STATE OF MAINE

MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

LAW DOCKET NO. PEN-23-410

CAROL CUTTING,

Plaintiff/Appellant,

v.

DOWN EAST ORTHOPEDIC ASSOCIATES, P.A.,

Defendant/Appellee.

BRIEF OF APPELLANT CAROL CUTTING

Dated: July 10, 2024

Respectfully submitted,

/s/ Laura H. White

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..iv

STATEMENT OF FACTS………...1

I. INTRODUCTION: FAILURE TO OBTAIN INFORMED CONSENT AND THE FALSIFIED OPERATIVE REPORT........................1

II. PROCEDURAL HISTORY ………..……………………………………….5

III. COLLOQUY REGARDING RULE 50 MOTION AND PUNITIVE DAMAGES………………………………………………….5

IV. FACTS RELATED TO THE TRIAL COURT'S FAILURE TO RECORD SIDEBAR CONVERSATIONS…………………………………9

V. FACTS RELATED TO DR. GILL'S EXPERT OPINION…………………11

VI. FACTS RELATED TO THE PANEL CHAIR'S RULE 80M VIOLATIONS……………………………………………...15

STATEMENT OF ISSUES PRESENTED FOR REVIEW.....................................20

SUMMARY OF THE ARGUMENT 20

ARGUMENT...22

I. STANDARD OF REVIEW 22

A. De Novo Review and Harmless Error……………………………… 22

B. Exclusion of Evidence Versus Statutory Interpretation…………… 23

II. THE COURT ERRED IN GRANTING DOWN EAST'S RULE 50 MOTION REGARDING PUNITIVE DAMAGES……………………… 24

III. THE TRIAL COURT'S FAILURE TO CAPTURE ALL SIDEBAR DISCUSSIONS AND EVIDENTIARY RULINGS ON THE RECORD AMOUNTED TO PREJUDICIAL, REVERSIBLE ERROR…………… 29

IV. THE COURT ERRED IN EXCLUDING EVIDENCE OF BIAS ON THE PART OF DOWN EAST'S MEDICAL EXPERT……………………………………………………………………33

V. THE COURT ERRED IN FAILING TO EXCLUDE PANEL FINDINGS BECAUSE THE PANEL CHAIR'S CONDUCT VIOLATED RULE 80M…………………………………………………….. 35

CONCLUSION..39

CERTIFICATE OF SERVICE 40

TABLE OF AUTHORITIES

Cases

Bernier v. Moxie Gore Primitive Camps & Tent Sites,
2006 Me. Super. LEXIS 157, *8-12 (Me. Super. Ct. July 20, 1995). 22, 27

Bratton v. McDonough, 2014 ME 64, ¶ 25-26, 91 A.3d 1050, 1058-59................28

Cutting v. Down E. Orthopedic Assocs., P.A., 2021 ME 1, 244 A.3d 226................2

D'Amour v. Flynn, 2021 M. Super. LEXIS 61, *6
(Me. Super. Ct. March 23, 2021). 28

Davies v. Davies, 2022 ME 56, ¶ 5, 285 A.3d 284, 286..25

Estate of Nickerson v. Carter, 2014 ME 19, ¶ 24,
86 A.3d 658, 664 .... 23, 25, 38, 39, 40

Foster v. *Oral Surgery Associates, P.A.,* 2008 ME 21, ¶ 21,
940 A.2d 1102, 1107 18

Gierie v. Mercy Hosp, 2009 ME 45, ¶ 23, 969 A.2d 944, 950-51...........................36

Goldberg v. *Kelly,* 397 U.S. 254, 270 (1970). 41

Hodges v. May, 2024 U.S. Dist. LEXIS 98109, *15
(N.D. Ohio May 15, 2024). 32, 33

Huggins v. State, 1991 Del. LEXIS 301 (Del. Aug. 21, 1991)...............................33

In re Peterson, 253 U.S. 300, 309 (1920) 37

Irish v. Gimbel, 1997 ME 50, ¶ 25, 691 A.2d 664.. 36, 37
Jacob v. Kippax, 2011 ME 1, ¶ 14, 19, 10 A.3d 1159...24

Lehouiller v. East Coast Steel, 13 F. Supp. 2d 109, 110 (D. Me. 1998) 27

Levesque v. Cent. Me. Med. Ctr., 2012 ME 109, ¶ 16, 52 A.3d 933, 938...............24

McDonald v. Scitec, Inc., 2013 ME 59, ¶ 9, 79 A.3d 374, 377 24

Mulready v. Bd. of Real Estate Appraisers, 2009 ME 135, ¶, 20,
984 A.2d 1285, 1291 24

Newbury v. Virgin, 2002 ME 119, ¶ 21, 802 A.2d 413, 418 29

Oliver v. Me. Med. Ctr., 2018 ME 123, ¶ 27, 193 A.3d 157 25

Preciado v. State, 130 Nev. 40 (Nev. 2014) 33

State v. Poulin, 2016 ME 110, ¶ 37, 144 A.3d 574, 582 35

Tobin v. Barter, 2014 ME 51, ¶ 2, 89 A.3d 1088, 1090 28

Todd v. Andalkar, 1997 ME 59, ¶ 6, 691 A.2d 1215 .... 25, 35, 36

Tuttle v. Raymond, 494 A.2d 1353, 1361 (Me. 1985) 7, 22, 26, 27, 29

United States v. Brown, 1996 CCA LEXIS 91, *2-3
(Air Force CCA March 12, 1996)...34

United States v. Sierra, 981 F.2d 123, 125 (3d Cir. 1992) 33

Statutes

17-A M.R.S. § 707-A 28

24 M.R.S. § 2857 38

4 M.R.S. § 651-A 31

M.R. App. 5(d)(1) 33

M.R. Civ. P. 80M 16, 17, 25, 38, 39, 40, 41

M.R. Evid. 403 41

M.R. Evid. 607 35

M.R. Evid. 801(c)(2)). 35

Me. Const. art. I, § 20 37

Rule 50 30

Other Authorities

Administrative Order JB-12-1 (A. 9-17),
"Recording of Trial Court Proceedings." 31, 32, 33

STATEMENT OF FACTS

I. INTRODUCTION: FAILURE TO OBTAIN INFORMED CONSENT AND THE FALSIFIED OPERATIVE REPORT

The instant case alleging medical negligence and lack of informed consent is on its second trip to the Law Court. *See Cutting v. Down E. Orthopedic Assocs., P.A.*, 2021 ME 1, 244 A.3d 226. Plaintiff/Appellant Carol Cutting ("Cutting") brought a notice of claim against Defendant/Appellee Down East Orthopedic Associates, P.A. ("Down East") on November 1, 2016. Joint Appendix ("JA") at p. 054-057. From there, multiple procedural complexities ensued. After years of litigation, the case was tried to a jury from September 27, 2023 to October 3, 2023.

Cutting suffers from Tourette's Syndrome, which causes involuntary vocal and motor tics, including occasional arm movements and pointing, along with vocalizations and spitting. JA 010; 054; 064; 102. She suffered a fall at home in or around 2011 and injured her right shoulder. *Id.* On June 20, 2013, Cutting had her first and only office visit with an employee of Down East named D. Thompson McGuire, M.D. ("Dr. McGuire"). *Id. See also* TT Vol. II, at p. 138. Dr. McGuire is an orthopedic surgeon specializing in shoulder repair. TT Vol. IV, p. 143; 148-149.

After performing a brief physical exam on Cutting, Dr. McGuire diagnosed her with Acromioclavicular Arthritis. JA 054; 103. He also treated Cutting in an incredibly hostile, humiliating, and abusive manner because of her disability. *Id*. *See also* JA 104; TT Vo. II, p. 142; 152. Dr. McGuire moved away from Cutting and sat

clear across the room, stating: "I don't want you to hit me," in reference to Cutting's motor tics. JA 054; 104. Cutting felt demeaned and humiliated by Dr. McGuire's conduct, which was undertaken "because of" her disabling Tourette's Syndrome. *Id.*

Dr. McGuire recommended that Cutting undergo a right acromioclavicular (or "AC joint") arthroscopy with subacromial decompression. JA 260-264. His June 20, 2013 office note mentioned the possibility of rotator cuff tendonitis and impingement, but said nothing about a rotator cuff tear. *Id. See also* JA 106-107. The June 20, 2013 note also documented that Cutting had Tourette's Syndrome with "uncontrollable, intense, involuntary motions of right upper extremity frequently." JA 260.

After Dr. McGuire humiliated Cutting, she explained to him that she had never hit anybody, yet he insisted on staying far away from her. TT Vol. II, at p. 157.

Based on how Dr. McGuire treated her, Cutting considered getting a second opinion about the surgery he recommended. TT Vol. II, at p. 159-160. She also had to delay surgery due to summer vacation plans. JA 103. In the fall of 2013, Cutting called Down East to ask questions about how Tourette's Syndrome would impact Dr. McGuire's plan of care, including whether she would be immobilized following surgery. JA 105; 180-181; 194. Dr. McGuire never discussed the answers to these questions, but his physician's assistant, Danielle St. Onge, PA-C, returned the calls to indicate immobilization would not be necessary. JA 105; TT Vol. II, p. 158-160;

TT Vol. V, at p. 178. Cutting decided to proceed with surgery because "a surgeon doesn't need to be a social worker." TT Vol. II, at p. 142.

Dr. McGuire never had an informed consent conversation with Cutting. Instead, his physician's assistant, Danielle St. Onge, PA-C, obtained informed consent on November 7, 2013. TT Vol. II, at p. 159. The pre-operative office visit note authored by St. Onge on November 7, 2013 does not mention the possibility of a rotator cuff tear or how Tourette's Syndrome would change the surgical plan; nor does the consent form signed by Cutting on the day she met with St. Onge. JA 265-271. Dr. McGuire's own expert, Dr. Thomas Gill, agreed that a rotator cuff tear was not mentioned "in any of" Dr. McGuire's notes before surgery, the assessment did not include a rotator cuff tear, and the preoperative diagnosis "did not have anything to do with the rotator cuff tear." TT Vol. V. at 88-89.

However, for the first time ever in Dr. McGuire's operative report on November 13, 2013, he included a "preoperative diagnosis" of "rotator cuff partial tear." JA 272. Cutting was adamant that Dr. McGuire never discussed the possibility of a rotator cuff tear with her prior to surgery, and "I didn't even know what a rotator cuff was until post-surgically." JA 107; TT Vol. II, at p. 162.

The November 13, 2013 operative report also included the following statement, which Cutting contends was categorically false:

> Limitations of surgery were discussed. We discussed the fact that if she were found to have a rotator cuff tear, it would not be repaired since it would be guaranteed to tear apart as soon as she moved her shoulder when she woke up. She was told that if a full-thickness rotator cuff tear was found, then our treatment would be limited to debridement.

JA 273.

At trial, Cutting was adamant that the above conversation never took place. TT Vol. II, at p. 168; 172; 173. Instead, Cutting proffered evidence that Dr. McGuire falsified his medical record after the fact to cover up for the fact that he found a rotator cuff tear intraoperatively, but he decided not to repair it on the spot because of Cutting's Tourette's Syndrome. Dr. McGuire denied falsifying his operative report. TT Vol. IV, at p. 168-169. Cutting was also adamant that she would never have proceeded to surgery with Dr. McGuire if he had told her that he would not repair a full thickness rotator cuff tear. TT Vol. II, at p. 170-173. Full thickness means a completely torn ligament that is separated from the shoulder bone. TT Vol. II, at p. 198; TT Vol. IV, at p. 30. Full thickness tears that are not repaired get worse over time. TT Vol. IV at p. 36; 52; 82; 100.

The evidence at trial established that it is never appropriate for a physician to guarantee an outcome, either in the negative or the positive. TT Vol. IV, at p. 40 (Cutting's expert witness Dr. Uma Srikumaran) and 205 (Dr. McGuire). Therefore Dr. McGuire's statement that Cutting was "guaranteed to fail" rotator cuff repair was also false and misleading. The jury also heard evidence about Cutting's damages

and her medical course following the failed rotator cuff repair, which included two subsequent surgeries (and recoveries) to finally fix six years of pain caused by Dr. McGuire failing to obtain informed consent. For all of these years while she was raising a young son on her own, Cutting suffered from excruciating pain and had little to no functional use of her arm. TT Vol. II, at p. 179; TT Vol. III, at p. 23.

II. PROCEDURAL HISTORY

Based on Dr. McGuire's hostile and humiliating treatment of Cutting, she filed a separate lawsuit against him in the United States District Court for the District of Maine alleging disability discrimination in a place of public accommodation. JA 095. The procedural complexities of that case arising under a completely different statute, along with a parallel federal case, will likely be the subject of Down East's cross appeal, but it is not pertinent to Cutting's statement of issues on appeal.

III. COLLOQUY REGARDING RULE 50 MOTION AND PUNITIVE DAMAGES

On the fifth day of trial, October 2, 2023, Down East brought a Rule 50 motion regarding both causation and punitive damages. JA 023-025. On the issue of punitive damages, Down East asserted this Court's "very high burden of proof" for such damages. JA 023 at p. 230. Down East contended that, in this informed consent case, there was nothing "that would be so outrageous that malice could be implied under the circumstances." *Id.* at p. 231-232 (articulating the "clear and convincing evidence" standard).

In response, Cutting argued that her claim against Down East did not allege mere reckless conduct as in *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). Instead, Dr. McGuire engaged in intentional conduct that was outrageous. JA 024 at p. 236. Beyond simply failing to obtain her informed consent, Dr. McGuire falsified a medical record – an act that is punishable by law. *Id.* Down East's own expert conceded that, if true, Dr. McGuire's actions in falsifying a medical record to cover up the lack of informed consent would be a "really big deal," "really bad," and "against the law." JA 034 at p. 119. Cutting herself testified that she thought Dr. McGuire treated her maliciously, with "bad motives." *See* JA 024 at p. 236. *See also* Trial Transcript ("TT") Vol. III. at p. 71-72.

The trial court responded to the arguments of counsel by noting that the allegations of insensitive or humiliating behavior toward Cutting in the first office visit did not qualify as outrageous; nor did any alleged failure to diagnose her rotator cuff tear prior to surgery. JA 025 at p. 239-240. Next addressing the issue of falsifying a medical record, the trial court stated as follows:

> So that leaves us with altering the medical record. If the jury were to conclude that the medical record were altered, that would definitely be outrageous behavior. But then the question would be, and this is where I really struggle, that would be conducted after-the-fact, designed to protect Dr. [McGuire's] own interests rather than to injure Ms. Cutting in some way. And – and I don't – I don't see that – that kind of self-protective behavior – if, in fact, that's what it was – qualifies under Tuttle v. Raymond.

JA 025 at p. 240.

Granting Down East's Rule 50 motion regarding punitive damages, the trial court concluded that an alleged "dishonest and self-protective act," did not qualify for punitive damages "as to her," "when the damage had already been done, when the failure of informed consent had already occurred, when the operation had already been performed." *Id.* at p. 240.

That evening, Cutting filed a motion for reconsideration, alleging that the trial court's decision amounted to a manifest error of law. JA 140-143. The parties' discussion of the motion for reconsideration will be discussed below, as will the de novo standard of review for issues of law. However, for purposes of any harmless error analysis Down East urges this Court to entertain, the opening and closing statements of counsel are critical.

Because Cutting specifically alleged that Dr. McGuire falsified her operative report – dictated the same day as the surgery, November 13, 2013 (JA 274) – and that conduct was not only intentional but ***a crime***, the issue of punitive damages was flagged for the jury during Cutting's opening:

> We're also going to ask that you award punitive damages in this case. If you find that Dr. McGuire's behavior was so outrageous, if you find that he lied, if you find that he behaved so outside the bounds of decency that we expect of physicians, we will ask you to award punitive damages not to compensate Carol, but for deterrence purposes. And that means, send Down East a message that physicians shouldn't treat people this way.

TT Vo. II at p. 55.

Down East also addressed punitive damages in its opening:

> Punitive damages are rarely requested, they require proof by a different burden of proof, now by clear and convincing evidence. It's no longer just what's more likely true than not true. It's now the burden of the Plaintiff to show by clear and convincing evidence that Dr. McGuire bore malice back towards the patient, that he wanted things to go badly for her, that he had ill-will for her. And that's just not the truth.

TT Vol. II at p. 65.

Between opening and Down East's closing, the court granted the Rule 50 motion, precluding an award of punitive damages. As a result, in Down East's closing, the following statement was made:

> You heard about in opening statements that there was going to be a claim for punitive damages, which is something beyond compensation. There actually is not a claim being presented to you for punitive damages. So in any aspect of damages that you consider and we – again, we – we do not believe that you'll get to that point. The only issue is what is compensation, not punishment, not punitive, not to send a message. It's simply compensation.

TT Vo. VII at p. 110-111.

As discussed below, the various comments on punitive damages during opening and closing had the prejudicial effect of misleading the jury into believing that the court had decided ***as a matter of fact*** that Cutting had not proven malice by the clear and convincing evidence standard articulated during Down East's opening. This prejudicial effect was more than harmless error, and it requires reversal based on the error of law discussed below.

IV. FACTS RELATED TO THE TRIAL COURT'S FAILURE TO RECORD SIDEBAR DISCUSSIONS

Due to the unavailability of a court reporter for this trial, an electronic recording device was used and managed by the Clerk, resulting in seven volumes of trial transcripts. For TT Vol. I and II, all sidebar bench conferences were captured on the record. *See* TT Vol. II at p. 34-38; 79-85; 99-106; 180-185.

At the beginning of TT Vol. III, a sidebar bench conference and evidentiary ruling was conducted on the record at p. 19-21. From that point forward, and without warning to either party, sidebar bench conferences apparently were conducted off the record.[1] The following objections and evidentiary rulings throughout the remainder of the trial were not captured on the record, and the basis for the objection or the resulting evidentiary ruling is largely unclear: Objection during Cutting's cross examination (TT Vol. III at p. 77 and 97); Sidebar discussion about Defendant's Exhibit 8 (TT Vol. III, p. 140).

On trial day 3, TT Vol. IV, none of the sidebar discussions and evidentiary rulings were captured on the record, including: Down East's objection to a question asked of Cutting's medical expert (TT Vol. IV, p. 51); Down East's objection to Cutting's question to Dr. McGuire about being told he had to "chill" during his

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[1] Cutting has reached out to eScribers (and the email address maine.transcripts@maine.courts.gov) to inquire whether the electronic recording was stopped during these sidebar conversations, or whether the recording was inaudible. If the outcome of that inquiry obviates the need for appellate review, Cutting will update the Court.

deposition (TT Vol. IV, p. 108); Down East's objection to Cutting's question to Dr. McGuire about other board complaints, the subject of an earlier Motion *in Limine* (TT Vol. IV, p. 118); Down East's objection to Cutting's question to Dr. McGuire about his CV, background, moving from jurisdiction to jurisdiction, the subject of an earlier Motion *in Limine* (TT Vol. IV, p. 139); Down East's objection to Cutting's attempt to impeach Dr. McGuire for his prior inconsistent statement under oath (TT Vol. IV, p. 172); Down East's objection to Plaintiff's Exhibits 85 through 88, regarding Dr. McGuire's name changing from one jurisdiction to another (TT Vol. IV, p. 187). For many of these colloquies at sidebar, the discussion was lengthy but at this point is not reproducible from memory.

On trial day 4, TT Vol. V, none of the sidebar discussions or evidentiary rulings were captured on the record, including the following: Down East's objection to questions posed to its medical expert, Dr. Gill, about his professional background and potential bias (TT Vol. V, p. 86); Down East's objection to a news article and information about Dr. Gill for bias and impeachment purposes (TT Vol. V, p. 98).

Other discussions captured on the record when the jury was out made it clear that the trial court understood the importance of preserving a full record for appellate review in this case. During trial day 3, TT Vol. IV, the court responded to an objection made outside the presence of the jury, which was recorded. Down East objected to more than one attorney on Cutting's side making arguments at sidebar,

and the court responded as follows: "This is a very complex and contentious case, and we're having sidebars that are more complicated than whether this question does or does not call for hearsay. And I don't want either side to leave an argument unmade and regret it afterwards." TT Vol. IV at p. 189-190.

The trial court's recognition of the importance of giving both sides a full opportunity to make an argument on the record and preserve issues for appellate review suggests that the failure to record the above discussions and evidentiary rulings was unintentional, however it occurred. Albeit unintentional, the absence of a full record for appellate review was an error that prejudiced Cutting in her ability to raise certain issues on appeal.

For instance, the arguments related to Dr. Gill can only be partially explained with an incomplete record. Other arguments that were ripe for appellate review, like the limitations on impeachment and hearsay evidence, or Dr. McGuire's character for untruthfulness, cannot even be briefed on appeal with so many of those sidebar discussions absent from the record. For all of these reasons, and those discussed in below, the trial court's failure to record evidentiary rulings was reversible error.

V. FACTS RELATED TO DR. GILL'S EXPERT OPINION

Down East called its medical expert, Dr. Thomas Gill, on trial day 4 (Vol. V). Dr. Gill testified extensively about his once impressive academic, clinical, and professional background. TT Vol. V. at p. 6-7. Down East elicited testimony from

Dr. Gill about how he was "proud" of receiving awards throughout his career, including as the "outstanding team doctor" for the New England Patriots, the Red Sox, and the Boston Bruins. *Id*. at p. 11.

When it came to his expert opinion, Dr. Gill explained that Cutting's physical exam did not involve findings consistent with a rotator cuff tear, but instead with AC joint arthritis and bursitis. *Id.* at p. 30. When asked: "Is there anything in that record [June 20, 2013 office visit, JA 260-264] that screams out to you, you should be on the lookout for a rotator cuff tear?" Dr. Gill responded: "No." *Id.* at p. 30-31.

Dr. Gill described the operation that Dr. McGuire intended to perform on Cutting, none of which had anything to do with a rotator cuff tear. *Id.* at 32-34. He testified that he agreed with Dr. McGuire's surgical plan, which again did not mention the rotator cuff. *Id.* at p. 34. He also agreed with the following statement: "[B]ased on the exam, the imaging, and the history," there was "no reason why a reasonable doctor should have suspected a rotator cuff tear at that point." *Id.* at p. 35.

On cross examination, Dr. Gill admitted that his role as an expert was not to opine on whether Dr. McGuire was telling the truth, or whether he falsified a medical record. JA 035 at p. 119. Dr. Gill was asked perfectly fair questions about his professional background on cross, just as he was on direct. When asked if his departure from Mass General was voluntary, Dr. Gill testified, "It was." JA 030 at

p. 83. Cutting was prohibited from delving further into court documents establishing that Dr. Gill had, in fact, been "forced out" of Mass General. When asked if he had actual altercations with other providers that caused him to leave Mass General, Dr. Gill said, "That caused me to leave? No. They didn't cause me to leave." *Id.* at p. 85. When asked a second time if he had been involved in "altercations," Dr. Gill said, "sure." *Id.* In fact, one time a dispute between Dr. Gill and another doctor got so heated that Mass General security had to be called. *Id.* at p. 85-86.

The above testimony established that Dr. Gill has been involved in interpersonal conflicts of a highly similar nature to some of Dr. McGuire's alleged conduct in this case. *See, e.g.,* TT Vol. I, p. 8-9 (discussing Motion *in Limine*). *See also* TT Vol. I, p. 77 (trial court noting that "Dr. McGuire's interpersonal tendencies are so much at issue"); *id.* at p. 118-119; TT Vol. IV at p. 104-105; *id.* at p. 108 (Dr. McGuire being taken out in the hallway during his deposition to calm down); *id*. at p. 115-116 (Dr. McGuire's altercation with a patient that led to police involvement).

Dr. Gill denied getting into a physical altercation with a sports reporter from WEEI in the Patriot's locker room, and the trial court severely truncated Cutting's ability to inquire about this altercation. JA 031 at p. 86-87. Similarly, when Cutting asked Dr. Gill about being fired from his position as the Red Sox team physician – contradicting his award-winning record as a team physician – Dr. Gill denied it. Cutting's ability to inquire further was severely restricted.

On the issue of Rob Gronkowski and his family's criticism of Dr. Gill because of Gronk's many arm surgeries, Down East objected on the basis that it was "very collateral." JA 032-033 at p. 93-94. Although the previous sidebar about Dr. Gill was not captured on the record, the trial court's ruling can be discerned: "Go ahead. Sir, you can answer yes or no. Beyond that, it will be collateral." JA 033 at p. 94. Dr. Gill denied that there had been any criticism of him related to Rob Gronkowski, or that the altercation with the WEEI reporter in the Patriot's locker room was related. Once again, the trial court's (unrecorded) rulings at sidebar precluded Cutting from effectively impeaching Dr. Gill on this fact or establishing bias.

Along the same lines, Cutting asked Dr. Gill about a purported "turf war" between him and another physician at Mass General, resulting in litigation. JA 033 at 95-96. Down East's objection to this line of questioning was sustained. Cutting was allowed to show Dr. Gill a Sports Illustrated article about his altercation with the WEEI reporter but could only ask very limited "yes" or "no" questions. *Id.* at p. 96-97. Once again, Cutting tried to impeach Dr. Gill and explore bias by asking him about the NFL players' association lawsuit involving him but was prevented from asking anything beyond a "yes" or "no" question. JA 034 at p. 98-99. The bench conference at sidebar was not recorded. *Id.* at p. 98.

VI. FACTS REGARDING THE PANEL CHAIR'S VIOLATIONS OF RULE 80M

Cutting brought a Motion in *Limine* to exclude or explain the unanimous panel findings in this case, arguing that the panel chair violated Rule 80M so egregiously that admission of the panel findings would be unconstitutional. JA 144. The panel chair demonstrated extreme and egregious bias throughout the process and violated Rule 80M by deciding this case against Cutting without the benefit of a hearing. JA 144. The chair also made a disparaging and minimizing comment about Cutting's case revealing her bias, stating during a discovery conference: "it's just a shoulder." These facts are recited in the Motion *in Limine* at JA 144-145.

The panel hearing was originally scheduled to occur on March 13, 2018, but had to be postponed due to a significant snowstorm. JA 145. The facts related to the panel chair's decision to consult each panelist, attempted to forego and dispense with the Rule 80M requirement of conducting a panel hearing, are recited at JA 145-148. Not only did the panel chair deprive Cutting of the opportunity to have the credibility of witnesses challenged and decided, but she also asked each of the volunteer/unpaid panelists to agree that no hearing was necessary. JA 146.

The only way the panelists would have agreed to dispense with a hearing is if they had already decided based on written submissions to credit the deposition testimony and arguments of the defense, to the point where nothing Cutting could

offer at hearing would change their mind. This result was an unconstitutional violation of Rule 80M. *Id.*

Panel proceedings in Maine so overwhelmingly result in unanimous findings for the defense that the system itself is undeniably flawed. Given the low frequency of unanimous panel findings ***against*** medical providers, it is impossible that the panel in this case wanted to dispense with the hearing requirement because they had decided the case in Cutting's favor. *Id.* Even if the panel process were not unduly skewed in favor of medical providers and against medical malpractice plaintiffs – a fact that is common knowledge among the bench and bar in Maine – the entire statutory scheme of the MHSA effectively precludes a panel chair from deciding a case in favor of a plaintiff before asking if the defendant medical provider wanted to be heard. *Id.* Ultimately, the panel made up its mind and decided this case without a hearing, in violation of Rule 80M and that decision was adverse to Cutting. *Id.*

Before the panel, Cutting moved *in limine* to exclude Down East's medical ethics expert, Dr. Fox, as well as "any reference to it in the panel brief." JA 148-149. Ultimately, the panel chair excluded Cutting's medical ethics expert but refused to strike Down East's medical ethics expert. JA 149. The panel chair allowed the deposition of Dr. Fox to be considered by the panel, by deposition, and the panel was prepared to decide the case in Down East's favor on the briefs. Relatedly, Cutting moved to preclude Down East from relying on the testimony of two experts

on the same issue of informed consent. JA 149. Down East's panel brief (which the panel was prepared to rely upon in deciding the case in Defendant's favor without a hearing), made repeated reference to not one but two experts who would provide duplicative testimony on Down East's behalf on the issue of informed consent. *Id.*

The panel's willingness to decide the case in Down East's favor without a hearing, based on the briefs, violated the one expert per issue rule contained in the Superior Court's standard scheduling order, as well as Rule 80M's prohibition against cumulative evidence. *Id.* Moreover, Cutting argued that parties in an informed consent case must establish the standard of care "based on the practice of health care practitioners in the same field and community and under the same or similar circumstances." *Foster* v. *Oral Surgery Associates, P.A.,* 2008 ME 21, ¶ 21, 940 A.2d 1102, 1107. *Id.*

Down East moved to exclude Cutting's medical ethics expert, Dr. Vega, and the panel chair agreed. JA 150. At the same time, the chair allowed Down East's medical ethics expert to essentially testify by deposition. JA 059-060. Even though the panel chair excluded Dr. Vega's opinion regarding medical ethics and discrimination, it allowed Dr. Fox's opinion to be considered by the panel because it was in the form of a deposition, not live testimony. *Id.* Without Dr. Fox's opinion about medical ethics, her only function was to provide a duplicative opinion on

informed consent, which Down East briefed for the panelists who decided in Down East's favor without a hearing. JA 150. *See also* panel chair orders at JA 059-060.

The panel chair violated Cutting's constitutional rights by depriving her of the opportunity to cross examine one of Down East's experts at hearing, and by refusing to exclude Dr. Fox and instruct the panel not to give any weight to her deposition testimony on informed consent. JA 150-151. Conversely, the panel chair granted Down East's motion *in limine* and precluded Dr. Vega from testifying. *See* JA 059-060. Essentially, the chair allowed Down East to rely on a second expert opinion on the issue of informed consent/ethics (Dr. Fox) but excluded Cutting's expert on the same issue (Dr. Vega). JA 151. These rulings had the bizarre result of allowing Dr. Fox's opinion to be considered – albeit by deposition instead of live testimony – but in response to no opinion offered by Cutting. *Id.*[2]

Next, the panel chair granted Down East's motion to exclude evidence that Dr. McGuire lied under oath about his history of professional discipline, even for impeachment purposes, which further prejudiced Cutting's right to fully cross examine witnesses. *See* JA 061; 151-152. The day before the hearing, Cutting filed

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[2] The issue of the panel chair allowing the deposition of Dr. Fox to be considered, while also excluding Dr. Vega's opinion, was discussed at length before the trial court. JA 147-149. The court expressed concern that: "if the panel chair literally said, yes, you can have your expert on issue X and to the other side, no, you can't have an expert on issue X, then that would, at least on its face, be so irregular that it seems to me it would call into question whether the result should be admissible." JA 047 at p. 85. In response, Down East argued that the panel chair concluded there would be no cumulative evidence, but functionally that is not what happened because Dr. Fox's opinion was allowed by deposition. JA 048-049 at p. 87; 90-91.

an objection to the panel chair's orders on the motions *in limine,* and a request for reconsideration.

Cutting's Motion *in Limine* before the trial court alleged a variety of other procedural irregularities and failure to allow her a full opportunity for cross examination, including questions about Dr. McGuire's professional record and lying about being disciplined in the past. JA 152-154. The arguments before the trial court on these issues, and the resulting colloquy, are found at JA 041-052.

The entire statutory scheme behind the MHSA dictates the conclusion that no panel would ever find against a physician without the opportunity for a full hearing. JA 044-045. The trial court agreed: "there does seem to be some commonsense affirmation of the idea that the panel chair would not affirmatively suggest resolution without a testimonial hearing, if there were any chance that the physician were going to be found against. Right? That's . . . what my instincts tell me that's probably true." JA 045 at p. 31; 32-33. Nonetheless, the trial court denied Cutting's motion regarding the panel findings. JA 051-052.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in granting Down East's Rule 50 motion regarding punitive damages, after acknowledging that the conduct alleged met the definition of "outrageous" necessary for a finding of implied malice.

2. Whether the trial court's failure to capture all sidebar discussions and evidentiary rulings on the record amounted to prejudicial, reversible error under the circumstances of this case.

3. Whether the trial court erred in excluding evidence of bias on the part of Down East's medical expert, when the interpersonal issues alleged against him were closely related to allegations against Dr. McGuire.

4. Whether the trial court erred in failing to exclude panel findings when the panel chair's conduct violated Rule 80M.

SUMMARY OF THE ARGUMENT

Reversal of the judgment in this case is warranted on several bases. It has long been the law in Maine that punitive damages are available in a negligence action when either express or implied malice may be proved. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). The "requirement of malice will be most obviously satisfied by a showing of 'express' or 'actual' malice. Such malice exists where the defendant's tortious conduct is motivated by ill will toward the plaintiff." *Id.* Implied malice need not be directed toward the particular plaintiff: "Punitive damages will

also be available . . . where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied." *Id.* The superior court has echoed this holding, explaining that when conduct is outrageous, malice may be implied even in the absence of evidence that a defendant directly bore ill will toward a plaintiff. *See Bernier v. Moxie Gore Primitive Camps & Tent Sites*, 2006 Me. Super. LEXIS 157, *8-12 (Me. Super. Ct. July 20, 1995).

In this case, the trial court erred by granting Down East's Rule 50 motion after concluding that Dr. McGuire's outrageous conduct was not directed at Cutting, but rather appeared to be an after-the-fact act of self-preservation. This conclusion failed to view the evidence in the light most favorable to Cutting, and failed to appreciate the distinction between actual and implied malice announced in *Tuttle v. Raymond*.

Additionally, reversal is warranted under the particular circumstances of this case because multiple evidentiary objections and rulings discussed at sidebar were not recorded, unbeknownst to the parties. Many of those uncaptured sidebar discussions involved evidentiary objections during Cutting's cross examination of Down East's medical expert, Dr. Gill, when Cutting attempted to ask legitimate and fully permissible questions about his professional background designed to elicit bias and impeach his claim of being an award-winning team doctor for the New England Patriots, Red Sox, and Bruins. The absence of a record, and in fact the rulings

truncating Cutting's ability to explore bias with Dr. Gill, amounted to harmful, reversible error.

Finally, the trial court's admission of the panel findings in this case, despite the bizarre and unusual violations of Rule 80M by the panel chair, violated Cutitng's constitutional right to a jury trial. Admission of the panel findings warrants reversal under this Court's holding in *Estate of Nickerson v. Carter*, 2014 ME 19, ¶ 24, 86 A.3d 658, 664.

ARGUMENT

I. STANDARD OF REVIEW

A. De Novo Review and Harmless Error

This Court reviews issues of law de novo. *Levesque v. Cent. Me. Med. Ctr.,* 2012 ME 109, ¶ 16, 52 A.3d 933, 938 (citing *Jacob v. Kippax*, 2011 ME 1, ¶ 14, 19, 10 A.3d 1159). The granting of Down East's Rule 50 motion for judgment as a matter of law on punitive damages is reviewed de novo. *See McDonald v. Scitec, Inc*., 2013 ME 59, ¶ 9, 79 A.3d 374, 377.

This Court will "not disturb a judgment if an error is harmless," meaning that "it is highly probable that the error did not affect the judgment." *Mulready v. Bd. of Real Estate Appraisers*, 2009 ME 135, ¶, 20, 984 A.2d 1285, 1291. The harmless error standard is based on M.R. Civ. P. 61, but here there is no question that granting judgment as a matter of law in Down East's favor on the punitive damages most

certainly did "affect the judgment." *Tolliver v. DOT*, 2008 ME 83, ¶ 39, 948 A.2d 1223, 1235. Without "substantial certainty that the error did not have prejudicial effect and that it did not affect the outcome" of the ultimate judgment, an error cannot be considered harmless. *In re Natasha S*., 2008 ME 54, ¶ 23, 943 A.2d 602.

B. Exclusion of Evidence Versus Statutory Interpretation

Unlike issues of law, the "ultimate determination to admit or exclude evidence is reviewed for an abuse of discretion." *Levesque v. Cent. Me. Med. Ctr.,* 2012 ME 109, ¶ 16, 52 A.3d 933, 938 (citing *Jacob v. Kippax*, 2011 ME 1, ¶ 14, 19, 10 A.3d 1159). Cutting's assignment of error based on the trial court's exclusion of impeachment evidence about Dr. Gill is reviewed for an abuse of discretion. *See Todd v. Andalkar*, 1997 ME 59, ¶ 6, 691 A.2d 1215.

In *Estate of Nickerson v. Carter,* 2014 ME 19, ¶ 24, 86 A.3d 658, 664, this Court considered the admission of panel findings an evidentiary matter, reviewable under an abuse of discretion standard ("In the face of a clear violation of statutory and procedural rules, the court abused its discretion by allowing the findings of the screening panel to be admitted in evidence.").

However, this Court has also noted that "statutory interpretation" is an issue of law warranting de novo review. *Oliver v. Me. Med. Ctr*., 2018 ME 123, ¶ 27, 193 A.3d 157. Because this case involves interpretation of the Maine Health Security Act ("MHSA") and M.R. Civ. P. 80M, de novo review is warranted. Review of "a

trial court's interpretation of procedural rules" is de novo, looking to "the plain language of the rules to determine their meaning." *Davies v. Davies*, 2022 ME 56, ¶ 5, 285 A.3d 284, 286. According to *Davies*, this Court's review of Rule 80M in this case must proceed under a de novo standard.

II. THE COURT ERRED IN GRANTING DOWN EAST'S RULE 50 MOTION REGARDING PUNITIVE DAMAGES

After the trial court granted Down East's Rule 50 motion regarding punitive damages on October 2, 2023 (JA 025), Cutting brought a motion for reconsideration. (JA 140), arguing that the very distinction drawn in *Tuttle v. Raymond* was that malice cannot be implied from reckless conduct. JA 026 at p. 5. However, malice can be implied from intentional, outrageous conduct, even if not directed toward the plaintiff. *Id*.

In response to the motion for reconsideration, Down East argued that implied malice must be directed at the person injured, but this was an incorrect statement of the law. JA 028 at p. 11. Down East also incorrectly contended that "intentional conduct" is "not one that we have here," because this was a negligence claim. *Id*. at p. 12. Down East's argument did not appreciate the distinction between implied and actual malice, or that punitive damages are available in a negligence case when the conduct alleged is intentional. *Id*. at p. 13. Cutting also reiterated that punitive damages are available to deter "outrageous conduct" of an intentional nature, which includes intentional misrepresentations. JA 029 at p. 14.

Reversal of the judgment against Cutting is warranted because the trial court concluded as follows: "If it were proved, if the jury were to find that Dr. McGuire falsified a note after the fact in order to cover up a mistake that he had made, that would be very bad. Linguistically, it would fall within the term 'outrage'." *Id*. On this basis alone, this Court must remand for a new trial.

In *Tuttle v. Raymond*, this Court held that "punitive damages are available based upon tortious conduct only if the defendant acted with malice." *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). The Court noted that the "requirement of malice will be most obviously satisfied by a showing of 'express' or 'actual' malice. Such malice exists where the defendant's tortious conduct is motivated by ill will toward the plaintiff." *Id.* However, actual malice demonstrated by ill will toward the particular plaintiff is ***not*** the only method of proving malice.

In addition, malice may be implied. "Punitive damages will also be available . . . where deliberate conduct by the defendant, ***although motivated by something other than ill will toward any particular party***, is so outrageous that malice toward a person injured as a result of that conduct can be implied." *Id.* (emphasis added). The superior court has echoed this holding, explaining that when conduct is outrageous, malice may be implied even in the absence of evidence that a defendant directly bore ill will toward a plaintiff. *See Bernier v. Moxie Gore Primitive Camps & Tent Sites*, 2006 Me. Super. LEXIS 157, *8-12 (Me. Super. Ct. July 20, 1995).

In *Bernier*, the superior court cited a District of Maine case that distinguished between mere reckless disregard of circumstances on the one hand, and outrageous conduct on the other. *Id.* at *9-10 (citing *Lehouiller v. East Coast Steel*, 13 F. Supp. 2d 109, 110 (D. Me. 1998)). *Lehouiller* suggests that any criminal conduct prohibited by law – such as falsifying a medical record – is inherently outrageous. *Id.*

Cutting introduced evidence from which a jury could conclude that Dr. McGuire intentionally falsified her operative report, which was dictated the same day as a surgery conducted without her informed consent (a battery at common law). The idea that such conduct would be anything less than outrageous under this Court's existing precedent ignores the fact that the Maine Legislature has chosen to criminalize falsification of medical records. *See* 17-A M.R.S. § 707-A. Any falsification of a medical record ***with the intent to deceive*** is a Class D crime, and possibly a Class C crime if it involves serious bodily injury (like the need for two more shoulder surgeries and long, painful recoveries). *Id.* at § 707-A(3) and (4).

A jury could have easily concluded that Dr. McGuire falsified Cutting's operative report with the intent to deceive her, his employer, the Maine Board of Licensure in Medicine, and the Prelitigation Screening Panel. The trial court's view of Dr. McGuire's conduct as after-the-fact and merely self-protective failed to view the evidence in the light most favorable to Cutting. *See Tobin v. Barter*, 2014 ME 51, ¶ 2, 89 A.3d 1088, 1090.

In 2014, this Court found that a knowingly intentional misrepresentation "could be sufficient for a fact-finder to find implied malice," even when the defendant presents evidence to rebut the assertion, because "this factual dispute should be settled by the jury." *Bratton v. McDonough*, 2014 ME 64, ¶ 25-26, 91 A.3d 1050, 1058-59. By comparison, allegations that utterly lack any basis for finding express or implied malice understandably do not justify consideration of punitive damages. *D'Amour v. Flynn*, 2021 M. Super. LEXIS 61, *6 (Me. Super. Ct. March 23, 2021). Under the cases discussed above, reckless disregard of the circumstances is not enough. Nonetheless, ***intentional*** conduct that rises to the level of outrageousness can indeed support an award of punitive damages if the jury finds the conduct was, in fact, outrageous.

Intent is the touchstone of this Court's precedent regarding punitive damages. A defendant's "mere reckless disregard of the circumstances" is not enough to warrant punitive damages because implied malice involves outrageous, intentional conduct. *Newbury v. Virgin*, 2002 ME 119, ¶ 21, 802 A.2d 413, 418 (quoting *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985)). The trial court undeniably agreed that the conduct alleged by Dr. McGuire could be considered "outrageous." That is enough, regardless of whether it was directed at Cutting or occurred after her surgery. Under the criminal code cited above that penalizes falsification of medical records, the obvious truth is that medical records are always dictated ***after the fact***.

Falsification with intent to deceive is outrageous and criminal, regardless of the timing.

The only remaining issue to be confronted by this Court before reversing the judgment based on the issue of punitive damages is the anticipated argument that the jury ultimately ***did find*** in Down East's favor. For the sake of argument, the jury concluded that Dr. McGuire ***did not*** falsify any medical records, and he ***did not*** fail to obtain informed consent, and therefore the jury was not going to award Cutting any damages at all, let alone punitive damages.

However, this anticipated argument ignores the fact that three jurors sided with Cutting, and only one more juror on her side would have precluded judgment in Down East's favor. Perhaps the fourth, fifth, or sixth juror in Down East's favor was swayed by the fact that the parties addressed punitive damages in openings, but then Down East indicated there was no claim on that basis. Perhaps one or more jurors believed the Court had ruled on the clear and convincing evidence standard, not on the issue of whether implied malice existed in this case.

An equally plausible scenario is that the jurors who sided with Down East had little appetite for compensating Cutting because they (correctly, although improperly) assumed she had insurance for all the surgeries, and she fully recovered from them. Perhaps for those jurors with little appetite for compensating Cutting, the

outcome would have been different if they had the opportunity to punish Dr. McGuire and deter outrageous conduct on his part.

In hindsight, the argument could be made that Cutting strategically chose to mention punitive damages in her opening and took the risk that the trial court would grant a Rule 50 motion on that basis, thereby having the prejudicial effect of damaging her credibility before the jury. However, if the trial court had not committed a manifest error of law in granting the Rule 50 motion based on punitive damages, then the discussion of punitive damages by both sides in openings would have been entirely appropriate. Ultimately, because the trial court's grant of the motion for judgment as a matter of law on punitive damages failed to view the evidence in the light most favorable to Cutting, and it was inconsistent with this Court's precedent on the issue of implied malice, the judgment must be reversed.

III. THE TRIAL COURT'S FAILURE TO CAPTURE ALL SIDEBAR DISCUSSIONS AND EVIDENTIARY RULINGS ON THE RECORD AMOUNTED TO PREJUDICIAL, REVERSIBLE ERROR

For reasons unknown, multiple evidentiary rulings that were critical to this Court's understanding of various assignments of error that could have been raised on appeal were not recorded. The pervasive failure to record sidebar discussions and evidentiary rulings under the circumstances of this case amounted to harmful, prejudicial, and reversible error for the reasons that follow.

Pursuant to 4 M.R.S. § 651-A, the "Supreme Judicial Court shall prescribe rules that ensure the production of a reviewable record of proceedings before all state courts within the Judicial Department." 4 M.R.S. § 651-A, Subchapter 1, "Reporters in the Supreme and Superior Courts." Effective September 25, 2017, this Court issued Administrative Order JB-12-1 (A. 9-17), "Recording of Trial Court Proceedings." The Order established "standards and procedures for courtroom operation of electronic equipment . . . in all State trial courts to ensure a complete and accurate oral recording of all proceedings, as well as a written record of all information necessary for accurate transcription." Administrative Order JB-12-1.

"Any reallocation of resources . . . must always safeguard the quality of justice and of the resulting record." *Id.* That did not happen in this case. Pursuant to Administrative Order JB-12-1, jury trials "must be recorded and monitored in the following manner: "Unless testimony is being taken down by an official court reporter" – and here it was not – "all proceedings" involving a civil jury or non-jury trial "shall be recorded and monitored by a court clerk or other court personnel whose primary function in the courtroom is to monitor the recording pursuant to standards issued by the Office of Transcript Operations. Administrative Order JB-12-1, Part II.

"In cases that are recorded, and particularly when cases are recorded but not monitored, the clerk must ensure that all microphones and the recording equipment

are working properly. The clerk or designee must submit log sheet header information along with any relevant scheduling notices or lists identifying the matters heard to the Office of Transcript Operations." *Id*. at Part V.

Unsurprisingly, no Maine case squarely on point addresses this issue. In other jurisdictions, the issue has arisen mostly in the criminal context. For instance, the Northern District of Ohio recently reviewed an ineffective assistance of counsel claim when the criminal defense attorney failed to point out to the trial court that it was error to not put side bar conferences on the record at trial. *Hodges v. May*, 2024 U.S. Dist. LEXIS 98109, *15 (N.D. Ohio May 15, 2024).

Unlike in *Hodges v. May*, Cutting's counsel had no idea that sidebar conferences were not being recorded. Like the criminal rule in *Hodges v. May,* Administrative Order JB-12-1 requires that all proceedings be recorded. *Id.* at *33. In *Hodges,* as a prerequisite to establishing error, the appellant needed to "demonstrate the existence of some material prejudice resulting from the failures to record." *Id.* Other jurisdictions have reached similar conclusions. *See Preciado v. State*, 130 Nev. 40 (Nev. 2014); *Huggins v. State*, 1991 Del. LEXIS 301 (Del. Aug. 21, 1991); *United States v. Sierra*, 981 F.2d 123, 125 (3d Cir. 1992) (holding that, in the absence of a showing of prejudice, failure to record voir dire was harmless error).

Under Maine law, when a transcript of a proceeding is "unavailable," because it was "not recorded," or the transcript "cannot be prepared for reasons not attributable to the appellant, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection, for use instead of a reporter's transcript." M.R. App. 5(d)(1). In the instant case, the trial ***was recorded***, and Cutting ordered a costly transcript of the proceedings in the ordinary course after filing her Notice of Appeal.

The $7,850.80 price tag of the transcript in this case certainly did not leave the impression that any portion of the trial, including sidebar discussions, went unrecorded. Rule 5(d)(2) has a very short deadline to submit a statement of evidence in lieu of a recording, which would be impossible to meet under the circumstances of this case. Only when a party knows at the conclusion of the evidence that no recording was made could that party meet the deadline of 21 days from the entry of judgment, or 14 days after the filing of a notice of appeal, to submit a statement of the evidence in lieu of a recording. M.R. App. P. 5(d)(2).

By contrast, Cutting did not receive trial transcripts until late December, well past the deadline to submit a statement of evidence. At least one court has concluded that the failure to record sidebar conferences is error, even when the parties have an opportunity to summarize objections and evidentiary rulings. *See United States v. Brown*, 1996 CCA LEXIS 91, *2-3 (Air Force CCA March 12, 1996).

Under these circumstances, prejudicial error has occurred. Cutting's Motion *in Limine* regarding Dr. McGuire's board discipline and professional history was argued at length in TT Vol. I, and issues related to his character for truthfulness and prior inconsistent statements came up multiple times throughout his testimony, but none of the arguments or rulings are available for review. The absence of recorded sidebar discussions and rulings directly prejudiced Cutting's ability to even appeal on this basis. When it comes to Dr. Gill, Cutting has slightly more context and record evidence to challenge the Court's rulings about "collateral" matters. However, Cutting is still prejudiced by not having a full record to challenge all evidentiary rulings about Dr. Gill, as discussed below. Accordingly, this Court should reverse and remand for a new trial.

IV. THE COURT ERRED IN EXCLUDING EVIDENCE OF BIAS ON THE PART OF DOWN EAST'S MEDICAL EXPERT

The rule against hearsay, M.R. Evid. 802, makes inadmissible a statement made outside of court when it is offered "to prove the truth of the matter asserted in the statement." *State v. Poulin*, 2016 ME 110, ¶ 37, 144 A.3d 574, 582 (quoting M.R. Evid. 801(c)(2)). This Court has held that any party "may attack" a witness's credibility under M.R. Evid. 607, and "a statement offered solely for the purpose of impeaching a witness, when accompanied by a limiting instruction, may be admitted at trial." *Id.*

Certain newspaper articles about Dr. Gill that Cutting attempted to use with him should have been admissible as non-hearsay under Rule 801(c)(2), and Cutting's ability to make that argument now on appeal is prejudiced by the lack of a recording. Even for those out of court statements that were inadmissible as hearsay because they would only be offered for their truth, the underlying subject matter was fair game – collateral or not – to establish bias and attack credibility.

In *Todd v. Andalkar*, this Court noted that "both bias and prejudice are of great value in assessing credibility, and courts liberally admit evidence showing relationships or circumstances tending to impair a witness's impartiality." *Todd v. Andalkar*, 1997 ME 59, ¶ 8, 691 A.2d 1215, 1218. In *Irish v. Gimbel*, the trial court abused its discretion by excluding evidence about an expert witness that was "relevant, material, and crucial to the issue of witness's bias and prejudice." *Id.* (citing *Irish v. Gimbel*, 1997 ME 50, ¶ 25, 691 A.2d 664) ("*Irish I*").

Extrinsic evidence of bias is admissible and "never a collateral matter nor one on which the cross-examiner is bound to take the witness's answer." *Id.* Based on this holding from *Todd*, and the decision in *Irish I*, it was reversible error and an abuse of discretion for the trial court to limit any inquiry into bias, prejudice, or lack of impartiality on the part of Dr. Gill.

In *Gierie v. Mercy Hosp.*, this Court drew a distinction between the extensive inquiry of bias that was allowed in *Todd*, noting that it was based on the expert

witness's relationship with the defendant hospital's own insurance company. *Gierie v. Mercy Hosp*, 2009 ME 45, ¶ 23, 969 A.2d 944, 950-51. By contrast, in *Gierie* the expert did not have a connection with the "insurer at risk of liability," and therefore it was not an abuse of discretion to limit inquiry into the expert's bias. *Id.* at ¶ 22. The trial court allowed "substantial latitude" in questioning the expert about potential bias, which was not the case with Dr. Gill. *Id.* At every turn, Cutting was cabined in her questioning of Dr. Gill's potential areas of bias, and then prejudiced in her ability to appeal by having none of the colloquies recorded.

Here, sufficient overlap existed between the kind of interpersonal issues Dr. Gill was asked about, and those alleged against Dr. McGuire. Presumably, or at least hopefully, it is a rare circumstance when physical altercations with physicians lead to police involvement. However, that was true for both Dr. Gill and Dr. McGuire. Accordingly, it was reversible error and an abuse of discretion for the trial court to limit Cutting's exploration of those facts so strenuously.

V. THE COURT ERRED IN FAILING TO EXCLUDE PANEL FINDINGS BECAUSE THE PANEL CHAIR'S CONDUCT VIOLATED RULE 80M

The Maine Constitution provides as follows: "In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced. . . ." Me. Const. art. I, § 20. "A party has a right to a jury trial in all civil actions unless it is

affirmatively shown that jury trial were unavailable in such a case in 1820." *Irish v. Gimbel*, 1997 ME 50, ¶ 7, 691 A.2d 664, 669 ("*Irish I*"). The constitutional right to a trial by jury requires that all material questions of fact be decided by a jury. *Id.* (quoting *Peters v. Saft*, 597 A.2d 50, 53 (Me. 1991)). According to the United States Supreme Court, the right to a trial by jury means that "the ultimate determination of issues of fact by the jury be not interfered with." *Id.* (quoting *In re Peterson*, 253 U.S. 300, 309 (1920)). Before the trial court, Cutting summarized this Court's precedent in *Irish I* at JA 154-157, and then *Irish II* at JA 157-158.

The instant case perfectly demonstrates why admission of the panel findings was an unconstitutional violation of Cutting's right to a jury trial. Cutting was handcuffed in her ability to enlighten the jury about the bizarre nature of the process in this particular case, and she was precluded from cross examining the highly biased panel chair and unpaid volunteer panel members. The confidentiality and mystique of the process itself (24 M.R.S. § 2857) necessarily guarantees that jurors have no idea just how incredibly biased and constitutionally deficient the panel can be in some cases.

The kind of "judicial legislation" of an unconstitutional statute discussed in the *Irish II* dissent (JA 158) is all the screening panel statute has ever known. *See also* discussion of *Smith I* and *Smith II* from JA 159-260. Under the unique circumstances of the instant case, the language of Rule 80M, combined with the Law

Court's decision in *Irish I*, *Irish II*, *Smith I*, and *Smith II*, as well as *Estate of Nickerson v. Carter,* mandated exclusion of the panel findings as not just an evidentiary matter, but one of statutory interpretation.

In *Estate of Nickerson v. Carter*, the Law Court reviewed the admissibility of panel findings where the panel chair's credibility determinations were based on her own personal experience with her primary care doctor's office, rather than the evidence presented at the panel hearing. 2014 ME 19, ¶ 9, 86 A.3d 658, 661 ("For what it is worth my family physician has never scheduled a follow-up visit for me but, rather, asks me to do it myself. Furthermore, her practice does not schedule more than six months in advance so I have to remember to call every year for my annual exam. THUS, [I] found [Dr. Carter's expert's] testimony more credible regarding the practices of reasonable physicians."). Right off the bat, the statement made in *Estate of Nickerson* was less problematic than what the panel did here, deciding the case against Cutting before a hearing even occurred.

The Law Court vacated the judgment and found that the panel findings should have been excluded by the trial court because: "Pursuant to the language of the MHSA, medical malpractice screening panel members are to base their findings solely 'upon [the] evidence as presented at the hearing, the records and any expert opinions provided by or sought by the panel or the parties." *Id.* at ¶ 17. In addition

to the MHSA, Rule 80M requires that the screening panel must "make its findings based on the issues and evidence presented at the hearing." *Id.*

In concluding that the panel findings in *Estate of Nickerson* should never have been admitted, the Law Court explained: "By requiring the screening panel to make findings based only on the evidence presented at the hearing, litigants are 'safeguard[ed] against appointed panelists performing their own independent investigation[s] or deciding [cases] based on issues not addressed by the parties." *Id.* at ¶ 17 (citing M.R. Civ. P. 80M Advisory Committee's Note, January 2009).

Due process "requires that agencies proceed exclusively upon matters 'in evidence,' because absent such a restriction, parties would have no opportunity to cross-examine or to explain adverse evidence." *Id.* at ¶ 18. That is precisely what happened in the instant case, where the panel relied on its own personal experiences to determine that Plaintiff's case was "just a shoulder," and then decided the case against her before giving any "opportunity to cross-examine or to explain adverse evidence." *Id.*

Of particular significance to the instant case, the Law Court noted in *Estate of Nickerson* that one of the difficult tasks of the panel is supposed to be assessing "credibility determinations between competing experts." *Id.* at ¶ 22. Here, the panel did not engage in any credibility determinations between competing experts, opting instead to simply read panel briefs, medical records, and depositions, and then decide

the case in Down East's favor. The Law Court has been clear that it is an abuse of discretion to allow screening panel findings to be admitted in evidence "in the face of a clear violation of statutory and procedural rules." *Id.* at ¶ 24. Moreover, the panel chair functionally admitted that she had improperly compared Cutting's case ("it's just a shoulder") with others over which she had personally presided. According to *Estate of Nickerson*, such comparisons violate Rule 80M. *Id.* at ¶ 21.

The standard jury instructions in medical malpractice actions include a statement that a "hearing" was held by the panel. The panel chair ignored Rule 80M(g)(7)(B)'s requirement that: "The parties shall have the right to examine and cross-examine witnesses." The U.S. Supreme Court has long held that: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly,* 397 U.S. 254, 270 (1970). For all of these reasons, the admission of panel findings in the instant case was a violation of Rule 80M, a violation of the United States Constitution, and a violation of M.R. Evid. 403 that improperly misled the jury.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the jury verdict and judgment below and remand for a new trial.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2024, I filed an electronic copy of the foregoing Brief of Plaintiff/Appellant Carol Cutting with the Court, along with ten paper copies delivered by hand, and two copies to counsel for Defendant/Appellee Down East Orthopedic Associates, P.A.

Dated: July 10, 2024 *s/ Laura H. White*

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