

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

NICOLE GOODMAN,

Appellant,

CASE NO.: 4D23-0675

vs.

L.T. CASE NO.: 50-2017-
CA-003673-XXXX-MB-AG

JOHN STUART LEVIN, D.P.M.,
KEVIN SHORT, D.P.M., CASEY
BOWLES, D.P.M., and JFK MEDICAL
CENTER LIMITED PARTNERSHIP
d/b/a JFK MEDICAL CENTER

Appellees.

_____ /

**APPELLEE, JOHN STUART LEVIN D.P.M.'S
ANSWER BRIEF**

Rafael E. Martinez

Florida Bar No.: 0243248
rmartinez@mmdorl.com

Wilbert R. Vancol

Florida Bar No.: 0093132
wvancol@mmdorl.com

**McEwan, Martinez, Dukes,
Hall & Vancol, P.A.**

Post Office Box 753
Orlando, FL 32802-0753
Telephone: (407) 423-8571
Facsimile: (407) 423-8637
E-Service: NOS@mmdorl.com
Attorneys for Appellee/
Defendant, John Stuart Levin,
D.P.M.

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PRELIMINARY STATEMENT

Appellant, Nicole Goodman, will be referred to as “Appellant”, “Plaintiff” or “Ms. Goodman.” Lisa Goodman, Nicole Goodman’s mother, will be referred to as “Mrs. Goodman” or “Lisa Goodman.” Appellees, John Stuart Levin, DPM, will be referred to as “Dr. Levin” or “Appellee.” Kevin Short, D.P.M. will be referred to as “Dr. Short.” Casey Bowles, D.P.M. will be referred to as “Dr. Bowles.” JFK Medical Center Limited Partnership d/b/a JFK Medical Center will be referred to as “JFK Medical Center” or “JFK.” The Appellees will be collectively referred to as “Appellees” or “Defendants.”

STATEMENT OF CASE AND FACTS

Appellant provides an argumentative 30-page Statement of Case and Facts that fails to differentiate between the facts at issue and the arguments of counsel. *See Sabawi v. Carpentier*, 767 So. 2d 585, 586 (Fla. 5th DCA 2000) (“The purpose of providing the statement of the case and of the facts is not to color the facts in one’s favor or to malign the opposing party or its counsel but inform the Appellate Court of the procedural history and pertinent record fact underlying the parties’ dispute.”). Consequently, Appellee provides this limited statement of case and facts to direct the Court’s attention to the pertinent factual and procedural issues.

Factual and Medical History

The underlying medical malpractice action stems from an arthroscopic ankle surgery performed by Dr. Levin at JFK Medical Center on January 30, 2015. (R. 61). Ms. Goodman had a complicated medical history that led to this surgery. (T. 2347-52). In June 2008, Ms. Goodman injured her left ankle while playing basketball; another player landed on her ankle. (T. 1240). The condition was managed conservatively with the use of a walking boot. (T. 1240). However, after 4 weeks, Ms. Goodman continued to

complain of tenderness to the left ankle. An MRI performed on July 30, 2008, showed an osteochondral lesion/fracture of the talus along with the complete tear of the anterior talofibular ligament. (T. 2347-49). Consequently, on August 8, 2018, Ms. Goodman underwent a debridement of the osteochondral lesion performed by Omar Hussamy, M.D. **Surgery #1.**

After recovering from the surgery, Ms. Goodman was permitted to return to playing basketball. However, on September 29, 2008, Ms. Goodman returned to Dr. Hussamy, after she again injured her left ankle (again while playing basketball.) (T. 1240-41). An MRI confirmed a microfracture of the medial talus. (T. 1241). Dr. Hussamy, on this occasion, opted to conservatively manage the defect, without surgery. However, on December 22, 2008, Ms. Goodman returned to Dr. Hussamy after she re-injured her left ankle yet again; she sprained multiple ligaments to the left ankle. (T. 1241-42). Several weeks later, Ms. Goodman, while walking to school, felt a pop in her left ankle. (T. 1242). Ms. Goodman's re-injury and persistent complaints of left ankle pain resulted in Kirk Maes, M.D. performing an open anterior talofibular ligament reconstruction with allograft on March 13, 2009. (T. 2347-52). **Surgery #2.**

After a 3-month recovery period, Dr. Maes permitted Ms. Goodman to return to limited physical activity by Dr. Maes. However, within a year, Ms. Goodman had again returned to Dr. Maes for complaints related to the left ankle. By this point, Ms. Goodman had started to develop left anterior ankle impingement with development of bone spurs and scar tissue formation. (T. 2349-50). Dr. Maes performed yet another surgery on Ms. Goodman's left ankle on August 8, 2010; Dr. Maes performed an arthroscopic anterior debridement and bone spur shaving. (T. 1905, 2350). **Surgery #3.**

Despite these numerous surgical interventions, Ms. Goodman's left ankle pathology persisted. (T. 1907-14). By August of 2011, Ms. Goodman had recurrent worsening left ankle pain as well as Achilles tendonitis. (T. 1914). This resulted in yet another surgery of Dr. Maes. On September 30, 2011, Dr. Maes performed an Achilles tendon lengthening procedure with manipulation under anesthesia as well as an anterior tibial ankle capsular injection. (T.1916). **Surgery #4.**

On October 8, 2014, Ms. Goodman presented to yet another provider, Jared Moyles, DPM, for continued complaints related to her left ankle. (T.1919). An MRI ordered by Dr. Moyles showed age

advanced osteoarthritis to the ankle joint with lost joint space, progressive osteophytosis, subchondral marrow edema and an osteochondral lesion. (T. 565, 1737-38). Additionally, the MRI of the left ankle showed chronic Achilles tendinopathy. (T. 565). Given the complex nature of Ms. Goodman's left ankle and the numerous previous surgical interventions performed to the joint space, Dr. Moyles referred the patient to Dr. Levin. In particular, Dr. Moyles noted "since she has already underwent so many procedures, I would recommend that she seek treatment at a tertiary care center. I have recommended that she be referred to Dr. John Levin..." (T. 2555-56).

On November 3, 2014, Ms. Goodman presented to Dr. Levin for an initial office visit. Dr. Levin detailed Ms. Goodman's long and significant history with her left ankle pathology. (T. 614-16). At the time of the initial presentation, Ms. Goodman noted that she was in persistent 6/10 pain that was constant, throbbing and aching. (T. 782, 1932-33). She noted that she had weakness to the left ankle and had difficulty walking, standing, going upstairs, and exercising. (T. 782-83). Dr. Levin had a lengthy conversation with Nicole Goodman and her mother regarding the complex nature of the case. Dr. Levin

ordered a CT scan to assist him in the next step of managing Ms. Goodman's ongoing left ankle issues. (T. 614-16).

Ms. Goodman returned to Dr. Levin on November 25, 2014. (T. 1933). Dr. Levin reviewed the CT scan, and based upon those findings, Dr. Levin recommended surgery. As far as the consent conversation, Dr. Levin expressly noted that he had an "extremely lengthy discussion" with Ms. Goodman and her mother regarding Ms. Goodman's current condition. (T.2581). Dr. Levin noted that Ms. Goodman had pain essentially with all activities of daily living and that "[Ms. Goodman] does not feel she can live with the symptoms." (T. 616, 2581). Dr. Levin also communicated that he would attempt to perform the procedure arthroscopically, but given the complexity of Ms. Goodman's underlying pathology, conversion to an open procedure might be required. (T. 2581-82). After an extensive conversation detailing the surgery as well as available alternatives, Ms. Goodman consented to moving forward with surgery. (T. 2584-85).

On January 30, 2015, Ms. Goodman presented to JFK Medical Center for the surgical procedure with Dr. Levin. (T. 783) Dr. Levin, for the surgery, was assisted by Kevin Short, DPM, a third-year

podiatric resident. It is this surgery that forms the basis of the claim. As such, understanding the intricacies of the surgery is relevant. (T. 992-93).

Ms. Goodman was placed on the OR table in the supine position (on her back). (T. 1091). Her femur was angled upward to about 45 degrees and the leg was allowed to drop down so this permitted the foot to be distended to allow better access to the ankle joint. (T. 2585-87). The left leg was kept in that position by being placed in the left knee holder. (T. 2587). A tourniquet was applied to decrease blood flow to the operative area. (T. 2587-88, 2615). Dr. Levin then insufflated the ankle joint using 2 ml of saline solution. (T. 2592). Using a blunt trochar, Dr. Levin then created the medial (side of ankle that is in the midline of the body) arthroscopic portal. (T. 2592-94). At that point, a 2.3 mm arthroscope was placed into the joint (T. 2593-97). Placing the arthroscope prior to placing any surgical tools allowed Dr. Levin to assess the level of pathology and to make a final decision that an arthroscopic procedure remained appropriate. (T. 2597-98). Once Dr. Levin confirmed that the patient remained a candidate for arthroscopic surgery, Dr. Levin then created the lateral ankle joint portal. (T. 2600-03). While the medial portal at the start

of the surgery is used for the scope, the lateral portal, at the start of the surgery, is used for the working instruments of the procedure. (T. 2601-03). During the procedure, Dr. Levin utilized three “working instruments: 3.5 mm shaver, Oritech probe (thermal debridement device), and a hooded burr.” (T. 2601-03, 2606-09, 2614-15). Dr. Levin began the arthroscopic procedure by first utilizing the shaver to remove soft tissue adhesions. (T.2601-03). This is a slow and tedious process. (T. 2602). The shaver is connected to a suction device. So, as the shaver “bites” the soft tissue, the suction device connected to the shaver removes the masticated soft tissue from the ankle joint space. (T. 2602)

At this point, Dr. Levin would have removed the shaver from the lateral portal and carried out thermal debridement realizing the Oritech probe. (T. 2606-09). During the utilization of the Oritech probe, there would be high flow saline solution that would be cycled in and out of the joint. (T. 2606-09). The solution would be kept at 60 to 65 degrees, which is significantly cooler than the body’s natural internal temperature. (T. 2606-09). The purpose of the ingress and egress of the fluid was to prevent excessive heating and fluid inside the joint capsule. (T. 2608-09). Dr. Levin would have utilized the

thermal device to address soft tissue that was on the anterior portion of the ankle joint capsule. (T. 2606-09). Importantly, Dr. Levin noted that he did not point the thermal device superiorly in the ankle joint capsule. (T. 2613). The significance of this is that Ms. Goodman's subsequent wound, which forms the basis of this claim, developed superior to the ankle joint. Dr. Levin then switched sides with the instrumentation where the scope was placed in the lateral arthroscopic portal and the working instrumentation was placed in the medial portal. (T.2607-08). After completion of removing the soft tissue that was inside the joint capsule, Dr. Levin identified bone spurs that were coming down from the distal tibia and into the ankle joint space. (T. 2614). The most distal portion of the distal tibia represents the most superior portion of the ankle joint capsule. Since neither the thermal probe nor the shaver are appropriate instrumentation to address bone, Dr. Levin utilized the hooded burr for bone removal. (T. 2379, 2614-15). This is the instrumentation that would have addressed the superior portion of the ankle joint capsule. After Dr. Levin completed the hooded burr portion and addressed all bony deformity, he then performed a joint lavage to remove all remaining debris. (T. 2615-17).

After completing the arthroscopic portions of the procedure which addressed the front or anterior portion of the left lower extremity, Ms. Goodman had to be transitioned to the Achilles lengthening procedure, which addressed the posterior or back of the left lower extremity. (T. 2616-20). The transition is not an uncomplicated or unlabored process. (T. 2618). During the transition, Dr. Levin held Ms. Goodman's left leg up to allow the surgical team to remove Ms. Goodman from the knee holder. (T. 2618-20). At the same time, all the instrumentation that had been utilized for the arthroscopic procedure had to be removed as well. (T. 2618-20). Once the arthroscopic procedure began, Dr. Levin maintained Ms. Goodman in the frog leg position by placing his thumb on Ms. Goodman's left leg— anterior and superior to the ankle joint. (T. 2620). His remaining fingers hold the back of the leg. (T. 2620-24). Dr. Levin firmly held Ms. Goodman's left leg in this position during the entirety of the Achilles lengthening portion of the procedure, which lasted about 15 minutes., (T. 2618-20, 2858). The Achilles lengthening portion of the procedure was performed by Dr. Short. (T. 2621-22).

After completion of the arthroscopic portion of the procedure, the tourniquet was released to permit return of blood flow. (T. 2622). Normal hyperemic flush returned to all digits of the toe. (T. 2777-78). However, there was a blanched area roughly the size of Dr. Levin's thumb at the location he had placed his thumb for the Achilles lengthening procedure. (T. 2628-29). Dr. Levin believed this was secondary to the use of Epinephrine in the saline solution and the arthroscopic portion of the procedure. (T. 2628-29). Dr. Levin testified that the Epinephrine effect or blanched area following the use of Epinephrine was typical and normal for surgery. (T. 2624-29). He testified that the location was atypical. (T. 2626-27). However, he attributed the location to the fact that he performed an arthroscopic ankle procedure followed immediately by an Achilles lengthening procedure at the same time. (T. 2626-29). Thus, he felt the atypical location was due to the atypical combination of procedures. A cast was applied to the left lower extremity. (T. 2626-29). Ms. Goodman was discharged home on the same day, January 30, 2015. (T. 2630)

The following day, on January 31, 2015, Ms. Goodman, after initially presenting to the emergency department at Palm Bay Community Hospital for post-operative pain, was directed to return

to JFK Medical Center. (T. 1415, 2630-36). She presented to the emergency department at JFK in the early afternoon hours on January 31, 2015. (T. 2632). Ms. Goodman was complaining primarily of significant postoperative pain. (T. 1578-79). The cast that had been applied the previous day was removed. (T. 1724). The blanching, which was present immediately postoperatively, had resolved. (T. 2633). However, Ms. Goodman now had a bullae or blister in roughly the same area. (T. 2633). Dr. Bowles took a picture of the blister and sent it to Dr. Levin who was not in the hospital at that time. (T. 2632-33). Neither Dr. Bowles nor Dr. Levin felt it was alarming as the development of blister following surgery is not uncommon. (T. 1577, 2635) The area was re-dressed and a new cast was reapplied. (T. 2635-36).

Ms. Goodman had postoperative visits with Dr. Levin on February 5, 2015, February 11, 2015, and February 17, 2015. (T. 2646-48, 2650). The blister, which was present during the ED presentation, remained in place. During these office visits, the blister was aspirated or drained and Xeroform dressing was applied. (T. 2650-51). By February 17th, the blister had developed into a stable eschar. (T. 2650-51). At this point, Ms. Goodman and her mother

made the decision that she would transition her care back to Dr. Moyles in Melbourne, Florida, whose office was closer to where Ms. Goodman resided. (T. 2651-54).

Ms. Goodman had a complicated course related to the blister. On February 27, 2015, Dr. Moyles decided to perform excisional debridement of the wound. (T. 1119-21). Dr. Moyles determined this was a superficial ulceration, and not a full thickness wound. (T. 1118-21). The distinction between a superficial ulceration and a full thickness wound depends on the level of injury to the skin and the underneath layers. (T. 691-92). The skin is made up of the dermis and epidermis. (T. 691-92). A superficial wound would only involve the level of the skin. (T. 691-92). However, once there is destruction of levels below the skin, (fat tissue, subcutaneous layer, retinaculum, tendon, deep veins, anterior tibial artery and bone) then such an injury would be viewed as a full thickness wound. (T. 691-92). Dr. Moyles was able to debride the dermis and epidermis, and it had viable tissue at the fat level. (T. 1119-21). Despite the management of the wound by Dr. Moyles, Ms. Goodman's wound continued to deteriorate until it ultimately resulted in a full thickness wound that required a flap. (T. 691-92).

Procedural History

On March 31, 2017, Ms. Goodman filed her initial Complaint. (R. 57-68). Per the initial Complaint, Plaintiff's primary allegation against the Defendants was that the Defendants failed to properly cast and bandage Ms. Goodman's leg following the surgery. (R. 61-62). After more than 5 ½ years of pre-trial workup, this case went to trial on October 20, 2022. By the time of trial, Plaintiff's assertion was that Ms. Goodman experienced a thermal injury that was irreversible at the time of surgery on January 30, 2015, because Dr. Levin utilized the Oritech probe at either a too high of a setting or for too long a period of time or a combination thereof. (T. 976-77). Conversely, Dr. Levin's position was that the Oritech probe was at a default setting that was only used for limited portion of the surgery. (T. 2638-40, T. 2642-45). Thus, it was not used for too long of a period of time or at too high of a setting. Consequently, Appellees presented evidence that Ms. Goodman's injury was multifactorial with the primary etiology being microvascular disease. (T. 2390-91). This was a highly contested medical malpractice case on both standard of care and causation. After 13 days of jury selection and trial, testimony from numerous experts and admission of thousands of pages of

medical records into evidence, the jury, on November 7, 2022, returned a verdict on behalf of Defendants. (R. 13145-13148).

Plaintiff filed a Motion for New Trial, which was denied and final judgment was entered on behalf of Defendants.

SUMMARY OF ARGUMENT

The Trial Court did not abuse its discretion in denying Plaintiff's Motion for Mistrial and New Trial.

First, the Trial Court appropriately found that the references to the use of "misleading" photographs were directed to Dr. Zelen, not Plaintiff's counsel. Second, Dr. Levin did not improperly bolster his credentials. He did not refer to any third-party that selected him as a top doctor or highly rated physician. Third, Plaintiff waived her objection related to closing arguments regarding the "financial impact" of the trial on Dr. Levin. Fourth, Dr. Levin and Dr. Ross's trial testimony did not change in comparison to their deposition testimony. As such, the Trial Court appropriately denied Plaintiff's *Binger* objections to the testimony the witnesses provided.

STANDARD OF REVIEW

A trial court's order denying a motion for new trial is reviewed for abuse of discretion. *Allstate Ins. Co. v. Marotta*, 125 So. 3d 956, 960 (Fla. 4th DCA 2013).

ARGUMENT

I. THE IDENTIFICATION OF DR. ZELEN'S USE OF DEMONSTRATIVE PHOTOGRAPHS AS "MISLEADING" WAS NOT ERROR.

Although this was a highly disputed medical malpractice case where Plaintiff and Defendants had competing and inherently incompatible theories on the cause of Ms. Goodman's wound, the parties were abundantly clear as to those theories. Plaintiff asserted that Ms. Goodman experienced a thermal injury that was caused when Dr. Levin utilized the Oritech probe inside the ankle joint for too long a period of time and/or too high of a temperature. (T. 976-77). This resulted in thermal energy or heat from the containing capsule to outside the capsule, through the tendon, through the fat layer, through the epidermis, and all the way to the top of the skin. (T. 976-7) (*e.g.* In the trial transcript, "inside out" appears 58 times transcript; "thermal injury" appears 234 times in the transcript.). Conversely, Defendants' theory of the case was that the thermal device was not used for an inappropriate; rather, the cause of Plaintiff's injury was multi-factorial with the primary culprit being microvascular disease. (T. 2390-91). (*e.g.* The term microvascular appears in the trial transcript 220 times).

It was within this context Dr. Zelen provided his initial deposition testimony. (R. 14396-606). During his deposition, Dr. Zelen conceded that he had never seen an inside out thermal injury emanating from the use of thermal device from the ankle joint. He had never seen it in his practice; he had never seen it as a testifying expert witness; he had never seen it in any literature source (R. 14496-500). Notably, Dr. Zelen had never seen an injury on the surface of the skin as a result from a thermal probe being used inside a joint. Dr. Zelen conceded that.

Subsequent to Dr. Zelen's deposition, Defendant filed a Motion in Limine (R. 3882-89) and a *Daubert* Motion (R. 3691-3866) to exclude the standard of care opinions of Dr. Zelen. In the motions, Defendant argued the complete absence of any evidence to support Dr. Zelen's theory that the device was used for too long or too high a power made the opinion unreliable. (R. 3691-3701). Plaintiff filed responses to the Motion in Limine (R. 9909-54) and *Daubert* Motion (R. 9955-10846). In both responses, Plaintiff included the same affidavit from Dr. Zelen. (R. 9951-54, 10538-51.) In his affidavit, Dr. Zelen indicated that he would be relying on three articles for his causation opinion, including Lyon C., *Case Report: Full-Thickness*

Skin Necrosis After Percutaneous Radio-Frequency Ablation of a Tibial Osteoid Osteoma, Iowa Orthop. J., 2008 28: 85-87. (“Case Report”) (R. 9952, 10539, 10543-45). Dr. Zelen asserted that the Case Report supported his causation opinion that a radiofrequency (RF) device being used in the joint caused a full thickness thermal injury. (R. 9953). However, the Case Report was materially different from the Plaintiff’s theory of the case. (T. 1122-29). The Case Report was not related to the thermal injury secondary to the use of a radiofrequency ablation (or thermal) device inside the joint. (T. 1122-29). Rather, in the Case Report, the patient had an osteoid osteoma in the tibia. (T. 1122-29). A hole was drilled through the skin to the anterior-most portion of the tibia. (T. 1122-29). At that point, a radiofrequency electrode was inserted through the drill track into the osteoid osteoma. (T. 1122-29). After the radiofrequency ablation was completed, the thermal electro-probe was removed through the same hole that had been established. (T. 1122-29). Nine days after the radiofrequency ablation, the patient in the Case Study presented with redness and a thermal injury at the incision line, which is where the drill hole had been placed and the thermal device had been inserted. (R. 10543-45). The suspected cause of the injury in the Case Study

was improper insulation around the tip of the electro-probe. (R. 10543-45). Thus, as the probe was being removed, it injured the skin. (R. 10543-45). From Defendants' perspective, the Case Study and Plaintiff's theory of causation were incomparable, and Dr. Zelen's use of the case Study to "provide additional support...for [his] causation opinions" (R. 9953) was indeed "misleading."

A. Standard for evaluating credibility challenges depends on person being challenged.

Ms. Goodman alleges "[the] trial court erred by denying Plaintiff's motions for mistrial and new trial based on JFK's accusation that Plaintiff's counsel and/or her expert were attempting to mislead the jury using the case study photograph." (I.B. 34) (emphasis added). Ms. Goodman, as exemplified in the title of her argument, comingles a claim that JFK's counsel questioned the credibility of Dr. Zelen's testimony with a claim that JFK's counsel questioned the credibility of Ms. Goodman's counsel. These are two fundamentally different claims and arguments. This is not an argument where "and/or" can be utilized. The arguments have to be divorced because the judicial analysis for the arguments are profoundly different.

Appellee agrees with Appellant regarding the general proposition that it is improper to impugn the credibility and general candor of opposing counsel. *Owens-Corning Fiberglas Corp. v. Crane*, 683 So. 2d 552, 555 (Fla. 3d DCA 1996). (“[It] is never acceptable for one attorney to effectively impugn the integrity or credibility of opposing counsel before the jury in the process.”). On the other hand, attorneys are expressly permitted to question the credibility of a witness. *Murphy v. Int’l Robotic Sys., Inc.*, 766 So. 2d 1010, 1028 (Fla. 2000). In fact, “it is not improper for counsel to state during closing argument that a witness ‘lied’ or is a ‘liar,’ provided such characterizations are supported by the record.” *Id.*

When an attorney refers to a witness as being a “liar,” (or a less inflammatory term such as “misleading”), the attorney is “merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence.” *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987). It is then up to jury to decide what evidence and testimony is worthy of being believed. *Id.* Furthermore, even when a witness seeks to explain away the perceived inconsistencies, counsel is still permitted to maintain the credibility challenge. *Benjamin v. Diel*, 831 So. 2d 1227, 1228 (Fla. 4th DCA 2002) (“Although [plaintiff] maintains he

explained most of his inconsistencies, the jury did not have to accept his explanations, and defense counsel could highlight [Plaintiff's] discrepancies as credibility issues for the jury.”); *Forman v. Wallshein*, 671 So. 2d 872, 874 (Fla. 3d DCA 1996) (holding there was no impropriety in defense counsel calling the plaintiff a “liar” when a discrepancy existed between plaintiff’s testimony and the medical records regarding previous injuries). *See also*, *State v. Comesana*, 904 So. 2d 462, 464 (Fla. 3d DCA 2005) (holding that it is not improper for an attorney to describe defendant and his family members as having “stonewalled, attempted to cover up, deceived and lied” when such descriptors are supported by the record); *Pino v. State*, 776 So. 2d 1081, 1081 (Fla. 3d DCA 2001) (holding not improper for attorney, in closing argument, to argue that defendant had told “lies”).

Thus, there is a distinction if the alleged challenges to credibility are directed to a witness versus opposing counsel. This point is exemplified in *Redish v. State*, 525 So. 2d 928 (Fla. 1st DCA 1988). In *Redish*, the court noted it was not improper for counsel to state that a defendant had lied during his testimony if the evidence supported such a conclusion, and concurrently held reference to

opposing counsel’s “‘cheap tricks’ to be clearly beyond the bounds of proper closing argument.” *Id.* 930-31.

Consequently, when a closing argument challenges the credibility of a person in the court room, it is imperative to determine if that challenge is directed to a witness or opposing counsel. In the cases cited by Ms. Goodman, the appellate courts found that the credibility challenges were directed to opposing counsel based on clear, unequivocal credibility commentary. *See R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 58-59 (Fla. 4th DCA 2016) (“Comments by counsel... amount to an *ad hominem* attack on opposing counsel for being part of a purported scheme to mislead... counsel’s reference to ‘the defense in these cases’ was clearly directed towards appellant’s attorneys. He could not have been merely referring to either of the litigants, particularly when describing the ‘recasting’ of jury instructions and verdict forms in other litigation.”). *See also, Fla. Peninsula Ins. Co. v. Nolasco*, 318 So. 3d 584 (Fla. 3d DCA 2021) (holding it is improper for plaintiff’s counsel to state “everyone loves drama,” “that’s what [defense counsel] is all about, drama,” “next promise they broke is when [defense counsel] walked up here and lied to you”); *Wicklowsky v. State*, 42 So. 3d 85, 87 (Fla. 4d DCA 2010)

(holding it's improper for plaintiff's attorney to state "the only conflicts are between the defense attorney and the evidence. That's it. Don't be manipulated... Don't be gullible."); *Sanchez v. Nerys*, 954 So. 2d 630, 632 (Fla. 3d DCA 2007) (holding it was improper for plaintiff's counsel to argue in closing that defense counsel was "pulling a fast one," "hiding something," and "trying to pull something.").

B. Dr. Zelen's testimony, not Plaintiff's counsel, was described by JFK as "misleading."

Based upon the foregoing guidance, the first step in determining the propriety of the questions asked about the "misleading" nature of the photographs is to identify whether the credibility questions were directed to a witness or to opposing counsel. JFK's counsel, in discussing the misleading nature of the photographs, never stated or implied that Plaintiff's counsel was misleading the jury. (T.T. 1122 - 1129). All the questions regarding credibility were directed to Dr. Zelen. Conduct of Plaintiff's counsel is also consistent with a belief that the comments regarding the misleading nature of the photographs were not directed to Plaintiff's counsel's behavior but to Dr. Zelen's testimony. On at least four separate occasions, counsel

for JFK identified Dr. Zelen's testimony as misleading without an objection from Ms. Goodman's counsel.

24. Q. And in doing so, inside that bone heat was
25. generated and it came out of that bone, that structure,
1 through the fatty tissue and to the skin and burned?

2 A. Correct.

3 Q. That's awfully misleading, isn't it?

...

15 Q. It may not have meant to be but it could
16 have been. So let's clarify it.

...

13 Q. Let's discuss how this example could be
14 misleading to a jury.

...

25 Q. All right. And so do you see how it could
1 be a little misleading?

T.1123-24, 1127, 1128-29.

The only objection raised during this line of questioning about the misleading photographs was when counsel for JFK described the Dr. Zelen's testimony as "misleading *as heck*":

2 Q. And my suggestion --

3 A. Yes, sir.

4 Q. -- as we move forward is it's *misleading as*
5 *heck*, and let's follow through.

6 Because where that heat --

7 MR. ODUM¹: Your Honor, object.

8 BY MR. RAMSEY²:

9 Q. -- came out --

10 MR. ODUM: *That's argumentative.*

¹ Plaintiff's counsel

² JFK's counsel

11 *Misleading as heck.*
12 BY MR. RAMSEY:
13 Q. Let's discuss how this example could be
14 misleading to a jury.
15 A. Yes.

T. 1127.

Counsel for Ms. Goodman objected to the use of “as heck” as being argumentative. In fact, after the objection to “misleading *as heck*,” for which counsel for Plaintiff did not obtain a ruling, counsel for JFK describes Dr. Zelen’s testimony as misleading on two subsequent occasions without an objection from Ms. Goodman’s counsel. Further, the only other objection on the issue arose during the testimony of Dr. Carson, JFK’s surgical expert:

19 You searched for any articles that were
20 similar to the phenomenon that's being discussed in
21 this courtroom, correct?
22 A. Correct, sir.
23 Q. And you didn't find any same or similar to
24 this?
25 A. Correct.
1 Q. And I want you to assume that plaintiff's
2 experts were in here and they couldn't find any either.
3 A. I would imagine.
4 Q. But one of them did pull up a picture of kind
5 of a hole in a leg, small hole but a hole -- we'll let
6 the jury decide.
...
20 Q. I want you to assume that that example, if
21 you will, provided by, I believe it was Dr. Zelen...
...

15 Would that in any way, shape, form,
16 reassemble the phenomena that's being discussed in this
17 courtroom?

18 A. No. We're talking whole different things...

...

4 Q. Would you consider, you, personally, consider
5 trying to utilize this situation as somewhat misleading
6 in terms of what this case is about?

7 A. I'm not going to talk about anyone's motives.

8 MR. CARTER: I'm sorry. I need to approach,
9 please.

...

14 (A bench conference was had.)

15 MR. CARTER³: ***He just asked if Dr. Zelen was***
16 ***misleading.***

...

4 MR. CARTER: ***But by the question, he***
5 ***suggested that Dr. Zelen's testimony was***
6 ***misleading about this specific image,*** and I would
7 ask that there be a curative instruction about the
8 question that was just asked. They should
9 disregard the question and an instruction that ***it***
10 ***would be improper for a witness to comment***
11 ***negatively, suggest that another expert's***
12 ***testimony was misleading.***

...

21 THE COURT: I will ask the jury to disregard
22 the last question.

T. 2271-74 (emphasis added).

In the objection raised by Plaintiff's counsel, counsel expressly noted that he felt the "misleading" questions and comments were

³ Plaintiff's counsel

related to Dr. Zelen's testimony. Ultimately, the objection that was raised and sustained (and a curative instruction given) was that it was improper for one expert to comment on another expert. (T. 2271-74). Thus, even by the objection raised by Plaintiff in Dr. Carson's testimony, there was an implicit acknowledgment that JFK's use of the term "misleading" was being attributed to Dr. Zelen's testimony and not Plaintiff's counsel.

Based on the foregoing, it is incompatible with the record to contend the "misleading" comments/questions were directed to Plaintiff's counsel. These comments were directed to Dr. Zelen. As noted previously, comments and arguments questioning the credibility of a witness is permissible if such arguments are supported by the record. *See Murphy*, 766 So. 2d at 1028; *Craig v. State*, 510 So. 2d at 865; *Benjamin v. Diel*, 831 So. 2d at 1228; *Forman*, 671 So. 2d at 874; *Comesana*, 904 So. 2d at 464; *Pino*, 776 So. 2d at 108.

Arguments calling into question the credibility of Dr. Zelens's testimony on the use of the photographs are supported by the record. The issue in the case was not whether a thermal device is capable of causing a thermal injury to the skin. The issue, at least as framed by

Defendants, is whether a thermal device, when inside a joint, can cause an inside out injury. The photograph utilized by Dr. Zelen to depict “a thermal injury” does not address the type thermal injury at issue with Ms. Goodman. This is why, ultimately, Dr. Zelen agreed that he understood why JFK’s counsel would say the use of the photograph was misleading.

19 Q. Okay. Yeah. And it's that -- that part
20 that we just discussed, meaning the heat is coming out of
21 the very same hole that the probe went in.

22 That part I don't think was actually
23 discussed or made clear to the jury and --

24 A. No. I understand. I understand.

25 Q. All right. And so do you see how it could
1 be a little misleading?

2 A. No. I understand exactly what you're
3 saying.

(T. 1128 - 1129).

Based on the disparate nature of the injury depicted in the photographs as compared to Ms. Goodman and based on the acknowledgement of Dr. Zelen regarding how photographs could be “a little misleading,” JFK’s counsel was permitted to refer to the portions of Dr. Zelen’s testimony related to the photographs as misleading. *See Craig*, 510 So. 2d at 865.

In the Initial Brief, Plaintiff also contends a new trial is warranted because JFK's counsel asked Dr. Carson about Dr. Zelen's "misleading" photograph. However, this argument is unclear because it commingles and relies upon a credibility challenge to Dr. Zelen that took place and a non-existing credibility challenge to Plaintiff's counsel. (I.B. 42) ("Defendants cannot show that there is no reasonable possibility that JFK's question suggesting the Plaintiff's counsel and expert were attempting to mislead the jury contributed to the verdict.") (emphasis added). The request should be denied for several reasons.

First, as noted above, Defendants, based on the record evidence, JFK's counsel was permitted to identify Dr. Zelen's testimony as misleading. Second, Defendants never questioned the credibility of Plaintiff's counsel. Third, Dr. Carson never commented on the credibility of Dr. Zelen; Dr. Carson refrained from answering the question. This is relevant because experts are prohibited from *commenting* on the credibility of other witnesses; there was no comment in this case. *See Caban v. State*, 9 So. 3d 50, 53 (Fla. 5th DCA 2009) ("[Defendant] is correct that an expert may not *comment* on the credibility of other witnesses and that this was improper

impeachment.”). Fourth, the Plaintiff’s reliance on the harmless error test articulated in *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251 (Fla. 2014), is misplaced. *Special* requires judicial error and not error by counsel. *Bowers v. Tillman*, 323 So. 3d 322, 323–24 (Fla. 5th DCA 2021) (“[We] expressly reject the suggestion that we should apply the harmless error standard of review announced in *Special*. ‘Error’ in the context of harmless-error analysis, is an improper ruling by the trial court, not an improper comment by counsel or a witness.”). In the present case, there was not any alleged judicial error in the inclusion or exclusion of evidence regarding Dr. Carson. The Trial Court sustained Plaintiff’s objection and provided a curative instruction. (T. 2274-76)⁴.

Based on the foregoing, the Trial Court appropriately denied Plaintiff’s motions for mistrial and new trial.

⁴ Even if the Court was to analyze the matter under *Special*, the alleged “error” would be harmless. As noted Dr. Carson never answered the question. However, in Dr. Zelen’s direct examination he was permitted, over Defendant’s objections, to comment on the qualifications of Defendants’ sole standard of care expert. (T. 879-82) (Q. So again, Doctor, based on your review of the deposition of Dr. Ross, does she use a radiofrequency device in her practice? A. She testified that she does not.) *Caban*, 9 So. 3d at 53.

II. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S REQUEST FOR MISTRIAL AND NEW TRIAL ON THE "BOLSTERING" OF DR. LEVIN.

In her second augment on appeal, Ms. Goodman alleges Defendants improperly bolstered Dr. Levin via testimony and closing argument. Plaintiff cites to three alleged errors: (i) Dr. Levin's testimony regarding working for a "premier" group; (ii) hearsay testimony by the Plaintiff's mother, Lisa Goodman; and (iii) closing argument by JFK's counsel regarding Dr. Levin being the "best." (I.B., P. 42 - 47). The reasons articulated by Plaintiff do not rise to the level of being error, and if indeed were error, such error was harmless.

Ms. Goodman contends the Trial Court erred in overruling her objection to Dr. Levin referring to his employer, Orthopaedic Center of Palm Beach County, as being a "premier group." (T. 2524 - 25). In support of her position, Ms. Goodman cites to *Maksad v. Kaskel*, 832 So. 2d 788 (Fla. 4th DCA 2002), *Liberatore v. Kaufman*, 855 so. 2d 404 (Fla. 4th DCA 2003), and *Tomlian Ex Rel Tomlian v. Grenitez*, 782 So. 2d 905 (Fla. 4th DCA 2001). None of the three cases cited by the Plaintiff supports the proposition that the comment made by Dr. Levin that he held a *personal* opinion that he worked for a "premier group" warrants a new trial. All three cases cited by Plaintiff relate to

a defendant-physician testifying that an independent third-party had selected the defendant-physician as a “top doctor.” *Maksad*, 832 So. 2d at 792 (defendant-physician testified he was voted a “top ten doctor”); *Liberatore*, 835 So. 2d at 407 (defendant-physician testified last three years he had been on a list of “top doctors” published by the Center for Study of Services); *Tomlian*, 782 So. 2d at 907 (defendant-physician blurted out that had been listed as a “top doctor” in a local magazine).

The operative issue in *Liberatore*, *Maksad*, and *Tomlian* is that the defendant-physician bolstered his credibility by indicating a third-party or publication has already vouched for the physician as being a “top doctor.” These cases, which relate to improper bolstering of qualifications by referencing third-party sources, are consistent with cases that proscribe improper bolstering of opinions by referencing to a third-party source or publication. *Schwarz v. State*, 695 So. 2d 452, 455 (Fla. 4th DCA 1997) (“Experts cannot, on direct examination, bolster their testimony by testifying that a treatise agrees with their opinion.”). As the Supreme Court has explained, “improper bolstering occurs when an expert testifies on direct examination that some other authority not subject to cross-

examination, such as another expert whom the witness consulted or a secondary treatise, agrees with the testifying expert's opinions.”) *Gutierrez v. Vargas*, 239 So. 3d 615, 627 (Fla. 2018) (emphasis added).

In the instant case, Dr. Levin provided testimony regarding his opinion of the group for which he worked. The statements do not arrive to the jury cloaked in the affirmation or imprimatur of a third-party source or publication.

Furthermore, if this Court was to conclude the testimony of Dr. Levin is akin to the line of cases where the defendant-physician testifies a third-party has selected him or her as a “top physician,” the admission of the testimony should still be viewed as harmless error. This point is affirmed by virtue of the fact that none of cases cited by Plaintiff found that the “bolstering” testimony, by itself, constituted reversible error. In *Maksad*, this Court noted the bolstering testimony was admissible to refute the claim against defendant-hospital for negligent credentialing. *Id.* at 792. In *Tomlian*, the entirety of this Court’s analysis of the issue was limited to a single line: “It was error, however, for the defendant physician to blurt out that he had been listed as a “top doctor” in a local magazine.” *Id.* at

907. There is no reasonable possibility that the testimony of Dr. Levin that he worked for an employer of whom he had a high opinion of contributed to the verdict in this case. The objected-to testimony occurred at the very beginning of Dr. Levin's testimony (R. 2527) at the start of the morning on November 3, 2022. Dr. Levin, after making the comment, remained on the witness stand until 6:30 p.m. that day (R. 2797). Dr. Levin's testimony continued in the next day for several hours (R. 2837-2921). It is unreasonable to believe the isolated statements by Dr. Levin at the beginning of his testimony permeated the proceedings to such a degree as to impact the verdict. *Special*, 160 So. 3d at 1256. The error, if any, was harmless.

Appellant also asserts the Trial Court erred in permitting hearsay testimony from Lisa Goodman regarding her conversations with Dr. Moyles about his referral to Dr. Levin. (T. 1711). The exchange at issue was as follows:

5 Q. But, in fact, it was your impression the
6 reason that was done is that Dr. Moyles thought Dr. Levin
7 possessed greater skill to perform what needed to be
8 performed from a surgical perspective, correct?
9 A. *Dr. Moyles talked about Dr. Levin and*
10 *how--how--what a good, awesome, you know, surgeon he*
11 *was and that he would be able to better do the surgery*
12 *than Dr. Moyles. I don't know why Dr. Moyles didn't.*
13 You know, I believe that now that they might have even

14 been in the same position. I don't know. Dr. Moyles
15 talked about -- about training under Dr. Levin. So maybe
16 that had something to do with it.

(T.1711).

Plaintiff contends the statement by Lisa Goodman regarding her conversation with Dr. Moyles was hearsay. (I.B., 45). Appellant's argument should be rejected categorically. The error being alleged in the Initial Brief was not objected to at trial and was not raised in the motion for new trial. Plaintiff's Renewed Motion for Mistrial and Motion for New Trial does not ever reference improper hearsay testimony being a basis for a new trial. (R. 13149-73). *Estate of Herrera v. Berlo Indus., Inc.*, 840 So. 2d 272, 273 (Fla. 3d DCA 2003) ("Issues not presented in the trial court cannot be raised for the first time on appeal."); *Boyd v. Dep't of Revenue*, 682 So. 2d 1117, 1119 (Fla. 4th DCA 1996) (same).

Finally, Plaintiff contends JFK's counsel improperly bolstered Dr. Levin during JFK's closing argument. Plaintiff objects to the following portion of the closing argument:

15 It's been alleged in this case that the
16 hospital is responsible for Dr. Levin. And I
17 could just tell you that the hospital is very
18 proud of the care that Dr. Levin renders at JFK
19 Medical Center. He is a doctor's doctor.

20 So your doctors may refer patients out, so if
21 you are an internal medicine physician and you
22 need an infectious disease doctor, you send the
23 case to an infectious disease doctor. Or if you
24 are a primary care physician, you send a case to,
25 you know, you have a skin problem, you might send
1 them to a dermatologist. But Dr. Levin is the
2 kind of doctor where you have a podiatrist, the
3 exact type of doctor Dr. Levin is, and they say,
4 you know what, this is too much for me, this is
5 too complicated, I'm going to bring in the best.
6 And that's why Dr. Levin was consulted in this
7 case.

(T. 3048-49).

Attorneys should be afforded great latitude in presenting closing arguments. *Murphy*, 766 So. 2d at 1028. Attorneys are permitted to make “argument to the facts and evidence presented to the jury and all logical deductions from the facts in evidence.” 713 So. 2d 1071, 1072 (Fla. 5th DCA 1998). Additionally, a “closing argument is not limited to a flat robotic recitation of ‘just the facts.’” *Jackson v. State*, 89 So. 3d 1011, 1019 (Fla. 4th DCA 2012). *See also, R.J. Reynolds Tobacco Co. v. Schleider*, 273 So. 3d 63 (Fla. 3d DCA 2018) (holding attorney’s comments regarding concealment was supported by evidence at trial and was not improper).

JFK’s counsel argued Dr. Levin was the type of physician that would be referred complicated patients from other physicians in the

same specialty. In Lisa Goodman's testimony, she noted that Dr. Moyles believed Dr. Levin was "a good, awesome" surgeon who "would be able to better do the surgery than Dr. Moyles." (T. 1711). Mrs. Goodman also believed that Dr. Moyles thought Dr. Levin possessed greater skills than Dr. Moyles to perform the surgical procedure on Nicole Goodman. (T. 1712). In Nicole Goodman's testimony, she confirmed that Dr. Moyles referred her to Dr. Levin, who was an hour and 20 minutes away from where Nicole Goodman lived. (T. 1925). Additionally, in Dr. Levin's trial testimony, he confirmed that he receives referrals from a lot of other physicians and in this particular case Dr. Moyles believed Dr. Levin had more training, was more experienced, and was a more competent provider. (T. 2555 - 2556).

Based on the foregoing, the closing argument of JFK's counsel was a reiteration of the facts and evidence presented to the jury and a logical deduction from those facts and evidence. Consistent with the testimony of Dr. Levin, Lisa Goodman and Nicole Goodman, counsel for JFK argued Dr. Levin was the type of podiatrist that other podiatrists seek out when cases become too difficult or complicated. As Lisa Goodman indicated, Dr. Moyles referred her daughter to Dr. Levin because Dr. Moyles felt Dr. Levin was "awesome." (T. 1711).

Consequently, the Trial Court did not abuse its discretion on denying a new trial on this issue.

III. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL REGARDING DR. LEVIN NOT SEEING PATIENTS DURING TRIAL.

Ms. Goodman contends the Trial Court abused its discretion in failing to grant a new trial based on JFK's closing argument where counsel references Dr. Levin being present during every moment of trial and not seeing patients during that timeframe. Specifically, Ms. Goodman contends the Trial Court erred in handling the following exchange:

23 We're here in court, and this is
24 Ms. Goodman's day in court, but I'm sure you
25 understand this is also Dr. Levin's day in court.
1 In fact, this was his two and a half weeks in
2 court. And here he was, here he sat. His
3 practice was shut down. His patients obviously
4 were not getting surgery during this time.
5 MR. CARTER: Your Honor, Objection.
6 May we approach?
7 THE COURT: Yes.
8 (A bench conference was had.)
**13 MR. CARTER: The objection is he just said
14 that Dr. Levin is here at a cost to him, costing
15 himself and his practice. His practice had to be
16 shut down so he could be in the court and his
17 patients weren't getting care because he is in
18 court. That is so improper to talk about the
19 financial impact on a defendant for attending a
20 trial.**

21 MR. RIEF⁵: That's not --

22 MR. CARTER: He had to shut his practice
23 down, his patients aren't getting care.

24 MS. KRUSBE⁶: It would be improper talking
25 about the financial comment impact. You can
1 certainly talk about what everybody has to
2 sacrifice.

**3 THE COURT: Maybe the better objection is the
4 fact that it's not in evidence. I'm not aware of
5 any testimony he shut down his practice or wasn't
6 able to treat patients.**

**7 MR. CARTER: Maybe it is a better objection,
8 additional objection, your Honor.**

9 THE COURT: I will sustain it on that
10 objection, even though it's my own. I don't want
11 to cross the line here.

12 MR. CARTER: I will ask for mistrial.

13 THE COURT: I will deny the motion for
14 mistrial.

T.3058-60.

A. Plaintiff waived her financial impact objection.

Based on the foregoing, during the sidebar, the Trial Court was provided with two objections to rule upon: commentary on financial impact and facts not in evidence. During the exchange, counsel for Ms. Goodman expressly noted that the more appropriate or “better” objection was facts-not-in-evidence. The Trial Court expressly sustained the objection related to facts not in evidence. Significantly,

⁵ JFK’s Counsel

⁶ JFK’s Counsel

the Trial Court did not rule on the objection related to financial impact. Additionally, after the objection related to facts-not-in-evidence was sustained, Ms. Goodman's counsel did not request a ruling on the "financial impact" objection. Appellant's failure to request a ruling results in waiver of the objection.

As this Court has noted, "[the] failure to secure a ruling on an objection waives it, unless the Court deliberately and patently refuses to so rule." *LeRetilley v. Harris*, 354 So. 2d 1213, 1214 (Fla. 4th DCA 1978). If there is any ambiguity in a court's ruling on an objection, the burden is on the objecting party to seek clarification of an ambiguous ruling to preserve the objection for appeal. *Newton v. S. Florida Baptist Hosp.*, 614 So. 2d 1195, 1196 (Fla. 2d DCA 1993). When the objection at issue relates to allegedly inappropriate comments during closing arguments, failure to obtain a ruling converts the ruled-upon objection to a non-objection. *Schreidell v. Shoter*, 500 So. 2d 228, 233 (Fla. 3d DCA 1986) ("Although appellants objected and moved for a mistrial, the trial judge made no response to either request...Failure to secure a ruling on an objection waives it.... Thus, there can be no consideration of the [closing argument] unless the error is fundamental."). Consequently, Ms. Goodman

would need to show the challenged statement rose to the level of fundamental error. *Id. See also, Murphy*, 766 So. 2d at 1030, (Fla. 2000) (A party is entitled to a new trial on an unobjected-to argument if the party can demonstrate the item being challenged was improper, harmful, incurable and so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial.).

Recently, this Court noted that its position on the matter is in line with the “plethora of Florida cases [that] support the notion that a party must obtain a ruling from the trial court in order to preserve an issue for appellate review.” *Carratelli v. State*, 832 So. 2d 850, 857 (Fla. 4th DCA 2002). In addressing a perceived misinterpretation of 4th DCA jurisprudence by the Second DCA in *Newton*, this Court expressly noted that “the law in this district is still that the burden is on a party to secure ruling.” *Id.* at 857.

Ms. Goodman's “financial impact” objection was expressly raised. However, counsel for Ms. Goodman did not obtain a ruling on the objection. Rather, Plaintiff's counsel noted that the “facts not in evidence” objection initially referenced by the Trial Court was the “better objection.” The Trial Court ruled on the better of two objections. There was not an express ruling on the “financial impact”

objection. Importantly, because Ms. Goodman’s counsel assented to the “facts not in evidence” objection, there was no further argument by Defendants’ counsel or further analysis by the Trial Court on the “financial impact objection.” (T. 3059 – 60). Since the “financial impact objection” was waived, the Trial Court did not abuse its discretion in denying Plaintiff’s Motion for New Trial.

B. “Financial impact” statement not fundamental error.

However, even if this Court was to determine the closing argument by JFK’s counsel was a comment on Dr. Levin’s finances, this isolated statement would be insufficient to rise to the level of a fundamental error under *Murphy* and insufficient to warrant a new trial. Plaintiff is correct that “Florida has a longstanding rule that no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other’s.” *State Farm Mut. Auto. Ins. Co. v. Medina*, 300 So. 3d 177 (Fla. 4th DCA 2020). However, as this Court has noted, this rule generally applies because “jurors have a tendency to favor the poor against the rich... In other words, the rule is generally intended to protect the wealthier party and prevent the jury from applying the deep pocket theory of liability.” *Id.* 183 - 84. This point is reinforced

in Plaintiff's Initial Brief. Plaintiff alludes to the fact that the jury had an impression that podiatric surgeons made a significant amount of money based on the questioning of Dr. Zelen. (I.B. 50.) Additionally, Dr. Levin's Co-Defendant in this action was a corporate hospital, JFK Medical Center. Thus, similar to the Court's analysis in *Medina*, it is unreasonable and unlikely a jury would be sympathetic to Defendants based on financial disparity.

Furthermore, single or relatively isolated comments are normally insufficient to warrant a new trial. *Grushoff v. Denny's, Inc.*, 693 So. 2d 1068 (Fla. 4th DCA 1997) (holding closing argument invoking "Golden Rule" was not highly prejudicial and inflammatory because, generally, isolated comments do not harmfully infect a case.); *State Farm Mut. Auto. Ins. Co. v. Matthews*, 49 Fla. L. Weekly D217 (Fla. 5th DCA Jan. 19, 2024) (holding isolated comment in closing that a party had "no dog in the fight" was misleading but was not so highly prejudicial and inflammatory to warrant a new trial).

The heightened threshold to establish the fourth prong of *Murphy* is exemplified in Plaintiff's Initial Brief. *Murphy*, 766 So. 2d at 1030 ("the argument so damaged the fairness of trial of the public's interest in our system or justice requires a new trial"). In addressing

the alleged non-harmless nature of Defendants' closing argument, Plaintiff cites to cases where closing arguments have been deemed inflammatory and harmful because they "suggested that an opponent should be punished for defending a claim or 'having the temerity to be in Court' to be inflammatory and harmful. (I.B. 51.) See *Intramed, Inc. v. Guider*, 93 So. 3d 503 (Fla. 4th DCA 2012); *Fasani v. Kowalski*, 43 So. 3d 805 (Fla. 3d DCA 2010); *Hollenbeck v. Hooks*, 993 So. 2d 50 (Fla. 1st DCA 2008).

In *Intramed*, this Court found a new trial was warranted because Plaintiff's counsel, in closing argument, switched the focus of the case "to punishing the defendant for the 'wrongful conduct' of defending the case in court." *Id.* at 506 - 507. This Court went on to cite a litany of objectionable arguments raised by plaintiff's counsel:

(i) The only way to get this company to care is to force them to pay all of the harms they have caused. That's what the law is for, to get a company to care, to change, to do what is right.

(ii) They have never taken responsibility. They have been forced to admit they sent the wrong medication ... and they still take zero responsibility.

(iii) How did they respond? Have you heard sorry once in this courtroom, we are sorry we sent you the wrong medication? ... Not one time have you heard that, not from there, not anywhere.

(iv) There are things your verdict cannot fix ... But you can fix the harms that were caused her, the way they defend this case.

(v) [The defendant] will get off cheap. [The defendant] will sweep it under the rug. [The defendant] will move on. [The defendant] won't change. [The defendant] won't care.

(vi) It doesn't matter what [the defendant] do[es] as a company. [They] can get off cheap if [they] want. Slap on the wrist.

(vii) How do you ask her that? How do you defend yourself that way?

Id. at 507.

Likewise, in *Fasani*, the Third DCA concluded a new trial was appropriate due to plaintiff's counsel's argument which insinuated that the corporate defendant should be punished for defending the case. *Id.* at 809. The plaintiff's counsel characterized the defendants' treatment of the plaintiff as "kicking him out on the street like a dog," "kicking him out and saying we're giving you nothing," and of having "drug him through all of this." *Id.* at 810. The plaintiff's attorney argued the defendants had refused "to do the right thing" despite knowing "it's [defendants'] fault." *Id.* Plaintiff's counsel then attributed this behavior and to "corporate greed and arrogance." *Id.*

Finally, in *Hollenbeck* (which may be the only case comparable to this present appeal), the First DCA did address a party's injection of wealth into the trial. *Id.* at 50. However, the court did so in the context of the attorney misrepresenting and misleading the jury regarding the facts. *Id.* at 50-51. In *Hollenbeck*, appellee's counsel indicated that he was a "consumer justice attorney, and I represent John Hooks [Appellee], a Merchant Marine, not some fancy company, not some conglomerate." *Id.* at 50. The court noted counsel's statement was misleading because he was in fact "retained by Appellee's insurer; therefore, he did represent 'one of those big companies'". *Id.* at 50-51. The appellate court noted that the misleading statement implied that an award of damages would be paid solely by the individual. *Id.* at 51. *Hollenbeck* in granting a new trial noted that the statements were "impossible to refute at trial [because] it would have been clear error for the trial court to inform the venire of the fact that the Appellee's counsel was retained by insurance company to represent the Appellee." *Id.* at 51.

The improper and pervasive behavior identified in *Hollenbeck*, *Fasani*, and *Intramed* is wholly dissimilar from the conduct at issue in this appeal. It would require a strained reading of JFK's closing to

conclude that any portion of JFK's argument challenged Ms. Goodman's ability or right to move forward with this case. In fact, the closing argument begins with JFK's counsel acknowledging that both Ms. Goodman and Dr. Levin should have their "day in court." (T. 3058) ("We are here in court, and this is Ms. Goodman's day in court, but I'm sure you understand this is also Dr. Levin's day in court."). This is materially different than the cases cited by the Plaintiff.

When viewed in the context of the requirements of *Murphy* and the cases cited by Plaintiff, it cannot be said that the statements of JFK's counsel rise to the level of fundamental error or improperly inflame passions.. *Murphy*, 766 So. 2d at 1030. *See also, Marotta*, 125 So. 3d at 960 (noting that even when an objection to closing argument is preserved the trial court should grant a new trial only if the argument was so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial).

Based upon the foregoing, the comments made by JFK's counsel in closing argument are insufficient to support a new trial. Consequently, the Trial Court did not abuse its discretion denying Plaintiff's Motion for New Trial.

IV. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL BASED ON ALLEGED CHANGE IN TESTIMONY OF DR. ROSS AND DR. LEVIN.

In her Initial Brief, Plaintiff contends Dr. Levin's trial testimony regarding his communication with Dr. Bowles and Dr. Ross' trial testimony about her experience with thermal energy devices were surprises and violated *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981). In *Binger*, the Court held that a trial court can properly exclude the testimony of a witness who had not been disclosed in accordance with the pretrial order. *Id.* at 1313. The Court noted that the discretion to exclude such a witness "should be guided largely by a determination as to whether the undisclosed witness will prejudice the objecting party." *Id.* at 314. Under *Binger*, prejudice means surprise in fact. *Id.* *Binger* has also been extended to apply to where a "medical expert *changes* his or her opinion, resulting in surprise and prejudice to the opposing party." *Allstate Prop. & Cas. Ins. Co. v. Lewis*, 14 So. 3d 1230 (Fla. 1st DCA 2009).

In the cases applying *Binger* to the testimony of a previously disclosed expert, the appellate courts normally require an actual and substantial change in testimony for surprise in fact to be present. *See Krysiak v. Dawson*, 301 So. 3d 259, 265 (Fla. 4th DCA 2020)

(excluding any opinion that was disclosed on the eve of trial which for the first time diagnosed the patient with PTSD); *Kellner v. David*, 140 So. 3d 1042, 146 – 147 (Fla. 5th DCA 2014) (excluding testimony of expert about measurements taken at the scene of the accident two days before trial). Additionally, as part of the *Binger* analysis, counsel has an obligation to conduct sufficient discovery to ascertain the nature of the testimony that will be offered by a witness. *Hargrove v. Howell*, 884 So. 2d 960, 962 (Fla. 1st DCA 2004) (“much of the surprise that appellant complains of was the result, in large measure, of her not conducting a more thorough deposition examination ... a party has an obligation to conduct sufficient discovery to ascertain the nature of the testimony to be offered by a witness.”).

A. Dr. Ross’s testimony was unchanged.

Plaintiff contends Dr. Ross changed her testimony when she testified at trial that she teaches residents how to use thermal devices by utilizing non-patient simulations and cadavers. (T. 2364 – 2368). In Dr. Ross’s deposition, Plaintiff’s counsel made the decision to take a very superficial examination of Dr. Ross’s qualifications. In terms of establishing Dr. Ross’s qualifications, at the start of her deposition,

Plaintiff's counsel simply asked Dr. Ross to confirm she was a podiatrist. (R. 9240) (Q. And you are a podiatrist? A. I am).

As it relates to questions regarding Dr. Ross's use of the thermal device, Plaintiff's questions were again very limited— this time confirming that Dr. Ross had not utilized a thermal device in the treatment of patients:

20 Q All right. Are you, do you utilize the type
21 of thermal device that Dr. Levin used in this surgery in
22 your practice?

23 A Do I like it?

24 Q Do you utilize it?

25 A No, I don't utilize it.

**1 Q Do you use any type of thermal device in the
2 ankle joint for debridement?**

3 A Not routinely, no, I don't. Have I used it in
4 the past in training? Yes. You know, but my particular
5 preference is no, I haven't.

**6 Q And why is it your preference not to use that,
7 a thermal device for debridement in the ankle joint?**

9 THE WITNESS: Perhaps for training. You know,
10 my surgical training while I was in fellowship, as
11 well as in residency training, we didn't use it
12 routinely. So much like if I were using particular
13 hardware or external fixation, you know, there's
14 just certain areas that you prefer more.

(R. 9297-98).

Plaintiff's counsel had Dr. Ross's curriculum vitae. (R. 9257).

Plaintiff's counsel didn't discuss her responsibilities or the different facets of her professional responsibilities. In fact, the only questions

asked of Dr. Ross about her CV was regarding why she omitted her consulting services LLC from her CV. (R. 9257-58). Plaintiff was aware, via Dr. Ross's CV, that she was certified in arthroscopic procedures. (T. 2364). However, Plaintiff's counsel did not ask any questions regarding what it took to obtain the certification (e.g. showing proficiency in the understanding how thermal devices work in arthroscopic procedures) or whether the certification has to be renewed. Likewise, Plaintiff's counsel never meaningfully explored Dr. Ross's responsibilities as it relates to training residents. In fact, Dr. Ross, in two passing comments, in response to unrelated questions, brought up the fact she trains residents. (R. 9295) (Dr. Ross mentioned she sits on the Emory University Residency Program in response to a question as to how she may know one of Plaintiff's experts who also practiced in Georgia); (R. 9303) (Dr. Ross stated "...But for someone who works with resident,..." in response to how she knew what portion of the procedure was handled by Dr. Short.). Despite these answers, Plaintiff's counsel never followed up on how Dr. Ross trains residents regarding arthroscopic procedures. In fact, the only specific question Plaintiff's counsel asked about resident training related to documentation:

23 Q What do you teach your residents to do with
24 regard to documenting the use of a local anesthetic
25 during a procedure?
2 THE WITNESS: Typically we teach, you know, to
3 document use of local anesthetic, how long
4 tourniquet time is. Is that done every single
5 time? No.

(R. 9333). Plaintiff's counsel, like the specific question about how Dr. Ross trains residents to document, could have asked about other aspects of how she trains residents regarding performing arthroscopic procedures. However, Plaintiff's counsel chose not to explore any of these areas of her qualifications.

Rather than fully exploring Dr. Ross's background, including what she does with residents, Plaintiff's counsel was satisfied in establishing through Dr. Ross's deposition that she had never been in the position Dr. Levin found himself as it related to Ms. Goodman. Namely, Dr. Ross had never utilized a thermal device on one of her own patients. (R. 9297-98). Satisfied with establishing the fact that Dr. Ross "[does not] use any type of thermal device in ankle joint for a debridement," Plaintiff's counsel moved on from the issue. (R. 9298).

Dr. Ross' trial testimony did not change from the testimony she provided in her deposition. Consistent with her deposition testimony,

Dr. Ross conceded that she has not used a thermal device to treat a patient since residency and she does not use it to treat patients in her practice. This point was confirmed three times during the direct examination of Dr. Ross by Dr. Levin's counsel:

24 Q. But just to be clear, you are not using the
25 RF probe on your patients, fair?

1 A. No.

2 Q. And I just want to make that clear.

3 Dr. Levin obviously uses it on his patients?

4 A. Yes.

...

5 Q. Even though you have train and experience in
6 using it, what is the difference between, for example,
7 Ms. Goodman, the type of patient Dr. Levin treats where
8 he uses the RF in his patients and patients that you
9 treat and why you don't normally use the device?

10 A. Yeah, so that's a great question.

11 Patient populations are different. You know,
12 my patient population particularly are older and more
13 sedentary patients. I'm typically not seeing someone
14 who is -- they have come in occasionally, but I don't
15 see that high volume of patients that are typically
16 requiring something like an RF device or whatnot.
17 So I scope, I shave, but the majority of my
18 patients that are coming in, they've had one ankle
19 sprain -- excuse me, they've had an ankle sprain,
20 history of ankle instability, but they are not these
21 severe arthrofibrosis-type cases.

...

22 Q. Is that the reason, because of that patient
23 demographic, you don't use the device?

24 A. Yes.

(T. 2368-69).

The point was then reaffirmed six more times during Dr. Ross's cross-examination by Ms. Goodman's counsel:

21 Do you mean if he specifically asked me about
22 that particular probe?

23 Q. Would you have told him words to the effect,
24 if he asked whether or not you use any type of thermal
25 device in ankle joint for debridement, would you have
1 told him something along the lines of, no, routinely,
2 no, I don't. Have I used it in the past in training,
3 yes, you know, but my particular preference is, no, I
4 haven't...

15 A. Yes, yes, that would be accurate.

...

9 Q. Okay. You don't use, as an attending
10 physician, when you are doing a surgery, you don't use
11 any type of radiofrequency device in your surgeries,
12 right?

13 A. Right, since training. But do I expose the
14 residents to it in training, I do. Do I use it now in
15 my practice, no. But I think I have explained that
16 with Mr. Vancol, my patient population is different.

...

17 Q. Regardless of your patient population, I'm
18 not trying to criticize you for the use or not using
19 it.

20 A. Sure. Sure.

...

11 Q. But regardless of the patient population,
12 old, young, in your practice, you don't use it in your
13 practice, right?

18 So to answer your question, yes, I do not
19 currently use RFA when I'm doing arthroscopic
20 procedures...

...

20 Q. Again, not criticizing you in any way, shape
21 or form about your nonuse of it, because some
22 podiatrists don't use it because it's being utilized in

23 a tight space and because it generates heat, that's one
24 reason that a podiatrist may have a preference not to
25 use it; would you say that's true?

1 A. That would be one reason. That's not mine
2 but I appreciate you saying that.

...

8 Q. But as far as you, aside from your preference
9 to use it or not use it, the fact is that you haven't
10 used it in any surgeries where you were the operating
11 surgeon at all in your practice, period, correct?

12 A. I have not used it as the attending surgeon
13 since training...

(T.2414-19).

Thus, on nine separate occasions, Dr. Ross confirmed her deposition testimony. She acknowledged that she has never used a thermal device to treat a patient. This was the testimony that she provided in her deposition. This was the testimony that Plaintiff was satisfied in obtaining in her deposition. Plaintiff's counsel was sufficiently content with Dr. Ross's deposition testimony, counsel did not ask any other meaningful questions regarding Dr. Ross's qualifications, including any questions regarding Dr. Ross's certification in arthroscopic procedures or training of residents. This is not a case where a witness provides undisclosed opinions or changes factual testimony. Plaintiff's counsel, in deposition, obtained testimony regarding what they viewed to be a weakness in Dr. Ross'

qualifications. Plaintiff's counsel made the tactical decision not to explore the matter any further. Dr. Ross provided trial testimony (9 separate times) that was consistent with the deposition testimony. She then provided additional information regarding her qualifications that was never explored by Plaintiff's counsel during the deposition. The absence of a change in testimony between Dr. Ross' deposition testimony and trial testimony means the Trial Court did not abuse its discretion in denying the Plaintiff's Motion for New Trial.

B. Dr. Levin's testimony did not change.

As it relates to Dr. Levin, Plaintiff contends Dr. Levin changed his testimony at trial by indicating he communicated the blister that was present on January 31 was at the location where his thumb was during the surgery.

6 Q. But you didn't tell Casey Bowles word one
7 about what you had seen the day before, correct?

8 A. Vis-a-vis what?

9 Q. Vis-a-vis, what. Anything?

10 A. No, that's not -- that's inaccurate.

11 Q. Well, you heard Casey Bowles' testimony that
12 in no way, shape or form was there any discussion about
13 what had been seen in the operation the day before; you
14 were in court for that testimony?

15 A. I was in court. I believe that what Casey
16 Bowles said is that he didn't recall if Dr. Levin had
17 discussed the epinephrine blanching. And I believe
18 Casey Bowles also indicated that he had, and again, I'm

19 paraphrasing because I don't know the exact words on
20 the testimony, whether he had a lengthy discussion or
21 an extensive discussion with Dr. Levin about the
22 blister.

23 And at that point, I distinctly recall
24 telling Casey Bowles that she had a frog leg
25 positioning and that area was where my thumb pressure
1 was. So I, if Casey Bowles doesn't recollect, I don't
2 know, but my direct recollection is that I would have
3 had -- that I did have a conversation, that I wouldn't
4 have had an extensive discussion about a blister and
5 not discussed etiology. It just doesn't make sense.
6 And my recollection is that I did.

**7 Did I tell him that there was a blanched area
8 due to epinephrine? It was as -- I wouldn't have said
9 that. I wouldn't have told him about epinephrine
10 because the epinephrine was gone. The image showed
11 there was no blanching.**

(T. 2767 - 68.)

Based upon the foregoing, Dr. Levin made it clear that he likely would not have communicated any information regarding Epinephrine or blanching to Dr. Bowles. What he testified to is that he advised Dr. Bowles about his thumb being at the area where the oval blister was present on January 31. The trial testimony was consistent with Dr. Levin's deposition testimony, which was that he would not have communicated information regarding Epinephrine to Dr. Bowles:

3 Q So if it was **a pressure type thing from the**

4 **blanching**, like you push it down and then you wait, you
5 didn't, and see, and the capillaries refill and the
6 color returns, you didn't undertake that kind of
7 exercise to see if it would refill?

8 A Well, it didn't immediately, so I, **the**
9 **assumption was it was the Epinephrine.**

10 Q Your assumption?

11 A My assumption.

12 Q Did you express that to anyone?

13 A I don't know. I don't remember if I said that
14 to Bill or not.

15 Q **Did you say it to Casey Bowles the next day**
16 when your patient was back in the emergency room?

17 **A I wouldn't have mentioned that to him.** That
18 wouldn't have been something that I would have I think
19 mentioned. **All I was interested in is what the**
20 **appearance of the skin was, in other words, was it not**
21 **blanched any more.**

(T. 591-92, 611)

Despite Dr. Levin's repeated attempts to separate the Epinephrine/blanching from thumb pressure and the blister seen the next day, Plaintiff's counsel would routinely comingle the issues in his questioning. However, even when the comingled questions led to a possibly confusing answer, Dr. Levin made it clear that the answers he was providing Plaintiff's counsel was in reference to the issues related to Epinephrine. (R. 620-21).

It should also be noted that Plaintiff contends the harm caused by Dr. Levin's testimony is that the testimony prevented Plaintiff from

opining Dr. Bowles breached the standard of care. (I.B. 63). However, such a contention is immaterial because Dr. Bowles' conduct would not have been the proximate cause of Ms. Goodman's injuries. As Dr. Zelen, Plaintiff's expert, noted, the die was cast at time of surgery on January 30, not the next day when Dr. Bowles saw the patient:

15 In terms of the ultimate injury, it's your
16 opinion that the die was cast, it was a done deal.
17 Nothing was going to change at the time that the thermal
18 injury occurred, which was during the surgery.
19 A. That's correct. Yes, sir.
20 Q. Okay. So all of this documentation,
21 criticisms and inappropriateness and so on and so on that
22 we've talked about or you did for sometime, you might
23 find it not particularly reasonable or maybe you would
24 like to see it done better or differently, but it didn't
25 change the ultimate outcome with regard to this wound;
1 true?
2 A. I agree with you, sir.

(T. 1129-30). Thus, Plaintiff would have been incapable of establishing the elements to maintain a claim against Dr. Bowles. See *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1020 (Fla. 1984) (The plaintiff must show that the injury more likely than not resulted from the defendant's negligence in order to establish a jury question on proximate cause.”)

Ultimately, similar to Dr. Ross, Dr. Levin's testimony at trial did not change from the testimony he provided in his deposition. As such, the Court correctly denied Plaintiff's Motion for New Trial.

CONCLUSION

The Trial Court did not abuse its discretion in denying Plaintiff's motions for mistrial and new trial.

RESPECTFULLY SUBMITTED

**MCEWAN, MARTINEZ, DUKE, HALL &
VANCOL, P.A.**

/s/ Wilbert R. Vancol _____
Rafael E. Martinez
Florida Bar No.: 0243248
rmartinez@mmdorl.com
Wilbert R. Vancol
Florida Bar No. 0093132
wvancol@mmdorl.com
Post Office Box 753
Orlando, FL 32802-0753
Telephone: (407) 423-8571
E-Service: NOS@mmdorl.com
Attorneys for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March, 2024, the foregoing was electronically filed with the Clerk and furnished via e-mail to: Andrew Harris, andrew@harrisappeals.com, grace@harrisappeals.com, eservice@harrisappeals.com and Jason L. Odom, Esq. and David M. Carter, Esq., Gould Cooksey Fennell, P.A., 979 Beachland Blvd., Vero Beach, FL 32963, E-service: dmceservice@gouldcooksey.com & jlo-eservice@gouldcooksey.com Andrew A. Rief, Esq., Billing, Cochran, Lyles, Mauro & Ramsey, P.A., 300 Avenue of the Champions, Suite 270, Palm Beach Gardens, FL 33418, E-service: wpb-pleadings@bclmr.com; Vivianr@bclmr.com

/s/ Wilbert R. Vancol
Wilbert R. Vancol
Florida Bar No.: 0093132

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this Answer Brief complies with the font and word count limit requirements of Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B).

/s/ Wilbert Vancol
Wilbert Vancol
Florida Bar No.: 0093132