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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

DEFENDANTS BELOW, APPELLANTS PATRICK SWIER, M.D.'S AND PATRICK SWIER, M.D., P.A.'S OPENING BRIEF ON APPEAL

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Dated: 8/29/16

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NATURE OF PROCEEDINGS

This is a claim for medical negligence filed by Patricia A. McLeod against Dr. Patrick Swier and his practice. (A25-A59) Ms. McLeod filed her initial Complaint on July 3, 2012 and an Amended Complaint on October 2, 2012. (A25-A59) Dr. Swier denied all allegations of negligence. (A60-A65) No allegations of punitive damages were raised. (A25-A59)

The parties engaged in discovery and submitted a Pretrial Stipulation on October 31, 2014. (A1-A10, A66-A80) The Court entered the Pretrial Stipulation as an Order on November 14, 2014. (A10, A80) Again, Ms. McLeod did not assert that Dr. Swier's alleged misconduct warranted punitive damages.

Trial proceeded forward on December 1, 2014. (A81) During trial, the parties submitted jury instructions, which the Court accepted and read to the jury on December 10, 2014. (A1385-A1433) The only issue placed before the jury was whether Dr. Swier committed medical negligence, whether that was a proximate cause of injury to Ms. McLeod, and what amount of money damages the jury may award. (A1402-A1402, A1433) Again, at no point prior to the jury's verdict did Ms. McLeod seek punitive damages.

The parties presented closing argument on December 10, 2014. (A1315-A1384) On December 11, 2014, after deliberating for less than a few hours, the

jury returned a verdict in Ms. McLeod's favor in the amount of $3,425,515.00. (A1444, A1464, A1596)

On December 19, 2014, Ms. McLeod filed her Bill of Costs. (A15) Defendants then moved for a new trial on December 24, 2014. (A15, A1465-A1549) Plaintiff responded on January 7, 2015. (A1550-A1577) The Superior Court heard oral argument on August 20, 2015. (A1578-A1610) By Opinion dated January 27, 2016, the Superior Court denied Defendant's Motion for a New Trial. (A1611-A1631) A copy of the Order sought to be reviewed is attached as Exhibit A.

Defendants then filed a Notice of Appeal on February 18, 2016. (A19) By Order dated May 17, 2016, the Supreme Court held that the appeal was interlocutory due to Ms. McLeod's pending Bill of Costs. (A20) Dr. Swier then responded to Plaintiff's Bill of Costs, and the Superior Court entered an Order dated June 9, 2016 granting in part and denying in part Plaintiff's Bill of Costs. (A21-A22, A1631-A1633) A copy of the Order sought to be reviewed is attached as Exhibit B.

Dr. Swier filed a timely notice of appeal on June 29, 2016. (A22) This is Defendants Below, Appellants Patrick Swier, M.D.'s and Patrick Swier, M.D., P.A.'s Opening Brief on Appeal.

SUMMARY OF ARGUMENT

I. The Superior Court erred when it failed to grant a new trial after Plaintiff's Counsel made improper, irrelevant and inflammatory comments in closing argument that significantly prejudiced Dr. Swier.

STATEMENT OF FACTS

Medical Background and Allegations

Dr. Swier is a board-certified plastic surgeon who began treating Ms. McLeod in September 2009. (A25-A26, A50-A51) After various visits and tests, Dr. Swier recommended and performed, and Ms. McLeod underwent, various nerve decompression surgical procedures in her left leg only on April 5, 2010. (A26-A30, A51-A53) Despite the procedures, Ms. McLeod continued to have pain and issues with her left leg. (A29-A30, A53-A54) She was diagnosed with Reflex Sympathetic Disorder (RSD) and Complex Regional Pain Syndrome (CRPS) in early 2011 and had treatment to address the ongoing pain in her left leg and foot. (A29-A30, A53-A54) She further claimed that she was permanently disabled and unable to work as a middle school teacher as a result of the injuries to her left leg. (A29-A30, A53-A54)

In the Complaint, Plaintiff alleged that Dr. Swier was medically negligent in that he improperly performed the procedures on April 5, 2015, failed to treat her properly following the procedures, and failed to obtain informed consent before performing the procedures. (A30-A35, A55-A59) As a result of these negligent acts, Ms. McLeod claimed permanent injuries, pain and suffering, permanent disability, lost wages and other economic damages. (A30-A35, A55-A59) Ms.

McLeod did not allege that Dr. Swier caused any injuries intentionally or recklessly at any time, nor did she claim that his alleged misconduct warranted punitive damages. (A30-A35, A55-A59) Likewise, Ms. McLeod did not claim any medical negligence from any alleged care to Ms. McLeod's right leg, nor did she allege any improper motive for performing surgery, such as economic gain. (A30-A35, A55-A59) Dr. Swier denied all allegations. (A60-A65)

Pre-Trial Stipulation

After all discovery, the Court signed the joint Pretrial Stipulation. (A66-A80) Again, Ms. McLeod alleged that Dr. Swier was medically negligent but did not seek punitive damages or allege that Dr. Swier acted intentionally or recklessly. (A66-A67, A76-A77)

Trial

At trial, Ms. McLeod further whittled her claim and informed the Court that the only claims she was pursuing were: (1) that Dr. Swier caused her CRPS from the April 5, 2010 procedures, and (2) that the procedures were unnecessary and below the standard of care to perform given the testing done. (A85-A86) Ms. McLeod specifically dropped any claim that Dr. Swier failed to timely and

appropriately treat Ms. McLeod's CRPS after the surgeries and any claim that she did not give informed consent. (A85, A123; A1117) No claims as to the right leg were raised.

In Ms. McLeod's opening statement, her counsel argued that the case was about holding Dr. Swier responsible for "unnecessary" and "aggressive" surgeries performed to Ms. McLeod's left leg on April 5, 2010 that caused her permanent injuries. (A143-A144, A153) Although counsel stated that Dr. Swier "manipulated" her into the surgery, there was no claim or direct argument that Dr. Swier acted maliciously. (A155) Rather, Dr. Swier's counsel responded to Ms. McLeod's counsel's implicit jab that Dr. Swier performed the surgeries at issue for money by explaining that, *inter alia*, there were no claims that the surgery was performed improperly, that there were no unknown complications, or that Dr. Swier did not injure a nerve. (A163-A165) In other words, the only issue before the jury was whether Dr. Swier acted within the standard of care when he determined that Ms. McLeod was an appropriate candidate for the surgical procedures to the left leg based on the relevant data. (A1464)

Trial Testimony

At trial, Ms. McLeod's experts (Dr. Raymond Michael Dunn and Dr. Richard Bird) testified that Dr. Swier's treatment was below the standard of care. (A231-A233, A250, A255-A256, A264-A265, A386, A394) In particular, Dr. Bird testified that the surgery was "excessive" and that he was "incredulous" as to Dr. Swier recommending surgery on the right leg. (A386, A392) Neither expert suggested, however, that Dr. Swier acted maliciously or with any recklessness. Similarly, during cross-examination of Dr. Swier, Ms. McLeod's counsel never suggested that Dr. Swier acted in an intentional or reckless manner in his care of Ms. McLeod. (A998-A1089)

Closing Arguments and Jury Verdict

In closing argument, Ms. McLeod's counsel argued that Dr. Swier breached the standard of care in failing to exhaust conservative measures before proceeding with surgery and then, when proceeding with surgery anyway, performing "overly aggressive" surgery. (A1319) But instead of limiting argument to Dr. Swier's alleged two breaches of the standard of care at issue, counsel urged the jury to punish Dr. Swier:

> So it's going to be up to you as the conscience of this community to decide how badly a doctor can violate the patient's safety rules and

> safe medical practices before the community's going to stand up and say enough is enough.

(A1319-A1320) Dr. Swier's counsel objected to Ms. McLeod's counsel urging the jury to "send[] a message" as "inappropriate," and the Court agreed. (G11) The Court specifically noted that Ms. McLeod's counsel could tell the jury to "simply render a verdict on the facts" but that he could not ask the jury "to say as a community we have this message, this verdict says, 'Enough is enough.' You can't ask them to do that." (A1320) The Court specifically noted that referring to the jury as the conscience of the community was "pushing it" and was inappropriate. (A1321) The Court then instructed the jury as follows:

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

(A1322)

Ms. McLeod's counsel, however, ignored this admonition and proceeded to argue that Dr. Swier did not merely breach the standard of care but acted in a reckless, deceiving, and fraudulent manner. Not only did he repeat "enough is enough" minutes after being told explicitly that this was improper, but Ms. McLeod's counsel told the jury that it was to focus on Dr. Swier's "opportunist"

nature, not whether he breached the standard of care, to determine if Ms. McLeod should win the case:

> So the question is, what does Patricia McLeod, what is she entitled to expect from her doctor? Okay. Is she to expect that he will care about her as his patient? Can she expect that he should know what he's doing? Should she expect to be treated as an individual rather than as a product on the assembly line?[1] Should she expect that her doctor will be honest? Should she expect that her doctor will be fair? Should she expect that her doctor will use his substantial knowledge for good? Should she expect that her doctor will put her health above any financial incentive for himself? Should she expect that her doctor will follow relevant patient safety rules?
>
> And, of course, we know that the answers to all of those questions is yes. That's what she can expect. And so the question is, has that been delivered to her here by this doctor?
>
> . . .
>
> Is this case a case where an honest and caring doctor was truly using his best judgment and determined that the most radical treatment option was truly necessary and worth all the risks to treat Patricia's complaints, or through the evidence that you've heard, is this a case where the doctor was an opportunist, caring more about his own bottom line than his patient, seeing a perfect opportunity to convince Patricia that her condition was actually far more dire than it actually was so that he can process her through his surgery assembly line? Which of those two is it?
>
> Obviously, if it's the first, if he's the honest, caring doctor, he wins. We all go home. No one remembers this case except my client, who remembers it until her last day on earth. Alternatively, is he the

[1] This stands in contrast to Ms. McLeod's counsel's agreement during trial that Dr. Swier was not operating an "assembly line [with his patients], because that is not what's going on here." (A1260)

> opportunist? In which case we win and the case will be long remembered because you will have decided that on these facts enough is enough from this doctor.

(A1322-A1324) (emphasis added)

Ms. McLeod's counsel then told the jury that Dr. Swier acted "unbelievably outrageous[ly]" by suggesting that Ms. McLeod needed surgery on her right leg, even though the surgery at issue occurred on the left leg and even though surgery never proceeded on the right leg. (A1328-A1329) He further suggested that Dr. Swier's conduct was "crazy," "nuts," and "insanity." (A1329)

Ms. McLeod's counsel further invited the jury to speculate as to how Dr. Swier manipulated Ms. McLeod into the surgery by "imagin[ing] how he can sell this and misrepresent this condition to this woman to convince her that this is something that has to be done" based on his website. (A1333) Counsel further argued that Dr. Swier knew that conservative treatment, rather than surgery, was the first option because "all doctors know that." (A1335)

Ms. McLeod's counsel continued to suggest Dr. Swier was a bad physician and commented on Dr. Bird's (Ms. McLeod's expert's) beliefs as to Dr. Swier. In particular, he stated:

> I don't know if you were able to discern or detect the level of conviction and outrage that Dr. Bird feels about what Dr. Swier did to this patient, their joint patient, and it's a rare – it's a rarity when a doctor from the same community will come in and criticize another

> doctor and Dr. Bird was willing to do that and he did it. He believes that to the depth of his soul.

(A1341)

Ms. McLeod's counsel then suggested to the jury that Dr. Swier had to rebut the Plaintiff's claim of causation:

> And don't you think if there was an expert out there such as Dr. Ducic [Dr. Swier's expert] that they could bring in that could have looked at this record and said, hey, this CRPS wasn't caused by this surgery, it came about because of this or that or the other thing, that would have been done? That's what you would have heard. These are super high stakes in this case and they would have brought someone in if they had someone, anyone in the whole world, that could have looked at this and said there was something other than the surgery that caused this CRPS.

(A1343) Ms. McLeod's counsel completed his closing argument by again emphasizing that Ms. McLeod was not treated like a person by Dr. Swier but was instead part of an assembly line of patients:

> It's unimaginable to think about her daily existence and to think about what she goes through day after day after day all because of this doctor who was dead set on doing the surgery no matter what and treated her like another cog in the machine. He wanted another person in his surgery assembly line. Hey, he helps a lot of people. Great. He completely ruined this one. Thank you.

(A1348)

In response, Dr. Swier's counsel initially noted that he did not expect to have to defend his client's character:

> I planned this closing to talk to you about the facts and the evidence and talk to you about the law as it will be given to you by Judge Brady. I did not presume that I would have to defend the character of my client which has been seriously attacked here. I think I may need to spend a little time on that.

(A1349) Dr. Swier's counsel then emphasized that the jury should not consider Dr. Swier's character but should, instead, "consider in a medical negligence case . . . the facts in evidence and the law, as it will be instructed to you in a calm and deliberate manner, not inflamed by words such as assembly lines and shams and manipulation and scare tactics." (A1349) Dr. Swier's counsel urged the jury to consider the "evidence, not arguments, not character assassination, but evidence." (A1354)

Nonetheless, Dr. Swier's counsel responded to Ms. McLeod's counsel's character attacks:

> Now, here's where I have to talk to you about this character attack. It's clear what Mr. Landon wants you to believe, and he said it, that this is greed. This really isn't a case of negligence. This is a case of intentional acts that this doctor, out of greed, intentionally did something that didn't need to be done. What have you seen in the records and in his testimony that evidences greed?
>
> . . .
>
> He does this surgery because he's trained to do it and because it works because, as you have heard from Dr. Ducic and Dr. Swier, there's a tremendous success rate with these surgeries. Dr. Swier's success rate is 85 percent. Dr. Ducic has dedicated basically his entire practice to

> helping people in this and Dr. Swier dedicates 30 percent of his practice because this works and it helps people.

(A1360-A1362)

In rebuttal, Ms. McLeod's counsel focused on Dr. Swier's alleged decision to do surgery on Ms. McLeod's right leg, which was not at issue. (A1378-A1380) Ms. McLeod then implied to the jury that Dr. Swier's counsel was manipulating testimony:

> In terms of whether or not, on cross-examination, after suffering from this condition for the past, I guess it's been a little over four years now, with her sparring with Mr. Galperin about, well, I don't think that was true, I don't think I had those problems, I don't think I had that complaint, *skillful lawyer, Mr. Galperin is skillful, I'll give him that,* he's a very good lawyer, he did a very nice job of going through that information.

(A1382) (emphasis added) Counsel then ironically suggested that Dr. Swier's counsel's arguments as to Ms. McLeod's credibility were "red herrings to deflect your attention away from what the real issues are in this case." (A1383) Counsel closed by noting that Dr. Swier needed to "be held responsible for the damage that he did to this woman." (A1384)

The jury was ultimately instructed on the law of the case. In particular, the jury was instructed that "[i]t is not proper, however, for an attorney to state an opinion as to the truth or falsity of any testimony or evidence. What an attorney personally thinks or believes about the testimony or evidence in a case is not

relevant and you are instructed to disregard any personal opinion or belief offered by an attorney concerning testimony or evidence." (A1388) The jury was further instructed that the only issues in the case were whether the defendant met the standard of care and, if not, whether that was a proximate cause of injury to her. (A1393) The jury was further instructed to award Ms. McLeod damages (if appropriate) for her injuries. (A1396-A1399) The jury was also told to put aside any "passion, prejudice, sympathy, or any motive except a fair and impartial consideration of the evidence." (A1399) At no time, however, was the jury told to disregard comments seeking punishment of Dr. Swier, nor did the trial judge instruct the jury to disregard any other improper comments.

Ultimately, the jury was asked to address only two questions: (1) whether "Patrick Swier, M.D., committed medical negligence in a manner which was a proximate cause of injury to Patricia A. McLeod" and, if so, what amount of damages should be awarded to Ms. McLeod. (A1403, A1433) After being charged, the jury deliberated for less than a few hours over two days and returned a verdict in the amount of $3,425,515.00. (A1596)

Motion for New Trial

Dr. Swier moved timely for a new trial on the basis that Ms. McLeod's counsel's argument was unfairly inflammatory and caused significant prejudice to Dr. Swier, and Ms. McLeod responded. (A1465-A1549) At oral argument, Dr. Swier's counsel emphasized that Ms. McLeod's closing argument "demonstrated a theme and a pattern to characterize the defendant as a liar, one who puts money ahead of patients, an intentionally bad actor, and even as far as to saying that he was insane or nuts," despite the fact that the case addressed only medical negligence and not intentional or reckless acts warranting punitive damages. (A1581-A1582)

In response, Ms. McLeod's counsel agreed that his argument was "close to the line" and "may have even crossed the line slightly[.]" (A1600) Nonetheless, he argued that the totality of his argument "was not exhorting the plaintiff to penalize the doctor, to award punitive damages to the doctor." (A1590) He further argued that his "malign[ing]" of Dr. Swier's alleged decision to do surgery on the right leg (which was not at issue) supported Ms. McLeod's contention that he did unnecessary surgeries on Ms. McLeod's left leg. (A1595, A1601) That the jury deliberated for less than a few hours in Ms. McLeod's favor was not because counsel's argument was inflammatory but "because the facts in the case as

presented through the witnesses was so overwhelmingly clear to this particular jury that this doctor didn't stand a chance." (A1596-A1597) Likewise, the jury's award did not evidence an intent to punish Dr. Swier because the damages award was less than the claimed special damages. (A1597)

Opinion

Despite Ms. McLeod's counsel conceding at oral argument that his argument "crossed the line slightly[,]" the Superior Court evaluated each of the points raised by Counsel *in seriatim* rather than *in toto* and found no impropriety. (A1631) The Court further concluded that Dr. Swier's counsel made a strategic decision not to object during closing argument and that, to the extent any comments were improper, they did not amount to plain error that deprived Dr. Swier of a fair trial or substantially prejudiced the jury. (A1631) As a result, the Court concluded that the verdict should be upheld. (A1631)

ARGUMENT

I. THE SUPERIOR COURT ERRED WHEN IT FAILED TO GRANT A NEW TRIAL AFTER PLAINTIFF'S COUNSEL MADE IMPROPER, IRRELEVANT AND INFLAMMATORY COMMENTS IN CLOSING ARGUMENT THAT SIGNIFICANTLY PREJUDICED DR. SWIER.

A. Question Presented

Did the Superior Court err when it failed to reverse the verdict after Dr. Swier was significantly prejudiced by Ms. McLeod's counsel's closing argument that evidenced a pattern of inflammatory and demeaning rhetoric designed to bias and distract the jury from evaluating the limited medical negligence issues in this case?

Dr. Swier preserved this issue when he objected during Ms. McLeod's counsel's closing argument, when he moved for a new trial, and when he presented argument on the Motion for New Trial. (A1320-A1322, A1465-A1549, A1578-A1609)

B. Scope of Review

This Court reviews a lower court's decision to deny a motion for a new trial based on improper closing argument for an abuse of discretion. *Med. Ctr. of Del., Inc. v. Lougheed*, 661 A.2d 1055, 1060 (Del. 1995). A judge abuses her discretion in denying a motion for a new trial under these circumstances where the improper

comments were "significantly prejudicial so as to deny them [the moving party] a fair trial." *DeAngelis v. Harmon*, 628 A.2d 77, 80 (Del. 1993). Where a comment is prejudicial, a trial judge abuses her discretion when she fails to issue an immediate cautionary instruction. *Id.* at 81.

Where a party does not timely object to an improper argument, this Court reviews the claim for plain error.[2] *Med. Ctr. of Del., Inc.*, 661 A.2d at 1060. Plain error exists where the asserted error was "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.* (citations omitted) Although any particular statement may be sufficiently prejudicial to warrant reversal, this Court must review the statements cumulatively to evaluate whether the argument as a whole is prejudicial. *Mason v. State*, 658 A.2d 994, 999 (Del. 1995). Where there are extensive, repetitive references that are improper, plain error exists. *Robertson v. State*, 596 A.2d 1345, 1358 (Del. 1991).

C. Merits of Argument

At trial, the trial judge agreed that she had a duty to intervene when impropriety occurs, even with no objection:

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[2] Dr. Swier did object to Plaintiff's closing argument, thereby preserving the issue. (A1320) To the extent that this Court determines that the objection was insufficient, however, the claim would be reviewed for plain error.

> There is no evidence in the record at this point that would support that claim [that other unnamed doctors were negligent], unless something is going to change seriously. *Should he [Ms. McLeod's counsel] argue that, I will interrupt his closing. I don't always wait for you to object if I think that a problem for appellate review has occurred. I will interject to protect the record and the integrity of whatever verdict is received.*

(A846) (emphasis added) Yet, when Ms. McLeod's counsel insulted Dr. Swier repeatedly, made improper commentary about witnesses, focused on irrelevant evidence, suggested that Dr. Swier's counsel manipulated testimony, and repeated objectionable phrases after being instructed not to do so, the trial judge remained silent and permitted him to engage in unfettered inflammatory and prejudicial rhetoric. And, when the trial judge was presented with a second opportunity to correct the errors after trial, she again failed to rectify the significant prejudice to Dr. Swier. As there is a substantial likelihood that the jury was inflamed and misled by Ms. McLeod's counsel's repeated inappropriate comments and strategy to attack Dr. Swier's character, a new trial should be granted. *DeAngelis*, 628 A. 2d at 81 (Del. 1993) (argument that attempts to shift jury focus away from plaintiff's injury and loss creates "a serious risk of jury confusion and prejudice" that warrants a new trial).

In making a closing argument, counsel cannot distract the jury from its task of evaluating the case in an individualized and unbiased manner. *DeAngelis*, 628

A.2d at 80. In particular, efforts by counsel to appeal to a jury's bias and prejudice are improper. *Id.* Likewise, this Court has held that it is improper:

> to make a factual statement which is not supported by evidence, *Henne v. Balick,* 51 Del. 369, 146 A.2d 394, 398 (1958); to comment on the legitimacy of a client's claim or defense, *Robelen Piano Co. v. DiFonzo,* 53 Del. 346, 169 A.2d 240, 248-249 (1961); to mention that the defendant is insured, *Chavin v. Cope,* Del.Supr., 243 A.2d 694, 696-697 (1968); to suggest to the jury that it place themselves in the plaintiff's position (the "golden rule" argument), *Delaware Olds v. Dixon,* Del.Supr., 367 A.2d 178, 179 (1976); to comment on a witness' credibility based on personal knowledge or evidence not in the record, *Joseph v. Monroe,* Del.Supr., 419 A.2d 927, 930 (1980); to vouch for a client's credibility, *Jardel Co., Inc. v. Hughes,* Del.Supr., 523 A.2d 518, 532-33 (1987); or to make an erroneous statement of law. *Shively v. Klein,* 551 A.2d at 44-45.

DeAngelis, 628 A.2d at 80. Where the cumulative impact of counsel's arguments indicates a "studied purpose on the part of counsel to inflame or prejudice the jury improperly," reversal is appropriate. *Delaware Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1210 (Del. 1997) (quoting *McNally v. Eckman*, 466 A.2d 363, 375 (Del. 1983), *overruled on other grounds by Wright v. State*, 953 A.2d 144 (Del. 2008)).

More specifically, in a medical negligence case, telling the jury that "enough is enough" or asking it to "send a message" is inappropriate because the jury should focus on the plaintiff's injury or loss. *Cunningham v. McDonald*, 689 A.2d 1190, 1196 (Del. 1997); *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 527 (Del. 1987)

(citing 22 AM.JUR.2D DAMAGES § 1, at 13 (1965)). A doctor's competence or punishment in a medical negligence case, by contrast, is irrelevant and should not be considered. *See, e.g.,* Jury Instruction on "Verdict/Sympathy", *Ragnis v. Myers*, C.A. No. 09C-05-057 JOH (Del. Super. Ct. Jul. 23, 2012) (jury in medical negligence case should not consider "irrelevant" concerns like "[a doctor's] general professional competence, right to practice medicine or punishment") (attached as Exhibit C); Jury Instruction on "Verdict Based on Evidence", *Hodel v. Ikeda, et al.*, C.A. No. 09C-01-227 JOH (Del. Super. Ct. Feb. 22, 2013) (same) (attached as Exhibit D). Instead, only with punitive damages should a jury focus on the defendant's conduct. *Riegel v. Aastad,* 272 A.2d 715, 718 (Del. 1970) (punitive damages serve to punish tortfeasor for willful or wanton conduct, not to compensate plaintiff for injury); *Nishihama v. City and County of San Francisco*, 112 Cal.Rptr.2d 861, 864-65 (Cal. Ct. App. 2001) (argument that jury should "send a message" and hold defendant "accountable" was improper in negligence case); *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 58 (Fla. Dist. Ct. App. 2016) (precluding plaintiff from asking the jury to "send a message" or act as "conscience of the community" by punishing defendant when seeking compensation for injuries because argument serves to "divert the jurors' attention from the proper consideration").

Here, the jury was tasked with considering whether Dr. Swier breached the standard of care in his treatment of Ms. McLeod's left leg. Ms. McLeod's counsel, however, asked the jury repeatedly, in both his closing argument and rebuttal argument, to not only focus on potential surgery on the right leg -- which was never performed and was not at issue -- but to also focus on the irrelevant issue of punishment of Dr. Swier.[3] This served to not only impugn Dr. Swier but to distract the jury from the issue in this case: compensation, if any, to which Ms. McLeod was entitled for her injuries resulting from the left leg surgery. Unfortunately, counsel's rhetoric was not a single isolated instance but revealed a "studied purpose on the part of counsel to inflame or prejudice the jury improperly," warranting reversal. *Delaware Elec. Co-op., Inc.*, 703 A.2d at 1210; *DeAngelis*, 628 A.2d at 80.

Specifically, Ms. McLeod's counsel asked the jury to "stand up and say enough is enough," which the Court agreed was improper. (A1319-A1322) But Ms. McLeod's counsel, disregarding the trial judge's admonishment, then argued

[3] Of course, a plaintiff may only recover for medical negligence where the defendant's breach in the standard of care proximately causes harm. 18 *Del. C.* § 6853(e); *Cooney-Koss v. Barlow*, 87 A.3d 1211, 1217 (Del. 2014) (lack of causal nexus between alleged breach in the standard of care and harm precludes claim for medical negligence). Even assuming that Dr. Swier breached the standard of care by considering surgery on the right leg, there was no harm to Ms. McLeod by this alleged breach because no procedures were performed on that leg, making any alleged care of the right leg irrelevant to this matter.

again, with the same words, that "enough is enough" minutes later. (A1324) The Court, well aware that this comment was inappropriate, remained silent and did not intervene. Free to continue with his argument unfettered, counsel then maligned Dr. Swier as a dishonest and unfair opportunist who used his medical knowledge for bad (A1322-A1324); who acted "unbelievably outrageous[ly]" (A1328-A1329); who was "crazy," "nuts," and "insan[e]" for considering surgery on the right leg (which was not at issue) (A1329); who misrepresented Ms. McLeod's condition (A1333); and who treated Ms. McLeod like "another cog in the machine," despite counsel's acknowledgement that Dr. Swier was not operating an assembly line (A1260, A1348). These repeated comments requesting that the jury punish Dr. Swier -- which was never an issue in this case -- inflamed the jury against him. Said differently, the jury was asked to make a decision out of passion rather than evidence. The trial judge, however, failed to intervene and put an end to these arguments.[4]

[4] During trial, the Court suggested that Ms. McLeod's counsel was "appropriately angry and distrustful" of Dr. Swier during his questioning of him. (A1028) To the extent that the trial judge agreed with Ms. McLeod's theory of the case, she may have been reluctant to interrupt Ms. McLeod's counsel's closing argument. If correct, this matter should be reversed due to the lack of Court's impartiality. *Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203, 1211 (Del. 2002) (trial judge's failure to comply with her duty of neutrality "may be grounds for reversal on the basis of plain error").

With the trial judge not intervening, Ms. McLeod's counsel made additional improper comments. For example, Ms. McLeod's counsel told the jury that "all doctors know" that conservative treatment is always appropriate before surgery without evidence to this effect (A1335). This is despite the fact that what "all doctors" know was not at issue or supported by the evidence. *DeAngelis*, 628 A.2d at 80 (Del. 1993) (citation omitted) (counsel cannot make a factual statement which is unsupported by the evidence). Counsel further improperly commented on one of Ms. McLeod's expert's (Dr. Bird's) credibility by noting that he was "outrage[d]" and "believes . . . to the depth of his soul" that Dr. Swier harmed Ms. McLeod. (A1341); *DeAngelis*, 628 A.2d at 80 (citation omitted) (counsel cannot comment on a witness's credibility based on personal knowledge). Ms. McLeod's counsel then undermined the legitimacy of Dr. Swier's defense by telling the jury that Dr. Swier "would" have or "could" have brought in a causation expert to defend the "super high stakes" in this case, suggesting that Dr. Swier had the burden of proof even though he was under no obligation to offer any evidence whatsoever. (A1343, A1624); *DeAngelis*, 628 A.2d at 80 (citation omitted) (counsel cannot comment on legitimacy of defense); *O'Donald v. McConnell*, 858 A.2d 960, 2004 WL 1965034, at *2 (Del. Aug. 19, 2004) (plaintiff bears burden of proof in medical negligence case). Finally, Ms. McLeod's counsel suggested that

Dr. Swier's counsel was manipulating testimony or acting improperly when he suggested that "Mr. Galperin is skillful, *I'll give him that*" when cross-examining Ms. McLeod.[5] (A1382) (emphasis added); *Walker v. State*, 790 A.2d 1214, 1219 n.14 (Del. 2002) (citation omitted) (noting that "attacks on opposing counsel [were] inappropriate in closing argument").

While each of these issues would be sufficiently improper to significantly prejudice Dr. Swier, they serve cumulatively to constitute plain error, especially when coupled with the inflammatory rhetoric to malign Dr. Swier and seek punishment. *Murphy v. Thomas*, 1999 WL 742892, at *1 (Del. Super. July 9, 1999), *aff'd*, 801 A.2d 11, 2002 WL 1316242 (Del. Jun. 13, 2002) ("It may well be that all these items were borderline, not clear legal error, but the cumulative effect of pro-Plaintiff rulings or inaction on these items, even if they be viewed as discretionary, tilted the scale unevenly and unfairly in the Plaintiffs' favor."); *Walker*, 790 A.2d at 1219 ("In this case, the prosecutor's remarks to the jury in closing argument and rebuttal summation cumulatively served to denigrate the role of defense counsel and the defensive strategy employed."). The trial judge, however, "broke[] down" Dr. Swier's comments into "categories" but never

[5] Contrary to the trial judge's conclusion, Ms. McLeod's counsel's reference to "Mr. Galperin" is, by definition, a comment on counsel, and his sarcastic comment that he was "skillful" is an improper attack. (A1627)

evaluated their cumulative impact on him.[6] (A1618); *Mason*, 658 A.2d at 999. Even assuming *arguendo* that the improper comments were not sufficiently improper on their own (which they were), the trial judge failed to evaluate the cumulative impact of these statements, which, when read *in toto*, reveal a "studied purpose on the part of counsel to inflame or prejudice the jury improperly" warranting reversal. *Delaware Elec. Co-op., Inc.*, 703 A.2d at 1210.

Delaware Courts, of course, do not tolerate improper and inflammatory comments that serve to distract the jury from its task and have not hesitated to reverse a verdict when those comments are significantly prejudicial. *See, e.g., DeAngelis*, 628 A.2d at 81 (reversing verdict where defense counsel made irrelevant and misleading comments, regardless of their truth or falsity, in closing because they distracted the jury "from the task at hand -- the individualized determination of the factual merit of a specific claim"). And other Courts, when faced with similar patterns of improper commentary during closings, have likewise not hesitated to reverse verdicts. For example, in *Roetenberger v. Christ Hosp.*,

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[6] The trial judge also cited to *Hughes v. State*, 437 A.2d 559 (Del. 1981) to note that the Court should consider whether the Defendant mitigated the claimed error, whether the Court mitigated the claimed error with jury instructions, and whether manifest injustice occurred. (A1628) None of these factors are discussed in *Hughes*, and it is unclear as to from where these considerations derive. Regardless, as discussed *infra*, these factors support Dr. Swier's claim that the prejudice from the pattern of inflammatory and improper comments made by Ms. McLeod's counsel caused him manifest injustice.

839 N.E.2d 441, 444-46 (Ohio Ct. App. 2005), *appeal denied*, 843 N.E.2d 793 (Ohio Mar. 8, 2006) (Table), defense counsel attacked plaintiff's counsel, criticized plaintiff's experts, presented his own view of the credibility of witnesses, and argued that the case was only about money. The Ohio Court of Appeals found such comments to be reversible error, even without objection, because "there was a substantial likelihood that the jury was misled and that the verdict was influenced by defense counsel's improper remarks. *Id.* at 446. Specifically, the Court held:

> Remarks or arguments that are not supported by the evidence and are designed to arouse passion or prejudice to the extent that there is a substantial likelihood that the jury may be misled are improper. . . . If there is room for doubt about whether counsel's improper remarks may have influenced the outcome of the case, that doubt should be resolved in favor of the losing party.

Id. at 446. Likewise, in *Fehrenbach v. O'Malley*, 841 N.E.2d 350, 358-70 (Ohio Ct. App. 2005), *aff'd*, 862 N.E.2d 489 (Ohio 2007), the Ohio Court of Appeals held that pervasive statements designed to arouse sympathy, passion and prejudice required reversal of the judgment, despite the lack of objections to each comment, "because there is a substantial likelihood that the jury was misled and that the verdict was influenced by defense counsel's "gross and abusive conduct." *Fehrenbach*, 841 N.E.2d at 359-60. For the same reasons, Ms. McLeod's counsel's improper argument that served to do nothing but arouse the jury's passion and prejudice against Dr. Swier is reversible, and any doubts as to the

argument's impact should be resolved in Dr. Swier's favor and should warrant reversal. *R.J. Reynolds Tobacco Co.*, 188 So.3d at 60 (finding improper comments in closing argument reversible where there was a reasonable possibility that they contributed to the verdict).

Because the closing argument was improper and prejudicial, this Court must consider "whether the improper comments caused sufficient prejudice to the complaining party to warrant reversal or whether the prejudice was cured by the cautionary instructions given by the Trial Court." *R.T. Vanderbilt Co. Inc. v. Galliher*, 98 A.3d 122, 129 (Del. 2014) (citations omitted). In particular, the Court considers three factors from *Hughes v. State,* 437 A.2d 559 (Del. 1981): "(1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken in mitigation." *DeAngelis*, 628 A.2d at 81 (citing *Hughes,* 437 A.2d at 571). Given the overall and repeated prejudicial themes of Ms. McLeod's closing argument, as well as Ms. McLeod's counsel's permitted and repeated requests for punishment of Dr. Swier after the cautionary instruction, the three *Hughes* factors weigh in favor of reversal.

First, this was a close case. Both sides presented experts to address Dr. Swier's liability, and the issue and extent of Ms. McLeod's damages was heavily contested. Indeed, Ms. McLeod's credibility was so important that Ms. McLeod's

counsel attacked Dr. Swier's counsel for his cross-examination of Ms. McLeod. (A1382); *Payne v. Home Depot, Inc.*, 2007 WL 4577624, at *3 (Del. Super. Ct. Dec. 14, 2007) (noting that "[c]redibility of the parties, and particularly the plaintiff, is one of the most important factors to consider in a personal injury case").

Second, Ms. McLeod's improper arguments were directly central to the issues. As noted above, the focus of the case should have been on whether Dr. Swier breached the standard of care and, if so, to what compensation Ms. McLeod was entitled. Instead, Ms. McLeod's counsel sought to distract the jury from these issues by attacking Dr. Swier's character, seeking punishment of him, commenting on witnesses' (and Dr. Swier's attorney's) credibility, and suggesting that Dr. Swier failed to offer expert proof, despite his lack of obligation to do so.

Third, the trial court failed to take sufficient steps to mitigate the overwhelming prejudice created by Ms. McLeod's closing argument. As noted above, while the Court issued a curative instruction, the trial judge failed to intervene when counsel not only repeated the same comment which she ruled was objectionable, but also when counsel attacked Dr. Swier's character over and over, allowing the prejudicial comments to continue unabated. *R.T. Vanderbilt Co. Inc.*, 98 A.3d at 129. The trial judge likewise failed to prevent Ms. McLeod's counsel

from making other improper comments as discussed *supra*. In other words, at no point after the initial objection did the trial judge "interject to protect the record and the integrity of whatever verdict is received." (A846); *Sears, Roebuck & Co.*, 893 A.2d at 551 (holding that, "even without objection, the trial judge should act *sua sponte* to control the conduct of the court's officers, if necessary to prevent this type of transgression"). And even though Dr. Swier's counsel responded to some of these attacks in his closing argument, there is a major difference between counsel's argument (which is not evidence) and the Court's failure to intervene (which suggests tacit approval). *See, e.g.,* DEL. P.J.I. CIV. § 3.3 (2000), rev. Aug. 15, 2006 ("What the attorneys say is not evidence.") (attached as Exhibit E); *Price*, 790 A.2d at 1211 (Del. 2002) (quoting *Travelers Insurance Co. v. Ryan,* 416 F.2d 362, 364 (5th Cir. 1969)) ("By reason of his role, quickly observed by jurors, the judge is a figure of overpowering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted upon with alacrity and without question."). In any case, given the overwhelming pattern of impropriety, any response by Dr. Swier was insufficient to eradicate the unfairness and permanent bias cast on this jury.

Similarly, while the jury instructions reflected the appropriate law of the case, the instructions themselves did not suggest that counsel's argument was

improper or "crossed the line." (A1606) Not only were these not read contemporaneously with Ms. McLeod's arguments, but no other contemporaneous instructions and admonitions were given to counsel at the time of the improper comments. *See DeAngelis*, 628 A.2d at 80 (with objection, trial court "is obliged to act firmly with curative instructions even where no objection is forthcoming until after summations") (emphasis added). Nor did the jury instructions explain that punishment of Dr. Swier was an improper consideration.[7] That the jury awarded less than the claimed boardable damages is irrelevant as to whether the comments are improper, nor does a lower-than-claimed award somehow "correct" counsel's improper comments.[8] (A1630) To permit this verdict to stand, when there is a reasonable probability that the verdict was tainted by the rhetoric, would create manifest injustice to Dr. Swier, and this Court should resolve any doubts in favor of Dr. Swier, the losing party. *Roetenberger*, 839 N.E.2d at 444-46.

In reviewing Ms. McLeod's counsel's closing argument, it is clear that there was an intent to portray Dr. Swier as a dishonest, greedy, and "bad" doctor. These claims -- unsupported by the evidence and irrelevant in a case with no punitive

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[7] Of course, the mere fact that the jury instructions were proper does not mean that that the harm to the defendant and court system from the improper argument should be countenanced.

[8] Of note, the jury deliberated in a multi-million dollar case that took two weeks for less than a few hours. That fact, in and of itself, suggests that the jury was swayed by Ms. McLeod's improper closing argument.

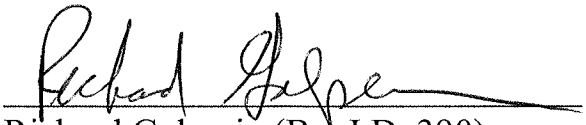
damages -- were allowed to stand unfettered by the trial judge, despite her acknowledgment of her responsibility to protect the integrity of the judicial process so that both parties received a fair trial free from bias and a prejudiced jury. And, despite the caustic nature of these arguments and the trial judge's own recognition that the argument was improper, the trial judge failed to intervene firmly, protect the impartiality of the jury, and permit Dr. Swier to have a fair trial. As a result, this Court should reverse the verdict and remand this matter for a new trial with specific instructions to counsel to refrain from similar commentary.

CONCLUSION

The trial judge erred when she failed to intervene *sua sponte* and, instead, permitted Ms. McLeod's counsel to make repeated implicit and explicit comments -- even after Dr. Swier's sustained objection -- that Dr. Swier was a bad physician deserving of punishment by the jury. Regardless of whether the standard of review is the abuse of discretion or plain error standard, the totality of Ms. McLeod's closing arguments demonstrates an intent to inflame the jury against Dr. Swier and distract it from its only purpose: to evaluate whether Dr. Swier breached the standard of care in his treatment of Ms. McLeod's left leg, whether that breach proximately caused injury to Ms. McLeod, and, if so, what is reasonable compensation for the injury. That Ms. McLeod's argument caused significant and unfair prejudice to Dr. Swier is not only evident from the numerous improper comments made by counsel but is also clear from the jury's rapid deliberations. As Dr. Swier is entitled to have his case heard by an unbiased, impartial, and non-inflamed jury, this Court should reverse the verdict below and remand this matter for a new trial.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,



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Dated: 8/24/16

CERTIFICATE OF SERVICE

I, Richard Galperin, hereby certify that on this 25th day of August, 2016, I have caused the following documents to be served electronically on the parties listed below:

Defendants Below, Appellants Patrick Swier, M.D.'s and Patrick Swier, M.D., P.A.'s Opening Brief on Appeal and Appendix thereto

Online service to:

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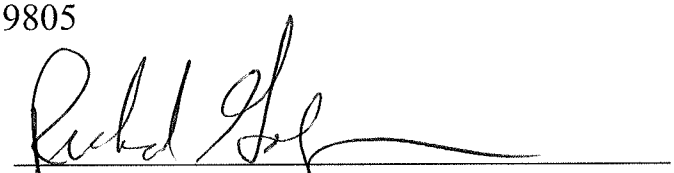

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