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Case Number 229,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH HINEMAN	:	
	:	
Plaintiff Below,	:	No. 229,2015
Appellant	:	
	:	
v.	:	C.A. No. Below: N10C-03-014 CLS
	:	
PAUL IMBER, D.O., and EAR, NOSE	:	
THROAT, AND ALLERGY	:	
ASSOCIATES, LLC, a Delaware Company	:	
Defendants Below,	:	
Appellees	:	

Appeal from the Superior Court of the State of Delaware,
In and For New Castle County, C.A. No. N10C-03-014 CLS

APPELLANT'S OPENING BRIEF

HUDSON & CASTLE LAW, LLC

/s/ Bruce L. Hudson
Bruce L. Hudson, Esq. (#1003)
2 Mill Road Suite 202
Wilmington, DE 19806
(302) 428-8800
Attorney for Appellant

Dated: August 24, 2015

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NATURE AND STAGE OF PROCEEDINGS

On March 1, 2010, Appellant Joseph Hineman (hereinafter "Plaintiff" or "Mr. Hineman") brought this medical negligence action against Appellee Paul M. Imber, D.O., (hereafter "Defendant" or "Dr. Imber"), and his employer, Ear, Nose, Throat, and Allergy Associates, LLC, a Delaware company (hereafter "Defendant" or "ENT Associates"). (A 8) Plaintiff alleged that Dr. Imber was medically negligent when he examined Mr. Hineman in his office on December 5, 2007 after Mr. Hineman was injured on the job approximately an hour earlier by a rod that entered and lacerated his mouth and throat. (A 20). After examining Mr. Hineman, and noting lacerations in his throat, Dr. Imber advised Mr. Hineman to go home, take the rest of the day off, and take Advil if required for pain. (A 21). Mr. Hineman was discovered by a family member approximately an hour and a half later, on the floor of his home with left sided weakness. (A 38-40). He was transported by ambulance to Christiana Care Hospital where he was diagnosed as having suffered a stroke due to an occlusion of the internal carotid artery, caused by a puncture wound to the back of the throat. (A 62-64). The Complaint, accompanied by the requisite Affidavit of Merit, averred that Defendant Imber failed to meet the standard of care in that he:

1. Failed to properly take Plaintiff's history and physical in assessing his condition;

2. Failed to rule out that Plaintiff may have suffered an injury to the left internal carotid artery;

3. Failed to refer Plaintiff to a hospital for tests and further examination;

4. Failed to consult other physicians;

5. Allowed Plaintiff to go home in an unstable condition;

6. Failed to take other steps required by the minimum standard of care in treating Plaintiff, and

7. In such other and further particulars as the evidence may show.

(A 10).

Plaintiff alleged that had the Defendant sent him to a hospital instead of telling him to go home, he would have received timely clotbusting medication which can only be administered within three hours of the onset of the injury. By the time Plaintiff arrived at the hospital, more than three hours had elapsed. (A 25).

Defendants denied all the allegations of Plaintiff's Complaint. The Complaint was later amended to withdraw the loss of consortium claim by Mr. Hineman's wife, Dorothy Hineman. (A 45).

A jury trial began on April 23, 2014. On April 28, 2014, a mistrial was declared due to insufficient number of jurors. (A 50). The case was retried beginning on April 20, 2015 and on April 24, 2015, the jury found in favor for the Defendants and against the Plaintiff. (A 55).

Appellant files the instant appeal on the grounds set forth in the Summary of Arguments section below.

SUMMARY OF ARGUMENTS

I. The Trial Court committed reversible error by granting Defendants' Motion to admit references to the use of marijuana by Plaintiff earlier in the day prior to his injury which occurred when he ducked a snowball and injured himself in the throat on a snowplow marker. There were insufficient facts for an expert to opine that marijuana affected Plaintiff's perception of his pain during examination, and the expert was not qualified to give such an opinion. In addition, Defense violated the Court's permitted purpose of marijuana mention to the jury by not linking it to Plaintiff's pain perception during his medical examination by Defendant.

II. The Trial Court committed reversible error resulting in confusion and prejudice by denying Appellant's Motion to preclude reference to a separate lawsuit brought by Plaintiff against the landowner where the injury occurred and against the person who threw a snowball causing Plaintiff to duck and injure himself on the snowplow marker.

STATEMENT OF FACTS

I. IN THE ABSENCE OF SUFFICIENT FACTS TO SUPPORT THE OPINION, THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ACCEPTING DEFENDANTS' EXPERT WITNESS OPINION THAT PLAINTIFF WAS AFFECTED BY THE MARIJUANA AT THE TIME OF EXAMINATION BY DEFENDANT. DEFENSE THEN VIOLATED THE INTENT OF THE COURT'S PERMITTED MENTION OF MARIJUANA AT TRIAL BY NOT REFERENCING IT TO PLAINTIFF'S PERCEPTION OF PAIN DURING HIS MEDICAL EXAMINATION.

Plaintiff was the owner of a property maintenance business which involved lawn cutting, and other outdoor work during the spring, summer, and fall seasons, and snowplowing during the winter. (A 18).

On December 5, 2007, Plaintiff and his employee, Michael Epp, were preparing for snowplowing and had installed the plow on the front of a truck. Plaintiff and Mr. Epp threw snowballs at each other, Plaintiff ducked, and impaled his throat on a marker attached to the end of the snowplow. (A 19). Plaintiff's wife worked in the office of the Defendant, Dr. Imber, who is an ear, nose and throat specialist. Mr. Hineman called the Defendant's office and explained what happened, and was told to come in so Dr. Imber could examine him. (A 20). Plaintiff drove himself to Dr. Imber's office, and was examined by Dr. Imber. After examining Mr. Hineman, Dr. Imber did not refer him to a hospital for further evaluation, and instead told him to go home and go to bed and take Advil. (A 21).

Plaintiff drove himself home, and within minutes, he lost consciousness and use of the left side of his body. (A 22). He was taken by ambulance to Christiana Care Hospital and diagnosed with a dissection of the right internal carotid artery resulting in a stroke and paralysis to the left side of his body. (A 62-4). The injury to the carotid artery was linked to a puncture wound in the rear of the throat. (A 62-4). Upon his release from Christiana Care Hospital, Mr. Hineman underwent several months of rehabilitation and physical therapy and has permanent impairment of his left upper and lower extremities. (A 9-10).

Sometime between 45 minutes and 2 hours before Mr. Hineman was injured by the snowplow marker, he had smoked marijuana with his employee Mr. Epp. (A 33). During his deposition, Mr. Hineman indicated that he and Mr. Epp had smoked marijuana on the afternoon he was injured, and estimated they smoked a few hours prior to the time the injury occurred. (A 66). Mr. Hineman testified at trial that he did not think that marijuana was affecting him on the afternoon when he was having a snowball fight. (A 34). Michael Epp in his deposition estimated that he and Plaintiff had smoked marijuana "probably 45 minutes before," and when asked whether Plaintiff was feeling the effects of the marijuana he answered, "I don't know that, no." (A 68).

On March 26, 2012, Defendants filed a Memorandum of Law to support their contention that Plaintiff's use of marijuana on the day of his injury is admissible

testimony at trial. (A 69). In support of their Motion, Defendants pointed to deposition testimony of Plaintiff's ENT expert Dr. Robert Bogdasarian during questioning by Defendants' attorney: (A 76-7).

> Q: "Mr. Hineman has reported that he had been smoking marijuana that afternoon before this happened. Do you have any reason to believe that being high, as he claims he was, would have any significance in any part of your evaluation in this case?"
> A: "Well, fortunately, I guess I can say I don't have personal experience with this sensation, but I would say that I suppose it may have something to do with lightheadedness possibly. I'm really not an expert though in the effects of marijuana I'm afraid."

Defendants produced an affidavit from their ENT expert, M. Boyd Gillespie, M.D., containing his opinion on the significance of Plaintiff's marijuana use in determining whether Dr. Imber met the standard of care in his medical treatment of Plaintiff. (A 78). Dr. Gillespie stated in his affidavit:

1. Because marijuana is a sedative, a person under the influence of marijuana may perceive less pain and therefore report less pain to the doctor.
2. Marijuana can cause confusion and memory loss such that the ability to relate a full and accurate history by patient to a doctor would be impaired.
3. Mr. Hineman testified that being under the influence of marijuana made him feel "happy." A feeling of euphoria could result in Mr. Hineman's misperception of the extent of his injury and, therefore, the manner in which he reported it to his doctor.
4. Mr. Hineman should have told Dr. Imber that he had smoked marijuana and considered himself under the

> influence so that Dr. Imber could understand the possible inaccuracies of Mr. Hineman's reported history and symptoms. (A 79).

There was no evidence in the record regarding the quantity of marijuana that Plaintiff smoked earlier in the day, prior to his accident, and this important fact was disregarded by the Trial Court (A 83). Plaintiff arrived at Dr. Imber's office approximately one hour after the accident. (A 9). The Court assumed in its ruling that Plaintiff had smoked marijuana "a couple of hours" prior to the accident which, if accurate, would mean Dr. Imber's examination did not occur until three hours after the marijuana usage. (A 87). Defendants' standard of care expert, Dr. Gillespie, made no mention of the role that time of use plays in assessing whether a person is under the influence of marijuana, and in fact he was never asked any questions at trial about Plaintiffs marijuana use.

The Court noted in its Order that:

> "Defendants argue that Plaintiff's deposition testimony and the opinions of the experts demonstrate that Plaintiff's perceptions, feelings, symptoms or behaviors at the time of his injury and when he conveyed his injury to Dr. Imber, may have been skewed by the marijuana use. Defendant submits that the Plaintiff's marijuana use is relevant, because it impacted Dr. Imber's opportunity to make adequate recommendations to the patient. Additionally, Defendant submits that this evidence is admissible under D. R. E. 403, because its probative value substantially outweighs the danger of unfair prejudice."

(A 89). Plaintiff opposed Defendants' Motion and submitted that evidence of Plaintiff's prior marijuana use was not relevant because:

1. There is insufficient evidence for an expert to state, with reasonable medical probability, that Plaintiff was under the influence at the time of Dr. Imber's examination; and

2. Dr. Imber had a duty during his examination to ask Plaintiff whether he had taken any medication or drugs prior to the accident. (A 83-4).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION TO PRECLUDE REFERENCE TO A SEPARATE LAWSUIT BROUGHT BY PLAINTIFF AGAINST THE LANDOWNER WHERE THE INJURY OCCURRED, AND AGAINST THE PERSON WHO THREW A SNOWBALL CAUSING PLAINTIFF TO DUCK AND INJURE HIMSELF ON THE SNOWPLOW MARKER

Prior to the instant lawsuit, a Pennsylvania law firm filed and settled a lawsuit in Pennsylvania on Plaintiff's behalf, alleging fault on the part of the property owner and also Michael Epp, the employee who threw the snowball at Mr. Hineman. Prior to the beginning of opening statements, in the instant case, a conference was held with counsel and the trial judge at Plaintiff's request for the purpose of seeking the Court's ruling on the admissibility of any references at trial to the prior lawsuit. (A 97-105).

Plaintiff argued that there was no probative value in mentioning the prior lawsuit since that lawsuit was brought in connection with the act that caused the injury to Plaintiff's throat, not for the medical negligence of Dr. Imber which was the basis for the instant lawsuit. Plaintiff never brought suit against any party other than Defendants for the medical negligence which he alleges caused stroke related

injuries resulting from failure to timely diagnose and treat the carotid artery dissection.

The trial testimony of Michael Epp, the employee who threw the snowball at Plaintiff causing him to duck and injure his throat on the plow marker, was to be presented at trial by deposition testimony due to the unavailability of Mr. Epp. The deposition testimony contained references to the prior lawsuit but did not mention what the lawsuit was about and Plaintiff argued that it was therefore speculative, likely to confuse the jurors, and highly prejudicial.

Defendant argued that the references to the earlier lawsuit went to credibility of Plaintiff and also "the fact that he did previously blame other people for this injury and he made contradictory statements in another lawsuit." (A 100).

Deposition testimony regarding the prior lawsuit shown below was specifically objected to by Plaintiff, but the Court ruled that the following testimony of Michael Epp could be read in front of the jury (A 103-5).

> **Q:** "Prior to Nikki and Joe contacting you, were you aware that they had a lawsuit pending against Dr. Imber?"
> **A:** "Yes."
> **Q:** "How did you know that?"
> **A:** "Just from what my lawyer told me in the other deposition, that's how I found out they had a case against Dr. Imber."
>
> **Q:** "Okay. Now I understand that there was a lawsuit in which he named you as a defendant. Are you aware of that?"

A: "As a defendant, no-yeah, I'm sorry. As a defendant, yes."
Q: "You had legal representation?"
A: "Yes I did."
Q: "In that suit. Was there anyone else named? Was anyone else being sued. Besides, you?"
A: "Yes." (A 110-11).

In closing argument, defense counsel made the following reference to the prior lawsuit:

> "Blame. This is really the unspoken, the unspoken issue in this case, blame. Mr. Hineman had a freak accident that occurred when he was having the snowball fight, horsing around with his friend on his friend's property around heavy machinery, having smoked marijuana, and it resulted in a very rare, but a very unfortunate injury, and now we're all here because somebody has to be blamed. Mr. Hineman certainly gets nowhere blaming himself for this injury. He gets nowhere blaming himself for not going directly to the hospital, as some people had told him he should do.
>
> Who else could he blame? Well, he sued his friend, signed off on a lawsuit against his friend, calling it a vicious and intentional attack, which of course it wasn't, and he knew it wasn't. He sued his own father whose property he was on when this happened. He alleged that there were unsafe premises. Blames his father in a lawsuit... Why did he sue all of these people? Whether the suits were successful or not... Why did he sue all of these people? The same reason he's here today, for money." (A 115-6).

ARGUMENTS

I. IN THE ABSENCE OF SUFFICIENT FACTS TO SUPPORT THE OPINION, THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ACCEPTING DEFENDANTS' EXPERT WITNESS OPINION THAT PLAINTIFF WAS AFFECTED BY THE MARIJUANA AT THE TIME OF EXAMINATION BY DEFENDANT. ADMISSION AT TRIAL OF REFERENCES TO PLAINTIFF'S MARIJUANA USE VIOLATED DELAWARE RULES OF EVIDENCE 702(1) AND 703.

A. QUESTIONS PRESENTED

1. Did the Trial Court abuse its discretion by accepting in the absence of sufficient facts, and expert qualifications, Appellees' expert witness opinion that Plaintiff was under the influence of marijuana at the time of his medical examination by Defendant?

2. Did the Defendant violate the Court's limited permissible use relating to the mention of marijuana at trial by repeatedly mentioning Plaintiff's marijuana use without ever linking it to the issue of Plaintiff's pain perception during the medical examination by Defendant?

B. SCOPE OF REVIEW

The Trial Court's rulings on evidentiary issues are reviewed for an abuse of discretion. *Lily v. State*, 649 A.2d 1055, 1059 (Del. 1994); *Lamkins v. State*, 465 A.2d 785 (Del. 1983); *M. G. Bancorporation, Inc. v. Le Beau*, 737 A. 2d at 513.

C. MERITS OF ARGUMENT

The evidence of Plaintiff's marijuana use before his accident must first be relevant to be admissible at trial.[1] Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [2]

The Delaware Supreme Court has held that "the definition of relevance encompasses materiality and probative value"[3] Evidence is deemed material if it is offered to prove "a fact that is of consequence to the action."[4] "Evidence has no probative value if it affects the probability that the fact is, as the party offering the evidence asserts it to be.[5] In making a relevancy determination, it is necessary to examine the purpose for offering the evidence.[6]

The Trial Court in its Order of June 20, 2012 stated, "Defendants argue that Plaintiff's marijuana use may have affected his perception of his injury or pain threshold. The evidence is admissible for that purpose." (Underlining added). (A 93).

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[1] D.R.E. 402
[2] D.R.E. 401
[3] *Stickel v. State, 975 A. 2d 780, 783 (Del. 2009) (*citing *Lily v. State*, 649 A. 2d 1055, 1060 (Del. 1994).
[4] *Id, at 783.*
[5] *Id.*
[6] *Firestone Tire and Rubber Company v. Adams*, 541 A. 2d 567, 570 (Del. 1988).

There can be little doubt that Plaintiff was in obvious extreme pain following the accident. Michael Epp described Plaintiff's condition at the time of the accident:

> **Q:** "Okay. Tell us what you remember. After getting the plow hooked up. What did you and Joe do next?"
> **A:** "Joe-we went to move one truck and proceeded to have a snowball fight as snowballs were thrown. Joe came towards me, I threw-fake throwing a snowball and he ducked, and when he ducked he was-injured himself. I thought he had hit his face on the plow, because when he ducked he went out of vision of me, and when he came back up. I could see him, it was, he was bleeding from his lip, there was blood on his face, and I didn't really know what happened at that point."
> **Q:** "How did you know that?"
> **A:** "Just from what my lawyer told me in the other deposition, that's how I found out they had a case against Dr. Imber." (A 12, 91:4-16).
> **Q:** "Okay. You saw blood coming out of his mouth?"
> **A:** "Yes."
> **Q:** "What else was there about his appearance that made you think he must've hit his head on the plow?"
> **A:** "He had a blank look in his eyes, and, like I said, disoriented, wobbly, swaying from side to side. Just not secure on his feet."
> **Q:** "Okay. What happened next?"
> **A:** "Next he started wobbling and I could tell he was either going to keel over-or kneel down and or fall over, so I ran around the truck and he started to fall, and I tried to catch him. The best I could. He's obviously a bigger man than I am. And I caught him for the most part, and laid him, laid, got him down, and that's when he started having convulsions, and to me it looked like he passed out. Eyes were closed. He was shaking pretty vigorously. And that went on for about 10 seconds on the ground. And then he opened his eyes and regained consciousness or what I thought was regained consciousness." (A 107)

Q: "Okay. Approximately how long would you say if you can recall, his eyes were closed?"
A: "10, 15 seconds. Probably seemed like a lifetime, but it was probably 10 seconds."
Q: "Okay. While his eyes were closed, what else did you notice about him?"
A: "He was shaking." (A 107).

Several minutes later, Mr. Hineman got in his pickup and drove to Dr. Imber's office. He gave Michael Epp a ride to his parents' house, which was about five minutes away. Mr. Epp described Mr. Hineman's condition during that part of the ride:

Q: "How would you describe his physical appearance when he came back out of the garage and proceeded to get in the pickup?"
A: "Pale. I kept asking him if he was alright. He kept saying his head hurt a lot. But other than the paleness, and, you know, his head hurting, the blood on his lip, it wasn't that much you could see. I mean, he kept saying his head hurt a lot." (A 108).
Q: "How long was the trip from his parents' house to drop you off?"
A: "5 to 7 minutes. It is a pretty quick trip."
Q: "Do you recall, what his appearance, physical appearance was, condition during the drive?"
A: "He was holding his head, leaning against the window, holding his head, and you could tell he was in some pain. Just saying that his head hurt a lot, he had never had a headache like that."
Q: "When you say he was leaning against the window, he was leaning his head against the window?"
A: "He had his elbow against the window and had his hand on his head." (A 109).

Mr. Hineman described his physical condition when he appeared at the Defendant's office:

> **Q:** "And when you got to Dr. Imber's office, what do you remember about that visit?"
> **A:** "I remember my head was in severe pain. And it was just a little snow out, I walked right into the office. And Dr. Imber examined me with Nikki in the room. I explained what happened. I'm sure that I explained that I passed out, I mean, I know that for a fact. I said that to every person I've talked to about this story, and there's no reason why I wouldn't have said that in his office."
> **Q:** "Did Dr. Imber ask you questions?"
> **A:** "Yes, sir."
> **Q:** "Did he examine you?"
> **A:** "Yes, he did."
> **Q:** "Did he tell you what he was advising that you could do?"
> **A:** "I was told to gargle with, I believe its called Xylocaine, but I'm not positive, but that's how it's pronounced and to take Advil and go to bed. So I proceeded to go home." (A 21).

> **Q:** "Now, after you drove yourself to Dr. Imber's office, are you certain that you told him you had a headache?"
> **A:** "Yes sir, I did have a headache. I had severe head pain. As I recall, it was, I had my left elbow on the window, I was holding my head with my left hand as I drove with my right, because the pain was very bad." (A 36).
> **Q:** "You didn't tell him you had a headache?"
> **A:** "I told him I had a headache. But I told him I had passed out, and he didn't write that down. I never said I was lightheaded, that word never came out of my mouth ever."
> **Q:** "The word headache never came out of your mouth?"

> **A:** "Yes it did. I had a headache, and I passed out twice, that was exactly what I said."
> **Q:** "I missed your last answer, you said something never came out of your mouth, what word never came out of your mouth?"
> **A:** "I never said that I felt lightheaded, I never said that." (A 37).

The Trial Court's admission at trial of Plaintiff's marijuana use constituted reversible error for three reasons. First, Defendants' motion was based on an affidavit from Defendant's standard of care expert, Dr. Gillespie, who is an ear, nose, and throat specialist. At no time was there ever any evidence proffered that he was an expert on the physical effects of marijuana on the human body. Hence, he was not qualified to render an opinion with reasonable medical certainty that Plaintiff's marijuana use may have affected his perception of his injury or pain threshold.

Second, the timing of marijuana usage and the amount consumed must be considered essential facts in assessing the expected impact on an injured person's perception of injury or pain during a subsequent medical examination. The timing of use ranges from 1 hour 45 minutes, to 3 hours prior to the exam by Dr. Imber, based on Plaintiff's trial and deposition testimony. It could be safely assumed that the more time that lapses, the less impact on pain perception that can be expected. More importantly, there is absolutely no evidence in the record as to how much marijuana was consumed, making it medically impossible to reach an opinion with reasonable medical probability that Plaintiff was under the influence when he was

examined by Defendant. Cherry-picking certain facts and ignoring other material facts renders an expert opinion unreliable and inadmissible. *Le Clerq v. Lockformer Company,* 2005 WL 11 62979 (N.D. Ill., Apr. 28, 2005). That Court went on to say "such selective use of facts fail to satisfy the scientific method and Daubert – This disregard of relevant data undermines the reliability of (the) entire opinion - -." If any of the Daubert steps analysis renders the expert's analysis unreliable then the expert's testimony is inadmissible. *In re Paoli R.R. Yard PCB Litigation*, 35 F. 3d 717, 745 (3d Cir. 1994) Cert. denied, 513 U.S. 1190 (1995).

Third, as the Trial Court noted in its opinion of June 20, 2012, "Defendants argue that Plaintiff's marijuana use may have affected his perception of injury or pain threshold. **The evidence is admissible for that purpose.**" (Emphasis added). (A 93). The issue of marijuana, however, was never raised by Defendants at trial for the above mentioned purpose permitted by the Court. As previously noted, marijuana was mentioned to the jury by Defendant in Defendants' opening statement, cross-examination of Plaintiff, as well as in Defendants' closing statement, but at no time at trial was Defendants' expert Dr. Gillespie ever asked to opine as to whether "Plaintiff's marijuana use may have affected his perception of his injury or pain threshold" during the examination by Defendant. Hence, Defendant was able to exploit the prejudicial effect of mentioning Plaintiff's marijuana use several times to the jury, beginning with Defendants' opening

statement, for purposes other than that which had been held permissible by the Trial Court. (A 93). Defendants' expert affidavit was a Trojan Horse. Defendant was granted permission to introduce Plaintiff's marijuana use at trial on the false premise it would be used to explain Plaintiff's pain perception during examination. Instead it was mentioned repeatedly by Defense counsel in a manner designed to create prejudice among the members of the jury.

As a result of the erroneous ruling, the Trial Court permitted several references to Plaintiff's marijuana use:

1. Comments by Defense counsel in opening statement,

> "You'll hear from Mike Epp, and he'll tell you that he and Joe were smoking pot for about 45 minutes, and then got into a snowball fight and that Joe hit his mouth on the marker when he went to duck a snowball."

There was no testimony at trial that Joe was smoking pot for 45 minutes. Mike Epp did estimate that it was approximately 45 minutes before he was injured that he smoked marijuana (A 68), and Plaintiff estimated it could have been a couple hours. (A 66).

2. Cross-examination by Defense counsel of Plaintiff regarding his use of marijuana prior to the accident.

> **Q:** "On the day of this incident. You had in fact been smoking for a while before this actually occurred –"

A: "No, that is incorrect. Actually, if you look at the testimony it says we were smoking 45 minutes before. It doesn't say we smoked for 45 minutes, which is what Courtney stated when she made her opening statement. We did not smoke marijuana for 45 minutes that is incorrect."

Q: "In the deposition on page 26, the question had been asked, "when had you most recently smoked,?" And you answered, "I'm not sure." And then said, around the time of the incident? And you said, before, possibly a couple of hours. Okay. And then I said, can you tell me how much you smoked? You said you don't know. So you're saying you smoked a couple hours before and then had stopped?"
A: "Yes, that is what I'm saying."
Q: "Do you not think that that marijuana had any effect on you, is that why you gave that answer?"
A: "I've already said, sir, I don't know why I gave that answer 'cause it's not correct. And I don't have a problem admitting what I did."
Q: "Do you think that marijuana was affecting you on that afternoon you were having a snowball fight?"
A: "No, I do not. Absolutely not."
Q: "Absolutely not what?"
A: "No, it did not affect me in a negative way, like you're trying to say."
Q: "In your Pennsylvania deposition, on page 112, you are asked a question, "Did you feel you were under the influence at all of the marijuana at the time of the incident?"
A: "I said yes."
Q: "You actually said, 'I hope so, otherwise I wasted my money.'"
A: "Yeah, exactly, that is what I said, you're right. I was trying to make a joke, I was trying to break the tension in the room. I know that's hard to understand, but it was a very tense moment. I was trying to, you know, lighten the mood a little."
Q: "So you were under the influence of the

marijuana?"
A: "Yeah, absolutely. It didn't make me forget what I was doing or saying. (A 33-5).

3. References by Defense counsel in his closing argument to Plaintiff's marijuana use:

"December 5, 2007, Joe Hineman was working around heavy machinery on his father's property, he was smoking marijuana and he was having a snowball fight and horsing around." (A 114).

References by Defense throughout the trial to Plaintiff's marijuana use were never offered for the limited purpose allowed by the Court and were clearly irrelevant. "Irrelevant and misleading comments in jury summations are not judged on the basis of truth or falsity, per se, but whether they distract the jury from the task at hand, the individualized determination of the factual merit of a specific claim. *DeAngelis v. Harrison*, 628 A.2d 77 (Del. Supr. 1993).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION TO PRECLUDE REFERENCE TO A SEPARATE LAWSUIT BROUGHT BY PLAINTIFF AGAINST THE LANDOWNER WHERE THE INJURY OCCURRED, AND AGAINST THE PERSON WHO THREW A SNOWBALL CAUSING PLAINTIFF TO DUCK AND INJURE HIMSELF ON THE SNOWPLOW MARKER.

A. QUESTION PRESENTED

Did the Trial Court abuse its discretion when it admitted testimony referring to a previous lawsuit brought by Plaintiff against the landowner where the injury occurred and against the person who threw the snowball causing Plaintiff to duck and injure himself? This question was preserved by Plaintiff's Motion in conference preceding opening statements on April 20, 2015, and denied on the same date. (A 97-105).

B. SCOPE OF REVIEW

The Trial Court's rulings on evidentiary issues are reviewed for an abuse of discretion. *Lily v. State*, 649 A.2d 1055, 1059 (Del. 1994); *Lamkins v. State*, 465 A.2d 785 (Del. 1983); *M. G. Bancorporation, Inc. v. Le Beau*, 737 A. 2d at 513.

C. MERITS OF ARGUMENT

The Trial Court abused its discretion by permitting Defendants to refer to the lawsuit previously filed on Plaintiff's behalf in Pennsylvania, alleging fault on the

part of the property owner and also Michael Epp, the employee who threw the snowball at Mr. Hineman. Plaintiff argued prior to trial that permitting reference to the lawsuit would have little probative value, yet a high risk of confusion and prejudice against the Plaintiff. The prior lawsuit was for alleged acts relating to the fault and cause of the injury to Plaintiff's throat during the accident. The only lawsuit based upon alleged medical negligence after the accident is the instant case, thus, the lawsuits are for two distinctly different purposes.

D.R.E. 403 states that relevant evidence "may be excluded if the probative value is substantially outweighed by the damage of unfair prejudice, confusion of the issues or misleading the jury…" Defendants' counsel exploited the potential confusion and unfair prejudice by instructing the jury in closing argument that the prior lawsuit was evidence that Plaintiff was blaming others in addition to Dr. Imber for the damages resulting from the alleged medical negligence:

> "Blame. This is really the unspoken, the unspoken issue in this case, blame. Mr. Hineman had a freak accident that occurred when he was having the snowball fight, horsing around with his friend on his friend's property around heavy machinery, having smoked marijuana, and it resulted in a very rare, but a very unfortunate injury, and now we're all here because somebody has to be blamed. Mr. Hineman certainly gets nowhere blaming himself for this injury. He gets nowhere blaming himself for not going directly to the hospital, as some people had told him he should do.
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> Who else could he blame? Well, he sued his friend, signed off on a lawsuit against his friend, calling it a vicious and intentional attack, which of course it wasn't, and he knew it wasn't. He sued his own father whose property he was on when

> this happened. He alleged that there were unsafe premises. Blames his father in a lawsuit... Why did he sue all of these people? Whether the suits were successful or not... Why did he sue all of these people? The same reason he's here today, for money." (A 115-116).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the Trial Court's erroneous rulings and remand this action for a new trial.

HUDSON & CASTLE LAW, LLC

/s/ Bruce L. Hudson
Bruce L. Hudson, Esq. (#1003)
2 Mill Road Suite 202
Wilmington, DE 19806
(302) 428-8800
Attorney for Appellant

Dated: August 24, 2015

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOSEPH HINEMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N10C-03-014 CLS
	)	
PAUL M. IMBER, D.O. and	)	
EAR, NOSE, THROAT AND	)	
ALLERGY ASSOCIATES	)	
LLC, a Delaware Company	)	
	)	
Defendant.	)	
	)	

ORDER

AND NOW, TO WIT, this 20th day of June, 2012, **IT IS HEREBY ORDERED** as follows:

Introduction

Before the Court is Defendants' Memorandum of Law pertaining to the admissibility of Plaintiff's, Joseph Hineman ("Plaintiff") use of marijuana on the day of his injury. The evidence is relevant and is admissible pursuant to D.R.E. 403. Accordingly, Defendants' Motion *in Limine* to introduce evidence of Plaintiff's marijuana use on the day of the injury is **GRANTED**.

Facts

On December 5, 2007, Plaintiff fell on a metal rod attached from a plow marker during a snowball fight, injuring the left soft pallet of his mouth. An hour after the incident, Plaintiff went to Dr. Imber's office complaining of a headache, pain in his temples and a sore throat. Dr. Imber examined the Plaintiff and observed two cuts on the roof of his mouth. Dr. Imber cleaned the wounds with a cotton ball and released Plaintiff to return home.

According to the Complaint filed on March 1, 2010, at about 5:00 p.m. on December 5, 2007, Plaintiff's mother found him in his kitchen in a pool of his own blood. Plaintiff was transported to Christiana Hospital where he was diagnosed with an infarct on his left internal carotid artery. On that same day, Plaintiff suffered a stroke and brain damage. Plaintiff underwent emergency surgery, was hospitalized for 13 days after the surgery and remained in recovery for 2 months. The Complaint alleges that as a result of Dr. Imber's medical negligence in assessing Plaintiff's injuries, Plaintiff is now permanently paralyzed.

Defendants seek to admit evidence of Plaintiff's use of marijuana, particularly on the day of his injury. During Plaintiff's deposition in this case, he admitted that he smoked marijuana "possibly a couple hours" before the accident, but did not know how much he smoked.[1] Another case was filed in the Court of

[1] Defts. Mot. in Limine, Ex. A.

Common Pleas in Delaware County. In the case filed in Delaware County, Joseph Hineman and Dorothy Hineman are listed as Plaintiffs and Michael Epp and Clifford Hineman are listed as the defendants. Plaintiff was deposed in connection with the Delaware County case on June 16, 2011. During the deposition, Plaintiff was specifically asked, "did you feel you were under the influence at all of the marijuana at the time this incident occurred?" Plaintiff answered, "I hope so. Otherwise, I wasted my money."[2]

The Plaintiff retained Dr. Bogdasarian as an expert witness. Dr. Bogdasarian testified that Plaintiff's use of marijuana use prior to the date of the incident may have contributed to his lightheadedness.[3] The Defendant retained Dr. M. Boyd Gillespie as an expert. The Defendant asked Dr. Gillespie to state a medical opinion as to the role of marijuana smoking on the medical care of the

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[2] After Plaintiff answered, the following relevant questions and answers followed:

> Q: How was it that the marijuana would make you feel?
> A: Just happy.
> Q. All right. Did it affect your ability to perceive any objects that were there that day?
> A: No.

Defts. Mot. in Limine, Ex. B.

[3] The testimony of the deposition states the following:

> Q: Mr. Hineman has reported that he had been smoking marijuana that afternoon before this happened, do you have any reason to belief that being high[,] as he claims he was[,] would have any significance in any part of your evaluation in this case?
> A: Well, fortunately[,] I guess I can say I don't have personal experience with his sensation, but I would say that I suppose it may have something to do with lightheadedness possibly. I'm really not an expert though in the effects of marijuana[,] I'm afraid.

Defts. Mot. in Limine, Ex. C.

Plaintiff. Dr. Gillespie submitted an affidavit based on the sworn testimony of Plaintiff that he smoked marijuana prior to the injury and that he was "under the influence" of marijuana at the time of the accident. According to the affidavit submitted by the Defendant, it is Dr. Gillespie's medical opinion that:

1. Because marijuana is a sedative, a person under the influence of marijuana may perceive less pain and therefore report less pain to the doctor.
2. Marijuana can cause confusion and memory loss such that the ability to relate a full and accurate history by a patient to a doctor would be impaired.
3. Mr. Hineman testified that being under the influence of marijuana made him feel "happy." A feeling of euphoria could result in Mr. Hineman's misperception of the extent of his injury and, therefore, the manner in which he reported it to his doctor.
4. Mr. Hineman should have told Dr. Imber that he had smoked marijuana and considered himself under the influence so that Dr. Imber could understand the possible inaccuracies of Mr. Hineman's reported history and symptoms.[4]

Parties' Contentions

The Defendants argue that Plaintiff's testimony and the opinions of the experts demonstrate that Plaintiff's perceptions, feelings, symptoms or behaviors at the time of his injury and when he conveyed his injury to Dr. Imber, may have been skewed by his marijuana use. Defendant submits that the Plaintiff's marijuana use is relevant because it impacted Dr. Imber's opportunity to make adequate recommendations to the patient. Additionally, Defendant submits that

[4] Defts. Mot. in Limine, Ex. D.

this evidence is admissible under D.R.E 403 because its probative value substantially outweighs the danger of unfair prejudice.

Plaintiff opposes Defendants Motion. Plaintiff submits that the evidence of Plaintiff's prior marijuana use is not relevant because: (1) there is no evidence for an expert state, with reasonable medical probability, that plaintiff was under the influence at the time of Dr. Imber's examination; and (2) that Dr. Imber had a duty to ask Plaintiff whether he used drugs prior to the accident. Therefore, the Plaintiff argues that the only inquiry before this Court is whether Dr. Imber was negligent for sending Plaintiff home instead of referring Plaintiff to the emergency room for treatment. Also, Plaintiff contends that the probative value of mentioning to the jury that Plaintiff smoked marijuana is greatly outweighed by the danger of unfair prejudice and is thus inadmissible pursuant to D.R.E. 403.

Discussion

The evidence of Plaintiff's marijuana use on the day of the accident is relevant and its probative value substantially outweighs the danger of unfair prejudice. Therefore, the evidence is admissible.

The evidence of Plaintiff's marijuana use a couple of hours before his snowball accident must first be relevant to be admissible at trial.[5] Relevant

[5] D.R.E. 402 ("All relevant evidence is admissible, except at otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.").

evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[6] The Delaware Supreme Court has held that "[t]he definition of relevance encompasses materiality and probative value."[7] Evidence is deemed material if it is offered to prove "a fact that is of consequence to the action."[8] "Evidence has probative value if it affects the probability that the fact is as the party offering the evidence asserts it to be."[9] In making a relevancy determination, it is necessary to examine the purpose for offering the evidence.[10] Absent a clear abuse of discretion, relevancy determinations will not be reversed on appeal.[11]

Though relevant, evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."[12]

In *Laws v. Webb*, the Delaware Supreme Court upheld the decision of this Court admitting evidence of the plaintiff's alcohol consumption prior to a car

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[6] D.R.E. 401.
[7] *Stickel v. State*, 975 A.2d 780, 783 (Del. 2009) (citing *Lilly v. State*, 649 A.2d 1055, 1060 (Del. 1994)).
[8] *Id.* at 783.
[9] *Id.*
[10] *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).
[11] *Id.*
[12] D.R.E. 403.

accident.[13] This Court first determined that the alcohol consumption was relevant the degree of plaintiff's fault and the evidence could assist the jury in determining plaintiff's perceptive abilities near the time of the accident.[14] This Court then weighed the probative value of the plaintiff's alcohol consumption against its prejudicial value and concluded that any prejudice was "outweighed by the defendant's fair need to have the jury understand as much as possible about the background of one of the potential proximate causes of the accident."[15] The Delaware Supreme Court held that this Court did not abuse its discretion.[16]

Similarly, in *Rachko v. Nationwide Mutual Insurance Co.*, this Court held that evidence of plaintiff's alcohol consumption was admissible to show plaintiff's ability to perceive and react in a case resulting in a car accident.[17] This Court left the determination of contested facts a question of fact for the jury to resolve.[18]

Also, in *Scott v. Ritterson*, this Court admitted evidence of plaintiff's consumption of alcohol on the day of the accident.[19] The plaintiff was not impaired and passed field sobriety tests at the scene of the accident.[20] In holding that the evidence of plaintiff's alcohol consumption prior to the accident was

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[13] 658 A.2d 1000, 1010 (Del. 1995) (overruled on other grounds by *Lagola v. Thomas*, 867 A.2d 891 (Del. 2005)).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] 1997 WL 817860, at *1 (Del. Super. Oct. 17, 1997).
[18] *Id.*
[19] 2004 WL 1790134, at *2 (Del. Super. Aug. 9, 2004).
[20] *Id.* at *1.

relevant, the Court reasoned that, "[t]he jury must assess the credibility of the parties in making its determination of liability. The ability of the parties to perceive and react to the auto accident is relevant to the jury's determination of liability."[21] This Court further held that any prejudicial effect the testimony may have had was greatly outweighed by the jury having all information necessary in making an assessment of negligence and proximate cause.[22]

In this case, evidence of the Plaintiff's admission that he smoked marijuana a couple of hours before the injury is relevant. This is a medical negligence case where Plaintiff alleges that Dr. Imber's treatment of Plaintiff's condition fell below the requisite standard of care. Defendants are not contending that the evidence is relevant to show that Plaintiff was in anyway at fault in causing his injury. Instead, Defendants argue that Plaintiff's marijuana use may have affected his perception of his injury or pain threshold. The evidence is admissible for that purpose. The jury must assess the credibility of the parties in making the determination of medical negligence. Similar to this Court's holding in *Scott*, the ability for the Plaintiff to perceive and react to his accident is relevant to the jury's determination of the alleged medical negligence.

Having determined that the evidence of Plaintiff's marijuana use on the day of the accident is relevant, the Court must now determine whether the prejudicial

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[21] *Id.* at 2.
[22] *Id.*

effect of that evidence substantially outweighs its probative value. It is essential for the jury to be presented with facts that could potentially affect the Plaintiff's perception at the time of his office visit with Dr. Imber. The evidence in this case shows that the Plaintiff's perception of pain may have been decreased or he was not able to appreciate the severity of his symptoms. Any prejudicial effect that this testimony may have is substantially outweighed by the jury's determination of the Plaintiff's perception at the time he was examined by Dr. Imber.

Conclusion

Based on the foregoing, Defendants' Motion is **GRANTED**.

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CIVIL TRIAL ACTIVITY SHEET

EFiled: Apr 24 2015 04:20PM EDT
Transaction ID 57136224
Case No. N10C-03-014 CLS

Case Number: N10C-03-014 CLS **Date of Jury Selection:** 04/20/

Trial Dates: 04/20/15, 4/21/15, 4/22/15, 4/23/15, 4/24/15

X Jury Trial
☐ Non-Jury Trial
☐ Condemnation
☐ Special Jury

Cause of Action:

X Medical Malpractice
☐ Breach of Contract
☐ Debt Action
☐ Personal Injury
☐ Personal Injury – Auto
☐ Other

Plaintiff's Counsel: Bruce Hudson & Ben Castle	*Joseph Hineman* vs. *Paul M. Imber, D.O. & Ear, Nose, Throat, and Allergy Associates, LLC*
Firm: Hudson and Castle Law LLC	
Defense Counsel: Richard Galperin & Courtney Hamilton	
Firm: Morris James, LLP	
Court Reporter: Tom Maurer	
Clerk: Jordan Beard/Lindsey Onley	
Judge at Jury Selection: Scott	**Judge at Trial:** Scott — **Courtroom:** 8C

JUROR NAME (Date Non-jury Trials as well)	**Dates:** 4/20/15	4/21/15	4/22/15	4/23/15	4/24/15
1. Tiffany T. Nichols	X	X	X	X	X
2. James D Miller	X	X	X	X	X
3. Elizabeth L Wood	X	X	X	X	X
4. Kenneth C Manning	X	X	X	X	X
5. Kerry J Gleason	X	X	X	X	X
6. Mark A Mass	X	X	X	X	X
~~**7.** Dana G Doughty~~	Excused @ 12:28 p.m. on 4/20/15				
8. Elizabeth A Sarnecki	X	X	X	X	X
9. Randolph J Strusowski	X	X	X	X	X
10. Brian C Miles	X	X	X	X	X
11. Lawrence M Volzone	X	X	X	X	X
12. Linda Feldbaumer	X	X	X	X	X
~~**A1.**~~ **7.** Lori C Patton	X	X	X	X	X
~~**A2.**~~ **A1.** Linda M Webber	X	X	X	X	Excused @ 1:29 on 4/24/15
~~**A3. A2. Mark D. Stueve**~~	Excused @ 12:28 p.m. on 4/20/15				
~~**A4. A3.**~~ **A2.** Barbara A Norton	X	X	X	X	Excused @ 1:29 on 4/24/15

Verdict: *Date: 4/24/15* ***Jury found:*** The Jury found in favor of the Defendant – Dr. Imber.

Nature of Claim:	❑ Soft Tissue ❑ Disk Herniation ❑ Surgery	❑ Wrongful Death ❑ Property Damage ✓ Other:

Brief Description of Claim (Less than 50 words; e.g. rear end collision...):
Plaintiff Joseph Hineman claims the defendant, Dr. Imber, breached the standard of care when he failed to properly diagnose his injury.

Detailed Description of Claim (Please list all claimed injuries if applicable; e.g. radiculopathy, numbness, C5-C6 herniation, etc.) ***Required:***

Plaintiff alleges medical negligence by the defendant, Dr. Imber in his failure to properly diagnose and refer him to a hospital for evaluation and treatment of injury. This injury to plaintiff's oropharynx caused an occluded internal carotid artery leading to an eventual stroke. Plaintiff claims that proper diagnosis would have allowed more substantial treatment; preventing or reducing the permanent injuries that resulted from the hyperfusion of blood to the brain – stroke.

Date of last responsive pleading: 3/19/11 **Date of Scheduling Order:** 3/25/14

Plaintiff's Exhibits	
1	CV of John R. Bogdasarian M.D.
2	Plow Marker
3	Calendar of Treatment for Joseph Hineman
4	Answer to Interrogatories #26 & 27
5	CV of Richard Meaghar M.D.
6	Photo of plow marker on plow
7	Photo of Plaintiff w/daughter
8	Photo of Plaintiff fishing w/father
9	Photo of Plaintiff on beach w/father
10	Photo of Plaintiff on chopped wood
11	Photo of Plaintiff doing rehab exercises
12	Photo of Plaintiff with daughters
13	Anatomy of the mouth
14	Side view of mouth
15	Carotid artery diagram
16	3D photo of gas in mouth
17	3D photo Tapered Occlusion of Right Artery
18	3d photo of right internal artery
19	CAT scan of lacerations in throat

Defendant's Exhibits	
1	CV of M. Boyd Gillespie M.D.
2	Photo of Anterior Pharynx, Posterior and soft palate - labeled

Court Exhibits	
No.	***Description***
1	Transcript of Thomas Knipper CRNA
2	Transcript of Michael Epp
3	Transcript of Antoninus J. Manos D.O
4	Left side photograph of gas in mouth
5	Left side photograph of gas in lower and upper region of mouth
6	Arterial Circulation of Carotid Arteries
7	Packet - Images

Ltr.	Description	Exh.
A	Photo of mouth	13
B	Photo of mouth from the side	14
C	**Court exhibit 4** – Left side photo of gas in mouth	
D	**Court exhibit 5** – Photo of gas in lower region and upper regions of mouth	
E	**Court Exhibit 6** – Arterial Circulation of Carotid Arteries	
F	Photo of Carotid Artery	15
G	Gas identification in throat photo	16
H	Reference view photo of Plaintiff	17
I	Tapered Occlusion of Right Internal Carotid Artery	18
J	**Court Exhibit 7** Packet - Images	

Ltr.	Description	Exh.

Plaintiff's Witnesses	
Date	***Name***
4/20/15	Thomas Knipper CRNA (video deposition)
4/20/15	Michael Epp (read in deposition)
4/21/15	Dr. John Bogdasarian
4/21/15	Dr. Antoninus Manos (video deposition)
4/21/15	Wayne Bloodgood
4/21/15	Joseph Hineman
4/21/15	Clifford Hineman
4/22/15	Dorothy Nicole Hineman
4/22/15	Dr. Richard Meagher

Defendant's Witnesses	
Date	***Name***
4/22/15	Dr. Paul Imber
4/23/15	Dr. Eli M. Zeserson
4/24/15	Dr. M. Boyd Gillespie

Joint Exhibits	
No.	***Description***
1	Joint Juror Notebook – Hineman v. Imber
2	
3	

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSEPH HINEMAN	)	
	)	C.A. NO. N10-C-03-014-CLS
	)	
	)	
PAUL M. IMBER, D.O., and	)	
EAR, NOSE, THROAT AND	)	
ALLERGY ASSOCIATES, LLC,	)	
a Delaware Company,	)	
	)	
Defendants	)	

SPECIAL VERDICT FORM

1. Do you find that Defendant Dr. Paul M. Imber, D.O. breached the standard of care in his treatment of the Plaintiff, Joseph Hineman?

_____ Yes ___✓___ No

If your answer to Question No. 1 is "YES," go on to Question No. 2. If your answer to Question No. 1 is "NO," you have now completed your assignment in this case. Please let the bailiff know that you are ready to return to the courtroom.

2. Do you find that Defendant Paul M. Imber, D.O.'s breach of the standard of care was a proximate cause of injury to Plaintiff Joseph Hineman?

_____ Yes _____ No

If your answer to Question No. 2 is "YES," go on to Question No. 3. If your answer to Question No. 2 is "NO," you have now completed your assignment in this case. Please let the bailiff know that you are ready to return to the courtroom.

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3. State the amount of your award of damages to Plaintiff, Joseph Hineman.

$_____

You have now completed your assignment in this case. Please let the bailiff know that you are ready to return to the courtroom.

Dated: April 25, 2014

(Foreperson)