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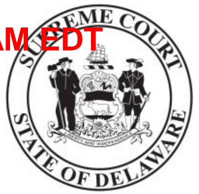

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

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

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

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Dated: 10/28/16

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ARGUMENT

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

The content and tone of Ms. McLeod's Answering Brief is perhaps the best argument supporting Dr. Swier's basis for concern with the closing argument at issue. It is not an effort to persuade based on fact but on prejudicial rhetoric. She argues repeatedly that Dr. Swier's "outrageous conduct" somehow permits improper argument. Indeed, Ms. McLeod makes little attempt to defend her closing argument and, instead, suggests that her statements were not inflammatory. Nor does she really address the three factors in *Hughes v. State,* 437 A.2d 559 (Del. 1981), which Dr. Swier submits weigh in favor of reversal. And, she agrees that claims related to consideration of surgery for the right leg were not at issue, that the trial judge agreed that the phrase "enough is enough" was improper but permitted her to utter those same words a second time, and that she admitted to the trial judge that her argument was improper (A1606). Dr. Swier submits that this Court should reject Ms. McLeod's continuing effort to use repeated attacks on Dr. Swier's character as support for her highly improper closing remarks and should reverse the verdict so that Dr. Swier receives a fair trial with an unbiased jury,

something that he should have received but did not in view of Ms. McLeod's closing argument.

Ms. McLeod spends a significant amount of time discussing the facts leading to Ms. McLeod's care with Dr. Swier, as well as his treatment of her. (Answering Brief at 7-14) While Ms. McLeod was certainly free to argue from the evidence that Dr. Swier was negligent, Ms. McLeod could not argue that he acted outrageously (which is an element of an intentional or reckless tort) or deserved to be punished, nor should that have been an issue, as it was never pled or raised at any point before closing argument, thereby depriving Dr. Swier of proper notice.[1] (A1-A10, A25-A59, A66-A80, A1402-A1402, A1433); Super. Ct. Civ. R. 16(e) (pretrial order "shall control the subsequent course of the action unless modified by a subsequent order"); *Alexander v. Cahill*, 829 A.2d 117, 129 (Del. 2003) (failure to raise issue pretrial precludes party from raising issue for first time at trial); *Gannett Co. v. Bd. of Managers of the Delaware Criminal Justice Info. Sys.*, 840 A.2d 1232, 1238 (Del. 2003) (pretrial stipulation controls issues to be addressed at trial). Likewise, Ms. McLeod's focus on Dr. Swier's consideration of doing surgery on her right leg -- and any issues related to that -- was improper, since the

[1] If the evidence was as clear as Ms. McLeod suggests, why was there a need to resort to the repeated inflammatory and prejudicial rhetoric in the first place?

only allegation related to the left leg.[2] Arguing over and over, and for the first time in closing argument, that Dr. Swier acted "outrageously" significantly prejudiced Dr. Swier, as the argument shifted improperly the entire focus of the case from the medical negligence issue, warranting a new trial. *DeAngelis v. Harrison,* 628 A.2d 77, 81 (Del. 1993) (argument that attempts to shift jury focus away from plaintiff's injury and loss creates "a serious risk of jury confusion and prejudice" that warrants a new trial).

It must be reemphasized that Ms. McLeod's argument, as does the Answering Brief, focused in large part on maligning Dr. Swier not for the surgery in question in every way possible. She did not merely highlight evidence – she crafted a highly inflammatory, prejudicial argument designed <u>not</u> to argue that Dr. Swier was negligent, but that he was "a deceitful doctor doing bad things." (Answering Brief at 33) She did this by: (1) calling him dishonest and opportunistic, (2) asking the jury to say "enough is enough" and punish him,[3] (3) using words like "outrageous," "nuts" and "insanity" when describing his care, and

[2] The only purpose of arguing that Dr. Swier misevaluated the right leg was to suggest that he was a bad doctor and must have acted outrageously in his treatment of the left leg, the only leg at issue. This is the exact type of argument that violates D.R.E. 404(b) and, in any case, is improper.

[3] Ms. McLeod suggests that her use of this phrase a second time was a "plea for a finding of liability." (Answering Brief at 27) The main, albeit not only, problem with this argument is that the trial judge found this commentary to be improper in the first instance, meaning that if it was improper once, it was improper thereafter. Ms. McLeod's suggestion that this was offered in a "different context" strains credibility and demonstrates her theme to seek punishment. *Id.*; (A1320, A1324)

(4) telling the jury that Dr. Swier treated Ms. McLeod like a "cog" in a machine (even though he admitted that there was no evidence of this). (A1260, A1319-A1324, A1328-A1329, A1348). Although this inflammatory "theme" is sufficient to establish plain error (or an abuse of discretion), the other erroneous statements, coupled with the earlier ones, demonstrate that Dr. Swier was significantly prejudiced, jeopardizing his right to a fair trial. Again, Ms. McLeod's counsel: (1) distracted the jury by focusing on his decision-making for her right leg, even though he rendered no treatment to that leg and it was not at issue (A1329); (2) made factual statements that were unsupported by the evidence (A1335);[4] (3) vouched for his expert's credibility (A1341); (4) suggested that Dr. Swier had the burden of proof (A1343, A1624); and (5) implied that Dr. Swier's counsel acted improperly (A1382).[5] The repeated improprieties and inflammatory theme reveal a "studied purpose on the part of counsel to inflame or prejudice the jury

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[4] That Ms. McLeod's expert opined that conservative treatment was required before her surgery is not the same as saying <u>all</u> doctors know that conservative treatment is always required before surgery. (Answering Brief at 31) This is especially true when Dr. Swier's expert, Dr. Ducic, testified that Dr. Swier complied with the standard of care when he treated Ms. McLeod without undergoing the conservative care that Ms. McLeod claims was required. (A1189-A1191, A1199-A1200) As there was no evidence of what all doctors know, it was improper for Ms. McLeod to draw this unreasonable inference. *DeAngelis*, 628 A.2d at 80.

[5] Ms. McLeod claims that her comment on defense counsel was a "pat on the back" and suggests that, if the comment were offensive, it would have caused "fireworks in the courtroom." (Answering Brief at 29) The commentary and punitive theme aimed at Dr. Swier and everyone associated with his case speaks for itself.

improperly," warranting reversal. *Delaware Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1210 (Del. 1997); *DeAngelis*, 628 A.2d at 80.

More importantly, Ms. McLeod fails to see the forest for the trees by focusing on individual statements, without addressing her closing argument as a whole, to evaluate the prejudice. This is the same error that the trial judge made, warranting reversal. While Dr. Swier agrees that the trial judge can assess whether a single statement in an argument may be curable, a single curative instruction, where the Court then permitted Ms. McLeod to argue the same objectionable comments repeatedly, cannot cure the significant prejudice to Dr. Swier. The trial judge's error in failing to step in to prevent this rhetoric and, on a motion for new trial, in failing to evaluate the cumulative impact of the prejudicial and improper statements, contradicts Delaware law and merits reversal. *Murphy v. Thomas*, 1999 WL 742892, at *1 (Del. Super. July 9, 1999), *aff'd*, 801 A.2d 11, 2002 WL 1316242 (Del. Jun. 13, 2002); *Walker v. State*, 790 A.2d 1214, 1219 (Del. 2002).[6] The support for the Court to find a "studied purpose on the part of counsel to inflame or prejudice the jury improperly" is found by looking at the closing in its entirety, not piecemeal. *Delaware Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1210 (Del. 1997).

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[6] It is odd that Ms. McLeod suggests that consideration of a closing argument *in toto* is "nonsensical" when Delaware law mandates the trial court to do exactly that. (Answering Brief at 32)

When viewing Ms. McLeod's closing argument cumulatively, it reflects an inflammatory theme of repeated inappropriate, irrelevant, and legally improper arguments to the jury. And, as acknowledged by Ms. McLeod, legal error warrants reversal, and this argument meets that test. (Answering Brief at 20) (citing *Mitchell v. Haldar*, 2004 WL 1790121, at *3 (Del. Super. Ct. Aug. 4, 2004), *aff'd*, 883 A.2d 32 (Del. 2005)); *Delaware Elec. Co-op., Inc.*, 703 A.2d at 1210; *DeAngelis*, 628 A.2d at 80. Indeed, it is this type of improper argument that creates a substantial likelihood that the jury was misled and that the verdict was influenced by counsel's improper remarks. *Roetenberger v. Christ Hosp.*, 839 N.E.2d 441, 446 (Ohio Ct. App. 2005), *appeal denied*, 843 N.E.2d 793 (Ohio Mar. 8, 2006) (Table); *Fehrenbach v. O'Malley*, 841 N.E.2d 350, 358-70 (Ohio Ct. App. 2005), *aff'd*, 862 N.E.2d 489 (Ohio 2007); *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 60 (Fla. Dist. Ct. App. 2016), *petition for review denied*, 2016 WL 4537513, at *1 (Fla. Aug. 30, 2016).[7] Simply, Dr. Swier's decision not to object a second time during argument does not give Ms. McLeod *carte blanche* to make improper arguments in violation of Delaware law any more than it permits the trial judge to countenance those arguments and abandon its duty "to protect the record and the

[7] Ms. McLeod claims that *Gafney* is distinguishable because she did not seek punishment of Dr. Swier. (Answering Brief at 27-28) Dr. Swier submits that that is exactly what she did, and for that reason, the *Gafney* Court's reasoning should apply and warrants reversal.

integrity of whatever verdict is received." (A846); *Sears, Roebuck and Co. v. Midcap*, 893 A.2d 542, 551 (Del. 2006) (holding that trial judge should act *sua sponte* to prevent improper argument).

That the jury may have awarded less than the total claimed amounts has no bearing on whether counsel's repeated improper attempts to arouse the jury's passion constitutes reversible error. Likewise, that the jury instructions were appropriate does not permit a party to make improper argument or allow the trial judge to sit silently while legal error that deprives a party of a fair trial is occurring. While we will never know the basis of the jury's substantial award of $3,425,515.00, we do know that Ms. McLeod's closing argument repeatedly sought punishment of Dr. Swier and contained numerous improper comments designed to distract the jury from the issue of Dr. Swier's alleged medical negligence. There is therefore a substantial likelihood that the jury was misled and influenced by counsel's admittedly improper argument, and this Court should resolve any doubts in favor of Dr. Swier.[8] *Roetenberger*, 839 N.E.2d at 446.

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[8] Contrary to Ms. McLeod's argument, Dr. Swier need not establish that the verdict "could only be the result of bias and prejudice." (Answering Brief at 21) If this were the standard, no one could ever prove bias, as jurors cannot be interviewed under Delaware law. D.R.E. 606(b); *Baird v. Owczarek*, 93 A.3d 1222, 1227 (Del. 2014) (recognizing the difficulty in proving actual jury bias). It is for that reason that Courts consider whether a substantial likelihood of bias exists, and as demonstrated here, that threshold has been met given the improper theme that Ms. McLeod placed before this jury again and again.

The Delaware Constitution guarantees all parties, including Dr. Swier, the right to a fair trial with impartial jurors with attorneys who make proper arguments. *Baird*, 93 A.3d at 1227. That includes the party's right to have any verdict be based "solely on *factual determinations* that are made from the evidence presented at trial." *Id.* (emphasis in original). And, where only one juror, let alone all of them, is improperly influenced, that right is violated and requires reversal. *Id.* (*citing Turner v. Louisiana*, 379 U.S. 466, 473 (1965)). By making repeated improper and inflammatory comments, Ms. McLeod tainted all of the jurors and created a substantial likelihood that it based its verdict on passion, not the factual evidence before it. And, by allowing the jury to be driven by prejudice, the trial judge deprived Dr. Swier of the right protected by this State's Constitution: the right to an unbiased jury that can render a verdict based on the factual determinations from the evidence. As there is a substantial likelihood that the jury was misled and influenced by these improper arguments, this Court should reverse this matter for a new trial.

CONCLUSION

Ms. McLeod has admitted that she views this case not as one of medical negligence (which was the only issue before the jury) but as one involving "a deceitful doctor doing bad things." (Answering Brief at 33) It was not: it was a case of medical negligence. This "deceit" theory was never pleaded, was not before the jury, and was not raised until Ms. McLeod's closing argument. Yet, the trial judge permitted Ms. McLeod to proceed with this theory in full force and allowed him to malign Dr. Swier, draw improper conclusions from the evidence, and seek punishment. And, even after Ms. McLeod admitted that her argument was improper, the trial judge still refused to acknowledge that cumulative impact of the prejudicial comments deprived Dr. Swier of his right to a fair trial. Under either an abuse of discretion or plain error standard, Ms. McLeod's closing argument was improper, inflammatory and legally impermissible. This Court should reverse the verdict below and remand this matter for a new trial.

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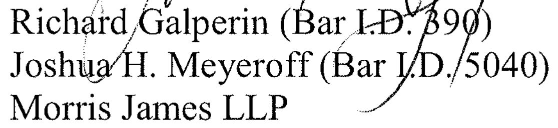
Respectfully submitted,



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Dated: 10/28/16

CERTIFICATE OF SERVICE

I, Joshua H. Meyeroff, hereby certify that on this 28th day of October, 2016, I have caused the following documents to be served electronically on the parties listed below:

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

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