PUBLIC VERSION

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

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INTRODUCTION

Defendant-Appellant Infectious Disease Associates, P.A. ("IDA") submits this Reply Brief in further support of its appeal against Plaintiff-Appellee [redacted] ("Mr. [redacted]").[1]

Mr. [redacted] misstates the applicable law in his Answering Brief, ("Ans. Br."). First, he fails to address the trial court's legal error in denying IDA's Motions for Judgment as a Matter of Law, when Mr. [redacted] had no medical expert testimony, no evidence of disclosure of his personal health information to any employee at Bell Supply Company ("BSC"), and no evidence of a non-transitory physical manifestation of his emotional distress. Neither the trial court nor Mr. [redacted] offer an adequate rationale for this error, and neither Appellee's trial testimony nor that of fact witnesses create a material fact in dispute justifying submission of his claims to the jury.

Second, Mr. [redacted] does not address the well-settled precedent in Delaware requiring expert testimony to prove causation and evidence of a non-transitory or recurring physical manifestation of purported emotional distress to make a *prima facie* case for negligent infliction of emotional distress. Appellee's reliance on decisional law addressing an **intentional** infliction of emotional distress is

[1] There is no Order or Stipulation to use a pseudonym for Appellee per Supr. Ct. Civ. R. 7(d). However, given the sensitive nature of the subject matter, Appellee's name and personal identifying information, is redacted in the public version consistent with Supr. Ct. Civ. R. 10.2 (9).

inapposite since that cause of action was not pled or properly before the jury. Any one of these three legal errors compel this Court set aside the jury's verdict and enter judgment in favor of IDA.

Third, regarding the admissibility of Mr. [redacted] sworn deposition testimony to impeach his credibility, Appellee ignores that his credibility was the central issue in this case and the only foundation for many elements of his claims. As such, admission of this evidence constituted reversible error.

Finally, Appellee's claim that evidence of the unemployment decision was relevant and admissible ignores his statements on the record acknowledging that the eligibility determination involved a different standard of review, and thus the propensity to confuse the jury and prejudice IDA. The admission of evidence suggesting he received unemployment for "wrongful termination" when the Delaware Department of Labor used a different standard and without regard to his [redacted] inappropriately shifted the burden of proof on IDA who had no ability to bring these facts to light. Appellant objected to this evidence and related rulings, the totality of which deprived IDA of a fair trial.

COUNTERSTATEMENT OF FACTS

Mr. [redacted] claims he signed and dated the medical release form required by [redacted] on March 6, 2013. (Ans. Br. At 5)(A1242 – 45). However, the form is dated by Mr. [redacted] and his case manager for "5/4/12". (A0034).

Mr. [redacted] does not dispute that as a result of his life experiences, he suffered from [redacted], and a [redacted] unrelated to and pre-existing the March 6, 2013 fax. (A1435, A1447 – 62). Rather, he cites to his daughter's testimony that "he sounded distraught and was shaking" when he called her on the phone on March 6, 2013 (A1479) although Mr. [redacted] testified that he did not "really get emotional about it until my daughter came over." (A1254). He also relies on his daughter's nonspecific conclusory statement that he lost weight which was not corroborated by any medical or fact witness nor connected to the incident in question as opposed to his underlying [redacted]. He ignores the fact that no BSC employee gave testimony at trial to substantiate a change in his emotional or mental state after March 6, 2013. *See, e.g.* (A1540, A1566, A1573).

Trial Testimony

Mr. [redacted] testified that Mr. Kursh stormed into his office and "yelled" at him the morning of July 26th (Friday). (A1277). Mr. Kursh did not recall that. (A1756). His coworkers testified Plaintiff called them to a meeting in his office July 29th (Monday) that was "confrontational". (A1574, A1540-41, A1691, A1706, A1721, A724-25, A1756, A1766). Mr. [redacted] actionable conduct occurred later that day (and not earlier as Plaintiff suggests in his answering brief), when he approached Mr. Kursh in his office. *Compare* (Ans. Br. at 8) *with* (A1692-93, A1705, A1726-27, A1771-72, A1784-85). While this interaction between Mr. Kursh and Mr. [redacted] was the impetus for the firing, there was also testimony of ongoing concerns with his teamwork and getting a full forty hour work week from him which dated back two years earlier. (A1712-A1718, A1755-58, A1764).

Contrary to Mr. [redacted] assertion, Dr. [redacted] did not attest to observing anxiety, depression, crying, shaking, and "a dramatic weight loss" when she saw Mr. [redacted] two days after the fax was sent. (Ans. Br. at 13-14). On, the contrary, she observed Mr. [redacted] to be "more restless, more anxious" and "[t]here was some crying part of the session." (A1439). There is likewise, no record to support that [redacted] is a "much stronger medication". (Ans. Br. at 7). Moreover, Mr. [redacted] fails to address his routine use of that drug during his treatment with his [redacted]

[redacted], [redacted] in the years leading up to the fax. (A0095, A0099, A0106, A0111, and A0116).

IDA's Conduct

Mr. [redacted] also claims that the IDA office manager, Lori Crimian, admitted employees received no training on handling personal health information ("PHI"). (Ans. Br. at 7-8). On the contrary, Mrs. Crimian testified that she had no personal knowledge of that training, which was completed by the time she was hired, and she personally observed the proper handling of PHI daily by the employees she supervised. (A1614-15, and A1583). Furthermore, Sherrie Saponaro, the individual who sent the fax, testified she was aware of the need to protect a patient's PHI (A1642-43), including PHI contained in thousands of faxes from [redacted] that came in (A1661-62), and were sent out using the fax number provided on the cover sheet (A1648) without incident (A1649). While IDA admitted that the fax was intended for [redacted] but sent to Mr. [redacted] employer, it never admitted that it disclosed his confidential protected health information, resulted in his termination or caused his damages. (Ans. Br. at 7, 16-17; A0037-39).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED IDA'S MOTIONS FOR JUDGMENT AS A MATTER OF LAW WHERE THERE WAS NO COMPETENT EVIDENCE OF DISCLOSURE, PHYSICAL MANIFESTATION OF INJURY, AND EXPERT TESTIMONY CAUSALLY LINKING IT TO IDA'S CONDUCT.

A. Mr. [redacted] perception that his co-workers knew his [redacted] was subjective and insufficient to create a material fact in dispute on the issue of disclosure.

Plaintiff fails to cite to any portion of the record to support an objective basis that his medical condition was disclosed as a result of the March 6, 2013 fax transmission.[2] Contrary to Mr. [redacted] representation, the fax in question has [redacted] initials, "[redacted]", on the first page. (A0033). Carolyn Teoli, the receptionist at BSC, testified that she could discern Mr. [redacted] name from the cover page. (A1538-39). She also testified that Mr. [redacted] initials, "[redacted]", were apparent from the cover page and that there were no other employees at BSC with those initials. (A1539). Thus, Mrs. Teoli would not need to turn over the cover page to identify the fax recipient. (A1539). Plaintiff fails to cite to any portion of the record to support an objective basis that his medical condition was disclosed as a result of the March 6, 2013 fax transmission.[2]

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[2] In the absence of any disclosure, Mr. [redacted] has no objective reasonable fear that his co-workers knew his [redacted]. *See Exxon Mobil Corp. v. Ford*, 40 A.3d 514, 547 (Md.App. 2012) ("There can be no compensation for fear or anxiety that is objectively unreasonable."); *see also Exxon Mobil Corp. v. Ford,* 71 A.3d 105,

Mr. [redacted], in an attempt to show some objective evidence of disclosure, testified that he only started to notice Mrs. Teoli's use of disinfectant on her phone **after** the fax was sent. (A1273). However, when Mr. [redacted] first noticed this is irrelevant and does not constituted adequate objective evidence that she knew about his [redacted]. The uncontroverted evidence adduced at trial was that she had been using disinfectant at her work area for years before the fax transmission. (A1536, A1569). Likewise, this was a long-standing practice by many BSC employees given the nature of its business. *See, e.g.* A1570. Mr. [redacted] perception of events is subjective and his beliefs and speculation are inadequate, as a matter of law, to allow presentation of this issue to the jury.

B. Mr. [redacted] provided no competent evidence of a demonstrable physical manifestation of injury and therefore, submission of this issue to the jury constituted reversible error.

Mr. [redacted] fails to address the prevailing case law in Delaware interpreting the burden of proof to make a *prima facie* showing for the *negligent* infliction of emotional distress. He does not claim any recurring or non-transitory symptoms as a result of the fax. Rather, he argues he made an adequate showing based on lay witness observations relying on (1) a case addressing emotional distress caused by an insurer's purported bad faith refusal to pay for treatment of testicular pain; and (2) a portion of a Maryland decision that was subsequently reversed on appeal.

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129 (Md. 2013)("[i]n the absence of any exposure, there can be no objective reasonable fear of cancer").

Mr. [redacted] argument is that an occurrence such as anxiety, depression, shaking, crying, nausea or weight loss satisfies his burden of proof. However, such an assertion is factually flawed and contrary to well-settled precedent. First, [redacted] and [redacted] were permanent, recurring phenomena well before the conduct at issue in this case. (A1322-24, A1435-37, A1451-52, A1458). Second, although there was testimony that he lost weight, Mr. [redacted] fails to cite to any evidence in the record that demonstrates it was due to IDA's conduct. Third, Mr. [redacted] relies on Dr. [redacted] testimony that he had nausea when she first saw him two days post-fax. (Ans. Br. at 14). The record does not support that. Fourth, Delaware courts routinely hold that the same or similar temporary phenomena do not rise to the level of recoverable physical injuries. *See, e.g., Doe v. Wildey*, 2012 WL 1408879, at *7 (Del. Super. Mar. 29, 2012)(finding nausea, embarrassment, fear, shame and anger were transitory non-recurring physical phenomena and not recoverable physical injuries); *Cooke v. Pizza Hut, Inc.*, 1994 WL 680051, at *3 (Del. Super. Oct. 3, 1994)(discussing how nausea and rage are transitory, non-recurring physical phenomena and "fall within the category of emotional disturbances which are not recognized as physical illnesses"); *Collins v. African Methodist Episcopal Zion Church*, 2006 WL 1579718, at *4 (Del. Super. Mar. 31, 2006)(where the physical phenomena accompanying are transitory and non-recurring they insufficient physical injury to recover for negligent infliction of

emotional distress). Because Plaintiff failed to adduce evidence of a cognizable injury and failed to present sufficient evidence of his pre-fax health to allow the jury to compare it with his post-fax health, this Court should set aside the verdict, and enter judgment in favor of IDA. *Lupo v. Medical Ctr. of Delaware, Inc.*, 1996 WL 111132, at *2 (Del. Super. Feb.7, 1996)(citing *Garrison v. Medical Ctr. of Del., Inc.*, 581 A.2d 288, 293 (Del. 1989); *McKnight v. Voshell,* 1986 WL 17360 (Del. Aug. 6, 1986) (Order); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Robb v. Pennsylvania R.R. Co.*, 210 A.2d 709 (Del. 1965). For the same reasons, the failure to instruct the jury on the proper standard of recovery for this cause of action is clear, prejudicial error warranting a new trial.

C. The absence of expert testimony causally linking an injury to IDA's conduct constitutes a complete failure of proof on Plaintiff's claims, as a matter of law.

Plaintiff does not dispute that he had multiple [redacted] and [redacted] that required [redacted] and medication management well before the March 6, 2013 fax transmission. (A1435, A1447 - 62). Thus, the complicated medical facts of this case necessitated medical expert testimony causally linking any emotional distress to IDA's conduct separate and distinct from a number of unrelated factors that contribute to his mental and emotional condition. *See Wildey*, 2012 WL 1408879 at *7 (finding that "the existence of emotional harm and its cause is a matter based on specialized knowledge better suited for expert

testimony" and necessary to prove intentional infliction of emotional distress and contemporaneous mental anguish arising from sexual abuse). This is particularly true when other events or conditions (such as Mr. [redacted] unilateral decision five weeks earlier to go off his [redacted] without consulting any physician) could explain some or all of these phenomena. (A1459-60, A1467-68)[3]; *Collins*, 2006 WL 1579718, at *4-6 (where plaintiff had a pre-existing medical condition and her alleged physical injuries could have been caused by a prior occurrence, a medical expert is necessary to establish the causal nexus for negligent infliction of emotional distress).[4]

Mr. [redacted] fails to address any of the cases cited by Appellant with the exception of *Wildey*. However, Plaintiff misinterprets that decision. He cites to *Doe v. Wildey*, 2012 WL 1408879 (Del. Super. Mar. 29, 2012) and *Tekstrom, Inc. v. Salva*, 2006 WL 2338050 (Del. Super. July 31, 2006) for the proposition that no expert testimony was required to prove causation. These cases do not support that contention. *Wildey*, 2012 WL 1408879, at *7-8 (rejecting "Plaintiffs conten[tion]

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[3] Mr. [redacted] record demonstrated he elected to unilaterally stop various medications recommended by his physicians. *See, e.g.* (A1457 – 58) ([redacted]), (A1459 – A1460) ([redacted]), and (A0146) ([redacted], [redacted] and [redacted]).

[4] *See also Kazatsky v. King David Memorial Park*, 527 A.2d 988, 995 (Pa. 1987)(competent medical evidence necessary to support recovery for emotional distress); *see generally Exxon Mobil Corp.*, 40 A.3d at 547 ("[t]here can be no compensation for fear or anxiety that is objectively unreasonable" which is why the law requires "reliable medical or scientific evidence" on causation).

that expert testimony is not necessary to assert a claim of intentional infliction of emotional distress." *Id.* at 4). On the contrary, the *Wildey* Court held that plaintiffs could not make a *prima facie* case for contemporaneous mental anguish absent expert medical testimony causally linking an injury to the alleged sexual abuse. *Id.* at * 8. ("Even if Plaintiffs alleged recoverable physical injuries, medical expert testimony would be necessary to show Defendant's actions proximately caused those injuries").

Mr. [redacted] reliance on Dr. [redacted] prescription of [redacted] and reintroduction of [redacted] to prove his emotional distress claim is precisely why expert testimony was required. *Wildey*, at *5 (noting that "[i]njuries such as nightmares, anxiety, headaches, stomach aches, nausea, and flashbacks require medical testimony to establish that those injuries derive from defendants' actions"). Because there are multiple explanations for Plaintiff's injuries and no expert testimony attributing them to Defendant's conduct as opposed to something else, Plaintiff's claim for emotional distress fails as a matter of law.

Mr. [redacted] relies on *Devaney v. Nationwide Mut. Ins. Co.*, 679 A.2d 71 (Del. 1996) to support his contention that the prescription of medication is sufficient to recover damages for emotional distress. However, this is misplaced in several respects. First, *Devaney* involved a disabling medical injury confirmed by a medical expert. *Devaney*, 679 at 72 and 77. Unlike this case, there was no record

to suggest any other possible cause for his pain and suffering. *Id.* at 73 and 77. Second, the Court did not address the proposition Plaintiff is attempting to argue here. *Id.* at 77. (finding the continued presence of testicular pain two years after an auto accident sufficient physical manifestation to pursue a claim for emotional distress at trial). Thus *Devaney* is inapposite.

Plaintiff also ignores the fact here that Dr. [redacted] did not testify as an expert and offered no testimony to link any treatment with IDA's conduct. Further, he fails to address the fact that she prescribed [redacted] at the same dose and a similar [redacted] to [redacted] prior to the alleged disclosure. (A1452, A1462-64). Therefore, Plaintiff was on a nearly identical medication regime before the fax transmission occurred.

Plaintiff cites to another factually distinguishable intermediate appellate case from Maryland for "three relevant generalizations regarding physical manifestation." Ans. Br. at 14-15 (discussing *Exxon Mobil v. Ford*, 40 A.3d 514 (Md. App. 2012) (hereinafter referred to as "*Exxon I*"). More importantly, the Maryland Court of Appeals (the state's highest appellate court) reversed the exact portion of the case cited by Plaintiff from the intermediate court. *Exxon Mobil Corp. v. Ford*, 71 A.3d at 127-132 (hereinafter referred to as "*Exxon II*") (finding "none of the [r]espondents' evidence or testimony provided sufficient manifestation of physical injury as a matter of law." *Id.* at 131). Instructive to this

Court's review, that appellate Court found that the proffer of expert testimony from a psychiatrist who related new psychological diagnoses to the defendant's conduct inadequate, as a matter of law, to permit recovery for emotional distress. *Exxon II* at 114 and 131-132. Here, there was no expert testimony by Mr. [redacted] psychiatrist and her diagnosis of Mr. [redacted] psychological and mental conditions did not change after the fax transmission. (A1462). Similar to the testimony discredited in *Exxon*, Dr. [redacted] testimony was based on "self-reported information" from Mr. [redacted] and did not include an evaluation of his complicated medical history or any contact with his medical providers. *Exxon II* at 129; (A1438-40). Despite her focus on medication management she could not speak to the duration, indications or dosage of her patient's prior treatment with [redacted], concurrent treatment with [redacted] or the specifics of Mr. [redacted] use through her office. *Compare* (A1447 – 49, A1460 – 61) *with* (A0100-A0103, A0114, A0122, A0127, A0131, A0133, A0135, A0136, A0140, A0142)(prescriptions by Dr. [redacted] for [redacted]) *and* (A0095, A0099, A0106, A0111, and A0116)(prescriptions by Dr. [redacted] for [redacted] and [redacted] to treat [redacted]). Thus, her fact testimony that she prescribed [redacted] was insufficient, as a matter of law, to demonstrate a cognizable injury and the Court's denial of IDA's *in limine* ruling was erroneous.

D. Testimony by IDA employees is immaterial to Plaintiff's burden of proof on causation and damages when they lacked the requisite knowledge of a disclosure or a compensable injury.

Mr. [redacted] urges this Court to treat IDA's generalized conciliatory statements and compliance with its notice obligations under federal law as evidence of Mr. [redacted] emotional distress. However, the contrition of Sherrie Saponaro and his treating [redacted] doctor, (Dr. [redacted]) is irrelevant to Plaintiff's burden of proof of a cognizable injury for recovering emotional distress. While Plaintiff posits that Mrs. Saponaro testified that "she thought he would lose his job", Mrs. Saponaro merely responded to direct questioning on cross-examination that she was concerned it could effect his employment. (Ans. Br. at 13)(A1666). Neither Mrs. Saponaro nor Dr. [redacted] had knowledge to establish an actual disclosure or Plaintiff's emotional distress. (A1811, A1814, A1825). Assuming such evidence was relevant it is inadmissible to demonstrate liability pursuant to Delaware's apology statute, 10 *Del. C.* § 4318(b).

E. "Outrageous" conduct is an improper standard when there is no cause of action for intentional emotional distress.

No cause of action for intentional infliction of emotional distress was pled in this case. (A0027-32); *see generally Tekstrom*, 2006 WL 2338050 at *1 ("Salva cross-appealed alleging a variety of wrongful employment practices, including . . . intentional infliction of emotional distress . . . "), *aff'd*, 918 A.2d 1171 (Del. 2007)(TABLE)("Delaware is a notice pleading jurisdiction")(citing

Doe v. Cahill, 884 A.2d 451, 458 (Del. 2005)).[6] Thus, whether or not IDA's conduct was outrageous is irrelevant to this appeal. Therefore, any cases citing to outrageous conduct to prove emotional distress are inapposite to this action.

II. THE TRIAL COURT ERRED WHEN IT DID NOT PERMIT IDA TO IMPEACH PLAINTIFF WITH HIS PRIOR STATEMENTS DIRECTLY RELEVANT TO HIS CREDIBILITY.

Mr. [redacted] states in conclusory fashion that the inconsistent sworn statements given by him at his deposition are irrelevant and unduly prejudicial without addressing the arguments raised by IDA. More importantly, Mr. [redacted] fails to address the central point – that the fact that he lied under oath (and not the fact that he used [redacted]) is relevant to causation, disclosure and damages because it supports IDA's defense that Mr. [redacted] version of events is unreliable and cannot be a credible basis for showing that BSC was aware of his medical condition, fired him as a result, and caused him severe emotional distress to such a degree that he was unable to locate other gainful employment. Even if the use of Mr. [redacted] deposition testimony to impeach his credibility was prejudicial, neither the Court nor Mr. [redacted] addressed the propriety of a limiting instruction, which could have addressed both parties' concerns. (A1343); *Register v. Wilmington Med. Ctr.*, 377 A.2d 8, 10 (Del. 1997); *State Farm Mut. Auto Ins. Co. v. Enrique*, 2010 WL 3448534, at * 3 (Del. Sept. 3, 2010). As Plaintiff's entire case turned on his credibility, the trial court deprived IDA of a fair trial when it limited its cross-examination on his credibility.

Mr. [redacted] does not dispute that he made inconsistent statements at his

deposition and in the treatment records of Dr. [redacted] and Dr. [redacted]. (Ans. Br. at 18-19).[5] That Mr. [redacted] use had no connection to his job performance, the reason for his termination, or his emotional health, does not render the fact that he lied under oath irrelevant, as such evidence would have permitted the jury to evaluate his credibility, his version of why he was fired, and his claimed damages. D.R.E. 401, 402 and 403. Because his inconsistent testimony under oath undermined his credibility "in a case . . . that turn[ed] on credibility" (A1958), it was material to IDA's defense, and should have been considered by the ultimate fact finder.

[5] *See also* A0123-A0124 (counseled by [redacted], M.D. to stop [redacted] and to avoid [redacted]).

III. UNEMPLOYMENT EVIDENCE, HEARSAY, AND TESTIMONY ABOUT INSURANCE RENEWAL FORMS AND PURPORTED CRIMINAL CONDUCT OF TWO FORMER BSC EMPLOYEES WAS IRRELEVANT, PREJUDICIAL AND INCLINED TO CONFUSE THE JURY ON THE ULTIMATE FACTS IN DISPUTE.

As an initial matter, IDA should not be faulted for failing to seek an *in limine* order before trial for routine evidentiary issues. *See, e.g.,* (A1262-62, A1702)(objecting to direct testimony by Mr. [redacted] that Mr. Connor asked him to disclose his personal health information their group healthcare insurance by way of a group healthcare plan form per D.R.E. 401 and 403 when the last coverage renewal for Mr. [redacted] would have occurred twelve or thirteen months before he was fired);(A1277-80, A1842)(objecting to hearsay attributed to Mr. Kursh); (A1282-85) (objecting to hearsay attributed to Mr. Conner); (A1696-A1700)(objecting to direct of Mr. Connor about Matt Teoli and Bob Thompson per D.R.E. 401 and 403 because Mr. Connor did not fire either individual, Bob Thompson worked at BSC before Mr. Kursh took over the company, and there was no evidence or testimony substantiating any theft by Matt Teoli); (A1767-69)(objecting to leading questions during direct of Mr. Kursh); (A1786- 89, A1792-98)(objecting to redirect of Mr. Kursh about the unemployment decision as beyond the scope of cross, irrelevant and unduly prejudicial); and (A1792- 98)(foundational objection to further redirect of Mr. Kursh on qualification decision). Moreover, as IDA argued its points on the

relevance and improper burden shifting and different legal standards concomitant with argument on unemployment evidence (A1084) and a HIPPA "breach", it did not waive this point. (Ex. A at 5-7, A0811-25, A0961-A1008).

Plaintiff does not argue that statements Mr. [redacted] attributed to his superiors were non-hearsay or admissible under an exception.[6] Nor does he address *any* of the cases cited by IDA on the unemployment issue. The sole purpose of testimony, argument and publication of this evidence was to emphasize to the jury "that he was not terminated for just cause." (A1797, A1787). BSC's inability to carry a burden at the DDOL is fundamentally different than Plaintiff's ability to meet his burden of proof against IDA. Allowing the jury to compare Mr. [redacted] employment relationship to that of two former BSC employees who were not proffered at trial on the basis of their purported misconduct and use that against IDA to demonstrate it caused his economic injury in this case is clear prejudicial error. This prejudice was compounded by unsubstantiated hearsay from Mr. [redacted] during cross-examination about a conversation with a DDOL employee about the fax and his [redacted]. (A1363-64). Thus, this Court should vacate the judgment, and remand this case with instructions to exclude such collateral evidence at the new trial.

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[6] For example, Mr. [redacted] testified that Mr. Kursh "stormed into his office" and "yelled" at him at least seven different times (A1277, A1279, A1281-82, A1288 and A1351).

CONCLUSION

The Court erred in denying IDA's Motion for Summary Judgment, Motion for Judgment as a Matter of Law, and Renewed Motion for Judgement as a Matter of Law or in the alternative, Motion for New Trial with respect to disclosure of Mr. [redacted] medical condition and the emotional distress damages entered in Plaintiff's favor. This Court should reverse the verdict and enter judgement in IDA's favor. Alternatively, the Superior Court's admission of irrelevant and unduly prejudicial testimony and hearsay evidence about the unemployment proceedings and BSC's treatment of other employees and Mr. [redacted] as well as its exclusion of evidence that Mr. [redacted] lied under oath significantly prejudiced IDA, and this court should reverse this matter and remand this case with instructions allowing IDA to impeach Mr. [redacted] with his sworn deposition testimony and excluding any reference to the unemployment qualification decision at the new trial.

Respectfully submitted,

BY: */s/ Lauren C. McConnell*

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