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Case Number 62,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

INFECTIOUS DISEASE ASSOCIATES, P.A.,	:	
	:	No. 62,2016
Defendant Below, Appellant,	:	
v.	:	Appeal from the Superior Court of the State of Delaware in and for New Castle County
[redacted]	:	
Plaintiff Below, Appellee.	:	C.A. No.: N13C-12-218 MMJ

DEFENDANT BELOW, APPELLANT INFECTIOUS DISEASE ASSOCIATES, P.A'S OPENING BRIEF ON APPEAL

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Dated: May 9, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

ATTACHMENTS

ATTACHMENTS (CONTINUED)

TABLE OF CITATIONS

NATURE OF PROCEEDINGS

[redacted] (hereinafter "Plaintiff" or Mr. "Doe") commenced the underlying suit on December 23, 2013 against Defendant Below, Appellant Infectious Disease Associates, P.A. (hereinafter "IDA") alleging that it dissimenated his confidential medical information to his workplace without his consent on March 6, 2013. Plaintiff claimed that due to the wrongful disclosure of his protected healthcare information, he was fired and sustained economic and emotional damages as a result. (A27-32). IDA denied all counts and asserted any injury was the result of a superseding and intervening cause, naturally occurring medical processes, comparative negligence or a failure to mitigate his damages. (A147-A153).

IDA moved for summary judgment on October 31, 2014 on all counts of Plaintiff's Complaint. (Ex. A). By Order dated April 21, 2015, the trial court denied IDA's motion for Plaintiff's claims for negligence and breach of confidentiality. A copy of the Order sought to be reviewed is attached as Exhibit B.

IDA filed pre-trial motions on September 21, 2015 to preclude (1) testimony from Manisha Wadhwa, M.D.; (2) damages for lost and future wages; and (3) evidence of Plaintiff's qualification for unemployment benefits. (A0832, A0908, A0961). Copies of the modified orders allowing fact witness testimony from Dr.

Wadhwa, evidence of wages up to the time of trial and rebuttal use of unemployment benefits sought for review are attached as Exhibits C, D and E.

Trial proceeded forward on October 12, 2015. (Ex. F). Defendant moved for judgment as a matter of law following at the close of Plaintiff's rebuttal case on the grounds that he failed to adduce any factual evidence to make a prima facie case on the elements of disclosure, causation and a recoverable physical injury for his mental distress. Plaintiff opposed, and the Court denied. (Ex. G). A copy of the Court's Bench ruling sought for review is attached as Exhibit H.

Approximately four hours later, the jury returned a verdict in favor of the Plaintiffs for $85,5267.76 for lost wages and $1,050,000.00 for emotional distress. A copy of the verdict sought to be reviewed is attached as Exhibit I.

IDA moved for renewed motion for judgment as a matter of law, or in the alternative, sought a new trial or remittitur. Plaintiff opposed, and the Court granted IDA leave to reply. By written decision dated February 1, 2016, the Superior Court denied IDA's renewed Motion for Judgment as a Matter of Law, motion for new trial, and application for remittitur. A copy of the Order sought to be reviewed is attached as Exhibit J.

IDA filed a timely notice of appeal on February 8, 2016. This is Defendant Below, Appellant Infectious Disease Associates, P.A's Opening Brief on Appeal.

SUMMARY OF ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED IDA'S MOTION FOR JUDGMENT AS A MATTER OF LAW WHERE THERE WAS NO EVIDENCE OF DISCLOSURE, PHYSICAL MANIFESTATION OF MENTAL DISTRESS OR EXPERT TESTIMONY CAUSALLY LINKING PLAINTIFF'SINJURIES TO IDA'S CONDUCT.

II. THE TRIAL COURT ERRED WHEN IT DID NOT PERMIT IDA TO IMPEACH PLAINTIFF WITH HIS PRIOR SWORN INCONSISTENT STATEMENTS.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING IDA'S MOTION TO PRECLUDE EVIDENCE OF THE UNEMPLOYMENT PROCEEDINGS AND ALLOWING THE JURY TO HEAR HEARSAY FROM PLAINTIFF ON WHY HE QUALIFIED FOR BENEFITS.

STATEMENT OF FACTS

Medical Background Facts

Plaintiff suffers from numerous health problems including [redacted] (A00045). He was diagnosed with [redacted] in [redacted] (A1236).

He started receiving routine treatment for his [redacted] with [redacted] on [redacted]. (A40 – A1803); Dr. Cohen is an infectious disease physician practicing at Infectious Disease Associates, P.A. ("IDA"). He is not involved in the administrative arm of the practice, which is lead by the senior founding member of IDA, Alfred Bacon, III. (A1805 – A1806).

At follow-up on May 30, 2003, Plaintiff was very upset because his lab values had significantly changed for the worse, suggesting [redacted] (A0049). At that visit, Plaintiff admitted to using [redacted]. (A0049) Dr. Cohen thus suspected that Plaintiff's [redacted] "[might] be [redacted]" (A0049). At times, Plaintiff treats with [redacted] which can result in [redacted] and [redacted]. (A0062, A0070, 80). Thus, Dr. Cohen routinely prescribed [redacted]

and [redacted] in the course of his care of Plaintiff. (A48-A0146). As a side effect of [redacted], Plaintiff has experienced [redacted], and [redacted] (A45, A48, A0049, A54, A72 - A77, A85).

Plaintiff started treating with [redacted] on [redacted] for [redacted]. She was aware that he was prescribed [redacted] and [redacted] but had no knowledge beyond a general understanding of the [redacted] (A1448). Dr. Wadhwa diagnosed Plaintiff with [redacted], [redacted] and [redacted] as of [redacted]. (A1449). These are [redacted]s. (A1448). Although she [redacted] for Plaintiff at the [redacted], she explained at trial that that [redacted] was in the [redacted] Plaintiff at the time of his initial evaluation. (A1443-A1444). Moreover, when Plaintiff presented to her on March 8th, he had been stopped taking [redacted] several weeks before without her input or instruction. (A1459). He was advised to restart that medication and with a planned increase in [redacted] from the visit prior to the fax from IDA. (A1449, A1459).

Bell Supply Company

Plaintiff had worked in bookkeeping for more than two decades at Bell's Supply Company before he was fired on July 31, 2013. (A124). Bell Supply

Company, Inc. is a family run business dealing in plumbing, heating and air conditioning supplies. (A117 – A119). While Plaintiff had used the fax machine at his work in the years leading up to this fax to exchange authorizations and confidential forms with [redacted] there is no dispute that Plaintiff did not give permission for IDA to send the [redacted] medical update documents to the fax at his workplace. (A1326-27).

Plaintiff conceded he had no objective proof of anyone at Bell Supply Company seeing the fax transmission. (A1385). However, he did not pick up the fax and place it in his inbin. Both of those items are located at the desk of the receptionist, Carolyn Teoli who is also tasked with sending and receiving faxes in addition to other administrative duties for Bell's Supply. (A1508 – A1510). She denies any knowledge of the fax of [redacted] before suit. (A1532 – A1535). She also testified she has always used Clorox at her desk and on her phone. (A1536). It is undisputed that Plaintiff never spoke with any of his coworkers about this fax, nor did any employee mention it to him.

Mr. Kursh reprimanded [redacted] for leaving early and ultimately terminated him on July 31, 2013, almost five (5) months after the facsimile from IDA. (A1755 – A1790). Plaintiff alleges that he was terminated as a result of the [redacted] via this facsimile. Plaintiff admits he has no evidence that anyone learned of his PHI. (A1331 – A1339, A1346 – A1347).

All Bell Supply Company employees testified that they were unaware of his [redacted] at any time before this litigation, that they did not review or learn of the facsimile at issue, and that Plaintiff was not treated differently from March 6, 2013 until his termination. (A1532 – A1536, A1565 – A1570, A1544, A1785, A1786). [redacted] testified at trial that he did not know who, if anyone at Bell Supply knew [redacted] except Jennifer Demers, who he told. (A1346).

Mr. Kursh testified that not only did he have no knowledge of [redacted] medical status, when he was fired, but also confirmed that he was terminated for insubordination (A1782 – A1790). Plaintiff subsequently applied for unemployment benefits with the Delaware Department of Labor ("DDOL"), which Bell Supply disputed, and was deemed eligible for benefits.

Motion for Summary Judgment

IDA moved for summary dismissal of Plaintiff's claims after all of the Bell Supply Company employees gave sworn testimony denying that they saw the fax, [redacted], observed any different treatment after the fax was sent, or suspected that Plaintiff was fired due to his medical condition. IDA argued Plaintiff could not make a prima facie case for negligent infliction of emotional distress and breach of confidential relationship absent objective proof of disclosure and physical manfiestations of his emotional distress. IDA also argued in the alternative that any termination based on Plaintiff's medical condition would

violate federal law and therefore, was not reasonably foreseeable as a matter of law. The Court disagreed as to Counts II and III of the Complaint, finding that there were several material facts in dispute, including but not limited to the credibility of Mrs. Teoli and the fax itself. (Ex. B).

Pre-Trial Discovery

During the course of discovery, IDA propounded interrogatories and requests for documents that sought information regarding [redacted] expert and trial witnesses and photo documentary proof of alleged pecuniary losses. (A0154 – A0183). Plaintiff did not serve IDA with any expert disclosures during the course of discovery, and given the unique nature of Dr. Wadhwa's hybrid role as a fact and treating physician, IDA moved to exclude her testimony in either capacity, in addition to evidence of economic damages and the unemployment proceedings. (A0832 – A1008).

Trial Testimony

At the close of Plaintiff's case, Defendant again moved for judgment as a matter of law on the grounds that Plaintiff had not offered any direct proof of [redacted] status to an unauthorized person, evidence of physical injury, or expert evidence to substantiate causation. The court denied Defendant's motion in essence, finding these were proper factual determinations for the jury. (Ex. G).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED IDA'S MOTION FOR JUDGMENT AS A MATTER OF LAW WHERE THERE WAS NO EVIDENCE OF DISCLOSURE, PHYSICAL MANIFESTATION OF MENTAL DISTRESS OR EXPERT TESTIMONY CAUSALLY LINKING PLAINTIFF'S INJURIES TO IDA'S CONDUCT.

A. Question Presented

Whether Plaintiff presented sufficient evidence on causation and damages to establish a prima facie claim for negligent infliction of emotional distress and related wage loss to support a jury verdict in his favor? Defendant preserved this issue when it moved for summary judgment raised in the Pre-Trial Stipulation, moved for Judgment as a Matter of Law, and moved for renewed judgment as a matter of law. (A0693 - A773) (Ex. A, A1025 – A1038, A1991 – A2113, A2157 – A2255, A1945).

B. Scope of Review

This Court reviews the trial court's decision to deny judgment as a matter of law *de novo*. *Whitaker v. Houston,* 888 A.2d 219, 224 (Del. 2005). The Court must determine "whether the evidence and all reasonable inferences that can be drawn therefrom, taken in the light most favorable to the non-moving party, raise an issue of material fact for consideration for the jury." *Treival v. Sabo,* 714 A.2d 742, 744 (Del. 1998)(citations omitted). However, a jury is not permitted to make factual findings in favor of a party at trial if "there is no legally sufficient

evidentiary basis for a reasonable jury to find for the party on that issue." *Carney v. Preston*, 683 A.2d 47, 55-56 (Del. Super. Ct. 1996) (citing to Super. Ct. Civ. R. 50(a)).

C. Merits of Argument

1. Plaintiff failed to establish a minimum factual predicate to support a claim for disclosure, as a matter of law.

All of the Bell Supply Company employees gave testimony under oath at their discovery depositions and at trial they had no knowledge of Plaintiff's medical condition until this litigation commenced, with the exception Ms. Demers. Plaintiff admitted he voluntarily [redacted] to her the day before his termination and that he had no objective evidence that anyone saw the fax in question or saw any confidential information within in. (A1346). Because the unconverted testimony at trial was that Plaintiff was the only individual with knowledge of his confidential medical information before March 2014, the trial judge erred when she denied IDA's Motion for judgment as a matter of law. *See Freedman v. Chrysler Corp.*, 564 A.2d 691 (Del. 1989)("The existence of a mere scintilla of evidence in favor of the nonmoving party is insufficient. The question is not whether there is literally no evidence supporting the party against whom the motion is directed, but whether there is evidence upon which the jury could properly find a verdict for that party.").

In the absence of any evidence of disclosure from Mrs. Teoli to Mr. Conner, from Mr. Conner to Kursh, or from Mrs. Teoli to Mrs. Kursh, and their sworn testimony disclaiming any knowledge of Plaintiff's medical condition, Plaintiff testified at trial he "assumed" that Mrs. Teoli must have seen his PHI because she had access to it, she would have turned over the cover page, and she would have [redacted] Such supposition is an insufficient basis for a jury to find disclosure of Plaintiff's confidential healthcare information. *See, e.g., Sutter Health v. Superior Court of Sacramento Cty.*, 174 Cal. Rptr. 3d 653 (Ct. App. 3d. 2014) ("the mere possession of the medical information or records by an unauthorized person [is] insufficient to establish a breach of confidentiality if the unauthorized person has not viewed the information or records.") *See, e.g. SEC v. Truong,* 98 F.Supp.2d 1086, 1101 (N.D. Cal. 2000)(discussing that "opportunity" to acquire knowledge of trade secrets insufficient to support inference of knowledge of them in a claim for misappropriation). Simply put, the opportunity for Mrs. Teoli to learn Plaintiff's medical information is not the same as knowing it. Because the only evidence of disclosure adduced at trial was Plaintiff's voluntary communication of his medical condition to Mrs. Demers, Plaintiff cannot prove legally cognizable damages due to the wrongful disclosure of his confidential medical information as matter of law.

Viewing the evidence in the light most favorable to Plaintiff, (1) there was a transmission of his personal health information to an unsecured fax machine, (2) without his permission, and (3) an authorized person removed that the facsimile from the fax machine and placed it in his mail cubby. However, what he though, felt or perceived is that he thought it was most likely the receptionist because of her proximity and access to the fax machine is legally insufficient to carry his burden of proof. *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995)(finding such "metaphysical doubt as to material facts" is insufficient to carry his burden of proof).

Even if speculation and conclusory allegations were sufficient to submit the question of disclosure to the jury, no reasonable jury could find that Mrs. Teoli saw the PHI based on the beliefs of a person with a history of [redacted] and [redacted] Plaintiff admitted that Mrs. Teoli disinfected the counters at her reception desk. At trial, he testified he noticed she was disinfecting the phone after he used it, but as a basis for her knowledge of his [redacted] but also admitted this could have been [redacted]. (A1273, 1338-39). He sensed a change in treatment, explaining:

> "I felt - - there was nothing overtly about them looking at me, or scorning me, or anything like that. I had just – it felt like people that you know – like their wives I worked with for 27 years, as well. It

seemed like they knew something about me that we wouldn't – that wasn't going to be discussed."

Id. As no evidence was adduced beyond Plaintiff's "personal feelings" that there was "tension in the air" or perception that "something was out of the ordinary" and the record was devoid of any objective evidence his [redacted] was revealed or known to his employer, there was insufficient evidence to create a genuine issue of material fact on Plaintiff's claims of wrongful disclosure. (A1346-A1347). This Court should therefore reverse the lower court's denial of IDA's motion for judgment as a matter of law, set aside the verdict, and enter judgment in the favor of IDA.

2. Even if Plaintiff presented sufficient evidence of disclosure, as a matter of law, any wrongful discharge was an intervening and superseding cause.

No reasonable jury could find in favor of Plaintiff on causation under a fair reading of the record as Plaintiff failed to adduce any evidence for a jury to logically conclude that Plaintiff's termination was foreseeable to IDA. *Carney*, 683 A.2d at 47, 55-56 ("A factual determination beyond the limits of reasonable judgment is at law a question of law."). Delaware decisional law treats claims for a breach of a duty to maintain the confidentiality of patient information as a tort. *See Martin v. Baehler,* 1993 WL 258843, at * 4 (Del. Super. Ct. May 20, 1993). Plaintiff failed to adduce any evidence at trial that could lead to a reasonable inference IDA had knowledge of the [redacted] or any

information to lead it to anticipate Plaintiff's employer would violate that act in response to learning his confidential information. Again, there is no evidence that the March 6, 2013 fax was the direct cause of Plaintiff's termination or a subsequent wage loss. *See Spicer v. Osunkoya,* 32 A.3d 347, 351 (Del. 2011) ("A remote cause cannot form the basis of liability, even if the plaintiff would not have been injured 'but for' that negligence"). As a result, there was no sufficient basis for a jury to find that Plaintiff's injuries were proximately caused by IDA's conduct or decisions on March 3, 2016. As such, Plaintiff must "[A] proximate cause is one which in natural and continuous sequence, *unbroken by any efficient intervening cause,* produces the injury and without which the result would not have occurred." *Spicer,* 32 A.3d at 351 (Del. 2011)(citing *Duphily v. Del. Elec. Coop. Inc.*, 662 A.2d 821, 829 (Del. 1995))(internal citations and quotations omitted).

3. Plaintiff failed to make a prima facie case of negligent infliction of emotional distress to support a jury award in his favor of causation and damages.

Delaware law precludes recovery for negligent infliction of emotional distress absent proof of physical injury. *See Doe v. Wildey,* 2012 WL 1408879, at *7 (Del. Super. Mar. 29, 2012) ("[t]ransitory, non-recurring physical phenomena, such as nausea and rage, 'fall within the category of emotional disturbances which are not recognized as physical illnesses'"); *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647, 551 (Del. 1984)(holding "'[i]n any claim for mental anguish, whether it

arises from witnessing the ailments of another or from the claimant's own apprehension, an essential element of the claim is that the claimant have a present physical injury"). As such, the trial court's denial of IDA's motion for judgment as a matter of law constitutes reversible legal error.

Delaware law precludes recovery for negligent infliction of emotional distress in the absence of proof of a physical manifestation of such injury. *Garrison v. Medical Center of Del., Inc.*, 581 A.2d 288, 293 (Del. 1990)("It is well settled law in Delaware, for a claim of mental anguish to lie, an essential ingredient is present and demonstrable physical injury"); *Brzoska*, at 1362 (citations omitted)(emphasis added)(discussing requirement of showing a physical injury where mental anguish stems from plaintiff's fear or subjective belief). While Plaintiff's daughter testified to her personal observations of Plaintiff crying and shaking, Plaintiff failed to proffer any evidence of recurring physical phenomena associated with mental anguish or distress to make a prima facie case for emotional distress. *Doe*, 2012 WL 1408879, at *7 (Citation omitted).

Moreover, Plaintiff's treating physician testified that her diagnoses and treatment remained unchanged after March 6, 2013 other than taking an addition thirty-five (35) minutes to counsel Plaintiff on March 8, 2013, prescribing a [redacted]. *See Lupo v. Medical Center of Del.*, 1996 WL 111132 (Feb. 7, 1996) (finding clinically diagnosed depression,

eating disorder, and recurring headaches sufficient evidence of "physical injuries" to create a material fact dispute to survive summary judgment). There was no testimony by Dr. Wadhwa or any witness attributing a change in diagnoses, persistent or recurring physical manifestations of mental distress, much less mental distress necessitating ongoing counseling or treatment. (A1459-A1462). *Cf. Wisnewski v. Jackman*, 2005 WL 406338 (Del. Super. Jan. 28, 2005)(summary judgment denied when psychiatrist related hyperviligence, hyperarousal, and Post-Traumatic Stress Disorder manifest in continuous ongoing shaking of arms and hands requiring current and future medication management and treatment to an accident three years earlier). In fact, here has been no change in his medications since March 8, 2013. (A1463). While that fact testimony may show that Plaintiff experienced those symptoms at office visits with Dr. Wadhwa after the date the fax was sent, it does not address the cause of the symptoms or impute them to any conduct on the part of Defendant.

Even if Plaintiff had adduced evidence of recoverable physical injuries, expert testimony would be necessary to show Defendant's actions proximately caused those injuries. *Money v. Manville Corp. Asbestos Disease Comp. Trust Fund*, 596 A.2d 1372, 1376 (Del. 1991)(discussing standard for expert testimony requirement to prove causal nexus in a tort case); *see also Bailey v. Acme*, 947 A.2d 1120 (TABLE)(Del. 2008) (holding that "the causal connection between the

defendant's alleged negligent conduct and the plaintiff's alleged injury must be proven by the direct testimony of a competent medical expert"). No expert opinion testimony was presented by a physician, counselor or vocational expert relating a [redacted] or inability to work to the fax, (as opposed to Plaintiff's underlying mood disorders and behavioral conditions).

Moreover, the unique medical facts in this case compelled expert evidence to aid the jury in evaluating [redacted]s claim for emotional distress. The correlation between Plaintiff's mental distress and Defendant's conduct distinct from symptoms attributable to his underlying [redacted]s ([redacted]) are beyond lay knowledge. *McKinley v. Casson*, 80 A.3d 618, 623 (Del. 2013). (" . . . [T]he jury cannot be left to speculate what a certain dosage of a specific medication indicates about the severity of one's anxiety."); (A1458). Moreover, a layperson cannot be expected to know the clinical manifestations of [redacted]y, [redacted] and [redacted] especially when he [redacted] (A1459-A1462) (A1467-A1468). The event which triggered the emotional disturbance and what perpetuates it must be something external to [redacted] and cannot have been brought about by his own mental disturbance or emotional disorder or otherwise [redacted]. The jury heard testimony from Dr. Wadhwa that

Plaintiff experienced [redacted] before the fax which could explain these phenomena. (A1447-A1452).

Second, as a matter of law, those facts to do not amount to an opinion to a reasonable degree of medical probability that IDA caused the Plaintiff's emotional distress or any physical manifestation of injury. Assuming Dr. Wadhwa was properly called as an expert, she gave no testimony connecting the fax transmission or IDA's conduct to Plaintiff's mental and emotional condition within a reasonable degree of medical probability. D.R.E. 703, 705. At no point did Dr. Wadhwa testify that but for the fax having been sent, Plaintiff's symptoms would not have occurred. Furthermore, no testimony was elicited establishing she had knowledge of Plaintiff's medical history or was competent to render an opinion causally linking Plaintiff's symptoms to IDA's conduct.

Given [redacted] admitted paranoia and pre-existing mental conditions, an expert was required to testify that [redacted] emotional symptoms and feelings were directly brought about by IDA's conduct and not attributable to other events in his life, including his underlying medical condition. *Collins v. African Methodist Episcopal Zion Church*, 2006 WL 1579718 (Del. Super. Ct. Mar. 31, 2006) (holding that physical injuries are not obviously related to the purported conduct of Defendant when the Plaintiff had a pre-existing medical condition and her alleged

physical injuries could have been caused by a prior occurrence). Here, there was no expert evidence linking Plaintiff's alleged physical injuries to IDA's conduct. Because he failed to offer any expert evidence to aid the jury in evaluating what symptoms and physical manifestations are proximately caused by IDA's conduct, he could not make a prima facie claim on causation as a matter of law.

In the alternative, the trial court's failure to instruct the jury warrants a new trial. *See McKenzie v. Blaselto*, 686 A.2d 160, 163 (Del. 1996) (a party has an "unqualified right to have the jury instructed with a correct statement of the substance of the law.") (citing *Culver v. Bennett*, 588 A2d 1094, 1096 (Del. 1991)). In this case, the jury should have been charged with finding Plaintiff had a burden to prove that his emotional distress is accompanied by non-transitory, recurring physical phenomena. Therefore, this Court should reverse the jury's verdict and remand this case for a new trial.

II THE TRIAL COURT ERRED WHEN IT DID NOT PERMIT IDA TO IMPEACH PLAINTIFF WITH HIS PRIOR SWORN INCONSISTENT STATEMENTS.

A. Question Presented

Whether the trial abused its discretion by preventing IDA to question Plaintiff about his sworn deposition testimony denying he [redacted] when he admitted its use to his treating medical providers and when it was probative to his truthfulness and any potential prejudice could be addressed by a limiting instruction? IDA preserved this issue in the Pre-Trial Stipulation, raised this issue at trial and in its merits in a Memorandum of Law. (A1032)(A1342-1426)(A1409).

B. Scope of Review

Generally, this Court reviews a trial court's evidentiary decisions for abuse of discretion. *Wright v. Sate*, 24 A.3d 747, 752 (Del. 2011). If the decision turns on a question of law, however, this Court's review is *de novo*. *Ibid.*

C. Merits of the Argument

To impeach Plaintiff, IDA sought to cross-examine him with sworn deposition testimony denying [redacted] and his statements admitting to it to his medical providers through their testimony at trial. (Dep. Plaintiff at 115:20-116:15). The Superior Court however held that [redacted] was not relevant and inflammatory.

At his deposition, [redacted] specifically denied ever taking [redacted] (A306 – A307). [redacted] also admitted that he had no objective evidence of any Bell Supply Company employee having knowledge of his medical condition other than the employee (Jennifer Demers) he informed himself the day before he was fired. (A1385). Therefore, the jury's determination of whether the fax transmission was seen by a Bell Supply Company employee turned on whether or not the jury found [redacted] perception and version of events at Bell Supply Company credible. Excluding evidence that Plaintiff lied under oath and precluding a legitimate inquiry into his credibility severely limited IDA's ability to defend Plaintiff's claims when "[t]he credibility of the witnesses was a central issue in this case," and constitutes reversible error warranting a new trial. (Ex. J at ¶ 7). *See, e.g., Jackson v. State*, 770 A.2d 506, 516 (Del 2000) (cross-examination is "the principal means by which the believability of a witness and the truth of his testimony is tested" and "is essential to a Defendant's right to a fair trial").

Had such evidence been permitted, IDA would have asked [redacted] to explain why he denied [redacted] under oath at his deposition, but admitted to it in the course of treating with Dr. Wadhwa and Dr. Cohen. *See Capano v. State,* 781 A.2d 556, 624 (Del. 2001) (Citation omitted) (explaining rationale for D.R.E. 803(4) is that "[a] person seeking medical treatment is unlikely to lie to a doctor [he] wants to treat [him], since it is in [his] best interest to tell the truth.").

Evidence is relevant if it tends to make the existence of a fact at issue more probable than not.[1] That IDA could not demonstrate to the jury that [redacted] gave sworn testimony about his [redacted] when he admitted to it for purposes of medical treatment unfairly prejudiced Defendant. *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 536 (Del. 2006) (witness may be impeached with prior inconsistent statement); *Weber v. State*, 457 A.2d 674, 681 (Del. 1983) (trial judge cannot "foreclose a legitimate inquiry into a witness's credibility").

Furthermore, , any danger for prejudice could have been cured by a limiting instruction. Moreover, Plaintiff was free to address these inconsistent statements, if needed, on re-direct thereby mitigating any potential unfair prejudice. D.R.E. 403.

In sum, the Superior Court's ruling precluding questioning on Plaintiff's deposition testimony deprived the jury of relevant evidence as to Plaintiff's credibility. *Jackson*, 770 A.2d at 515 ("Jurors should be afforded every opportunity to hear impeachment evidence that may undermine a witness's credibility"). In view of the obvious impact on IDA's ability to present evidence critical to its defense, reversal is warranted.

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[1] D.R.E. 401. If [redacted] lied under oath at his deposition, it means that he could lie under oath at trial. Thus, the evidence is relevant.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING IDA'S MOTION TO PRECLUDE EVIDENCE OF THE UNEMPLOYMENT PROCEEDINGS AND ALLOWING THE JURY TO HEAR HEARSAY FROM PLAINTIFF ON WHY HE QUALIFIED FOR BENEFITS.

A. Question Presented

Did the trial court commit reversible error by denying IDA's Motion to preclude any reference to the Claims Deputy Decision on his eligibility for unemployment benefits, where it was undisputed that Plaintiff received unemployment benefits? IDA raised this issue at oral argument on its dispositive motion, addressed it in its motion in limine, and preserved its objection during trial. (Ex. A, A0811, A0961).

B. Scope of Review

This Court reviews a lower Court's decision to admit or restrict testimony and evidence for an abuse of discretion. *Bush v. HMO, of Del., Inc.*, 702 A.2d 921, 923 (Del. 1996); *Firestone Tire and Rubber Co., v. Adams*, 541 A.2d 567, 570 (Del. 1988).

C. Merits of Argument

Following Plaintiff's identification of the DDOL Claim Deputy determination ("Qualification Decision") as a trial exhibit and Plaintiff's failure to consent to the release of his unemployment file, Defendant moved to preclude any evidence, pertaining to the Qualification Decision as irrelevant, highly prejudicial and likely to confuse the jury on a core material fact in dispute. On September 28,

2015, the Court ruled that Plaintiff could use such evidence to rebut testimony by Bell Supply Company employees on the reasons for his discharge. (Ex. D). As a result of this erroneous ruling, the trial court also permitted the following at trial:

1. Plaintiff's testimony about a phone call with the Claims Deputy, including that the Claims Deputy changed her decision after he told her about the fax and that BSC knew [redacted] (A1363 – A365)

2. Publication to the jury of the one-page Qualification Decision dated September 23, 2013;

3. Testimony about conduct and treatment of prior BSC employees and health insurance, including during direct examination of Plaintiff, John Connor, Carolyn Teoli, examination of Mr. Kursh, and during closing argument; and (A1696-A1700); and

4. Testimony during Plaintiff's direct examination about statements made by Mr. Kursh and Mr. Connor (A1277-A1285).

On appeal, IDA seeks reversal of each of these erroneous rulings.

First, any evidence or argument about the Qualification Decision is irrelevant to the claims against Defendant since Plaintiff's receipt of unemployment benefits was not disputed. D.R.E. 401; *see also Blumensaadt v. Stand. Prods. Co.*, 744 F. Supp. 160, 169 (N.D. Ohio 1989), *aff'd*, 911 F.2d 731 (6th Cir. 1990)(finding these administrative findings are often lacking any probative value); *Smith v. MBNA Bank, N.A., et al.*, No. 06-087, (D. Del. Mar. 2, 2007)(Ex.

K) (excluding evidence of Unemployment Insurance Appeals Referee's decision in claim for retaliatory discharge and unlawful discrimination). Not only was it undisputed that the administrative finding involved a different legal standard, but there was also no documentary support that the Claims Deputy determined that the cause of Plaintiff's discharge much less that it was due to knowledge of his [redacted]. As such, fact evidence that Plaintiff was discharged "without just cause" does not have a tendency to make the existence of any fact that is of consequence to Plaintiff's claims against IDA more probable or less probable than it would be without the evidence, D.R.E. 401, 402; *see also Blumensaadt v. Stand. Prods. Co.*, 744 F. Supp. 160, 169 (N.D. Ohio 1989), *aff'd*, 911 F.2d 731 (6th Cir. 1990) (finding these administrative findings are often lacking any probative value).

Second, the administrative decision was based on a limited record. It was not made in connection with a hearing or sworn witness testimony. *See generally, Swineford v. Snyder County Pa.*, 15 F.3d 1258, 1268-69 (3d Cir. 1994) (noting that procedures of the unemployment system are fast and information to facilitate a quick, basic compensation). Thus, any minimal value it had was substantially outweighed by its propensity to confuse and mislead the jury on a central issue in this case. D.R.E. 403. This is because the jury could conclude, contrary to the law and credibility of the witnesses before it, this evidence equated to adjudicative finding that Plaintiff was fired for an improper purpose or due to [redacted].

McGuire v. McCollum, 116 A.2d 897, 900 (1955) (While a jury may draw inferences from the facts of a case, those inferences may not be based upon speculation). Any probative value is outweighed by the manifest prejudice to Defendant if the jury confuses a third-party's burden of proof in an administrative proceeding involving a different issue with Plaintiff's burden of proof of its cause of action in this case. *See Finnegan v. Ross Tp.*, 2008 WL 4377125 (W.D. Pa. Sept 25, 2008)(holding that introduction of unemployment compensation findings "would cause jury confusion as well as create a significant risk that the jury will place undue weight on the findings in lieu of making their own credibility determinations." *Id.* at *2).

Third, the prejudice to Defendant was compounded by the trial court's erroneous admission of inadmissible hearsay testimony from the Plaintiff about a phone call with the Claims Deputy. Because the statement was offered to prove the truth of the matter asserted, *i.e.* that Plaintiff told the Claims Deputy that his employer knew [redacted], the statement is hearsay, and inadmissible. D.R.E. (801)(c) and 802. There are no hearsay exceptions that warrant its admission. For example, it was not made for purposes of medical treatment, nor was it a spontaneous statement by the Claims Deputy in response to an event. D.R.E. 803(4); *Warren v. State*, 774 A.2d 246, 251-52 (Del. 2001). The only purpose of the statement was to allow the jury to improperly infer that the Claims Deputy that

determined the Plaintiff was fired as a result of his employer learning his medical condition. *Green v. Saint Francis Hosp., Inc.*, 791 A.2d 731, 73 (Del. 2002) (Citing *Smith v. State*, 647 A.2d 1083, 1088 (Del. 1994)) (hearsay testimony is only admissible "where the declaration has some theoretical basis making it inherently trustworthy"). Finally, the residual exception does not apply because, for the reasons stated above, the hearsay statements do not have "circumstantial guarantees of trustworthiness." D.R.E. 807.

Furthermore, even if the statements were otherwise admissible, they should have been excluded due to the substantial risk that such testimony obscured the standards applicable to Plaintiff's qualification and to the "but for" standard in this case. The risk of misleading the jury to consider Plaintiff's hearsay testimony as direct evidence of why [redacted] was fired unduly prejudices Defendant. As such, allowing the jury to consider it constituted reversible legal error.

Moreover, the Court abused its discretion in allowing hearsay testimony from Plaintiff about out-of-court statements by Mr. Kursh and Mr. Connor as statements by a party opponent. (A1282-A1285).

CONCLUSION

The trial judge erred, as a matter of law, when he denied IDA's motion for judgment as a matter of law when Plaintiff adduced no objective evidence to make a prima facie showing that his PHI was disclosed to anyone at Bell Supply Company, and such disclosure was the "but for" cause of his economic and emotional injuries. The trial judge committed additional error in allowing improper hearsay testimony, collateral evidence of administrative findings and testimony about misconduct of prior employees while at the same time precluding IDA from impeaching the credibility of the Plaintiff. These errors separately and *in total* caused significant prejudice to IDA and deprived of it a fair trial. IDA therefore requests that this Court reverse the verdict below and enter judgment in favor of IDA. In the alternative, IDA requests this Court reverse the verdict below and remand this matter for a new trial because it is against the "great weight of the evidence" and misapplies precedential case law requiring proof of physical injury.

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Respectfully submitted,

BY: *//s// Lauren C. McConnell*

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