IN THE SUPREME COURT OF THE STATE OF DELAWARE

PATRICK SWIER, M.D. and PATRICK SWIER, M.D., P.A. Defendants Below, Appellants, v. PATRICIA A. MCLEOD, Plaintiff Below, Appellee.	)))))))))))	 No. 332, 2016 Court Below: C.A. No. S12C-07-004 MJB

APPELLEE'S ANSWERING BRIEF

ROGER D. LANDON, I.D. No. 2460
PHILIP T. EDWARDS, I.D. No. 4393
MURPHY & LANDON
1011 Centre Road, Suite 210
Wilmington, DE 19805
302.472.8100
Attorneys for Plaintiff

Date: October 14, 2016

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NATURE OF PROCEEDINGS

Unhappy with the results of their own trial strategy, defendants Patrick Swier, M.D. and his medical practice have appealed the judgment in this complex medical malpractice action that the parties litigated in the Superior Court over several years, and tried to a jury for almost two weeks. Despite the fact that most, if not all, the evidence in this case was put before the jury by agreement and without objection, defendants now ask this Court for a second bite at the apple, because defendants surmise that this adverse verdict could have only resulted from the alleged prejudicial nature of plaintiff's counsel's closing argument, as opposed to the evidence. Defendants ask this Court to ignore the mountain of un-objected to evidence in this case that proved defendants' outrageous conduct in performing an unnecessary surgery on the plaintiff Patricia McLeod resulting in severe and debilitating injuries. Defendants want this Court to solely focus on plaintiff's closing argument; as if plaintiff's closing argument took place in a vacuum. Defendants' strategy at trial waived most of its arguments on appeal, but even if these arguments were not waived, plaintiff's closing argument, while admittedly damaging to defendants' case, was completely supported by the evidence in this matter and was not unfairly prejudicial to the defense mandating a retrial. This was a well-executed and efficient trial, conducted by veteran trial counsel on both

sides, and presided over by an experienced and engaged trial court. The verdict is well supported by the evidence and should stand.

Plaintiff filed her Complaint on July 3, 2012 and her Amended Complaint on October 2, 2012. (A25 –A59). The Complaints alleged defendants improperly performed nine surgical procedures on plaintiff when her prior diagnostic testing did not indicate the need for surgery. (A55, A56). In short, plaintiff alleged defendants breached the standard of care by performing an unnecessary elective surgery on the plaintiff through manipulation and unreliable testing.[1] (A142-A143). Plaintiff relied on the expert testimony of Raymond Dunn, M.D. and Richard Bird, M.D. to support her allegation that these nine procedures were not only overly aggressive in their nature, but completely unwarranted given her physical presentation and diagnostic findings. (A256) (A386) (A394).

The parties proceeded through a normal course of discovery. Not a single contested or uncontested motion was filed during discovery. No summary judgment motions were filed. The parties presented the trial court with a joint pre-trial stipulation and any evidentiary disputes that remained, of which there were few, were worked out amongst the parties and the trial court prior to trial. (A1-A10, A66-A80). Trial began on December 1, 2014 and ended on December 10,

[1] Admittedly, proving that a physician performed unnecessary surgery on a patient by a preponderance of evidence is an extremely high hurdle to meet, but the evidence in this case emphatically established defendants' culpability in performing this unnecessary surgery with disastrous results. Plaintiff's Complaints sought compensatory damages for defendants' outrageous conduct, which breached the standard of care.

2014. (A81, A1385-A1433). As contemplated, the evidence was presented to the jury in an efficient manner with few objections by the parties. Any evidentiary disputes were minor in nature and expeditiously resolved by the trial court.

On December 10, 2014, the parties presented closing arguments to the jury. During plaintiff's closing argument, the defendants made a single objection to the plaintiff's counsel using the terms "enough is enough" and "the voice of the community." (A1320 –A1322). The trial court sustained the objection at sidebar and provided a curative instruction to the jury. (A1322). Plaintiff's closing argument proceeded without further objection from defendants or interruption from the trial court. (A1314 – A1348). Defendants made no objections to plaintiff's closing argument at its conclusion. (A1348, A1349). Defense counsel then put forth his closing argument and the plaintiff put forth her rebuttal. (A1349 –A1384). There were no objections made during either defense counsel's closing argument or plaintiff's counsel's rebuttal argument. (A1349 –A1384). The trial court then read the jury instructions. (A1386 – 1401). No exceptions were taken to the charge. (A1406). The jury began its deliberations late in the day on December 10, 2014. At 5:00 p.m. on December 10, 2014, the jury was sent home and charged to return the following day to continue its deliberations. (A1405). The jury returned at 9:00

a.m. on December 11, 2014 and returned a verdict in favor of the plaintiff at 1:00 p.m. that afternoon.[2] (A1443-A1447).

With no adverse summary judgment or evidentiary rulings to support appellate review, defendants' sole focus on appeal is that plaintiff's counsel made alleged prejudicial statements in his closing argument.[3] (OB.). Although defendants made only one objection during plaintiff's closing argument, which was sustained and a contemporaneous curative instruction issued, defendants now assert that the vast majority of the remainder of the argument so prejudiced defendants that they were deprived of a fair trial. (OB.). Nothing could be further from the truth. Defendants did not make contemporaneous objections to plaintiff's closing argument, because the argument was not objectionable. Plaintiff's argument was based on the evidence that established the defendants performed an unnecessary surgery on the plaintiff resulting in severe and debilitating injuries. The evidence also revealed defendants' records were rife with outright falsehoods designed to manipulate plaintiff into surgery and ensure payment from her

[2] Defendants' assertion that the jury's roughly five hour deliberation over two days somehow supports their claim that counsel's closing was prejudicial is nonsensical. In fact, the trial court instructed the jury that there was no minimum or maximum amount of time for them to render their verdict. (A1404 – A1405).

[3] Defendants attempt to attack plaintiff's closing argument by taking words and phrases out of context in an attempt to mischaracterize the context and demeanor of plaintiff's closing argument on this cold appellate record. This tactic was debunked by the trial court, who was present for the entire proceedings and has a firm grasp of how plaintiff's closing argument was actually delivered and received in the courtroom. (Ex. A. to OB (Trial Court's January 27, 2016 Order denying Defendants' Motion for a New Trial)).

insurance company. (A1054 -1059). It was the totality of the evidence, mainly consisting of defendants' own records, which caused the jury to render its verdict. Plaintiff's closing argument simply brought this damning evidence to the jury's attention, and plaintiff vehemently argued the evidence supported a verdict in favor of the plaintiff. The jury found defendants' outrageous conduct breached the standard of care and rendered a verdict in favor of the plaintiff.[4] (A1596).

Unsatisfied with the Superior Court's decision that the jury's liability determinations were reasonable and consistent with the evidence, defendants seek a redo in this Court.

[4] The evidence established, and Plaintiff argued, that defendants' conduct was outrageous and breached the standard of care, which entitled the plaintiff to compensatory damages. There is no requirement that the plaintiff seek punitive damages for outrageous conduct. The facts speak for themselves.

SUMMARY OF ARGUMENT

1. DENIED. The Superior Court did not err when it denied defendants' motion for a new trial. Plaintiff's counsel did not make improper, irrelevant and inflammatory comments in closing argument that prejudiced defendants.

COUNTER STATEMENT OF FACTS

Ms. McLeod's History of Negative Diagnostic Testing

In September 2009, plaintiff Patricia McLeod ("Ms. McLeod") presented to defendants Patrick Swier M.D. ("Dr. Swier") and his practice with complaints of an ache in her left knee and an occasional tingle in a couple of toes of her left foot, which she only felt when she would go to bed. (A699). Prior to seeing Dr. Swier, Ms. McLeod underwent a NCS/EMG (Nerve Conduction Study/Electromyogram) of the left leg on March 24, 2008.[5] (B01). Dr. Ricard Bird performed the March 24, 2008 NCS/EMG.[6] (B01). Dr. Swier himself agreed the EMG was the Gold Standard for evaluation of myelinated large fibers (A1006). The results of the March 24, 2008 studies were: "Normal study. No evidence of focal compressive neuropathy, generalized peripheral neuropathy or lumbar radiculopathy." (B01). In laymen's terms, the study did not find any muscle or nerve damage.

On September 18, 2008, Ms. McLeod underwent MRI's of her lumbar and cervical spine.[7] (A235-A236) (B02). The cervical and lumbar MRI results were negative for any conditions that could have caused the symptoms Ms. McLeod was

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[5] Nerve Conduction Studies measure how well and how fast nerves can send electrical signals. An EMG measures the electrical activities of muscles. These tests are performed by medical doctors trained in these procedures to determine if damage has occurred to an individual's muscles or nerves. These tests are the standard of care in assessing and treating muscle and nerve damage. (A234-A235). EMGs are the standard of care to assess nerve injury. (A388).

[6] Dr. Richard Bird is a board certified neurologist located in Salisbury, M.D.

[7] The purpose of these studies was to determine whether conditions in either Ms. McLeod's neck or back were causing the symptoms she was experiencing in her foot. (B01).

experiencing in her left leg and foot. (A235-A236) (B02). Ms. McLeod then underwent an MRI of her left knee on July 23, 2009.[8] The results of Ms. McLeod's left knee MRI were unremarkable. (B03). On September 16, 2009, Ms. McLeod underwent a second NCS/EMG performed by Michael H. Mark, M.D. The result of the EMG performed by Dr. Mark was again normal. (B05).

Dr. Swier and the Pressure Specified Sensory Device (PSSD)

Dr. Swier is a plastic surgeon with an office in Lewes, DE. (A25-26, A50-A51). Dr. Swier represents himself to the public as a surgeon for not only traditional aesthetic plastic surgery but also a surgeon with an expertise in peripheral nerve surgery. (A915-A917). Dr. Swier's website advertised how his peripheral nerve surgeries can prevent the need for amputations. (A1063, A1064).

Dr. Swier trained under a plastic surgeon named A. Lee Dellon, M.D. (A277) (A922-A924). Dr. Dellon invented a device called the pressure specified sensory device ("PSSD"). (A922-A924). The PSSD is a computer-based device that attempts to measure the amount of pressure required for a person to determine if one or two rounded objects were in contact with that skin's surface. (A935-A936) (A240-A242).[9] The PSSD should never be used as the sole diagnostic

[8] MRI's are interpreted by board certified radiologists. (B02) (B03).
[9] In basic terms the PSSD is a computerized two-point discrimination test. (A936) (A240-A242). Two-point discrimination is the ability to discern that two nearby objects touching the skin are truly two distinct points, not one.

criterion as the basis for surgery. (A241-A242) (A387). The PSSD is not conducted by a physician or registered nurse. (A336-A339).

Dr. Swier and Patricia McLeod

Patricia McLeod presented to Dr. Swier for the first time on September 9, 2009 with symptoms in her left lower extremity. (B04) (A942) (A709-A710). Dr. Swier was aware that Ms. McLeod's multiple prior NCSs/EMGs and MRIs of her left knee, back and neck were all negative (B04) (A946-A947). Dr. Swier performed a physical exam of plaintiff and scheduled her for a PSSD test in his office. (B04) (A713-A714). On October 16, 2009, Dr. Swier's non-medically trained assistant Lisa Howard performed a PSSD test on Ms. McLeod's left and right legs. (A347) (A355-A362). [10] Dr. Swier ordered no further diagnostic testing of Ms. McLeod.

Dr. Swier surmised from the PSSD test results performed by his non-medically trained assistant that Ms. McLeod was suffering from severe nerve damage in both her legs.[11] (A959-A963) (A715). Based on a single visit and the PSSD test results, Dr. Swier decided Ms. McLeod needed aggressive peripheral

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[10] Dr. Swier's assistant had no medical degrees and had worked in a hotel prior to working for Dr. Swier. (A340).

[11] This a significant fact in this matter, not just because no prior diagnostic study found any damage to any of Ms. McLeod's nerves and Dr. Swier's PSSD test performed by his assistant found severe nerve damage, but also because Ms. McLeod's right leg was completely asymptomatic. (A963-A964) (A714-A715). There is nothing indicating Ms. McLeod had any symptoms in her right leg prior to seeing Dr. Swier, yet the PSSD test found severe nerve damage in both legs. (A960-A964) (A240-A243) (A714-A715).

nerve surgery in both her legs. (A963-A969) (A715-A717). Ms. McLeod was hesitant to undergo surgery, but Dr. Swier's pitch was as calculated as it was terrifying. (A715-A716). In their meeting to discuss the PSSD test results, Dr. Swier pulled his stool close to Ms. McLeod and told her that the results of her PSSD test were extremely distressing and that if she did not have surgery immediately in both her legs, she would suffer permanent nerve damage. (A716-A717). Dr. Swier convinced Ms. McLeod she needed surgery. (A717-A718).

Amazingly, Dr. Swier first wanted to do surgery on Ms. McLeod's right leg, which was completely asymptomatic. (A717-A718) (B06).[12] Dr. Ducic, Dr. Swier's own expert, testified that performing surgery on an asymptomatic leg would be a breach of the standard of care. (A1251). Ms. McLeod objected to first performing surgery on her right leg because she had no symptoms in her right leg. (A717-A718). Dr. Swier capitulated and agreed to do surgery on Ms. McLeod's left leg first, but left open the idea that he would conduct surgery on her right leg in the future. (A718).

On April 5, 2010, Dr. Swier performed nine separate surgical procedures on Ms. McLeod's left leg with disastrous results. (B07-B10). In the weeks and months following the April 5, 2010 procedures, Ms. McLeod began experiencing

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[12] In describing the surgery he intended to perform on April 5, 2009 on Ms. Mcleod in his Surgical Justification Form, Dr. Swier indicates "Neuroplasty/nerve release of the right CPN, SPN, DP, TT (4 tunnels), PTN 2 soleu sling, with internal neurolysis using 3.5 x loop magnificantion. (B06).

severe pain, numbness, tingling and foot discoloration resulting in the diagnosis of Complex Regional Pain Syndrome ("CRPS") at John Hopkins Medical Center on March 23, 2011.[13] (B11). Ms. McLeod then began to treat with Dr. Enrique Aradillas for her CRPS. (A178) Dr. Aradillas testified at trial that Ms. McLeod's CRPS in her left leg was caused by Dr. Swier's April 5, 2010 surgery and that her CRPS would be a permanent crippling injury. (A194-A195) (A212). Defendants made the tactical decision not to elicit any expert testimony contradicting or even counterbalancing Dr. Aradillas' causation opinion.

During this postoperative period, while Ms. McLeod's medical condition was rapidly deteriorating, Dr. Swier continued to press Ms. McLeod to undergo another surgery on her asymptomatic right foot. (A734-A735). Faced with worsening CRPS in her left foot, Ms. McLeod sought a second opinion from a neurologist in Salisbury, MD, Dr. Bird, about Dr. Swier's continued insistence that she still needed surgery in her asymptomatic right leg. (A391-A392). Dr. Bird strongly advised against any surgery on her right leg. (A392-A393). Ms. McLeod heeded Dr. Bird's advice and never returned to Dr. Swier. (A735).

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[13] Complex regional pain syndrome (CRPS) is a pain condition most often affecting one of the limbs, usually after an injury or trauma to that limb. CRPS is believed to be caused by damage to, or malfunction of, the peripheral and central nervous systems. (A178).

The Operative Justification Form

In order to ensure payment from Ms. McLeod's insurance company, Dr. Swier generated a document titled the Operative Justification Form. (A1054-A1059) (B06). This document established that Dr. Swier submitted false information to Ms. McLeod's insurance company to ensure payment for Ms. McLeod's surgery that would not have otherwise been justified without these falsehoods. (A1054 –A1059).

Dr. Swier's testimony concerning the false information in his Operative Justification Form further established his outrageous conduct in performing an unnecessary surgery on Ms. McLeod and the lengths to which he went to make sure he got paid for it:

Q. Let's talk about your operative justification form.
A. Okay.
Q. The date of service in the top is listed as 4/5/10. That was the date of the surgery; correct?
A. That's correct.
Q. Mr. Galperin went over a couple of these things with you. I want to ask you a couple of more questions.
A. Okay.
Q. You've already told us that this was a template and then you modify it for the particular patient?
A. That's right.
Q. Failed conservative treatment is listed as one of the justifications for doing the operation?
A. That's right.
Q. The actual information under here is, in large part, not true; correct?
A. Well, some of it is not true because I should have crossed out physical therapy since, after researching, I found out that she did not have physical therapy.

Q. All right. Blood sugar control, that wasn't an issue with this patient because she was not diabetic; correct?

A. That's—yeah, she was not diabetic and blood sugar control was not really an issue on any of her blood sugar tests.

Q. Okay. So there hadn't been a course of treatment where you were trying to control her blood sugar in order to deal with her neuropathy that you thought she had and that, you know—

A. That's right.

Q. -- that didn't work?

A. That's right.

Q. That doesn't even apply here?

A. There is a –there's usually a – sort of general warning to every patient—diabetics and non-diabetics—and say, you know, remember that sugar and alcohol can hurt your nerves and you should stay away from it.

Q. Under, failed conservative treatment, there's an indication here that arch support was tried and that failed. That never happened, did it?

A. She went to see a podiatrist, but you're absolutely right, that I'm not 100 percent sure she, indeed, had arch support—

Q. Okay.

A. -- but not everybody needs arch support.

Q. So that's a – that's actually an incorrect or a false entry in this particular medical records? It's just not true.

A. It should have been, seen by a podiatrist, yes.

Q. Okay. Steroid injections. She never had any steroid injections—

A. She—

Q. -- to try to treat the neuropathy problem, did she?

A. She did not have steroid injections.

Q. Okay. So again, this medical record that appears in her chart and has this information in it is just false? It's not true.

A. As I said, the steroid injections and the physical therapy should have been crossed out, yes—

Q. Okay. So—

A. -- and I'm sorry.

Q. And she never had any physical therapy. Nobody tried that; right?

A. She did not have physical therapy. That's right.

Q. Okay. Medications, including Neurontin. She never had Neurontin prior to this for this problem, did she?

A. She had Celexa.

Q. She never had Cymbalta for problems in her leg prior to this, did she?

A. Yes—no, she had Celexa.

Q. And she never had—is Celexa a pain medication?

A. No.

Q. Okay. So she never had pain medication either, did she?

A. She had Naprosyn, but it's over-the-counter pain medication.

Q. Okay. So the—of the failed conservative treatment that you agree reasonably prudent and careful surgeons would do for a person with peripheral neuropathy before going to surgery, she didn't have any of that?

A. She had not all of it. That's true.

Q. Is this operative justification form another form that might be looked at by the pay-or-no-pay decider at the insurance company when they're trying to decide whether to pay for your surgery or not?

A. I don't know, but it's—in the surgery centers and the operating room, we use checklists like pilots do before they take off in airports and everything now is time-outs, checklists, and this is one of them and that's all to enhance patient safety.

Q. Under the reasons for proposed surgery—

A. Yes.

Q. -- one of the things that it says is, increasing number of falls and difficulty with balance. Do you see that?

A. Yeah, she did not have any falls that I am aware of.

Q. Okay. So that's another piece of information in her medical record that is just not true?

A. It should have been crossed out, yes.

(A1054 -A1059).

Contrary to defendants' position that it was plaintiff's closing argument that unfairly maligned Dr. Swier as an opportunist and a liar, it was Dr. Swier's own testimony and records that established these traits. Plaintiff's closing argument simply highlighted this evidence for the jury as any effective and compelling closing should do under those circumstances. To somehow ignore or white wash the evidence of Dr. Swier's outrageous conduct would have been unconscionable.

The Verdict

After several years of litigation, almost two weeks of trial and roughly five hours of deliberations spanning two days, the jury returned a verdict in favor of plaintiff in the amount of $3,425,515.00. (A-1596). The verdict was more than one million dollars less than plaintiff's claimed special damages.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR A NEW TRIAL.

A. Question Presented

Whether the Superior Court abused its discretion when it found plaintiff's counsel's statements in closing arguments did not prejudice defendants warranting a new trial?

B. Scope of Review

The Court's standard of review for appeals from a ruling denying a motion for a new trial is the stringent "abuse of discretion" standard. *Strauss v. Biggs*, 525 A.2d 992, 996-97 (Del. 1987). To find an abuse of discretion, there must be a showing that the trial court acted in an arbitrary and capricious manner. *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968).

Where a party fails to object at trial, the issue may only be reviewed on appeal under a "plain error" standard. *Delaware Bay Surgical Services, P.A. v. Swier*, 900 A.2d 646, 650 (Del. 2006). Plain error exists where "the error complained of [is] so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 832 (Del. 1995) (internal quotations omitted).

C. **Merits of Argument**

Defendants' sole argument on appeal is that plaintiff's counsel made improper, irrelevant and inflammatory comments in summation that significantly prejudiced defendants, warranting a new trial.

To begin with, the statements defendants complain of must be broken down into two categories: (1) Defendants' counsel's single objection to plaintiff's counsel's reference to the phrase "enough is enough" when speaking about the jury being the conscience of the community; and (2) the remainder of plaintiff's counsel's statements in his closing that were unobjected to by defendants. The former, which was the subject of a curative instruction, must be reviewed from an abuse of discretion standard, while the latter must be reviewed from a plain error standard. *Strauss*, 525 A.2d at 996-97; *Duphily,* 662 A.2d at 832 (Del. 1995).

Defendants' objection to plaintiff's counsel statement that the jury "as the conscience of the community" should say "enough is enough" was sustained by the trial court. (A1320-A1322). In sustaining the objection, the trial court asked how the defendants would like to handle the situation. (A1320). Defendant requested a curative instruction, and the following curative instruction was ultimately issued to the jury:

> Ladies and gentlemen of the jury, your job in this case is to render a verdict that is fair and impartial to both parties on the evidence presented and the law as I instruct you. It is not to be a voice of the community, rather, to decide

> this case regardless of any consequence, on the facts and law. Okay? (A1322).

With all parties satisfied with the trial court's instruction, plaintiff's counsel's summation continued with no further objection. (A1322 – A1348).

"Trial judges are in the best position to observe the impact of improper statements at the time they are made, to determine the extent to which they may have affected the jury or the parties, and to remedy any ill effects." *Thompson v. State*, 2005 Del. LEXIS 423, *9-10 (Del. 2005). This Court has found, in numerous cases, that prompt curative instructions can negate any prejudice to a defendant's rights. *Id.*

The trial court's curative instruction cured any negative impact plaintiff's counsel's statements may have had on the jury in this regard. As such, these statements made by plaintiff's counsel in his closing in no way warrant a new trial in this matter and do not fail the test established in *Hughes*.[14]

Defendants' remaining complaints about plaintiff's closing were waived unless plain error exists. Superior Court Civil Rule 46 "requires counsel to state his objection to anything taking place during the trial, and his failure to do so prevents him from urging the point on appeal." *Hamilton v. Wrang*, 221 A2d 605 (Del. 1966); *Delaware Superior Court Civil Rule 46*. In the absence of plain error,

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[14] In determining the effect of a comment on the jury, the trial court applies the following *Hughes* test: (1) the closeness of the case, (2) centrality of the issue affected by the error, and (3) the steps taken in mitigation. *Jardel v.Hughes*, 523 A.2d at 532 – 33.

a party's failure to object or take exception to an issue during trial amounts to waiver of that objection. *Mumford & Miller Concrete, Inc. v.Burns*, 1996 WL 376942 (Del.).

> A party must timely object to improper statements made during closing argument in order to give the trial court the opportunity to correct any error. We recognize that, for strategy reasons, counsel may choose not to object to a misstatement made in an opponent's closing remarks, but failure to object generally constitutes waiver of the right subsequently to raise the issue. Cline v. Prowler Industries of Maryland, Inc., 418 A.2d 968, 1060 (1980) (citing Lawrence J. Smith, *Art Advocacy: Summation*, § 2.23.)[15]

The only exception to this general rule that defendants waived their objections to statements made in plaintiff's summation because it did not timely object during or immediately after plaintiff's summation is if plain error exists. *Mason v. State*, 658 A.2d 994, 996 (1996). Statements made during closing arguments only amount to plain error where "the error complained of is so prejudicial to substantial rights as to jeopardize fairness and integrity of the trial process." *Robertson v. State*, 596 1345, 1356 (Del. 1991) (quoting *Wainwright v. State*, 504 A.2d 1096, 110 *cert. denied*, 479 U.S. 869; *Medical Center of Delaware, Inc. v. Lougheed*, 661 A.2d 105, 106 (Del. 1995) (internal citations omitted)("failure to object generally [to statements in closing argument] constitutes waiver of the right to subsequently

[15]Defendants cite to *Delaware Elec. Coop. v. Duphily*, *Gitsham-Feanv v. Miles*, *McNally v. Eckman*, *Nishihama v. City Counsel of San Francisco* and *Walker v. State* in support of their motion, but in each of these cases the motion for a new trial was denied.

raise the issue, unless plan error exists.) The plain error standard is an extremely high standard to meet.

The trial court's conduct at trial does not even come close to amounting to plain error. Further, the trial court's denial of defendants' new trial motion was well founded and supported by the evidence.

Above all else, the trial court recognized the well-established Delaware principle that a jury verdict is entitled to enormous deference. (Ex. A. to OB (Trial Court's January 27, 2016 Order) at 6); *Crist v. Connor*, 2007 WL 2473322, at 1 (Del. Super. Aug. 31, 2007) (quoting *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997)). The trial court was correct to find that "unless 'the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result' or the Court is convinced that the jury disregarded applicable rules of law, or where the jury's verdict is tainted by legal error committed by the Court during the trial" the verdict must be upheld. *Mitchell v. Haldar*, 2004 WL 1790121, at 3 (Del. Super.)(quoting *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1977)).

The trial court went to great lengths to ensure that the jury understood that this matter was to be decided on the evidence and the law. Several jury instructions were given stating that the jurors were judges of the facts, that statements made during jury summations were not evidence and that their decision should only be based on the facts and the law and not on sympathy. *Del. P.J.I.*

Civ. §3.2.; Del. P.J.I. Civ. § 3.3; Del. P.J.I. Civ. § 23.9; Del, P.J.I. Civ. § 24.1. Unable to point to any adverse summary judgment or evidentiary rulings, defendants' anemic appellate arguments focus solely on statements made by plaintiff's counsel, without acknowledging the evidence of defendants' outrageous conduct or that the trial court expressly instructed the jury that:

> What the attorneys say is not evidence. . . . What an attorney personally thinks or believes about the testimony or evidence in a case is not relevant, and you are instructed to disregard any personal opinion or belief offered by an attorney concerning testimony or evidence.
> (A-1774) (quoting Del. P.J.I. Civ. § 3.3).

Defendants' insistence that the verdict could only be the result of bias and prejudice against Dr. Swier is unfounded. If looked at from a common sense perspective, the jury's verdict was actually about $1 million less than the amount plaintiff boarded in special damages. If the jury was so inflamed and prejudiced against Dr. Swier by comments like "enough is enough" and wanted to send a message or punish Dr. Swier, the verdict would have been much higher.

As the trial court found, the principle reason why defendants' complaints about statements made in plaintiff's summation fail is that the statements were either directly supported by the evidence or reasonable inferences from the evidence. *Banther v. State*, 977 A.2d 870, 874 (Del. 2009) (the trial court is in the best position to assess risk of prejudice resulting from trial events.) It is within the province of the jury to make reasonable inferences from the evidence. *Rentz v.*

Ford, 1990 Del. Super. Lexis 192, *3-5 (Del. Super. 1990); *Williams v. Manning*, 2009 Del. Super. Lexis 498 (Del. Super. 2009)(citing *Jardel Co. Inc. v. Hughes*, 523 A.2d 518(Del. 1987) (finding the jury is entitled to make all reasonable inferences from the evidence.) The evidence of Dr. Swier's outrageous conduct was damning and plaintiff's summation was founded on this evidence.

Defendants first complain about plaintiff's counsel's use of common everyday sayings such as "that's nuts" or "this is insanity" and that Dr. Swier acted in an outrageous manner. As the trial court correctly noted, plaintiff's counsel did not call defendants "nuts" or "insane." (Ex. A. to OB at 8). Plaintiff's counsel was merely saying that performing surgery on an asymptomatic leg would be insanity.[16] (A392). While Dr. Swier's own expert, Dr. Ducic, did not use the word "insane" when testifying about Dr. Swier's insistence on operating on Ms. McLeod's asymptomatic right leg. Dr. Ducic did testify that operating on an asymptomatic leg was a breach of the standard of care.[17] (A1251). Further, Dr. Swier's conduct of manipulating Ms. McLeod into an unnecessary surgery and falsifying records to make sure he got paid for it was outrageous conduct. (A1054 -1059). The trial court correctly determined that the use of these statements was not improper.

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[16] These sayings are acceptable forms of argument that allowed counsel to zealously argue their position in an understandable manner. Common sayings from our vernacular do not cloud the facts; they paint them in a perspective that is easily understandable.

[17] All the evidence in the case, including Dr. Swier's testimony and common sense, support the notion that performing surgery on an asymptomatic leg is insanity. If the jury formed a negative opinion of Dr. Swier, it was based on this evidence and not on the arguments of counsel.

Defendants next take issue with the fact that plaintiff argued Dr. Swier "scared" Ms. McLeod into surgery, but this was the evidence. Ms. McLeod testified that Dr. Swier pulled his chair up close to her to show her the dire PSSD results, and Dr. Swier told her that if she did not have immediate surgery in both legs she would suffer permanent debilitating nerve damage. (A716-A717). Ms. McLeod testified that this scared her into having the surgery. (A720-A721). Once again, plaintiff's argument in this regard was directly supported by the evidence and was not improper, as found by the trial court. (Ex. A. to OB at 8 -11).

Defendants next take issue with plaintiff's reference to Dr. Swier's Operative Justification Form as containing "false information" and was a "lie." These arguments were again supported by the information contained in the document itself, and Dr. Swier's admissions regarding the false information. (A1054 -1059). The form, which Dr. Swier uses to justify the surgery to the insurance company to get paid, stated that Ms. McLeod "failed conservative treatments" warranting surgery. (B06). The form then goes on to list all the conservative treatments she allegedly underwent prior to surgery. (B06). But, based on the medical records, the testimony from the experts and Dr. Swier himself, Ms. McLeod underwent no conservative treatment prior to the surgery. (A1043-1059). The evidence, once again, conclusively showed much of the information Dr. Swier used to justify the surgery was false. Therefore, plaintiff's reference to "false" information was

supported by the evidence and needed to be argued to the jury as such. The trial Court correctly found that these statements were proper and supported by the evidence. (Ex. A. to OB at 8 -11).

Defendants next complain of plaintiff's statements in summation concerning Dr. Bird's, Ms. Mcleod's treating neurologist, demeanor at trial. Defendants, once again, torture plaintiff's counsel's statements and take them out of context in this regard. Here is what plaintiff's counsel actually said:

> Dr. Bird, from Salisbury, was there any witness in this case who was more adamant than Dr. Bird about the fact that this Dr. Swier breached the standard of care by doing the surgery? I don't know if you were able to discern or detect the level of conviction and outrage that Dr. Bird feels about what Dr. Swier did to this patient, their joint patient, and it's a rare—it's a rarity when a doctor from the same community will come in and criticize another doctor and Dr. Bird was willing to do that and he did it. He believes that to the depth of his soul. (A1341).

As shown, Plaintiff's argument was not commenting on Dr. Brid's credibility as a witness but rather his demeanor. Counsel merely highlighted Dr. Bird's testimony, his demeanor and his professional background, and asked the jury to make its own determination as to the credibility of his testimony.[18] As the trial court found, this was not an improper argument, let alone plain error. (Ex. A. to OB at 13).

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[18] Counsel's comments are consistent with Del. P.J.I. Civ. § 23.9 (2000), which was read to the jury and states "(y)ou are the sole judges of each witness's credibility. That includes the parties. You should consider each witness's means of knowledge; strength of memory; opportunity to

Further, the trial court properly distinguished *DeAngelis* and *Robelen* from the instant matter. (Ex. A. to OB. at 13). In both those cases, counsel improperly suggested the trial court had somehow validated a party's case through some type of court ruling. *DeAngelis v. Harrison*, 628 A.2d 77 (Del. 1993); *Robelen Piano Co. V. DiFonzo*, 169 A.2d 240 (Del. 1961). That is not the case here. Plaintiff's argument merely commented on Dr. Bird's demeanor, which was proper for argument.

Defendants next complaint is that plaintiff somehow shifted the burden of proof to defendants by referencing defendants' trial tactic of not putting forth expert testimony disputing plaintiff's causation evidence. Once again, the trial court correctly found that merely stating a party failed to call an expert witness does not shift the burden of proof. (Ex. A. to OB. at 13); *Benson v. State*, 636 A.2d 907, 910 (Del. 1994) (holding argument about the absence of an available witness does shift the burden of proof.) The very essence of closing argument is to highlight the weaknesses of an opposing party's case and that is what plaintiff's

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observe; how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witness's biases, prejudices, or interests; the witness's manner or demeanor on the witness stand; and all circumstances that, according to the evidence, could affect the credibility of the testimony.
If you find the testimony to be contradictory, you must try to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if you can't do this, then it is your duty and privilege to believe the testimony that, in your judgment, is most believable and disregard any testimony that, in your judgment, is not believable."

counsel did here. Further, the jury was read the following clear and unambiguous jury instruction that the burden of proof rested solely with the plaintiff:

> "In a civil case such as this one the burden of proof is by a preponderance of the evidence. Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not. Preponderance of the evidence does not depend on the number of witnesses. If the evidence on any particular point is evenly balanced, the party having the burden of proof has not proved that point by the preponderance of the evidence and you must find against the party on that point.
> In deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all the exhibits introduced into evidence, regardless of who produced them.
> In order to prevail against the defendant, the plaintiff must prove all the elements of her claim against the defendant by a preponderance of the evidence. Those elements are as follows:
> 1. That the defendant breached the applicable standard of care.
> 2. That any breach of the standard of care was the proximate cause of the claimed injury.
> 3. The nature and extent of any damages claimed by the plaintiff."
> (A1388-A1390); Del. P.J.I. Civ. § 4.1 (2000).

Defendants' regret over their trial strategy is no basis for overturning a jury verdict after a lengthy trial based on proper, relevant, and admissible evidence. *Beebe Medical Center, Inc. v. Bailey*, 913 A.2d 543, 555 (Del. 2006) ("In the end, [defendant] chose to try the case the way they did, and as a result, waived any opportunity to contest the scope of [the arguments] on this appeal.") Defendants'

trial tactic of not putting forth an expert on causation was readily apparent to everyone in the courtroom, including the jury. Plaintiff's counsel's comments pointing out this glaring weakness in defendants' case was fair game and proper argument, as found by the trial court. (Ex. A. to OB. at 14).

The trial court also properly determined that plaintiff's second reference to "enough is enough" after a previous sustained objection to that phrase was not an improper argument for punitive damages and was stated in a different context from its initial utterance. (Ex. A. to OB at 15 -16). Plaintiff's counsel never suggested the jury should punish defendant for his outrageous conduct. The phrase was merely a plea for a finding of liability against the defendants based on the evidence.

Defendants rely on the holdings of *Nishihama* and *Gafney* that plaintiff's argument that "enough is enough" was somehow a request for punitive damages warranting a new trial, but defendants' reliance on those cases is misplaced. (OB. at 21). Both cases dealt with the phrase "send a message." *Nishihama v. City and County of San Franciso,* 93 Cal.App.4th 298 (2011); *RJ Reynolds Tobacco Co. v. Gafney*, 188 S. 3d 53, 58 (Fla. Dist. Ct. App. 2016). Here, plaintiff's counsel did not ask the jury to send a message or punish the defendants as in *Nishihama* and *Gafney.* Further, the *Nishihama* court found that the party's assertion for the jury to "send a message," when read in context, was more of a plea for liability as

opposed to punitive damages in denying defendants' motion for a new trial. *Nishihama*, 93 Ca.App.4th at 304 -305. While the *Gafney* court did grant a new trial for counsel's plea for the jury to "send a message," it is distinguishable from the facts here. *Gafney*, 188 S. 3d 53. Once again, here, plaintiff's counsel never asked the jury to send a message or punish the defendants as in *Gafney*. The comments in *Gafney* were also the subject of a contemporaneous motion for a mistrial when the comments were uttered and reviewed at the appellate level under an abuse of discretion standard, as opposed to a plain error standard. *Id.* Here, when counsel said "enough is enough" a second time there was no objection and it was a plea for a liability verdict based on the evidence of defendants' outrageous conduct. (A1324). *Gafney* is clearly distinguishable from this matter. The trial court again found plaintiff's argument that "enough is enough" was proper when read in context.

Defendants then really go out a limb when they argue that plaintiff's summation somehow accused defense counsel of manipulating evidence and acting improperly. (OB. at 25). Plaintiff's reference to defense counsel did nothing of the sort. Plaintiff's counsel's statements when put in context are as follows:

> "In terms of where or not, on cross-examination, after suffering from this condition for the past, I guess it's been a little over four years ow, with her sparring with Mr. Galperin about, well, I don't think that was true, I don't think I had those problems, I don't think I had that complaint, skillful lawyer, Mr. Galperin is

> skillful, I'll give him that, he's a very good lawyer, he did a very nice job of going through that information.
> But remember what you heard from the doctors about CRPS and there was a term called dysexecutive function. Remember that word? Dysexecutive function. One of the reasons why she has difficulty in terms of future employability is because her brain isn't working right anymore because of this problem. And is it any wonder after being in unrelenting pain every minute of her life for four years that her brain and memory aren't functioning as well as they might or as well as they would if she didn't have this syndrome?
> So can't we cut her just a little bit of a break in terms of nitpicking through the record and asking her if she remembers this or that complaint from 1993 or 2000 or 1998?"
> (A1382-A1383).

Defense counsel painstakingly walked Ms. McLeod through a litany of medical records during a lengthy cross examination. (A756-A836). Counsel's comments referring to defense counsel was referencing defense counsel's cross examination and why Ms. McLeod may have gotten confused when plowing through thousands of pages of medical records. Further, the comment was not said in anger or with disrespect. When said, it was more a "pat on the back" to defense counsel for his thorough cross examination. Plaintiff's counsel did not accuse defense counsel of manipulating evidence. No one was offended by the comment, especially not defense counsel because he did not object to the statement. Had the referenced comments actually been what defendants now purport them to be, there would have been fireworks in the courtroom. There were none, because in reality the comment was an innocuous argument to the jury to cut Ms. McLeod some

slack for not remembering every detail of her thousands of pages of medical records during cross-examination.

This attempt by defendants to mischaracterize plaintiff's reference to defense counsel on this cold written appellate record is a prime example of why Delaware case law has consistently held that the trial judge is in the best position to assess the impact of statements at the time they are made to determine the extent to which they may have affected the jury or the parties, and to remedy any ill effects. *Thompson v. State*, 2005 Del. LEXIS 423, *9-10 (Del. 2005). Plaintiff's reference to defense counsel in his argument in no way suggested that defense counsel was somehow complicit in manipulating evidence, as held by the trial court. (Ex. A. to OB at 16 -17).

Another of defendants' complaints about plaintiff's closing argument is that plaintiff's counsel made reference to defendants' website in his closing. The trial court noted in its opinion that plaintiff's references to defendants' website were not supported by evidence and therefore improper. But, after a *Hughes* analysis, the trial court found the reference was not plain error. (Ex. A to OB at 18 - 20). But, evidence of defendants' website was before the jury. Plaintiff's counsel put actual snapshots of defendants' website on the ELMO for the trial court and jury to observe during Dr. Swier's cross examination, and plaintiff's counsel questioned Dr. Swier about the websites' comments about peripheral nerve surgery and how it

can be treated. (A1063-A1064). Therefore, plaintiff's reference to defendants' website in his closing was supported by the evidence and was proper. Because the evidence was based on information adduced at trial and therefore proper, a plain error analysis need not be undertaken in relation to plaintiff's counsel's reference to defendants' website.

Defendants also complain that plaintiff's comment that "all doctors' know" that conservative treatment is always appropriate before surgery was improper because it was unsupported by the evidence. (OB. at 24). This statement was proper argument based on the evidence. Plaintiff presented expert testimony that conservative treatment must take place before surgery is contemplated and Swier agreed. (A245-A249) (A1049-A1052). Further, the jury could make reasonable inferences from Dr. Swier's own conduct in falsifying his Operation Justification Form that conservative treatment is a pre-requisite to this kind of surgery in order to get paid. (B06) (A1054 – 1059).

Evidence of defendant falsifying his medical records to ensure payment also led to another reasonable inference for the jury to conclude, which sums up this entire case. The false information in the Operative Justification Form led to the reasonable inference that defendants knew the surgery that was about to be performed on Ms. McLeod was unwarranted and unnecessary. If all the criteria for surgery were met and defendants were confident that the surgery would be seen as

warranted and necessary, defendants would not have had to falsify the medical records to make it seem as though the surgery was warranted and necessary. Defendants' falsification of the medical records to ensure payment established a subjective knowledge on defendants' part that they knew Ms. McLeod's surgery was unnecessary and unwarranted before it was performed. This is outrageous conduct under any circumstances, which the jury found violated the standard of care in rendering its verdict.

Lastly, defendants' argument that the trial court's order denying their motion for a new trial is flawed because the trial court did not review the arguments *in toto* is nonsensical. Defendants' appellate brief and the trial court's order denying defendants' new trial motion are two ships passing in the night. This is because the trial court had no cause to examine the alleged effects of plaintiff's arguments *in toto* because the trial court did not find any of the plaintiff's argument improper when looked at *seriatim*.[19]

There may be no more difficult task at trial than to prove to a jury that a physician engaged in outrageous conduct by performing unnecessary and unwarranted surgery on his patient. But, this was the conclusion that was

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[19] In fact, the only argument in plaintiff's closing that the trial court found was improper warranting a *Hughes* analysis, but did not amount to plain error, was counsel's reference to Dr. Swier's website because it was not supported by the trial record. (Ex. A to OB). But, as shown above, Dr. Swier was cross-examined on, and the jury was shown, the website, which meant it was fair game to be referenced in plaintiff's summation. All the other arguments defendants' complain of in plaintiff's summation were found to be proper and based on the evidence. (Ex. A. to OB.).

supported by the evidence. Unfortunately, when a case such as this deals with falsified records and manipulation of a patient for profit, terms such as enough is enough, insanity, cog in an assembly line, etc., are reasonable argument to establish the depths and motivation for defendants' conduct. Such conduct, as shown by the evidence, can only be characterized as outrageous. In sum, this was not a trial about a doctor having a bad day. This was a trial about a deceitful doctor doing bad things.

Conclusion

The trial was a fair fight between experienced trial counsel. The trial court was engaged in all aspects of the trial and ensured both parties were given a fair trial. The evidence went in cleanly and the closing arguments of counsel were completely without objection, save for one objection and a curative instruction in the plaintiff's counsel's closing. The verdict in favor of the plaintiff, although substantial, was far less substantial than the evidence warranted, especially given the fact that the total verdict amount was $1,000,000 less than the plaintiff's claim for special damages. Essentially, it could be concluded that the jury either substantially discounted the special damages claim or awarded very little in terms of general damages for pain and suffering. Either way, the verdict resulted from a fair fight. With no substantial argument justifying a reversal, the defendants torture the trial record and argue that plaintiff's counsel's words in his closing argument somehow unduly prejudiced defendants and resulted in an unfair result. The facts simply do not support the defendants' argument.

The jury verdict in this case was not a product of a prejudiced or biased jury. It was based on the evidence. As such, the trial court properly denied defendants' motion for a new trial and the verdict should stand.

MURPHY & LANDON

/s/ Philip T. Edwards
ROGER D. LANDON, No. 2460
PHILIP T. EDWARDS, No.4393
1011 Centre Road, #210
Wilmington, DE 19805
302-472-8100
Attorneys for Appellee, Plaintiff Below