IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH HINEMAN, Plaintiff Below, Appellant, v. PAUL M. IMBER, D.O., and EAR, NOSE, THROAT AND ALLERGY ASSOCIATES, LLC, a Delaware company, Defendants Below, Appellees.	No. 229,2015 Court Below – Superior Court of the State of Delaware in and for New Castle County C.A. No. N10C-03-014 CLS

APPELLEES' AMENDED ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal of Plaintiff Below/Appellant Joseph Hineman ("Mr. Hineman") of: (1) the Superior Court's Order dated June 20, 2012 permitting testimony regarding Mr. Hineman's use of marijuana on the day of the incident (B-1-9); (2) Defendants Below/Appellees' use of testimony regarding Mr. Hineman's marijuana usage on the day of the incident; and (3) the Superior Court's denial of Mr. Hineman's motion to preclude reference to a separate lawsuit which Mr. Hineman filed against his former employee, Michael Epp, and his father, seeking monetary relief for the same injuries for which he sought relief against Dr. Imber.

On March 1, 2010, Plaintiff Joseph Hineman[1] filed a Complaint against Paul Imber, D.O., and his medical practice, Ear, Nose, Throat, and Allergy Associates, LLC (collectively, "Defendants"), claiming that Dr. Imber was medically negligent in his examination of Mr. Hineman on December 5, 2007, after Mr. Hineman injured his throat during a snowball fight. (Transaction I.D. 29795716). Specifically, the issues were: (1) whether Dr. Imber should have sent Mr. Hineman directly to the hospital instead of sending him home; and (2) if so, whether Mr. Hineman would have had a different outcome if he had been sent directly to the hospital.

[1] The lawsuit was initiated by both Mr. Hineman and his wife, Dorothy Nicole Hineman, but Mrs. Hineman moved to dismiss her claim in the litigation on August 23, 2010. (Transaction I.D. 32812624). This request was granted by the Court on September 27, 2010. (Transaction I.D. 33462938).

Plaintiff ultimately identified two experts who testified at trial: (1) Dr. John Bogdasarian, an ear, nose, and throat ("ENT") specialist, who opined that Dr. Imber breached the standard of care when he did not send Mr. Hineman directly to the emergency room; and (2) Dr. Richard Meagher, a neurosurgeon who opined that if Mr. Hineman had arrived at the Emergency Department earlier, he would have received interventions (specifically, the clot-busting medication tPA) that would have increased Mr. Hineman's likelihood of emerging from the injury without permanent deficits.

Defendants identified and called a single expert: Dr. Boyd Gillespie, an ENT who worked at the Medical University of South Carolina as an ENT consultant on cases such as Mr. Hineman's. Dr. Gillespie opined that Dr. Imber's history, examination, and plan to send Mr. Hineman home all met the standard of care because there was no indication from the wounds in Mr. Hineman's throat (which were superficial, which had stopped bleeding before Mr. Hineman arrived at Dr. Imber's office, and which did not have any bruising or other indication of severe trauma at the time Dr. Imber examined Mr. Hineman) or from Mr. Hineman's reported symptoms to Dr. Imber that Mr. Hineman was experiencing the extremely rare complication of a carotid artery dissection (a complication which is so rare that Plaintiff's expert, Dr. Bogdasarian, had never before seen it in his thirty-eight years of practice).

Dr. Gillespie further opined that Mr. Hineman would not have been given tPA even if Dr. Imber had sent him directly to the hospital because: (1) it took the hospital (which was not a defendant in the action) more than two hours to diagnose Mr. Hineman's stroke when Mr. Hineman did arrive later that afternoon, despite the fact that Mr. Hineman was displaying more symptoms at the time he went to the hospital (including clear paralysis on his left side, which everyone agreed was not present when Mr. Hineman was evaluated by Dr. Imber); (2) Mr. Hineman would have arrived at the hospital approximately one hour and forty-five minutes to two hours after his injury; and (3) the clot-busting medication tPA (upon which Dr. Meagher relied in his opinion that Mr. Hineman's outcome would have improved, and which must be given within three hours of injury) would not have been administered because the diagnosis would not have been made until three hours and forty-five minutes to four hours after the injury (assuming the hospital could have diagnosed the injury as quickly as they did later in the day when Mr. Hineman had more symptoms).

Finally, Dr. Gillespie opined that, because of the type of stroke Mr. Hineman was suffering (a tear in the artery wall which led to closure of the artery), he would not have recommended tPA even if Mr. Hineman had arrived at the hospital sooner due to the risk of a bleed which could have resulted in swift death.

The Court entered a Trial Scheduling Order on August 15, 2011, which set the trial date for this case as April 23, 2012. (Transaction I.D. 39286792). The Pre-Trial Conference took place on March 19, 2012. Days later, Defendants were informed that Plaintiff needed a new trial date due to the sudden unavailability of one of Plaintiff's experts. On March 28, 2012, Defendants docketed this request and the resolution between the parties and the Court regarding the new trial date – now set for September 24, 2012. (Transaction I.D. 43339551).

On March 26, 2012, Defendants filed a motion *in limine* (the "Marijuana Motion") concerning the admissibility of Mr. Hineman's use of marijuana on the day of the incident. (B-10-41). Plaintiff filed a response on April 2, 2012. (B-42-97). Thereafter, Defendants requested leave in a letter to reply to Plaintiff's response (B-98-99), and Plaintiff submitted a letter reply the same day (B-100-101).

On June 20, 2012, the Court entered an Order granting the Marijuana Motion and finding the testimony concerning Mr. Hineman's use of marijuana on the day of the incident was relevant and that the probative value was not substantially outweighed by any prejudicial effect. (*See* B-1-9).

Thereafter, a second Pretrial Conference was held on September 4, 2012. (Transaction I.D. 46238481). On October 16, 2012, Plaintiff filed a letter with the Court requesting a new trial date. (Transaction I.D. 47085838, attached as B-102).

In this letter, Plaintiff remarks that trial was once again "continued due to the last minute unavailability of one of the experts." *Id.* The Court granted this request on July 12, 2013 and re-scheduled trial for December 9, 2013. (Transaction I.D. 53246178).

By agreement of the parties, a new proposed trial date of April 28, 2014 was requested via letter and Proposed Order on October 2, 2013. (Transaction I.D. 54315898). The Court allowed the request with the slight modification that trial would begin on April 23, 2014. (Transaction I.D. 55198519).

The trial finally did, in fact, commence on Wednesday, April 23, 2014. (Transaction I.D. 55359936). However, one juror was excused that same day. *Id.* Plaintiff continued to present his case-in-chief through the end of the day on April 24, 2014.

The parties arrived back to the courthouse for the scheduled third day of trial on April 28, 2014. *Id.* Unfortunately, two additional jurors did not appear on April 28th, bringing the total jury pool down to eleven (11) jurors. *Id.* Accordingly, a mistrial was declared due to an insufficient number of jurors. *Id.*

Ultimately, the case was tried to completion from April 20 through April 24, 2015. The jury deliberated from 1:32 p.m. to 3:28 p.m., during which time they also ate lunch. (*See* B-117). At 3:30 p.m., they delivered their unanimous opinion that there was no breach in the standard of care by Dr. Imber. *Id.* at B-117-118.

Mr. Hineman filed a Notice of Appeal on May 6, 2015, and an Opening Brief on August 24, 2015. Defendants now file their Answering Brief.

SUMMARY OF ARGUMENTS

1) Mr. Hineman's argument is denied. The Superior Court's decision to permit evidence of Mr. Hineman's marijuana use on the day of the incident was well supported by the testimony of Mr. Hineman's expert, Dr. Bogdasarian, and Defendants' expert, Dr. Boyd Gillespie, as well as the case law concerning the admissibility of a party's use of drugs at or around the time of the incident at issue.

2) Mr. Hineman's argument is denied. Plaintiff improperly raises for the first time in his Opening Brief the issue of whether the testimony elicited at trial concerning his marijuana use fell within the Court's Order regarding the same, without providing the requisite explanation as to why "the interests of justice require" consideration of this argument despite Plaintiff's failure to object at any time during trial.

3) Mr. Hineman's argument is denied. The Superior Court's decision to permit evidence of a prior lawsuit filed by Mr. Hineman against his father and the individual who threw the snowball at him for the same injuries he was claiming in his lawsuit against Dr. Imber was supported as the evidence was relevant and went directly to Mr. Hineman's credibility, a central issue in the case.

STATEMENT OF FACTS

On the morning of December 7, 2007, Mr. Hineman was on the property of Dr. Imber performing leaf clean-up with two other individuals. (Mike Epp Trial Transcript (B-128-129). Mr. Hineman grew up next to Dr. Imber, and when Mr. Hineman began a lawn care service in or around 1999, Dr. Imber agreed to change from the lawn care service he was using at the time to Mr. Hineman's lawn care service. (Joseph Hineman Trial Transcript, B-290; Dr. Imber Trial Transcript, B-168).

Mr. Hineman later began dating and eventually married Dorothy Nicole Hineman (who goes by "Nikki"). Dr. Imber also gave work to Nikki Hineman, initially watching his children, and later in a role at his medical practice, Defendant Ear, Nose, Throat, and Allergy Associates, LLC. (B-290-291). Nikki Hineman was working at Dr. Imber's practice at the time of the incident.

In the early afternoon of December 5, 2007, when the weather turned and a snow storm began, and before the work on Dr. Imber's property was complete, Mr. Hineman and his crew left Dr. Imber's yard and moved their equipment next door to Mr. Hineman's parents' home, the base from which Mr. Hineman operated his lawn service. (B-129-130). Mr. Hineman sent one worker home, and asked the remaining worker, Mike Epp, to prepare plows to plow the snow. (B-132).

That same afternoon, Mr. Hineman and Mr. Epp smoked marijuana. Mr. Hineman and Mr. Epp, his employee, then engaged in a snowball fight. (B-150). During this fight, Mr. Epp threw a snowball at Mr. Hineman, and Mr. Hineman ducked to avoid the snowball. (B-134). When Mr. Hineman ducked, the marker rod on one of the snowplows went into the back of Mr. Hineman's throat. (B-145-146).

Mr. Hineman claims that he then lost consciousness twice on his way inside of the house. (B-151-152). Once inside of the house, he asked his mother to look him over. (B-142). He then called his wife to ask if Dr. Imber – an ear, nose, and throat specialist – would see him that afternoon, and Nikki said that Dr. Imber would fit him in. (B-255).

When Mr. Hineman emerged from the house, Mr. Epp offered several times to take Mr. Hineman to the hospital. (B-152). Mr. Hineman claimed at trial that he refused Mr. Epp's offers because Mr. Epp did not have a valid driver's license at the time, though he acknowledged that he never asked his mother to drive him to the hospital and that he refused his wife's offer to send him to the hospital. (B-297-298).

In addition, although Mr. Hineman spoke to both his mother and his wife while he was inside, he acknowledged that he did not tell either one that he had passed out at that time. (B-298-299).

Mr. Hineman then drove Mr. Epp home and continued on to Dr. Imber's office. (B-255). He testified that he felt fine during this drive, and that the bleeding in his mouth had stopped by the time he left for Dr. Imber's office. (B-299; B-299-301).

Once Mr. Hineman arrived in Dr. Imber's office, he went right in to an exam room and Dr. Imber performed an examination on Mr. Hineman. (B-256). Depending on when in the proceedings Mr. Hineman was asked, he may or may not have told Dr. Imber he had a headache. (B-301).

Mr. Hineman's friend, Mr. Epp, who witnessed the incident, said that he saw Mr. Hineman pass out briefly and have what appeared to be a seizure. (B-138-139). Mr. Epp testified that he told Mr. Hineman about the seizure. (B-156). Mr. Hineman does not recall Mr. Epp telling him about the seizure. (B-303-304). Mr. Hineman further testified that he "felt fine" when he was driving himself back from Dr. Imber's office. (B-307-308).

As the testimony emerged, a central issue in the case turned on whether Mr. Hineman told Dr. Imber during this examination that he had passed out prior to coming to see Dr. Imber. Dr. Imber recalled no such statement and had not written anything down about Mr. Hineman passing out, and Mr. Hineman claimed that he had told Dr. Imber he passed out. Interestingly, although Mr. Hineman's wife testified at trial that she was in the room at the time of the examination, she

did not say that Mr. Hineman told Dr. Imber that he passed out. (Dorothy Nicole Hineman Trial Transcript, B-327).

Whether Dr. Imber was informed that Mr. Hineman passed out controlled whether Dr. Imber was required to send Mr. Hineman directly to the hospital (or if his decision to send Mr. Hineman home was appropriate). If the symptoms were as Dr. Imber remembered them to be and as they were recorded in Dr. Imber's note, then even Plaintiff's expert acknowledged that Dr. Imber was not required to send Mr. Hineman to the hospital. If, however, Mr. Hineman informed Dr. Imber that he passed out, Defendants' expert conceded that the appropriate course of action would have been to send Mr. Hineman to the hospital. Because Mr. Hineman and Dr. Imber were the only witnesses to testify on these issues, the credibility of Mr. Hineman and Dr. Imber were of paramount importance in the trial.

Following Mr. Hineman's injury and prior to the trial in this case, Mr. Hineman filed another lawsuit – this time against Mr. Epp, whom Mr. Hineman claimed "wantonly and recklessly" threw the snowball he ducked when he injured his mouth on the rod, and against his father, whom he claimed maintained a dangerous property. (B-291-293; B294-295). Mr. Hineman also wanted to sue the snow plow manufacturer, though he ultimately did not. (B-296).

During the trial, however, Mr. Hineman admitted that at the time of the snowball fight, he was "horsing around, playing around, just being silly." (B-291). He further acknowledged that he did not believe either Mr. Epp or his father were responsible for his injuries. (B-296-297). Mr. Hineman's explanation for the statements, which he acknowledged were inaccurate, was that the lawyers made those statements up because they would do anything to win the case, notwithstanding his signature on a verification that all of the allegations in the Complaint were true and correct to the best of his knowledge. (B-291-295).

Ultimately, the jury concluded that they believed Dr. Imber met the standard of care and returned a verdict in his favor.

ARGUMENTS

A. THE SUPERIOR COURT'S ORDER PERMITTING TESTIMONY CONCERNING PLAINTIFF'S USE OF MARIJUANA ON THE DAY OF THE INCIDENT.

1) Questions Presented. Whether the Superior Court appropriately permitted evidence of Mr. Hineman's marijuana use on the day of the incident when the relevance of this evidence was supported by the testimony of Mr. Hineman's expert, Dr. Bogdasarian, and Defendants' expert, Dr. Boyd Gillespie, as well as the case law concerning the admissibility of a party's use of drugs at or around the time of the incident at issue.

2) Scope of Review. The Superior Court's determinations concerning the relevance of evidence and whether the probative value of a particular piece of evidence is substantially outweighed by unfair prejudice are determinations within the sound discretion of the Superior Court and will not be overturned absent "a clear abuse of discretion." *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

3) Merits of Argument.

The Superior Court had more than enough information through Plaintiff's own admissions and through expert testimony to determine that testimony regarding Plaintiff's use of marijuana, at most hours prior to the incident, was both relevant and admissible.

"The determination of whether proffered evidence is relevant is within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *Firestone Tire*, 541 A.2d at 570 (citing *Lampkins v. State*, 465 A.2d 785, 790 (Del. 1983)). "Also within the discretion of the trial court are determinations of whether or not the probative value of a particular piece of evidence is substantially outweighed by the danger of unfair prejudice to the opposing party." *Id.* (citing *Williams v. State*, 494 A.2d 1237, 1241 (Del. 1985); D.R.E. 401, 402, 403). "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.* (citations omitted).

A reviewing Court's analysis of an allegation that the trial court abused its discretion takes place in two parts: (1) whether the trial court abused its discretion in admitting certain evidence; and (2) if so, whether the mistakes constituted significant prejudice so as to have denied the appellant a fair trial. *Firestone Tire*, 541 A.2d at 570.

First, the Superior Court's ruling that the evidence regarding Plaintiff's use of marijuana on the afternoon of the incident was well supported by the facts and the law. Evidence is relevant where the evidence has "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." D.R.E. 401. "The definition of relevance encompasses materiality and probative value." *Stickel v. State*, 975 A.2d 780, 783 (Del. 2009) (citing *Lilly v. State*, 649 A.2d 1055, 1060 (Del. 1994)). Material evidence is evidence which is offered to prove "a fact that is of consequence to the action." *Id.* at 783. "Evidence has probative value if it affects the probability that the fact is as the party offering the evidence asserts it to be." *Id.*

In making its determination that the evidence regarding Plaintiff's marijuana use was relevant, the Superior Court had the benefit of: (1) Plaintiff's sworn statement saying he was under the influence of the marijuana at the time of the incident; (2) Plaintiff's expert's testimony that the marijuana could explain Plaintiff's symptom of lightheadedness; (3) Plaintiff's expert's testimony that if the symptoms were as reported by Dr. Imber and if Mr. Hineman was in fact under the influence of marijuana at the time of his evaluation by Dr. Imber, Dr. Imber was under no duty to send Mr. Hineman to the hospital; and (4) an affidavit from Defendants' expert, Dr. Gillespie, who specifically enumerated the ways in which Mr. Hineman's examination by Dr. Imber would have been impacted by Mr. Hineman's altered mental status. (*See* B-1-9; B-10-41).

Mr. Hineman's argument in response to the overwhelming factual support for Defendants' Marijuana Motion is that:[2] (1) Dr. Gillespie was not qualified to opine as to the effects of marijuana on Mr. Hineman; (2) the timing and amount of marijuana used by Mr. Hineman was unknown; and (3) that Defendants improperly used the evidence of Mr. Hineman's marijuana use (because this argument is not directed to a ruling made by the Court, Defendants address it separately in the next Question to be Answered below).

On the first point, Dr. Gillespie's affidavit established that he understood the effects of marijuana and how those effects would have specifically linked to and created difficulties in Dr. Imber's examination of Mr. Hineman. (*See* B-10-41). Dr. Gillespie identified three ways Mr. Hineman's marijuana use would have affected his ability to give complete and accurate information to Dr. Imber during the examination: (1) "marijuana is a sedative," and therefore "a person under the influence of marijuana may perceive less pain and therefore report less pain to his doctor;" (2) that "[m]arijuana 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;" and (3) that Mr. Hineman's testimony that the marijuana made him feel "happy" evidenced the feeling of euphoria also associated with marijuana which

[2] Plaintiff cites some testimony, both at trial (which would not have been available to the Superior Court when it made the decision prior to trial to admit the marijuana testimony) and at the deposition of Mr. Epp. However, Plaintiff does not link this testimony to any argument that the Superior Court erred, and Defendants therefore do not address this testimony herein.

"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." *Id.*

Each of these opinions evidence sufficient knowledge of the effects of marijuana and how those effects would impact Dr. Imber's examination. The opinions begin by explaining the effect of marijuana, then move into how the marijuana would have affected Mr. Hineman in a manner that would have impacted Dr. Imber's examination of Mr. Hineman.

Plaintiff has cited no grounds upon which the Court could conclude that Dr. Gillespie was unqualified aside from Plaintiff's belief that an ear, nose, and throat doctor would not be knowledgeable in the effects of marijuana (and how those effects would impact the exam of an ear, nose, and throat doctor). Plaintiff's belief that Dr. Gillespie was unqualified, despite the clear knowledge and rationale set forth in Dr. Gillespie's affidavit, is insufficient to form a basis to overturn the Superior Court's decision.

Notably, Plaintiff does not argue in his Opening Brief that any of the elements set forth in Dr. Gillespie's affidavit were irrelevant. To the contrary, each element of the affidavit went directly to disputed issues in the case. The first and third opinions offered by Dr. Gillespie go directly to whether Mr. Hineman appropriately perceived (and therefore accurately reported) the level of pain he was experiencing to Dr. Imber. The third opinion offered by Dr. Gillespie in the

affidavit concerned whether Mr. Hineman remembered to tell Dr. Imber that he passed out. Both of these issues – whether Mr. Hineman reported the severity of his pain to Dr. Imber and whether Mr. Hineman told Dr. Imber that he passed out – were relevant to whether Dr. Imber met the standard of care in his evaluation of Mr. Hineman and his recommendations for Mr. Hineman's treatment.

This is all supported by Mr. Hineman's testimony prior to and during the trial that he "felt fine" before, during, and after Dr. Imber's examination of him.

Plaintiff's second argument is likewise misguided. Mr. Hineman's recollection of the specific time of use or amount of use are irrelevant to the issues. What matters to the analysis is whether Mr. Hineman was under the influence of the marijuana at the time of the incident, which he admitted in deposition and again at trial that he was. (B-290).

Thus, the Superior Court appropriately determined, based upon the expert testimony of both Plaintiff's expert and Defendants' expert, as well as Mr. Hineman's admissions that he was under the influence of marijuana at the time of the incident, that Mr. Hineman's use of marijuana on the day of the incident was relevant, and that any prejudicial effect which might arise from the introduction of this testimony did not substantially outweigh its relevance.

B. THE APPROPRIATENESS OF THE TESTIMONY ELICITED REGARDING PLAINTIFF'S USE OF MARIJUANA ON THE DAY OF THE INCIDENT.

1) Questions Presented. Whether Mr. Hineman failed to preserve his argument that Defendants impermissibly referenced Mr. Hineman's marijuana use over the course of the trial.

2) Scope of Review. Rule 8 of the Rules of the Supreme Court of the State of Delaware provides that "[o]nly questions fairly presented to the trial court may be presented for review" unless "the interests of justice" require consideration of a question not presented to the trial court. *Russell v. State*, 5 A.3d 622, 627 (Del. 2010).

3) Merits of Argument.

Plaintiff failed to object at any time to testimony concerning Plaintiff's marijuana use and makes no effort in his Opening Brief to explain why the interests of justice require consideration of his argument notwithstanding his failure to fairly present the issue to the trial court. Accordingly, it is too late now to argue that this testimony was improperly elicited.

"Under Supreme Court Rule 8 and general appellate practice, [the Supreme Court] may not consider questions on appeal unless they were first fairly presented to the trial court for consideration." *Russell*, 5 A.3d at 627 (citations omitted).

"This prohibition applies to both specific objections as well as the arguments that support those objections." *Id.*

"A very narrow exception to Rule 8, embedded in its own text, permits [the Supreme Court] to consider a question for the first time on appeal 'when the interests of justice so require.'" *Russell*, 5 A.3d at 627. "This exception is extremely limited and invokes the plain error standard of review." *Id.*

"As a general matter, if the error about which an appellant complains is 'so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process,' then [the Supreme Court] may consider that appellant's argument even though he did not fairly present the argument to the trial court for decision." *Russell*, 5 A.3d at 627. "The only errors that satisfy this threshold are those which amount to 'material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly ... show manifest injustice." *Id.* "Otherwise, under Rule 8, [the Supreme Court] cannot consider an appellant's argument unless he fairly raised it at trial."

The only references to marijuana use at trial were as follows:

- Plaintiff's opening statement (B-369-370);
- Defendants' opening statement (B-378);
- Mike Epp's deposition testimony (B-150-151);

- Dr. Bogdasarian's testimony (B-462; B-465; B-466-467; B-467-468; B471; B-472-473);
- Mr. Hineman's testimony (B-286-290);
- Defendant's Closing Argument (mentioned one time) (B-478).

As the Court can plainly see from the attached sections of the transcript, Plaintiff made no objection at any time to the manner in which the testimony concerning Plaintiff's marijuana use came into evidence. In fact, Mr. Hineman's counsel began the broader use of this evidence in his opening statement, wherein he simply said that "You're going to be hearing mention made that earlier that morning Joe and his employee had smoked pot. We don't know how much. We don't know whether it was, when it was, but you're going to be hearing that." (B-369-370).

There was no effort at this time to explain to the jury the limited purpose for the admission of this testimony. No objection was made at any other point when evidence concerning Mr. Hineman's use of marijuana was being introduced through Mr. Epp, Dr. Bogdasarian, Mr. Hineman, prior to or during closing arguments.

This last timeframe is significant – if Plaintiff was withholding objection during the earlier part of trial under the belief that Dr. Gillespie would establish its medical relevance, when Dr. Gillespie's exam concluded without discussion of the

marijuana, Plaintiff should have objected and requested an instruction that the jury was not to consider the use of marijuana at that time. Instead, after all of the evidence was in, including Dr. Gillespie's testimony (where admittedly the issue was not explored), Plaintiff informed the Court that Plaintiff had nothing further and made no objection to the fact that Dr. Gillespie did not testify about the effects of the marijuana on Dr. Imber's examination. (B-586-588).

Thus, Plaintiff failed to fairly present this issue to the Superior Court. Moreover, Plaintiff made no effort in the Opening Brief to explain why the interests of justice might require consideration of this issue now for the first time despite Plaintiff's failure to timely raise the issue.

Nevertheless, out of an abundance of caution, Defendants will explain why the interests of justice do not require consideration of the manner in which the marijuana testimony was introduced. First, Defendants' counsel did not introduce the marijuana use through Dr. Gillespie (though they originally planned to) because they believed the medical relevance of Plaintiff's marijuana use was established through Plaintiff's expert Dr. Bogdasarian.

Specifically, Dr. Bogdasarian testified that if Mr. Hineman was under the influence of marijuana at the time of Dr. Imber's examination of him, and if Mr. Hineman's symptoms were otherwise as reported by Dr. Imber, Dr. Imber was not required to send Mr. Hineman to the hospital. (B-471; B-472-473). Based on this

testimony, Defendants believed the medical relevance of Mr. Hineman's marijuana usage had been established.

Additionally, even if Dr. Bogdasarian's testimony that Mr. Hineman being under the influence of marijuana would play a role in his ultimate decision on whether Dr. Imber met the standard of care was insufficient (though Defendants believe it is clearly sufficient to establish the relevance of this testimony), the testimony concerning Mr. Hineman's marijuana usage was not "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Russell*, 5 A.3d at 627.

As the Superior Court noted in its Order (and as Defendants argued in the Marijuana Motion), this case is similar to *Laws v. Webb*, 658 A.2d 1000, 1010 (Del. 1995) (overruled on other grounds by *Lagola v. Thomas*, 867 A.2d 891 (Del. 2005)), *Rachko v. Nationwide Mut. Ins. Co.*, 1997 WL 817860 (Del. Super. Ct. Oct. 17, 1997) (attached as B-589), and *Scott v. Ritterson*, 2004 WL 1790134 (Del. Super. Ct. Aug. 9, 2004) (attached as B-591), all cases in which the plaintiff's drug use was determined to be relevant.

The reasons the Superior Court determined (and in the case of *Laws v. Webb*, the Supreme Court affirmed the determination) that the use of drugs was relevant spanned from assisting the jury in determining negligence to providing the jury with a complete picture from which to make their determination, despite the

fact that the evidence established that the plaintiff was not under the influence of the drug (alcohol) at the time of the accident. *Laws v. Webb*, 658 A.2d at 1010; *Rachko*, 1997 WL 817860 at *1 (B-589); *Scott*, 2004 WL 1790134 at *2 (B-591).

Moreover, as set forth above, Mr. Hineman's use of marijuana was further relevant to the jury's determination of his credibility due to inconsistent statements made by Mr. Hineman regarding whether he used marijuana on the day in question and whether he was under the influence of marijuana at the time of the incident. (B-289-290).

Thus, because Plaintiff failed to raise the issue fairly before the Superior Court, because Plaintiff failed to explain why the interests of justice require consideration of this untimely argument, and because the interests of justice do not require consideration of this untimely argument, Plaintiff's appeal should be denied on this ground.

C. THE SUPERIOR COURT'S RULING THAT EVIDENCE OF A PRIOR LAWSUIT FILED BY PLAINTIFF AGAINST HIS FORMER EMPLOYEE AND FATHER FOR THE SAME INJURIES HE CLAIMED WERE CAUSED BY DR. IMBER.

1) Questions Presented. Whether the Superior Court appropriately permitted testimony concerning a prior lawsuit filed by Mr. Hineman concerning the same injuries for which he sought compensation in his case against Dr. Imber.

2) Scope of Review. The Superior Court's determinations concerning the relevance of evidence and whether the probative value of a particular piece of evidence is substantially outweighed by unfair prejudice are determinations within the sound discretion of the Superior Court and will not be overturned absent "a clear abuse of discretion." *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

3) Merits of Argument.

Plaintiff raised, for the first time on the morning the second trial began, an argument that evidence of a prior lawsuit filed by Mr. Hineman against Mr. Epp and his father for the same injuries for which he sought compensation from Dr. Imber was irrelevant or, alternatively, unduly prejudicial. (B-595-603).

Plaintiff's counsel admitted at the time that the testimony he was objecting to had been admitted without objection in the first trial. (B-597). The argument appeared to be that because the allegations concerning the **cause** of the injury in

the two lawsuits was different (though the injuries were the same), the prior lawsuit was irrelevant and prejudicial.

Defendants argued that the testimony was admissible for two reasons: (1) it showed that Mr. Hineman had previously blamed other people for his injuries; and (2) Mr. Hineman made prior inconsistent statements during the course of that trial, including accusing Mr. Epp of "wantonly and recklessly" throwing the snowball he ducked when he injured his mouth on the rod, and against his father, whom he claimed maintained a dangerous property. (B-291-293; B-294-295). Mr. Hineman later acknowledged that these representations were untrue. (B-291-295).

Plaintiff did not respond at trial, and again does not address in his Opening Brief, Defendants' argument that the testimony is relevant to establish that Mr. Hineman blamed his injuries on two other people in a prior lawsuit. Plaintiff also fails to refute that the knowingly false statements made by Mr. Hineman in the prior lawsuit are relevant for purposes of establishing (or discrediting) Mr. Hineman's credibility. Instead, Plaintiff's Opening Brief simply assumes, with little argument or discussion, that the prior lawsuit is irrelevant because the alleged cause of the injury was different than the alleged cause of the injury in Plaintiff's lawsuit against Dr. Imber.

Delaware Rule of Evidence 607 provides that "[t]he credibility of a witness may be attacked by any party[.]" "On cross-examination of a witness, every

permissible type of impeachment may be employed[,] for cross-examination has as one of its purposes the credibility of the witness." *Wilkerson v. State*, 953 A.2d 152, 156 (Del. 2008) (citing Michael H. Graham, Handbook of Federal Evidence § 607:2 (6th ed. 2006)). "Through cross examination, 'the believability of a witness and the truth of his testimony are tested.'" *Id.*

The scope of cross-examination is still subject to the relevance and prejudice analysis of D.R.E. 401, 402, and 403. As set forth above, evidence is relevant where the evidence has "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." D.R.E. 401. "The definition of relevance encompasses materiality and probative value." *Stickel v. State*, 975 A.2d 780, 783 (Del. 2009) (citing *Lilly v. State*, 649 A.2d 1055, 1060 (Del. 1994)). Material evidence is evidence which is offered to prove "a fact that is of consequence to the action." *Id.* at 783. "Evidence has probative value if it affects the probability that the fact is as the party offering the evidence asserts it to be." *Id.*

The fact that Mr. Hineman previously swore under oath that someone else was at fault for causing his injuries certainly affects the probability that his claim that Dr. Imber caused his injuries is accurate. This is particularly so when one takes into account the fact that Mr. Hineman knowingly lied in the prior litigation about the facts underlying the litigation.

Specifically, Mr. Hineman's claims against Mr. Epp were based on a representation that Mr. Epp "wantonly and recklessly" threw the snowball at him, when he knew full well that the snowball fight was playful. Mr. Hineman's claims against his father for maintaining a "dangerous property" were likewise untrue, as Mr. Hineman acknowledged that the "dangerous" property – the snowplow – was his and that he was storing it on his father's property.

A major issue in the case was whether Mr. Hineman told Dr. Imber that he passed out at the time of the visit. Given Mr. Hineman's history of knowingly lying about the cause of his injuries from the same event in the same timeframe, this testimony was highly relevant in assisting the jury in determining the veracity of Mr. Hineman's representations that he told Dr. Imber he passed out.

Moreover, its admission did not cause any "undue prejudice." "Generally, unfair prejudice within the context of D.R.E. 403 means an undue tendency to suggest that the jury will render an adverse decision based on emotional grounds, instead of properly weighing the evidence." "The determination whether the probative value of evidence is outweighed by the risk of undue prejudice 'falls particularly within the discretion of the trial judge, who has the first-hand opportunity to evaluate relevant factors.'" *Bentley v. State*, 930 A.2d 866, 876 (Del. 2007) (quoting *Winn v. State*, 625 A.2d 280 (Del. 1993)).

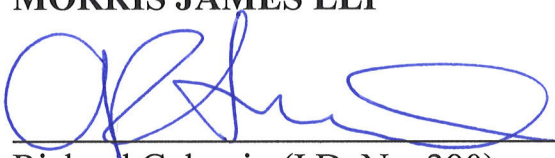
Evidence showing that Mr. Hineman previously testified in a knowingly inaccurate way about the cause of the very same injuries for which he was seeking damages in the case against Dr. Imber does not unfairly prejudice him, but rather rightly assists the jury in properly weighing the evidence and determining whether Mr. Hineman was testifying accurately in this case about what happened.

Thus, because the testimony was highly relevant and not unduly prejudicial, the Superior Court properly admitted it.

CONCLUSION

Because the Superior Court appropriately granted Defendants' motion to permit testimony concerning Mr. Hineman's marijuana use on the day of the incident, because Plaintiff failed to properly raise the issue of the use of testimony concerning Mr. Hineman's marijuana use at trial, and because the Superior Court rightly determined that Mr. Hineman's prior lawsuit against his former employee and father for the same injuries claimed in the lawsuit against Dr. Imber was relevant, Defendants respectfully request that Plaintiff's appeal be denied and that the Superior Court's decisions and Orders be affirmed.

MORRIS JAMES LLP



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CERTIFICATE OF SERVICE

I, Courtney R. Hamilton, hereby certify that on this 2nd day of October, 2015, I have caused the following document to be served electronically on the parties listed below:

Appellees' Amended Answering Brief and Appendix to Appellees' Amended Answering Brief

Online service to:

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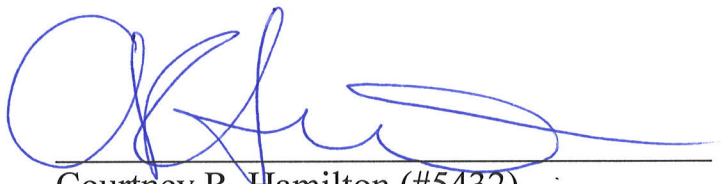

Courtney R. Hamilton (#5432)