Services, Inc. v. Crist,* 956 A.2d 622, 625 (Del.2008). A trial judge is responsible for management of the trial and is vested with broad discretion to perform that function. *Id.* An abuse of discretion occurs when a Court has exceeded the boundaries in view of the circumstances or so ignored recognized rules of law or practice to produce injustice. *Culp v. State*, 766 A.2d 486 (Del. 2001), citing, *Firestone Tire and Rubber, Co. v. Adams*, 541 A.2d 567, 571 (Del. 1988). Reversal of the lower Court's evidentiary decision is warranted only when there is a clear abuse of discretion by the Court. *Culp*, 766 A.2d at 489.

C. MERITS OF ARGUMENT

Plaintiffs specifically requested in discovery the disclosure of all medical literature which would be used in the examination and cross-examination of any witness. Plaintiff raised an objection in the Pre-Trial Stipulation and at the Pre-Trial Conference to use of any medical literature which was not produced or disclosed prior to trial. At the Pre-Trial Conference, the Trial Court properly ordered the parties to produce or disclose to each other all medical literature which may be used at trial.

It is undisputed that Defendants did not disclose to Plaintiffs or the Trial Court that Defendants intended to use the three large textbooks to cross-examine Dr. Spellacy. As much as Plaintiffs Counsel expressed surprise since the textbooks were not disclosed for possible use at trial, the Trial Judge was "a little bit shocked about the arguments that's being made ..." by Defendants regarding the use of the textbooks. (A1006) It should be noted that Defendants' Counsel explained to the Trial Court that he did not understand the Trial Court's order to include medical literature to be used on cross-examination. (A1006) Plaintiffs are not asserting or arguing here that Defendants' Counsel acted with ill intent or motive.

The underlying purpose of discovery in general is to reduce the element of surprise at trial by advancing the time at which disclosure can be ordered from the trial to a time before the trial date. *Empire Box Corp. v. Ill. Cereal Mills*, 90 A.2d

672, 678 (Del.Super.1952). Surprise is a ground for refusing to allow evidence at trial, because the Trial Court has a duty to enforce standards of fairness and the rules of the Court. *Concord Towers, Inc. v. Long*, 348 A.2d 325 (Del.1975).

Here, the Trial Court ordered the parties to exchange any medical literature that would be used during trial. This was the type of information which was requested by Plaintiffs in their Requests For Production of Documents. As the Delaware Superior Court recognized in the context of an employment hearing by a school board, material for cross-examination and impeachment is relevant and must be produced absent a statutory provision preventing discovery. *Ballard v. Board of Educ.of Christina School Dist.*, 1985 WL 188988 (Del.Super.).

Defendants assert that they are not required to disclose impeachment material because a cross-examiner would lose the effectiveness of his punch, citing an opinion of the Illinois Court of Appeals, *Stapleton ex. rel. Clark v. Moore*, 932 N.E.2d 487 (Ill.Ct. App. 2010). First, as noted by the dissent in *Stapleton*, the Illinois Courts have created a potentially inconsistent situation where an expert cannot use or refer to a medical treatise on direct examination because the author of the treatise is not subject to cross-examination, however, that same treatise may be used by opposing counsel in cross-examination even though the author is still not available to be cross-examined in Court.

Second, in Delaware, impeachment material is certainly discoverable and it

is highly doubtful that the Courts would condone the use of statements, medical records, documents, or other evidence for cross-examination if they had never been produced in discovery. *Hoey v. Hawkins*, 332 A.2d 403 (Del.1975). In fact, a Delaware Trial Judge has discretion to determine which modes of impeachment may be used. *Sammons v. Doctors for Emergency Services, P.A.*, 913 A.2d 519, 536 (Del. 2006).

Defendants cite *Jackson v. State*, 770 A.2d 506, 516 (Del. 2000) for support that the Trial Court erred in refusing to allow Defendants to cross-examine Dr. Spellacy using literature which was not disclosed prior to trial. However, the *Jackson* case involved the *Brady* rule in a criminal case, a criminal Defendant's constitutional right to confront a witness, and the Delaware Supreme Court upheld the convictions even when the State inappropriately withheld *Brady* material, because of the abundance of other evidence of guilt of the Defendant.

Likewise, Defendants assert that impeachment evidence need not be disclosed before trial citing the holdings in two criminal cases which are inapplicable to the instant matter. In *McBride v. State*, 477 A.2d 174 (Del.1984), the Delaware Supreme Court held that a criminal defendant could not use Criminal Rule 17(c) as a discovery tool in a criminal case to obtain impeachment evidence of a victim's prior statements from the State for cross-examination before trial, because Rule 17(c) is not a discovery device. In *State v. Block*, 2000 WL 303351

(Del.Super.), a criminal rape case, the Superior Court refused to allow discovery of a victim's school and medical records which were sought by Defendant to prepare for impeachment of the victim at trial. The rationale of those and many other decisions on criminal law rests on the purpose behind longstanding Delaware case law and Court Rules which do not require or permit disclosure of specific materials before trial.

Defendants also seek to find support in the opinion of the Superior Court regarding an Industrial Accident Board appeal in *Eanes v. Peninsula United Methodist Homes*, 1988 WL 77728 (Del.Super.). However, the *Eanes* Court held that the IAB decision was reversed because it failed to require the employer to disclose a written report of a defense expert at any time, even during the hearing. The *Eanes* Court held that discovery, fairness, and the ability of Claimant' counsel to prepare for the hearing and cross-examination of the witness required the production of the report prior to the hearing. In the instant matter, Defendants did the same thing as the employer in *Eanes*, failed to disclose the material (medical literature), although the literature was requested in discovery and disclosure was ordered by the Court.

Here, the Trial Court permitted Defendants to cross-examine Dr. Spellacy using the same questions Defendants wanted to use, just without referring to the literature. (A1022). Defendants claim that the answer of Dr. Spellacy to one of

the multiple questions asked of him was different in front of the jury than during *vori dire*:

- Q. Te Linde's states that: hysterectomy usually is the safest procedure and also the quickest that can be performed for a refractory bleeding. Do you agree with that statement?
- A. Yeah, I would agree it's the quickest but I don't think it's the most satisfactory when you have a young woman who may want more children. (A1016)
- Q. Doctor, do you agree with this statement that a hysterectomy is usually the safest procedure and also the quickest that can be performed for a refractory bleeding?

A: No. (A1023).

First, Dr. Spellacy did not explicitly agree with the statement during *voir dire*, he simply agreed that while a hysterectomy was the quickest procedure, it was not the best option for a young woman such as Plaintiff, and he had previously testified in detail that Dr. McCracken breached the standard of care in performing the hysterectomy. Second, Defendants did not pursue the line of questioning with Dr. Spellacy any further.

The Trial Court did not abuse its discretion in refusing to allow Defendants to use the textbooks to cross-examine Dr. Spellacy on them. The Trial Court properly exercised reasonable control over the conduct of trial with the Pre-Trial orders and with the ruling during trial.

IV. THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION FOR JUDGMENT

A. QUESTIONS PRESENTED

Did the Trial Court properly deny Defendants' Motion for Judgment based upon the testimony of Plaintiffs' medical expert Dr. Speallacy?

Issue preservation pursuant to Supreme Court Rule 8 refers to the preservation of issues by Appellants, not Appellees.

B. SCOPE OF REVIEW

On appeal from the Superior Court's denial of a motion pursuant to Superior Court Rule 50, the standard of review is whether the evidence and all reasonable inferences that can be drawn therefrom, taken in the light most favorable to the nonmoving party, raise an issue of material fact for consideration by the jury. *Russell v. Kanaga*, 571 A.2d 724 (Del. 1990).

C. MERITS OF ARGUMENT

As detailed above, Dr. Spellacy plainly and succinctly testified regarding the breaches in the standard of care by Dr. McCracken and the causation of injuries from those breaches. The breaches in the standard of care by Dr. McCracken included failing to exhaust appropriate conservative measures involving medication, hand compression and massage, and surgical techniques such as Uterine Artery Ligation and B-Lynch procedure.

Significantly, Defendants told the Trial Court twice on the record that they

believed that Dr. Spellacy's testimony precluded Judgment as a Matter of Law on the issue of whether Dr. McCracken negligently failed to exhaust appropriate measures to control the bleeding and avoid the unnecessary hysterectomy. (A1034; A1039) It was not until the close of all evidence that the Defendants reconsidered their position and requested judgment. (A1400)

To grant judgment as a matter of law on a particular issue, the Trial Court must find that there is no legally sufficient evidentiary basis for a jury to find for that party on that issue. *Porter v. Turner*, 954 A.2d 308 (Del. 2008). The testimony of Dr. Spellacy on cross-examination cited by Defendants involved simply a hypothetical and was not specific to Ms. Koss or Dr. McCracken. (A997) Dr. Spellacy agreed that if a physician had done the appropriate conservative measures, used every other technique and was at the end of the line, then a hysterectomy may be required. *Id*.

Contrary to Defendants' argument, Dr. Spellacy never testified that he believed that Dr. McCracken exhausted the appropriate conservative measures, never testified that Dr. McCracken used all techniques and was at the end of the line, and never testified that it was within Dr. McCracken's medical judgment to remove Plaintiff's womb. Dr. Spealley specifically testified to the opposite, that Dr. McCracken breached the standard of care, and if she would have followed it, Plaintiff would still have her womb.

The Trial Court, having heard all of the evidence from all of the experts, including Dr. Spellacy, denied Defendants' Motion for Judgment at the close of all evidence. (1401) The Trial Court confirmed that there was testimony from Dr. Spellacy, if the jury believed it had the more significant weight, that there had been a violation of the standard of care. (A1401) In ruling on the post trial motion, the Trial Court confirmed that while the experts agreed with the general hypothetical proposition advanced by Defendants, the experts disagreed whether the appropriate conservative measures were used by Dr. McCracken prior to taking the drastic step of removing Ms. Koss' womb.

Ultimately, the jury correctly concluded that Defendant was negligent by failing to use the known and available techniques to avoid the hysterectomy during the time periods testified to by Dr. Spellacy. The Trial Court was correct in determining that there was competent evidence to allow the case go to the jury, and to uphold the jury verdict.

V. THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION FOR A NEW TRIAL BASED ON ALLEGED IMPROPER COMMENTS OF COUNSEL IN CLOSING

A. QUESTIONS PRESENTED

Did the Trial Court properly deny the Motion for New Trial based on alleged improper comments of counsel during closing argument?

Issue preservation pursuant to Supreme Court Rule 8 refers to the preservation of issues by Appellants, not Appellees.

B. SCOPE OF REVIEW

A party who fails to object contemporaneously to an improper statement made in closing argument has waived the right to raise the issue on appeal. *General Motors Corp. v. Grenier*, 981 A.2d 531, 541 (Del. 2009). In that instance, the Supreme Court is required to apply a plain error standard to determine if the error complained of was so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. *Medical Center of Delaware, Inc. v. Loughheed*, 661 A.2d 1055, 1060 (Del.1995).

C. MERITS OF ARGUMENT

Defendants never objected to any comments of Plaintiff Counsel in closing argument, never made a post summation objection, and never requested a curative instruction at any point during or even after summation. A party who fails to take any of those steps has waived the right to raise the issue on appeal. *Delaware*

Elec. Co-op, Inc. v. Duphily, 703 A.2d 1202 (Del. 1997). That is because the objecting party must timely object in order to give the Trial Court the opportunity to correct any error. *Medical Center of Delaware, Inc. v. Loughheed*,661 A.2d 1055, 1060 (Del.1995).

Here, Plaintiffs' Counsel did not misstate the law in closing argument.

Delaware law provides that in civil actions, including medical negligence actions, the jury must determine whether the Defendant should be held *accountable* for his or her negligence. *Spicer v. Osunkoya*, 2001 WL 36291589, *5 (Del.Super.), *affirmed*, Spicer v. Osunkoya, 32 A.3d 347 (Del. 2011). The issue of proximate cause is directed to the question whether, considering everything, a Defendant should be held *accountable* for his or her negligence. *Vollendorf v. Craig*, 2004 WL 440418, *2 (Del.Super.). Black's Law Dictionary defines the term "liable" to include the state of being legally *accountable*. Blacks Law Dictionary 925 (7th ed.1999); Blacks Law Dictionary 475 (Abridged 5th ed.1983).

Here, the Trial Court correctly gave the jury various instructions including the fact that the law does not allow the jury to perform its duties with bias or to be influenced by sympathy, prejudice, or public opinion. (A1484) These instructions were given twice, when, at the end of the instructions the Trial Court told the jury that they could not be governed by prejudice, sympathy, or any other motive. (A1505) The jury was instructed that they were to make their decisions based

solely on the evidence.

The comments complained of by Defendants, if improper, do not rise to the level of being so clearly prejudicial to substantial rights so as to jeopardize the fairness and integrity of the trial process in this case. *Lougheed*, 661 A.2d at 1060. The issues of Dr. McCracken's liability were being considered by the jury, and the jury presumably took counsel's closing argument as just that, argument. *Id.* Ultimately, if the Court deems the comments improper, then the comments were brief in the entirety of a long closing argument, and when considered in the context of the entire argument do not amount to the Defendants being seriously prejudiced. *Grenier*, 981 A.2d at 542.

SUMMARY OF CROSS-APPEAL ARGUMENT

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT-BELOW APPELLEE JENNIFER BARLOW, M.D.

CROSS-APPEAL OPENING ARGUMENT

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT-BELOW APPELLEE JENNIFER BARLOW, M.D.

A. QUESTIONS PRESENTED

Did the Trial Court err in finding that Cross-Appellants in granting Summary Judgment to Dr. Barlow, finding that Cross-Appellants did not establish the medical negligence claims against Dr. Barlow.

Plaintiffs preserved this issue below by the following: Plaintiffs' Response to Dr. Barlow's Motion for Summary Judgment (B31-B37); Transcript of the August 15, 2012 Oral Argument in the Trial Court (A157-A162).

B. SCOPE OF REVIEW

The Court reviews decisions on a Motion for Summary Judgment *de novo*. Estate of Rae v. Murphy, 956 A.2d 1256, (Del. 2008). The moving party bears the burden of demonstrating that there is no material fact in dispute and that she is entitled to judgment as a matter of law. Moore v. Sizemore, 405 A.2d 679 (Del.1979). Summary judgment is appropriate only where, viewing the evidence in the light most favorable to the non-moving party, there is no issue as to any material fact. Id.

C. MERITS OF ARGUMENT

Plaintiffs alleged in their Complaint, in part, that Dr. Barlow was negligent performing the C-Section surgery on Ms. Koss including failure to properly suture Ms. Koss' uterus after the C-Section procedure and that Ms. Koss was injured as a result of that negligence. (A022) In a medical negligence action, the Plaintiff must present expert testimony regarding the Defendant's breach in the standard of care and the cause of the alleged injury. *Spencer v. Goodill*, 17 A.3d 552 (Del.2011).

Here, Plaintiffs identified medical expert Dr.Spellacy, who is a well qualified OB/GYN physician. Dr. Spellacy testified in his deposition that Dr. Barlow breached the standard of care by failing to properly suture the incision to Ms. Koss' uterus after the C-Section surgery the cesarean section surgery on April 22, 2010. (A050-A051)

Dr. Spellacy testified that Dr. Barlow was negligent in failing to do a two layer suture of the uterus incision and in using powder instead of suture to attempt to stop continued bleeding of the uterus incision site after the C-Section was performed. (A050) Dr. Spellacy also testified that the failure to properly suture the uterus incision allowed bleeding from that incision site to continue into Ms. Koss' peritoneal cavity. (A050-A051)

When Dr. McCracken opened Ms. Koss' abdomen on May 2, 2010 for the hysterectomy, she found a large hematoma (bleeding) at the uterus incision made and closed by Dr. Barlow during the April 22, 2010 C-Section procedure. (A060) Therefore, Dr. Speallcy opined that Ms. Koss was still bleeding at that uterus incision at the time that Dr. Barlow completed the C-Section surgery. (A060) Dr. Spellacy testified that the failure by Dr. Barlow to properly suture the uterus incision also ultimately caused there to be a hole in Plaintiff's uterus which caused and allowed blood to go from the uterus into Plaintiff's abdominal cavity. (A061)

When the Superior Court considers a summary judgment motion, if it appears that there is any reasonable hypothesis by which the Plaintiff might recover then the motion will be denied. *Vanaman v. Milford Memorial Hospital*, 272 A.2d 718 (Del.1970). Summary judgment is not appropriate when there is a dispute of material fact or a dispute as to the inferences which might be drawn from the facts of the case. *Id.* Issues of negligence and causation are typically fact-intensive determinations that lie within the province of the jury. *Duphilly v. Delaware Electric Electric Co-op, Inc.*, 662 A.2d 831 (Del.1995).

The Trial Court erroneously held that there were no issues of material fact as to the claims against Dr. Barlow. Plaintiffs presented the testimony of Dr. Spellacy who gave the medical opinions as to the negligence of Dr. Barlow and the fact that Dr. Barlow's negligence caused injury to Plaintiff. The injury occurred

by way of independent bleeding of Ms. Koss' uterus at the incision site and by way of the fact that the failed suturing allowed blood to go into Ms. Koss' peritoneal cavity from inside the uterus. It should have been left to the jury to decide whether Ms. Koss sustained injury, which Plaintiffs' expert determined contributed to the blood in Ms. Koss' peritoneal cavity.

CONCLUSION

WHEREFORE, the Appellees respectfully request that this Court affirm the decisions of the Superior Court below, and in the alternative, request the Court to reverse the decision of the Superior Court granting Summary Judgment for Defendant Barlow.

SHELSBY& LEONI /s/ Robert J. Leoni

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