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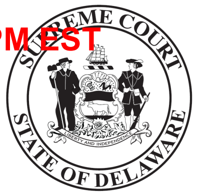

**IN THE SUPREME COURT OF THE
STATE OF DELAWARE**

THOMAS BAIRD,	)	
	)	
Plaintiff Below,	)	No. 504,2013
Appellant,	)	
	)	
v.	)	
	)	
FRANK OWCZAREK, M.D., EYE	)	Appeal from the Superior Court
CARE OF DELAWARE, LLC, and	)	of the State of Delaware in and for
CATARACT AND LASER	)	New Castle County
CENTER, LLC,	)	
	)	C.A. No. N11C-09-241 RRC
Defendants Below,	)	
Appellees.	)	

DEFENDANTS BELOW, APPELLEES FRANK OWCZAREK, M.D.'S, EYE
CARE OF DELAWARE, LLC'S, AND CATARACT AND
LASER CENTER, LLC'S ANSWERING BRIEF ON APPEAL

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Dated: January 17, 2014

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NATURE OF PROCEEDINGS

This is a claim for medical negligence filed by Thomas Baird ("Plaintiff") against Frank Owczarek, M.D. ("Dr. Owczarek"), Eye Care of Delaware, LLC, and Cataract and Laser Center, LLC (collectively, "Defendants"). Plaintiff alleged that Defendants engaged in continuous medical negligence from January 16, 2004 through October 14, 2009, when they determined that Plaintiff was an appropriate candidate for two LASIK eye surgeries: (1) one for both eyes on January 27, 2004, and (2) one for the left eye on October 14, 2009 (a LASIK "enhancement"). (A-22-29) Plaintiff further alleged that Defendants failed to obtain informed consent, although Plaintiff later withdrew that claim. (A-29-30, A-149-150) Defendants denied all claims of negligence. (A-32-45)

On February 15, 2013, Plaintiff moved, *inter alia*: (1) to exclude the defense of assumption of risk and evidence of informed consent, and (2) to preclude Steven Siepser, M.D. from offering opinions as to the October 14, 2009 surgery. (A-147-179) Defendants responded on March 18, 2013. (B022-060) On March 26, 2013, the Superior Court denied Plaintiff's motions but agreed to ask the jury panel pre-trial about elective surgery and ordered a limiting instruction. (A-198-230, A-325-327, A-379, B014, B061) On April 10, 2013, the Superior Court revisited its

ruling and issued a limiting instruction on April 11, 2013.[1] (A-1207)

In the Pretrial Stipulation, Plaintiff sought to admit a video of Albert Jun, M.D. performing a "DALK" procedure (a type of corneal transplant) on a separate patient. (A-356) Upon Defendants' objection, the Superior Court excluded the evidence under D.R.E. 403. (A-293-295, A-365, A-462-446)

Trial proceeded forward on April 1, 2013. (B068) On April 11, 2013, the jury found in favor of Defendants. (A-1215-1224, B068)

On April 25, 2013, Plaintiff moved for a new trial on the basis of *ex parte* communications he had with Juror No. 6 post-jury discharge. (A-1233-1247) Defendants opposed the motion, and the Court heard argument on June 11, 2013.[2] (B078-B083) The Court denied the motion on July 25, 2013, and August 29, 2013. (A-1248-1284, B118).

Plaintiff filed an appeal to the Supreme Court on September 24, 2013, and filed his Opening Brief with Appendix on December 20, 2013. This is Defendants Below, Appellees Frank Owczarek, M.D.'s, Eye Care of Delaware, LLC's and Cataract and Laser Center, LLC's Answering Brief on Appeal.

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[1] Plaintiff did not include this ruling in the appendix.

[2] Plaintiff did not include the transcript of the oral argument on June 11, 2013.

SUMMARY OF ARGUMENT

I. Denied. The Superior Court did not abuse its discretion when it permitted Defendants to reference Mr. Baird's consent forms, subject to a limiting instruction, as they were material and relevant to the standard of care, Plaintiff's expert's credibility, and the historical work-up at issue.

II. Denied. The Superior Court did not abuse its discretion when it concluded that Juror No. 6's claims of alleged juror misconduct, which were raised post-jury discharge after she had spoken improperly with Plaintiff *ex parte*, were too speculative to disturb the jury verdict and could not be investigated.

III. Denied. The Superior Court did not abuse its discretion when it permitted Steven Siepser, M.D., a board-certified and qualified ophthalmologist, to offer opinions that Defendants complied with the standard of care in 2009, and held that criticisms as to Dr. Siepser's inability to read a Pentacam eye mapping study, one of many factors to consider, went to the weight, not admissibility, of his testimony.

IV. Denied. The Superior Court did not abuse its discretion when it ruled that: (a) counsel's question asking the jury to place itself in Plaintiff's position violated the "golden rule" under Delaware law; and (b) a video of Dr. Jun performing a DALK procedure on a different patient than Plaintiff was too confusing and prejudicial to be admitted under D.R.E. 403.

STATEMENT OF FACTS

Medical Background Facts

Plaintiff began treating with Defendants on January 16, 2004, for potential elective LASIK eye surgery on both eyes. (A-475, A-505, A-510) Before surgery, which Defendants performed on January 27, 2004, Plaintiff executed a consent form that identified risks including, *inter alia*, diminished visual acuity and quality issues, the same issues claimed as a result of negligence. (A-1-4, A-510-13, A-475, A-512) Plaintiff later underwent a left eye LASIK "enhancement" surgery on October 14, 2009, and executed a similar consent form. (A-12, A-514-16) After Dr. Owczarek diagnosed Plaintiff with ectasia[3] in April 2011, Plaintiff underwent treatment including a "DALK" procedure. (A-50, A-83, A-480-81, A-1104)

Allegations

Plaintiff alleged that, prior to the January 27, 2004 surgery, Defendants failed to identify "signs of keratoconus"[4] that made him an inappropriate surgical

[3] Plaintiff's standard of care expert, Elizabeth Davis, M.D., defined ectasia as "a biomechanical weakening process of the cornea where the cornea can start to thin . . . [and] weaken[] and so, therefore, it can bulge out and become irregular." (A-408)

[4] Dr. Davis defined keratoconus as an eye condition "where the person's cornea progressively thins and bulges out and weakens." (A-408)

candidate. (A-025, A-408-09) Plaintiff further alleged that, prior to the October 14, 2009 enhancement procedure, he developed post-LASIK ectasia,[5] making him an inappropriate candidate for the second surgery. (A-419) Plaintiff therefore alleged that Defendants were negligent in performing both procedures and in failing to obtain informed consent. (A-22-31) Defendants denied all allegations of negligence and denied that the LASIK surgeries caused any claimed injuries. (A-33-42, A-559-561, A-739, A-810-812, A-820)

Informed Consent

As affirmative defenses, Defendants asserted, *inter alia*, that Plaintiff assumed the risks of his injuries and gave informed consent. (A-44) After Plaintiff withdrew his informed consent claim, he moved to exclude any reference to the consent forms as irrelevant and prejudicial. (A-149-150, A-199-203, A-350) In response, Defendants asserted that the forms were relevant: (1) to the standard of care and causation defenses; (2) to impeach Dr. Davis's, Plaintiff's only standard of care expert's, opinion that Defendants' negligence, rather than something else, caused Plaintiff's claimed injuries; (3) to show that Defendants' "work-up", a subject of Plaintiff's allegations, was proper; and (4) to demonstrate the historical

[5] Dr. Davis defined post-LASIK ectasia as "a cornea that demonstrates that it is weakened as a result of previous LASIK surgery." (A000419)

context of Plaintiff's care. (A-27-28, A-204-207, A-278, B022-028) Defendants further argued that any prejudice would be a cured by a limiting instruction. (A-205-206, B027-028)

The Superior Court denied Plaintiff's motion and held that the consent forms were admissible and relevant to Defendants' work-up, which was "very much at issue", and to the historical background of the elective surgeries. (A-207-208, A-379, A-506) The Superior Court, however, ordered that Plaintiff craft a limiting instruction and agreed to ask all potential jurors whether they had negative opinions as to elective surgery. (A-208, A-316-317, A-325-327)

At trial, Plaintiff himself referred to the forms numerous times during his case in-chief including: (1) during opening statements to argue that Defendants were negligent; (2) during Plaintiff's testimony to ask, *inter alia*, whether the form addressed the "risk" of medical negligence; (3) during Dr. Elizabeth Davis's testimony, in which they were published to the jury; and (4) during Dr. Owczarek's testimony. (A-383, A-408, A-493-494, A-512-513, A-1136-1144) Defendants referred to the forms in a historical context and to impeach Dr. Davis's opinion that the injuries resulted from negligence. (A-394-397, A-452)

On April 10, 2013, the Superior Court revisited its earlier ruling and held that informed consent and assumption of the risk were not valid defenses to

Plaintiff's claims.[6] The Superior also provided the following limiting instruction:

> Where the doctor has superior knowledge and expertise in medical matters, and the patient has a limited ability to ascertain the risks and dangers inherent of ectasia inherent in LASIK surgery, the patient cannot assume a risk of which he was not aware.
>
> Informed consent is not a valid defense to a medical negligence action. The plaintiff-patient cannot consent to the negligence of the defendant-doctor. The fact that the defendant-doctor may have informed the plaintiff of certain known and accepted risks, does not excuse him of liability for any negligence.
>
> When determining whether or not Dr. Owczarek committed medical negligence, you may not, and should not, consider any evidence of Mr. Baird's consent or any warnings given by Dr. Owczarek, as evidence that Mr. Baird consented to Dr. Owczarek's negligence, if any.

(A-1207, A-1212)

Testimony of Steven Siepser, M.D.

The parties did not dispute that Steven Siepser, M.D., a board-certified ophthalmologist who has performed over 15,000 LASIK surgeries, was an "expert" whose qualifications are "eminent." (A-97, A-217, A-546, B049-060) At his deposition, Dr. Siepser testified that Dr. Owczarek met the standard of care because Plaintiff was "clearly well within the range of an acceptable LASIK

[6] Plaintiff did not include the transcript of this ruling. That the ruling was made is evidenced by Defendants' renewed objection to the instruction on April 11, 2013. (A-1212)

patient." (A-97-99, A-127, A-130, A-144) This was based on factors, separate from the Pentacam studies, including CustomVue WaveScan studies, Plaintiff's corneal thickness (also known as pachymetry, for which one does not need to read Pentacam topography studies), his myopia, his astigmatism and post-October 14, 2009 Orbscan studies. (A-100-102, A-107, A0115, A-120, B032-039) Moreover, consistent with Dr. Davis's testimony that ophthalmologists "give credence to all the factors", Dr. Siepser testified that a reasonable ophthalmologist cannot rely on "a single thing" but must rely on "a constellation" of findings because "there are no real numerical absolutes." (A-100-102, A-107, A-115, A-434, A-442-447)

Plaintiff moved to exclude Dr. Siepser's testimony as to the 2009 surgery on the bases that: (1) allegedly he could not explain the standard of care,[7] and (2) he could not read the Pentacam studies used before the 2009 LASIK surgery. (A-160-169, A-219, A-350) Plaintiff acknowledged, however, that, "[i]n fairness," Dr. Albert Jun's (one of Plaintiff's expert's) inability to opine to a reasonable degree of medical probability as to certain aspects went to weight, not admissibility, just as Defendants argued for Dr. Siepser. (A-222-224, A-260-261) In apparent agreement, the Superior Court held that Plaintiff's criticisms went to weight, not

[7] Plaintiff has not pursued this argument on appeal. Therefore, Plaintiff has waived this claim. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). Nonetheless, Dr. Siepser defined the standard of care appropriately, and the jury was instructed as to the correct law. (A-630, A-1206)

admissibility, and could be addressed through cross-examination. (A-217, A-224-225)

Dr. Siepser reiterated at trial that Defendants complied with the standard of care in performing LASIK surgery based on a "constellation of findings," not just the mapping studies. (A-556-559, A-574-575, A-581, A602-604, A-611, A-676, A0-703-706) And, at trial, Dr. Siepser did not comment on the Pentacam topography. (A-606-608) Instead, Dr. Siepser reviewed the numerical portions of the study (i.e., the measurement of corneal thickness), relied on the clinical findings, referred to other tests like the CustomVue WaveScan tests, and testified that these confirmed that Plaintiff did not have ectasia before the 2009 surgery, making Plaintiff an appropriate LASIK surgery candidate in 2009. (A-602-611) Plaintiff cross-examined Dr. Siepser and discussed his inability to read the Pentacam topographical portions to the jury.[8] (A-632-639)

Video of DALK

Before trial, Plaintiff sought to admit a video of Dr. Jun performing a different DALK procedure on a separate patient. (A-293, A-356) The Superior Court excluded the video under D.R.E. 403 because the probative value was slight,

[8] Plaintiff did not include his closing argument in his appendix.

as there would be testimony about the surgery generally and Plaintiff's specific surgery. (A-293-294) The Superior Court further noted that the prejudice to Defendants was significant, as it would be "confusing [to] the jury" because it was not a video of "the patient in question". (A-294-295, A-356, A-365) At trial, the Superior Court reaffirmed its ruling that records relating to the DALK surgery would be admitted, that Dr. Jun could explain the DALK procedure (which he did),[9] and that the video was prejudicial in that it would inflame the jury. (A-463-466).

Conversation with Juror No. 6 on April 10, 2013

After Plaintiff's, but before Defendants', closing argument, Juror No. 6 spoke with counsel and the Superior Court to address whether she could continue to serve as a juror due to a migraine headache. (B062-067) Juror No. 6 stated that she could continue but did not raise any issues of jury misconduct. (B062-067)

Post-Verdict Conduct

On April 11, 2013, the jury found in favor of Defendants. (A-1215-1224) After the verdict was read, the Superior Court polled each juror individually,

[9] Plaintiff did not include the transcript of Dr. Jun's testimony in his appendix.

including Juror No. 6, who confirmed that she agreed with the defense verdict. (A-1217-1219) Thereafter, despite the trial judge offering to speak to the jurors, Juror No. 6 did not raise any jury misconduct or "concerns". (A-1218-1219, A-1230)

After the jury's discharge, Juror No. 6 contacted Plaintiff's New York counsel's office to speak with him. (A-1225) Plaintiff's counsel alerted the Superior Court to this call and requested permission to speak with her. (A-1225) Defendants objected, and the Superior Court denied Plaintiff's counsel's request to speak with her. (A-1226-1227, B074) The Superior Court also advised Juror No. 6 directly not to speak with any attorney in the case. (A-1226-1227)

Despite learning that counsel's request to speak to Juror No. 6 was denied, Plaintiff took it upon himself to contact her on April 21, 2013. (A1238-1240) He obtained her phone number from his counsel's letter to the Superior Court.[10] (A-1238-1241, B116) No counsel or Court personnel were present during the *ex parte* communications, nor did the Superior Court authorize them. (A-1239-1240)

On April 25, 2013, four (4) days after first speaking with Juror No. 6, Plaintiff filed a Motion for New Trial, supported by an affidavit prepared by

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[10] Plaintiff's affidavit makes clear that he spoke with Juror No. 6 on multiple occasions and likely communicated with her on Facebook. (A-1238-1240) Moreover, the Superior Court recognized that furnishing Plaintiff with Juror No. 6's phone number was "an unnecessary, if not unreasonable, risk" as Mr. Baird had a motive to (and did) speak with her. (A-1262-1263)

counsel and a letter from Juror No. 6 to the Superior Court dated April 23, 2013,[11] alleging only two bases of alleged juror misconduct: (1) that Juror No. 6 wanted to send a note to the trial judge but the foreperson prevented it; and (2) that Juror No. 9 "looked something up online the night prior just to see what it was". (A-1231-1241) Juror No. 6 did not identify the "something" that was researched, state that Juror No. 9 discussed the research, or suggest that it influenced the jury. (A-1231)

Juror No. 6's letter contains numerous inconsistencies, both internally and with Plaintiff's Affidavit, including, but not limited to, the following:

1. Juror No. 6 spoke with Plaintiff directly on April 21, 2013 and thereafter about his case, despite not calling Plaintiff' counsel "to discuss his client or the case details" (A-1230, A-1239-1240);

2. Juror No. 6 complained that it was "not fair" to discuss the jury's deliberations but then outlined them to the Court (A-1231);

3. Juror No. 6's statement that she could not speak with the trial judge about her "concerns" are undercut by at least four opportunities to do so: (1) during trial on April 10, 2013; (2) during polling; (3) immediately after the verdict with the Court; and (4) after discharge but <u>before</u> speaking with Plaintiff (A-1215-1219, A-1231, B062-067);

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[11] Although the letter was allegedly faxed to the Superior Court on April 25, 2013 (two days after the date of the letter), the Superior Court received it on April 29, 2013. (A-1228-1232, B075-077) Plaintiff, however, received it no later than April 25, 2013 via email (meaning that he provided his contact information to Juror No. 6 in anticipation of further communication) and was the first to provide it to the Superior Court and Defendants. (A-1228-1233)

4. Juror No. 6's statement that she did not agree with the verdict is contradicted by her assent to the verdict when she was individually polled (A1217-1219, A-1231); and
5. Juror No. 6 makes no mention of any communications with Plaintiff despite his affidavit confirming them (A-1230-1232).

Defendants opposed Plaintiff's motion and filed a Motion to Strike Plaintiff's Affidavit and a Motion for Sanctions, both of which Plaintiff opposed. (B078-093, B096-102, B106-B115) Defendants further opposed Plaintiff's request to summon Juror No. 6 before hearing argument on June 11, 2013,[12] and the Superior Court agreed. (B105-106)

Ultimately, the Superior Court denied Plaintiff's Motion for New Trial. (A-1248-1284, B118) First, the Superior Court held Juror No. 6's claim that she was prohibited from sending a note during deliberations was an "intrinsic" influence that could not be investigated. (A-1268-1270) Second, the Superior Court held that the claim that Juror No. 9 researched "something" online was too speculative and did not constitute "egregious circumstances". (A-1270-1277) Therefore, the Superior Court, in its broad discretion, ruled that the claimed misconduct was not "inherently prejudicial" and would not be examined post-verdict by the Court. (A-1267-1269)

[12] Although Plaintiff's Appendix indicates that the hearing transcript is included, Plaintiff did not include a copy of it.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF CONSENT FORMS OF PLAINTIFF'S ELECTIVE SURGERIES, SUBJECT TO A LIMITING INSTRUCTION, WHERE THEY WERE MATERIAL TO DEFENDANTS' CASE.

A. Question Presented

Did the Superior Court abuse its discretion when it permitted evidence of Plaintiff's consent forms, subject to limiting instructions proposed by Plaintiff, that supported Defendants' standard of care defense, that impeached the credibility of Plaintiff's standard of care expert, and that provided the historical context of Defendants' treatment of Plaintiff? Defendants preserved this issue when they responded to Plaintiff's Motion in Limine, responded to Plaintiff's objections at trial, and objected to the jury instructions. (A-204-208, A-506, A-1212, B022-048)

B. Scope of Review

Plaintiff claims that the trial judge erred in admitting evidence of consent forms. (Appellant's Opening Br. at 16) This Court reviews a lower court's decision to admit evidence for a clear abuse of discretion. *Firestone Tire and Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988). Judicial discretion is "the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion

has not been abused." *Id.* Even if the specific ruling was incorrect, this Court will only reverse if the error "constituted significant prejudice so as to have denied the appellant a fair trial." *Id.* (citing *Strauss v. Biggs*, 525 A.2d 992, 997 (Del. 1987)).

Although this Court will review a trial judge's refusal to instruct on a particular's party legal theory *de novo*, the trial judge instructed the jury in the manner requested by Plaintiff. (A-1207, A-1212) The instruction is reviewed for an abuse of discretion. *Hankins v. State*, 976 A.2d 839, 840 (Del. 2009).

Where the appellant fails to include all portions of the record relevant to the claims on appeal, this Court is precluded from undergoing appellate review and must affirm the lower court's ruling. *Tricoche v. State*, 525 A.2d 151, 154 (Del. 1987); Supr. Ct. R. 9(e)(ii) and 14(e).

C. Merits of Argument

1. Plaintiff has failed to include all relevant portions of the record, precluding appellate review and requiring affirmance.

Plaintiff has failed to include "the complete docket entries in the trial court arranged chronologically in a single column" as required by Court rule. Supr. Ct. R. 14(e). Plaintiff has also failed to include all relevant materials as follows:[13]

1. Defendants' Responses to Plaintiff's Motions in Limine dated

[13] Defendants' inclusion of some relevant materials in their Appendix does not "cure" Plaintiff's failure to furnish the necessary documents.

March 18, 2013 (D.I. 98) (B022-048); and

2. Trial Transcript of April 10, 2013 where the trial judge revised his ruling, held that the defense of the assumption of risk is not applicable, and agreed to issue a limiting instruction. (B021, B117)

These materials are necessary because: (1) the Superior Court's denial of Plaintiff's motion was based in part on what was "set forth traditionally in defendants' response" (A-207-208, A-379) (emphasis added), and (2) this Court needs to evaluate whether the Superior Court's revised ruling on April 10, 2013 addressed the claimed error. (A-1212) As Plaintiff has the burden to include in his appendix relevant portions of the record necessary to consider the context of the claimed error, appellate review is precluded, and this Court should affirm the lower court's ruling. Supr. Ct. R. 14(e); *Tricoche*, 525 A.2d at 154.

2. To the extent that Plaintiff's failure to raise this argument in Plaintiff's Motion for New Trial constitutes waiver, this Court cannot consider this argument.

To the extent that Plaintiff was required to reraise these issues in his Motion for New Trial (which he did not), the Superior Court was not fairly presented with this issue, and Plaintiff has waived this argument. (A-1233-1237); Supr. Ct. R. 8; *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991). As Plaintiff has not claimed plain error, this Court should affirm. *Culver*, 588 A.2d at 1096 (plain error only exists where the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process").

3. To the extent that this Court can review the Plaintiff's claim of error, the Superior Court admitted evidence of informed consent properly.

The Superior Court ruled that the consent forms executed by Mr. Baird were relevant to the medical work-up (which Plaintiff claimed was negligent), to the fact that LASIK surgery is elective, and to the historical context of Plaintiff's care at issue. (A-207-208) The Court further issued a limiting instruction, prepared by Plaintiff, that neither informed consent nor assumption of the risk is a "valid defense to a medical negligence action." (A-208, A-1207) As the Superior Court balanced the relevance with any prejudice appropriately, this Court should affirm. *Register v. Wilmington Med. Ctr.*, 377 A.2d 8, 10 (Del. 1977) ("Evidence which is irrelevant for one purpose may be quite relevant for another.")

First, Plaintiff highlighted Defendants' "own form of informed consent" to argue that Defendants breached the standard of care by ignoring Plaintiff's alleged signs of keratoconus in his Complaint and repeatedly at trial. (A-25, A-383, A-408, A-493-494, A-512-513, A-408, A-1136-1144) Once Plaintiff "opened the door," Defendants were entitled to discuss the forms to rebut the claim. *See, e.g., Liscio v. Pinson*, 83 P.3d 1149, 1156 (Col. Ct. App. 2003), *cert. denied*, 2004 WL 233309 (Colo. Feb. 9, 2004) (evidence of informed consent is admissible where plaintiff "opens the door"); *Bentley v. State*, 930 A.2d 866, 876 (Del. 2007) (evidence to contradict claim can be used when witness "opens the door").

Second, Plaintiff argued that Defendants "churned" patients like Plaintiff to generate profit, thereby not devoting appropriate attention to him. (A-384) (Defendants were negligent by being "too busy" to care for Plaintiff); (A-1133) ("Our theory is one of churning. Our theory is one of the LASIK conveyor belt, patient conveyor belt [.]"). The forms were relevant to rebut this theory because they showed that Defendants were careful and diligent. *See* 18 *Del. C.* § 6801(7) (requiring every medical professional to use "reasonable care and diligence").

Third, the forms were relevant to impeach Dr. Davis's testimony. Plaintiff claimed as injuries decreased visual acuity and quality resulting from the alleged negligence. (A-23-A29) But, because Dr. Davis, a paid expert who earned $30,000 from Plaintiff for her work, admitted that these conditions can occur irrespective of negligence, the forms, prepared before the surgeries, were relevant to impeach her credibility and expose her bias. (A-441, A-452); D.R.E. 401; D.R.E. 607; *Weber v. State*, 457 A.2d 674, 680 (Del. 1983) (party can explore bias to discredit witness and affect weight of testimony).

Fourth, the consent forms were relevant to the historical context of Defendants' care, as they permitted the jury to understand the entire course of care so that it did not speculate as to what occurred. (A-506); *Spencer v. Wal-Mart Stores East, LP*, 930 A.2d 881, 887 (Del. 2007) (holding that trial court properly exercised its discretion when it admitted evidence to avoid misleading the jury).

Even if this admissible evidence was prejudicial to Plaintiff, however, the Superior Court issued an appropriate limiting instruction to the jury to not consider this evidence as a defense to the medical negligence claims. (A-1207) A limiting instruction is sufficient to cure any perceived prejudice as "jurors are presumed to follow the instruction." *State Farm Mut. Auto. Ins. Co. v. Enrique*, 3 A.3d 1099, 2010 WL 3448534, at *3 (Del. Sept. 3, 2010). Plaintiff not only ignores the limiting instruction but also fails to identify anything to suggest that the jury misapprehended it.[14] Indeed, in none of the cases cited by Plaintiff did any court provide a similar explicit limiting instruction to disregard evidence of informed consent and assumption of risk as a defense as Plaintiff received in this case. *See Warren v. Imperia*, 287 P.3d 1128 (Ore. Ct. App. 2012); *Schwartz v. Johnson*, 49 A.3d 359 (Md. Ct. Spec. App. 2012); *Hayes v. Camel*, 927 A.2d 880 (Conn. 2007)[15]; *Wright v. Kaye*, 593 S.E.2d 307 (Va. 2004); *Liscio v. Pinson*, 83 P.3d 1149 (Colo. Ct. App. 2003); *Waller v. Aggarwal*, 688 N.E.2d 274 (Ohio Ct. App. 1996). While these courts may have come to a different conclusion, the Superior Court here balanced the relevance of the evidence while minimizing any prejudice

[14] Notably, Juror No. 6 did not claim that the jury misunderstood the instructions. (A-1230-1247)

[15] The Supreme Court of Connecticut did note, however, that an instruction to which Plaintiff agreed (and which was not as explicit as the instruction here) showed that evidence of informed consent "was not likely to have affected the jury's verdict[.]" *Hayes*, 927 A.2d at 892-93.

to Plaintiff, thereby acting within its discretion. *Firestone Tire and Rubber Co.*, 541 A.2d at 570 (trial judge has discretion when applying D.R.E. 403).

Finally, any error in admitting the evidence was harmless, as there was sufficient evidence to sustain the verdict. *Nelson v. State*, 628 A.2d 69, 77 (Del. 1993). The jury heard from two defense ophthalmologists, Dr. Siepser and Dr. Trattler (whose testimony is not challenged on appeal), as well as Dr. Owczarek and Dr. Paul Mitchell (an optometrist affiliated with Defendants)[16], who testified that Defendants were not negligent, irrespective of any consent forms. (A-556-559, A0733-735) Moreover, Defendants' closing argument focused on the clinical findings, not on the forms.[17] (A-1191-1203); *Hayes*, 977 A.2d at 891-92 (improper admission of consent forms was harmless where no one referred to them in summations). Finally, the jury was instructed to disregard this evidence when considering the claims of negligence. (A-1207); *Hayes*, 977 A.2d 892 (jury instruction to which plaintiff assented that discussed risks of surgery properly supported finding of harmless error). As there is substantial evidence that the verdict was not impacted, this Court should affirm.

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[16] This is based on counsel's recollection, as Dr. Mitchell's testimony was not submitted.

[17] To the extent counsel felt that Defendants ran afoul of the Superior Court's limiting instruction (which they did not), counsel needed to object. *Ray v. State*, 587 A.2d 439, 443 (Del. 1991) (failure to object during closing argument waives right to raise error on appeal).

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND NO BASIS TO INVESTIGATE JUROR NO. 6'S CLAIMS OF ALLEGED JURY MISCONDUCT POST-VERDICT THAT FAILED TO DEMONSTRATE ANY BASIS FOR REVERSAL.

A. Question Presented

Did the Superior Court abuse its discretion when it concluded that there was no basis to investigate an alleged intrinsic influence and a speculative extrinsic influence of juror misconduct that were first raised post-jury discharge and after improper *ex parte* communications between Plaintiff and a juror? Defendants preserved this issue when they objected to Plaintiff's counsel's communications with Juror No. 6; when they opposed Plaintiff's Motion for New Trial; when they filed a Motion to Strike Plaintiff's Affidavit and a Motion for Sanctions; when they opposed Plaintiff's request to summon Juror No. 6; and when they argued the motions on June 11, 2013. (B074, B078-091, B103-104, B106-115)

B. Scope of Review

This Court reviews the lower court's denial of a motion for new trial based on alleged jury improprieties for an abuse of discretion. *Barriocanal v. Gibbs*, 697 A.2d 1169, 1171 (Del. 1997). The trial court has "very broad discretion in deciding whether a case must be retried or the juror summoned and investigated due to alleged exposure to prejudicial information or improper outside influence." *Sheeran v. State*, 526 A.2d 886, 897 (Del. 1987) (citing *Styler v. State*, 417 A.2d

948 (Del. 1980)). Where the appellant fails to include all portions of the record relevant to the claims on appeal, this Court is precluded from undergoing appellate review and must affirm the lower court's ruling. *Tricoche*, 525 A.2d at 154.

C. Merits of Argument

1. Plaintiff has failed to include all relevant portions of the record, precluding appellate review and requiring affirmance.

Plaintiff has failed to include all relevant portions of the record as follows:

1. Defendants' Letter to the Hon. Richard R. Cooch Opposing Plaintiff's Request to Respond to Juror No. 6's Phone Call (D.I. 127) (B074);
2. Clocked-in Copy of letter from Juror No. 6 to the Hon. Richard R Cooch dated April 23, 2013, received by Judge Cooch's Office on April 29, 2013 and EFiled on April 30, 2013 (D.I. 133) (B075-077);
3. Defendants' Opposition to Plaintiff's Motion for New Trial and Motion for Sanctions (D.I. 135) (B078-083);
4. Defendants' Motion to Strike Plaintiff's Affidavit in Support of Plaintiff's Motion for New Trial (D.I. 137) (B084-087);
5. Defendants' Motion for Sanctions (D.I. 138) (B088-091);
6. Plaintiff's Preliminary Response to Defendants' Motion for Sanctions (D.I. 139) (B092-093);
7. Letter from the Hon. Richard R. Cooch to counsel dated May 20, 2013 addressing pending motions and requesting information from Plaintiff as to how Plaintiff obtained the telephone number of Juror Number 6 and who prepared the affidavit filed in connection with Plaintiff's Motion for New Trial (D.I. 141) (B094-095)
8. Plaintiff's Response to Defendants' Motion for Sanctions (D.I. 142) (B096-099)
9. Plaintiff's Opposition to Defendants' Motion to Strike Plaintiff's Affidavit in Support of Plaintiff's Motion for New Trial (D.I. 143) (B100-102);
10. Defendants' Letter to the Hon. Richard R. Cooch dated May 29,

2013 Opposing Plaintiff's Request to Summon Juror No. 6 to hearing on June 11, 2013 (D.I. 145) (B103-104);

11. Letter from the Hon. Richard R. Cooch to counsel dated May 31, 2013 refusing to summon Juror No. 6 at hearing on June 11, 2013 (D.I. 146, 149) (B105);
12. Defendants' Reply to Plaintiff's Response to Defendants' Motion for Sanctions (D.I. 147) (B106-111);
13. Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Strike Plaintiff's Affidavit in Support of Plaintiff's Motion for New Trial (D.I. 148) (B112-115);
14. Reply Affidavit of Thomas Baird (D.I. 151) (B117);
15. Hearing transcript for Oral Argument held on June 11, 2013 (D.I. 170) (B19, B21);
16. Clerk's Judicial Action for Oral Argument held on June 11, 2013 (D.I. 152) (B117); and
17. Letter from Cooch J., to counsel dated 7-25-13, advising counsel that the court has decided to resolve the pending motions with rulings (D.I. 154) (B118)

This Court needs these materials, especially the hearing transcript of June 11, 2013, to understand Defendants' positions, the context in which Plaintiff's Motion for New Trial was filed, and the Superior Court's basis for its ruling not to summon Juror No. 6 before the hearing. Without these, this Court cannot review the context of the Superior Court's ruling. In sum, Plaintiff's failure to include these materials, by Rule, precludes appellate review, and this Court should affirm the lower court's ruling. Supr. Ct. R. 14(e); *Tricoche*, 525 A.2d at 154.

2. To the extent that the Court can review the Plaintiff's claim of error, the Superior Court acted within its discretion when it denied Plaintiff's Motion for New Trial.

Plaintiff's Motion for New Trial relied on improper *ex parte*

communications with Juror No. 6 post-verdict, and a letter from Juror No. 6 written after those conversations, in which Plaintiff raised two allegations of juror misconduct: (1) the jury foreperson precluded Juror No. 6 from sending a note to the Superior Court, and (2) Juror No. 9 researched "something" online. Because the Superior Court concluded correctly that the first allegation related to an "intrinsic" influence that it could not investigate and that the second allegation was too speculative to establish prejudice to Plaintiff, the Superior Court acted within its broad discretion when it denied the motion. Therefore, this Court should affirm.

Initially, jurors may <u>only</u> be questioned post-verdict "<u>under judicial supervision</u>." *State v. Cabrera*, 984 A.2d 149, 163 (Del. Super. Ct. 2008) (emphasis added); *id.* at 171 (quoting *U.S. v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985) (post-verdict interviews of jurors by counsel or litigants without court supervision "will not be countenanced"); *State v. Manley*, 2011 WL 6188452, at *1 (Del. Super. Ct. Nov. 28, 2011) (citing *Knox v. State*, 29 A.3d 217 (Del. 2011)) (juror interviews must be done by judge). Delaware has enacted this rule, *inter alia*, to avoid harassment of jurors and exploitation of their thought-processes and to maintain confidence in jury verdicts. *Cabrera*, 984 A.2d at 170-71 (quoting *Kepreos*, 759 F.2d at 967). By communicating with Juror No. 6 repeatedly without Court or counsel's supervision (knowing the Superior Court refused to permit counsel to do the same), and before Juror No. 6 wrote her letter forming the basis

of Plaintiff's claim, Plaintiff irrevocably tainted any testimony she might have offered. *Id.* For this reason alone, which was raised with the Superior Court,[18] this Court should affirm the trial judge's decision. (B078-091, B106-111); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (Supreme Court can affirm on different basis that was presented to lower court).

Moreover, Delaware law prohibits a juror from impeaching her own verdict based on "intrinsic influences." *Sheeran*, 526 A.2d at 894; D.R.E. 606(b). As "intrinsic influences" address pressures between jurors during deliberations, such as a refusal to send a note to the Court (as Juror No. 6 alleged), the Superior Court determined properly that it could not investigate this claim. *See Sheeran*, 526 A.2d at 896-97 (claim that juror was prevented from sending a note is "precisely the kind of intra-jury influence that the prohibition in D.R.E. 606(b) was designed to protect from inquiry" and was "not open to consideration").

The Superior Court likewise acted within its broad discretion when it found Juror No. 6's claim that Juror No. 9 reviewed "something" online to be too speculative to warrant further investigation. Plaintiff, as the moving party, had the burden of demonstrating identifiable prejudice from the alleged jury misconduct or the existence of "egregious circumstances," which are "circumstances that, if true, would be deemed inherently prejudicial so as to raise a presumption of prejudice in

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[18] As noted *supra*, Plaintiff did not include the June 11, 2013 hearing transcript in his appendix.

favor of [the moving party].” *Black v. State*, 3 A.3d 218, 221 (Del. 2010). Evidence of “extraneous prejudicial information” is only suspect if there is a reasonable possibility that it may have influenced the verdict. D.R.E. 606(b); *McLain v. Gen. Motors. Corp.*, 586 A.2d 647, 653 (Del. Super. Ct. 1988).

At no point, however, did Plaintiff identify any evidence that Juror No. 9’s review of “something” online “just to see what it was” influenced the jury deliberations, was introduced to the jury, or pertained to a material issue. (A-1231); *Porter v. Murphy*, 792 A.2d 1009, 1017 (Del. Super. Ct. 2001) (finding that jury’s use of dictionary during deliberations, while improper, was insufficient to demonstrate prejudice sufficient to warrant new trial). Moreover, Juror No. 6 had multiple opportunities to raise any concerns before speaking with Plaintiff *ex parte*, including: (1) after Plaintiff’s closing argument on April 10, 2013, when she spoke with the trial judge and counsel about her migraine headache; (2) when she was polled individually after the verdict; (3) when she was invited by the trial judge to speak with him immediately after the verdict; and (4) immediately after she left Court post-discharge but before Plaintiff contacted her improperly *ex parte*. (A-1215-1219, A-1231, B062-067) Simply stated, Juror No. 9’s alleged research about “something”, while improper, was “not sufficiently credible or specific to warrant investigation” because Plaintiff did not establish a “reasonable probability” that he was identifiably prejudiced or that egregious circumstances

existed. (A-1271-1277); *Black*, 3 A.3d at 221; *Massey v. State*, 541 A.2d 1254, 1259 (Del. 1988); *Capano v. State*, 781 A.2d 556, 644 n. 338 (Del. 2001) (citing *Fisher v. State*, 690 A.2d 917, 918 (Del. 1996)) (finding no abuse of discretion in denying motion for new trial based on alleged juror misconduct where juror's statements were not credible and where juror could have raised concerns earlier).

Plaintiff's reliance on *U.S. v. Resko*, 3 F.3d 684 (3d Cir. 1993) is misplaced. The *Resko* Court held further investigation was needed where the trial judge learned <u>mid-trial</u> that jurors had already begun deliberations improperly. *Resko*, 3 F.3d at 686. In contrast, there was no juror misconduct discovered mid-trial, the allegations did not arise until Plaintiff's improper *ex parte* communications, Juror No. 6 had multiple opportunities to raise any concerns, and the Superior Court conducted a lengthy hearing on Plaintiff's Motion. Therefore, there was nothing credible to suggest that the integrity of the jury's deliberations was jeopardized. *Gov't of the Virgin Islands v. Weatherwax*, 20 F.3d 572, 579 (3d Cir. 1994).

Here, Juror No. 6's and Plaintiff's allegations arrived in a cloud tainted by Plaintiff's improper *ex parte* communications. But even accepting them, the Superior Court properly recognized that one allegation was an intrinsic influence that could not be considered, and the other was too speculative for further investigation. Under the circumstances, the Superior Court did not abuse its discretion, and this Court should affirm the denial of the motion for new trial.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED STEVEN SIEPSER, M.D. TO OPINE THAT DEFENDANTS COMPLIED WITH THE STANDARD OF CARE FOR THE 2009 SURGERY BASED ON ALL FACTORS.

A. Question Presented

Did the Superior Court abuse its discretion when it permitted Steven Siepser, M.D., a qualified ophthalmologist, to offer the opinion that Defendants complied with the standard of care in October 2009 when his inability to read one test went to weight and not admissibility? Defendants preserved this argument when they responded to Plaintiff's Motions in Limine. (A-221-228); (B022-060)

B. Scope of Review

This Court reviews a lower court's decision to admit or restrict testimony for an abuse of discretion. *Bush v. HMO of Del., Inc.*, 702 A.2d 921, 923 (Del. 1996). Where the appellant fails to include all relevant portions of the record to the claims on appeal, this Court is precluded from undergoing appellate review and must affirm the lower court's ruling. *Tricoche*, 525 A.2d at 154.

C. Merits of Argument

1. Plaintiff has failed to include all relevant portions of the record supporting their claim of alleged error, precluding appellate review and requiring affirmance.

Plaintiff failed to include the following relevant portions of the record:

1. Defendants Responses to Plaintiffs Motions in Limine (D.I. 98) (B022-060); and
2. Order denying Plaintiff's Motion in Limine as to Dr. Siepser (D.I. 111) (B061).

These materials are required to review the context of the argument and the basis of the claimed error. Supr. Ct. R. 14(b)(vii) (challenged orders with written rationale must be included in opening brief). As the Court does not have the relevant portions of the trial transcript to evaluate the claimed error in context, appellate review is precluded, requiring affirmance. Supr. Ct. R. 14(e).

2. To the extent that Plaintiff's failure to raise this argument in Plaintiff's Motion for New Trial constitutes waiver, this Court cannot consider this argument.

To the extent Plaintiff was required to reraise this issue in his Motion for New Trial, the Superior Court was not fairly presented with this issue, and Plaintiff has waived this argument. (A-1233-37); Supr. Ct. R. 8; *Culver*, 588 A.2d at 1096. As there is no plain error, this Court should affirm. *Culver*, 588 A.2d at 1096.

3. To the extent that the Court can review the Plaintiff's claim of error, the Superior Court admitted Dr. Siepser's testimony properly.

All experts agreed that the decision to perform a LASIK enhancement surgery is based on "a constellation" of factors.[19] (A-100-102, A-107, A-115-116,

[19] As both experts applied the proper methodology, Dr. Siepser's opinions are not "speculation." D.R.E. 702; Appellant's Open. Br. at 30.

A-556-559, A-574-575, A-581, A-602-611, A-676, A-703-706) Plaintiff's contention that a physician should assign significant weight to a mapping study, where Dr. Siepser disagrees, goes to weight, not admissibility, as it addresses the underlying assumptions, not the methodology. *Porter v. Turner*, 954 A.2d 308, 313-14 (Del. 2008). Therefore, the Superior Court did not err. (A-225)

By way of example, Dr. Siepser, without relying on mapping studies, testified that Plaintiff had normal corneal thickness, rebutting Plaintiff's contention that he had a thin cornea and was an inappropriate surgical candidate in 2009. (A-408-409, A-419, A-434, A-442-447, A-582-84, A-608) Indeed, during his direct-examination, Dr. Siepser testified that Defendants complied with standard of care without referring to the Pentacam studies but instead based on the clinical examination, the pachymetry values, and the CustomVue WaveScan tests (i.e., other studies and evaluations). (A-602-611) And, on cross-examination, he testified that a topographer cannot diagnose ectasia. (A-634-635) But any disagreement among experts as to the valuation of relevant factors is a factual question for the jury to decide, not a basis for exclusion. *Debernard v. Reed*, 277 A.2d 684, 685 (Del. 1971) (jury has sole province of resolving conflicts in opinions between medical experts). And as Plaintiff cross-examined Dr. Siepser to expose his inability to read the Pentacam studies, the Superior Court admitted Dr.

Siepser's testimony properly.[20] (A-556-559, A-574-575, A-581, A-602-604, A-611, A-637-639); *Turner*, 954 A.2d at 313-14 (vigorous cross-examination is sufficient to expose claimed errors in expert testimony); *Barriocanal*, 697 A.2d at 1173 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993)) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). Therefore, this Court should affirm.

[20] As Plaintiff did not move to strike Dr. Siepser's opinions when he testified as to the Pentacam study's importance (presumably for tactical reasons), Plaintiff has waived this claim. (A-638-639); *Czech v. State*, 945 A.2d 1088, 1097 (Del. 2008) (conscious failure to object for strategic reasons renders point of error waived and unreviewable).

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND: (1) PLAINTIFF'S "GOLDEN RULE" ARGUMENT WAS IMPROPER; AND (2) A VIDEO OF A DIFFERENT PATIENT'S SURGERY WAS UNDULY PREJUDICIAL UNDER D.R.E. 403.

A. Question Presented

Did the Superior Court abuse its discretion: (1) when it held that counsel's question to the jury to place itself in the shoes of Plaintiff violated the "golden rule"; and (2) when it held that a video of Dr. Jun performing a DALK procedure on a different patient was unduly prejudicial under D.R.E. 403? Defendants preserved these issues when they objected in the Pretrial Stipulation, at the Pretrial Conference, and at trial. (A-293-294, A-464-466)

B. Scope of Review

This Court reviews a lower court's decision to admit or exclude evidence under D.R.E. 403 for an abuse of discretion. *Firestone Tire and Rubber Co.*, 541 A.2d at 570; *Bentley*, 930 A.2d at 876 (evaluation under D.R.E. 403 "falls particularly within the discretion of the trial judge, who has the first-hand opportunity to evaluate relevant factors.") (citations omitted). Where the appellant fails to include all relevant portions of the record to the claims on appeal, this Court is precluded from undergoing appellate review and must affirm the lower court's ruling. *Tricoche*, 525 A.2d at 154.

C. Merits of Argument

1. Plaintiff has failed to include all relevant portions of the record supporting the claim of alleged error, precluding appellate review and requiring affirmance.

Plaintiff has failed to include all relevant portions of the record including:

1. Transcript of Plaintiff's Closing Argument on April 11, 2013 (D.I. 170) (B021);
2. Transcript of the ruling of the Superior Court finding Plaintiff's "golden-rule" argument to be improper on April 10, 2013; and
3. Trial testimony of Albert Jun, M.D. on April 3, 2013.

Without these materials, this Court cannot evaluate the propriety of the statements in the closing argument, or whether the probative value of the video was "slight" and outweighed by the prejudice. (A-294) Therefore, this Court should affirm the lower court's ruling. Supr. Ct. R. 14(e); *Tricoche*, 525 A.2d at 154.

2. To the extent that Plaintiff's failure to raise this argument in Plaintiff's Motion for New Trial constitutes waiver, this Court cannot consider this argument.

To the extent that Plaintiff was required to reraise these issues in his Motion for New Trial but failed to do so, the Superior Court was not fairly presented with this issue, and Plaintiff has waived this argument. (A001233-37); Supr. Ct. R. 8; *Culver*, 588 A.2d at 1096. As Plaintiff has failed to establish plain error, this Court should affirm. *Culver*, 588 A.2d at 1096.

3. **To the extent that the Court can review the Plaintiff's claim of error, the Superior Court acted within its discretion (1) when it held that counsel's question to the jury to place itself in the shoes of Plaintiff violated the "golden rule"; and (2) when it excluded the video of Dr. Jun performing DALK surgery on a different patient.**

Initially, Plaintiff admits that these alleged errors had little-to-no impact on the verdict and are therefore not reversible. *Nelson*, 628 A.2d at 77. However, as Delaware law precludes counsel's question asking the jury to place itself in Plaintiff's shoes, any ruling by the Superior Court finding that to be error was within its discretion. *Delaware Olds, Inc. v. Dixon*, 367 A.2d 178, 179 (Del. 1976); *Grayson v. State*, 524 A.2d 1, 2-3 (Del. 1987).

Likewise, the Superior Court excluded the DALK video correctly under D.R.E. 403. The probative value of the video was "slight" because Dr. Jun would (and did) testify about the procedure, while the video of a surgeon cutting into a different patient's eye would be unduly prejudicial and inflammatory. (A-294, A-465-66) Moreover, aside from delaying the trial, the video would confuse the jury because it was a "different patient." (A-294) As the Superior Court's ruling was based on conscience and reason without ignoring the rules of law and causing injustice, this Court should affirm the Superior Court's ruling excluding the video.

CONCLUSION

Because Plaintiff failed to include the relevant materials in his appendix, this Court cannot consider the claims and must affirm all rulings. Additionally, Plaintiff has waived the three arguments not raised in Plaintiff's Motion for New Trial. In the alternative, Plaintiff has failed to establish that the Superior Court abused its discretion: (1) in admitting relevant consent forms subject to a limiting instruction and after Plaintiff opened the door; (2) in denying Plaintiff's Motion for New Trial based on speculative juror misconduct derived from improper *ex parte* communications; (3) in admitting Dr. Siepser's expert testimony subject to cross-examination; (4) in finding Plaintiff's closing argument violated the "golden rule"; and (5) in excluding a video of a DALK surgery on a separate patient under D.R.E. 403. Therefore, this Court should affirm the jury's defense verdict.

Respectfully submitted,

/s/ Gregory S. McKee

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