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

ON APPEAL FROM PENOBSCOT COUNTY SUPERIOR COURT

BRIEF OF APPELLEE DOWN EAST ORTHOPEDIC ASSOCIATES, P.A.

September 11, 2024

Christopher C. Taintor, Esq.
Norman, Hanson & DeTroy, LLC
Two Canal Plaza, P.O. Box 4600
Portland, ME 04112-4600
(207) 774-7000

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF FACTS 2

I. DR. MAGUIRE'S TREATMENT OF CAROL CUTTING 2

II. THE LITIGATION 9

STATEMENT OF ISSUES PRESENTED FOR REVIEW 14

SUMMARY OF THE ARGUMENT 14

LEGAL ARGUMENT 15

I. THE ABSENCE OF A COMPLETE TRANSCRIPT DOES NOT WARRANT VACATING THE JUDGMENT 15

A. HAVING FAILED TO ENGAGE IN ANY EFFORT TO RECONSTRUCT THE RECORD, CUTTING CANNOT PREVAIL ON HER ARGUMENT THAT SHE IS PREJUDICED BY ITS INCOMPLETENESS 17

B. CUTTING HAS NOT IDENTIFIED ANY ISSUE THAT SHE IS UNABLE TO EFFECTIVELY ARGYE ON APPEAL DUE TO THE INCOMPLETENESS OF THE RECORD. 18

1. Because Cutting was given broad latitude to explore Dr. McGuire's professional history, she cannot demonstrate that the failure to record a sidebar conference impairs her ability to argue, on appeal, that she was unfairly limited in her ability to prove his dishonesty 21

2. Because Cutting was given broad latitude to cross-examine Dr. Gill, she cannot demonstrate that the failure to record a sidebar conference impairs her ability to argue, on appeal, that she was unfairly limited in her ability to impeach him 23

II. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN LIMITING THE SCOPE OF CROSS-EXAMINATION 24

III. THE PANEL FINDING WAS PROPERLY ADMITTED 27

IV. THE SUPERIOR COURT PROPERLY GRANTED DOWN EAST'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON CUTTING'S PUNITIVE DAMAGE CLAIM, AND IF THERE WAS ERROR IT WAS HARMLESS 32

A. THE FACTUAL PREDICATE FOR THE PUNITIVE DAMAGE CLAIM 33

B. BECAUSE THE JURY FOUND NO TORT LIABILITY, THE ENTRY OF JUDGMENT AS A MATTER OF LAW ON THE PUNITIVE DAMAGE CLAIM DID NOT AFFECT CUTTING'S SUBSTANTIAL RIGHTS 34

C. THE TRIAL JUDGE WAS RIGHT TO CONCLUDE THAT CUTTING HAD NOT ADDUCED EVIDENCE SUFFICIENT TO MAKE OUT A CLAIM FOR PUNITIVE DAMAGES 37

1. Because the Alleged Falsification of a Medical Record Did Not Contribute to the Commission of a Tort, It Cannot Be The Basis for an Award of Punitive Damages 37

2. Even Assuming Cutting's Evidence Would Have Been Sufficient to Support a Punitive Damage Claim Against Dr. McGuire, She Offered No Evidence That Down East Should Be Held Vicariously Liable for Punitive Damages 39

CONCLUSION 40

CERTIFICATE OF SERVICE 42

TABLE OF AUTHORITIES

Federal Cases

Supreme Court **Pg(s)**

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) 35

Courts of Appeal

Bergerco, U.S.A. v. Shipping Corp. of India, Ltd., 896 F.2d 1210 (9th Cir. 1990). 17

Herndon v. City of Massillon, 638 F.2d 963 (6th Cir. 1981) 18

Stout v. Jefferson Cty. Bd. of Ed., 489 F.2d 97 (5th Cir. 1974)..... 18

Udemba v. Nicoli, 237 F.3d 8 (1st Cir. 2001) 26

United States v. Mills, 597 F.2d 693 (9th Cir. 1979)..... 18

District Court

Whittlesey v. Espy, 1996 WL 689402 (S.D.N.Y. Nov. 26, 1996) 38

Maine Cases **Pg(s)**

Argereow v. Weisberg, 2018 ME 140, 195 A.3d 1210 13

Brooks v. Town of Bar Harbor, 2024 ME 21, 314 A.3d 205 40

Charette v. Charette, 2013 ME 4, 60 A.3d 1264..... 31

Colony Cadillac & Oldsmobile, Inc. v. Yerdon, 505 A.2d 98 (Me. 1986)..... 24

DiPietro v. Boynton, 628 A.2d 1019 (Me. 1993) 34

Estate of Nickerson v. Carter, 2014 ME 19, 86 A.3d 658 ..... 27, 28

Kinderhaus N. LLC v. Nicolas, 2024 ME 34, 314 A.3d 300.....35

In re Involuntary Commitment of M., 2020 ME 99, 237 A.3d 190 17

Irish v. Gimbel, 1997 ME 50, 691 A.2d 664. 31

Lewis v. Knowlton, 1997 ME 12, 688 A.2d 912..... 32

Maine Energy Recovery Co. v. United Steel Structures, Inc., 1999 ME 31, 724 A.2d 1248..... 32

State v. Beaudet, 1997 ME 133, 696 A.2d 436 16

State v. Drake, 1999 ME 91, 731 A.2d 858, 860 ..... 24, 26

State v. Milliken, 2010 ME 1, 985 A.2d 1152 ..... 15, 16, 22, 23

Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985) 33, 37, 39

Zemero Corp. v. Hall, 2003 ME 111, 831 A.2d 413..... 34

Other State Case(s) **Pg(s)**

Bradley v. Hazard Technology Co., Inc., 665 A.2d 1050 (Md. App. 1995) 17

Kehl v. Econ. Fire & Cas. Co., 433 N.W.2d 279 (Wis. App. 1988)..... 39

McCulloch v. Campbell, 60 So.3d 909 (Ala. App. 2010) 17

Paris v. Michael Kreitz, Jr., P.A., 331 S.E.2d 234 (N.C. App.) *review denied*, 337 S.E.2d 858 (1985) 38

Reynolds v. State, 284 P.3d 823 (Wyo. 2012) 17

Saucedo ex rel. Sinaloa v. Salvation Army, 24 P.3d 1274 (Ariz. App. 2001) 39

STATUTES

24 M.R.S. §2854 29

24 M.R.S. §2857 ..... 28, 29

COURT RULES

M. R. App. 5 ..... 16, 17, 18

M. R. App. 10 18

M. R. App. P. 11 30

M. R. Civ. P. 61 32

M. R. Civ. P. 80M 29

M.R. Evid. 611 24

OTHER AUTHORITIES

Alexander, *Maine Jury Instruction Manual* § 7-76 31

Alexander, *Maine Jury Instruction Manual* § 7-114 35

Restatement (Second) of Agency §217C 39

INTRODUCTION

In this action – one of three separate lawsuits Carol Cutting has brought against Down East Orthopedics ("Down East")[1] – she claims that Down East's employee, Dr. D. Thompson McGuire ("Dr. McGuire"), committed medical malpractice by performing shoulder surgery without her informed consent, and then falsified her medical record to make it appear as though he had informed consent, when in fact he did not. She also says Dr. McGuire discriminated against her on account of her disability, Tourette's Syndrome.

After a six-day trial, a Penobscot County jury returned a defense verdict. Ms. Cutting challenges the verdict, arguing that the trial judge unduly restricted her cross-examination of an expert witness; that a prelitigation screening panel finding was improperly admitted into evidence; that her appeal is prejudiced by the failure of the Superior Court's electronic recording system to capture some sidebar conferences; and that the Court below erred by granting Down East's Motion for Judgment as a Matter of Law with respect to the issue of punitive damages.

---

[1] Cutting twice sued Down East in the United States District Court for the District of Maine. In the first case, No. 1:16-cv-00582-JCN, she sued Down East for disability discrimination under the Americans with Disabilities Act (ADA) and the Maine Human Rights Act (MHRA). The District Court granted Down East's motion for summary judgment in that action, finding that Cutting had produced no "evidence to suggest that [Dr. McGuire's] medical decisions were the product of a discriminatory animus." See Down East's Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment (dated Dec. 30, 2022), ¶55 & Exhibit 11. In the second case, No.1:18-cv-00230-JCN, Ms. Cutting challenged the constitutionality of the Maine Health Security Act. That action was dismissed for lack of subject matter jurisdiction.

STATEMENT OF FACTS

I. DR. McGUIRE'S TREATMENT OF CAROL CUTTING

In June 2013, Carol Cutting was referred to Dr. McGuire, an orthopedic surgeon. She had been having right shoulder pain since a fall in 2010. TT Vol. II at 124:16-125:13 & 212:6-213:14; Joint Exhibit 1, Tab 2, at DEO 22. X-rays of the right shoulder at the time revealed joint narrowing and mild arthritic changes at the acromioclavicular joint. TT Vol. VI at 50:13-51:17 & 56:13-57:8. An earlier MRI showed supraspinatus tendinopathy, a partial rotator cuff tear, but no full thickness rotator cuff tear. TT Vol. VI at 53:14-55:9.

In their first encounter, on June 20, 2013, Dr. McGuire examined Ms. Cutting's right shoulder. TT Vol. VI at 44:23-47:20. His examination revealed that Ms. Cutting had, among other symptoms, tenderness localized to her acromioclavicular joint, but full range of motion of the right shoulder and good motor strength. TT Vol. VI at 47:21-50:12; Joint Exhibit 1, Tab 2, at DEO 25. The exam, like the MRI, was inconsistent with a full thickness rotator cuff tear, since it is atypical for patients with those injuries to have full range of motion. TT Vol. VI at 59:12-19.

Dr. McGuire diagnosed Ms. Cutting as suffering from acromioclavicular arthritis with possible rotator cuff tendonitis and impingement. TT Vol. VI at 55:10-56:12. Concluding that all non-surgical options for treating Ms. Cutting's shoulder

pain had been exhausted, Dr. McGuire offered her surgery. TT Vol. VI at 57:10-24. The surgery he proposed to perform included debridement of the rotator cuff and subacromial decompression – a procedure that would involve "cleaning up" the structures around the acromion, to minimize wear and tear on the rotator cuff, and to effectively relieve the patient's long-standing pain. TT Vol. IV at 79:16-80:7.

Importantly, Dr. McGuire did not tell Ms. Cutting that if she had a full thickness tear of the rotator cuff, he would repair it. TT Vol. VI at 59:20-24 & 80:7-13. As noted above, neither the imaging nor the exam suggested that a full thickness tear was present. And, in any event, Dr. McGuire would not have regarded repair of a full thickness tear as a medically reasonable option for Ms. Cutting. Surgical repair of a full thickness tear requires immobilization of the shoulder for at least six weeks post-surgically. TT Vol. III at 290:18-23 & Vol. VI at 69:20-70:8. Because the "threads and anchors" used in surgical repair "are not strong enough to withstand the forces you put on them when you move your arm," immobilization is needed to "get the tendon to heal to the bone." TT Vol. VI at 70:5-11. Consequently, the success of a rotator cuff repair – unlike a subacromial decompression procedure – "hinges completely on postoperative compliance with the immobilization protocol." TT Vol. VI at 70:15-21 & 71:8-23. Dr. McGuire understood that Ms. Cutting's Tourette's Syndrome, which causes involuntary rapid and forceful arm movements, would prevent complete immobilization. TT Vol. IV at 156:3-8.

Ms. Cutting elected to proceed with surgery. TT VI at 60:18-61:9. In the weeks after she made that decision, however, she had concerns about the risk that the Tourette's might cause her to be reinjured, even after a decompression. TT Vol. VI at 62:1-7.

On June 25th, less than a week after telling Dr. McGuire that she wanted to have surgery, Ms. Cutting saw a different physician, Dr. Alisa Roberts, who wrote in an Office Visit Note:

> Patient has a history of Tourettes syndrome and one of her tics is repetitive shoulder flexion the right side (in a punching motion) – this makes pain worse and she feels that this displaces her shoulder anteriorly.

Joint Exhibit 1, Tab 6, at SJH 075

On September 25, 2013, Ms. Cutting called Down East to cancel her surgery. She did that to buy time, so she could ponder treatment options and discuss them with her other doctors. TT Vol. II at 148:3-20 & Vol. III at 286:23-287:3.

On October 9, 2013, Ms. Cutting saw Dr. Roberts again. In her Office Visit Note of that day, Dr. Roberts wrote:

> [Ms. Cutting's] shoulder chronically subluxes, made worse from punching motion that is uncontrolled due to her Tourette syndrome. . . . She has decided to cancel her surgury [sic] proposed by Dr. McGuire which was to be arthroscopy, subacromial decompression and potential open excision of distal end of the clavicle. Patient still feels that this is not the best option for her she would like a second opinion. She really wants to be casted/immobilized to see if this will help any of her pain. In the meantime should like to continue with injection treatment.

Dr. Roberts called Down East the same day to report this discussion, noting that Ms. Cutting was "complex" because of her Tourette's syndrome. TT Vol. II at 155:11-156:7 & Plaintiff's Exhibit 5.

On October 29, 2013, Ms. Cutting was seen by Gregory Unruh, D.O., at St. Joseph Family Medicine. She told Dr. Unruh that she was "worried about how she will keep the shoulder from moving with her [Tourette's]." Joint Exhibit 1, Tab 6, at SJH 103.

On October 30, 2013, Ms. Cutting saw her long-time physical therapist, Ann Covey. Ms. Cutting had a close, trusting relationship with Ms. Covey, who served as an "advocate" for her, and as an "intermediary" or "liaison" with her health care practitioners. TT Vol. II at 72:7-11, Vol. III at 93:4-94:6 & Vol. V at 155:18-156:9. In her note of the October 30 visit, Covey wrote:

> Patient has a long standing R shoulder impingement with surgical intervention being recommended. Patient is unique in that her sensory system is disturbed from her Tourette's. . . . She is very overwhelmed and having difficulty deciding on what is the best course of action for her shoulder. She has asked PT to assist in coordinating and scheduling care as she has great difficulty talking on the phone. Will speak with Dr. McGuire regarding shoulder surgery and rehab afterwards as Carol has great concerns that she will have issues "not sitting still" due to her tics.

Joint Exhibit 1, Tab 8, at CPT 254.

On November 5, 2013, Ann Covey spoke on the phone with Danielle St. Onge, a Physician Assistant employed by Down East. Joint Exhibit 1, Tab 8, at CPT

257; TT Vol. III at 287:10-288:2. Ms. St. Onge practiced under Dr. McGuire's license and worked with him "hand and glove." TT Vol. III at 274:16-22 & 275:13-17. The purpose of Ms. Covey's call was find out, for Ms. Cutting, whether her arm would be immobilized after surgery, and to convey Ms. Cutting's concern about the impact her tics would have on her recovery. Joint Exhibit 1, Tab 8, at CPT 254; TT Vol. III at 288:3-289:6 & Vol. V at 174:12-177:12. St. Onge told Covey there would be no limitation on the mobility of Ms. Cutting's shoulder post-operatively; she would be provided with a sling for comfort, but not for immobility. TT Vol. III at 289:7-16 & Vol. V at 177:13-179:20.

Covey knew that a rotator cuff repair requires post-operative immobilization; therefore the fact that Ms. Cutting would *not* be immobilized necessarily meant to Covey – who was communicating with Down East as Carol Cutting's "liaison" and "advocate" – that she would *not* undergo a rotator cuff repair. TT Vol. V at 179:21-180:21. Covey, in turn, shared this information with Ms. Cutting, who was reassured enough to rebook the surgery. TT Vol. III at 290:13-17 & Vol. V at 180:22-181:4.

On November 7, 2013, Ms. Cutting, having decided to proceed with the surgery, returned to Down East for a pre-operative appointment with PA St. Onge. TT Vol. 3 at 256:14-259:21. They discussed the planned procedure, and the fact that the risks of surgery included incomplete relief of symptoms, failure of repair, and the need for reoperation. Joint Exhibit 1, Tab 2, at DEO 38; TT Vol. III at 259:22-

260:8. Ms. St. Onge told Ms. Cutting that she would not have any restrictions following the surgery and that she would be in a sling for comfort, which could be removed. TT Vol. III at 288-289:2. Cutting also signed an informed consent that included the following language:

> My physician has discussed with me the details of my medical condition, the nature of the proposed procedure and the benefits to be reasonably expected compared with alternative treatment approaches. . . .
>
> No Guarantee: My physician has represented to me that no guarantee has been made to me concerning the results of his surgery/procedure.
>
> Extension of Operation: My physician has explained to me that during the course of surgery unforeseen conditions may be revealed, that may require a change or extension of the operation.
>
> I authorize such additional surgical procedures as are necessary for my condition . . . .

Joint Exhibit 1, Tab 2, at DEO 39-40.

On November 13, 2013, Ms. Cutting presented to the hospital for surgery. Dr. McGuire, consistent with his routine practice, saw her in the pre-operative area, reviewed the consent form with her again, and confirmed that she understood what the procedure would entail. TT Vol. Vol. 3 at 263:16-25 & Vol. 4 at 166:19-168:23.

Dr. McGuire then performed the surgery, which was in two parts. TT Vol. III at 266:6-267:1. One part was an "open" distal clavicle excision, where the skin was retracted to expose the operative field, allowing him to remove one centimeter of the distal clavicle. TT Vol. III at 295:21-24. The other was an arthroscopy,

during which a camera was inserted through the skin, permitting Dr. McGuire to see on a monitor what was inside the shoulder joint. TT Vol. III at 295:25-296:4. During the arthroscopic portion of the procedure, Dr. McGuire identified both a partial thickness rotator cuff tear and a full thickness rotator cuff tear. TT Vol. III at 267:5-7. He then debrided and smoothed the rough edges around both. TT Vol. IV at 156:4-8, 202:17-20 & 205:21-22

Dr. McGuire elected to perform debridement to address the full thickness tear, rather than attempting a rotator cuff repair, because he believed that if he repaired the tendon, Ms. Cutting's tics would cause it to be re-torn following surgery. TT Vol. IV at 156:4-8. He understood it was possible that she would continue to have some pain, TT Vol. IV at 177:6-178:7, but opted for debridement because he believed a full repair would not have been safe, TT Vol. IV at 156:3-8, and to perform it would actually have been negligent. TT Vol. IV at 202:17-20.

In his Operative Report, Dr. McGuire wrote:

> Carol has unremitting right shoulder pain. Condition is complicated by severe Tourette syndrome and uncontrollable, violent, spontaneous movements of right shoulder. She failed to improve with nonoperative measures. Relative indications for surgery were discussed, which were intolerable symptoms, which failed nonoperative treatment. 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. Potential risks and complications of surgery include but are not

> limited to failure to alleviate pain, infection, hematoma, and wound healing complications. She desired to proceed with surgery. Signed consent was obtained to proceed.

Joint Exhibit 1, Tab 3, at DEO 042 (JA 273).

On November 16, 2013, three days after the surgery, Carol Cutting sent an email to her physical therapist and advocate, Ann Covey. In it, she wrote:

> MADE IT THROUGH! McGuire did the piece off clavical [sic] & cleaned out bursa. . he was happy about that. . . he wasn't happy as he also found a rotor [sic] cuff tear that he couldn't [repair], as my arm would have to be still for 6 weeks and . . as he told my Mom . . . "she can't keep it still six minutes[."] Danille [St. Onge] was really awesome.. I [didn't see] McGuire [but she] explained everything to increasing details until I told her it was all I wanted to hear.

Plaintiff's Exhibit 70 at 16; Defendant's Exhibit 14; TT Vol. 2 at 220:2-15 & Vol. V at 181:5-184:20 (correcting typographical and other errors in the email).

II. THE LITIGATION

In the Superior Court, Cutting filed a three-count Complaint.

In Count I, captioned "Failure to Obtain Informed Consent," she alleged that "Dr. McGuire had a duty to determine if [she] wanted to undergo rotator cuff repair notwithstanding the increased risk, in the event she was willing to take that risk in order to have a chance to reduce her pain," and that "if Dr. McGuire was unwilling to perform rotator cuff surgery . . . regardless of her acceptance of risk, he was obligated to refer [her] to another provider for a second opinion." Complaint ¶¶110 & 111. She asserted that if she had been informed that Dr. McGuire would not

surgically repair a full thickness tear, she would not have let him operate on her. Complaint ¶¶117 & 119.

In Count II, captioned "Medical Negligence," Ms. Cutting alleged that Down East, acting through Dr. McGuire, "breached its duty of care . . . by treating her in an openly hostile, discriminatory, biased, and humiliating manner," Complaint ¶123, and that Dr. McGuire's "treatment of [her] was so openly hostile, outrageous, and discriminatory that malice may be implied, justifying an award of punitive damages." Id. ¶125.

In Count III, Ms. Cutting asked the Superior Court to issue a judgment declaring the Maine Health Security Act unconstitutional as applied to her.

Ms. Cutting did not sue Dr. McGuire personally. She sued only Down East.

Cutting's Formulation of the Punitive Damage Claim at Trial

Before trial, Ms. Cutting submitted the following proposed jury instruction with respect to punitive damages:

> Plaintiff Carol Cutting seeks an award of punitive damages against Defendant Down East. . . . Punitive damages are available for deliberate or reprehensible conduct by Down East, including its agent Dr. McGuire. Punitive damages are recoverable even when the conduct was not motivated by ill will toward any particular party, but it was so outrageous that malice toward a person injured as a result of that conduct can be implied.
>
> . . . .

> An award of punitive damages should only occur if Ms. Cutting has proven by clear and convincing evidence that Down East, by and through its agent Dr. McGuire, acted with express or implied malice toward her. . . .

Plaintiff's Proposed Jury Instructions. Cutting did not ask the Court to instruct the jury as to what findings it would need to make to hold Down East vicariously liable for Dr. McGuire's malicious conduct, assuming it found any. Rather, her proposed instruction would have had the jury find that if *Dr. McGuire* acted maliciously, *Down East* necessarily was subject to liability for punitive damages.

Ms. Cutting also submitted a proposed Jury Verdict Form, which would have asked the jurors to answer the following question:

> Do you find, by clear and convincing evidence, that Down East's treatment of Ms. Cutting, by and through its agent Dr. McGuire, amounted to deliberate and/or outrageous conduct, from which malice can be implied? If so, you may enter an award of punitive damages in order to deter Down East, Dr. McGuire, and other providers from engaging in similar conduct that causes harm to others. . . .

Plaintiff's Proposed Jury Verdict Form. The proposed Verdict Form, like the proposed instruction, was silent as to what conduct, on the part of Down East, had to be proven in order to subject Down East to liability for punitive damages. According to Ms. Cutting's formulation of the law, the jury would have had to impute to Down East any "outrageous" conduct on the part of Dr. McGuire, regardless of whether they found that Down East authorized or ratified that conduct.

The Evidence on the Issue of Punitive Damages

At trial, Ms. Cutting testified that Dr. McGuire never informed her, and she had no idea, that if he found a full thickness tear he would not repair it. TT Vol. II at 170:1-172:17. According to Ms. Cutting, then, the part of Dr. McGuire's operative note where he described their pre-operative discussions about the "limitations of surgery" – his assertion that he had explained that "if she were found to have a rotator cuff tear, it would not be repaired" – was a complete fabrication.

Ms. Cutting did not, however, produce at trial *any* evidence whatsoever that *if* Dr. McGuire falsified the record – an allegation he flatly denied – any principal or manager of Down East knew about his conduct, participated in it, authorized it, or ratified it. Nor did she present evidence that Down East had reason to anticipate that Dr. McGuire might falsify a patient record. In fact, the only Down East employee, other than Dr. McGuire, who testified at trial was Physician Assistant Danielle St. Onge. There was no testimony from any owner or manager of the practice

The Motion for Judgment as a Matter of Law

At the close of the evidence, Down East moved for judgment as a matter of law on the whole case, and alternatively on the claim for punitive damages.

Arguing in opposition to the motion regarding punitive damages, Plaintiff's counsel acknowledged:

> We only win this case if the jury believes that the medical record was fabricated intentionally; informed consent was never given,

> that conversation never took place. If the jury doesn't believe that, we lose. And it's that simple. TT Vol. VI at 236:8-12.

The trial judge denied the Rule 50 motion as to the whole case, allowing the negligence case to go to the jury. The Court granted the motion, however, with respect to the claim for punitive damages. TT Vol. VI at 238:25-241:20.

Closing Argument

In summation, counsel for Ms. Cutting urged the jurors to consider an "example" that would help them conceptualize what, according to Ms. Cutting, Dr. McGuire had done. She compared Dr. McGuire to a lawyer who had missed a statute of limitations, and then "backdated" documents to make it appear as though he had acted in a timely manner. According to Ms. Cutting's counsel, that conduct would "take[ ] what [the lawyer] did from just being a mistake that was negligent and elevate[ ] it to a whole other level" – and that, she said, was "what the proof has been all throughout this trial." TT Vol. VII at 46:18-47:19.

The Jury Verdict

The jury returned a defense verdict, finding of no negligence on the part of Dr. McGuire.[2] This appeal timely followed.[3]

[2] The verdict was 6-2. TT, Vol. VII, at 157:24-158:3. After the Brief of the Appellant was filed, counsel for the Appellant contacted undersigned counsel, noting that the vote had been inadvertently misstated in the brief, see Brief of Appellant at 28, and asking that it be corrected.

[3] Down East cross-appealed, but now abandons that cross-appeal, which was and is unnecessary. *Argereow v. Weisberg*, 2018 ME 140, ¶11 n.4, 195 A.3d 1210.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is Ms. Cutting's ability to prosecute this appeal prejudiced by the failure of the Superior Court's electronic recording system?
2. Did the trial judge abuse his discretion by limiting the cross-examination of an expert witness, Dr. Gill, and if so, was that error prejudicial?
3. Did the trial judge abuse his discretion by admitting the Prelitigation Screening Panel's finding?
4. Was the evidence admitted at trial legally sufficient to require that the jury be instructed on Down East's vicarious liability for punitive damages?
5. Did the Superior Court's ruling which granted Down East's Motion for Judgment as a Matter of Law on punitive damages affect Carol Cutting's substantial rights?

SUMMARY OF THE ARGUMENT

First, because Cutting has not taken advantage of the procedure established by rule to fill gaps in the trial transcript, she has waived her right to appeal from the judgment based on the failure of the Superior Court's electronic recording system. In any event, she cannot demonstrate that she is prejudiced by the fact that any sidebar conference was not transcribed.

Cutting has also waived the right to argue that the Chair of the prelitigation screening panel, or the other members of that body, prejudged her claim. She was

aware, before the panel hearing, of the facts she now cites as the basis for that argument, but she made a tactical decision to proceed. Having taken her chances at the hearing, she could not raise this issue for the first time in the Superior Court.

Insofar as Cutting's appeal is based on the theory that the screening panel findings should not have been admitted because they were tainted by procedural error, her argument is foreclosed by the Maine Health Security Act and this Court's precedent. Because the panel proceedings are confidential, the Superior Court lacked, and this Court lacks, the power to adjudicate her substantive claim of error.

The rulings that limited Cutting's cross-examination of Down East's expert witness were also well within the bounds of the trial judge's discretion. Cutting was given extraordinarily broad leeway in that examination. The judge was right to rein in the examination, and his rulings did not affect Cutting's substantial rights.

Finally, the Court's ruling on the Rule 50 motion was both correct and, in view of the defense verdict, harmless.

LEGAL ARGUMENT

I. THE ABSENCE OF A COMPLETE TRANSCRIPT DOES NOT WARRANT VACATING THE JUDGMENT.

"'[A]n appellant bears the burden of providing an adequate record upon which the reviewing court can consider the arguments on appeal.'" *State v. Milliken*, 2010

ME 1, ¶ 11, 985 A.2d 1152 (quoting *Springer v. Springer*, 2009 ME 118, ¶2, 984 A.2d 828, 829).

Where, as here, a complete transcript is unavailable through no fault of the appellant, the Maine Rules of Appellate Procedure nonetheless place the burden on her to supplement the existing record by producing a draft statement of the proceedings. M.R. App. P. 5(d). The statement must be filed within 21 days after the entry of judgment, or 14 days after the filing of a notice of appeal, whichever is sooner, so "the trial court will be more likely to have a fresher memory of the event." M.R. App. P. 5, Advisory Committee's note to 2010 amendment.

Accordingly, the absence of portions of the trial transcript due to a technical error will not render the record inadequate for appeal *per se*, nor justify vacating the judgment. "[T]o demonstrate denial of a fair appeal, an appellant must show prejudice resulting from the absence of the transcript at issue." *State v. Milliken*, 2010 ME 1, ¶15, 985 A.2d 1152 (citation omitted). And "to prove prejudice, [a litigant] 'must present something more than gross speculation that the transcripts were requisite to a fair appeal.'" *Id*. ¶17 (quoting *Bransford v. Brown*, 806 F.2d 83, 85-86 (6th Cir. 1986)). *See State v. Beaudet*, 1997 ME 133, ¶ 5, 696 A.2d 436 (the lack of a complete trial transcript did not prejudice a criminal defendant, so as to justify a new trial, where the missing portions were reflected in other parts of the record or were not crucial to review on appeal).

A. HAVING FAILED TO ENGAGE IN ANY EFFORT TO RECONSTRUCT THE RECORD, CUTTING CANNOT PREVAIL ON HER ARGUMENT THAT SHE IS PREJUDICED BY ITS INCOMPLETENESS.

Both state and federal courts have recognized that a litigant seeking to overturn a judgment because of an incomplete transcript must prove not only that the defect in the record is "material," but that "a [reconstruction] proceeding has failed or would fail to produce an adequate substitute for the evidence." *Bergerco, U.S.A. v. Shipping Corp. of India, Ltd.*, 896 F.2d 1210, 1215 (9th Cir. 1990); *see also Reynolds v. State*, 284 P.3d 823, 827 (Wyo. 2012) (*Bergerco* "recognizes an appellant's responsibility to attempt to reconstruct the record using the rules of appellate procedure."); *McCulloch v. Campbell*, 60 So.3d 909, 915-16 (Ala. App. 2010) (following *Bergerco*); *Bradley v. Hazard Technology Co., Inc.*, 665 A.2d 1050, 1055 (Md. App. 1995) (same); *see also In re Involuntary Commitment of M.*, 2020 ME 99, ¶¶15-18, 237 A.3d 190 (although absence of a clear recording of commitment hearing implicated due process, committee who did not file a motion to supplement the record could not show that his right to due process had been violated).

Here, Ms. Cutting has made literally no effort – timely or otherwise[4] – to supplement the missing elements of the transcript, as permitted by M.R. App. 5(d).

[4] Since the trial was not fully transcribed until late December of 2023, Cutting could not have known of the electronic recording problem within the time allowed by M. R. App. 5(d)(2).

There is no reason to think that an effort to reconstruct the sidebar arguments in January of 2024, once the transcripts were produced, would have been futile. At the very least, memories would have been fresher then. Having failed to make even a token effort to comply with M.R. App. 5(d), Ms. Cutting has waived the right to argue on appeal that she is prejudiced by the incompleteness of the trial record. *See Herndon v. City of Massillon*, 638 F.2d 963, 965 (6th Cir. 1981) ("[A] party may not seek a new trial simply because matters occurring in the district court are not reflected in the transcript. Rather, that party must at least attempt to cure the defect by reconstructing the record as provided by Fed. R. App. Pro. 10(c)."); *see also Stout v. Jefferson Cty. Bd. of Ed.*, 489 F.2d 97, 98 (5th Cir. 1974) ("Appellant, by failing to comply with Rule 10 F.R.A.P., has not shown, and indeed cannot show, any abuse of discretion by [the trial judge]."); *United States v. Mills*, 597 F.2d 693, 698 (9th Cir. 1979) (where appellant "made no attempt to follow the procedures prescribed by Rule 10(c)," argument could not be considered on appeal).

B. CUTTING HAS NOT IDENTIFIED ANY ISSUE THAT SHE IS UNABLE TO EFFECTIVELY ARGUE ON APPEAL DUE TO THE INCOMPLETENESS OF THE RECORD.

In her "Statement of Facts," Cutting identifies several "objections and evidentiary rulings [which] were not captured on the record." Brief of Appellant at

---

Because the delay in discovering the problem was not attributable to her, though, the Court presumably would have entertained a late submission on the ground that the failure to act in time was due to excusable neglect.

9-10. They include two objections to her own cross-examination (one where she was asked to read from her deposition transcript, and another where she was asked to confirm her prior deposition testimony); her objection to the admission of an email she had authored; Down East's objections to questions posed to its medical expert, Dr. Gill; and Down East's objections to questions about prior board complaints against Dr. McGuire, and about Dr. McGuire's professional background more broadly. In the "Argument" section of her brief, though, Cutting makes no serious effort to demonstrate that *any* of these omissions actually impair her ability to prosecute this appeal.

Ms. Cutting does not suggest, for example, that there was anything erroneous, let alone prejudicial, about the Court permitting Down East to cross-examine her with her own deposition testimony. Of course, anything she testified to under oath in deposition was an admission, and fair game for cross-examination.

And although there is no transcript of the sidebar where Defendant's Exhibit 8 was discussed, Cutting's brief does not even hint at how she might have been prejudiced by the admission of that document – an email she sent to a friend, describing her initial visit with Dr. McGuire. Indeed, before going to sidebar on that occasion, when Cutting's counsel was asked if she objected to the admission of Defendant's Exhibit 8, she answered: "I don't know." TT, Vol. III, at 138:10-140:6.

There is also no transcript of the sidebar that followed an objection by Down East's counsel to a question asked of Cutting's medical expert. When the testimony resumed, though, the expert was asked – and was allowed to answer – an almost identical question. TT, Vol. IV, at 51:7-52:15. Because Cutting was able to eventually admit the evidence she wanted admitted, she cannot plausibly argue that the absence of a transcript reflecting that sidebar conference causes her any harm.

Nor can Cutting say she is prejudiced as a result of the Court sustaining an objection to the question of whether Dr. McGuire had to be told to "chill" during his deposition. That question was part of a strategy to paint Dr. McGuire as a person with a difficult, combative personality – Cutting's counsel started her examination of Dr. McGuire by taking that tack, and she was given an extraordinarily long leash. Without question, the examination at trial revealed that Dr. McGuire's deposition had been confrontational, that he had been defensive, and that the deposition had been adjourned while the participants composed themselves. TT, Vol. IV, at 104:11-112:22. That point would not have been made any more salient if Dr. McGuire had been required to answer whether his lawyer had instructed him to "chill."[5]

In the final analysis, Cutting identifies only two discrete issues that she says she is unable to fully develop in her brief. The first issue centers around "Dr.

[5] In the deposition, Down East's counsel actually said: "Let's just chill here and get to it." Plaintiff's Exhibit 57 at 12:13-15. As he explained to the trial judge, the suggestion to "chill" was directed as much to counsel as to Dr. McGuire. TT, Vol. IV, at 104:11-23.

McGuire's board discipline and professional history," and more broadly "his character for truthfulness and prior inconsistent statements." The second involves her cross-examination of a defense expert, Dr. Gill. With respect to both issues, however, Cutting fails to describe what she thinks might be missing from the trial transcript. And in neither instance does she explain how the absence of a transcript impairs her ability to prosecute this appeal.

1. Because Cutting was given broad latitude to explore Dr. McGuire's professional history, she cannot demonstrate that the failure to record a sidebar conference impairs her ability to argue, on appeal, that she was unfairly limited in her ability to prove his dishonesty.

A prominent feature of Cutting's strategy at trial was an effort to prove that Dr. McGuire is a bad, dishonest doctor. To that end, her counsel sought to establish that Dr. McGuire, having encountered disciplinary issues in other states, fled from jurisdiction to jurisdiction, changing his name to avoid detection. As the Court might expect, Dr. McGuire categorically denied that accusation. Nevertheless, Cutting was allowed to develop that theory in depth (indeed, in much greater depth that Down East argued it should have been).

At Volume IV of the trial transcript, starting at page 180 and continuing through page 192, Cutting's counsel established that Dr. McGuire has, over time, been identified – in school, at work, at a bank, on driver's licenses, and with various licensing boards – in a variety of ways: as Daniel McGuire, as Daniel Thompson

McGuire, as D. Thompson McGuire , and as Thompson McGuire. She is concerned, however, that one exhibit – Plaintiff's Exhibit 86, a page from Dr. McGuire's college yearbook, which shows his picture and bears the name "Daniel McGuire" – was excluded, and there is no record of the sidebar conference where the admissibility of that exhibit was discussed. TT, Vol. IV, at 182:16-23 & 186:15-187:11.

In summary, then, Cutting was permitted, over Down East's objection, to consume considerable trial time cross-examining Dr. McGuire about the variations in his name – all in service of a fanciful theory that he is a rogue doctor hiding from the authorities – and the *only* obstacle she encountered was a ruling that precluded her from admitting into evidence a page from a decades-old yearbook. Simply put, the absence of a transcript reflecting the argument on that trivial point[6], and the rationale for the trial judge's ruling, does not "demonstrate denial of a fair appeal," *State v. Milliken*, 2010 ME 1, ¶15, 985 A.2d 1152, requiring that the judgment below be vacated.

[6] As Cutting acknowledges, Brief of Appellant at 33, the admissibility of evidence bearing on Dr. McGuire's "board discipline and professional history" had been the subject of a Motion *in Limine.* Thus, there is no mystery about the arguments made for and against the admission of the discipline-related evidence. Down East argued that the evidence was irrelevant and unfairly prejudicial. Defendant's Motion *in Limine* to Exclude Evidence of Discipline or Board of Licensure Actions Against Dr. McGuire (dated September 8, 2023).

2. Because Cutting was given broad latitude to cross-examine Dr. Gill, she cannot demonstrate that the failure to record a sidebar conference impairs her ability to argue, on appeal, that she was unfairly limited in her ability to impeach him.

The other issue Cutting says she is unable to effectively argue involves her counsel's cross-examination of Dr. Thomas Gill, an expert on orthopedic surgery whose testimony was presented by Down East. She says she is "prejudiced by not having a full record to challenge [those] evidentiary rulings." Brief of Appellant at 33. That argument, though, is hard to fathom. Cutting plainly has plenty of ammunition to challenge the rulings that were made with respect to Dr. Gill's testimony – in fact, she devotes two pages of her brief to arguing that the trial judge improperly excluded evidence of Dr. Gill's "bias," Brief of Appellant at 33-35 – and she does not identify even in general terms how an additional question or two would have changed the outcome of the case.

Cutting seems to imply that her counsel had some impeachment evidence up her sleeve that would have destroyed Dr. Gill's credibility as an expert, but which she was prohibited from using. If that is her theory, though, she ought to be able to at least tell the Court what the evidence was, and why the trial judge precluded it. Not having done that, Cutting is unable to demonstrate that the absence of a transcript will cause her to be denied a "fair appeal." *State v. Milliken*, 2010 ME 1, ¶15, 985 A.2d 1152.

II. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN LIMITING THE SCOPE OF CROSS-EXAMINATION.

The Law Court "review[s] a trial court's determination to exclude evidence pursuant to M.R. Evid. 403 for abuse of discretion." *State v. Drake*, 1999 ME 91, ¶5, 731 A.2d 858, 860 (citing *State v. Clough*, 391 A.2d 361, 362 (Me.1978)). "'A trial justice has broad discretion in determining whether the probative value of evidence is outweighed by the danger of confusing issues or by sheer waste of time.'" *Id*. (quoting *State v. Clough*, 391 A.2d at 362).

The Maine Rules of Evidence also affirmatively empower trial judges to limit cross-examination in the interest of justice. M.R. Evid. 611(a) ("The court must exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . [a]void wasting time and . . . [p]rotect witnesses from harassment and undue embarrassment. . . ."). A ruling that limits the scope of cross examination will be upheld on appeal unless the judge has "clearly interfered with a party's right to a fair trial." *See Colony Cadillac & Oldsmobile, Inc. v. Yerdon*, 505 A.2d 98, 100 (Me. 1986) (citing Field & Murray, Maine Evidence § 611.1, at 153 (1976)). "Prejudicial injury occurs only if the evidence excluded was relevant and material to a crucial issue and it can with reason be said that such evidence, if admitted, would probably have affected the result or had a controlling influence on a material aspect of the case." *Id.* Here, the trial judge acted well within the scope of his discretion in controlling the cross-examination of Dr. Gill.

Cutting's counsel started her cross-examination of Dr. Gill by asking a series of questions about newspaper articles that commented on events in his past employment, which has included treating professional athletes. TT Vol. V 93:20-25, 94:1 ("Q: Doctor, I just want to talk to you about some of the perceptions of some of the teammates that you've worked with and treated. . . Isn't it true that Gronk's family, Rob Gronkowski's family, was also very critical of you for causing him to need so many arm surgeries?"). She also questioned Dr. Gill about a Sports Illustrated article, which said he had poked a reporter in the chest during a discussion about an article the reporter had written. TT Vol. V, 96:15-25, 97:1-4.

These questions were entirely collateral to Dr. Gill's credibility as an expert on shoulder injuries. It is not even clear what they were intended to accomplish, except to invite the jury to side with a Boston sports celebrity, and to tarnish Dr. Gill by painting him as a hothead. Over Down East's repeated objections, the trial judge permitted Dr. Gill to "answer yes or no." TT Vol. V 94:6-7. "[B]eyond that," though, the Judge determined this line of questioning to "be collateral." *Id.*

Cutting now argues that this line of questioning was relevant because it showed "bias" on the part of Dr. Gill. Bias is, of course, a relevant and permissible topic to explore on cross-examination. It is absurd, however, to suggest that these lines of questioning were calculated to demonstrate bias, as that term is commonly understood and as it is defined in the law.

"Bias can be defined, broadly speaking, as 'the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.'" *Udemba v. Nicoli*, 237 F.3d 8, 17 (1st Cir. 2001) (quoting *United States v. Abel*, 469 U.S. 45, 52 (1984)). "It may stem from a wide variety of causes, including 'a witness' like, dislike, or fear of a party, or . . . the witness' self-interest." *Id.*

There is no allegation here that Dr. Gill had any relationship with Down East (or Dr. McGuire), or that he had any reason to "like, dislike, or fear" Carol Cutting. Instead, Cutting suggests that Dr. Gill may have been inclined to slant his testimony because he has experienced interpersonal issues that "overlap" with Dr. McGuire's. Her theory, it seems, is that both Dr. Gill and Dr. McGuire are alleged to have behaved intemperately; therefore Dr. Gill would be biased in favor of Dr. McGuire (who was not a defendant in the case). But she cites no law, and Down East is aware of none, which equates a shared personality trait with "bias."

In this circumstance, the trial judge properly exercised his "broad discretion in determining whether the probative value of evidence is outweighed by the danger of confusing issues or by sheer waste of time." *State v. Drake*, 1999 ME 91, ¶5, 731 A.2d 858, 860. Indeed, it would have been entirely reasonable for him to exclude altogether any examination about Dr. Gill's conflict with a sports reporter, his treatment of Rob Gronkowski, and any other event from his past that was not at least

arguably relevant to his medical opinions. By allowing Cutting's counsel to ask questions at all on these topics – questions that elicited "yes" and "no" answers from Dr. Gill – the trial court was, if anything, overly indulgent.

III. THE PANEL FINDING WAS PROPERLY ADMITTED.

The Law Court "afford[s] trial courts 'wide discretion' in making evidentiary rulings," including a decision regarding the admissibility of a prelitigation screening panel finding, and it "review[s] for abuse of discretion their rulings on the admissibility of evidence with respect to its prejudicial effect." *Estate of Nickerson v. Carter*, 2014 ME 19, ¶ 12, 86 A.3d 658, 661 (citing *Jacob v. Kippax*, 2011 ME 1, ¶ 14, 10 A.3d 1159).

The trial judge did not abuse his discretion here. Although Cutting accuses the Panel Chair of "demonstrat[ing] extreme and egregious bias throughout the [screening panel] process," and although she accuses the whole panel of prejudging the case "to the point where nothing [she] could offer at hearing would change their mind,"[7] the law is clear – except in limited circumstances not present here, "all proceedings before the panel . . . must be treated in every respect as private and confidential by the panel and the parties to the claim." That means, among other things, that the evidence from the hearing "may not . . . be submitted or used *for any*

[7] She also says it is "common knowledge" that the panel process is "skewed in favor of medical providers," and that it almost never results in unanimous findings against medical providers. Brief of Appellant at 16. She provides no evidence to support either claim.

purpose in a subsequent court action." 24 M.R.S. §2857(1)(A) (emphasis added). Accordingly, although Cutting asked the Superior Court, and she now asks this Court, to review the panel proceedings and second-guess the panel's decree, that is exactly what *Estate of Nickerson v. Carter* says courts cannot do.

In *Estate of Nickerson,* this Court held that the Superior Court, ruling on a motion to exclude screening panel findings that the plaintiff argued were inconsistent with evidence presented at the panel hearing, properly refused to review that evidence. The Law Court explained that the Superior Court *could not* assess whether the panel's findings were consistent with the evidence because "[t]he trial court's 'inherent power to protect the integrity of the judicial process by controlling the presentation of evidence at the trial' does not permit it to consider the panel proceedings, which are designated confidential by statute and the Maine Rules of Civil Procedure." *Estate of Nickerson v. Carter*, 2014 ME 19, ¶23 n. 2, 86 A.3d 658 (quoting *Sherburne v. Medical Malpractice Prelitigation Screening Panel*, 672 A.2d 596, 597 (Me. 1996)).[8]

Here, Cutting makes two arguments for why she thinks the panel findings were erroneously admitted. First, she says the Panel Chair made procedural and

[8] Although the Court in *Estate of Nickerson* did ultimately vacate the judgment of the Superior Court, it took that action *not* because it concluded that the panel finding was inconsistent with the evidence, but because a communication from the panel chair *after* the hearing revealed that she had based her vote on information that neither party had presented to the panel. *Id.,* ¶¶ 21, 24. There is no suggestion that anything similar happened here.

evidentiary rulings that were erroneous and unfair. Second, she says that because the panelists signaled that they would have been willing to decide the case on the basis of written submissions (medical records, deposition transcripts, exhibits, and briefs) if the parties had agreed, they must have prejudged the case.

The first argument – that the panel findings are subject to substantive attack because of procedural flaws in the way the hearing was conducted – is precluded by *Estate of Nickerson*. The confidentiality conferred by 24 M.R.S. §2857(1) encompasses not just the evidence presented at a hearing; it extends to "all proceedings before the panel," including the Panel Chair's rulings on procedure and evidence.[9] The Law Court may not second-guess the Panel Chair's rulings.

The second argument – that the panel prejudged the case before it heard any witnesses – is wild speculation. Nothing in the Health Security Act or in Rule 80M prohibits a prelitigation screening panel from relying on deposition testimony. Indeed, Rule 80M(g)(4) contemplates that the Panel Chair has authority to order a pre-hearing conference, where the parties must be prepared to discuss, among other things, "manner of presentation of testimony." And it is not uncommon for parties in medical malpractice cases to submit the deposition transcripts of at least some

[9] Even if the Law Court *could* review the Panel Chair's procedural and evidentiary rulings, it would have to defer to them. 24 M.R.S §2854 ("The chair shall make all procedural rulings and those rulings are final").

witnesses, which are received and considered by the Panel in lieu of live testimony. The willingness of the Panel Chair (and the other panelists) to alleviate the burden on the parties by deciding the case on the paper, instead of rescheduling the cancelled hearing, was gracious. It does not suggest prejudgment, any more than this Court's provisional decision to dispose of a case on the briefs, pursuant to M.R. App. P. 11(g), suggests that it has prejudged the merits of an appeal.

Nor was there anything untoward about the Panel Chair's comments that the case involved "just a shoulder." Medical malpractice cases come in all sizes. A shoulder surgery case may be more complicated than a hand surgery case, but much less complicated than one that involves a birth injury or a neurologic misdiagnosis. It is not surprising, or improper, that a panel chair would discuss with counsel the probable length and complexity of an impending hearing – just as a judge preparing to sit on a civil or criminal trial might ask counsel in advance to give a forecast of how long and complicated a trial is likely to be. The Panel Chair's comment about the part of the anatomy at issue in the case does not in any way suggest that she improperly relied on extrinsic evidence, that she was biased, or that she otherwise violated the MHSA when she ultimately voted to find no negligence – a vote in which the other two panelists, including an orthopedic surgeon, concurred after a full evidentiary hearing that occurred months later.

Notably, moreover, Ms. Cutting did not assert at the time that the offer to

decide the case on the paper suggested prejudgment. Her counsel, in fact, expressed a willingness to have the panel decide the case without a hearing if Down East would agree to a modified *Irish* instruction[10] at trial. And she did not move to recuse the Panel Chair, or the other panelists, on the ground that they had prejudged the case.

Where a litigant possesses information she believes would justify the recusal of a judicial officer, "[her] failure to make a timely motion 'constitutes an implicit waiver of the objection to the [officer's] qualification.'" *Charette v. Charette*, 2013 ME 4, ¶22, 60 A.3d 1264 (quoting *In re Kaitlyn P.*, 2011 ME 19, ¶ 8, 12 A.3d 50). "The rationale for this rule is obvious: A party should have no incentive to 'roll the dice' for a favorable decision and then, if the decision is unfavorable, raise grounds for recusal of which [he] or [his] counsel had actual knowledge prior to the decision being made." *Id.* (quoting *In re Kaitlyn P.*, 2011 ME 19, ¶ 9, 12 A.3d 50).

In summary, Cutting cannot prevail on her argument that the Panel Finding was improperly admitted because (1) the Law Court lacks the power to scrutinize the panel proceedings, which are confidential by law, (2) she has waived the right to argue that the panelists were biased, and (3) in any event, her claim of bias is barren of factual support.

---

[10] *Irish v. Gimbel*, 1997 ME 50, 691 A.2d 664. The standard jury instruction on the significance of unanimous panel findings (and the instruction given in this case, TT, Vol. VII, at 132:2-18), which is a product of this Court's decision in *Irish, id.* ¶12, includes the sentence: "The panel conducted a summary hearing, not bound by the rules of evidence." Alexander, *Maine Jury Instruction Manual* § 7-76. Cutting proposed that if there was a unanimous finding, the references to a "hearing" be removed. Down East did not agree to this proposal.

IV. THE SUPERIOR COURT PROPERLY GRANTED DOWN EAST'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON CUTTING'S PUNITIVE DAMAGE CLAIM, AND IF THERE WAS ERROR IT WAS HARMLESS.

"When [the Law Court] review[s] the grant of a Rule 50(b) motion for a judgment as a matter of law, [it] examine[s] the jury's verdict to 'determine if any reasonable view of the evidence and those inferences that are justifiably drawn from that evidence supports the jury verdict.'" *Maine Energy Recovery Co. v. United Steel Structures, Inc.*, 1999 ME 31, ¶ 6, 724 A.2d 1248, 1250 (quoting *Townsend v. Chute Chemical Co.*, 1997 ME 46, ¶ 8, 691 A.2d 199, 202). The Court must set aside the grant of a Rule 50 motion "if 'any reasonable view of the evidence could sustain a verdict for the opposing party.'" *Lewis v. Knowlton*, 1997 ME 12, ¶ 6, 688 A.2d 912, 913 (quoting *Currier v. Toys 'R' Us, Inc.,* 680 A.2d 453, 455 (Me.1996)).

In analyzing the Superior Court's ruling on the motion, moreover, the Court must consider whether the ruling, even if erroneous, prejudiced the Appellant. *See* Me. R. Civ. P. 61 ("[N]o error or defect in any ruling or order . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

A. THE FACTUAL PREDICATE FOR THE PUNITIVE DAMAGE CLAIM.

Carol Cutting's claim for punitive damages is based entirely on the theory that *Dr. McGuire* made a false entry in the medical record. She argues that the ruling was error because the evidence was sufficient to support a finding by the jury that *Dr. McGuire's* behavior was "outrageous," as that term is used in *Tuttle v. Raymond,* 494 A.2d 1353 (Me. 1985), and its progeny.

Ms. Cutting, however, did not sue Dr. McGuire. She sued only his employer, Down East. A plaintiff who sues a principal on the theory that the principal should be vicariously liable for punitive damages bears a double burden. She must prove by clear and convincing evidence that the principal's agent acted with malice, either express or implied, which contributed to the commission of a tort; *and* she must prove that the principal authorized or ratified its agent's malicious conduct.[11] Here, Ms. Cutting failed on both counts. She did not offer evidence sufficient to prove that Dr. McGuire committed a tort with malice. And she offered *no* evidence whatsoever that *if* Dr. McGuire did what she accuses him of, Down East authorized or ratified his behavior.

[11] Because this Court has not directly addressed the question of whether, and under what circumstances, a principal may be held vicariously liable for punitive damages, see infra at page 39 & n.12, it has not had occasion to say whether – assuming there *can* be vicarious liability – the factual predicate for it (authorization or ratification) must be proven by clear and convincing evidence.

Ultimately, though, the Law Court need not decide whether the evidence was, as an abstract matter, legally sufficient to support a punitive damage claim. From the verdict, we know the jury was *not* persuaded – even by the more lenient "preponderance of the evidence" standard – that Dr. McGuire falsified the record. Because the jury found no liability on Ms. Cutting's underlying tort claim, and without tort liability there can be no liability for punitive damages, the trial judge's decision on the Rule 50 motion was necessarily harmless as a matter of law. Since that is the simpler issue, we address it first.

B. BECAUSE THE JURY FOUND NO TORT LIABILITY, THE ENTRY OF JUDGMENT AS A MATTER OF LAW ON THE PUNITIVE DAMAGE CLAIM DID NOT AFFECT CUTTING'S SUBSTANTIAL RIGHTS.

As a general proposition, "[p]unitive damages . . . will lie only when the plaintiff receives compensatory or actual damages based on the defendant's tortious conduct." *DiPietro v. Boynton*, 628 A.2d 1019, 1025 (Me. 1993)); *see also Zemero Corp. v. Hall*, 2003 ME 111, ¶ 11, 831 A.2d 413, 416 ("[P]unitive damages are impermissible absent an award of compensatory damages."). The Law Court has crafted a single, narrow exception to this general rule for trespass cases, reasoning that nominal damages – which "reflects 'damage . . . presumed to flow from a legal injury to a real property right'" – are so similar to compensatory damages that a plaintiff who recovers nominal but not compensatory damages may recover punitive

damages. *Kinderhaus N. LLC v. Nicolas*, 2024 ME 34, ¶ 47, 314 A.3d 300, 314 (quoting *Gaffny v. Reid*, 628 A.2d 155, 158 (Me. 1993)).

In either case, there must be an underlying tort liability. There is no free-standing right to recover punitive damages, just because another person is alleged to have behaved with "malice," express or implied. The right to recover punitive damages depends on proof that the other's malice contributed to the commission of a tort. That explains, in part, why it is appropriate (and common) to bifurcate the trial of liability and punitive damages.[12] If the plaintiff fails at the liability phase of a trial, there is no need to reach the punitive damage phase. And it explains why juries routinely are instructed that they should not reach the question of punitive damages unless they have first found the defendant liable for a tort. See Alexander, Maine Jury Instruction Manual §7-114 (2022) ("If you find that [the plaintiff] sustained damages caused by the defendant's [conduct on which the finding of liability was based], you may consider separately whether you should award [the plaintiff] punitive damages.") and Comment on §7-114 (citing *DiPietro v. Boynton*).

Here, Carol Cutting failed to prove that she "sustained damages caused by the defendant's conduct." Even if the Rule 50 motion had been denied, then, a properly instructed jury, having found in favor of Down East on the threshold question of tort

[12] *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 618 (1996) (listing jurisdictions that mandate the bifurcation of liability and punitive damages determinations).

liability, would not have reached the issue of punitive damages. For this elementary reason, Ms. Cutting cannot plausibly argue that the Superior Court's ruling on the Rule 50 motion was prejudicial error.

It is also clear that Ms. Cutting was not prejudiced for another related, but subtly different reason. To recover *either* compensatory *or* punitive damages, she had to prove that Dr. McGuire falsified the medical record. Her attorney admitted as much. At trial, and while arguing the issue of punitive damages, Ms. Cutting's counsel candidly acknowledged:

> [W]e only win this case if the jury believes that the medical record was fabricated intentionally; informed consent was never given, that conversation never took place. If the jury doesn't believe that, we lose. And it's that simple.

TT, Vol. VI at 236:8-12. And in her closing argument, she told the jury that Dr. McGuire's fabrication of the medical record was conduct which, in her view, transformed the case from one of simple negligence to something more sinister – in her words, to a "whole other level." TT Vol. VII at 46:18-47:19. Following this argument to its logical conclusion, the jury must have believed Dr. McGuire when he testified that the operative report accurately described his communication with Ms. Cutting. And the jury's implicit finding – that the operative record was accurate – necessarily means that it rejected the whole factual construct underlying the punitive damage claim.

C. THE TRIAL JUDGE WAS RIGHT TO CONCLUDE THAT CUTTING HAD NOT ADDUCED EVIDENCE SUFFICIENT TO MAKE OUT A CLAIM FOR PUNITIVE DAMAGES.

1. Because the Alleged Falsification of a Medical Record Did Not Contribute to the Commission of a Tort, It Cannot Be the Basis for an Award of Punitive Damages.

In explaining his ruling on Down East's Rule 50 motion, the trial judge focused on the question of whether the allegedly "outrageous" conduct alleged by Carol Cutting – fabrication of evidence in an operative report, to create the false appearance that Dr. McGuire had obtained her informed consent to surgery – could support an award of damages, given that the fabrication supposedly happened "when the damage had already been done, when the failure of informed consent had already occurred, when the operation had already been performed." TT Vol. VI, at 241:11-20. That was exactly the right focus, and it led him to the right result.

The reason it was right is related to the principle, discussed above, that there is no independent, free-standing right to recover punitive damages; they are available only to a plaintiff who proves an underlying tort liability. This Court made the point clearly in *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985). There, the Court first said that "'express' or 'actual' malice exists where the defendant's *tortious conduct is motivated by ill will* toward the plaintiff." *Id.* at 1361. Then, the Court said: "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*. at 1361 (emphasis added)

Tuttle tells us, then, that whether a plaintiff seeks to establish a claim for punitive damages by proving "express" or "implied" malice, the malice must be germane to the underlying tort. "Express" malice is relevant only if it supplies the motivation for the tort. And the "outrageousness" of a defendant's conduct is relevant only if a plaintiff was "injured as a result of that conduct."

Consistent with this principle, falsification or concealment of evidence is not a basis for punitive damages *unless* it contributes to a plaintiff's harm. *See, e.g., Whittlesey v. Espy*, 1996 WL 689402, at *1 (S.D.N.Y. Nov. 26, 1996) ("[C]ourts in New York have refused to recognize the tort of intentional spoliation of evidence when a physician allegedly falsifies his records in order to avoid medical malpractice liability when the plaintiff cannot show any injury resulting from the falsification."); *Paris v. Michael Kreitz, Jr., P.A.*, 331 S.E.2d 234, 243 (N.C. App.), *review denied*, 337 S.E.2d 858 (1985) (plaintiffs' attempt to use evidence of document falsification as the basis for their punitive damages claim "must also fail because they neither allege nor attempt to prove that the document alteration aggravated the injury caused by the alleged malpractice").[13]

[13] Courts have dealt more frequently with the analogous question of whether a driver who leaves the scene of an automobile accident can be held liable for punitive damages based on that conduct. The decision to flee an accident scene is presumably motivated by the desire to conceal culpability

2. Even Assuming Cutting's Evidence Would Have Been Sufficient to Support a Punitive Damage Claim Against Dr. McGuire, She Offered No Evidence That Down East Should Be Held Vicariously Liable for Punitive Damages.

In *Tuttle v. Raymond*, *supra*, at 1360, the Law Court left "for future consideration" the question of "whether one can be vicariously liable for punitive damages." In this case, too, the Court need not conclusively resolve that question. Down East assumes, for purposes of the pending appeal, that there are circumstances where a principal may be so deeply enmeshed in the underlying wrongful conduct of its agent that vicarious liability is warranted. Assuming that is true, though, the majority rule is that a principal can be held vicariously liable for punitive damages only in very narrowly-defined circumstances: where "(a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act." *Restatement (Second) of Agency* §217C.

– the very same desire that would, in theory, motivate a doctor to falsify a medical record. Courts have generally held that punitive damages are not recoverable in that circumstance, unless the tortfeasor's flight from the scene aggravated a plaintiff's harm. *See Saucedo ex rel. Sinaloa v. Salvation Army,* 24 P.3d 1274 (Ariz. App. 2001) (although defendant's flight from scene after hitting pedestrian was a crime, it could not be used to support a punitive damage claim absent evidence that it aggravated the victim's injuries); *Kehl v. Econ. Fire & Cas. Co.,* 433 N.W.2d 279, 281 (Wis. App. 1988) ("Since Kehl cannot recover compensatory damages against Milkie for leaving the accident scene, punitive damages may not be awarded for that conduct.").

In this case, Ms. Cutting offered no evidence whatsoever to establish any of the conditions that must be met to impose vicarious liability for punitive damages. As her proposed Jury Instructions and Jury Verdict Form make clear, she assumed that the standards governing vicarious liability for compensatory and punitive damages are identical – that if Dr. McGuire behaved outrageously while employed by Down East, then vicarious liability for punitive damages would attach to Down East. That assumption was wrong. Because Ms. Cutting offered no evidence to prove Down East's vicarious liability, the Superior Court had available to it an alternative, independently sufficient basis for granting the Rule 50 motion. Accordingly, the Law Court may affirm on this alternative ground. *See Brooks v. Town of Bar Harbor,* 2024 ME 21, ¶ 7, 314 A.3d 205, 207 ("As a general rule, '[the Law Court] may affirm a summary judgment on alternative grounds from the trial court decision when we determine, as a matter of law, that there is another valid basis for the judgment.'") (quoting *Yankee Pride Transp. & Logistics, Inc. v. UIG, Inc.*, 2021 ME 65, ¶ 11, 264 A.3d 1248).

CONCLUSION

For the foregoing reasons, the Appellee Down East Orthopedic Associates, P.A. respectfully requests that the Law Court affirm the judgment of the Superior Court.

Dated at Portland, Maine this 11th day of September, 2024.

Respectfully submitted,

NORMAN, HANSON & DeTROY, LLC

_____

Christopher C. Taintor, Esq. – Bar No. 3313
Attorney for Defendant-Appellee/Cross-Appellant

Norman, Hanson & DeTroy, LLC
Two Canal Plaza, P.O. Box 4600
Portland, ME 04112-4600
(207) 774-7000
ctaintor@nhdlaw.com

CERTIFICATE OF SERVICE

I, Christopher C. Taintor, Esq., Attorney for Defendant-Appellee/Cross-Appellant Down East Orthopedic Associates, P.A., hereby certify that I have served an electronic copy of the Brief of Appellee with the Law Court and counsel for the Plaintiff-Appellant, and further certify that I have served two copies of the Brief of Appellee upon all counsel of record, by depositing same in the United States Mail, postage prepaid, as follows:

Laura H. White, Esq.
Danielle Quinlan, Esq.
White & Quinlan, LLC
62 Portland Road, Suite 21
Kennebunk, ME 04043
(Counsel for Plaintiff-Appellant)

Dated at Portland, Maine this ____ day of September, 2024

NORMAN, HANSON & DeTROY, LLC

_____
Christopher C. Taintor, Esq. – Bar No. 3313
Attorney for Appellee
Down East Orthopedic Associates, P.A.

Norman, Hanson & DeTroy, LLC
Two Canal Plaza, P.O. Box 4600
Portland, ME 04112-4600
(207) 774-7000