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Case Number 504,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS BAIRD,	:	
	:	
Plaintiff Below,	:	No. 504,2013
Appellant,	:	
	:	
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 REPLY BRIEF

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INTRODUCTION

Plaintiff-Appellant Thomas Baird ("Appellant") submits this reply brief in further support of his appeal against Defendant-Appellees Frank Owczarek, M.D., Eye Care of Delaware, LLC, and Cataract and Laser Center, LLC (collectively, "Appellees").

Appellees repeatedly mischaracterize the applicable law and facts in their January 17, 2014 Answering Brief ("Ans. Brief"). First, Appellees fail to justify the trial court's abuse of discretion by infecting a medical malpractice action with extensive informed consent evidence, where Appellant had withdrawn his informed consent claim. Neither the trial court nor Appellees offer any adequate rationale for this error, and neither Appellant's trial presentation nor the trial court's purported limiting instruction justify the error.

Second, Appellees do not offer any law to rebut the well-established Delaware rule that trial court judges are obligated to investigate allegations of juror misconduct.

Third, regarding the admissibility of the testimony of the defense expert Steven Siepser, M.D. ("Dr. Siepser"), Appellees ignore that Dr. Siepser was not qualified to analyze Appellant's color corneal topography.

Finally, Appellees claim that this Court is precluded from review of this appeal because of purported deficiencies in Appellant's appendix. However, as a

matter of both law and fact, Appellant has provided the court with a sufficient record on appeal.

Accordingly, the judgment in favor of Appellees should be vacated, and a new trial should be ordered.

ARGUMENT

I. THE INFORMED CONSENT EVIDENCE WAS IRRELEVANT, PREJUDICIAL AND INCLINED TO CONFUSE THE JURY, WHERE APPELLANT ABANDONED HIS CLAIM FOR LACK OF INFORMED CONSENT

A. The Trial Court Erred By Admitting Evidence Concerning Informed Consent

In *Warren v. Imperia*, 252 Ore. App. 272 (Or. Ct. App. 2012), the Court of Appeals of Oregon recently held in a LASIK malpractice case that evidence of informed consent should be precluded where there was no informed consent claim. It explained that "what *plaintiff* was told bears no relationship to what *defendant* should have done." *Id.* at 280 (emphasis in original). Appellees fail to address *Warren* and the other cases cited by Appellant.

Neither the circumstances of this case, nor the trial court's purported limiting instruction, address the compelling rationale of *Warren*. Accordingly, the trial court erred by admitting irrelevant, prejudicial and confusing evidence concerning informed consent.

B. Where The Trial Court Denied Appellant's *Motion In Limine* To Exclude Reference To Informed Consent, Appellant Was Not Required To Raise The Issue Again In His Motion For A New Trial

Appellees do not offer any law to support their argument that Appellant was required to re-raise the issue of the admissibility of evidence of informed consent in his Motion for New Trial. Appellees cite *Culver v. Bennett*, 588 A.2d 1094,

1096 (Del. 1991). *Culver* states simply that "the Court will generally decline to review contentions not raised and not fairly presented to the trial court for decision." *Id.* at 1096. Here, Appellant "fairly presented" the issue of admissibility of evidence of informed consent to the trial court as the subject of a *motion in limine*. *Id.*; Supr. Ct. R. 8. Therefore, Appellant duly preserved the issue for appellate review.

C. Where The Trial Court Ruled That Evidence Of Informed Consent Was Admissible, Appellees Cannot Claim That Appellant "Opened The Door" By Referring To The Evidence At Trial

Appellees argue that they were entitled to introduce evidence of informed Consent because Appellant "opened the door" by referring to informed consent forms at trial. This argument is inconsistent with the record. In Delaware, the doctrine of "opening the door" is as "an exception to the inadmissibility of evidence […] when the injured party raises the issue during his or her direct examination." *James v. Glazer*, 570 A.2d 1150, 1155 (Del. 1990). "Put simply, 'opening the door' is a way of saying one party has injected an issue into the case, and the other party should be able to introduce evidence to explain its view of that issue." *Smith v. State*, 913 A.2d 1137, 1139 (Del. 2006).

Unlike the Plaintiffs in *Liscio v. Pinson*, 83 P.3d 1149 (Col Ct. App. 2003), *cert. denied*, 2004 WL 233309 (Colo. Feb 9, 2004), upon which Appellees rely, Appellant moved to exclude reference to informed consent. The trial court denied

Appellant's motion. Therefore, again unlike the Plaintiffs in *Liscio*, Appellant's references to informed consent were not tactical, but instead arose from the need to minimize the negative effect of prejudicial evidence. By virtue of its denial of Appellant's *motion in limine*, it was the trial court, not Appellant, which injected the issue of informed consent into the case. Accordingly, Appellees incorrectly assert that Appellant "opened the door."

D. The Trial Court's Limiting Instruction Was Inadequate To Cure The Prejudice To Appellant Of The Introduction Into Evidence Of Reference To Informed Consent

Appellees argue that the trial court's limiting instruction was sufficient to cure the prejudice to the appellant resulting from the introduction of informed consent evidence. Appellees are mistaken.

State Farm Mut. Auto. Ins. Co. v. Enrique, 2010 Del. LEXIS 440, at *8 (Del. 2010), upon which Appellees rely, is inapposite. In *State Farm*, the trial court admitted photographic evidence of a car accident to demonstrate to the jury the relevant, although expressly conceded, elements of causation and fact of the plaintiff's injuries. Here, by contrast, reference to informed consent is wholly irrelevant and has no bearing whatsoever on any claim or defense. Where the evidence is very prejudicial, and completely irrelevant, the prejudice is so "egregious" that the curative instruction must be "deemed insufficient to cure the prejudice" to Appellant. *Id.*

II. THE TRIAL COURT'S REFUSAL TO INVESTIGATE ALLEGATIONS OF JURY MISCONDUCT REQUIRES VACATUR AND RETRIAL

Appellees perpetuate the trial court's error by criticizing Appellant for not making an adequate showing of identifiable prejudice resulting from juror misconduct. The only reason that there is no such showing is because the trial court was not willing to interview Juror No. 6. Moreover, Appellant's counsel was precluded by the court and by court rule from interviewing Juror No. 6, although permission to do so was sought from the court.

Appellees' claim of taint is equally misplaced. Juror No. 6 contacted the trial court with her allegations prior to any contact with Appellant. Absent a judicial hearing with Juror No. 6, there is no basis to speculate that Appellant tainted Juror No. 6's claim of juror misconduct.

Appellees' distinction of *U.S. v. Resko*, 3 F.3d 684 (3d Cir. 1993), is unavailing. Appellant cited *Resko* not on the issue of timing of juror misconduct, but rather for the proposition that, when there is an allegation of misconduct, it is the court's obligation to investigate. More importantly, Appellees fail to explain how it was not an abuse of discretion for the lower court to have refused to investigate the allegations of juror misconduct, in view of this Court's decision in *Black v. State*, 3 A.3d 218, 221 (Del. 2010). Any perceived defect in Appellant's proof of jury misconduct is undermined by the trial court's refusal to conduct any

investigation. Consequently, this Court's precedent mandates vacatur of the judgment and a retrial.

III. DR. SIEPSER'S ADMITTED INCOMPETENCE NECESSITATED THE PRECLUSION OF HIS TESTIMONY

Apart from the purported "constellation" of factors that inform a doctor's decision to perform LASIK enhancement surgery (A-100-102; A-107; A-115-116; A-556-559; A-574-575; A-581; A-602-611; A-676; A-703-706), the parties' experts agree that the most important evidence is the patient's color corneal topography. A-57; A-145. Dr. Siepser admitted that he could not read or interpret the topography. A-107; A-120. Properly, Dr. Siepser's testimony should have been precluded.

Porter v. Turner, 954 A.2d 308, 313-14 (Del. 2008), upon which Appellees rely, is inapposite. In *Porter*, this Court held that an expert economist's failure to include earnings from a "side job" in his projections of plaintiff's lost income created doubt about the "accuracy of his assumptions." *Id.* at 314. By contrast, a medical expert "may not be permitted to 'hide behind' [an] allegedly reliable" methodology. *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 796 (Del. 2006).

To leave Appellant to muddle through cross examination where an expert concedes lack of knowledge on the most important issue constitutes an abuse of discretion. *M.G. Bancocorporation, Inc. v. LeBeau*, 737 A.2d 513, 523 (Del.

1999). Appellees do not and cannot explain how it is justified for an expert who cannot opine on the central issue to offer his musings about everything else.

IV. THE RECORD IS SUFFICIENT

A. As A Matter Of Law, Appellant Is Not Required To Provide The Entire Record On Appeal

Appellees erroneously state that "[w]here the appellant fails to include all portions of the record relevant to the claims on appeal, this Court is precluded from undergoing appellate review and must affirm the lower court's ruling. *Trioche v. State*, 525 A.2d 151, 154 (Del. 1987); Supr. Ct. R. 9(e)(ii) and 14(e)." Ans. Brief, p. 15 (citations in original). In *Trioche,* this court held that appellants must provide "such portions of the trial transcripts as are necessary to give [the] Court a fair and accurate account of the context in which the error occurred." *Trioche,* 525 A.2d at 154. Therefore, contrary to Appellees' assertion, Appellant did not err by omitting Defendants' Responses to Plaintiff's Motions in Limine, as those briefs do not comprise relevant portions of the trial transcripts.

B. As A Matter Of Law, Appellees May Supplement The Appendix

Appellees further allege that Appellant impermissibly excluded a number of portions of the record that Appellees deem "necessary to consider the context of the claimed error." Ans. Brief, p. 15. Appellant's appendix included "such portions of the trial transcripts as are necessary to give the Court a fair and accurate account of the context in which the error occurred." *Trioche,* 525 A.2d at 154. To the extent that Appellees intend to rely upon additional portions of the record in

their opposition, they are permitted to supplement the record before the court with "such other parts of the record material to the questions presented as [they wish] the Justices to read." Supr. Ct. R. 14(e).

C. As A Matter Of Fact, Appellant Supplemented His Appendix To Include Relevant Portions Of The Record

Appellees argue that Appellant failed to include the hearing transcript of oral argument of June 11, 2013. Therefore, Appellees contend that Appellant should be precluded from appellate review of his claim for jury misconduct. However, as Appellant's counsel explained to this Court by letter dated January 23, 2014, Appellant intended to include the hearing transcript in his appendix. The transcript was cited in Appellant's opening brief and listed the table of contents to Appellant's appendix. An electronic filing error caused the pages to be omitted from the final appendix presented to this Court and to the parties. Consequently, on January 28, 2014, this Court granted Appellant leave to supplement his appendix with the missing transcript portions. Therefore, Appellees' argument on this point has been rejected and rendered moot.

D. As A Matter Of Fact, Appellant Is Not Required To Provide Portions Of The Record That Relate Solely To Appellees' Motion For Sanctions

Appellees argue that Appellant should be precluded from appellate review of

his claim for jury misconduct for failing to include in the record the following documents:

1. Defendants' Letter to the Hon. Richard R. Cooch Opposing Plaintiff's Request to Respond to Juror No. 6's Phone Call (D.I. 127) (B074);
2. Clocked-in Copy of letter from Juror No. 6 to the Hon. Richard R. Cooch dated April 23, 2013 and EFiled on April 30, 2013 (D.I. 133) (B075-077);
3. Defendants' Opposition to Plaintiff's Motion for New Trial and Motion for Sanctions (D.I. 135) (B078-083);
4. Defendants' Motion to Strike Plaintiff's Affidavit in Support of Plaintiff's Motion for New Trial (D.I. 137) (B084-087);
5. Defendants' Motion for Sanctions (D.I. 138) (B088-091);
6. Plaintiff's Preliminary Response to Defendants' Motion for Sanctions (D.I. 139) (B092-093);
7. Letter from the Hon. Richard R. Cooch to counsel dated May 20, 2013 addressing pending motions and requesting information from Plaintiff as to how Plaintiff obtained the telephone number of Juror Number 6 and who prepared the affidavit filed in connection with Plaintiff's Motion for New Trial (D.I. 141) (B094-095);
8. Plaintiff's Response to Defendants' Motion for Sanctions (D.I. 142) (B096-099);
9. Plaintiff's Opposition to Defendants' Motion to Strike Plaintiff's Affidavit in Support of Plaintiff's Motion for New Trial (D.I. 143) (B100-102);
10. Defendants' Letter to the Hon. Richard R. Cooch dated May 29, 2013 Opposing Plaintiff's Request to Summon Juror No. 6 to hearing on June 11, 2013 (D.I. 145) (B103-104);
11. Letter from the Hon. Richard R. Cooch to counsel dated May 31, 2013 refusing to summon Juror No. 6 at hearing on June 11, 2013 (D.I. 146, 149) (B105);
12. Defendants' Reply to Plaintiff's Response to Defendants' Motion for Sanctions (D.I. 147) (B106-111);
13. Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Strike Plaintiff's Affidavit in Support of Plaintiff's Motion for New Trial (D.I. 148) (B112-115);
14. Reply Affidavit of Thomas Baird (D.I. 151) (B117);

[…]

16. Clerk's Judicial Action for Oral Argument held on June 11, 2013 (D.I. 152) (B117); and
17. Letter from Cooch, J., to counsel dated 7-25-13, advising counsel that the court has decided to resolve the pending motions with rulings (D.I. 154) (B118)

Ans. Brief, pp. 22-23.

Appellant is not required to include the above-listed portions of the record. First, the documents do not constitute "such portions of the trial transcripts as are necessary to give this Court a fair and accurate account of the context in which the error occurred." *Trioche*, 525 A.2d at 154. Second, the listed items actually relate to Appellees' motion for sanctions, which is not the subject of this appeal. Therefore, the items are irrelevant and do not bear upon Appellant's claim of jury misconduct.

CONCLUSION

WHEREFORE, for the foregoing reasons and the reasons set forth in Plaintiff's initial brief, the judgment in favor of Appellees should be vacated, and the case remanded to the Superior Court for retrial.

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