IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D2024-0650

MARY ANNE MCGUIRE

Appellant,

vs. L.T. Case No. 2021-CA-001462

BRIAN ZIRGIBEL, M.D. AND TALLAHASSEE ORTHOPEDIC CLINIC III, P.L.

Appellees.

_____/

ON APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

A. Introduction

This is a medical negligence case. Plaintiff Mary Anne McGuire appeals a final judgment entered after a jury verdict for defendants Dr. Brian Zirgibel, M.D. and his practice group, Tallahassee Orthopedic Clinic.

After she sustained a fall, Ms. McGuire—then 65—underwent a total hip replacement surgery. Dr. Zirgibel performed the surgery on October 27, 2019. While placing a surgical cable meant to hold Ms. McGuire's femur intact during and after the surgery, Dr. Zirgibel entrapped and strangled Ms. McGuire's sciatic nerve. Ms. McGuire alleges Dr. Zirgibel was negligent in placing the cable, and that his negligence has caused her to suffer disability and chronic pain—both physical and mental—since the surgery. The case proceeded to trial and the jury rendered a defense verdict. Ms. McGuire raises two issues in this appeal.

First, the defense—over Ms. McGuire's objection and in violation of an order in limine—elicited a new expert opinion not disclosed before trial: namely, that the defense expert "agreed" that the size of the cable passer used by Dr. Zirgibel was unproblematic.

T3.168:10–24 (PDF.697)[1]; R.525 (order in limine). The cable passer is the device used by the surgeon to wrap the cable around the femur bone. T1.80:24–81:24 (PDF.83–84). Before trial, defense counsel represented that "we don't know" the size of the cable passer (*see* R.2086:7–9); accordingly, neither side's medical expert opined on whether Dr. Zirgibel used the correct-size cable passer. At trial, however, it came to light that Dr. Zirgibel always uses the "large" cable passer when placing cables. T3.97:14–16 (PDF.626). Despite testifying—consistent with Ms. McGuire's expert—that the standard of care is to start with the *smallest* cable passer (*see* T3.167:19–21 (PDF.696), the defense expert opined for the first time at trial that he took no issue with Dr. Zirgibel's choice of cable passer in this instance. T3.168:10–24 (PDF.697). This surprise opinion resulted in undue prejudice to Ms. McGuire.

Second, the trial court erroneously admitted into evidence a long string of text messages between Ms. McGuire and Dr. Zirgibel.

[1] Throughout this brief, citations to "T1," "T2," "T3," and "T4" are to the transcripts of the first, second, third, and fourth respective days of trial (i.e., October 23, 24, 25, and 26 of 2023). For the Court's convenience, we also include the PDF page number of each citation to the trial transcripts.

These texts detail the development of a close friendship between the two following the surgery. *See* R.2579–2769. The entire text string admitted into evidence is contained in the Appendix filed simultaneously with this brief.

Among other things, the text string included pictures of Dr. Zirgibel's children and praise of Dr. Zirgibel by Ms. McGuire. The probative value of Ms. McGuire's texts—which the defense argued went to Ms. McGuire's mental and emotional damages—was far outweighed by their tendency to elicit an emotional response from the jury.

Ms. McGuire raised both of the above grounds in a motion for new trial (*see* R.4193–4220), which the trial court denied after a hearing. R.4278. The following is a summary of the proceedings below and the pertinent evidence before the trial court.

B. Summary of the proceedings below

1. Pretrial proceedings

a. Ms. McGuire's motion in limine to exclude text messages between her and Dr. Zirgibel

Ms. McGuire moved to exclude the 187-page string of text messages between her and Dr. Zirgibel following the surgery. R.1396–

1444. She sought to exclude the texts on relevance and hearsay grounds. R.1396–98. Further, she argued that a number of her specific texts—concerning matters such as religion, family, food, Dr. Zirgibel's past injuries, and other topics—were more prejudicial than probative. R.1397–98. These texts include the following, among others, which were eventually admitted into evidence:

- "Thank you. I think there are surgeons who only see hips and knees, not people. They seem to look right through you. They give surgeons a bad name. But I can understand a little. After doing so many thousands of procedures over the years." R.2613.

- "Maybe those other surgeons just bury those doubts and become inhumane because they can't handle the humanity of their patients." R. 2614.

- "You are my silver lining. I could have had one of those 'other' surgeons. I can't imagine how bad that would be." *Id.*

- In response to a text from Dr. Zirgibel stating "[I]'m yours forever now," Ms. McGuire texted, "Guardian angel? Even though I don't believe in those. :)" R.2614–15.

- "We have a bond over this trauma that we both experienced, although we did not really experience it together. I can't imagine what it would be like to not have a clue about who you are or how this has affected you. Please keep praying for me and if I can figure out how I will pray for you." R.2661.

- "I am sad that you suffer so much over this. I wish I could help you more. It is still a bit overwhelming for me, but I am

starting to feel more normal and I want you to feel more normal too. I hope you will tell me if you know of a way I can help you. I am feeling better so maybe you can a little too." R.2715.

- "I believe you. You have already told me things that show me your character. And if you were b.s.-ing, you should win an Academy Award. I believe your sincerity." R.2717.

- "I will never forget that you cut me open again to right the 'wrong'.... I now understand a little better how hard that was for you. Without your perseverance I imagine I would be in much worse shape now." R.2718.

- "Well, I am supposed to be mad at you but I just can't. I am so glad you are my doctor and not someone else. And I think of you as a friend." R.2719.

A hearing was held on the motion in limine. R.4422–4436 (relevant portion of hearing transcript). The defense argued the texts were relevant to noneconomic damages; specifically, Ms. McGuire's mental and emotional health following the surgery. R.4425:2–21. Ms. McGuire argued the texts were unnecessary because evidence of her mental and emotional health could be elicited through live testimony. R.4430:13–23. The court denied the motion in limine without prejudice, subject to the defense laying the proper foundation for introducing the texts. R. 1623 ¶ 6, 4435:7–12.

b. Medical expert depositions

Ms. McGuire's medical expert, Dr. Scott Desman, and the defense medical expert, Dr. James Roberson, were each asked in deposition whether he had any opinion concerning the size of the cable passer used by Dr. Zirgibel.

For instance, in Dr. Desman's deposition, defense counsel asked:

> And you don't have an opinion in this case with respect to the [cable passer] size that [Dr. Zirgibel] chose being incorrect *because we don't know*?

Dr. Desman responded:

> I don't know. All I know is that it did not stay on the bone. That's the only way it went over the muscle and over the nerve because it wasn't in contact when it went around.

R.2086:7–13 (emphasis added).

Likewise, in his deposition, Dr. Roberson was asked by plaintiff's counsel whether there was "any way to tell what size cable passer Dr. Zirgibel selected." Dr. Roberson responded, "No, I don't know. I couldn't tell from the records." R.2196:9–12.

c. Ms. McGuire's motion in limine to limit experts to the opinions expressed in deposition

Before trial, Ms. McGuire moved to limit the testifying experts to the opinions expressed in deposition. R.306–07. The defense agreed, and the trial court ordered that "counsel will not question about opinions not disclosed prior to trial and shall advise their expert witnesses not to express any opinions at trial that were not previously disclosed in their depositions without first obtaining the permission of the Court outside the presence of the jury." R.525.

2. The evidence adduced at trial

a. Dr. Desman's testimony

Dr. Desman, Ms. McGuire's medical expert, was the first witness. Like Dr. Zirgibel, Dr. Desman is an orthopedic surgeon with experience performing hip replacements. T1.71:2 (PDF.74), 73:1–75:17 (PDF.76–78). Dr. Desman testified that when a hip replacement is performed, the femur may fracture. T1.77:2–11 (PDF.80). The solution is to wrap a cable—called a cerclage cable—around the femur and tighten it so that the femur stays intact. T1.75:22–23 (PDF.78), 77:12–17 (PDF.80). The passers used to wrap

the cable "come in different sizes to accommodate different size bones," and are "meant to fit the bone." T1.81:8–17 (PDF.84).

Dr. Desman testified that "when you put the cable around the [femur] bone … you want it to be right against the bone and you don't want it to trap any soft tissue," such as muscles or nerves. T1.81:17–24 (PDF.84). When using a cable passer to wrap a cable, a surgeon is unable to see all around the bone. T1.83:25–84:3 (PDF.86–87). Consequently, a degree of tactile skill is required to ensure the passer and the cable stay on the hard surface of the bone. T1.90:10–91:7 (PDF.93–94). Distinguishing between bone and soft tissue is "a matter of feeling." T1.90:21–22 (PDF.93).

Ms. McGuire's counsel asked Dr. Desman, "Is there any reason to have a big cable passer on a small bone or do you match … the passer to the bone?" T1.91:17–19 (PDF.94). Dr. Desman answered, "You try to match the passer to the bone, and if you use too small a cable passer … you can't get it around [a large] bone." T1.91:20–24 (PDF.94). However, if the cable passer is too large, "it's hard to keep it on the bone all the way round … and it ends up wandering too far out." T1.91:24–92:3. (PDF.94–95). Thus, according to Dr. Desman, "usually you start with a smaller size and if it won't go you try to go

to a bigger size." T1.92:5–6 (PDF.95). As explained *infra*, Dr. Roberson would later give very similar testimony as to the proper technique in selecting a passer.

Dr. Desman testified that neither he nor any of his partners have ever strangled a nerve while passing a cable, and that he had never heard of this happening in his nearly two decades of working on a hospital's quality assurance committee. T1.92:23–93:25 (PDF.95–96). He opined that Ms. McGuire exhibited normal anatomy. T1.94:1–5 (PDF.97). He testified that Dr. Zirgibel breached the standard of care by failing to stay on or near the bone while passing the cable, and that this breach caused Ms. McGuire's injuries. T1.95:21–96:6 (PDF.98–99). Dr. Desman further opined that wrapping a cable around the sciatic nerve is not an acceptable risk of a total hip replacement procedure. T1.99:5–14 (PDF.102).

On cross-examination, defense counsel asked Dr. Desman whether he was critical of the size or shape of the cable passer Dr. Zirgibel used. T1.103:6–7 (PDF.106). Dr. Desman answered that he did not know the size of the passer. T1.106:8 (PDF.109). Defense counsel then showed Dr. Desman a demonstrative passer and represented to him that Dr. Zirgibel "used this size," i.e., "the large

passer." T1.103:9–13 (PDF.106); T4.41:23–42:3 (PDF.768–69). When defense counsel asked Dr. Desman whether he was "critical" of Dr. Zirgibel's decision to use that size, Dr. Desman responded "[n]o." T1.103:9–11 (PDF.106).

b. Patty McAlpine's testimony

Patty McAlpine is a licensed clinical social worker who provided therapy to Ms. McGuire after her hip replacement. T1.140:16–17 (PDF.143), 142:18–22 (PDF.145). Ms. McAlpine testified that Ms. McGuire struggled with grief over the loss of her health in the wake of the surgery. T1.146:19–23 (PDF.149). She opined that Ms. McGuire suffered from situational depression related to her injury. T1.153:19–154:13 (PDF.156–57). Ms. McAlpine agreed that it is important to the mental and emotional recovery of a patient to have a supportive relationship with his or her surgeon following a surgical injury. T1.165:21–25 (PDF.168). She acknowledged that Ms. McGuire spoke with her about text conversations Ms. McGuire had with Dr. Zirgibel after the surgery. T1.166:8–12 (PDF.169).

Over Ms. McGuire's objection, the defense asked Ms. McAlpine about a text in which Ms. McGuire told Dr. Zirgibel she was "glad" he was her doctor, and that she considered him a "friend." T1.166:16–

168:11 (PDF.169–71). Ms. McAlpine recalled hearing about that text. T.168:12 (PDF.171). The defense then asked Ms. McAlpine about another text in which Ms. McGuire told Dr. Zirgibel that his support helped her get "through these rough times." T.168:13–18 (PDF.171). Ms. McAlpine also recalled that text, and she agreed that the relationship and communication between Ms. McGuire and Dr. Zirgibel helped Ms. McGuire's mental and emotional recovery. T1.168:19–25 (PDF.171).

c. Mary Anne McGuire's testimony

Ms. McGuire testified that upon waking up after her surgery, she could not move or feel her foot, and she felt excruciating pain in her leg. T1.203:2–16 (PDF.206). She spoke with Dr. Zirgibel, who informed her that her sciatic nerve had been injured by a cable during the surgery.[2] T1.206:17–21 (PDF.209). Dr. Zirgibel provided her with his cellphone number and told her to contact him if she needed anything. T1.210:3–6 (PDF.213). Over the next year-and-a-half, Ms. McGuire maintained consistent contact with Dr. Zirgibel,

[2] Upon discovering that the cerclage cable had entrapped Ms. McGuire's sciatic nerve, Dr. Zirgibel performed a surgical procedure to remove the cable. T1.293–94.

who was "very supportive" and "very involved" in the recovery process—a fact which Ms. McGuire "appreciated … very much." T2.274 (PDF.277). On two occasions, Dr. Zirgibel came to visit her in her home on St. George Island. T2.274–75 (PDF.277–78).

The defense cross-examined Ms. McGuire at length about her texts with Dr. Zirgibel. *See* T2.297–321 (PDF.300–24). Ms. McGuire admitted to exchanging approximately 550 texts with Dr. Zirgibel in the year-and-a-half following the surgery. T2.297 (PDF.300). When asked whether the text conversations with Dr. Zirgibel helped her cope with the mental and emotional pain she experienced following the surgery, Ms. McGuire answered that they did. T2.298 (PDF.301). She said she was pleased to have Dr. Zirgibel as her surgeon, and she was happy with his responsiveness to her texts. T2.298–99 (PDF.301–02).

d. Dr. Zirgibel's testimony and the introduction of the text messages between him and Ms. McGuire

Dr. Zirgibel was the first defense witness. He testified that when he passes a cable during a hip replacement, his "goal is to stay on the bone as much as possible." T3.61:16–19 (PDF.590). He

characterized the shape of the femur as an "oval" and the shape of the cable passer as "a circle, half a circle." T3.64:10–18 (PDF.593).

He did not recall having any indication that the cable was off Ms. McGuire's bone during the procedure. T3.66:14–17 (PDF.595). If there was such an indication, he would have "pull[ed] [the cable] back and reposition[ed] it and advance[d] it again." T3.66:18–21 (PDF.595). He testified that a surgeon cannot always tell when the cable passer has come off the bone. T3.67:9–11 (PDF.596).

Dr. Zirgibel recounted that after Ms. McGuire's second procedure to have the cerclage cable removed, he gave her his cellphone number. T3.73:11–15 (PDF.602). He testified to exchanging 500 text messages with Ms. McGuire over a year-and-a-half period. T3.74:3–6 (PDF.603). Among other things, the messages discussed referrals for physical therapy, counseling, and specialist physicians, as well as medication recommendations. T3.74:7–75:9 (PDF.603–04).

Defense counsel sought to elicit testimony from Dr. Zirgibel as to the content of certain texts. T3.75:10–22 (PDF.604). Ms. McGuire's counsel objected, and a sidebar conference was held. T3.75:12–23 (PDF.604). Defense counsel argued that all of Dr. Zirgibel's texts were

admissible to show the effect on the listener, since they were part of a back-and-forth conversation. T3.77:21–25 (PDF.606). Defense counsel also argued the texts were relevant to the issue of Ms. McGuire's mental damages. T3.78:1–2 (PDF.607). Ms. McGuire's counsel objected to the wholesale introduction of the text string—consisting of 187 pages—on relevance grounds, and suggested that the trial judge may need to "go[] through each text message" in the string to determine admissibility. T3.78:13–14 (PDF.607), 79:9–17 (PDF.608). The trial judge told the parties he would review the texts during the following lunch break. T3.82:18–21 (PDF.611).

Dr. Zirgibel later testified that the space between the sciatic nerve and the femur is typically only several millimeters, and that the cabling of the sciatic nerve is a known risk and recognized complication of a total hip replacement. T3.86:8–18 (PDF.615), 87:1–7 (PDF.616).

Moreover, when asked whether he always uses the same passer when passing a cable, he answered that he always uses the "large passer" on the proximal femur. T3.97:14–16 (PDF.626). This was the first time Dr. Zirgibel testified regarding cable-passer size; he did not

give any testimony regarding cable-passer size in either of his depositions. *See* R.1685–1751 (volume I), 1799–1825 (volume II).

After the lunch break, the trial judge went through the text messages with the parties. T3.117:13–120:20 (PDF.646–49). Ms. McGuire's hearsay objection was sustained as to every text message by Dr. Zirgibel for which there was no response by Ms. McGuire. *Id.* However, all the other messages were admitted for the non-hearsay purpose of demonstrating the effect on the listener. T3.120:9–20 (PDF.649).

e. Dr. Roberson's testimony

Dr. Roberson, the defense's medical expert, was the final witness. Like Dr. Desman, he noted that the shape of a cable passer is different from that of a femur. T3.147:21–22 (PDF.676). He also noted that every femur is a different size. T3.148:1–2 (PDF.677). Dr. Roberson opined that an orthopedic surgeon will always come off the bone at some point when passing a cable, given the differences in size and shape between the passer and the femur. T3.152:11–21 (PDF.681). He further stated that a surgeon will not always know if the cable passer has come off the bone, and that nerve compression by a cable is possible even when the standard of care is met.

T3.153:8–13 (PDF.682), 154:17–21 (PDF.683). However, on cross-examination, he admitted that he had never encircled a sciatic nerve with a cerclage cable, and he could not recall whether anyone he knew had ever done so. T3.161:13–19 (PDF.690).

Contrary to Dr. Zirgibel—but consistent with Dr. Desman—Dr. Roberson testified that he does *not* use the same size cable passer on every patient. T3.156:11–16 (PDF.685). Dr. Roberson stated that when he passes a cable, he starts with the smallest size passer. T3.167:15–16 (PDF.696). If that does not work, he moves on to the next size, and so on. T3.167:16–18 (PDF.696). He opined that it is "not good technique" to start with the largest size. T3.167:19–21 (PDF.696).

On re-direct, Dr. Roberson was asked whether he agreed with Dr. Desman's purported deposition testimony that he was "not critical of the size of the cable passer that Dr. Zirgibel used." T3.168:10–13 (PDF.697). Ms. McGuire's counsel objected on the ground that this testimony was "not in the deposition." T3.168:14–16 (PDF.697). The objection was overruled without a sidebar conference or any further discussion. T3.168:17 (PDF.697).

Dr. Roberson then answered that he "agree[d]" with Dr. Desman's purported deposition testimony, opining that "the actual size of the cable passer has very little to do with the chance of injury." T3.168:19–169:1 (PDF.697–98).

3. Closing arguments

Ms. McGuire's closing argument juxtaposed Dr. Zirgibel's testimony that he always uses the large passer with the testimony of both sides' medical experts, who agreed that it is improper to start with the large passer. T4.21:14–25 (PDF.748).

The defense's closing argument highlighted Dr. Desman's testimony that he was not critical of the size of the cable passer held up by defense counsel during his direct examination. T4.41:22–42:3 (PDF.768–69). Defense counsel then argued that Dr. Roberson "agreed" with Dr. Desman's purported opinion that "the large [passer] was the correct size." T4.42:4–9 (PDF.769). Defense counsel later repeated this representation of the experts' testimony. T4.43:14–16 (PDF.770). Defense counsel also noted that Ms. McGuire texted Dr. Zirgibel to "thank [him] for saving [her] nerve." T4.52:15–18 (PDF.779).

4. The jury's verdict

After over an hour of deliberations, the jury reportedly reached a verdict. T4.78:6–8 (PDF.805). The court announced a defense verdict. T4.78:24–79:4 (PDF.805–06). However, when juror number one was asked if this was his verdict, he answered that it was not. T4.79:8–14 (PDF.806), 80:13–19 (PDF.807). Accordingly, the court instructed the jury to return to the jury room to continue deliberations. T4.80:20–81:1 (PDF.807–08). Without objection, the court gave the standard jury instruction for a deadlocked jury. T4.81:24–83:4 (PDF.808–10); *see* Fla. Std. Civ. Jury Instr. 801.3.

The jury subsequently asked two questions: first, it asked for a transcript of Dr. Roberson's testimony. T4.83:9–13 (PDF.810). Second, it asked, "Did Dr. Zirgibel attempt to use the smallest passer first, that is before proceeding with [*sic*] larger?" T4.87:22–88:1 (PDF.814–15).

In response to the first question, the court informed the jury that it would take several hours for Dr. Roberson's testimony to be transcribed; the court instructed the jury to return to the jury room to discuss the request further (i.e., to possibly narrow the request). T4.90:19–91:10 (PDF.817–18). The court informed the jury it could

not answer the second question, and sent the jurors back to the jury room. T4.91:11–23 (PDF.818).

After about thirty minutes of further deliberations, the jury returned with a defense verdict. T4.92:11–19 (PDF.819).

SUMMARY OF ARGUMENT

The verdict in favor of Dr. Zirgibel and Tallahassee Orthopedic Clinic is tainted by two evidentiary errors, both of which—individually and collectively—merit reversal and a new trial.

First, the trial court erred by allowing the defense's medical expert, Dr. Roberson, to offer the new opinion that he "agreed" that Dr. Zirgibel's choice of cable passer was unproblematic. The harm caused by this error is readily apparent: the defense was able to capitalize on the new opinion in closing, and the jury—after a deadlock—asked about the size of the cable passer before it rendered its verdict for the defense.

Second, the trial court erred by allowing the defense to introduce numerous highly-prejudicial text messages detailing the development of a close friendship between Ms. McGuire and Dr. Zirgibel. The texts evoked sympathy for Dr. Zirgibel and invited the jury to speculate about Ms. McGuire's motives for suing someone

whom she once referred to as her "guardian angel." The introduction of this emotionally-charged and minimally-probative evidence was not harmless: the jury's initial deadlock indicates that this was a close case.

As explained further *infra*, this Court should reverse the final judgment for Dr. Zirgibel and Tallahassee Orthopedic and remand for a new trial.

ARGUMENT

I. The trial court abused its discretion by allowing the defense medical expert to offer a new opinion at trial.

Standard of Review

A trial court's admission of expert testimony into evidence is reviewed for an abuse of discretion. *Harrison v. State*, 33 So. 3d 727, 728 (Fla. 1st DCA 2010).

Preservation

This issue is preserved for appeal. Ms. McGuire moved in limine to limit testifying experts to the opinions expressed in their depositions. R.306–07. The trial court granted the motion. R.525. In their respective depositions, both medical experts were asked about the size of the cable passer used by Dr. Zirgibel, and both answered,

"I don't know." R.2086:7–13 (Dr. Desman's deposition); R.2196:9–12 (Dr. Roberson's deposition). However, at trial during redirect examination of Dr. Roberson, defense counsel represented that Dr. Desman's deposition testimony was that he was "not critical" of the size of the cable passer used by Dr. Zirgibel. T3.168:10–13, 20–22 (PDF.697). Ms. McGuire objected on the grounds that Dr. Desman did not say this in his deposition. T3.168:14–16 (PDF.697).

By asking Dr. Roberson whether he agreed with an opinion that Dr. Desman had not previously offered, the defense was necessarily asking Dr. Roberson to render a new expert opinion for the first time at trial. Therefore, Ms. McGuire's objection was sufficient to preserve this issue because "the specific ground" for the objection was "apparent from the context." *See* § 90.104(1)(a), Fla. Stat. The trial court overruled the objection. T3.168:17 (PDF.697).

Merits

Dr. Roberson's new opinion that he "agreed" with Dr. Desman's nonexistent deposition testimony resulted in unfair prejudice to Ms. McGuire, thus requiring a new trial under the principles of *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981). *See Allstate Prop. & Cas. Ins. Co. v. Lewis*, 14 So.3d 1230, 1234 (Fla. 1st DCA 2009)

(holding the *Binger* analysis should be applied where a medical expert changes his or her opinion at trial).

Under *Binger*, the Court is to consider whether the new opinion prejudiced Ms. McGuire, as well as the following factors: "(i) [Ms. McGuire's] ability to cure the prejudice … (ii) [the defense's] possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case." 401 So. 2d at 1313–14. As explained next, the balance of the *Binger* factors favors exclusion of Dr. Roberson's new opinion.

A. Dr. Roberson's new opinion should have been excluded under *Binger*.

1. Dr. Roberson's change of opinion concerning the size of the cable passer prejudiced Ms. McGuire.

Prejudice, for purposes of *Binger*, "refers to the surprise in fact of the objecting party." *Id.* at 1314. Both medical experts testified in their depositions that they were unaware of the size of the cable passer used by Dr. Zirgibel. R.2086:7–13 (Dr. Desman); 2196:9–12 (Dr. Roberson). The first time the defense revealed its knowledge of the purported size of the cable passer was during the cross-examination of Dr. Desman, when defense counsel held up a demonstrative passer and said Dr. Zirgibel "used this size." T1.103:9–

10 (PDF.106); T4.41:23–42:3 (PDF.768–69). Dr. Desman was then asked whether he was "critical" of that size—"the large passer"—and he answered "[n]o." T1.103:9–18 (PDF.106). This answer was consistent with his deposition testimony that he did not know the size used by Dr. Zirgibel. *See* R.2086:7–13. It was also consistent with defense counsel's representation during Dr. Desman's deposition that "we don't know" the size of the passer. *See* R.2086:7–9. Thus, the prejudice to Ms. McGuire was not yet apparent.

The prejudice only became apparent two days later, during the defense's redirect examination of Dr. Roberson. Defense counsel incorrectly represented that Dr. Desman's deposition testimony was that he was "not critical" of the size of the passer used by Dr. Zirgibel. T3.168:10–13 (PDF.697). Over Ms. McGuire's objection, Dr. Roberson testified that he "agree[d]" with this nonexistent deposition testimony. T3.168:19–169:1 (PDF.697–98).

The effect of Dr. Roberson's new opinion was to leave the jury with the false impression that both experts had examined the cable passer used by Dr. Zirgibel before trial, and that both agreed the size of the passer was unproblematic. But this is exactly the opposite of what happened. Before trial, neither expert had any opinion

regarding the size of the cable passer that was used, and defense counsel represented that "we don't know" the size of the passer. *See supra* p. 6.

Dr. Roberson's newly revealed opinion resulted in surprise-in-fact to Ms. McGuire. Had he offered this opinion before trial, Ms. McGuire would have had an opportunity to obtain and present rebuttal evidence. However, Ms. McGuire was not given a fair opportunity to dispel the false impression created by Dr. Roberson's testimony.

2. Ms. McGuire's ability to cure the prejudice caused by Dr. Roberson's new opinion was hampered.

Dr. Desman—a practicing orthopedic surgeon who traveled to Tallahassee from South Florida, *see* T1.71:9–12 (PDF.74)—was excused as a witness on the first day of trial. T1.132:13 (PDF.135). Dr. Roberson did not testify until the third day of trial. *See* T3.131–170 (PDF.660–99). Because Dr. Roberson's surprise testimony was offered two days after Dr. Desman was excused, Ms. McGuire lacked the opportunity to present expert testimony rebutting Dr. Roberson's new opinion. *Cf. Kellner v. David*, 140 So. 3d 1042, 1049 (Fla. 5th DCA 2014) (affirming exclusion of expert testimony under *Binger*

where the opposing party's expert "had finished testifying, and had been excused from trial"). Accordingly, this *Binger* factor favors Ms. McGuire.

3. The defense's conduct suggests the possibility of intentional noncompliance with the pretrial order.

The defense's eliciting of a new opinion from Dr. Roberson violated the agreed pretrial order, which provided that "counsel will not question about opinions not disclosed prior to trial and shall advise their expert witnesses not to express any opinions at trial that were not previously disclosed in their depositions without first obtaining the permission of the Court outside the presence of the jury." R.525. Despite both experts' deposition testimony that they were unaware of the size of the cable passer used by Dr. Zirgibel—as well as *defense counsel's own representation* during Dr. Desman's deposition that "we don't know" the size of the passer[3]—defense counsel brought a demonstrative passer to trial and represented to Dr. Desman that Dr. Zirgibel "used this size," i.e., "the large passer." T1.103:9–13 (PDF.106); T4.41:23–42:3 (PDF.768–69). While Ms.

[3] *See* R. 2086:7–9.

McGuire admittedly did not object, this conduct by the defense suggests its violation of the pretrial order was intentional. This point is further supported by the defense's misrepresentation of Dr. Desman's deposition testimony both in questioning Dr. Roberson and in closing. *See* T3.168:19–169:1 (PDF.697–98); T4.42:4–9 (PDF.769).

Accordingly, this *Binger* factor favors Ms. McGuire.

4. Correcting the prejudice of Dr. Roberson's new opinion would have necessarily entailed disruption of the trial.

As discussed *supra*, Ms. McGuire was deprived of a meaningful opportunity to refute Dr. Roberson's surprise testimony. Dr. Desman was excused on the first day of trial and left Tallahassee that same day. T1.132:13 (PDF.135); T3.37:6–7 (PDF.566). Because Dr. Desman is a practicing orthopedic surgeon, there is a significant chance that calling him up to give rebuttal testimony would have required delaying the trial to accommodate his work schedule. Moreover, deposing Dr. Roberson—another practicing orthopedic surgeon—also likely would have required delaying the trial.

Accordingly, the final *Binger* factor favors Ms. McGuire.

B. The error in admitting Dr. Roberson's new opinion was not harmless.

The burden of demonstrating harmless error is on the beneficiary of the error, who must show "there is no reasonable possibility that the error contributed to the verdict." *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014). Appellees cannot make this showing.

The size of the cable passer—which only came to light for the first time during trial—became a prominent issue in the trial. In closing, Ms. McGuire's counsel attempted to deal with the new issue by pointing out both experts' testimony that when they pass a cable, they start with a small passer and then move up to a larger passer. T4.21:14–25 (PDF.748) (closing argument); *see* T3.167:19–21 (PDF.696) (Dr. Roberson's testimony); T1.92:5–6 (PDF.95) (Dr. Desman's testimony). This consistent testimony was juxtaposed with Dr. Zirgibel's testimony that he *always* uses the large passer. T4.22:3–4 (PDF.749) (closing argument); T3.97:14–16 (PDF.626) (Dr. Zirgibel's testimony). Based on this contrast, Ms. McGuire's counsel argued that Dr. Zirgibel used the wrong size passer on Ms. McGuire's femur. T4.22:1–23 (PDF.749).

To rebut this argument, the defense specifically pointed out Dr. Roberson's surprise testimony that he "agreed" with Dr. Desman's purported opinion that "the large [passer] was the correct size." T4.42:4–9 (PDF.769). Because Dr. Desman was not available to rebut this testimony, Ms. McGuire was unable to effectively counter the defense's argument in rebuttal. Where a party capitalizes on inadmissible evidence during closing argument, Florida courts have held the admission of the evidence is not harmless. *See, e.g., Woodard v. State*, 978 So. 2d 217, 220 (Fla. 1st DCA 2008); *Bullington v. State*, 311 So. 3d 102, 111 (Fla. 2d DCA 2020).

Prejudice is further demonstrated by the fact that after the jury deadlocked, it posed two questions: first, the jury asked for a transcript of Dr. Roberson's testimony, T4.83:9–13 (PDF.810); second, the jury asked "[d]id Dr. Zirgibel attempt to use the smallest passer first, that is before proceeding with [the] larger?" T4.87:22–88:1 (PDF.814–15). Two respective inferences can be drawn from these questions: first, Dr. Roberson's testimony weighed on the jurors' minds, and second, the size of the cable passer played a role in the jury's deliberations.

Where evidence relevant to an issue has been improperly admitted and the jury asks questions regarding that issue, Florida courts have held the admission of the evidence is not harmless. *See, e.g., Coney v. State*, 756 So. 2d 173, 174 (Fla. 4th DCA 2000); *Pierre-Charles v. State*, 67 So. 3d 301, 306 (Fla. 2d DCA 2011).

In sum, because the issue of the size of the cable passer became a feature of the trial—especially during closing arguments—it cannot be said that the admission of Dr. Roberson's new opinion was harmless. *Cf. Shiver v. State*, 900 So. 2d 615, 618 (Fla. 1st DCA 2005) (finding erroneous admission of evidence was not harmless where the evidence was a "feature" of the proponent's closing argument). This is especially true because this was a close case: *both* experts testified that their procedure for passing cables is different from that of Dr. Zirgibel—who "always" starts with the large passer. T3.97:14–16 (PDF.626). Moreover, the jury deadlocked before reaching a defense verdict. T4.79–81 (PDF.806–08); *cf. Alcantar v. State*, 987 So. 2d 822, 826 (Fla. 2d DCA 2008) (finding erroneous admission of evidence was not harmless where "the jury struggled … as indicated by its initial deadlock").

Accordingly, this Court should reverse and remand for a new trial and allow Ms. McGuire to depose Dr. Roberson regarding his changed opinion.

II. The trial court abused its discretion by admitting unduly prejudicial text messages into evidence.

Standard of Review

This Court "review[s] a trial court's admission of evidence for an abuse of discretion, but that discretion is limited by the rules of evidence." *De Hoyos v. Bauerfeind*, 286 So. 3d 900, 902 (Fla. 1st DCA 2019).

Preservation

This issue is preserved for appeal. Ms. McGuire filed a motion in limine arguing that certain of her texts to Dr. Zirgibel were either irrelevant or their relevance was outweighed by prejudice. R.1396–98. At the motion hearing, Ms. McGuire argued the "wholesale" admission of the text string between her and Dr. Zirgibel was "improper," since the text string discussed matters such as "religion, discussions of prayer … [and] discussions that [Ms. McGuire] is glad [Dr. Zirgibel's] her surgeon…." R.4424:4–12.

In response to the defense's argument that the texts were relevant to Ms. McGuire's emotional and mental damages, Ms. McGuire argued that because "80 to 90 percent" of the texts were inadmissible, the defense could elicit evidence of Ms. McGuire's mental and emotional damages through alternative means, i.e., live testimony at trial. R.4430:13–23. The trial court orally denied the motion without prejudice to the defense's establishing a foundation for introducing the texts at trial, *see* R.4435:7–10, and later issued a written order denying the motion without prejudice. *See* R. 1623 ¶ 6.

At trial, Ms. McGuire argued the text string should not be "dump[ed]" into the record without the court "going through each text message" to determine admissibility. T3.78:13–14 (PDF.607), 79:9–11 (PDF.608). The trial court then conducted an in camera examination of the texts, but only redacted the texts which failed to meet a hearsay exception. T3.117:13–120:20 (PDF.646–49).

Merits

A. The probative value of Ms. McGuire's texts was substantially outweighed by the risk of undue prejudice.

The defense purportedly sought to introduce the 187-page text string between Ms. McGuire and Dr. Zirgibel for the sole purpose of

challenging Ms. McGuire's claim for noneconomic damages. R.4237–40, 4425:2–21; T3.78:1–5 (PDF.607). However, Ms. McGuire's texts do far more than show her mental and emotional state; they vividly depict the development of a close friendship between Dr. Zirgibel and herself following the surgery. Because the texts identified in the motion in limine tend to evoke sympathy for Dr. Zirgibel, and because the defense had other less prejudicial means of challenging Ms. McGuire's claim for noneconomic damages, the texts should have been excluded from evidence. *See* § 90.403, Fla. Stat. ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence….").

Whether evidence is admissible under section 90.403 turns on four factors: "the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction." *Taylor v. State*, 855 So. 2d 1, 22 (Fla. 2003) (citation omitted). These factors all favor exclusion of the texts, as explained next.

1. Ms. McGuire's texts were unnecessary to the jury's determination of noneconomic damages.

As Ms. McGuire's counsel predicted at the pretrial hearing on the motion to exclude the text messages, *see* 4430:13–23, the live testimony of Ms. McGuire and her therapist, Ms. McAlpine, obviated any need for the introduction of the texts themselves into evidence. Specifically, the defense elicited testimony from Ms. McGuire that she exchanged around 550 texts with Dr. Zirgibel over the year-and-a-half period following the surgery, T2.297 (PDF.300), and that these conversations helped her cope with her mental and emotional pain. T2.298 (PDF.301). Ms. McAlpine testified likewise. *See* T1.165–168 (PDF.168–71).

Insofar as the texts themselves are relevant to showing Ms. McGuire's post-surgery mental and emotional state, they add very little to this testimony. What the texts *do* add is extensive praise by Ms. McGuire for Dr. Zirgibel's character, as well as expressions of pity for Dr. Zirgibel's own suffering. But Ms. McGuire's opinion of Dr. Zirgibel's character and her sympathy for him have nothing to do with her claim for mental and emotional pain and suffering.

Therefore, the first factor of the prejudicial-versus-probative analysis weighs in Ms. McGuire's favor.

2. Ms. McGuire's texts evoke sympathy for Dr. Zirgibel and prejudice against Ms. McGuire.

"[T]he law imposes upon a jury the duty to impartially determine the facts and decide the issues in each case based on the evidence presented and the applicable law. Fidelity to that duty prohibits a jury from being swayed by sympathy for any party when rendering its verdict. A soft heart infused with pity proclaims sympathy, not facts based on evidence, and there are no rules of law that guide its direction." *Samuels v. Torres*, 29 So. 3d 1193, 1196 (Fla. 5th DCA 2010); *see also Fla. Patient's Comp. Fund v. Von Stetina*, 474 So. 2d 783, 790 (Fla. 1985) ("Mere sympathy cannot sustain a judgment. A juror is charged with the duty to weigh evidence and to find fact. The jury system should not function on emotion, but on logic.").

Why would someone sue her close friend—whom she once called her "guardian angel," *see* R.2615—over the very encounter that sparked the friendship? The jury was not tasked with answering this question. Yet the introduction of Ms. McGuire's texts created an

unacceptable risk that this question would loom large in the minds of the jurors and color their views of her claim.

The issue for the jury to decide was *not* whether Ms. McGuire was a good or bad friend to Dr. Zirgibel, but whether Dr. Zirgibel negligently performed a surgical procedure on Ms. McGuire. As the defense admitted in its response to Ms. McGuire's motion for new trial, "[t]he text messages had no bearing on whether Dr. Zirgibel complied with the standard of care or not." R.4241.

The introduction of the texts makes this case analogous to *Aetna Casualty & Surety Co. v. Cooper*, 485 So. 2d 1364 (Fla. 2d DCA 1986), which involved essentially the inverse of the facts here. In *Cooper*, a doctor sued his insurer for damages sustained in a car crash. *Id.* at 1365. The doctor argued that as a result of the crash, his left eye was injured such that he could no longer operate as a neurosurgeon. *Id.* At trial—over the insurer's objection—the jury was shown a video of a news program discussing the doctor's practice, including interviews of the doctor and his patients. *Id.* In the video, the doctor was described as a "miracle worker" for his patients. *Id.*

The Second District held the video's admission into evidence was reversible error. As the Second District reasoned, the jury "could

not reasonably be expected to consider the tape solely as an aid to understanding [the doctor's] reputation and loss of enjoyment of life, and to disregard the provocative, emotional nature of the inadmissible statements." *Id.* at 1366. Similar to this case, there was other less prejudicial evidence before the jury on the issue of damages—including the live testimony of the doctor himself. *Id.*

The texts identified in Ms. McGuire's motion in limine are arguably even more problematic than the video in *Cooper* because they tend to suggest not just one, but *two* improper bases for the jury's resolution of Ms. McGuire's claim. First, the texts tend to evoke sympathy for Dr. Zirgibel by bolstering his character. Second, the texts tend to invite scrutiny of Ms. McGuire's character; the texts show her heaping praises on Dr. Zirgibel—her "friend" and "guardian angel"—just prior to her filing a lawsuit against him.

Accordingly, the second factor of the prejudicial-versus-probative analysis weighs in Ms. McGuire's favor.

3. The texts are weak evidence of Ms. McGuire's mental and emotional state following the surgery.

Both Ms. McGuire and her therapist testified that Ms. McGuire's texting with Dr. Zirgibel helped her cope with her mental

and emotional pain. T1.168:20–25 (PDF.171); T2.298–99 (PDF.301–02). This is strong evidence of Ms. McGuire's mental and emotional state following the surgery. However, Ms. McGuire's texts calling Dr. Zirgibel her "guardian angel" (R.2614–15), praising his "sincerity" and "perseverance" (R.2717–18), and expressing sympathy for his own suffering (R.2661, 2717) are—at best—unclear evidence of Ms. McGuire's mental and emotional state. While such statements *could* be interpreted as the product of a healthy mind, they are not at all inconsistent with a depressed mind. In other words, the texts—unlike the testimony of Ms. McGuire and her therapist—require a chain of inferences in order to draw a conclusion about Ms. McGuire's mental and emotional state. As such, their probative value is minimal. *See Green v. State*, 27 So. 3d 731, 738 (Fla. 2d DCA 2010) ("Evidence that requires an extended chain of inferences to be relevant … should be excluded").

Consequently, the third factor of the prejudicial-versus-probative analysis weighs in Ms. McGuire's favor.

4. A limiting instruction would not have cured the prejudice caused by the texts.

Here, no limiting instruction was given to the jury with respect to the texts. Even if given, such an instruction would have been futile. A limiting instruction cannot cure the undue prejudice caused by evidence that is calculated to "play upon the jury's passions and evoke sympathy." *Lewek v. State*, 702 So. 2d 527, 534 (Fla. 4th DCA 1997); *see also Cooper*, 485 So. 2d at 1366. Indeed, a limiting instruction may have even aggravated the prejudice caused by the texts by reminding the jury of their existence. *Cf. Johnson v. State*, 135 So. 3d 1002, 1017 (Fla. 2014) ("This Court has held that deciding not to draw attention to a comment can constitute sound trial strategy, including in situations where trial counsel … chose to decline a curative instruction."); *cf. also United States v. Lee*, 573 F.3d 155, 163 (3d Cir. 2009) ("[W]e will not blindly assume that a jury is able to follow a [trial] court's instruction to ignore the elephant in the deliberation room.").

Simply put, the prejudicial effect of the texts is a bell which cannot be unrung. Thus, the fourth factor of the prejudicial-versus-probative analysis weighs in Ms. McGuire's favor.

B. The admission of the highly prejudicial texts into evidence was not harmless error.

In the proceedings below, the defense argued the admission of the texts was harmless because the jury never reached the issue of damages, having found that Dr. Zirgibel was not negligent. *See* R.4240–41 ¶ C. However, the Florida Supreme Court has rejected such a "result-oriented test" for harmful error in favor of a more holistic approach: "[a]s the appellate court evaluates whether the beneficiary of the error has satisfied its burden, the court's obligation is to *focus on the effect of the error on the trier-of-fact* and avoid engaging in an analysis that looks only to the result in order to determine harmless error." *Special*, 160 So. 3d at 1256 (emphasis added). The pertinent inquiry is "[*c*]*ould* the admission of evidence that should have been excluded have contributed to the verdict?" *Id.* (emphasis added).

Here, the answer is yes. As discussed *supra* in section I.A.2., the prejudicial effect of the texts was twofold: they evoked sympathy for Dr. Zirgibel and they tended to portray Ms. McGuire as a disloyal friend. To argue that the jurors simply disregarded their natural human reaction to such evidence is "to suggest that this [C]ourt

indulge a naive assumption." *See Gov't Emps. Ins. Co. v. Kisha*, 160 So. 3d 549, 554 (Fla. 5th DCA 2015) (holding it was reversible error for the trial court to admit evidence which "constituted an impermissible plea for sympathy"); *see also Opsincs v. State*, 185 So. 3d 654, 659 (Fla. 4th DCA 2016) (rejecting harmless-error argument as to the admission of defendant's statements evincing his "callous and uncaring" nature).

The mere fact that the jury never reached the issue of damages does not support the defense's assumption that "the text messages would have only been considered by the jury regarding [Ms. McGuire's] claim for non-economic damages" *See* R.4240–41 ¶ C. Florida courts have rejected harmless-error arguments in similar scenarios. *See, e.g., Hurtado v. Desouza*, 166 So. 3d 831, 835 (Fla. 4th DCA 2015) (holding admission of evidence of plaintiff's mental anguish was not harmless error, even though a directed verdict was granted on the plaintiff's mental anguish claim); *Probkevitz v. Velda Farms, LLC*, 22 So. 3d 609, 615 (Fla. 3d DCA 2009) (holding admission of evidence of comparative negligence was not harmless error, despite fact that jury never reached issue of comparative negligence).

Because the relevance of the texts to the noneconomic damages claim is tenuous at best—*see supra* § I.A.3—this Court cannot simply assume that the jury would have only considered them for that limited purpose. The texts reasonably could have "improperly confused the jury, influenced their thought process, and prejudiced [Ms. McGuire]" with respect to the main issue: whether Dr. Zirgibel was negligent. *See Probkevitz*, 22 So. 3d at 615. This possibility is heightened by the fact that this was a close case—as evidenced by the jury's initial deadlock. *Cf. supra* § I.B. at 28–29. The defense also highlighted Ms. McGuire's texts in closing—*see* T4.52:15–18 (PDF.779)—a fact which cuts against a finding of harmless error. *Cf. Woodard*, 978 So. 2d at 220; *Bullington*, 311 So. 3d at 111.

In sum, it cannot be said that there is no reasonable possibility that the admission of the texts contributed to the verdict. The Court should hold their admission was reversible error and remand with instructions that the prejudicial texts identified in the motion in limine be excluded from evidence in a new trial.

CONCLUSION

This Court should reverse the final judgment and remand for a new trial consistent with the legal principles argued herein.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 7,994 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed via the Florida Courts E-Filing Portal on August 19, 2024, which will serve an electronic copy to the following counsel of record:

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