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Case Number 504,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS BAIRD,	:	
	:	
Plaintiff Below, Appellant,	:	No. 504,2013
	:	
v.	:	C.A. No. Below: N11C-09-241 RRC
	:	
FRANK R. OWCZAREK, M.D., EYE CARE OF DELAWARE, LLC, and CATARACT AND LASER CENTER, LLC,	:	
	:	
Defendants Below, Appellees.	:	

Appeal from the Superior Court of the State of Delaware,
In and For New Castle County,

APPELLANT'S AMENDED OPENING BRIEF

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Dated: December 27, 2013

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Dated: December 27, 2013

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NATURE OF PROCEEDINGS

On September 30, 2011, Appellant Thomas Baird (Plaintiff Below, hereafter "Appellant" or "Mr. Baird") filed this medical negligence action against Appellees Frank R. Owczarek, M.D. ("Dr. Owczarek"), Eye Care of Delaware, LLC, and Cataract and Laser Center, LLC (collectively, "Appellees"). Appellant alleged, *inter alia*, that from January 16, 2004, continuing through April 20, 2011, Appellees performed two LASIK surgeries which were contraindicated because of the preoperative condition of the Appellant's corneas. A-22. The claim was that the surgeries never should have been performed, not that Dr. Owczarek was unskillful in how he performed the surgeries. The first LASIK surgery was performed upon both of Appellant's eyes on January 27, 2004. The second LASIK enhancement surgery was performed on Appellant's left eye on October 14, 2009. A-22. Specifically, Appellant pleaded that: "[Appellees] failed to recognize that due to the condition of [Appellant's] eyes, including without limitation, signs of keratoconus and frank keratoconus, [Appellant] was not a suitable candidate for [either] LASIK surgery." A-25. As a result of the contraindicated surgeries, Appellant developed a vision threatening corneal disease called post-LASIK ectasia. A-26.

Notably, Appellant withdrew his claim concerning lack of informed consent.

On April 11, 2013, after an eight-day trial, the jury found in favor of Appellees. When the Court polled the jury, Juror No. 6 appeared visibly distraught. A-1252 (trial court observing: "Juror No. 6 hesitated before she acknowledged the verdict"). Beginning later that day, and continuing for the next two weeks, Juror No. 6 repeatedly attempted to contact the trial court to alert the court of juror misconduct. A-1233. However, the trial court refused to return Juror No. 6's telephone calls, and refused to permit counsel to contact Juror No. 6. A-1226-1227. On April 23, 2013, Juror No. 6 wrote a letter to the trial judge describing two specific instances of juror misconduct. A-1230-1232. The first involved the introduction of extrinsic internet research during deliberations. *Id.* The second involved the foreperson's refusal to convey written questions to the trial court seeking clarification of its jury instructions, in contravention to the written jury instructions given at the close of evidence. *Id.*

On April 25, 2013, Appellant filed a motion for a new trial based upon these specific allegations of juror misconduct. A-1233. On August 29, 2013, the trial court denied Appellant's request to interview Juror No. 6 or otherwise investigate her allegations, and denied Appellant's motion. A-1248. Without explanation, the trial court declined to investigate the allegations by Juror No. 6. In short, the trial court engaged in conscious avoidance of knowledge of wrongdoing by the jury.

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

SUMMARY OF ARGUMENTS

1. The trial court committed reversible error by denying Appellant's motion to preclude reference to informed consent, and permitting the jury to hear Appellees' arguments concerning assumption of risk, where Appellant had withdrawn his claim concerning lack of informed consent.

2. The trial court committed reversible error by improperly failing and refusing to investigate particularized allegations of juror misconduct.

3. The trial court committed reversible error by erroneously permitting Appellees' expert, Steven Siepser, M.D. ("Dr. Siepser"), to testify concerning Appellant's suitability for surgery, even though Dr. Siepser admitted that he lacked the knowledge to offer his opinion to the requisite degree of medical certainty.

4. The trial court committed additional errors which should be corrected prior to any remand for a new trial, including:

   a. erroneously ruling that asking, "Who would you choose as your healthcare provider?" during closing argument violated the so-called "golden rule;" and

   b. erroneously precluding a video showing "stitch-for-stitch" the precise cornea transplant surgery which Appellant underwent as a result of his injuries as a result of Appellees' negligence.

STATEMENT OF FACTS

I. DR. OWCZAREK COMMITTED CONTINUOUS MEDICAL NEGLIGENCE FROM JANUARY 16, 2004, THROUGH APRIL 20, 2011

Appellant alleged, *inter alia*, that from January 16, 2004, continuing through April 20, 2011, Appellees negligently treated Appellant's corneas in connection with LASIK surgery upon both of Appellant's eyes on January 27, 2004, and LASIK enhancement surgery on Appellant's left eye on October 14, 2009. A-22-23.

Dr. Owczarek's preoperative examination of Mr. Baird in January 2004, revealed signs of keratoconus, a contraindication to LASIK surgery. A-345-346. Dr. Owczarek's pre-enhancement examination in September and October 2009, revealed signs of keratoconus and/or signs of ectasia, both of which were contraindications to LASIK surgery.

As a result of the contraindicated surgeries, Appellant developed post-LASIK ectasia. A-23. Post-LASIK ectasia is a vision-threatening disease of the cornea, involving a weakening of collagen fibers, which leads to a progressive thinning and bulging of the cornea. A-346. In this case, it necessitated the need for cornea transplant surgery in Appellants' left eye. A-155.

II. THE TRIAL COURT ERRONEOUSLY ADMITTED APPELLEES' INFORMED CONSENT FORMS INTO EVIDENCE AND PERMITTED APPELLEES TO ASSERT AN AFFIRMATIVE DEFENSE OF ASSUMPTION OF RISK

On February 15, 2013, Appellant withdrew his claim for lack of informed consent. A-149. At the same time, Appellant sought entry of an order:

(i) dismissing Appellees' affirmative defense of assumption of risk; and

(ii) precluding admission into evidence of Appellees' pre-printed informed consent forms, which Mr. Baird was required to sign before his LASIK surgeries. A-149-153. *See also* A-44 ("Plaintiff's claims are barred by the Doctrine of Assumption of the Risk."); A-44 ("Plaintiff was adequately informed of all risks, benefits and alternatives of the procedures at issue and, therefore, assumed the risks of his alleged injuries.") Contrary to the established precedent in Delaware, the trial court permitted Appellees to present their affirmative defenses of assumption of risk and informed consent to the jury. Contrary to the established precedent around the country, the trial court permitted Appellees to admit their informed consent forms into evidence.[1]

As set forth below, assumption of risk and informed consent are not valid defenses to a medical negligence action. Furthermore, because consent to a

[1] Although this appears to be an issue of first impression in Delaware, the established case law around the country precludes admission of informed consent forms in the absence of a lack of informed consent claim. The settled case law in Delaware, and elsewhere, precludes a defendant doctor from asserting affirmative defenses of assumption of risk or informed consent, in a medical negligence action.

procedure is not a valid defense to a negligence claim, Appellees' informed consent forms served no probative purpose at trial, confused the jury and unduly prejudiced Appellant.

The forms played a critical role at trial, because they list many of the visual complaints from which Mr. Baird suffers. A-1-4 (noting risks of haze, night glare, blurriness, and haloes). At trial, Appellees published the forms at least three critical times: (i) during opening statement; (ii) while cross-examining Appellant; and (iii) during closing argument. Appellees repeatedly argued that Mr. Baird had assumed the risks of his visual injuries, and Dr. Owczarek could not have committed medical negligence, because Mr. Baird's visual injuries were listed on the forms.[2] A-1-4. By way of example, during opening statement, Appellees' counsel published Appellees' four-page "Consent for the use of the Excimer Laser for Performing CustomVue LASIK" dated January 27, 2004, A-1-4, and directed the jury's attention to the risks listed thereon nine times:

1. "The risks and benefits were explained." A-394;
2. "The risks and benefits of LASIK and CustomVue LASIK were explained to the patient." A-395;
3. "All of the risks were discussed again with Mr. Baird. And he consented to the procedure." A-395;

[2] Notably, both parties' experts testified that post-LASIK ectasia rarely occurs in the absence of medical negligence. A-453; A-954-956 (citing study in which 95% of patients with post-LASIK ectasia had preexisting risk factors).

4. "This is the consent form. This is Page 1 of 4 . . . You'll see there's no guarantee. It says it twice here." A-395;

5. "Page 2. Additional risks as we keep going through this. Haze. Scarring. Night glare. Blurriness." A-395;

6. "The outcome, again, can never be guaranteed. There's a risk the vision may be made worse." A-395;

7. "Page 3. We just keep going." A-396;

8. "These are more [risks listed on the form.] I'm not going to go through them all again. You will have an opportunity to see the informed consent. But there are several here. Different adverse events, different transient complications or temporary complications. All of this is seen and signed by Mr. Baird before he ever undergoes the procedure." A-396; and

9. "All the risks are explained. I'm not going to go through all these informed consent documents that he looked at again." A-397.

During closing argument, Appellees' counsel again referred to the informed consent forms to buttress their assumption of risk defense. A-1192-1193.

At the close of evidence, the trial court read two jury instructions concerning assumption of risk and informed consent. A-1207. Those two instructions, given in the middle of a 37-page oration, constituted too little, too late. The instructions could not cure the overwhelming prejudice suffered by Appellant due to the erroneous admission of the informed consent forms, and Appellees' repeated arguments that Appellant had assumed the risk of his injuries.

III. THE TRIAL COURT ERRONEOUSLY PERMITTED DEFENSE EXPERT, STEVEN SIEPSER, M.D., TO TESTIFY CONCERNING APPELLANT'S SUITABILITY FOR LASIK ENHANCEMENT SURGERY EVEN THOUGH HE ADMITTED THAT HE LACKED THE KNOWLEDGE TO OFFER THAT OPINION TO THE REQUISITE DEGREE OF MEDICAL CERTAINTY

All of the ophthalmology experts in this case agreed that the standard of care in evaluating patients for LASIK surgery required that the surgeon take and review the patient's preoperative corneal topography. *See, e.g.,* A-57 (defense expert William B. Trattler, M.D.: "corneal topography is the only tool that could potentially diagnose forme fruste keratoconus;"); A-145 ("Q. In screening a patient for LASIK surgery, does the standard of care require that a topography be done and reviewed? [Dr. Siepser:] A. Yes. Q. And is the same true of an enhancement surgery, you got to do a topography before the enhancement? A. Topography and pachymetry, and, today, probably OCT.") In this case, topographies were performed prior to Mr. Baird's October 14, 2009 LASIK enhancement surgery on a Pentacam topographer. *See* A-11-12.

However, Dr. Siepser testified at his pretrial deposition that he was not familiar with the Pentacam machine, and could not read or interpret corneal topographies created on a Pentacam topographer. Consequently, he could not answer any questions concerning critical evidence of ectasia on Mr. Baird's pre-enhancement Pentacam topographies: "You know, I'm not really familiar with a

Pentacam, never use it, don't have enough experience, as far as to make a comment." A-120. *See also* A-107 ("I don't have any familiarity with a Pentacam"). In short, Dr. Siepser admitted that he lacked sufficient knowledge to opine concerning Mr. Baird's suitability for the October 14, 2009 LASIK enhancement surgery.

Thus, Appellant moved *in limine* to preclude Dr. Siepser from offering any opinions concerning Appellant's candidacy for the October 14, 2009 LASIK enhancement surgery. A-167-168. The trial court denied Appellant's motion, erroneously stating that Dr. Siepser "has other evidence to testify that Dr. Owczarek . . . performed the appropriate work-up, that [Mr. Baird] was an appropriate candidate for both the 2004 and 2009 surgeries, and that the post-enhancement studies of Mr. Baird support the decision to perform the 2009 enhancement surgery." A-225.

On direct examination at trial, Dr. Siepser testified that Mr. Baird was a suitable candidate for the October 14, 2009 LASIK enhancement surgery. A-557-558 ("Q. Do you have an opinion that you hold to a reasonable degree of medical probability as to whether Mr. Baird was a reasonable LASIK enhancement candidate in October 2009? A. Yes, he definitely was.")

However, on cross-examination Dr. Siepser confirmed that because he could not read Pentacam topographies, he could not determine whether Mr. Baird was an

appropriate candidate for the October 14, 2009 LASIK enhancement surgery:

> Q. Thank you for the clarification. But the LASIK surgeon does have to review a topography before – in terms of evaluating a patient for LASIK or LASIK enhancement surgery; is that true?
>
> A. Yes.
>
> Q. And because all of Mr. Baird's topographies for the 2009 enhancement surgery were Pentacam topographies, you can't tell me whether Mr. Baird was a good candidate for that LASIK enhancement surgery, can you?
>
> A. No.

A-638-639.

Unfortunately, by that point, the trial court had already allowed the jury to hear Dr. Siepser's hollow opinion that Mr. Baird was a suitable candidate for the October 14, 2009 LASIK enhancement surgery.

IV. THE TRIAL COURT CONSCIOUSLY AVOIDED KNOWLEDGE OF JUROR MISCONDUCT BY REFUSING TO INVESTIGATE JUROR NO. 6'S ALLEGATIONS

On April 11, 2013, the jury found in favor of Appellees. When the Court polled the jury, Juror No. 6 appeared visibly distraught and only confirmed the verdict, begrudgingly, after being polled twice by the trial judge. A-1218.

Later that day, Juror No. 6 telephoned the trial court in an effort to report juror misconduct during deliberations. A-1230. Unfortunately, the attempt was thwarted when Juror No. 6 was told that she could not speak to anyone in chambers. Later that afternoon, Juror No. 6 telephoned Appellant's counsel's

office and requested to speak to Appellant's counsel. A-1225. Appellant's counsel was not in his office, and his receptionist took Juror No. 6's name and telephone number. *Id.* Appellant's counsel never communicated with Juror No. 6.

Consistent with Del. R. Prof. Cond. 3.5(c), Appellant's counsel requested the trial court's permission to return Juror No. 6's telephone call. A-1225. By letter dated April 16, 2013, the trial court denied that request. A-1226. The trial judge also refused to return the call, and instead wrote a letter to Juror No. 6 stating:

> I write to you because I have been advised by the attorneys for Mr. Baird that you telephoned Mr. Todd Krouner at his office in New York on April 11 in the late afternoon. I write to advise you that Delaware law does not permit an attorney to communicate with a juror after discharge of the jury.

A-1227.

On April 21, 2013, Appellant Mr. Baird contacted Juror No. 6 by telephone.[3] A-1239. During that conversation, Juror No. 6 identified two instances of jury misconduct, which warrant a new trial. First, Juror No. 6 stated that during deliberations, Juror No. 9, introduced evidence of internet research concerning the trial. *Id.*

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[3] Appellees moved the trial court for sanctions against Appellees' counsel based upon Mr. Baird's unilateral decision to contact Juror No. 6, without first advising counsel. On August 29, 2013, the trial court denied that motion: "No convincing evidence shows that Mr. Baird's attorneys suggested that Mr. Baird contact Juror No. 6, and no authority barred Mr. Baird from contacting her. Defendants' motion for sanctions is therefore **DENIED**." A-1257 (emphasis in original).

Second, Juror No. 6 stated that during jury deliberations, several jurors had questions concerning the standard of care. *Id.* Therefore, as she had been directed by the trial court's express jury instructions, Juror No. 6 requested that the foreperson, Juror No. 1, present the Court with a written request to clarify the central question concerning the standard of care. A-1211 ("You are further instructed that any questions or requests to me from the jury during the jury's deliberations must be communicated by a written note from the foreperson to the bailiff who will then deliver that note to me.") Juror No. 1 refused to submit the written question to the trial court, thus thwarting Juror No. 6's effort to communicate with the trial court prior to the verdict, and tainting the integrity of the jury's deliberative process. A-1239.

On April 23, 2013, Juror No. 6 wrote a letter to the trial court confirming the misconduct. A-1228-1232. In particular, Juror No. 6 stated: (i) "Also, juror #9 mentioned during deliberation that she looked something up online the night prior just to see what it was;" (ii) "I even tried to request to write a note to you [the trial judge] to clarify my concerns and was denied and told that I can't change the law;" and (iii) "The majority of the juniors [sic] said if the question [on the verdict sheet] was worded differently, which they wished it was, then they would have answered the questions NO the standard of care was not followed." *Id.*

Due to the prejudicial nature of this jury misconduct, Appellant moved for a new trial on April 25, 2013. In the alternative, Appellant requested that the trial court conduct an investigation concerning Juror No. 6's allegations of juror misconduct. A-1243-1244. By letter dated May 28, 2013, Appellant's counsel requested that the trial court summon Juror No. 6 to testify concerning her allegations. A-1242.

By written decision dated August 29, 2013, the trial court conceded that pursuant to Del. R. Evid. 606(b), it had the authority to interview Juror No. 6 concerning her allegations that Juror No. 9 introduced internet research into the jury deliberations. A-1271. However, the trial court then ruled that "even though Juror No. 6 'may testify' about whether Juror No. 9 did [internet] research, Juror No. 6 'may not testify' about whether the research affected the verdict." A-1270. The trial court refused to interview Juror No. 6, and abdicated its responsibility to investigate juror misconduct.

Finally, after refusing to conduct any investigation, and denying Appellant's counsel the opportunity to speak with Juror No. 6, the trial court ruled: "Because Plaintiff has not shown – at all – what Juror No. 9 researched online, the Court cannot infer that the research was 'inherently prejudicial'; therefore, Plaintiff's motion for a new trial is **DENIED**." A-1277 (emphasis in original).

Thus, the trial court denied Appellant's motion for a new trial on the

grounds that "Plaintiff has not shown *what* Juror No. 9 may have researched on the internet." A-1277 (emphasis in original). However, the only reason why Appellant could not show what Juror No. 9 may have researched is because the trial court repeatedly refused to address Juror No. 6's three attempts to communicate her knowledge of wrongdoing, including;

1. Refusing to speak to Juror No. 6 when she called chambers on April 11, 2013, or to return her call;
2. Denying permission to Appellant's counsel to speak to Juror No. 6, when she called his office on April 11, 2013; and
3. Refusing to conduct any investigation into the allegations of juror misconduct set forth in Juror No. 6's letter, dated April 23, 2013.

In addition, the trial court refused to summon Juror No. 6 for questioning as requested in Appellant's counsel's letter dated May 28, 2013 (A-1242), and during oral argument at the June 11, 2013 hearing concerning Appellant's Motion for a New Trial. A-1304-1305.

The trial court abdicated its responsibility to investigate allegations of juror misconduct. It ruled in a vacuum that there was no showing of demonstrated prejudice. However, the only reason that no prejudice could be demonstrated was because the trial court consciously avoided the necessary and appropriate inquiry.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION TO PRECLUDE REFERENCE TO INFORMED CONSENT, AND PERMITTING THE JURY TO HEAR APPELLEES' ARGUMENTS CONCERNING ASSUMPTION OF RISK

A. Question Presented

Did the trial court commit reversible error by denying Appellant's motion to preclude reference to informed consent, and permitting Appellees' arguments concerning assumption of risk, where Appellant withdrew his claim concerning lack of informed consent? This question should be answered in the affirmative. This issue was presented to the trial court in Appellant's motion in limine. A-149.

B. Scope Of Review

Whether a defendant in a medical negligence action may assert affirmative defenses of assumption of risk and informed consent, in the absence of a claim for lack of informed consent, is a purely legal question. Thus, this Court's review of this issue on appeal is *de novo*. *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007)

C. Merits Of Argument

On February 15, 2013, Appellant withdrew his claim for lack of informed consent. On March 27, 2013, the trial court denied Appellant's motion to strike Appellees' affirmative defenses of assumption of risk and informed consent. A-

379. As a result of that erroneous ruling, the trial court also permitted the following at trial:

1. Introduction into evidence, and publication to the jury of Appellees' four-page "Consent for the use of the Excimer Laser for Performing CustomVue LASIK" form, dated January 27, 2004. A-1-4;

2. Introduction into evidence, and publication to the jury of Appellees' one-page "General Consent for Operations and Procedures" form dated October 24, 2009. A-12;

3. Extended discussion of Appellees' informed consent forms, including during Appellees' opening statement, cross-examination of Mr. Baird, and during closing argument. A-394-397; A-511-513; A-1192-1193; and

4. Detailed questioning during Mr. Baird's cross-examination concerning the risks of LASIK surgery printed on Appellees' forms. A-510-513; A-515.

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

Assumption of risk is not a valid defense to a medical negligence action. *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 885 (Del. Super. 2005) ("Particular to medical negligence cases, 'the superior knowledge of the [healthcare provider] with [its] expertise in medical matters and the generally limited ability of the patient to ascertain the existence of certain risks and dangers that inhere in certain medical treatments, negates the critical elements of the defense, i.e., knowledge and appreciation of the risk.'") (quoting *Morrison v. MacNamara*, 407 A.2d 555, 567 (D.C.A. 1979)); *Larrimore v. Homeopathic Hosp. Ass'n of Del.*, 54 Del. 235, 247 (Del. Super. 1961). Similarly, the fact that the

healthcare provider obtained the patient's informed consent prior to the procedure at issue is not a valid affirmative defense. *Storm v. NSL Rockland Place, LLC*, 898 A.2d at 885, n. 48 (citing 18 Del. C. § 6852, "explaining the requirement that the healthcare provider obtain the patient's informed consent to perform healthcare services, but in no way suggesting that doing so will relieve the healthcare provider of his duty to comply with the standard of care.") Accordingly, the trial court's refusal to strike Appellees' affirmative defenses of informed consent and assumption of risk constituted reversible error.

Additionally, the trial court's admission into evidence of Appellees' informed consent forms constituted reversible error for three reasons. First, absent a claim for lack of informed consent, the forms were not relevant to or probative of any remaining issues in the case. Del. R. Evid. 401. Second, Mr. Baird suffers from many of the symptoms listed on the forms, including having developed irregular corneas, glare, presbyopia, dry eyes, infection, flap complication, and loss of best corrected vision. A-1-4. Therefore, the forms were highly prejudicial and likely to confuse and mislead the jury. Del. R. Evid. 402. Third, although this appears to be an issue of first impression in Delaware, courts around the country uniformly preclude reference to informed consent forms, in the absence of a claim for lack of informed consent. *See, e.g.*, *Warren v. Imperia*, 287 P.3d 1128, 1133 (Ore. Ct. App. 2012); *Schwartz v. Johnson*, 49 A.3d 359, 372 (Md. Spec. App.

2012) ("Even if evidence of informed consent was relevant . . . the admission of such evidence in a medical malpractice case would be prejudicial to the patient."); *Hayes v. Camel*, 927 A.2d 880, 889 (Conn. 2007) ("[E]vidence of informed consent, such as consent forms, is both irrelevant and unduly prejudicial in medical malpractice cases without claims of lack of informed consent."); *Wright v. Kaye*, 593 S.E. 2d 307, 317 (Va. 2004) ("[T]he admission of evidence concerning a plaintiff's consent could only serve to confuse the jury because the jury could conclude, contrary to the law and the evidence, that consent to the surgery was tantamount to consent to the injury which resulted from that surgery. In effect, the jury could conclude that consent amounted to a waiver, which is plainly wrong."); *Liscio v. Pinson*, 83 P.3d 1149, 1156 (Col. Ct. App. 2003) ("Evidence pertaining to a patient's informed consent may be irrelevant and potentially unfairly prejudicial to the patient in cases where the patient sues a physician solely on the theory of negligent medical treatment."); *Waller v. Aggarwal*, 688 N.E.2d 274, 275 (Ohio Ct. App. 1996) ("The fact that appellee informed appellant that injury to the bladder was a possible risk of the procedure could not be a defense to the claim of negligence brought by appellant. Thus, the admission of evidence pertaining to that issue and references to that issue carried great potential for the confusion of the jury.") *See also* Joe Bennett, Esq., A Patient's Informed Consent to Treatment Is Not a Defense and Is Inadmissible in a Claim for Negligence, Trial Talk,

February/March 2008, a copy of which is included in Appellant's appendix, A-6-10.

The facts of the *Warren* case, decided last year by the Oregon Court of Appeals, are nearly identical to this case. 287 P.3d at 1128. Just as in this case, the plaintiff in *Warren* alleged that defendant ophthalmologist was "negligent in screening plaintiff as an appropriate candidate for 'monovision' eye surgery [conductive keratoplasty, or CK]." 287 P.3d at 1129. Prior to her CK surgery, the plaintiff disclosed to defendant that she had experienced contact lens monovision, which was an absolute contraindication to CK surgery. *Id.* at 1131. Just as in this case, when the plaintiff suffered severe negative effects after the surgery, the defendant doctor performed another procedure. *Id.* at 1129. The second procedure did not bring about a substantial improvement in the plaintiff's symptoms. *Id.* at 1130.

At trial, the defendant doctor sought to introduce "(1) testimony about presurgical discussions with plaintiff related to those procedures to be performed, the risks of those procedures, and the availability of alternative treatment; and (2) various written documents (including consent forms) given to plaintiff prior to surgery." *Id.* at 1129. The Court of Appeals affirmed the trial court's exclusion of the proffered evidence as irrelevant and unfairly prejudicial: "Put simply, what

plaintiff was told bears no relationship to what *defendant* should have done." *Id.* at 1132 (emphasis in original).

In this case, the trial court permitted Appellees to enter the informed consent forms into evidence, publish them for the jury, and question witnesses about the forms. That erroneous ruling was unfairly prejudicial, and should be reversed on appeal.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO INVESTIGATE JUROR NO. 6'S ALLEGATIONS OF JURY MISCONDUCT

A. Question Presented

Did the trial court abuse its discretion by failing to investigate particularized allegations of juror misconduct, including introduction of outside internet research and disregard of jury instructions? This question should be answered in the affirmative. This issue was presented to the trial court in Appellant's post-trial motion for a new trial. A-1233-1241.

B. Scope Of Review

This Court "review[s] the Superior Court's denial of a motion for a new trial under an abuse of discretion standard." *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).

C. Merits of Argument

The trial court abused its discretion by failing to investigate Juror No. 6's claims of jury misconduct. Appellant should prevail where the trial court conducted no investigation whatsoever. "A party seeking a new trial on account of jury misconduct must ordinarily make a preliminary showing, on the basis of affidavits, that misconduct sufficient to impeach the verdict has occurred, and that the movant has competent evidence to this effect." *McLain v. General Motors Corp.*, 586 A.2d 647, 653 (Del. Super. 1988).

In this case, Appellant met his burden by producing evidence that: (i) outside internet research was introduced during jury deliberations; and (ii) the foreperson disregarded the trial court's jury instructions and refused to convey written questions to the trial court.

Generally, "[t]he trial court has discretion to decide that allegations of juror misconduct are not sufficiently credible or specific to warrant investigation." *Black v. State*, 3 A.3d 218, 221 (Del. 2010). However, once the trial court has been presented with evidence of juror misconduct, "it [is] incumbent on the trial court to determine" whether either party was prejudiced:

> Having found juror misconduct, it was incumbent on the trial court to determine whether Black was prejudiced. The trial court evaluated the information it had, and determined that Black was not prejudiced. But the trial court did not have all the information. Juror # 3 admitted that he told the rest of the jury about his discussion with his son. Juror # 3 was evasive, or at least forgetful, when asked exactly what he told the jurors. As a result, the trial court was required to find out whether the other jurors were prejudiced by the extraneous information provided by Juror # 3. **Failing to conduct that additional investigation requires reversal** because, after finding juror misconduct, there is no record that all the jurors remained impartial.

Id. (emphasis added).

Here, Juror No. 9 introduced the results of her internet research into the jury's deliberations. In its written opinion, the trial court conceded that "Juror No. 6 'may testify' (to use the language of Rule 606(b)) that Juror No. 9 did out-of-court research." A-1270. However, the trial court refused to permit Juror No. 6 to

offer that testimony, either by way of judicial investigation or permitting counsel to contact Juror No. 6. That refusal denied Appellant any opportunity to learn the content of Juror No. 9's internet research. Thereafter, the trial court ruled: "The circumstances do not come close to warranting a new trial or further investigation here because here Juror No. 6 has not stated with any detail what Juror No. 9 researched online." A-1271. Just as in *Black*, where the trial court was presented with evidence of juror misconduct, "it was incumbent" upon the trial court to investigate those allegations. The trial court's failure to conduct any investigation constituted an abuse of discretion and requires a new trial.

In *United States v. Resko*, the Third Circuit reversed the jury's conviction of criminal defendants, because the trial court failed to adequately investigate the prejudicial effect of jury misconduct on the jury's deliberations. 3 F.3d 684 (3d Cir. 1993). In *Resko*, the trial court submitted a two-part written questionnaire to the jurors, which inquired whether the jurors had engaged in premature deliberations and, if so, whether the discussions had led them to form an opinion regarding the defendants' guilt. Because the questions were not phrased to ascertain information about the content or extent of the jurors' discussion, the Third Circuit held that the district court could not have made a reasoned determination that the defendants would not suffer any prejudice due to the

premature deliberations. *Id.* at 690. Therefore, the appellate court reversed the defendants' convictions and remanded the case for a new trial. *Id.* at 695.

In this case, Juror No. 6 indicated that there was confusion about the meaning of standard of care. In accordance with the trial court's jury instructions, Juror No. 6 requested to send a note to the trial court "to clarify [the jurors'] concerns." A-1231. Juror No. 1 refused to send that note to the trial court. *Id.* Juror No. 6's letter demonstrates an absence of an informed deliberative process on the central issue of liability in this case.

With deference to Del. R. Evid. 606, Appellant's concern is not with the content of the jury's deliberations, or the content of Juror No. 6's proposed request for instruction. Rather, it is with the integrity of the deliberative process, and the inability of the jurors to communicate with the trial judge by the very means he had instructed. *Accord, Gov't of the Virgin Islands v. Weatherwax*, 20 F.3d 572, 578 (3d Cir. 1994) ("We have emphasized the importance of questioning jurors whenever the integrity of their deliberations is jeopardized. . . . failure to evaluate the nature of the jury misconduct or the existence of prejudice require[s] a new trial.")

Appellant was "identifiably prejudiced" by that misconduct, insofar as the "majority of" jurors who wanted to find for Appellant were not permitted to

communicate questions to the Court. *Massey v. State*, 541 A.2d 1254, 1257 (Del. 1988); A-1231.

In its written opinion, the trial court cited *Porter v. Murphy*, 792 A.2d 1009, 1017 (Del. Super. 2001), in support of its refusal to investigate Juror No. 6's allegations. In *Porter*, the jury requested a dictionary from the bailiff. *Id.* at 1016. The bailiff provided Webster's New Collegiate Dictionary to the jury without presenting the request to the trial court. *Id.* In its opinion denying the plaintiffs' motion for a new trial, the trial court noted that the bailiff had acted improperly. *Id.* at 1016. Nonetheless, the *Porter* court declined to further investigate the issue and did not grant a new trial. *Id.* at 1017.

The *Porter* case is inapposite and distinguishable for two reasons. First, *Porter* is a Superior Court opinion and is of no precedential value before this Court. Second, the Webster's dictionary provided to the jury in *Porter* contained only basic definitions of common English words. There is no comparison between the quality and quantity of information contained in a dictionary versus the internet. By contrast, the information obtained by Juror No. 9's internet research is potentially unlimited, and may have included independent medical and scientific research, and personal, prejudicial information concerning the parties, witnesses and/or counsel. In sum, the Superior Court's refusal to grant a new trial in *Porter* has no bearing upon this Court's ruling concerning Juror No. 9's internet research.

The trial court cited *Sheeran v. State*, for the proposition that a failure to investigate allegations concerning the foreperson's refusal to send a written note to the trial judge is not reversible error. 526 A.2d 885 (Del. 1987). However, *Sheeran* is distinguishable from this action in two important respects. First, in *Sheeran*, a total of three jurors wrote letters to the trial court after the verdict. One disgruntled juror alleged that a male juror had blocked the door and prevented her from sending a note to the judge. *Id.* at 889. "Subsequently, two other jurors wrote to the Court denying that anyone had been coerced, threatened, or pressured." *Id.* at 894. In this case, Juror No. 6's allegations remain uncontroverted. Second, the substance of the disputed note in *Sheeran* concerned interpersonal conduct between the jurors. In this case, Juror No. 6's proposed note concerned the central issue of the standard of care.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING APPELLEES' EXPERT, STEVEN SIEPSER, M.D., TO SPECULATE CONCERNING APPELLANT'S SUITABILITY FOR LASIK ENHANCEMENT SURGERY, WHERE HE WAS INCAPABLE OF INTERPRETING THE CRITICAL PENTACAM TOPOGRAPHIES

A. Question Presented

Did the trial court abuse its discretion by permitting Appellees' expert, Dr. Siepser, to testify concerning Appellant's suitability for surgery, even though Dr. Siepser admitted that he lacked the knowledge to offer his opinion to a reasonable degree of medical certainty? This question should be answered in the affirmative. This issue was presented to the trial court in Appellant's motion in limine. A-148.

B. Scope Of Review

This Court applies an abuse of discretion standard when reviewing a trial court's determination whether to admit or exclude expert testimony. *M.G. Bancorporation, Inc. v. LeBeau*, 737 A.2d 513, 522 (Del. 1999).

C. Merits of Argument

The trial court abused its discretion by permitting Dr. Siepser to testify concerning Mr. Baird's suitability for the October 14, 2009 LASIK enhancement surgery. All of the experts agree that in order to evaluate a patient's candidacy for LASIK or LASIK enhancement surgery, the surgeon must review a corneal topography. A-57; A-145. In this case, the topographies that Dr. Owczarek reviewed prior to the October 14, 2009 LASIK enhancement surgery were taken on

a Pentacam machine. A-11. At his pretrial deposition, Dr. Siepser testified that he was not familiar with the Pentacam machine, could not read Pentacam topographies and could not answer any questions concerning Mr. Baird's pre-enhancement Pentacam topographies. A-107; A-120. Before trial, Appellant sought entry of an order precluding Dr. Siepser from testifying concerning Mr. Baird's candidacy for the October 14, 2009 LASIK enhancement surgery. A-148. The trial court denied Appellant's motion. A-379. The trial court erroneously ruled that Dr. Siepser's inability to testify to a reasonable degree of medical certainty concerning Mr. Baird's candidacy for LASIK enhancement surgery could be fodder for cross-examination, but was not grounds to preclude his testimony on the subject. A-224-225.

Thus, Dr. Siepser was permitted to offer his opinion at trial that Mr. Baird was a good candidate for LASIK enhancement surgery on October 14, 2009. A-556-557. On cross-examination, Dr. Siepser conceded that because he could not read Pentacam topographies, he could not hold that opinion to a reasonable degree of medical certainty. A-637-638.

In order to be admissible, medical expert testimony must be given to a reasonable degree of medical certainty. *Floray v. State*, 720 A.2d 1132, 1136 (Del. 1998). Moreover, pursuant to Del. R. Evid. 702, expert testimony must be "based upon sufficient facts or data."

In this case, Dr. Siepser conceded at both his pretrial deposition and trial, that he could not interpret the most critical document in determining Mr. Baird's candidacy for LASIK enhancements surgery. Dr. Siepser further conceded that he could not opine to a reasonable degree of medical certainty on that issue. Nonetheless, the jury was permitted to hear Dr. Siepser speculate that Mr. Baird was a suitable candidate for LASIK enhancement surgery. Dr. Siepser's inadmissible opinion on that critical issue prejudiced Appellant and tainted the jury's verdict. Thus, Appellant respectfully requests reversal of the trial court's erroneous holding, and remand for a new trial.

IV. THE TRIAL COURT COMMITTED ADDITIONAL ERRORS WHICH SHOULD BE CORRECTED PRIOR TO ANY REMAND FOR A NEW TRIAL, INCLUDING: (A) ERRONEOUSLY RULING THAT ASKING "WHO WOULD YOU CHOOSE AS YOUR HEALTHCARE PROVIDER?" DURING CLOSING ARGUMENT VIOLATED THE SO-CALLED "GOLDEN RULE;" AND (B) ERRONEOUSLY PRECLUDING A VIDEO SHOWING "STITCH-FOR-STITCH" THE PRECISE CORNEA TRANSPLANT SURGERY WHICH APPELLANT UNDERWENT AS A RESULT OF APPELLEES' NEGLIGENCE

A. Question Presented

(1) Was the trial court's ruling erroneous, that Appellant's counsel violated the so-called "golden rule," when he asked during closing argument: "Who would you choose as your healthcare provider?" This question should be answered in the affirmative.

(2) Did the trial court erroneously preclude a video showing "stitch-for-stitch" the precise cornea transplant surgery which Mr. Baird underwent as a result of Appellees' negligence? This question should be answered in the affirmative. This issue was presented to the trial court in the Joint Pretrial Stipulation, and by *ore tenus* motion to reconsider on April 3, 2013. A-356; A-461-469.

B. Scope Of Review

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

C. Merits of Argument

On this appeal, Appellant also challenges two of the trial court's evidentiary rulings. Appellant concedes that these rulings, in and of themselves, do not constitute reversible error. However, in the event of a new trial, Appellant respectfully requests an instruction to the trial court as to the erroneous nature of these rulings.

1. The Trial Court Erred When It Interrupted Counsel's Closing Argument For An Alleged Violation Of The "Golden Rule"

During closing argument, Appellant's counsel asked the jury, in substance: "If you or a loved one wanted to go see an ophthalmologist, among those who have testified at trial, who would you choose as your healthcare provider?" Appellees' counsel objected on the grounds that Appellant's counsel had invoked the so-called "golden rule." "Briefly, a 'golden rule argument' is where counsel asks the jury to place themselves in the shoes of a party to the suit in arriving at a verdict, and to render such verdict as they would want rendered in case they were similarly

situated." *Delaware Olds, Inc. v. Dixon*, 367 A.2d 178, 179 (Del. 1976) (citations omitted).

In this case, Appellant's counsel's statement did not invoke the "golden rule." Rather, Appellant's counsel simply asked the jury to assess the credibility and expertise of the ophthalmologist witnesses, including both parties' ophthalmology experts and Dr. Owczarek.

2. The Trial Court Erred When It Excluded A Video Of The Precise Cornea Transplant Surgery That Appellant Required As A Result Of Appellees' Negligence

Additionally, Appellant seeks appellate review of the trial court's preclusion of a video depicting the precise corrective corneal transplant surgery that Appellant required as a result of Dr. Owczarek's continuing negligence. On December 14, 2012, Mr. Baird underwent deep anterior lamellar keratoplasty ("DALK") corneal transplant surgery on his left eye with Albert S. Jun, M.D., Ph.D. ("Dr. Jun"), at the Johns Hopkins University, Wilmer Eye Center in Baltimore, Maryland. A-155. At trial, Appellant sought to introduce a video of Dr. Jun performing DALK surgery on another patient. A-356. Appellees objected:

> Defendants object on the basis of relevance. It's not the procedure for Mr. Baird. Second of all, there's no objection that Mr. Baird underwent the procedure. It's highly prejudicial.

A-293.

In response, Appellant's counsel explained:

> It is not the particular procedure that was performed upon Mr. Baird, but it is the exact same surgery on a different patient. And the idea is that it's no different than an anatomical model. This is a video of exactly what Dr. Jun, when he did it. And he'll explain the potential outcome and what he's doing on the surgery, and it should be demonstrative for the jury to understand the surgery.

A-293-294.

The trial court sustained Appellees' objection and precluded Appellant from showing the video at trial:

> I think under Rule 403 the probative value of this evidence, which I think is kind of slight because it is going to be testified to orally, is outweighed by considerations of – you say only give minutes or so – delay in the trial, but also confusing the jury. It's on a different patient, not the patient in question. So, I am going to sustain the objection and disallow that.

A-294-295.

Prior to Dr. Jun's testimony on April 3, 2013, Appellant requested reconsideration of the prior ruling:

> The proffer that we would be prepared to make if the Court is amenable by way of voir dire, if necessary, through Dr. Jun is that in fact he is the surgeon. In the video, as the application indicated, it is not the plaintiff Thomas Baird's eye on which he is operating. However, Dr. Jun is prepared to testify that cut-for-cut and stitch-for-stich the procedure depicted in the video is 100 percent identical to the procedure that he performed on Thomas Baird.
>
> And with that proffer, we respectfully request reconsideration of the issue and believe that the probative value of this video for demonstrative purposes outweighs any prejudice, outweighs any risk of confusion with the clear instruction that this is illustrative and this is not Thomas Baird, but it is, as we state, stitch-for-stich, cut-for-cut the same thing he did on Thomas Baird.

A-463. The trial court declined to reconsider its prior ruling.

Neither the trial court, nor Appellees identified the nature of any alleged prejudice or confusion concerning Dr. Jun's video. Therefore, Appellant respectfully requests that Dr. Jun's video be admitted into evidence upon retrial.

CONCLUSION

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

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Dated: December 27, 2013

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Dated: December 27, 2013

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EFiled: Aug 29 2013 04:26PM EDT
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Case No. N11C-09-241 RRC

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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2013 AUG 29 PM 3:23

RE: Thomas Baird v. Frank R. Owczarek, M.D., Eye Care of Delaware, LLC, and Cataract and Laser Center, LLC
C.A. No. N11C-09-241 RRC

Submitted: June 21, 2013
Decided: August 29, 2013

On Defendants' Motion for Sanctions.
DENIED.

On Defendants' Motion to Strike Plaintiff's Affidavit in Support of Plaintiff's Motion for a New Trial.
DENIED AS MOOT.

On Plaintiff's Motion for a New Trial.
DENIED.

On Defendants' Amended Motion for Costs.
GRANTED IN PART and **DENIED IN PART.**

Dear Counsel:

Ethical rules do not set forth best practices; instead, ethical rules set forth minimum standards, which can foster "minimal-ethicality":

> Not only do many professional codes frame ethicality narrowly, leaving out what might be thought to be most important, they often function affirmatively to encourage a sort of minimal-ethicality, according to which actors are rewarded for being as "minimally ethical" as possible. . . . Whenever ethics is reduced to a system of rules, one need not make choices, but may merely mechanically follow the rules. Rules also benefit the savvy and opportunistic. They will operate as close as possible to the rules' border, while the inexperienced or morally motivated will remain well inside.[1]

This decision is about dubious—yet still ethical—conduct. No one broke the rules, although the parties and their counsel "pushed the envelope." But the conduct of Plaintiff's counsel is more troubling than the conduct of Defendants' counsel.

The facts raised now, as this medical negligence case ends, are not complex. After a jury did not find that Defendant Frank R. Owczarek, M.D. did not treat Plaintiff Thomas Baird negligently, Mr. Baird contacted Juror No. 6 because his lawyers could not. Mr. Baird asked the Court to grant a new trial based solely on the juror's claim that jurors misbehaved during the trial and while they deliberated. Defendants Dr. Owczarek, Eye Care of Delaware, LLC, and Cataract and Laser Center, LLC, aggrieved, asked the Court to sanction Mr. Baird and his lawyers, but Defendants did not comply completely with the rule that governs of their request. This Court does not condone "minimal-ethicality";[2] however, the Court will countenance "minimal-ethicality" when the law so requires.[3] And it does not here:

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[1] Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. Pa. L. Rev. 933, 953 (1991).

[2] As the Principles of Professional for Delaware Lawyers note, "[a] lawyer . . . should not be satisfied with minimal compliance with the mandatory rules governing professional conduct." Del. Principles Professionalism for Lawyers A; *see also* Del. Lawyers' R. Prof'l Conduct, Preamble ¶ 7 ("Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.").

[3] *See* Del. Principles Professionalism for Lawyers, Preamble ("These Principles shall not be used as a basis for litigation, lawyer discipline or sanctions.").

Defendants' motion for costs is **GRANTED IN PART** and **DENIED IN PART**, and the other motions are **DENIED** or **DENIED AS MOOT**.

I. FACTS[4]

On January 16, 2004, Defendant Frank R. Owczarek, a board-certified ophthalmologist, concluded that he could fix Plaintiff Thomas Baird's eyesight. The doctor proposed laser-assisted in situ keratomileusis—also known as LASIK. On January 27, Dr. Owczarek operated; that is, he reshaped Mr. Baird's corneas. No complications arose during the surgery.

Matt J. Epstein, O.D., an optometrist, treated Mr. Baird after his surgery. Dr. Epstein maintained a relationship with Dr. Owczarek and his two firms, Defendants Eye Care of Delaware, LLC and Cataract and Laser Center, LLC. Defendants scheduled Mr. Baird's post-operative care with Dr. Epstein directly and shared twenty percent of the LASIK fee with him. In 2004, Dr. Epstein saw Mr. Baird twice, and his sight was better—at first.

In the fall of 2009, Dr. Epstein referred Mr. Baird back to Dr. Owczarek because Mr. Baird's sight had deteriorated. On October 14, 2009, Dr. Owczarek operated on Mr. Baird's left eye again; however, his sight continued to worsen. Then on April 20, 2011, Dr. Owczarek diagnosed Mr. Baird with corneal ectasia, which is a degenerative disorder in which the cornea weakens, thins, and bulges. Ectasia is also a contraindication of LASIK.

Five months later, on September 30, 2011, Mr. Baird sued Dr. Owczarek and Eye Care of Delaware;[5] Mr. Baird later joined another defendant: Cataract and Laser Center, LLC.[6] Mr. Baird claimed that

1. Dr. Owczarek should have diagnosed Mr. Baird with corneal ectasia before the first LASIK in 2004,

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[4] For additional facts not relevant to the motions before the Court here, see *Baird v. Owczarek*, 2013 WL 1400848 (Del. Super. Apr. 1, 2013) (denying Defendants' motion for partial summary judgment).

[5] Compl.

[6] Am. Compl., Second Am. Compl.

2. Dr. Owczarek should not have operated on Mr. Baird in 2004 or 2009 because corneal ectasia is a contraindication of LASIK, and

3. the first LASIK, the second LASIK, and the intervening treatment were one continuing tort.[7]

Defendants answered that Dr. Owczarek exercised reasonable care[8] and, in the alternative, that the statute of limitations barred part of the suit because

1. the first LASIK happened on January 27, 2004—more than two or even three years before Mr. Baird filed a complaint against Defendants—and

2. the first and second LASIKs were not one continuing tort because they were not "inexorably related" or "intertwined," as the Supreme Court's holding in *Ewing v. Beck*[9] requires.[10]

Before the trial, Defendants asked the Court to enter partial summary judgment against Mr. Baird because the statute of limitations[11] allegedly barred his claim that Dr. Owczarek was negligent in 2004.[12] The Court denied the motion because Mr. Baird and Defendants disputed facts that were material to whether the first and second LASIKs were sufficiently related.[13]

The trial began on April 1, 2013 and ended nine trial days (11 days) later. The parties presented their cases well, and the attorneys exhibited professionalism, civility, and skill. The trial was intense: the jury faced complex questions, and experts from across the nation testified about ectasia, LASIK, and ophthalmology. Cross-examination was thorough. The Court did not instruct the jury until April 11.

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[7] Second Am. Compl. ¶¶ 12–36.

[8] Answer to the Second Am. Compl. ¶ 63.

[9] 520 A.2d 653 (Del. 1987).

[10] Answer to the Second Am. Compl. ¶ 57.

[11] 18 *Del. C.* § 6856.

[12] Defs.' Mot. for Summ. J.

[13] *Baird v. Owczarek*, 2013 WL 1400848 (Del. Super. Apr. 1, 2013).

The jury returned a verdict within a few hours. The jury found that

1. Mr. Owczarek did not "breach[] the standard of care in his treatment of [Mr.] Baird concerning LASIK surgeries performed on January 27, 2004," and

2. Mr. Owczarek did not "breach[] the standard of care in connection with LASIK enhancement surgery performed on [Mr.] Baird on October 14, 2009."[14]

When taking the verdict, the Prothonotary, per usual procedure, asked the jurors whether they agreed with the verdict. After the jurors collectively stated that they agreed with the verdict, the undersigned Judge directed the Prothonotary to poll the jurors individually. The Prothonotary asked each juror whether he or she agreed with the verdict, and each juror told the Court that the verdict was also his or her verdict, although Juror No. 6 hesitated before she acknowledged the verdict as her verdict. The Court then discharged the jury.

Later that day, Juror No. 6 called the Chappaqua, New York office of Todd J. Krouner, one of Mr. Baird's lawyers.[15] Mr. Krouner was unavailable because he was still returning from Delaware; thus, he did not talk with the juror.[16] According to Juror No. 6, she also called the Court, but she "was unable to reach" the undersigned Judge.[17] And on April 12, Bruce L. Hudson, another of Mr. Baird's lawyers, asked the Court to either contact Juror No. 6 directly or permit Mr. Baird's counsel to contact her:

> I am writing to seek Your Honor's guidance concerning an issue that has arisen after the verdict in this matter was rendered yesterday. Yesterday afternoon around 5:00 P.M., my out-of-state co-counsel, Todd Krouner, received a call at his office in New York from juror number 6, [name omitted], who asked to speak with him. He was then returning to New York. Consequently, Mr. Krouner's receptionist indicated to [Juror No. 6] that Mr. Krouner was unavailable and not able to speak to her. At this time, no further communication has been made with that juror.

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[14] Special Verdict Form, Questions 1 & 6.

[15] Letter from Bruce L. Hudson to the Court (Apr. 12, 2013) (Pl.'s Mot. for a New Trial, Ex. B).

[16] *Id.*

[17] Letter from Juror No. 6 to the Court (Apr. 23, 2013) (Pl.'s Mot. for a New Trial, Ex. E).

> The Court may recall that when it polled the jury, [Juror No. 6] hesitated, and appeared to be in visible distress. After conferring with Mr. Krouner, and reviewing Rule 3.5(c) of the Delaware Lawyers' Rules of Professional Conduct, we respectfully seek leave of the Court to respond to [Juror No. 6's] unsolicited telephone call. In the alternative, as a courtesy to [Juror No. 6], we respectfully request that the Court communicate with her, and among other things, explain that Mr. Krouner is not permitted to respond.
>
> We appreciate the Court's guidance on this issue. For the Court's convenience, the number that [Juror No. 6] left with Mr. Krouner's office is [telephone number omitted].[18]

Although Mr. Hudson identified Juror No. 6's telephone number "[f]or the Court's convenience,"[19] the Court did not call her. The Court informed Juror No. 6 only that Mr. Krouner could not contact her:

> I write to you because I have been advised by the attorneys for Mr. Baird that you telephoned for Mr. Todd Krouner at his office in New York on April 11 in the late afternoon.
>
> I write to advise you that Delaware law does not permit an attorney to communicate with a juror after discharge of the jury.[20]

And the Court did not permit Mr. Baird's counsel to contact Juror No. 6:

> For your information, I enclose a copy of a letter written by me today to Juror No. 6, [name omitted]. Permission is not granted to Plaintiff's counsel to "respond to [Juror No. 6] unsolicited telephone call" as set forth in Plaintiff's letter to me of April 12.[21]

Most of the issues now before the Court arose from Mr. Baird's decision to call Juror No. 6.

On April 25, 2013, Mr. Baird moved the Court to grant a new trial under Superior Court Civil Rule 59 because jurors allegedly misbehaved when they

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[18] Letter from Mr. Hudson to the Court (Apr. 12, 2013) (Pl.'s Mot. for a New Trial, Ex. B).

[19] *Id.*

[20] Letter from the Court to Juror No. 6 (Apr. 16, 2013) (Pl.'s Mot. for a New Trial, Ex. D).

[21] Letter from the Court to Mr. Hudson and Gregory S. McKee (Apr. 16, 2013) (Pl.'s Mot. for a New Trial, Ex. C).

deliberated and their misconduct harmed him.[22] Defendants have contended that the Court must set aside the jury's verdict if

1. "there is a reasonable possibility that allegedly extraneous information . . . affected the verdict" or

2. "the integrity of the deliberative process was compromised."[23]

To support his motion for a new trial, Mr. Baird has filed an affidavit, in which he averred that

1. he called Juror No. 6 and discussed the jury's deliberations with her,

2. his counsel did not suggest that he contact Juror No. 6, although he got her telephone number from Mr. Hudson's April 12 letter to the Court, and

3. he did not ask Juror No. 6 to write a letter to the Court or dictate what she wrote in her April 23 letter to the Court.[24]

The Court has also received a letter from Juror No. 6, in which she alleged that

1. Juror No. 8 said that Orenthal James "O.J." Simpson was innocent,

2. Juror No. 9 pushed the jury to decide the case quickly,

3. Juror No. 1 wanted to decide the case but not review the evidence,

4. Juror No. 1 repeatedly asked Juror No. 6 (among others) to explain her opinions,

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[22] Pl.'s Mot. for a New Trial.

[23] Pl.'s Mot. for a New Trial ¶¶ 11–19.

[24] Aff. of Thomas Baird ¶¶ 8, 15 (Pl.'s Mot. for a New Trial, Ex. A). In the letter sent from Mr. Hudson to the Court and dated April 12, 2013, Mr. Hudson did not identify Mr. Baird as a recipient. Omitting the client as a recipient is typical in letters to the Court.

5. a majority of the jurors wanted to ask the Court to clarify the standard of care, but Juror No. 1 (the foreperson) refused to pass along their questions, and

6. Juror No. 9 researched "something" online.[25]

In response to the actions of Mr. Baird and his counsel, Defendants have asked the Court to

1. sanction Mr. Baird because he contacted Juror No. 6,[26]

2. sanction Mr. Baird's counsel because they knowingly helped him contact Juror No. 6 or waited too long to tell the Court that he contacted her,[27] and

3. strike Mr. Baird's affidavit in support of his motion for a new trial because the affidavit recounts his conversation with Juror No. 6.[28]

Mr. Baird has not contested Defendants' claim that neither he nor his counsel told the Court that he contacted Juror No. 6 until he asked the Court for a new trial. He and Juror No. 6 spoke on April 21,[29] and he filed his motion on April 25;[30] Mr. Baird and his lawyers thus waited about four days before they told the Court that he and Juror No. 6 spoke.

In the motion for sanctions, Defendants asked the Court to

1. revoke the two New York attorneys' *pro hac vice* admissions,

2. award attorneys' fees and costs that Defendants incurred to litigate the motion for a new trial and related motions, and

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[25] Letter from Juror No. 6 to the Court (Apr. 23, 2013) (Pl.'s Mot. for a New Trial, Ex. E).

[26] Defs.' Mot. for Sanctions.

[27] Defs.' Mot. for Sanctions.

[28] Defs.' Mot. to Strike Pl.'s Aff. in Supp. Of Pl.'s Mot. for a New Trial.

[29] Aff. of Thomas Baird at ¶ 8 (Pl.'s Mot. for a New Trial, Ex. A).

[30] Pl.'s Mot. for a New Trial.

3. refer Mr. Baird's counel to the Office of Disciplinary Counsel.[31]

Before filing the motion for sanctions, Defendants had asked the Court to order Mr. Baird to pay their costs under Superior Court Civil Rule 54 and Title 10, Sections 5101 and 8906 of the Delaware Code.[32]

II. DEFENDANTS' MOTION FOR SANCTIONS

Defendants have asked the Court to sanction Mr. Baird and his lawyers because Mr. Baird contacted Juror No. 6 after the Court discharged the jury and his lawyers helped him. The Court may sanction lawyers under

1. Superior Court Civil Rule 11 or

2. the Court's inherent power to police proceedings.[33]

The Court's power under Civil Rule 11 is limited,[34] but the Court's inherent power is quite potent.[35] The Court must wield its inherent power with great restraint.[36]

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[31] Defs.' Mot. for Sanctions 4.

[32] Defs.' Mot. for Costs; Defs.' Am. Mot. for Costs.

[33] *Speidel v. St. Francis Hosp., Inc.*, 2003 WL 21524694, at *5 (Del. Super. July 3, 2003) (quoting *Gilmour v. PEP Modular Computers, Inc.*, 1995 WL 791001, at *3 n.4 (Del. Super. Dec. 14, 1995)) (concluding that the Court would not award attorneys' fees to the defendant under Super. Ct. Civ. R. 11 because the defendant did not follow Super. Ct. Civ. R. 11 or the Court's inherent power because the plaintiff's claim was not frivolous).

[34] *See* Super. Ct. Civ. R. 11(c)(2) ("A sanction imposed for violation of [Civil Rule 11] shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.").

[35] *Cf. Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) ("Because of their very potency, [the federal courts'] inherent powers must be exercised with restraint and discretion." (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980))).

[36] *Speidel*, 2003 WL 21524694, at *5 (quoting *Gilmour*, 1995 WL 791001, at *3 n.4); *see also STMicroelectronics N.V. v. Agere Sys., Inc.*, 2009 WL 1444405, at *3 (Del. Super. May 19, 2009) ("Prudent restraint must be exercised by parties in demanding Rule 11 censure. Counsel should not consume the court's time unless the opposing parties or counsel have acted in an egregious manner, and there has been a good faith attempt to resolve the underlying issues.").

And before asking the Court to use either power, a party should exercise similar restraint because even doubtful accusations can leave a stain behind them.[37] Plaintiff has offended Defendants—and their offense is certainly reasonable; however, Defendants' counsel did not comply with all of Rule 11's requirements. No convincing evidence shows that Mr. Baird's attorneys suggested that Mr. Baird contact Juror No. 6, and no authority barred Mr. Baird from contacting her. Defendants' motion for sanctions is therefore **DENIED**.

A. The Court Will Not Sanction Mr. Baird's Lawyers under Superior Court Civil Rule 11 Because Defendants Did Not Serve His Attorneys with the Motion for Sanctions More Than 21 Days Before Defendants Filed the Motion with the Court.

The main goal of Superior Court Civil Rule 11 is to deter frivolous claims.[38] Rule 11 is not a tactical tool;[39] the legal system is the Rule's intended beneficiary.[40] A motion for sanctions under Rule 11(c) must meet three "significant procedural requirements,"[41] which dissuade litigants from abusing the Rule:

1. The motion must "be made separately from other motions or requests";

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[37] *See Anguilla RE, LLC v. Lubert-Adler Real Estate Fund IV, L.P.*, 2012 WL 5351229, at *8 (Del. Super. Oct. 16, 2012) (Johnston, J.) ("Allegations of violations of [Superior Court Civil] Rule 11's ethical and professional obligations are extremely serious. Such charges are all too easily made . . . . The standards set by the Delaware Bench and Bar demand that a motion for Rule 11 sanctions be brought only after the most careful and conscientious consideration . . . .").

[38] *Cf. Anderson v. State*, 21 A.3d 52, 63 (Del. 2011) (interpreting Court of Common Pleas Rule 11); *ASX Inv. Corp. v. Newton*, 1994 WL 178147, at *2 (Del. Ch. May 3, 1994) (interpreting Court of Chancery Rule 11).

[39] *See Anguilla RE, LLC*, 2012 WL 5351229, at *8 ("The threat of asserting Rule 11 claims should never be used as a litigation strategy.").

[40] Super. Ct. Civ. R. 11 "protect[s] the integrity of the judicial process." *STMicroelectronics N.V.*, 2009 WL 1444405, at *3, although sanctions that the Court imposes under Rule 11 often benefit litigants directly. In fact, the Supreme Court has noted that "sanctions that are imposed [on] the court's [own motion] (as opposed to a motion by a party) [under Federal Rule of Civil Procedure 11] are limited to monetary penalties payable to the court. *Anderson*, 21 A.3d at 62 n.51.

[41] *Speidel*, 2003 WL 21524694, at *5.

2. The motion must "describe the specific conduct alleged to violate [Rule 11(b)]";

3. The motion may "not be filed with or presented to the Court unless, within 21 days after service of the motion . . . , the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."[42]

The price of noncompliance is possibly high—the Court may deny the motion.[43] That result is appropriate here.

Defendants did not serve their motion for sanctions as Rule 11(c) required: Defendants served Mr. Baird with the motion *when* they filed it with the Court, although the Rule directed them to allow his lawyers to right any wrongs.[44] Defendants provided Mr. Baird and his counsel with less than 21 days—zero days in fact—to fix or withdraw his motion for a new trial. Nothing justified this rush. Defendants have claimed that they could not provide Mr. Baird's counsel with *any* days because the Court's electronic filing system—File & ServeXpress—serves and files papers at the same time. But this argument is not persuasive because Defendants could have observed the spirit, if not the letter, of Rule 11(c). Civility and collegiality define the Delaware Bar; its members cherish their cooperative, yet adversarial, interactions, which demonstrate the great respect, consideration, and admiration that the members have for each other and the law.[45]

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[42] Super. Ct. Civ. R. 11(c)(1)(A); *Speidel*, 2003 WL 21524694, at *5.

[43] *See Speidel*, 2003 WL 21524694, at *5 ("[F]ailure to comply with these requirements has been held to be grounds for denying [a] motion" under Super. Ct. Civ. R. 11(c).). The Court may impose additional penalties as well. *See Anguilla RE, LLC*, 2012 WL 5351229, at *8 ("[U]nder appropriate circumstances, a Rule 11 movant may and should be subject to sanctions where it is demonstrated that the motion is pursued for an improper purpose.").

[44] *Cf. Metro. Life Ins. Co. v. Kalenevitch*, 502 F. App'x 123, 125 (3d Cir. 2012) (per curiam) ("The procedural steps mandated by [Federal] Rule [of Civil Procedure] 11(c)(2) are not technical rules, but rather serve the substantial function of 'giv[ing] the offending party a safe harbor within which to withdraw or correct the offending pleading.'" (quoting *Matrix IV, Inc. v. Am Nat'l Bank & Tr. Co. of Chicago*, 649 F.3d 539, 552 (7th Cir. 2011)) (first and second alterations added) (internal quotation marks omitted)). Defendants joined a motion for sanctions with their opposition to Mr. Baird's motion for a new trial about 20 minutes before they filed their stand-alone motion for sanctions as Super. Ct. Civ. R. 11 requires.

[45] In re *Hillis*, 858 A.2d 317, 325 (Del. 2004), *clarified on reargument*, 858 A.2d 325 (Del. 2004); *see also* Del. Principles Professionalism for Lawyers A ("A lawyer should develop

Defendants could have warned Mr. Baird and his counsel that Defendants were planning to ask the Court to sanction his counsel under Rule 11—but they did not. Defendants also could have asked the Court to exempt their motion from Rule 11's safe harbor requirement if they thought that File & ServeXpress was a problem. Sanctions under Superior Court Civil Rule 11 are thus not warranted.

B. The Court Will Not Sanction Mr. Baird's Lawyers under Its Inherent Power Because Defendants Did Not Prove by Clear and Convincing Evidence That His Lawyers "Knowingly" Helped Him Contact Juror No. 6 after the Court Discharged the Jury.

Only the Supreme Court may supervise the practice of law in Delaware; however, this Court may still protect the integrity of its proceedings and thereby ensure "the fair and efficient administration of justice":

> While [the Supreme Court] recognize[s] and confirm[s] a trial court's power to ensure the orderly and fair administration of justice in matters before it, including the conduct of counsel, the [Delaware Lawyers'] Rules [of Professional Conduct] may not be applied in extra-disciplinary proceedings solely to vindicate the legal profession's concerns in such affairs. Unless the challenged conduct prejudices the fairness of the proceedings, such that it adversely affects the fair and efficient administration of justice, only this Court has the power and responsibility to govern the Bar, and in pursuance of that authority to enforce the Rules for disciplinary purposes.[46]

In other words, the Court may not sanction a lawyer just because the lawyer violated the Delaware Lawyers' Rules of Professional Conduct.[47] More is needed: the Court's only recourse is referral to the Office of Disciplinary Counsel unless the breach impaired the fairness of a proceeding.[48] No sanctions are hence proper here.

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and maintain the qualities of integrity, compassion, learning, *civility*, diligence and public service that mark the most admired members of our profession." (emphasis added)).

[46] In re *Appeal of Infotechnology, Inc.*, 582 A.2d 215, 216–217 (Del. 1990).

[47] *See* Del. Lawyers' R. Prof'l Conduct, Scope ¶ 20 ("The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement for the Rule.").

[48] *Crumplar v. Superior Court*, 56 A.3d 1000, 1009 (Del. 2012) (citing *Appeal of Infotechnology*, 582 A.2d at 220).

Defendants have contended that Plaintiff's three attorneys collectively violated Delaware Lawyers' Rules of Professional Conduct 3.5(c) and 8.4(a), under which they could not "knowingly" help Mr. Baird "communicate with a juror . . . after discharge of the jury unless the communication is permitted by court rule."[49] The facts are essentially undisputed:

1. On April 11, 2013, the day when the Court discharged the jury, Juror No. 6 called the Chappaqua, New York office of Mr. Krouner, one of Mr. Baird's lawyers. Mr. Krouner did not return the juror's telephone call; instead, he properly asked Delaware counsel, Mr. Hudson, to ask the Court whether Mr. Baird's counsel could return Juror No. 6's telephone call.[50]

2. In a letter dated April 12, Mr. Hudson asked the Court to contact Juror No. 6 or to allow Mr. Baird's counsel to do so. Mr. Hudson provided the juror's telephone number to the Court "[f]or [its] convenience."[51]

3. In a letter dated April 16, the Court advised Juror No. 6 that Mr. Baird's attorneys could not return her telephone call or otherwise contact her.[52] The Court provided a copy of this letter to both Mr. Baird's and Defendants' counsel.[53]

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[49] Del. Lawyers' R. Prof'l Conduct 3.5(c), 8.4(a). The phrase "unless the communication is permitted by court rule" at least includes Delaware Rule of Evidence 606(b) and its interpretations by the Supreme Court and this Court. *State v. Cabrera*, 984 A.2d 149, 170 (Del. Super. 2008). A lawyer may thus question a juror, albeit only under the Court's supervision. *Id.* However, no similar rule applies to parties. The Court's ruling in *Cabrera* stopped the defendant from contacting jurors because he was in prison and could contact jurors only via his lawyer.

[50] Letter from Mr. Hudson to the Court (Apr. 12, 2013) (Pl.'s Mot. for a New Trial, Ex. B).

[51] *Id.*

[52] Letter from the Court to Juror No. 6 (Apr. 16, 2013) (Pl.'s Mot. for a New Trial, Ex. D).

[53] Letter from the Court to Mr. Hudson and Mr. McKee (Apr. 16, 2013) (Pl.'s Mot. for a New Trial, Ex. C).

4. In a letter dated April 16, the Court told both parties' counsel that Mr. Baird's counsel could not return Juror No. 6's telephone call or otherwise contact her.[54]

5. Sometime between April 12 and April 21, Mr. Baird obtained a copy of the April 12 letter, which included Juror No. 6's telephone number.

6. Sometime between April 16 and April 21, Mr. Baird learned that his lawyers could not return Juror No. 6's telephone call or otherwise contact her.[55]

7. On April 21, Mr. Baird called Juror No. 6, and the two discussed the jury's deliberations.[56]

8. On April 25, Mr. Baird asked the Court for a new trial under Superior Court Civil Rule and cited what Juror No. 6 supposedly had told him.[57]

Defendants have claimed that Mr. Baird's counsel "knowingly" helped him call the juror.[58] Because no evidence supports Defendants' contention directly, they in effect ask the Court to infer that Mr. Baird's counsel acted "knowingly."

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[54] *Id.*

[55] Aff. of Thomas Baird ¶ 7 (Pl.'s Mot. for a New Trial, Ex. A).

[56] Aff. of Thomas Baird ¶¶ 8–14 (Pl.'s Mot. for a New Trial, Ex. A).

[57] Pl.'s Mot. for a New Trial.

[58] Defs.' Mot. for Sanctions ¶ 5. Defendants have also claimed that Mr. Baird's lawyers should have told the Court that he contacted Juror No. 6 when they learned that he contacted her. But Mr. Baird's lawyers could not have told the Court that Mr. Baird contacted Juror No. 6. In general, Del. Lawyers' R. Prof'l Conduct 1.6(a) "prohibits an attorney from revealing information relat[ed] to represent[ing] . . . a client unless the client consents after consult[ing]" with the attorney. *Bowden v. Kmart Corp.*, 1999 WL 743308, at *1 (Del. Super. July 1, 1999). No doubt exists that what Mr. Baird told his lawyers about his contacting Juror No. 6 was related to their representing him. Defendants have not argued that Mr. Baird's lawyers could have told the Court that Mr. Baird contacted Juror No. 6 because Del. Lawyers' R. Prof'l Conduct 1.6(b) applied and therefore permitted the lawyers to tell the Court that Mr. Baird contacted the juror. Rule 1.6(b), which provides six exceptions to Rule 1.6(a), does not seem to apply here anyway.

When asserting a violation of a Delaware Lawyers' Rule of Professional Conduct, a party must prove, "by clear and convincing evidence,"

1. a violation of the rule and

2. how the violation disrupts the administration of justice.[59]

Before Mr. Baird called Juror No. 6, he had obtained a copy of the April 12 letter in which his lawyers provided the Court with the juror's telephone number. Mr. Baird's lawyers asserted, both in the April 12 letter and during oral argument, that they provided the telephone number to the Court "[f]or [its] convenience."[60] They have also stated that they sent Mr. Baird with a copy of the April 12 letter because Rule 1.4(a)(3) required them to keep him informed about the case.[61] No evidence indicates that they "knowingly" helped Mr. Baird contact Juror No. 6. Defendants have in effect asked the Court to infer that Mr. Baird's lawyers acted "knowingly" because they could have benefited if Mr. Baird contacted Juror No. 6. But because the evidence is not "clear and convincing," the Court must decline Defendants' invitation to sanction Mr. Baird's counsel.[62]

Yet Mr. Baird's attorneys do not occupy moral high ground. They should have known that Mr. Baird might very well contact Juror No. 6 because Mr. Baird had just lost his lawsuit, and this result most likely disappointed him.

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[59] *Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 3876199, at *13 (Del. Ch. Aug. 20, 2008) (citing *Appeal of Infotechnology*, 582 A.2d at 221) ("The party seeking disqualification bears the burden of proving, by clear and convincing evidence: (1) the violation of a rule; and (2) how that violation will prejudice the fairness of the proceedings.").

[60] Letter from Mr. Hudson to the Court (Apr. 12, 2013) (Pl.'s Mot. for a New Trial, Ex. B).

[61] Del. Lawyers' R. Prof'l Conduct 1.4(a)(3).

[62] In *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, the Supreme Court described what evidence is "clear and convincing":

> The clear and convincing evidentiary standard is "an intermediate evidentiary standard, higher than mere preponderance, but lower than proof beyond a reasonable doubt." The Delaware Court on the Judiciary has described this standard as requiring "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of [the] factual contentions are 'highly probable.'" Authorities also say that, to meet this burden, the evidence must "product in the mind of the fact-finder a firm belief or conviction that the allegations in question are true." The Superior Court's civil jury instructions on clear and convincing evidence require the proof to be "highly probable, reasonably certain, and free from serious doubt."

794 A.2d 1141, 1151 (Del. 2002) (footnotes omitted).

He thus had a good motive to call Juror No. 6; he only needed a means to do so. His lawyers nonetheless provided him with a copy of the April 12 letter in which they gave Juror No. 6's telephone number to the Court "[f]or [its] convenience." The Court did not need the telephone number at that time. If the Court needed Juror No. 6's telephone number, the Court could have easily obtained the telephone number from the Jury Services Office. Including Juror No. 6's telephone number in the April 12 letter was hence an unnecessary, if not unreasonable, risk. Mr. Baird's counsel should have known better and not furnished Mr. Baird with Juror No. 6's telephone number.[63]

C. The Court Will Not Sanction Mr. Baird under Its Inherent Power Because No Authority Barred Him from Contacting Juror No. 6.

This Court may take "whatever action is reasonably necessary to ensure the proper administration of justice";[64] however, the totality of the circumstances does not warrant sanctions. In an April 16 letter, the Court told the parties' lawyers that "Plaintiff's counsel" could not contact Juror No. 6:

> For your information, I enclose a copy of a letter written by me today to Juror No. 6, [name omitted]. Permission is not granted to Plaintiff's counsel to "respond to

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[63] Plaintiff and his counsel retained Charles Slanina, former Chief Disciplinary Counsel for the Supreme Court, to opine on whether they violated Super. Ct. Civ. R. 11 or Del. Lawyers' R. Prof'l Conduct 3.5(c). Mr. Slanina observed that Mr. Baird's counsel could have told him that he could contact Juror No. 6, if he could legally do so, although his counsel could not do so:

> I recognize that [Del. Lawyers' R. Prof'l Conduct] 3.5(c) prohibits a lawyer from communicating with a juror after discharge of the jury unless the communication is permitted by Court rule. I was further advised that Plaintiff's counsel deny doing so, but [they] requested either leave of the Court or the Court's assistance in responding to the juror-initiated contact. While I further note that Rule 3.5 governs the conduct of attorneys, I recognize that Rule 8.4(a) prohibits a lawyer from violating the Rules through the acts of another.
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> Comment [1] specifically provides that the Rule does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take. I have been advised that Plaintiff's counsel deny suggesting or requesting that their client respond to the juror's contact attempt. Instead, I have been advised that the client gleaned both the contact information and the idea to respond to the contact from the juror from the copies of the pleadings filed with the Court requesting leave or assistance in contacting the juror.

Aff. of Charles Slanina at 2–3 (Pl.'s Resp. to Defs.' Mot. for Sanctions, Ex. A) (emphasis omitted). Mr. Slanina's observation emphasizes how important the intent—or lack thereof—of a lawyer is.

[64] *State v. Guthman*, 619 A.2d 1175, 1178 (Del. 1993).

> [Juror No. 6] unsolicited telephone call" as set forth in Plaintiff's letter to me of April 12.[65]

Mr. Baird is not an attorney, and he is not representing himself. In other words, the group "Plaintiff's counsel" does not include him. In another April 16 letter, the Court told Juror No. 6 that an "attorney" could not communicate with her:

> I write to advise you that Delaware law does not permit an attorney to communicate with a juror after discharge of the jury.[66]

The Court stated only that "Plaintiff's counsel" or an "attorney" could not contact Juror No. 6 because the Court was construing Delaware Lawyers' Rule of Professional Conduct 3.5(c), which does not apply to Mr. Baird, a non-lawyer.[67] Charles Slanina, former Chief Disciplinary Counsel for the Supreme Court, has opined in this case that the rule only "governs the conduct of *attorneys* . . . ."[68] Because Rule 3.5(c) does not apply to Mr. Baird, no interpretation of Rule 3.5(c) applies to him either, including the Court's holding in *State v. Cabrera*.[69]

In *Cabrera*, the Court held that Rule 3.5(c) did not violate the Constitution.[70] A jury convicted the defendant, Luis G. Cabrera, of two counts of murder.[71] Seven years later, he asked the Court to set aside his judgment of conviction under Superior Court Criminal Rule 61 because

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[65] Letter from the Court to Mr. Hudson and Mr. McKee (Apr. 16, 2013) (Pl.'s Mot. for a New Trial, Ex. C).

[66] Letter from the Court to Juror No. 6 (Apr. 16, 2013) (Pl.'s Mot. for a New Trial, Ex. D).

[67] *Cf. Dumas v. Hurley Med. Ctr.*, 2011 WL 863506, at *1 (E.D. Mich. Mar. 9, 2011 ("*Pro se* litigants are not bound by the rules of professional conduct applicable to attorneys.").

[68] Aff. of Charles Slanina at 2 (Pl.'s Resp. to Defs.' Mot. for Sanctions, Ex. A) (emphasis added in original).

[69] 984 A.2d 149 (Del. Super. 2008).

[70] The *Cabrera* Court summarized its decision:

> The Court is satisfied that there is no need to contact the trial jurors. The issues about which Cabrera claims there is such a need were thoroughly explored at his trial over seven years ago. In any event, rule 3.5(c) permits examination of jurors consistent with Delaware Rules of Evidence § 606. Even though that results in such examination being conducted under judicial supervision, Rule 3.5(c) does not operate to violate any of Cabrera's constitutional rights.

Cabrera, 984 A.2d at 150.

[71] *Id.* at 150.

1. one juror might have known the defendant's wife,

2. one juror might have prejudged the defendant, and

3. one juror complained about the internal dynamics of the jury's deliberations.[72]

Cabrera asked the Court to allow him to interview the jurors *ex parte*.[73] But because Cabrera was in prison, he could not interview the jurors himself; therefore, he could interview them only if his counsel could interview them. And his counsel could interview them only if

1. Rule 3.5(c) was unconstitutional and thus void or

2. a "court rule" allowed his lawyers to interview the jurors.

He claimed that Rule 3.5(c) was unconstitutional because no "court rule" existed.[74] The Court concluded that Delaware Rule of Evidence 606(b) is a "court rule" that would permit his lawyers to interview the jurors—albeit only before the Court.[75] Rule 3.5(c) was hence upheld.

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[72] *Id.* at 150–61.

[73] *Id.* at 150, 161.

[74] *Id.* at 161.

[75] *Id.* at 170. The *Cabrera* Court only interpreted Del. Lawyers' R. Prof'l Conduct 3.5(c); the Court did not determine whether Cabrera himself could interview jurors *ex parte*:

> The Delaware Supreme Court has since 1980 invoked D.R.E. 606(b) as a basis to allow post-trial judicially conducted or supervised examination[s] of jurors. It did so when DR 7-108 [of the Delaware Lawyers' Code of Professional Responsibility] had no "escape clause." It invoked D.R.E. 606(b) when Rules 3.5(b) and 3.10 were written as they were. Even though it never explicitly said so, Rule 3.5(b)'s "except as provided by law" included the "law" as set out in the precedents reviewed above. That "law" included D.R.E. 606(b). That evidentiary rule is the only rule known regulating examination of jurors. It is a court rule of evidence. This Court holds, therefore, that the phrase "except as provided by court rule" in Rule 3.5(c) encompasses, at a minimum, D.R.E. 606(b) and its interpretations by the Supreme Court. What else may be included within that phrase will have to wait another day.
>
> Therefore Rule 3.5(c) operates to preserve Cabrera's right to a fair trial and an impartial jury as secured by the Sixth Amendment and Article I, [Section] 7 of the Delaware Constitution.

Cabrera, 984 A.2d at 170.

Rule 3.5(c) and the *Cabrera* Court's interpretation of Rule 3.5(c) do not bind Mr. Baird because

1. he is not a lawyer and

2. he, unlike Cabrera, could interview Juror No. 6 himself.

Mr. Baird may thus interview jurors—free from the Court's supervision—unless an authority besides Rule 3.5(c) states otherwise. First, Defendants only cite the Court's April 16 letters, in which the Court answered a very narrow question. Second, Mr. Baird also did not harass or invade the privacy of Juror No. 6; in fact, the juror tried to contact Mr. Krouner well before Mr. Baird contacted her. He challenged the verdict, but he did not obstruct the administration of justice. For these reasons, sanctions are not appropriate, even if the Court disapproves of Mr. Baird's choice to contact Juror No. 6.

Neither Mr. Baird nor his attorneys behaved perfectly, but sanctions are inappropriate; accordingly, Defendants' motion for sanctions is **DENIED**.

III. PLAINTIFF'S MOTION FOR A NEW TRIAL

Plaintiff has asked the Court to set aside the verdict and grant a new trial under Superior Court Civil Rule 59 because two jurors compromised the jury's deliberations and therefore the trial was not fair. He has claimed that

1. Juror No. 1, the foreperson, prevented other jurors from asking the Court to clarify the standard of care and

2. Juror No. 9 researched "something" online.[76]

Plaintiff has reasoned that the Court must presume that the jurors' conduct prejudiced him because the circumstances are "egregious."[77] Defendants have responded that

[76] Pl.'s Mot. for a New Trial. Under the Rule, the Court may grant a new trial "as to all or any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court." Super. Ct. Civ. R. 59(a).

1. Juror No. 6 may not testify about whether Juror No. 1 prevented other jurors asking the Court to clarify the standard of care, and

2. because the circumstances are not "inherently prejudicial," the Court may not presume that Juror No. 9's "research" prejudiced Plaintiff.[78]

Both Plaintiff and Defendants contend that the facts warrant a presumption only if there is a "reasonable possibility" that the jurors' actions affected the verdict,[79] although the Supreme Court explicitly rejected this standard in *Massey v. State*.[80] Certain language in *McLain v. Gen. Motors Corp.*[81] somewhat muddied the waters because the *McLain* Court restated the then-rejected standard three months after *Massey* was decided.[82] But the *McLain* Court ultimately stated the right standard:[83] the Court must presume that Plaintiff was prejudiced if the circumstances are "so inherently prejudicial" that there is a "reasonable probability," not "possibility," that the circumstances affected the verdict. Plaintiff's motion for a new trial is therefore **DENIED** because Juror No. 6 may not testify about whether or how the jurors influenced each other and the remaining circumstances are not "inherently prejudicial."

A. Juror No. 6 May Not Provide Evidence That Juror No. 1 Stopped Jurors From Asking the Court to Clarify the Standard of Care but May Provide Evidence for the Court Preliminarily to Consider Whether Juror No. 9 Researched "Something" Online.

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[77] Pl.'s Mot. for a New Trial, ¶ 13.

[78] Defs.' Opp'n to Pl.'s Mot. for a New Trial ¶¶ 6, 7.

[79] Pl.'s Mot. for a New Trial, ¶ 12; Defs.' Opp'n to Pl.'s Mot. for a New Trial ¶ 7.

[80] 541 A.2d 1254, 1259 (Del. 1988).

[81] 586 A.2d 647 (Del. Super. 1988).

[82] *See Id.* at 653 ("The jury verdict will be set aside if there is a reasonable possibility that allegedly extraneous information or influences affected the verdict.").

[83] *See Id.* at 654 ("'[If] a [party] can show that there is a reasonable probability of juror taint of an inherently prejudicial nature, a presumption of prejudice should arise that [the moving party] [*sic*] right to a fair trial has been infringed upon.'" (quoting *Massey*, 541 A.2d 1257) (alterations except "[*sic*]" in original)).

The general rule is that no juror may impeach his or her own verdict.[84] The goals of this rule are

1. to shield jurors from harassment,

2. to protect the privacy of jurors and also their deliberations,

3. to promote the finality of and thus confidence in verdicts, and

4. to prevent tampering with the jury and the judicial process.[85]

Delaware Rule of Evidence 606(b), which states the rule, provides two exceptions:

> [A] juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.[86]

Because Rule 606(b) allows a juror to provide evidence only about whether a juror learned "extraneous prejudicial information" or experienced "outside influence," Delaware courts have distinguished between so-called "extrinsic" and "intrinsic" influences:[87]

1. jurors may testify about whether an "extrinsic influence" existed, and

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[84] *McLain v. Gen. Motors Corp.*, 586 A.2d 647, 649 (Del. Super. 1988).

[85] *Id.* (citing *McDonald*, 238 U.S. at 267); *accord* 3 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:16 (3d ed. 2007).

[86] D.R.E. 606(b).

[87] *See, e.g.*, *Thompson* ex rel. *Thompson v. Papastavros Assocs. Med. Imaging, L.L.C.*, 729 A.2d 874, 878 (Del. Super. 1998) (holding that "[t]here is nothing . . . to suggest an extraneous or extrinsic influence on the deliberative process" because the "[p]laintiffs' contention . . . is no more than an inference on a hearsay allegation that the two jurors did not recognize and disclose during *voir dire* biases against people who bring law suits for money damages").

2. jurors may not testify about whether an "intrinsic influence" existed or how an influence—whether "intrinsic" or "extrinsic"—affected the verdict.[88]

Notably, Plaintiff's motion does not raise every allegation that Juror No. 6 raised in her April 23 letter to the Court. Plaintiff alleges only two influences here: one "intrinsic"—that Juror No. 1 stopped other jurors from asking the Court to clarify the standard of care—and one "extrinsic"—that Juror No. 9 researched "something" online.

Plaintiff first claims that Juror No. 1, the jury's foreperson, stopped jurors from asking the Court to clarify the standard of care.[89] Plaintiff's only evidence is

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[88] *Id.* at 879 (citing *Sheeran v. State*, 526 A.2d 886, 895 (Del. 1987)).

[89] Pl.'s Mot. for a New Trial ¶ 17. The Court had instructed the jurors to send all notes through the jury's foreperson—Juror No. 1. The Supreme Court has allowed this Court to funnel jurors' communications through the foreperson. *See Sheeran*, 526 A.2d at 894–98 (holding that the Court did not abuse its discretion when it did not investigate a juror's complaint that the foreperson prevented the juror from sending a note to the judge because the foreperson's conduct was not intrinsic influence about which the juror could not testify). Juror No. 6 nonetheless had an opportunity to speak with the Court directly before it discharged the jury. On April 10, the Court interviewed her, with Plaintiff's and Defendants' counsel present, after she told a bailiff that she was nauseous because she had a migraine headache:

The Court:	Have a seat, please, Juror No. 6.
Juror No. 6:	Hi.
The Court:	I asked you to come here because the bailiff told me that you've had a migraine all day. Can you tell us how [you] are feeling, and have you been able to follow the evidence and the arguments and everything with your migraine?
Juror No. 6:	Well, before I came to court this morning, I took medication. I don't have the migraine headache now, I just was having the nausea effect.
The Court:	Have you been able to follow during the trial this morning, the testimony, which was the videotape deposition, were you able to pay attention to that and observe that video.
Juror No. 6:	Yes. Normally, when I have migraines, I'm usually sensitive to light, so I wasn't experiencing any type of visual impairment because of the migraine. Once I took the medication, the headache subsided.
The Court:	How are you feeling now?
Juror No. 6:	I'm feeling fine right now, yes, once I went to lunch and got something to eat.
The Court:	I had the impression maybe you were feeling a little worse now. Do you feel that you are able to continue working until about five o'clock, and then we'll recess until tomorrow, do you feel you are able to do that?

what Juror No. 6 told Plaintiff and her letter sent to the Court and dated April 23.[90] Even if the Court would conclude that Juror No. 1 behaved as Juror No. 6 alleges, she could not testify about how Juror No. 1 acted during the jury's deliberations because no "juror may . . . testify as to any matter or statement [that] occurr[ed] during . . . the jury's deliberations."[91] Plaintiff has no other evidence; hence, further discussion is not needed.[92]

Plaintiff also claims that Juror No. 9 researched "something" online.[93] Plaintiff's only evidence is what Juror No. 6 told Plaintiff and her April 23 letter.[94] She "may testify" about whether Juror No. 9 researched "something" online because "a juror may testify [about] whether extraneous prejudicial information was improperly brought to the jury's attention."[95] But even though Juror No. 6 "may testify" about whether Juror No. 9 did research, Juror No. 6 "may not testify" about whether the research affected the verdict:

> A juror may not testify as . . . to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the

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Juror No. 6: Yes.

The Court: Please step out in the hallway for just a moment.

(Juror No. 6 exits the conference room.)

The Court: Well, it does seem that she's able to function and continue on.

(Conference concluded.)

Conference Tr. 3:14–5:2 (Defs.' Opp'n to Pl.'s Mot. for a New Trial, Ex. 1). Juror No. 6 told the Court that she could still serve as a juror, and significantly, she voiced no concerns about the other jurors, even though some of the conduct that she alleged in her April 23 letter to the Court occurred before she met with the Court and counsel on April 10.

[90] Aff. of Thomas Baird ¶¶ 11, 16(b)–(c). (on file as Pl.'s Mot. for a New Trial, Ex. A); Letter from Juror No. 6 to the Court (Apr. 23, 2013) (on file as Pl.'s Mot. for a New Trial, Ex. E).

[91] D.R.E. 606(b).

[92] *See McLain*, 586 A.2d at 653 ("If a party alleges the sort of misconduct about which testimony would be barred under [Delaware Rule of Evidence] 606(b), the Court may conclude that further inquiry would be futile.").

[93] Pl.'s Mot. for a New Trial ¶ 15.

[94] Aff. of Thomas Baird ¶¶ 11, 16(b)–(c). (on file as Pl.'s Mot. for a New Trial, Ex. A); Letter from Juror No. 6 to the Court (Apr. 23, 2013) (on file as Pl.'s Mot. for a New Trial, Ex. E).

[95] D.R.E. 606(b).

> verdict or indictment or concerning his mental processes in connection therewith . . . .[96]

Because Juror No. 6 "may testify" (to use the language of Rule 606(b)) that Juror No. 9 did out-of-court research, additional discussion is warranted.

B. The Court Cannot Conclude That the Circumstances Are "Egregious" Because Plaintiff Has Not Shown What Juror No. 9 Researched and Hence Whether the Research Was "So Inherently Prejudicial" That There Is a "Reasonable Probability" That the Research Prejudiced Plaintiff.

Under Superior Court Civil Rule 59, the Court may set aside a verdict and grant a new trial because a juror knew or learned extraneous information only if the aggrieved party proves that

1. the information "identifiably prejudiced" the party, or

2. the information was "so inherently prejudicial" that the Court must presume that the information prejudiced the party.[97]

The Court will not investigate the conduct of discharged jurors or grant a new trial if the opposing party (here, Defendants) rebuts the Court's presumption.[98] When deciding whether a new trial or further investigation is warranted, the Court enjoys "very broad discretion."[99] The circumstances do not come close to warranting a new trial or further investigation here because Juror No. 6 has not stated with any detail what Juror No. 9 researched online.[100] Juror No. 6 has not explained (if she even knows) what Juror No. 9 "looked up" on the internet.

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[96] D.R.E. 606(b).

[97] *McLain*, 586 A.2d at 653, 654.

[98] *See Black v. State*, 3 A.2d 218, 220 (Del. 2010) ("The presumption of prejudice can be rebutted by a post-trial investigation conducted by the trial judge." (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954))).

[99] *Thompson*, 729 A.2d at 879 (citing *Sheeran*, 526 A.2d at 897, *Styler v. State*, 417 A.2d 948, 953 (Del. 1980), and *McLain*, 586 A.2d at 655).

[100] For the purpose of deciding Pl.'s Mot. for a New Trial, the Court assumes, but does not find, that Juror No. 9 researched "something" online as Juror No. 6 alleges.

Any prejudice is thus completely speculative.[101] In other words, Plaintiff has not shown that there is a "reasonable probability" that what Juror No. 9 researched online affected the verdict.

In general, an aggrieved party cannot prove—at least directly—that extraneous information affected a verdict[102] because no juror may testify about how anything affected the verdict.[103] The Supreme Court has considered this issue.[104] This Court may thus infer from the circumstances—the nature of the information and its relationship to the case—that extraneous information affected the verdict.[105] But the Court does so only if the circumstances are "egregious."

Since at least 1985,[106] the Court has presumed that a juror's misconduct was prejudicial only when the circumstances were "egregious."[107] In *Hughes v. State*,[108]

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[101] *See Black*, 3 A.3d 218, 221 ("The trial court has discretion to decide that allegations of juror misconduct are not sufficiently credible or specific to warrant investigation." (citing *Lovett v. State*, 516 A.2d 455, 475 (Del. 1986))).

[102] *See Hughes v. State*, 490 A.2d 1034, 1047 (Del. 1985) ("Considering the nature of the harm complained of it is extremely difficult for a defendant to demonstrate that jurors were actually biased by the prejudicial information to which they were exposed." (citing *Peters v. Kiff*, 407 U.S. 493, 504 (1972) and *Barnes v. Toppin*, 482 A.2d 749, 752 (Del. 1984))).

[103] *See* D.R.E. 606(b) ("A juror may not testify as . . . to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith . . . ."); *cf. Barnes*, 482 A.2d at 752 ("[I]n view of D.R.E. § 606(b), the [C]ourt may not inquire as to the part 'actual bias' played during deliberations . . . ." (footnote omitted)).

[104] *See Massey v. State*, 541 A.2d 1254, 1259 (Del. 1988) ("This Court has gone though a similar analysis regarding the difficulty, at times, of proving actual prejudice." (citing *Hughes*, 490 A.2d at 1047)).

[105] *See McLain*, 586 A.2d at 653, 654 ("The question of whether prejudice result must be resolved by drawing inferences."). Often, only circumstantial evidence is available. *Cf. Barnes*, 482 A.2d at 752 ("[I]n cases where actual bias played a part in the verdict, the proof thereof is likely to consist of circumstantial evidence.").

[106] The analysis was nonetheless the same before and after 1985. In *McCloskey v. State*, the Supreme Court stated that "[w]hile no prejudice would have to be proven, in cases not involving formal stages of the proceedings actual prejudice should be conceivable before the presumption of prejudice prevails." 457 A.2d 332, 337 (Del. 1983) (quoting *Jacobs v. State*, 418 A.2d 988, 989 (Del. 1980)) (internal quotation marks omitted). The *McCloskey* Court then granted a new trial because "the record establishe[d] a *reasonable probability* of the unlawful intimidation of [the juror] sufficient to raise a presumption of prejudice." *Id.* at 338 (emphasis added).

after the Supreme Court set aside a verdict, another jury convicted the defendant.[109] Before the Supreme Court again, the defendant alleged that his second trial was not fair because

1. jurors knew that a jury had convicted him once before,

2. jurors knew that he had failed a polygraph test.[110]

The Supreme Court agreed and determined that the "egregious circumstances" justified a presumption that the defendant was prejudiced:

> In order to obtain a new trial on the grounds that an impartial jury was never empanelled, generally speaking, we require a showing of identifiable prejudice to the accused. However, under egregious circumstances such as those presented here, the law raises a presumption of prejudice and, consequently, a violation of due process, in favor of the defendant. . . .
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> * * *
>
> In deciding whether prejudice will be presumed, . . . each case must turn on its special facts.[111]

The Supreme Court then held that the State had not rebutted the presumption.[112]

The Supreme Court further discussed what were "egregious circumstances."[113] In *Massey v. State*,[114] the defendant claimed that a juror used drugs and alcohol

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[107] *See, e.g.*, *Hughes*, 490 A.2d at 1046 ("[U]nder egregious circumstances . . . , the law raises a presumption of prejudice, and consequently, a violation of due process, in favor of the [criminal] defendant.").

[108] 490 A.2d 1034 (Del. 1985)

[109] *Id.* at 1050.

[110] *Id.* at 1039–1040.

[111] *Id.* at 1046–1047.

[112] *Id.* at 1048.

[113] *See Massey*, 541 A.2d at 1257 (stating that circumstances are "egregious" if they, "if true, would be deemed inherently prejudicial so as to raise a presumption of prejudice in favor of defendant" (citing *Hughes*, 490 A.2d at 1046–1048)).

[114] 541 A.2d 1254 (Del. 1988).

during the trial.[115] Before the Supreme Court, the defendant argued that even a "reasonable possibility" that the juror's misconduct affected the verdict justifies a presumption that he was prejudiced.[116] The *Massey* Court rejected this argument, reaffirmed the holding of the Supreme Court's decision in *Hughes v. State*, and then explained what circumstances are "egregious":

> Generally, a defendant must prove he was "identifiabl[y] prejudice[d]" by the juror misconduct, unless the defendant can establish the existence of "egregious circumstances," *i.e.*, circumstances that, if true, would be deemed inherently prejudicial so as to raise a presumption of prejudice in favor of [the] defendant. As the rule was stated in *Hughes*, if a defendant can show that there is a reasonable probability of juror taint of an inherently prejudicial nature, a presumption of prejudice should arise that [the] defendant's right to a fair trial has been infringe upon.[117]

In other words, circumstances are "egregious" if there is a reasonable *probability*, not just a reasonable *possibility*, that a juror's misconduct affected the verdict.[118] This rule remains the law today.[119]

The Court has applied the rule in civil trials as well.[120] In *McLain v. General Motors Corp*,[121] the plaintiff alleged that

1. one juror did not accept the verdict until the other jurors harassed her,

2. the other jurors harassed her because they did not want to deliberate another day,

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[115] *Id.* at 1255.

[116] *Id.* at 1256.

[117] *Id.* at 1256–1258.

[118] *See State v. Shaia*, 2000 WL 303338, at *6 (Del. Super. Feb. 10, 2000) ("Defendants receive the benefit of th[e] presumption [of prejudice] where they show a 'reasonable probability' that the alleged error [was] inherently prejudicial." (quoting *Massey*, 541 A.2d at 1257)), *aff'd*, 765 A.2d 953 (Del. 2000).

[119] The Court applied the rule in *Black v. State*, 3 A.2d 218 (Del. 2010).

[120] *See McLain*, 586 A.2d 653–655 (applying the rule in a civil trial).

[121] 586 A.2d 647 (Del. Super. 1988).

3. a bailiff told the jurors that they would need to deliberate another day if they failed to return a verdict before the end of the day.[122]

The Superior Court did not grant a new trial because the bailiff's comments were not prejudicial. The *McLain* Court mentioned the "reasonable possibility" standard that the Supreme Court had rejected in *Massey v. State*:

> The jury verdict will be set aside if there is a reasonable possibility that allegedly extraneous information or influences affected the verdict. . . .[123]

But immediately after that statement, the *McLain* Court explained and applied the correct standard:

> The moving party generally carries the burden of demonstrating misconduct. There are, however, certain classes of misconduct in which the burden is upon the party, in whose favor the verdict was rendered, to demonstrate the harmlessness of the alleged influence. The question of whether prejudice resulted must be resolved by drawing inferences. Some types of misconduct are considered presumptively prejudicial, especially in criminal, but also occasionally in civil cases, and a rebuttable presumption of prejudice may arise in favor of the moving party, depending on the misconduct alleged. The Delaware Supreme Court has labeled these instances "'egregious circumstances'—circumstances that, if true, would be deemed inherently prejudicial so as to raise a presumption of prejudice in favor of [the moving party]." "[I]f a [party] can show that there is a reasonable probability of juror taint of an inherently prejudicial nature, a presumption of prejudice should arise that [the moving party] [*sic*] right to a fair trial has been infringed upon."[124]

The *McLain* Court applied the same standard that the *Massey* Court had applied. Under this standard,

1. the Court must presume that an aggrieved party was prejudiced if the circumstances are "egregious," and

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[122] *Id.* at 649.

[123] *Id.* at 653.

[124] *Id.* at 653–654.

2. the circumstances are egregious if they are "so inherently prejudicial" that there is a "reasonable probability" that they affected the verdict.

Out-of-court research can be misconduct, but out-of-court research is not *ipso facto* "so inherently prejudicial" that there is a "reasonable probability" that such research would affect a verdict. The Court instead needs enough information to assess how the research could influence jurors and therefore affect the verdict. For example, the Court did not presume that an aggrieved party was prejudiced just because jurors looked up words in a dictionary while they were deliberating.[125] In *Porter v. Murphy*,[126] the jury asked the bailiff for a dictionary.[127] She did not ask for the Court's leave; instead, she simply provided the jury with a copy of *Webster's New Collegiate Dictionary*.[128] After the jury returned a verdict against the plaintiffs, they asked the Court to set aside the verdict and grant a new trial because

1. "the only reasonable inference [was] that the jury looked up the very words that went to the core of the case," and

2. "the introduction of the dictionary tainted the evidence and presumably contradicted the legal instructions."[129]

The Court noted that the bailiff acted improperly but did not grant a new trial.[130] The Court described the plaintiffs' "only reasonable inference" as "completely speculative."[131] Because nothing showed what word or words—"if any"—were looked up, the Court did not presume that the research prejudiced the plaintiffs.[132]

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[125] *Porter v. Murphy*, 792 A.2d 1009, 1017 (Del. Super. 2001).

[126] 792 A.2d 1009 (Del. Super. 2001).

[127] *Id.* at 1016.

[128] *Id.*

[129] *Id.* (internal quotation marks omitted).

[130] *Id.* at 1016, 1017.

[131] *Id.* at 1017 (internal quotation marks omitted).

[132] *Id.* at 1017.

The Court's rationale in *Porter* governs the Court's analysis in this case.[133] Plaintiff has not shown *what* Juror No. 9 may have researched on the internet; instead, Plaintiff has asked the Court to presume or infer that he was harmed just because Juror No. 6 has alleged that Juror No. 9 "looked something up."[134] No evidence indicates what that "something" was. In her letter to the Court, Juror No. 6 has stated neither what this "something" was nor how it was material. This weakens Plaintiff's claim: Juror No. 6 likely would have provided more detail if what Juror No. 9 researched online had affected how the jury reached its verdict. Only one reasonable inference exists—the research was not or barely material. The Court will not disregard a verdict or compromise other jurors' privacy unless an aggrieved party shows that the alleged "inherent prejudice" is not speculative. The Court cannot assess the danger of research if its goal is ill or not defined. Because Plaintiff has not shown—at all—what Juror No. 9 researched online, the Court cannot infer that the research was "inherently prejudicial";[135] therefore, Plaintiff's motion for a new trial is **DENIED**.[136]

IV. DEFENDANTS' AMENDED MOTION FOR COSTS

Defendants have asked the Court to tax $21,713.50 in total costs against Plaintiff under Superior Court Civil Rule 54 and Title 10, Sections 5101 and 8906 of the Delaware Code:

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[133] The Court is not satisfied that it should treat offline and online research differently.

[134] Pl.'s Mot. for a New Trial, Ex. D at 4.

[135] The Court cannot determine whether Juror No. 9 found "extraneous information on a critical issue" because her allegations were not "specific" enough. *See Black v. State*, 3 A.3d 218, 221 (Del. 2010) ("The trial court has discretion to decide that allegations of juror misconduct are not sufficiently credible or specific to warrant investigation. Here, however, the trial court undertook a limited inquiry and learned that one juror had obtained extraneous information on a critical issue in the trial. Having found juror misconduct, it was incumbent on the trial court to determine whether [the defendant] was prejudiced." (footnote omitted)).

[136] Plaintiff cites *Gov't of the Virgin Islands v. Weatherwax*, 20 F.3d 572 (3d Cir. 1994) for the proposition that "the Court must be concerned about the integrity of the deliberative process" despite D.R.E. 606(b). Pl.'s Mot. for a New Trial, ¶ 16. But Plaintiff ignores the facts in *Weatherwax*, in which the defendant alleged that extraneous information—a newspaper article that discussed the case—affected the verdict. That is, the *Weatherwax* Court was concerned about whether an "extrinsic" influence—not an "intrinsic" influence—affected the verdict. Plaintiff is incorrect to the extent he suggests otherwise.

1. $642.50 to pay Veritext for producing the video deposition of Matt J. Epstein, O.D.;

2. $8,000 to pay Steven B. Siepser, M.D. for attending the trial and testifying as an expert;

3. $6,000 to pay William B. Trattler, M.D. for attending the trial and testifying as an expert;

4. $1,800 to pay Thomas F. Grogan, C.F.E. for attending the trial and testifying as an expert;

5. $96 to pay Parcels, Inc. for serving Dr. Epstein with a subpoena;

6. $675 to pay Vincent A. Bifferato, Sr., for mediation; and

7. $4,500 to reimburse Defendant Frank R. Owczarek, M.D. for the expenses that he "necessarily incurred" to attend the trial.[137]

"Costs" are "incidental damages" that the Court may award to reimburse a party for expenses that it "necessarily incurred" to assert its rights before the Court.[138] The Court may decline to tax "excessive" or "unreasonable" expenses as costs.[139] Defendants' expenses are recoverable under Delaware law, except as noted below. Defendants' motion for costs is **GRANTED IN PART** and **DENIED IN PART**: Plaintiff must pay $15,639.02 in costs to Defendants.

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[137] Defs.' Am. Mot. for Costs 4.

[138] *Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 723 (Del. 1976) (quoting *Peyton v. William C. Peyton Corp.*, 8 A.2d 89, 91 (Del. 1939)) (internal quotation marks omitted).

[139] *See Miller v. Williams*, 2012 WL 3573336, at *2 (Del. Super. Aug. 21, 2012) (finding that an expert witness's fee was "excessive" and awarding an amount that the Court deemed "reasonable").

A. Plaintiff Must Pay $642.50 for the Production of Matt J. Epstein, O.D.'s Video Deposition.

Per Superior Court Civil Rule 54(f) and Section 5101 of the Delaware Code, the Court may tax the costs of videoing the deposition of Matt J. Epstein, O.D. because:

1. Defendants introduced the video into evidence,[140]

2. Defendants provided proof that Veritext charged $642.50 to video the deposition,[141] and

3. nothing indicates that Veritext's fee was excessive.

For these reasons and because Plaintiff did not object to this cost specifically, the Court awards $642.50 to Defendants.

B. Plaintiff Must Pay $14,225.52 of Steven B. Siepser, M.D.'s, William B. Trattler, M.D.'s, and Thomas F. Grogan, C.F.E.'s Fees for Attending the Trial and Testifying as Expert Witnesses.

Per Superior Court Civil Rule 54 and Section 8906 of the Delaware Code, the Court may tax the fees of Steven B. Siepser, M.D., William B. Trattler, M.D., and Thomas F. Grogan, C.F.E. for testifying as expert witnesses:

> An expert's fee is recoverable as a cost of litigation, but is limited to the time necessarily spent in actual attendance upon the Court for the purpose of testifying. "Attendance includes a reasonable time for traveling to and from the courthouse, waiting to testify, and testifying."[142]

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[140] Super. Ct. Civ. R. 54(f).

[141] Defs.' Mot. for Costs, Ex. F.

[142] *Cimino v. Cherry*, 2001 WL 589038, at *2 (Del. Super. May 24, 2001) (quoting *Deardoff Assocs., Inc. v. Paul*, 2000 WL 1211077, at *1 (Del. Super. Apr. 27, 2000)) (footnotes omitted).

Defendants ask the Court to tax $15,700 in fees against Plaintiff, but the Court will use its discretion to adjust this amount because it is excessive:[143]

1. In 1995, the Medical Society of Delaware's Medico-Legal Affairs Committee concluded that a fee between $1,300 and $1,800 per half-day is reasonable.[144]

2. From January 1, 1995 to April 1, 2013, the price of health care increased by 95.15 percent according to the Consumer Price Index.[145]

3. In April 2013, a fee between $2536.99 and $3512.76 per half-day or between $5073.99 and $7025.52 was reasonable.

4. Dr. Siepser's fee was $8,000 but exceeds the range's upper bound by $974.48, or about 14 percent.[146]

5. Dr. Trattler's fee was $6,000 and is within the range.[147]

6. Mr. Grogan's fee was $1,200,[148] which is $600 less than what Defendants asked the Court for in their amended motion.[149] Nothing indicates that Mr. Grogan's fee is unreasonable.

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[143] 10 *Del. C.* § 8906; *Cimino*, 2001 WL 589038, at *1.

[144] *See Clough v. Wal-Mart Stores, Inc.*, 1997 WL 719314, at *1 (Del. Super. Sept. 9, 1997) (using the Consumer Price Index and the 1995 study by the Medical Society of Delaware's Medico-Legal Affairs Committee to determine whether an expert witness's fee is reasonable); *see also Jones v. State Farm Ins. Co.*, 2013 WL 4084811, at *1 (Del. Super. July 10, 2013) (same); *Houghton v. Shapira*, 2013 WL 3349956, at *2 (Del. Super. June 27, 2013) (same); *Merced v. Harrison*, 2009 WL 3022134, at *1 (Del. Super. Sept. 1, 2009) (same). The Federal Reserve Bank of St. Louis makes data on the Consumer Price Index available at http://research.stlouisfed.org/fred2/. This Court used the Consumer Price Index for Medical Care, for which data is available at http://research.stlouisfed.org/fred2/series/CPIMEDSL.

[145] On January 1, 1995, the price level was 216.600. On April 1, 2013, the price level was 422.702. The percentage change in the price level between January 1, 1995 and April 1, 2013 is thus (422.702-216.600)/216.600, or about 95.15 percent.

[146] Defs.' Mot. for Costs, Ex. H.

[147] Defs.' Mot. for Costs, Ex. J.

Defendants did not argue that Dr. Siepser's fee was reasonable; they contended that his fee was "recoverable," and they provided proof that he charged $8,000.[150] For these reasons, the Court awards only $14,225.52 total to repay Defendants for Dr. Siepser's, Dr. Trattler's, and Mr. Grogan's fees.

C. Plaintiff Must Pay $96 for the Service of a Subpoena on Matt J. Epstein, O.D.

Per Superior Court Civil Rule 54(d) and Section 5101 of the Delaware Code, the Court may tax Parcel, Inc.'s fee for serving Dr. Epstein with a subpoena.[151] Parcels charged $96,[152] and nothing indicates that $96 was too much. Plaintiff only argued that the Court could not award this cost under Rule 54(f), (g), and (h).[153] The Court therefore awards $96 to Defendants.

D. Plaintiff Must Pay $675—Defendants' Share—of the Mediator's Fee.

Per Superior Court Civil Rule 54(d) and Section 5101 of the Delaware Code, the Court may tax Vincent A. Bifferato, Sr.'s fee for mediation to Plaintiff.[154] The Court concludes that Plaintiff should pay the whole fee:

1. The mediation failed.

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[148] Defs.' Reply to Pl.'s Opposition to Defs.' Mot. & Am. Mot. for Costs, Ex. X.

[149] Defs.' Am. Mot. for Costs 4.

[150] Defs.' Reply to Pl.'s Opposition to Defs.' Mot. & Am. Mot. for Costs ¶ 4.

[151] *See Bordley v. GMRI, Inc.*, 2006 WL 2988074, at *4 (Del. Super. Oct. 19, 2006) ("[The] Defendant incurred $80.00 in subpoena service fees as part of the filing costs. The Defendant as the prevailing party is entitled to recover these fees as court costs." (footnote omitted)).

[152] *See Bordley v. GMRI, Inc.*, 2006 WL 2988074, at *4 (Del. Super. Oct. 19, 2006) ("[The] Defendant incurred $80.00 in subpoena service fees as part of the filing costs. The Defendant as the prevailing party is entitled to recover these fees as court costs." (footnote omitted)).

[153] Pl.'s Opp'n to Defs.' Mot. & Am. Mot. for Costs ¶ 7.

[154] *See Spencer v. Wal-Mart Stores E., LP*, 2007 WL 4577579, at *3 (Del. Super. Dec. 5, 2007) ("It is undisputed that the attempt to resolve this case through mediation failed, that an offer of judgment for $100,000 was made by Defendant and subsequently rejected by Plaintiff, and that a trial by jury found for Defendant and awarded no damages to Plaintiff. Given these facts, this Court concludes that mediation cost sought by Defendant must be granted.").

2. Defendants negotiated in good faith: they offered $200,000 to Plaintiff; he did not accept that offer.[155]

3. The jury found that Defendants were not negligent and awarded no damages to Plaintiff.

4. The fee was $1,350—of which Plaintiff already owes half, or $675.[156]

5. Nothing indicates that the fee is unreasonable.

Plaintiff claimed that this fee was not recoverable under Rule 54(f), (g), and (h).[157] Rule 54(f), (g), and (h) does not allow the Court from taxing the mediator's fee; however, Rule 54(f), (g), and (h) does not prohibit the Court from doing so either. Plaintiff ignored other authority, under which the Court may tax the mediator's fee. For these reasons, the Court awards $675 in costs to Defendants.

E. The Court Will Not Require Plaintiff to Pay the Expenses that Dr. Owczarek Incurred Because He Attended His Trial.

Defendants have asked the Court to tax one final cost against Plaintiff. Because Dr. Owczarek attended the trial, he missed nine days of work.[158] Defendants have asserted that his insurer, ProAssurance, paid him $500 each day, or $4,500 in total.[159] They have contended that the $4,500 was a "necessarily incurred expense of Dr. Owczarek's presence at trial" because he "necessarily" lost income when attended his trial.[160]

But Defendants produced no evidence that Dr. Owczarek lost $4,500; they claimed that he lost "at least" $4,500 and that his insurer paid $4,500 to him. Defendants' argument was conclusory:

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[155] Defs.' Am. Mot. for Costs ¶ 7.

[156] Defs.' Mot. for Costs, Ex. L.

[157] Pl.'s Opp'n to Defs.' Mot. & Am. Mot. for Costs ¶ 7.

[158] Defs.' Am. Mot. for Costs ¶ 9.

[159] Defs.' Am. Mot. for Costs ¶ 9.

[160] Defs.' Am. Mot. for Costs ¶ 9.

> "[T]he $4,500 amount paid by Dr. Owczarek's insurance carrier is, in fact, much less than he would have earned had he been treating patients and performing surgeries during the 9 days of trial. As Dr. Owczarek necessarily lost income as a result of asserting his rights in court, and the $4,500 offered by his carrier is a fraction of that amount, Dr. Owczarek requests that amount.[161]

The income that Dr. Owczarek might have lost is too speculative for the Court to tax to Plaintiff. Defendants also cited no direct authority that supports their claim. For these reasons, the Court declines to award costs to reimburse Dr. Owczarek for this kind of expense.

For these reasons and because Defendants have substantiated their costs, although Plaintiff contends otherwise,[162] Defendants' amended motion for costs is **GRANTED IN PART** and **DENIED IN PART**: Plaintiff must pay $15,639.02 in costs to Defendants.

V. CONCLUSION

The Court's decision involves a complicated end to a complicated case. The Court was fortunate that counsel for Mr. Baird and for Defendants were good: both before and during the trial, professionalism, civility, and skill characterized the advocacy. Because this decision only discusses counsel's final choices, it does not convey the totality of the Court's experience. For the reasons stated:

1. Defendants' Motion for Sanctions is **DENIED**;

2. Defendants' Motion to Strike Mr. Baird's Affidavit in Support of His Motion for a New Trial is **DENIED AS MOOT**;

3. Plaintiff's Motion for a New Trial is **DENIED**; and

4. Defendants' Amended Motion for Costs is **GRANTED IN PART** and **DENIED IN PART**: the Prothonotary is directed to enter judgment in favor of Defendants Frank R. Owczarek, M.D., Eye Care of Delaware, L.L.C., and Cataract and Laser

[161] Defs.' Reply to Pl.'s Opposition to Defs.' Mot. & Am. Mot. for Costs ¶ 5.

[162] Pl.'s Opp'n to Defs.' Mot. & Am. Mot. for Costs ¶¶ 8–12.

Center, L.L.C. and against Plaintiff Thomas Baird in the amount of $15,639.02.

IT IS SO ORDERED.

Richard R. Cooch

Richard R. Cooch, R.J.

cc: Prothonotary