STATEMENT OF THE CASE

Appellee and Cross-Appellant Billy Karl Boone disagrees with Appellants' characterization of the question posed to Dr. Goldberg's expert witness. Mr. Boone quotes the transcript in his Statement of Facts *infra* at page12.

QUESTIONS PRESENTED IN MR. BOONE'S CROSS-PETITION

1. Where a retained expert is asked a single cross-examination question about his prior inconsistent testimony in a highly publicized case, does that question warrant reversal of the denial of a mistrial motion, when the defendants never sought to preclude such questioning in advance, never sought a curative instruction, and did not move for mistrial until a day later, especially when the trial court rejected defense counsel's claims of improper personal attacks and commended all counsel for the "highest degree of professionalism" throughout the trial?

2. Where the jury found for plaintiff on both surgical negligence and informed consent claims, should the court consider a sufficiency of evidence argument that goes only to informed consent?

3. (If the court considers the merits of the informed consent issue): Did the Court of Special Appeals correctly conclude that, as a matter of law, a surgeon with little experience in a complex procedure performed close to the brain had no duty to inform his patient of the risk of brain injury and the abundance of more experienced specialists available?

STATEMENT OF FACTS

A. Events giving rise to the lawsuit

On January 6, 2000, Dr. Seth Goldberg, an ear-nose-throat ("ENT") surgeon, operated on the mastoid cavity behind Billy Boone's left ear to remove a benign growth. That procedure, a mastoidectomy, was the second such procedure Mr. Boone had had and was thus called a "revision" mastoidectomy. The first, done 17 years before by another surgeon, had left a hole in Mr. Boone's skull above the mastoid. The hole exposed the dura, the tough fibrous tissue that covers the brain. (E.129, 139, 193). Dr. Goldberg saw the hole on a CT scan before the surgery. (E.443). Dr. Goldberg did not tell Mr. Boone

that even normal revision mastoidectomies were more complex than first-time mastoidectomies, that the hole made the operation riskier because the brain was vulnerable, or that he had had little recent experience doing revision surgery. (E.446-450).

After the surgery, Dr. Goldberg dictated an operative report. He noted nothing unusual. (E.200). Mr. Boone went home that day. (E.200). The next morning, he could not read or remember the names of family members. (E.350) (testimony of Mr. Boone). Neurologists ordered imaging studies of his brain to try to diagnose his condition. (E.82, 85) (Dr. Satinsky). They saw a tract of what appeared to be air surrounded by blood in his brain, leading from a pre-existing hole in the side of Mr. Boone's skull (the same one that Dr. Goldberg had seen on the pre-operative scan). They concluded that something had penetrated the dura and then the brain during Dr. Goldberg's surgery. (E.89). Mr. Boone was given antibiotics to prevent an infection in the brain. Surgery was ruled out as an option because the bleeding was confined to the brain tissue, and there was no pool of free blood that could be drained to stop further damage. (E.94).

Mr. Boone was told 18 months later that his brain injury was permanent. His cognitive and emotional brain changes left him unable to work. (E.273). In 2002, he sued Dr. Goldberg and the Aesthetic Facial Surgery Center ("defendants") for the negligent performance of the surgery and for failure to obtain informed consent.

B. Evidence on Surgical Negligence

Dr. Goldberg admitted that penetrating the brain during this surgery would have been negligent. (E.470). Therefore, the main issue at trial was whether he in fact had penetrated Mr. Boone's brain with an instrument. Mr. Boone proved that this had happened through the pre-operative and post-operative imaging scans of Mr. Boone's brain and the interpretations of his treating physicians. His witnesses also addressed the expert opinions disclosed by Dr. Goldberg. Dr. Goldberg and his experts offered several theories, among them that the bleeding was not within the brain tissue itself but rather on the surface of the brain, and therefore the tract of air that seemed to penetrate into the brain was actually floating in a pool of free blood outside the brain. Another theory,

introduced for the first time during trial, maintained that a piece of the benign growth had escaped the bony roof of the mastoid, called the tegmen, traveled through the hole, and contacted the dura with sufficient force to cause it to fall apart and allow gel foam to penetrate the brain.

1. Mr. Boone's case

Mr. Boone's first trial witness was a treating physician, Dr. David Satinsky, a neurologist who saw Mr. Boone five days after the surgery. He at first suspected Mr. Boone had had a stroke after the surgery. He ordered MRI and CT scans and reviewed the CT scan with Dr. Citrin, a neuroradiologist. They both concluded that the CT scan showed a tract of air penetrating through the skull into the brain. (E.88-89). Dr. Satinsky prescribed antibiotics to prevent an infection from the brain having been penetrated from the outside. (E.90). He concluded that the bleeding was inside the brain tissue, not on the surface of the brain. (E.83-85). Dr. Satinsky telephoned Dr. Goldberg to report the brain penetration and made notes about the call in Mr. Boone's chart. (E.90-91). According to the note, Dr. Goldberg insisted that the air had to be in the area of the surgery in the mastoid cavity, not in the brain itself. (E.91). At trial, Dr. Goldberg testified that no such conversation had taken place. (E.456A). Dr. Satinsky was on a first-name basis with Dr. Goldberg and did not appear at trial voluntarily. (E.90, 92-93).

Mr. Boone also called as an expert a leading ear surgeon from New York, Dr. Samuel Selesnick, vice chairman of the otolaryngology department at Cornell New York Presbyterian Hospital. Dr. Selesnick testified that Dr. Goldberg violated the standard of care by penetrating the brain during the surgery in an area where he had no reason to put an instrument. (E.102, E.105, E.116, E.137). Dr. Selesnick showed the jury that a tract of what appeared to be air led from the pre-existing hole in the side of Mr. Boone's skull directly into his brain. Because Dr. Goldberg denied penetrating Mr. Boone's brain, the exact mechanism of injury could not be determined. However, Dr. Selesnick said that several of the tools used in the procedure – including drills with tiny burr heads and suction tubes – could have produced the injury seen on the post-surgery CT scan. (E.141-142). Dr. Selesnick showed that the skull defect through which the brain was

penetrated was outside the area where Dr. Goldberg should have been working. Thus, there was no good reason to have an instrument there. (E.135-136, E.204). Dr. Selesnick testified that the penetration – through the skull, then through the tough dura covering the brain, and then about 1.5 cm into the brain tissue itself – was "very, very deep." (E.137). The depth of the penetration showed that the injury was not caused by a tiny, non-negligent slip, but rather by the probability that Dr. Goldberg was lost and did not realize where he was operating. (E.199). With careful surgical technique, Dr. Goldberg could have readily avoided penetrating the brain. (E.130-131).

Dr. Selesnick addressed the defense theory that the gel foam traveled into the brain on its own or else placed so much pressure on the brain as to cause a large bleeding. He showed the jury a sample of gel foam, which is mixed with salt water in the operating room to make a "very soft" gelatin like Jello. (E.139-140). He further testified that a bleeding created by pressure on the brain, as opposed to penetration, would have shown a very different pattern, with blood spreading over the surface of the brain and not penetrating deep into the tissue as the injury to Mr. Boone did. (E.205). Dr. Selesnick testified that the only way the gel foam could have gotten into the brain would have been for the surgeon to have placed it there to stop bleeding after injuring the brain. (E.139-141). Similarly, Dr. Potolicchio, a treating neurologist, testified it was "physically not possible" for this injury to have occurred merely from pressure from the outside of the brain; rather, something was "driving right down into the brain itself." (E.332-333).

Dr. Selesnick also addressed the defense theory that the entry site of the injury was not through the pre-existing skull defect but was much closer to the area of Dr. Goldberg's operation, through a hole in the roof of the mastoid cavity, or "tegmen." Dr. Selesnick reviewed all the scans and concluded there was no hole in the tegmen. He said Dr. Goldberg's own records confirmed the absence of any hole. (E.151, E.155).

Dr. Lucien Levy, a treating physician and the chief of neuroradiology at George Washington University Hospital in Washington, D.C., testified. He received his medical training at Johns Hopkins and had a Ph.D. in biomedical engineering from MIT. He became involved in Mr. Boone's care 18 months after the injury when his department

performed an MRI scan to see what residual damage was left in Mr. Boone's brain. Dr. Levy later reviewed the previous imaging of Mr. Boone's brain to determine how the injury had occurred. (E.96). He concluded that "the brain had been penetrated by an object through a hole on the side of the skull, and that led to bleeding and eventually damage."(E.97K) He showed the jury that the skull had been penetrated through the pre-existing hole "by some kind of structure," which knocked off small pieces of bone from the edge of the hole as it penetrated. (E.97P, E.100D, Apx 015 (X-ray chart)).

Dr. Levy obtained the digital computer file on the CT scan done eight days after Dr. Goldberg's surgery and loaded the file onto his own computer at GWU, so that he could read the original data just as the official interpreter of the January 2000 CT scan, had done. (E.97Q-97T). Dr. Levy showed the jury an extensive set of three-dimensional images that he had reconstructed from the digital data. (E.97U-97W, E.98-100, E.100A-100L). He measured the tract going into the brain, at about two millimeters wide by 1.3 to 1.8 centimeters long, (Apx 001), and showed how the egg-shaped mass of blood inside the brain followed the trajectory of the object that had penetrated the brain. (E.100G-100H). The tract going into the brain can be seen on the main image reconstructed by Dr. Levy, (E.655, color version at Apx 014). By studying the digital density numbers of the image, Dr. Levy showed that the tract was not pure air but appeared to be air mixed with a slightly more dense substance consistent with surgical gel foam. (E.100G).

2. The defendants' case

Dr. Goldberg denied causing any injury to Mr. Boone (E.452-453); he also denied that the telephone call that Dr. Satinsky documented in his record had ever taken place. (E.456A). In his deposition, Dr. Goldberg admitted he had "no explanation" for the bleeding in Mr. Boone's brain. (E.455). Then, at trial, he theorized that the gel foam which he had placed into the mastoid cavity during surgery had somehow traveled around the bone separating the mastoid cavity from the floor of the brain and expanded during two to three days after surgery to put pressure on the brain, creating the bleeding. (E.453A-456, E.456B-457). He then conceded that the soft gel foam could not get into the brain unless some kind of instrument had made a hole in the brain. (E.456F-457). He

opined that the foam was not in the brain itself but was floating inside a pool of blood on the surface of the brain that pushed aside the brain tissue. (E.458-459). He agreed that this opinion was contrary to the first MRI taken a few days after the surgery, which showed blood saturating the brain tissue, but no free blood on the surface of the brain. (E.459-462). He also admitted that when he first looked at the MRI scan while Mr. Boone was still his patient, he had not noticed any bleeding on the surface of the brain. (E.460-461). Dr. Goldberg conceded that his new theory also was at odds with Dr. Satinsky's interpretation and the official interpretation of the CT scan by Dr. Citrin. (E.463-464).

Asked if any treating physician agreed with Dr. Goldberg's theory of how the injury had occurred, Dr. Goldberg was aware of none. (E.465). He agreed that the only physicians who supported his view of what had happened were the paid expert witnesses hired for trial. (E.466). Those experts had prepared a diagram showing the brain injury connected to a non-existent hole in the roof of Mr. Boone's mastoid cavity. The diagram was produced by the defense 10 days before trial. Dr. Goldberg conceded on the witness stand that the diagram did not correctly show the site of the injury. (E.467). That diagram was withdrawn and was replaced at trial with another. That diagram also failed to show accurately the place where the brain was penetrated. Dr. Goldberg testified: "This is not an accurate picture, I agree with you." (E.468). He conceded that he and his experts were now hypothesizing that there was a hole in the tegmen bone which no radiologist had ever seen and which he had not seen while operating. (E.468-469).

No treating doctor testified for Dr. Goldberg on the issue of what had happened, and his expert witnesses had difficulty with the theories which had been disclosed in discovery. After their two successive sets of medical illustrations proved to be anatomically incorrect and were disavowed by Dr. Goldberg, they announced a new theory in mid-trial. (E.473). They theorized that before the surgery, the benign growth in Mr. Boone's mastoid cavity had escaped the bony cavity by traveling around the tegmen, had gone through the hole in the side of the skull, had contacted Mr. Boone's dura and brain directly above the mastoid, and had caused the dura to fall apart, all of which was unnoticed by Dr. Goldberg when he was operating a few millimeters away, and then,

after he closed the surgical site, the gel foam slipped through this opening and somehow got into the brain. Dr. Goldberg's surgical expert, Dr. Lambert, relied on some new images shown at trial by Dr. Lande, the defense radiology expert. (E.473).

The defense also relied on arguments about good character. The defense argued in opening statement that Mr. Boone had implicitly accused Dr. Goldberg of lying when he denied penetrating the brain, that Dr. Goldberg stood accused of being "a callous, uncaring, worthless scum of an individual," (E.78), and that Dr. Goldberg's "career … reputation … and standing in our community" had been attacked by Mr. Boone's lawsuit. (E.72). The trial judge later admonished defense counsel to refrain from further argument about the defendant's reputation. (E.79B).

3. Mr. Boone's rebuttal

Dr. Levy returned to rebut the new theory that the benign growth had escaped the mastoid cavity and caused the dura to fall apart. He testified that both the pre-operative and the post-operative imaging studies showed that the growth was confined to the mastoid and had never reached the dura or brain. (E.508-519). He also showed the jury that the images they had seen from the defense radiologist had incorrectly presented a horizontal slice and a vertical slice as though they were comparable. (*Id.*)

C. Informed Consent Evidence

The plaintiff's second theory of liability against Dr. Goldberg was presented through Dr. Selesnick. He testified, "[T]he informed consent should include complications that occur within regional anatomical boundaries, including the brain, which is right near the mastoid." (E.116). He continued, "[I]t would have been prudent for the physician to consider referring this patient to someone more expert in the care of this type of problem once it was understood that this was a complicated surgery. It was a revision surgery and there was exposed dura, the covering of the brain was already exposed prior to the surgery." (Id.; see also E.144). Dr. Selesnick further opined that "he should've at least discussed the possibility of going to a more specialized surgeon so that the patient could be involved in the decision of the type of risks that the patient would want to entail, and clearly the risks would be different in those two situations… That the

risks would be different in someone that rarely did a revision mastoidectomy compared to the risks associated with someone who did routine (inaudible) mastoidectomies." (E.146). The patient should have been told about the hole in his brain because he was "at increased risks." (E.207).

Dr. Selesnick performs revision mastoidectomies 100 times or more a year. (E.104). He testified that there were surgeons in the Washington, D.C. area with similar experience. (E.145-146). Dr. Goldberg, by contrast, had only done about five non-revision mastoid procedures per year. In the previous three years before Mr. Boone's operation, Dr. Goldberg had only done one revision mastoidectomy. (E.145). Dr. Selesnick also testified that doctors who do a general ear-nose-throat residency do not finish the program ready to do complicated procedures. Rather, they are expected to know when to ask for help. (E.112-115).

Dr. Goldberg admitted that when he discussed the surgery beforehand with Mr. Boone, he did not tell Mr. Boone anything about his pre-existing skull defect, and that he did not warn Mr. Boone about the possibility of brain injury or the availability of more experienced surgeons. (E.446-450). He testified that the area of the hole was "above [his] surgical field." (E.160).

D. Evidence on Injury and Damages

The parties contested the extent of Mr. Boone's impairment. Mr. Boone testified and also called his companion, several former clients, and a treating neurologist.

1. Mr. Boone's evidence

Mr. Boone, then 62 years old, developed problems with verbal, short-term memory and word retrieval immediately after the surgery. Those problems persist to this day. (E.236). He began to experience outbursts of anger which also persist and are disabling. (E.235). His neurologist, Dr. Samuel Potolicchio, a neurology professor at George Washington University, related these problems to the damage to the left temporal lobe, on the dominant side of Mr. Boone's brain (E.234-235, 242-243, 246, 261-265).

When Dr. Potolicchio first saw Mr. Boone some 17 months after the surgery, he referred him for an MRI scan to see how the brain had changed. The official interpreter

of that scan was Dr. Levy. (E.96). Dr. Levy testified that the MRI scan taken in July 2001 showed an area of dead brain tissue in the temporal lobe, about 30 millimeters by about 20 millimeters tall, and that the brain had shrunken around this dead tissue. (E.97E-97J). He said the injury was permanent. (E.97J). The jury was shown the size and shape of the dead tissue on a poster of the MRI images. (E.654, color version at Apx 016).

Dr. Potolicchio testified that the neuropsychological testing he had ordered for diagnostic purposes, (E.233), was consistent with the testing later done by Dr. Schretlen, an expert hired by Dr. Goldberg's counsel. Both sets of tests showed the verbal memory and word retrieval problems that Mr. Boone has had since the injury, and both underscored his trouble controlling his emotions. (E.248, E.254-260). Dr. Potolicchio related these difficulties to the damage in Mr. Boone's left temporal lobe and adjacent structures, the hippocampus and amygdala, which regulate emotion. (E.261).

Dr. Potolicchio tried treating Mr. Boone's mood disturbance with antidepressant drugs but found it difficult because of the traumatic nature of the injury. (E.265-266). Dr. Potolicchio testified that Mr. Boone has deficient insight about his injury, which is common with brain-injured persons and which interferes with adaptation to the injury because of his inability to understand and appreciate his own problem. (E.266-267, E.335H, E.335L). Therapy would help him develop insight and adjust to the injury. (E.335H, E.399).

Dr. Potolicchio referred Mr. Boone for further treatment to Dr. Griffith, a neuro-psychiatrist at George Washington University. (E.236-237). Dr. Griffith diagnosed Mr. Boone as suffering from "anger dyscontrol secondary to brain injury," (E.660, E.659-E.670), and "dementia secondary to brain injury." (E.663).

Before his surgery, Mr. Boone had been a successful home improvement contractor known to his many loyal clients as likeable, garrulous and meticulous in his craftsmanship. (E.338, E.343). He now cannot work because of memory problems and his inability to control his mood swings. (E.347). Dr. Potolicchio said it would be "impossible" for Mr. Boone to work again. (E.273). Ms. Dishman, who became Mr. Boone's girlfriend after both were widowed, took over many routine functions that Mr.

Boone could not handle for himself, such as making doctor appointments, handling business on the telephone, and grocery shopping. (E.326-327), (E.355-356). She testified she did not feel comfortable leaving Mr. Boone alone overnight. (E.393). Mr. Boone's daughter-in-law handles his personal finances. E.407. Mr. Boone testified that he goes out of his home less than he used to because of his memory problems and his fear of having an emotional outburst in public. He has had outbursts with most family members as well as professionals trying to help him. (E.352-357).

Dr. Potolicchio testified that it was not safe to leave Mr. Boone alone because of his impairments. He said it would be prudent for Mr. Boone to have an aide come into his home regularly to check on him and help with daily routines. ((E.260-261, E.271).

Beverly Whitlock, the director of the Brain Injury Rehabilitation Program in Rockville, testified. Her facility is the oldest free-standing brain injury rehab facility in Maryland, (E.355A-355C). She recommended that Mr. Boone undergo up to six months of practical therapy to teach him tasks like planning a trip to the grocery store, (E.355F), to reduce stress in his environment, (E.355G), and to cope with his mood disorder. She also testified that Mr. Boone would need someone to help on a daily basis if his live-in companion was no longer available. (E.355I-355K). Mr. Boone had been recommended to Ms. Whitlock's facility by the "life care planning" expert who testified for Dr. Goldberg. (E.335C-335D).

Priscilla Phillips, a nurse with a special expertise in planning for patients with chronic injuries, developed a care plan for Mr. Boone. (E.380). She concluded, based on her own observations and those of Dr. Potolicchio, Ms. Dishman and Ms. Whitlock, that Mr. Boone would not function well without regular help, including a person to provide "companion services" on a daily basis. (E.395-409, E.412). The costs of the care that she determined were reasonably necessary for Mr. Boone totaled $880,584 to $915,495 over his life expectancy, in present value dollars. (E.657). Dr. Potolicchio described Ms. Phillips' care plan as "reasonable" and "relatively conservative." (E.268-269).

2. The defendants' evidence

Dr. Goldberg called a neurosurgeon, Dr. Joel Falik, who testified that the area of damage to Mr. Boone's temporal lobe would not be likely to cause permanent behavioral deficits because most of it lay in an area that was considered safe to remove surgically. He conceded on cross-examination that he was mainly a spine specialist, had never met or examined Mr. Boone, and did not treat patients with behavioral problems due to brain injury. (Apx 002-004).

On the sixth day of the eight-day trial, the defendants called Dr. Schretlen, a forensic neuropsychologist whom they had identified shortly before trial, who testified for a fee about Mr. Boone's mental capacity after the injury. They produced a list of Dr. Schretlen's "Court and Deposition Testimony" from April 2000 through March 2004. (E.700). The list identified 28 cases by caption and court. The last and most recent case on the list was "*Sharon Burke v. The Neurology Center, et al."* The case before that was "*Commonwealth of Virginia v. Lee Boyd Malvo*." (E.700). Dr. Goldberg did not seek a confidentiality order concerning Dr. Schretlen's participation in *Malvo*, and the defense did not file a motion *in limine* to exclude discussion of it or any other case.

Concerning Mr. Boone, on whom he had performed an abbreviated set of psychological tests, Dr. Schretlen testified that "in most respects, Mr. Boone's cognitive or neuropsychological functioning is perfectly normal." (E.480). The jury had already heard Dr. Potolicchio's conclusion to the contrary about Dr. Schretlen's testing.

In his cross-examination of Dr. Schretlen, Mr. Boone's counsel first asked him about his testimony in the most recent trial listed, *Burke*. In *Burke*, a medical malpractice case involving brain injury, the defense hired Dr. Schretlen. He opined that the plaintiff's mental capacity was not as impaired as her witnesses had said it was, although she had scored in the abnormal range on nearly all the tests he had given her. Counsel for Mr. Boone identified the case to the witness and asked several questions about that testimony, without objection. (E.478-482).

Further exploring whether Dr. Schretlen's interpretations of his test results varied according to the side which had retained him, (E.481), plaintiff's counsel then asked,

"Now, the case before that, that you testified in, was a criminal case, right?" (E.483). The "case before that" on the chronological list which had been produced in discovery was *Malvo*. (E.700). Upon Dr. Schretlen's uncertainty as to the case referred to, counsel rephrased the question: "Well, you testified a young man, about 18 years old, and you did a day-long battery of tests on him, and he tested abnormal in one or two tests, right?" The defense did not object. Dr. Schretlen answered, "Oh, yes, I know who you are speaking of." Mr. Boone's counsel proceeded: "Okay, he was only abnormal in one or two tests?" Again, there was no objection, and Dr. Schretlen answered, "That's right." (E.483). Counsel asked the next question: "Okay. And that young man, you were willing to come into court and testify that he might have been brainwashed into murdering 10 people in the sniper thing, isn't that true?" Dr. Goldberg then objected, but Dr. Schretlen answered: "That is absolutely incorrect and outrageous." (E.483).

At the bench conference, Dr. Goldberg's counsel stated this objection:

> This is an outrage. I am not getting into the sniper syndrome, and I don't have the records and I don't have -- and it has no relevance to this case. And this is only the kind of cross-examination that I heard once before in my career and that came from Marvin Ellin (phonetic sp.) in a case, and I objected to it then and I do now. We don't know anything about these other cases.

(E.484).

Mr. Boone's counsel responded:

> I tried to lay a fairly careful foundation before I asked him the question, which is that he testified he tested a young man over a period of eight hours, and this young man he tested only tested abnormal on one or two of the tests he gave him, and yet he was willing to come into court and testify on his behalf. Maybe I phrased it wrong on the ultimate outcome, but he is one of the star witnesses for the defense on this issue of whether or not he had some dissociative behavior.
> The point is he will minimize on one side or maximize on the other side. That is the point I am trying to make here. I think it is absolutely fair.

(*Id.*)

The court stated, "All right. I am not going to allow you to get into this area. Objection sustained." The defendants did not move to strike the question or the answer, did not seek a curative instruction, did not question the sufficiency of the relief that the

trial court had granted them, and did not invite their expert to elaborate on his answer. No further mention of either the "sniper" or his case was made in front of the jury for the rest of the trial. The rest of the cross-examination of Dr. Schretlen focused on how he had had much less opportunity to observe Mr. Boone than the treating physicians who held contrary opinions and family members whose testimony he had not reviewed. (Apx 005-007).

The parties began and completed their examination of Dr. Schretlen that day. After he was excused, the defendants called Dr. Saia, Mr. Boone's internist, to the stand. Before trial, Dr. Goldberg's counsel had announced that Dr. Saia would testify that Mr. Boone had a reduced life expectancy because of high blood pressure and that this would reduce his damages for future care needs. (E.29A-29X). Dr. Saia did not so testify. Instead, Dr. Saia, the only treating doctor who appeared in the defendants' case, testified from his medical records that after the surgery Mr. Boone confused names, could not speak properly, could not read, and had memory problems. (E.490-491). These records did not support Dr. Schretlen's findings. Dr. Saia also read to the jury his office note that said "something punctured the dura" (E. 491). This testimony contradicted the defense theories. Dr. Saia agreed that Mr. Boone "didn't seem quite the same" as before the surgery. (E.496). Thus, the testimony of the only treating doctor who testified for the defense was more favorable to the plaintiff than to the defendants. Dr. Saia was excused that afternoon. The court and counsel conferred on scheduling matters. (E.496).

The next morning, on the last day of testimony, defense counsel moved for a mistrial on the basis of the question about *Malvo,* and the court heard argument on the purpose of the question. Dr. Goldberg's counsel argued that the question was "calculated to prejudice the defense." (E.498). Mr. Boone's counsel argued,

> My intent was to bring out, and I have brought out previously that, I was trying to impeach his credibility on being a minimizer or maximizer, as the case may call for…It was right on his list and if they had any problem with me getting into it, they certainly could have mentioned it….*** So my point was that he did an eight hour test on this other guy, found only one abnormal test in the entire eight hours and still was willing to come into court and testify as he did, and I thought that was quite a legitimate contrast

> to, you know, coming into Court and saying that somebody else who has several abnormal tests is hardly damaging at all….

(E.499).

Dr. Goldberg's counsel rebutted: "The inference is clear from the questions [sic] was to remind the jury that Lee Malvo and this man, they know Lee Malvo is guilty and this man tried to get him off in some way. I don't know what tests he's talking about…."

The court addressed these arguments and found:

> [I] think the purpose was clear or the inference was clear that [counsel] was trying to suggest that he was called regularly as a minimizer initially by your office and then when he went to the Malvo case, that essentially he's a hired gun, and then I think that was the purpose he would, at least that's what I took, that he would testify essentially for whoever hired him, whoever paid him.

(E. 501).

The court then ruled: "And I don't think it rises to the level of a mistrial. So I'm going to deny the motion for a mistrial." *Id.*

After the motion for mistrial was denied, the jury heard from two final defense witnesses, an economist and a "life care planner," then heard from Dr. Levy in rebuttal.

The eighth and final day of trial was devoted to jury instructions and closing arguments. Defense counsel said at the bench before closing arguments: "I do want to tell the Court in a series of questions of virtually every witness, my personal integrity has been impugned and if that continues, I will move for a mistrial and I have case law on that." The court asked, "How was your personal integrity impugned?" Dr. Goldberg's counsel stated, "Because he always says they hire you to come in here and minimize, maximize and whatever and how much money we paid to them." After defense counsel referred to "personal attack--on the Defense…" (as incompletely transcribed), the court stated, "Those are appropriate questions to ask as to whether there's some bias in the witness and they were all appropriately asked." (E.565).

The closing arguments went forward without objection. Plaintiff's counsel, in arguing about the relative credibility of the treating physicians who testified for Mr. Boone as contrasted to the paid experts who testified for Dr. Goldberg, emphasized that

the treating physicians deserved more weight because their motive was to treat the patient and because they had had more opportunities to observe the patient than the "one time snap shot" of a hired expert. (E.566, E.570). Contrary to Dr. Goldberg's brief, plaintiff's counsel never suggested that defense counsel had acted unethically (brief p.5) or that any witness had "manufactured medical evidence for money" (brief p.18). Rather, the argument focused on bias and the opportunity to observe the plaintiff. (E.569-570). Defense counsel in closing argument told the jury that the plaintiff's counsel had shown insufficient respect for him and his witnesses. (E.614). However, defendants made no objection to plaintiff's closing argument and did not renew their mistrial motion.

E. Motions

After the close of all evidence, Dr. Goldberg moved for judgment, solely on the issue of informed consent. (E.520). Counsel stated, "Where the duty comes from is not anything for which we direct our motion. However, they have never, ever even attempted to establish proximate cause." (E.521). The court reserved decision. (E.535-536). The next day, that court heard further argument, remarking that it had read *Sard v. Hardy* overnight, "only look[ing] at the section of it that really talked about the issue of causation and the test." (E.538). The defense stated its argument again: "They don't say where he would have gone and they have absolutely no opinion as to what would have happened there...[A]nd there isn't one bit of evidence in the area of proximate causation if he had gone somewhere else. (E.541). After the trial, the defendants moved for judgment notwithstanding the verdict "predicated upon the same argument set forth by counsel at trial" on the alleged lack of proximate cause as to informed consent. (E.674). No argument was made about duty.

F. Verdict Form

The plaintiff's two theories of liability – negligence in surgical technique and informed consent – were presented to the jury in a verdict form drafted by defendants' counsel. (E.549A-549C). Mr. Boone's counsel explained the verdict form in closing argument as to how the two theories were separate and distinct from each other. (E.579; E.582-584). The defense in its closing also referred to the specific questions on the

verdict form and told the jury that if they did not find that Dr. Goldberg had "stabbed him in the brain," then "the answer to No. 1 [on the verdict form] is no." (E.625).

G. The Jury's Award

The jury returned a verdict in Mr. Boone's favor on both his surgical negligence count and his informed consent count. It awarded him damages in a compromise amount. (E.671-672). The award for future care expenses was $355,000, less than the plaintiff's estimate of $880,000 and more than the defendants' estimate of $127,000. The jury also awarded $123,000 in lost wages, less than the estimate of both the plaintiff and the defense economist. (E.475-476, E.507). It awarded non-economic damages of $475,000, well under the statutory cap.

Immediately after the verdict, the trial judge addressed the jury in open court:

> [I] have seen judges in the newspaper and on television criticizing lawyers for their lack of professionalism, their improper behavior with respect to each other, and let me just say to you folks that what you had a chance to see was four outstanding lawyers who not only were very effective advocates for their clients in this case, but they also, despite maybe some of [defendants' counsel's] protestations in his closing, they also, I think, conducted themselves according to the highest degree of professionalism in our profession as lawyers. And when you see and read things in the paper, every once in a while somebody needs a lawyer and you're real happy if you have a good lawyer and you have a lawyer who knows what he's doing and has prepared his case. And in this case, I would just like to thank counsel. I appreciate the professionalism that you showed to each other, to the witnesses in this case as well as to the Court.

(E.652).

H. The Appeal Below

Dr. Goldberg appealed on seven issues. The lower court, (hereinafter "*Goldberg* court"), in a reported opinion, found that the trial court had abused its discretion when it denied Dr. Goldberg's motion for a mistrial. The court found that the question about Dr. Schretlen's testimony in Malvo was improper. The court also assumed that the mention of the "sniper" was so prejudicial as to merit a mistrial. The court further found that this mistrial motion, asserted after the witness had left the stand and after another witness's testimony had not favored the defense, was not untimely. The court also held that Mr.

Boone had not stated an informed consent action cognizable under Maryland law because a surgeon had no duty to disclose his own lack of experience, a point Dr. Goldberg never argued until appeal. It left the jury's finding of surgical negligence intact. It vacated the damages award and remanded the case for a new trial on damages caused by the surgical negligence. *Goldberg v. Boone,* 167 Md. App. 410, 893 A.2d 625 (2006).

ARGUMENT IN SUPPORT OF CROSS-APPEAL AND IN RESPONSE TO APPELLANT'S ARGUMENT

INTRODUCTION

The six questions on which this Court granted the petition and cross-petition fall into three categories: (1) whether the trial court abused its discretion in denying the defendants' motion for a mistrial (both parties' Question One); (2) whether the Court needs to reach the informed consent issues (Appellees' Question Two and part of Appellants' Two); and (3) whether the plaintiff's informed consent case presented a jury question (Questions Two and Three for Appellants and alternate Three for Cross-Appellants). Because of this overlap, Mr. Boone has combined his cross-appellant's argument and his response to the appellants' argument under headings corresponding to these three categories.

(1) Did the trial court abuse its discretion in denying the motion for a mistrial?

I. The lower court's reversal of the trial court's discretionary denial of Dr. Goldberg's mistrial motion was erroneous, because the defendants did not establish an exception to the evidentiary rules permitting impeachment of paid experts, did not show prejudice from the asking of this one question, did not object to the line of questioning which led to the question, did not move to strike the question or the answer, and did not move for a mistrial or request curative measures when he was on the stand or even that day.

This Court has instructed that "the trial court, in the exercise of its discretion, should declare a mistrial only where there is 'manifest necessity for the act.'" *Wilhelm v. State,* 272 Md. 404, 430,326 A.2d 707, 723-24 (1974). "'The power ought to be used

with the greatest caution, under urgent circumstances and for very plain and obvious reasons.'" *Id.* (internal citations omitted). A trial court's determination of the "core question" of whether justice has been done "necessarily depend[s] upon the judge's evaluation of the character of the testimony and of the trial…." and thus is highly discretionary. *Buck v. Cam's Broadloom Rugs Inc.*, 328 Md. 51, 57, 612 A.2d 1294, 1297 (1992).

An appellant seeking reversal of a trial judge's denial of a mistrial motion normally carries a heavy burden. First, he must show that the complained-of evidence or argument was inadmissible. *Cf. Stoddard v. State,* 389 Md. 681, 887 A.2d 564 (2005) (analyzing first whether arguments were permissible, and then whether prejudice ensued). Then, he must show that he "clearly was prejudiced by the court's abuse of discretion." *Klauenberg v. State,* 355 Md. 528, 554, 735 A.2d 1061, 1075 (1999). A mere possibility of prejudice fails to meet the burden. *Crane v. Dunn,* 382 Md. 83, 91-92, 854 A.2d 1180, 1185 (2004). This Court will find abuse of discretion "only in the extraordinary, exceptional, or most egregious case." *Medical Mutual Ins. Society of Maryland v. Evans*, 330 Md. 1, 34, 622 A.2d 103, 119 (1993). That standard has usually been hard to satisfy:

> [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. [internal quotations omitted].

*Dehn v. Edgecombe***,** 384 Md. 606, 628, 865 A.2d 603, 616 (2005).

Further, as with other appeals, an appellant challenging the denial of a mistrial motion must show he preserved the error. *See, e.g., Cooley v. State,* 385 Md. 165, 867 A.2d 1065 (2005) (finding that a party who discovered an event after the jury had been excused for the day preserved it by raising it first thing the next morning).

The *Goldberg* court's reported opinion subsumes four basic holdings. First, the court created without discussion an exception to the evidentiary rule that parties may cross-examine paid experts on their biases and their testimony in prior cases unless an order *in limine* bars such cross-examination.

Second, on prejudice, the court held that the mere mention of an expert's notorious client constitutes prejudice as a matter of law. It did so without regard to the trial judge's perception of the purpose and effect of the question and answer, without regard to the fact that the reference was isolated and never repeated, and without regard to the other factors which this Court has adopted for the determination of prejudice by reviewing courts.

Third, on abuse of discretion, the court did not recognize the level of egregiousness usually required for reversal, did not defer to the trial court's rejection of defendants' allegation of inflammatory intent, and did not acknowledge that a single question involving an expert witness's credibility, as opposed to questions going to a party's or key eyewitness's credibility, has never met the test of incurable prejudice in Maryland.

Fourth, on preservation, the court held that appellate courts may review denials of mistrial motions asserted by movants who have not acted to prevent the complained-of event by moving *in limine* or objecting to the line of questioning, who have not requested curative measures, and who have waited to assert their motions until after that witness and even the next have left the stand.

Each of these four holdings was erroneous.

A. Without a granted motion *in limine* or Rule 5-403 ruling from the court, a paid expert's prior inconsistent testimony in a notorious case is a proper subject of cross-examination under Rules 5-607, 5-613(a), and 5-616(a).

The threshold question in an appellate court's review of the denial of a mistrial motion is whether the complained-of evidence or argument was in fact objectionable. *See, e.g., Stoddard,* 389 Md. 681, 887 A.2d 564. Here, the inquiry is this: without an order *in limine* or any indication in advance that an expert's credibility may not be explored, does any rule preclude a party from cross-examining a paid expert on his prior testimony in a notorious case disclosed in routine discovery?

Title 5 of the Maryland Rules governs the admission and exclusion of evidence. Those Rules expressly and repeatedly permit impeachment of a witness's credibility.

Rule 5-607 provides, "The credibility of a witness may be attacked by any party, including the party calling the witness." Rule 5-611(b) provides, in part, "[C]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Rule 5-613(a) permits the cross-examination of a witness about prior oral statements and requires that the contents and circumstances of the statement be disclosed to the witness during the cross-examination. Rule 5-616(a) permits impeachment of any witness by questions directed at proving that the witness has made prior inconsistent statements, that the opinion expressed is not held by the witness or "not worthy of belief," or that the witness is biased or prejudiced. These Rules permit impeachment of an expert by reference to his prior testimony and pay.

The case law confirms that, without an order *in limine*, cross-examination into the credibility of paid experts has a broad scope. As this Court has made clear, parties are to be accorded "wide latitude" to impeach forensic experts on their litigation income and on their differing opinions in the cases in which they have appeared. *Wrobleski v. de Lara*, 353 Md. 509, 517-19, 727 A.2d 930, 933 (1999) (approving cross-examination into experts' biases). *See also Kruszewski v. Holz,* 265 Md. 434, 440, 290 A.2d 534, 538 (1972) (stating, *"*It is well settled law in this State that exploratory questions on cross-examination are proper when they are designed to affect a witness's credibility, test his memory or exhibit bias."). An expert may be asked, for example, how often he has been retained by a particular attorney. *Ager v. Baltimore Transit,* 213 Md. 414, 132 A.2d 469 (1957); *abrogated on other grounds by Ragland v. State,* 385 Md. 700 (2005).

This Court has also made clear that witnesses may be impeached by their earlier testimony. *See, e.g., Gonzales v. State,* 388 Md. 63, 70, 878 A.2d 604, 608 (2005) (finding that that the trial court abused its discretion by precluding evidence of prior testimony); *Virginia Freight Lines v. Montgomery,* 256 Md. 221, 226, 260 A.2d 59, 60 (1969) (stating that prior inconsistent testimony may bear on credibility).

The relevance of each inquiry into prior inconsistent testimony is not to be judged in a vacuum: "The test of relevance is whether, in conjunction with all other relevant evidence, the evidence tends to make the proposition asserted more or less probable."

Snyder v. State, 361 Md. 580, 592, 762 A.2d 125, 131 (2000). In his review of the changes effected by the 1994 Rules of Evidence, Magistrate Judge Grimm notes:

> For example, if a witness's trial testimony differs from her pretrial deposition testimony on a number of points, any one of which viewed alone would not greatly affect her credibility, the opposing attorney is still allowed under Rule 5-401 to explore each example of prior inconsistency. [footnote omitted]. The existence of each inconsistent statement makes her credibility less convincing than it would have been without the evidence.

P.W. Grimm, *Impeachment and Rehabilitation Under the Maryland Rules of Evidence: An Attorney's Guide,* 24 U. Balt. L.Rev. 95, 100 (1994).

Here, Mr. Boone's counsel began his impeachment of Dr. Schretlen by asking him about his testimony for the malpractice defendant in *Burke,* where Dr. Schretlen had also testified about the plaintiff's mental abilities. Counsel established with the expert that his next most recent case involved a young man with one or two abnormal results on a day-long battery of testing, and no objection occurred. (E.483). Counsel then asked Dr. Schretlen how he could interpret multiple abnormal test results one way for malpractice defendants whereas, as an expert hired by Mr. Malvo's lawyers, he had found Mr. Malvo's "only one or two" abnormalities so disabling as to render that defendant not responsible for his crimes. As required by Rule 5-613, counsel made sure for *Burke* and *Malvo* that Dr. Schretlen knew which case he was talking about and gave him the opportunity to explain the inconsistency. (E.483). Nothing in the Rules made that line of questioning irrelevant.

Nor was the question improper. No order or request by the defendants concerning the cases listed on the expert's list of court appearances put Mr. Boone's counsel on notice that any of the expert's history was off-limits. The purpose of such lists is to enable parties to investigate and test experts' credibility. Rule 5-104 provides that a party may ask the trial court to consider in advance whether the prejudicial effect of evidence will outweigh its probative effect under Rule 5-403. These defendants filed motions *in limine* on other topics, (E.14-17) but none as to Dr. Schretlen's prior testimony. The question was relevant and proper.

The *Goldberg* court held that Mr. Boone's counsel "had the right to question Dr. Schretlen about being a 'minimizer,' but had no right to specifically reference the sniper case during this line of questioning." *Goldberg,* 167 Md. App. at 437. This overlooks the relevance of the specific reference to the line of questions; it was not just that Dr. Schretlen would support an insanity defense based on one or two abnormal test results, but that he would do so for a particularly heinous series of crimes.

The defendants allege nefarious intent by Mr. Boone's counsel, but they fail to acknowledge that the trial court, the closest impartial observer, found no improper purpose. This issue was thoroughly aired in the trial court. (E.498-501). That court expressly rejected Dr. Goldberg's contention about improper motive and found instead that Mr. Boone's counsel was "trying to show that [the expert] would testify essentially for whoever hired him, whoever paid him." (E.501).

The *Goldberg* court erroneously disregarded the trial court's finding when it assumed both irrelevance and improper purpose and compared this case to *Tierco v. Williams,* 381 Md. 378, 849 A.2d 504 (2004), which involved repeated appeals to racial prejudice. When a trial court has exercised its discretion, this Court has instructed that reviewing courts are to defer to it. When it has not exercised its discretion, this Court has ordered a remand to the circuit court. *See, e.g., Cooley,* 385 Md. 165 (reversing lower appellate court's determination of prejudice and remanding for trial court's exercise of its discretion). The *Goldberg* court erroneously rejected the trial court's perspective on the events in the courtroom and made new findings on the cold record. By phrasing their first question to assume "intent" by Mr. Boone's counsel to ask an improper question, defendants urge that same error of fact on this Court. And, by basing their argument on that one question in isolation from the others in the line of questioning, defendants urge this Court to adopt a rule by which relevance may be gauged in a vacuum and on the cold record [1], rather than on the events as perceived by the trial court.

[1] The record contains a transcription error in the mistrial colloquy. The transcript as read by the Court of Special Appeals wrongly attributes this statement to Judge Dugan: "Well, I mean, I've never had anybody do anything like that to me and I've been a trial lawyer a long time." (E.

Defendants also contend that plaintiff's counsel accused their counsel of "unethical" conduct for having "bought" an expert's opinion (brief at p.5) and that the plaintiff accused the defense of having "manufactured medical evidence for money" (brief at p.18). These arguments widely miss the mark. Defense counsel was never accused of doing anything wrong, and the trial court recognized that when it *sua sponte* and at length praised all counsel after the verdict "despite maybe some of Mr. Brault's protestations in his closing" for "conduct[ing] themselves according to the highest degree of professionalism in our profession as lawyers." (E.652). Plaintiff's closing argument, made with no objection from defendants, was addressed to the natural tendency of any retained expert witness to favor the side that paid the witness and to the superior credibility of treating physicians who formed their opinions in the course of treating the patient and who had more opportunities to observe the patient than the paid experts. (E.570). These are all factors that the jury was instructed they should consider in evaluating witness testimony: "the witnesses' opportunity to see or hear the things about which testimony was given," the witnesses' "interest in the outcome," whether the witness's testimony was "consistent" or "differed from statements made on any previous occasion." (E.551-552). All these factors were taken from *Maryland Civil Pattern Jury Instructions* No. 1-3 ("Witness Testimony Consideration") (2002 ed.).

Without an order *in limine*, the Rules do not contemplate that a party may in discovery list as one of his expert's credentials the fact that he testified in a famous case and then at trial claim that cross-examination into the expert's testimony in that case was so prejudicial as to compel a mistrial. Before this case, lawyers have not been required to foresee both an objection and the court's ruling when they are impeaching a forensic expert on his bias, especially on matters disclosed in discovery and not mentioned in motions *in limine*. The ordinary and previously settled procedure is that if the probative/prejudicial line is breached in cross-examination, the trial court, upon timely

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500). Actually, counsel for the defense said that. The circuit court has since ordered the error corrected. (Apx. 017).

objection and request for curative instruction, will instruct the jury to disregard the question.

B. The lower appellate court erred when it found that Dr. Goldberg was "clearly prejudiced" when his damages expert was asked one question about the Malvo case.

Dr. Goldberg also has failed to prove any prejudice as to either liability or damages. Prejudice must be a real probability, not a mere possibility. *See, e.g., Maryland Deposit Insurance Fund Corp. v. Billman,* 321 Md. 3, 17 (1990). This Court has considered claims of prejudice frequently and has provided factors to aid in the analysis. *See*, e.g., *Spain v. State*, 386 Md. 145, 159, 872 A.2d 25, 33 (2005). These include:

- Pervasiveness of the prejudicial comments throughout the trial.
- "Severity" of the prejudicial comments.
- Steps taken to mitigate the harm.
- Centrality of the issue.
- Closeness of the case.

Dr. Goldberg's argument meets none of these tests.

Pervasiveness: This Court has often addressed whether objectionable comments are so pervasive as to "infect" the trial with unfairness, or whether the error is an isolated event. *See, e.g., Tierco v. Williams,* 381 Md. 378, 849 A.2d 504 (2004) (holding that, where plaintiffs' counsel alluded to race discrimination by the defendant at least 63 times in a case where discrimination was not at issue, racial matters pervaded the 3-day trial); *Lawson v. State,* 389 Md. 570, 886 A.2d 876 (2005) (noting that improper golden rule comments "continued unabated"); *Spain v. State*, 386 Md. 145, 872 A.2d 25 (2005) (stating that the improper remark was "an isolated event that did not pervade the entire trial"); *Wilhelm v. State,* 272 Md. 404, 425-26, 326 A.2d 707, 721 (1974) (finding that one improper comment by the prosecutor during closing argument did not infect the trial with unfairness); *Hill v. State,* 355 Md. 206, 226, 734 A.2d 199, 210 (1999) (instructing the lower court to "take account of the persistency of the prosecutor's conduct"). In *Evans v. State*, the prosecutor's "single reference" in closing argument that a defense

expert's testimony would not hold true for a notorious criminal in another case did not rise to prejudice. 333 Md. 660, 681, 637 A.2d 117,127-28 (1994).

This record provides no support for the notion that this trial was "pervaded" by any notion that Dr. Schretlen supports snipers: Mr. Boone's counsel asked about the expert's findings in that case in one question and was trying to rephrase it acceptably when a bench conference ensued. After the trial court granted defense counsel's articulated objection to any further inquiry into the expert's prior cases and his less-clearly stated objection to the mention of the sniper,[2] the jury heard no further mention of that case. The lower appellate court erred when it implicitly equated the one question in this case with the 63 improper references to race discrimination in *Tierco*. And, in arguing now that this single question "cast a pall over the proceedings as the sniper reference was made in an attempt to harass and embarrass Dr. Schretlen" (brief p.16), defendants avoid the trial court's finding, after a thorough hearing, that no such attempt had taken place.

"Severity:" An application of the "severity of the remarks" factor to this record also supports the trial court's discretionary finding that the question did not merit a mistrial. Many mistrial cases concern closing arguments and comments directed at parties. This case cannot be equated with a case in which a prosecutor in closing remarks referred to the defendant as a monster and raised the specter that the defendant, if freed, would engage in further sex crimes. *See Lawson,* 389 Md. at 596-97. Nor can it be equated with a case in which the defendant's representative was asked about the party's clearly inadmissible prior bad acts. *Medical Mutual v. Evans,* 330 Md. 1, 622 A.2d 103 (1993) (finding that improper questioning coupled with reference to insensitive conduct by defendant caused prejudice). And, contrary to defendants' characterization, (brief p. 1), nobody asked Dr. Schretlen "about his involvement in the infamous October 2002

[2] Defense counsel stated these grounds: "This is an outrage. I am not getting into the sniper syndrome, and I don't have the records and I don't have -- and it has no relevance to this case. And this is only the kind of cross-examination that I heard once before in my career and that came from Marvin Ellin in a case, and I objected to it then and I do now. We don't know anything about these other cases." (E.484).

sniper shootings." The question was focused on his testimonial role. Nor did counsel seek "to embarrass Dr. Schretlen by improperly referring to the most indelible prior 'bad act' one can imagine" (brief p. 17). Rather, the questioning focused on the pattern of favoring one side or the other that could be discerned from Dr. Schretlen's prior cases.

This case perhaps comes closest to *Evans v. State,* an appeal of a death sentencing proceeding in which a prosecutor's closing remarks referred to a notorious prison escape to cast doubt on a criminal behavior expert's testimony about the adaptability of prisoners to life imprisonment. 333 Md. at 681-82, 637 A.2d at 126-27. The Court there found that the comment was not improper, because the prosecutor could refer to matters of common knowledge, including the escape. It alternatively found that the notion that the jury would conclude that the defendant would escape because the other prisoner had was "pure speculation." Here, too, the notion that the jury would conclude that Dr. Schretlen supports sniper shootings seems fanciful. Indeed, it seems more logical that the jury might have given Dr. Schretlen extra credibility, not less, for having been a star witness in a big case Dr. Schretlen's earlier role in the *Malvo* trial certainly did not seem so negative as to prompt defendants to move *in limine* to bar its mention, or, for that matter, to hire a neuropsychologist without that credential.

In the end, it remains no more than a "mere possibility" that defendants were automatically and incurably prejudiced by the jury's knowledge that his expert had been hired by Mr. Malvo's defense team. And in finding that the trial court had abused its discretion, the lower appellate court erroneously resolved every conflicting inference adversely to the trial judge's conclusion that the question did not rise to the level of a mistrial.

Mitigation of harm: Another factor in determining prejudice is the steps taken to mitigate the effects of the event – assuming there was any harm. Here, curiously, Dr. Schretlen may have provided his own mitigation: disregarded by the *Goldberg* court and defendants is the fact that Dr. Schretlen answered the "sniper" question: "That is absolutely incorrect and outrageous." (E.483). Since the line of questions stopped with

that heated denial, the jury could well have concluded that Dr. Schretlen had not supported the sniper's insanity defense.

Mitigating prejudice assumes that a cure has been sought in a timely way. Here, the defense asserted an inchoate objection that the inquiry into the sniper case should go no further. That objection was sustained. The defense then voiced no further protest on the subject – not during argument on the objection, not while Dr. Schretlen was on the stand, not during the conference on scheduling at the end of the day, and not at any other time that day. The next morning, the defense asserted a more precise objection to the sniper reference and sought a mistrial. (E.498). As this Court stated in *Hill v. State,* a court which has granted the only relief a party has sought by sustaining an objection has not erred as to that party. 355 Md. 206, 226, 734 A.2d 199, 201 (1999).

If inadmissible evidence has improperly been put before the jury and a litigant timely seeks a mistrial, "The trial judge will assess the impact of the inadmissible evidence and assess whether the prejudice can be cured. If not, a mistrial must be granted. If a curative instruction is given, the instruction must be timely, accurate, and effective." *Carter v. State,* 366 Md. 574, 589, 785 A.2d 348, 356 (2001).

Here, the trial judge was given no chance to weigh curative measures while the issue was still fresh with the witness on the stand. Under the rule devised by the lower appellate court here, a movant can wait until it is too late for a curative instruction and still be held to have timely asserted a mistrial motion. Such a rule promotes gamesmanship and invites the constant disruption of trials by belated motions by counsel seeking to revisit what has happened one or more days earlier in the trial.

Centrality of the issue: A fourth factor, "centrality," has been applied to find prejudice when an improper remark goes to a central issue, such as the credibility of a party or a key witness to the event. *See, e.g., Walker v. State,* 373 Md. 360, 404, 818 A.2d 1078, 1104 (2003) (finding "important to a fact-finder" the credibility of the only non-law enforcement eyewitness to the alleged crime). Here, the questioner was exploring by increments whether this forensic damages expert interprets test results according to the needs of the party who retained him. The defense objected partway through this line of

questioning. Under *Goldberg,* collateral impeachment of forensic damages experts may be deemed "central" for purposes of mistrial motions when not so perceived by the trial court. Appellants now argue that it is "central" for liability purposes. It was not central even on damages.

Closeness of the case: Another important factor in weighing prejudice is the "closeness of the case" and the "weight of the evidence." The *Spain* Court, addressing remarks made in closing argument, said:

> When assessing whether reversible error occurs when improper statements are made during closing argument, a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused. *U.S. v. Melendez,* 57 F.3d 238, 241 (2nd Cir.1995); *see also Henry v. State,* 324 Md. 204, 232, 596 A.2d 1024, 1038 (1991) (finding that "[i]n determining whether reversible error occurred, an appellate court must take into account '(1) the closeness of the case, 2) the centrality of the issue affected by the error, and 3) the steps taken to mitigate the effects of the error' " (citations omitted)).

386 Md. at 159, 872 A.2d at 33.

Defendants argue that the prejudice was so great that both the damages and the liability verdicts should be vacated. Yet at trial, their counsel conceded that the evidence on surgical negligence was sufficient for the jury (E.520). The lower appellate court was "persuade[d] that there exists no reasonable possibility that a new trial on all issues would result in a different verdict on the issue of appellant's negligence." 167 Md. App. at 438.

In his brief, Dr. Goldberg suggests that the fact that he "vehemently denied" that he penetrated Mr. Boone's brain with a surgical tool makes liability a close question. It does not. First, all the treating doctors who saw Mr. Boone after the injury (among others, Drs. Satinsky, Citrin, Potolicchio, Levy and Saia) concluded that the brain had been penetrated in the surgery, and they said so in their contemporaneous records. (E.567-568). Next, Dr. Goldberg himself conceded that penetrating the brain during mastoid surgery is negligent. (E.470). Then, the jury saw compelling visual evidence of the tract going into the brain on the CT scan, (Apx 013-016), and Dr. Goldberg's theories

as to how the injury might have taken place without the brain being penetrated were proven to be anatomically impossible or contradicted by the brain scans. (E.149-151, E.509-510). Finally, Dr. Goldberg's denial that he had gone anywhere near the site of penetration of the brain was disproved by a comparison of the pre-operative CT scan to the post-op CT, which showed evidence of surgery at the entrance to the hole. Dr. Selesnick commented on air bubbles in the soft tissues at the entrance site as proof that "that's where at least some of the surgery took place," (E.135), and Dr. Levy testified that the same area showed small pieces of bone knocked off by the object on its way through the skull hole into the brain. (E.97P). A before/after X-ray of this critical area was introduced as Exhibit 16-S and 39A, reproduced here as Apx 015.

Defendants were left with so little to say about the surgical negligence and the resulting injury that their counsel finally argued that the negligence alleged was so awful that it could not have happened without almost criminal intent. He asked the jury in his closing argument: "Would any doctor, almost intentionally, injure and allow a patient to be at risk of death? And cover it up? That indeed is a bitter pill to swallow." (E.623). "Did he stab him in the brain, take it out, know he did it, put gel foam in? If you say to yourself, no, I just can't go that route, then the answer to question No. 1 is no." (E.624). However, as the jury instructions provided, Mr. Boone did not need to prove either intent or concealment. The jury answered yes to question No. 1 and thus found for the plaintiff on the surgical negligence. (E.671).

Defendants also have shown no prejudice as to damages. The verdict suggests a lack of any adverse effect. The jury did not entirely credit either party's experts on this issue: it awarded less than Mr. Boone's experts estimated and more than the defendants' experts estimated. Further, there was ample evidence to support the trial judge's determination that a mistrial was not warranted. By the time defendants moved for a mistrial, the court had heard all of the live testimony by persons who had assessed Mr. Boone's mental condition. The evidence that Mr. Boone had suffered a significant injury was clear. The defense called Dr. Saia right after Dr. Schretlen, and his testimony failed to help their case. The only other physicians who had examined Mr. Boone testified that

he had a significant injury. Dr. Potolicchio, the neurologist who had known Mr. Boone for three years since the surgery, described Mr. Boone as "poorly function[ing]," and someone who because of his impairments, could not be safely left alone. (E.260-261, E.271). Other witnesses, including Beverly Whitlock, head of a brain rehab agency (E.335-335N), Mr. Boone's family members, and several of his former clients, testified about how badly impacted he was by the cognitive and emotional changes in his brain. Dr. Levy noted that MRI scans taken 18 months after the injury showed shrinkage of brain tissue and permanent damage. (E.97C-97J, Apx 008-012). That explained Mr. Boone's loss of ability to control his emotions. (Apx 012, E.234-235) (testimony of Dr. Potolicchio). Especially in light of the evidence of surgical negligence, defendants have not met their burden of establishing that they were so "clearly prejudiced" by a single question to their damages expert that a new trial on all issues – or any issue – is necessary.

The defense introduced Mr. Boone's deposition transcript to suggest that he could remember things, and Dr. Schretlen testified that the transcript showed no memory problems. (E.485). Yet in the same transcript, Mr. Boone's counsel identified thirteen examples of Mr. Boone's forgetfulness and memory problems. (E.646-647). In light of the evidence that Mr. Boone cannot work, can no longer be left alone, cannot make his own medical appointments, cannot grocery-shop, and is prone to sudden bursts of uncontrollable anger that have estranged him from his own family, it cannot be said that Dr. Goldberg suffered "clear prejudice" from the mention of the fact that his expert had testified in *Malvo.*

Goldberg contains no analysis of this Court's prejudice factors. Instead, the court referred to the notoriety of Mr. Malvo as if the solitary mention of his name fatally poisoned the entire trial process. The facts that the defense hired Dr. Schretlen despite his work for Mr. Malvo, produced a list of his cases that included Malvo's, filed no motion *in limine*, sat silently at trial as the first Malvo-related questions were asked, sought no curative instruction after the word "sniper" was mentioned, and waited till the next day to move for a mistrial – raises inferences that support the trial court's perception

that the "urgent circumstances" that would necessitate a mistrial were not present. *Cf. Wilhelm,* 272 Md. at 430.

Goldberg conveys the message to litigants and trial courts that a mistrial in a civil case can be predicated on an isolated event, without a showing that the movant was "clearly prejudiced" and without a showing even of clear error. To the knowledge of the undersigned, *Goldberg* is the first reported decision in Maryland in which impeachment of a party's retained expert in a civil case has been held to warrant reversal of a trial court's conclusion that no mistrial was justified.

C. The events here are not comparable to any of this Court's prior cases where it found that a trial court had abused its discretion for failing to declare a mistrial.

For an appellate court to find that a trial court has abused its discretion, the court must do more than conclude it would have ruled differently. Rather, "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. [internal quotations omitted]." *Dehn v. Edgecombe***,** 384 Md. 606, 628, 865 A.2d 603, 616 (2005). The question that Mr. Boone's counsel addressed to Dr. Schretlen falls within none of the categories of events that have impelled this Court to overrule a trial judge's denial of a mistrial. This case does not involve the settled law that parties may not appeal to jurors' racial prejudices. *See, e.g., Tierco v. Williams*, 381 Md. 378, 849 A.2d 504 (2004) (reversing denial of new trial motion when plaintiffs made racial discrimination by the defendant "the focus" of a trial of claims to which it did not pertain). Nor does this case concern the inadmissibility of a defendant's prior bad acts. *See, e.g*., *Medical Mutual Ins. v. Evans*, 330 Md. 1, 622 A.2d 103 (1993). (reversing denial of mistrial when the defendant's employee had been asked about other bad-faith actions against it); *Lai v. Sagle*, 373 Md. 306, 818 A.2d 237 (2003) (remanding for a new trial because plaintiff's counsel mentioned five prior suits against the defendant doctor in opening statement); *Nelson v. Seiler,* 154 Md. 63, 139 A. 564 (1927) (finding prejudicial

the admitted evidence of the plaintiff's prior driving convictions). No one here referred to anyone as a monster, pervert, or future abuser of children. *Cf. Lawson,* 389 Md. 596-97.

This case does not involve "repeated references" to murder, analogies between asbestos defendants and Nazis, and references to the Holocaust. *Owens-Corning Fiberglas v. Garrett*, 343 Md. 500, 518, 682 A.2d 1143, 1151-52 (1996). Even those references, while "unduly inflammatory" and "upsetting," especially to those who had experienced those events, and while deserving of an admonition by the Court, were not prejudicial enough to warrant a new trial. This case did not involve a defendant's racist remarks in a case not involving discrimination. *Young v. State*, 370 Md. 686, 720, 806 A.2d 233, 253 (2002). Even then, the probative nature of that evidence outweighed any "incidental emotional effects."

In fact, the question asked of Dr. Schretlen involves no reference to any defendant's behavior. In this case, the reference to *Malvo* appeared in one question on the sixth day of an eight-day trial, had nothing to do with prior bad acts by the defendants, let alone the expert, invoked no racial or other improper prejudice on the part of the jurors, was a proper subject of impeachment, and never came up again. Despite the inference urged by the defense, no one argued that the defendants consort with snipers. The trial court considered and rejected that alleged inference. Furthermore, Dr. Goldberg had not drawn it before trial: his counsel hired the expert, produced his list of cases, did not take measures to forestall the reference before trial, and did not object to the foundation questions. The defense never moved to strike the question.

The lower appellate court here found abuse of discretion by the trial court with no careful analysis of how the trial court's ruling could have been "beyond the fringe" of acceptability. Defendants cite *Buck v. Cam's Broadloom, supra*, for the proposition that remarks about experts can be prejudicial. There, the Court upheld the trial court's discretion. *Goldberg*, however, reversed the trial court. The decision below plows new ground in the judicial review of fact-intensive trial court events by expanding the availability of the formerly extraordinary remedy of mistrial and shrinking the role of the

trial judge. If the "abuse of discretion" standard is to retain any meaning other than "we would have ruled differently," this Court should reinstate the trial court's ruling.

D. *Goldberg* sets an unwise precedent by interpreting the timeliness requirement of Rule 2-517(c) in such a way that an objection asserted on the next day and without cause for the delay is now preserved for appeal.

Litigants are required to state their objections fully and on time so that the trial court can manage the trial fairly to all the parties. Maryland Rule 2-517(c) requires "a party, at the time the ruling or order is made or sought, [to] [make] known to the court the action that the party desires the court to take or the objection to the action of the court." S*ee also Farley v. Allstate Ins. Co.***,** 355 Md. 34, 58, 733 A.2d 1014, 1026 (1999) (stating that, even if remarks in closing argument were prejudicial, "it was incumbent upon counsel to immediately object so that the trial judge could promptly rule on the matter.")

When a party has promptly sought curative measures, the appellate courts have reviewed their sufficiency. *See, e.g., Medical Mutual Liability Ins. Co. v. Evans*, 330 Md. 1, 19, 622 A.2d 103 (1993) (considering whether the prejudice caused by reference to the defendant's prior bad acts transcended the effect of the curative instruction). When a party has not sought a curative instruction at the time of the event, the lower court has usually been especially reluctant to reverse the trial court's finding that the event did not warrant a mistrial. *See, e.g*., *Somers v. State*, 156 Md. App. 279, 292-93 and 314, 846 A.2d 1065 (2004) (remarking on the fact that defense counsel "[rethought]" their position after the witness had left the stand; finding no abuse of discretion in the overruling of a "late-made objection."). That court has also found waiver when a party has obtained the precise relief it sought and has not promptly objected to its sufficiency. *See, e.g., id.,* 156 Md. App. at 311 (finding that defendant waived objection to the sufficiency of a curative instruction by both proposing it and not objecting to it). The lower court has found untimely a mistrial motion made one day after an allegedly improper closing argument. *Greater Metropolitan Orthopaedics P.A. v. Ward*, 147 Md. App. 686, 697-98 (2002).

In this case, the *Goldberg* court excused defendants from the Rule 2-517(c) requirement that a party object to a ruling "at the time the ruling or order is made…." The defendants objected to Mr. Boone's third question about Dr. Schretlen's testimony in *Malvo*. They won all the relief they asked for: the trial court instructed Mr. Boone not to continue the line of questioning. At that point, Rule 2-517(c) required the defendants to state any objection to the court's ruling. They did not. They requested no curative instruction and made no motion to strike the question or the answer. Instead, they listened to the remainder of the cross-examination of Dr. Schretlen, asked a few redirect questions, then called Mr. Boone's treating physician Dr. Saia to testify, and then engaged in colloquy with the court about the next day's schedule, all before deciding, the next day, to move for a mistrial on a more precisely articulated contention that Dr. Schretlen's credibility had been irrevocably damaged by one question regarding his opinions in *Malvo*.

In finding the defendants' mistrial motion timely, the *Goldberg* court quoted the wrong standard: the one that applies to a mistrial motion when a curative instruction is sought but is insufficient to fix any unfair prejudice. The court entirely overlooked the defendants' failure to even ask for a curative instruction, and to do so while the witness was still on the stand. 167 Md. App. at 434 n.10. Further, the *Goldberg* court applied *Tierco* to waive Rule 2-517(c) without any showing of cause for the delay in requesting further relief. 167 Md. App. at 434. A trial court taking instruction from the opinion reported below will perceive that any skepticism it displays towards a late-made motion for a mistrial on the basis of a single question may well be considered an abuse of discretion.

Under the lower court's expansive, published interpretation of Rule 2-517(c) and *Evans*, litigants will be encouraged to repeatedly burnish earlier objections during the course of a trial. Trial courts will be required to revisit those objections when it is too late to salvage the trial and the only option is to dismantle the proceedings and start over. And because belated objections will be preserved for appellate review, more of these cases will be appealed. These results will not serve the public interest in orderly, fair and

efficient proceedings. Rather, enforcing Rule 2-517(c) to require timely and fully articulated objections will let trial judges manage their proceedings as they occur, not a day or more later after a litigant has devised a new reason to seek more or different relief. And, the interpretation of that Rule to require objections contemporaneous with the event or ruling will keep the onus on counsel to either prevent foreseeable problems by making pre-trial or Rule 5-403 motions or to seek a cure in time.

(2) Does this Court need to reach the informed consent issue?

II. The informed consent claim need not be addressed because the jury also found surgical negligence, and Dr. Goldberg has not established that that verdict should be vacated because of jury confusion.

Defendants present questions concerning proof of proximate cause in an informed consent claim based on the surgeon's lack of qualifications for doing a risky procedure. Unless this Court finds that the Schretlen question compels a mistrial on Dr. Goldberg's liability for the negligent performance of the surgery, this Court does not need to reach informed consent. The *Goldberg* court erred in reaching the informed consent issue when it remanded for a re-trial on damages for the proven surgical negligence.

Appellate courts usually do not address unnecessary issues. *See, e.g., American Laundry Machinery v. Horan*, 45 Md. App. 97, 412 A.2d 407 (1980) (finding no need to consider appellate issue of strict liability where jury's finding of negligence was independently supportable). The Court of Special Appeals has stated the rule, "[W]here independent grounds are sufficient to sustain a jury verdict, we are bound to uphold that verdict." *Krouse v. Krouse*, 94 Md. App. 369, 385, 617 A.2d 1098, 1106 (1993). *See also Huffer v. Miller,* 74 Md. 454, 22 Atl. 205 (1891) (not reaching sufficiency of two counts when the third was good and the judgment would not be reversed).

Defendants argue that this Court should reach the informed consent issue because the jury could have been confused into voting that Dr. Goldberg was negligent in his conduct of the surgery (question No. 1 on the verdict form) when they intended to be voting on informed consent (question No. 3). Their jury confusion theory is problematic for four reasons.

First, the form, (E.671-672), was worded clearly. It straightforwardly separated the surgical negligence claim into questions 1 and 2 and the informed consent claim into questions 3 and 4. The form does not support any *post hoc* speculation that the jury might only have found surgical negligence on questions 1 and 2 because they were confused by questions 3 and 4 on informed consent.

Second, defense counsel wrote the verdict form. (E.549A-549C). The court, in presenting the verdict form to the jurors in its closing instructions, told them the form had "been gone over by both counsel and I think they did a good job of that." (E.649). Defendants neither objected to the form nor proposed different language.

Third, both sides explained the verdict form in closing argument and made it clear how the two legal claims were separate and distinct from each other. (E.582-584; E.624-625). Plaintiff's counsel repeatedly pointed out to the jury that there were two separate claims, one for negligence in performing the surgery, and the other for failing to give adequate information before the procedure. (E.579, E.644). The defense told the jury that, to find for the plaintiff on question 1, it had to determine that Dr. Goldberg had penetrated the brain with a surgical instrument. (E.624-625). Since there was graphic physical evidence from the CT scans that he had done so (see, for example, the illustrations of the CT scans at E.655 and E.656, color copies of which are attached hereto at Apx 013 and Apx 014, and the before/after X-ray comparison at Apx 015), and since the defense never offered a plausible alternative explanation for the injury, the jury was amply justified in answering "yes" to question No. 1 on the verdict form about whether Dr. Goldberg "breached the standard of care in his performance of a radical mastoidectomy performed upon Billy K. Boone." (E.671).

Fourth, no evidence was introduced at trial that elicited any objection as relating solely to a legally insufficient informed consent theory. The informed consent facts were brief, straightforward, and largely uncontested: Dr. Goldberg did not tell Mr. Boone that his mastoidectomy would be a complicated revision mastoidectomy, that the hole in Mr. Boone's skull would make this complicated procedure yet more complicated, that brain injury could result, that Dr. Goldberg had done few of these operations in recent years,

that there was a good supply of surgeons locally who had, and that general ear-nose-throat surgeons are not necessarily competent to do complex procedures. Finally, the damages claimed for informed consent were no different than the damages sought for the surgical negligence. Hence, by agreement of the parties, the verdict form had only one section on damages.

Juries are frequently asked to consider different counts and to differentiate among them on issues such as the degree of intent. They are presumed to be able to understand and obey their instructions. *Spain,* 386 Md. 160, 872 A.2d 34 (stating the "presumption that juries are able to follow the instructions given to them by the trial judge, particularly when the record reveals no overt act on the jury's part to the contrary"). Defendants' allegations of jury confusion lack any basis in this record.

Defendants' argument is completely inapposite on the "majority rule" about the necessity for substantial evidence for each liability theory for a "general verdict." (brief pp. 26-28.) This case had a special verdict form, written by defense counsel, with the two liability theories separately and clearly stated. The damages for each theory were the same, and thus there was only one section on the verdict form for the itemization of damages. *See Arrabal v. Crew-Taylor*, 159 Md. App. 668, 688-89, 862 A.2d 431 (2004) (in a malpractice case based on theories of surgical negligence and lack of informed consent, "no matter what theory prevailed, the damages would be the same").

Dr. Goldberg's final argument – that the two theories were "inextricably intertwined" (brief pp.28) – speculates that the jury would not have found that Dr. Goldberg performed the surgery negligently if they had not also been told he should have consulted with a more experienced surgeon. The case was never presented that way to the jury. Instead, the abundant and graphic evidence that Dr. Goldberg had pierced Mr. Boone's brain, and thus was negligent by his own concession, stood unrebutted by the end of trial.

Unless this Court orders a new trial on liability because of the question posed to Dr. Schretlen, this Court need not reach the informed consent issue.

(3) Did the informed consent evidence present a jury issue?

III. The lower appellate court erred in reversing the informed consent judgment, because Dr. Goldberg' motion for judgment addressed causation, not the duty issues on which the court ruled, because a reasonable juror could have found on this record that a patient facing complex surgery next to his brain would find material the fact that his surgeon had seldom performed such a procedure, and because this plaintiff's causation evidence was sufficient under *Sard v. Hardy.*

The two informed consent issues argued here by defendants raise three questions: whether defendants preserved their duty argument for appeal under Md. Rule 2-535(a) when they moved for judgment on proximate cause; if so, whether the *Goldberg* court erred in deciding duty as a matter of law; and whether the trial court correctly found the proximate cause evidence sufficient to submit to the jury.

A. Defendants moved for judgment on causation and not duty.

Rule 2-535(a) provides, "In a jury trial, a party may move for judgment notwithstanding the verdict only if that party made a motion for judgment at the close of all evidence and only on the grounds advanced in support of the motion. The transcript of defendants' oral motion for judgment shows that the only issue they raised about informed consent at the close of the evidence concerned causation. In that motion, (E.520-522), defendants' counsel – after admitting the sufficiency of the surgical negligence claim, (E.520) – said:

> The second claim they have is that he failed to give informed consent and while they've couched it as the standard of care as Your Honor undoubtedly knows, under Maryland law, it is a legal duty and it is not subject to a finding of standard of care, either to give or not to give it, but it is a legal duty that is required to give a patient who is to undergo a proceeding so that the patient can understand the nature of the proceeding and any alternatives and make an informed decision about his or her own care. That claim, however, carries with it a second requirement before it becomes a viable cause of action, and that second requirement is that the failure of giving an informed consent, if any, be a proximate cause of the injury of which the plaintiffs complain. **While they have attempted to establish as a standard of care opinions as to whether it should have been given, they could as easily have argued as a legal duty imposed by the law. Where the duty comes from is not**

> **anything for which we direct our motion. However, they have never, ever even attempted to establish proximate cause.**

(E.520; see also E.521-522) (emphasis added).

Defendants thus expressly disavowed duty as a subject of the motion. They argued that Mr. Boone had not established causation proof because he had not shown "where he would go and what the outcome would have been." (Id.)

After the verdict, defendants moved for judgment notwithstanding the verdict. That written motion appears at (E.673-677). In it, defendants twice stated the basis of their motion for judgment. First, they stated, "The Defendants' motion was based on the fact that the Plaintiff failed to present any evidence to show that Dr. Goldberg's failure to provide an informed consent proximately caused the Plaintiff's injuries." (E.673). Second, they stated, "The Defendants' Motion for Judgment Notwithstanding the Verdict is predicated upon the same argument set forth by counsel at trial. That is, in order for the Plaintiff to recover under an informed consent theory, he must prove that his injuries would not have occurred if adequately warned by Dr. Goldberg." (E.674)

The *Goldberg* court erred when it addressed duty and found it unnecessary to reach causation. 167 Md. App. at 425-26. Defendants had only preserved the proximate cause issue.

B. In reaching duty, the *Goldberg* court erred in resolving all factual inferences in favor of the movant, in deciding as a matter of law the question of what facts would be material to the reasonable patient, and in adding to the tort of informed consent an element that the physician must have "misled" the plaintiff.

The Court has defined a physician's duty to obtain an "informed consent" to a procedure this way:

> [T]he physician's duty to disclose risk information is whether such data will be material to the patient's decision: "The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is whatever is material to the decision. Thus, the test for determining whether a potential peril must be divulged is its materiality to the patient's decision." [internal citation omitted] ***

> We hold, therefore, that the scope of the physician's duty to inform is to be measured by the materiality of the information to the decision of the patient. A material risk is one which a physician knows or ought to know would be significant to a reasonable person in the patient's position in deciding whether or not to submit to a particular medical treatment or procedure. Whether a physician has fulfilled his duty to disclose, then, is to be determined by reference to a general standard of reasonable conduct and is not measured by a professional standard of care.

Sard v. Hardy, 281 Md. 432, 443-44, 379 A.2d 1014, 1022 (1977) (citations omitted); *seealso Faya v. Almarez*, 329 Md. 432, 450, 620 A.2d 327,334, n.6 (1993).

Thus, the question of what a reasonable patient would want to know is gauged on a "reasonable person" standard. This Court has not limited that information to mere disclosure of the events that might occur during the procedure. Instead, the Court has made clear that a reasonable person would want to know facts about his or her medical provider. In *Faya*, the patients alleged a cause of action by pleading that their surgeon did not disclose his sickness with AIDS. *Id.* In *Dingle*, the reasonable person would have found material the fact that someone else entirely would perform her surgery, and that that doctor was a resident. *Dingle v. Belin,* 358 Md. 354, 749 A.2d 157 (2000). As defendants acknowledged in their motion for judgment, expert testimony is not required on what a patient would want to know (E.522, stating that standard of care could have been argued as "a legal duty imposed by the law"). Indeed, in Maryland, a plaintiff who alleges only an informed consent count against a medical provider need not even attach an expert's certificate to his or her complaint. Md. Cts. and Jud. Proc. § 3-2A-04(b)(1).

The jury question in this case was whether a reasonable patient would want to know: (1) that his particular anatomy and medical history made an operation next to his brain complex and risky, (2) that his surgeon had done very few procedures of this complexity and (3) that many specialists in the area had done them frequently. Dr. Goldberg admitted that he never told Mr. Boone about the

complexity of the operation, the vulnerability of his brain, or the surgeon's slender experience with such procedures. Mr. Boone proved through experts that that information should have been provided. This jury, properly instructed on duty under *Maryland Civil Pattern Jury Instructions* No. 24:7, found that Dr. Goldberg did not provide Mr. Boone with the facts which a reasonable patient would find significant. On its verdict form, it found that this doctor "failed to adequately advise the Plaintiff of the risks of his radical mastoidectomy procedure [.]"

The *Goldberg* court disagreed with the jury on the facts and also revised the law. That court decided that, as a matter of law, a patient needing a procedure cannot base an informed consent claim "on the ground that the physician who performed the procedure failed to advise the patient that there were other physicians in the locality who had even more impressive qualifications and/or experience" unless the patient can prove that the doctor "has somehow misled the patient and/or was not qualified to perform a particular procedure…." 167 Md. App. at 425.

Whether or not it formulated the rule correctly, the *Goldberg* court erred in assuming as a fact that this defendant had "impressive qualifications and/or experience" for this procedure. To make that assumption, the court had to disregard Mr. Boone's evidence about Dr. Goldberg's competence to perform this particular procedure. The evidence raised conflicting factual inferences. Dr. Goldberg agreed that he had only done one revision mastoidectomy in the last three years (E.145). Dr. Selesnick does this procedure 100 times or more per year and stated that there were surgeons in Washington, D.C. with similar experience. (E.145-146). From those facts alone, a reasonable jury could find that this doctor's qualifications and experience were not "impressive" as to this procedure. Dr. Selesnick, an ENT surgeon who practices and teaches residents and specializes further in mastoid and skull-base surgery, also testified that a general ENT residency does not equip surgeons to do revision mastoidectomies on their own. Defendants' voir dire of Dr. Selesnick elicited this testimony:

> Q Now, the other thing I wanted to ask you about, in your teaching, you teach residents, among other things you teach them the art of mastoid

surgery, including the removal of the tumor, cholesteatoma, is that correct?

A That's correct. …

Q And you expect that after someone has completed the four-year residency at [a] tertiary facility with a department such as yours, learning how to do mastoid surgery, including removing cholesteatomas, that they're qualified to go out into the world of patients, and go to their home communities and perform that surgery, correct?

A In selected cases, yeah. …

Q …So, your residents are only trained in some of them but not all of them?

A My residents are hopefully trained in good judgment also and, and will decide when a case has too many complexities where they wouldn't want to do a surgery, and that's what you give a situation. But simple cholesteatomas first time around, not revisions, no abnormalities, …I would hope they'd be able to do that.

Q Well, now let's go back over what you do. Didn't you tell us in your deposition that the main thing you do at your institution is complicated cholesteatoma surgeries?

A I do complicated and I do primary.

Q And your residents are with you when you do both complicated and primary, correct?

A That's, that's absolutely right.

Q And they're right by your elbow as you are helping them learn the difference between complicated and, and simple, if I can use that word, and they're learning from that experience, correct?

A Yes, and I often get comments like, boy, if this came around, I'd rather there's someone like you I could send this to on, on really complicated ones.

Q I see.

A But on straightforward ones I think they feel pretty good about doing them.

Q I see. Your training program really is limited to simple procedures, correct?

A No. Our training program teaches residents both technical skills and judgment.

Q But you only expect them to do simple procedures, that's what you're telling this jury, correct?

A I'm expecting them to, to do what they feel comfortable doing and referring out cases that they don't feel comfortable doing.

(E.112-115).

The *Goldberg* court erred in deciding the disputed facts regarding Dr. Goldberg's qualifications, in implicitly creating a legal presumption that those who have completed a residency in a certain field are equipped to perform all procedures in that field, in apparently assuming that this surgery implicated only the ENT field, and in disregarding Mr. Boone's evidence to the contrary.

The *Goldberg* court also erred by turning the fact question of materiality into a legal question. This jury heard the pattern jury instruction on materiality and decided the issue in Mr. Boone's favor. Because the jury found against Dr. Goldberg on that issue, he needed to establish in his motion for judgment notwithstanding the verdict that there was no evidence from which a "rational mind" could have inferred materiality. *Cf. Houston v. Safeway Stores, Inc.,* 346 Md. 503, 520, 697 A.2d 851, 859-60 (1997).

Nothing in defendants' motion for judgment (E.673-677) addresses a lack of evidence on materiality of the fact that a surgeon has little experience in a procedure made yet more complicated by the pre-existing hole in this plaintiff's skull. Dr. Selesnick testified that the fact that the operation was going to occur right below a hole in the patient's skull, with the dura and the brain under that hole, "would play a very important part. That is something you would want to talk to the patient about since the patient is at increased risks. He deserves to know that." (E.207). This jury reasonably found that such a patient would like to know that his revision mastoidectomy, already complex, was going to be especially tricky and that this surgeon had little expertise in any kind of revision mastoidectomy. The *Goldberg* court erred in deciding *de novo* the facts about what the reasonable patient facing surgery next to a hole in his skull is entitled to know about the doctor who is wielding the drills.

Under *Goldberg*, then, a patient who has not been told by a surgeon that his operation risks brain injury and that that surgeon has done few such operations, and who then suffers brain injury because the surgeon did not know where he was operating (E.199), must first face a presumption that those who have completed a residency in a field are competent to do all procedures in that field. As applied here, that presumption was insurmountable even by Dr. Selesnick's testimony that ENT general surgeons are

expected to be able to recognize tricky procedures and exercise judgment about their competence to perform them, that this surgeon had little experience with this procedure, and that other surgeons specialized in it. It is not clear what proof would overcome that presumption. What is clear is that the new burden is unusually high and does not bear a relation to how a reasonable patient facing such surgery might define "qualified."

Alternatively, under *Goldberg,* an informed consent patient must prove that the surgeon lied or exaggerated his qualifications. The tort of informed consent has traditionally involved a physician's silence. *Goldberg* now requires affirmative misrepresentations in cases in which the undisclosed material fact involves a generalist's competence to perform a complex procedure safely.

The *Goldberg* court also suggested that a patient cannot prove materiality of the non-disclosed information without proof that that he or she could have made timely appointments with specialists and operating rooms. The court assumed facts contrary to the evidence about how urgent this surgery was. In its footnote 6, the court stated,

> Moreover, while a person who needs surgery is likely to want the surgery performed by the most skilled surgeon available, a patient who needs surgery within the next ten days is unlikely to insist that the surgery be delayed for three months because (1) the most highly qualified surgeon will not be available until that point in time, and/or (2) the patient wants the surgery performed in a particular operating room that is 'booked' for that period of time.

167 Md. App. at 425. There was no evidence that Mr. Boone needed the surgery urgently. To the contrary, he first saw Dr. Goldberg for a pre-surgical consultation on Nov. 15, 1999 and had the surgery on Jan. 6, 2000. (E.202). The benign growth was very slow growing and would eventually have to come out, (E.179-180), but there was no testimony about any lack of time for seeking further consultations. The record does not support the court's assumption that no specialist in the Baltimore-Washington Metropolitan area could have performed the procedure in a timely way. And, until *Goldberg*, informed consent plaintiffs have not needed to introduce into evidence the appointment books of other doctors.

The *Goldberg* court erred in excepting this case from the usual informed consent law on duty and in resolving every inference against the plaintiff.

C. The trial court correctly denied Dr. Goldberg' motion for judgment notwithstanding the verdict on causation.

Mr. Boone testified, without dispute, that Dr. Goldberg never informed him of the hole in his skull, or the possibility of brain damage, or the availability of more specialized surgeons. (E.348-350). Mr. Boone was never asked, on either direct or cross-examination, what difference that information would have made to him. The reason that question was never posed is that a plaintiff's self-serving hindsight testimony does not establish proximate cause in an informed consent case. Rather, Maryland applies an objective test, asking what a reasonable patient would have done under the circumstances. This Court stated the applicable law in *Sard v. Hardy*, 281 Md. 432, 379 A.2d. 1014 (1977):

> [T]he causality requirement in cases applying the doctrine of informed consent is to be resolved by an objective test: whether a reasonable person in the patient's position would have withheld consent to the surgery or therapy had all material risks been disclosed. If disclosure of all material risks would not have changed the decision of a reasonable person in the position of the patient, there is no causal connection between the nondisclosure and his damage. If, however, disclosure of all material risks would have caused a reasonable person in the position of the patient to refuse the surgery or therapy, a causal connection is shown. Under this rule, the patient's hindsight testimony as to what he would have hypothetically done, though relevant, is not determinative of the issue.

379 A.2d. at 1025.

Defendants' motion rested on another ground: that the plaintiff was required to prove, not merely that a reasonable patient would have gone to another surgeon, but that this second hypothetical surgeon would have operated without injuring the brain. Dr. Selesnick, plaintiff's ear surgery expert, testified that "clearly the risks would be different" between a surgeon who had Dr. Selesnick's level of experience, 100 procedures or more a year, versus Dr. Goldberg's experience of having done only one revision mastoidectomy in the prior three years, because "the more you do something and

the more comfortable you are, the less risk is entailed." (E.146). The defense offered no contrary testimony. Given the nature of the injury Dr. Goldberg produced – entering the brain through a hole in the skull that was not even within his surgical field and penetrating to a depth of 1.5 cm – the jury could have readily concluded that any experienced surgeon would not have produced such an injury.

Furthermore, the plaintiff was not required to prove a better outcome with another surgeon. An informed consent claim is a decisional claim. One must prove that the non-disclosure of material information would have made a difference to the reasonable patient in the decision made about the surgery. As the court said in *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977), "If … disclosure of all material risks would have caused a reasonable person in the position of the patient to refuse the surgery or therapy, a causal connection is shown." 379 A.2d. at 1025. See also *Maryland Civil Pattern Jury Instructions* (3rd ed. 1997) No. 27:4 (Informed Consent), Comment B (causation).

By finding for the plaintiff on the special interrogatory on this subject (question No. 3), the jury determined that Dr. Goldberg had negligently failed to disclose material information about the surgery. The jury then found that his non-disclosures had played a causal role in producing Mr. Boone's injuries (question No. 4). On this subject, the court did not give a specific instruction to the jury about causation, except the general proximate cause instruction. This left defendants free to argue, as their counsel did, that the plaintiff should have to prove that the injury would not have been caused if the surgery had been performed by another surgeon. (E.618-619). The plaintiff, on the other hand, argued that the only causation requirement was that a reasonable person would have declined to have the surgery with Dr. Goldberg and would have gone to another more specialized surgeon with less risk of brain injury. (E.583-584). The plaintiff's argument accorded fully with *Sard v. Hardy*. Since there was enough evidence on either theory of causation – that another, more experienced surgeon would not have committed such a gross error (defendant's causation requirement), or that any reasonable patient

would have chosen a more experienced surgeon for an operation that carried a risk of brain injury (plaintiff's version) – there was no error in submitting the claim to the jury.

Puzzlingly, the *Goldberg* court acknowledged at one point that plaintiff had stated a claim sufficient for the jury's consideration on the failure to advise about the risk of brain injury, stating that it would have remanded for a new trial on informed consent if plaintiff had won on informed consent alone, 167 Md. App. at 427-28, but then it committed another error by directing entry of judgment for Dr. Goldberg on informed consent. 167 Md. App. at 444.

To the plaintiff's knowledge, Maryland appellate courts have not addressed an informed consent case in which the non-disclosed facts were the patient's special anatomy, the complexity of the procedure, the high stakes in light of that complexity, and the surgeon's relative inexperience with even the straightforward procedure. *Faya* is close in that it addresses non-disclosure of information personal to the surgeon, rather than the usual facts involving risks inherent in the procedure done by an impliedly competent surgeon. The court did not signal a change in the causation rules for that case, which primarily addressed duty. Under *Goldberg,* that patient would have had to prove either that other surgeons were not HIV-positive or that other surgeons were available. *Dingle* is also close in that it recognized the role of the qualifications of the surgeon in a patient's decision to consent to the procedure and found that the material information may include more than risks and effects of the procedure. 358 Md. 354, 370, 749 A.2d 157, 165 (2000). There, the patient thought her surgeon was operating; he did not, and a resident did, and she was injured. When the defendants argue that causation is not proven when the patient would have undergone the therapy anyway, (their p. 22), they not only avoid *Faya* and *Dingle*, but also miss the point of this case: this jury reasonably found that a person who learns that his brain will be vulnerable during surgery would want to know that a general ENT surgeon should at least have help from a specialist.

The Supreme Courts of Wisconsin and New Jersey have addressed informed consent cases based on the physician's lack of experience, and both have rejected defense arguments that such plaintiffs must prove that another physician would have operated

successfully. In *Johnson v. Kokemoor*, 199 Wis.2d 615, 545 N.W.2d 495 (1996), the Wisconsin Supreme Court considered an informed consent claim by a patient rendered partly quadriplegic by an aneurysm-clipping procedure in her brain done by the defendant. The plaintiff's evidence was that the defendant had overstated his own experience in the procedure, had downplayed the risks, and had failed to advise the plaintiff of the availability of more experienced surgeons to do the procedure at less risk. The Wisconsin Supreme Court summarized the defendant's argument: "Even had the surgery been performed by a 'master,' the defendant argues, a bad result may have occurred." 545 N.W.2d at 509. The court went on to state:

> The defendant appears to attack the basic concept of causation applied in claims based on informed consent…. [T]he question confronting a jury in an informed consent case is whether a reasonable person in the patient's position would have arrived at a different decision about the treatment or surgery had he or she been fully informed. … If the defendant is arguing here that the standard causation instruction is not applicable in a case in which provider-specific evidence is admitted, this contention has not been fully presented and developed.

545 N.W.2d at 509-10. This Court cited *Kokemoor* with approval in *Dingle v. Belin*, 358 Md. at 370, on the issue of a surgeon's duty to disclose more than just routine information about the proposed surgery, but did not reach causation.

In *Howard v. University of Medicine and Dentistry of New Jersey*, 172 N.J. 537, 800 A.2d 73 (2002), the neurosurgeon allegedly overstated his experience with the procedure proposed for the plaintiff and misstated that he was board-certified. The plaintiff was rendered paralyzed by the surgery. The New Jersey Supreme Court first observed that this was not a claim about unnecessary elective surgery:

> The allegation here is that defendant's misrepresentations concerning his credentials and experience were instrumental in overcoming plaintiff's reluctance to proceed with the surgery. *The theory of the claim is not that the misrepresentation induced plaintiff to proceed with unnecessary surgery*. [Citation omitted.] Rather, plaintiff essentially contends that he was misled about material information that he required in order to grant an intelligent and informed consent to the performance of the procedure because he did not receive accurate responses to questions concerning

> defendant's experience in performing corpectomies and whether he was 'Board Certified.'

800 A.2d at 83-84 (emphasis added). The court then established a two-pronged causation inquiry that required the plaintiff to prove, first, "that the additional undisclosed risk posed by defendant's true level of qualifications and experience increased plaintiff's risk of paralysis from the corpectomy procedure," and second, "whether that substantially increased risk would cause a reasonably prudent person not to consent to undergo the procedure." 800 A.2d at 84-85. In short, the plaintiff was required to prove a causal nexus between the lack of experience/credentials and the risk of the bad outcome that the plaintiff actually suffered, and that this would have influenced the decision of a reasonable person. Mr. Boone had such testimony through Dr. Selesnick.

The plaintiff in the New Jersey case was *not* required to prove that a hypothetical alternative surgeon would have done the surgery successfully. Nor was the Wisconsin plaintiff in *Kokemoor* required to make such a showing. At most, the plaintiff need only prove that a reasonable patient would not have undergone the surgery with Dr. Goldberg because of the material risks of a worse outcome at his hands. Ample evidence existed to put that claim to the jury. But in any case, the evidence was sufficient to meet Dr. Goldberg's proposed causation requirement. No reversible error occurred.

The *Goldberg* court erred in reaching issues not raised in defendants' motion for judgment, in excepting this case from the established informed consent law, in undertaking to find facts, in basing its findings and assumptions of fact on inferences favorable to the losing party, and in granting judgment to the defendants despite the acknowledged sufficiency of the consent claim based on the admitted non-disclosure about the risk of brain injury .

CONCLUSION

The overwhelming evidence established that Dr. Goldberg negligently punctured Mr. Boone's brain and caused a permanent, significant injury affecting Mr. Boone's ability to function on a daily basis. The damages were conservative and showed that the jury gave considerable weight to the defendants' damages witnesses. This trial was fair,

and, as the trial court observed after the verdict, the lawyers exhibited professionalism. The Court of Special Appeals erred in making new law that will encourage second-guessing of trial judges' discretion on mistrial motions and that will encourage belated motions without offering any lesser remedy to the judge. It also erred in reaching the issue of informed consent and in deciding materiality as a matter of law on this record. Mr. Boone respectfully urges this Court to vacate the decision below and reinstate the trial court's judgment in his favor.

Respectfully Submitted,

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CERTIFICATE OF TYPE AND FONT SIZE

This brief was prepared in Times New Roman font, 13-point size.

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Patrick A. Malone

VERBATIM TEXT OF PERTINENT STATUTES AND RULES

Rule 2-517. Method of making objections

(c) *Objections to other rulings or orders.*- For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

Rule 2-535. Revisory power

(a) *Generally*- On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534.

Rule 5-104. Preliminary questions

(a) *Questions of admissibility generally*- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of section (b). In making its determination, the court may, in the interest of justice, decline to require strict application of the rules of evidence, except those relating to privilege and competency of witnesses.

(b) *Relevance conditioned on fact*- When the relevance of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding by the trier of fact that the condition has been fulfilled.

(c) *Hearing of jury*- Hearings on preliminary matters shall be conducted out of the hearing of the jury when required by rule or the interests of justice.

(d) *Testimony by accused*- The accused does not, by testifying upon a preliminary matter of admissibility, become subject to cross-examination as to other issues in the case.

(e) *Weight and credibility*- This rule does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.

Rule 5-401. Definition of "relevant evidence".

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence

Rule 5-403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 5-607. Who may impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 5-611. Mode and order of interrogation and presentation: control by court; scope of cross-examination; leading questions.

(b) *Scope of cross-examination*-

(1) Except as provided in subsection (b) (2), cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Except for the cross-examination of an accused who testifies on a preliminary matter, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(2) An accused who testifies on a non-preliminary matter may be cross-examined on any matter relevant to any issue in the action.

(c) *Leading questions*- The allowance of leading questions rests in the discretion of the trial court. Ordinarily, leading questions should not be allowed on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be allowed (1) on cross-examination or (2) on the direct examination of a hostile witness, an adverse party, or a witness identified with an adverse party.

Rule 5-613. Prior statements of witnesses

(a) *Examining witness concerning prior statement*- A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.

(b) *Extrinsic evidence of prior inconsistent statement of witness*- Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

Rule 5-616. Impeachment and rehabilitation – Generally

(a) *Impeachment by inquiry of the witness.*- The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:

(1) Proving under Rule 5-613 that the witness has made statements that are inconsistent with the witness's present testimony;

(2) Proving that the facts are not as testified to by the witness;

(3) Proving that an opinion expressed by the witness is not held by the witness or is otherwise not worthy of belief;

(4) Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely;

(5) Proving lack of personal knowledge or weaknesses in the capacity of the witness to perceive, remember, or communicate; or

(6) Proving the character of the witness for untruthfulness by (i) establishing prior bad acts as permitted under Rule 5-608 (b) or (ii) establishing prior convictions as permitted under Rule 5-609.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Appellee's Brief were sent by mail, postage prepaid, on August 16, 2006, to:

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APPENDIX TO APPELLEE'S BRIEF

This appendix contains pages from the trial transcript that were inadvertently omitted from the joint record extract. It also contains color copies of several of the brain imaging exhibits that could not be reproduced in color in the joint extract.

APPENDIX TABLE OF CONTENTS