

No. 07-4059

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

JONATHAN S. MCGLOTHAN, M.D.,)	Appeal from the United States
)	District Court for the
<i>Defendant-Appellant,</i>)	Southern District of Indiana
v.)	
)	
TRACEY WALLACE and)	
ERIC WALLACE,)	
)	
<i>Plaintiffs-Appellees,</i>)	No. 2:05-CV-262
)	
)	TheHonorable
)	Larry J. McKinney
)	Judge Presiding.

**BRIEF OF DEFENDANT-APPELLANT
JONATHAN S. MCGLOTHAN, M.D.**

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ORAL ARGUMENT REQUESTED

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Appellate Court No: 07-4059

Short Caption: McGlothan vs. Wallace

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JURISDICTIONAL STATEMENT

District Court Jurisdiction

This is an appeal from a final amended judgment on a jury verdict entered on November 2, 2007. The United States District Court for the Southern District of Indiana had federal diversity jurisdiction of this matter under 28 U.S.C. §1332 (2005), as the parties are citizens of different states. Plaintiffs-appellees Tracey Wallace (“Tracey”) and Eric Wallace (“Eric”)(collectively the “Wallaces”) are domiciled in Illinois and the defendant appellant Jonathan S. McGlothan (“Dr. McGlothan”) is domiciled in Indiana (App. 27, 56, 64; Trans. 25). The amount in controversy exceeds \$75,000.00 (App. 92; Trans. 373).¹

Appellate Court Jurisdiction

The United States Court of Appeals for the Seventh Circuit has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 (1982). On October 23, 2007, at the close of the evidence, the defendant, Dr. McGlothan, moved for judgment as a matter of law as to the issue of the permanency of Tracey’s alleged damages (App. 88-91; Trans., 349-352). This motion was denied by the district court on October 23, 2007 (D108). The jury’s verdict against Dr. McGlothan and for the Wallaces was reached on October 24, 2007 (D109, 112). The judgment on the jury verdict was subsequently entered by the district

¹ The following abbreviations are utilized throughout the brief for citations to the record: “SA” refers to documents contained in the attached short appendix; “App.” refers to documents contained in the separate appendix; “D” refers to the district court docket numbers; “Trans.” refers to the trial transcript; “DE” refers to materials contained within the designated record on appeal; “TE” refers to the trial exhibits, which were designated in paragraph #1 in the Designation of the Record on Appeal.

court on November 1, 2007 (D 114). On November 2, 2007 an amended judgment and corrected judgment were entered in favor of the Wallaces and against Dr. McGlothan (D115, 116). Timely post-trial motions for Judgment as a Matter of Law After Trial, Alteration of Judgment, and a New Trial were filed by Dr. McGlothan on November 5, 2007 (D 117). These motions were denied by the district court on December 4, 2007 (D 122).

Timeliness of Appeal

Following the denial of his post-trial motions, Dr. McGlothan filed his notice of appeal on December 24, 2007 (D131). The 30th day by which the notice of appeal could be filed was January 3, 2008. Fed. R. Civ. P. 6(a); Fed. R. App. P 3(a)(1). Therefore, Dr. McGlothan's notice of appeal was timely and was filed based on the amended judgment order of the district court, which disposed of this case.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err when it denied Dr. McGlothan's Motion for Judgment as a Matter of Law, based on the Wallaces' failure to present required expert testimony to prove Tracey's left eye injury was permanent?

2. Did the district court err when it denied Dr. McGlothan's Motion for Judgment as a Matter of Law, based on the Wallaces' failure to present required expert testimony that Tracey's alleged vision injury was proximately caused by Dr. McGlothan's malpractice rather than a pre-existing condition?

3. Whether the district court denied Dr. McGlothan his fundamental right to a fair trial, by declining to vacate the jury verdict where defendant had no opportunity

to cross examine plaintiffs' expert witnesses about the aggravation of a pre-existing condition?

STATEMENT OF THE CASE

This civil action was brought by plaintiffs against defendant Dr. McGlothan for medical malpractice under Indiana's Medical Malpractice Act, I.C. § 34-18-1, *et. seq* (1999). Dr. McGlothan is an ophthalmologist practicing in Terre Haute, Indiana. (App. 25:15-16). Tracey had bilateral LASIK surgery performed by Dr. McGlothan on April 25, 2002. During the procedure, a complication known as a "button hole" occurred on both the right eye and the left eye. (App. 26: 25-27: 2)

After the district court granted motions for partial summary judgment by both parties, the issue presented to the jury was limited to the damages Tracey and Eric suffered as a proximate cause of the failed LASIK procedure on Tracey's left eye (D71, 77, 88; App. 1-13).

The matter proceeded to a jury trial on October 22 - 24, 2007 in the United States District Court, Southern District of Indiana, Terre Haute, Indiana. On October 23, 2007, at the close of plaintiffs' case, the Wallaces asked the district court to take judicial notice of Tracey's life expectancy (App. 74; Trans., 279). Dr. McGlothan objected on the grounds that no evidence was offered by the Wallaces during their case in chief to establish "permanency" of the claimed injury to the left eye, which was a prerequisite to an instruction on life expectancy (App. 74; Trans., 279). The district court overruled this objection (App. 74; Trans., 279). Dr. McGlothan then requested an opportunity to present a motion outside the presence of the jury. The district court stated the motion

would be heard later and Dr. McGlothan should proceed with his case (App. 75; Trans., 280).

Dr. McGlothan proceeded with his case and at the close of the evidence he moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) (App. 88; Trans., 349). The district court denied this motion (App. 91; Trans., 352). The case was given to the jury on October 24, 2007, and the jury subsequently found in favor of the Wallaces awarding \$555,813.57 to Tracey and \$122,980.00 to Eric. (SA, 3-4; D114) An amended judgment on the jury's verdict was entered by the district court on November 2, 2007 (SA, 5, 7; D 115, 116).

On November 5, 2007, Dr. McGlothan timely filed post-trial motions pursuant to Fed. R. Civ. P. 50(b), 59 and 60 (D117). On December 4, 2007, the district court denied these motions (SA9; D122). This appeal of the judgment in favor of the Wallaces followed.

STATEMENT OF FACTS

Background to this Litigation

Tracey first presented to a Terre Haute, Indiana ophthalmologist, Dr. McGlothan, on September 5, 2001 (TE A, 7). Tracey was interested in LASIK surgery (TE A, 7).² On her patient history form provided to Dr. McGlothan, she indicated she wore glasses,

² **Laser Assisted in situ Keratomileusis (LASIK)** is a type of refractive surgery that permanently changes the shape of the cornea using an excimer laser. The procedure beings by creating a "flap" of the outermost layer of the cornea with a razor blade knife (microkeratome). Then, the flap is lifted, the laser is applied to the cornea and, finally, the flap is put back in place. Patients choose LASIK as an alternative to wearing glasses or contact lenses. See www.fda.gov/cdrh/lasik.

had trouble reading fine print, driving at night and driving in bright sunshine (App. 93; TE A, 5).

Months later, on April 15, 2002, Tracey returned to Dr. McGlothan's office for a pre-LASIK workup (TE A, 9). At that visit her vision, with correction, was 20/20 on the right and 20/20 -2 on the left, and both eyes measured 20/400 without correction (TE A, 9). Dr. McGlothan discussed the risks involved with LASIK, including the possibility of vision loss, continued need for spectacles, glare/halo potential, continued need for glasses, risk of infection and dry eye management. (TE A, 10). Tracey was also given a detailed informed consent form, which she reviewed and signed (TE A, 21-29).

Tracey returned to Dr. McGlothan's office on April 25, 2002, for the bilateral LASIK eye surgery (App. 28; Trans. 26: 2-5). Dr. McGlothan started with the procedure on Tracey's right eye (App. 21A; DE A, 65:8-9). First, he applied the microkeratome device to make a thin cut on the outer corneal layers (App.29; Trans., 27). After the head of the microkeratome retracted, Dr. McGlothan saw that a "button hole" flap had been created (App. 29, 30; Trans. 27, 43). The "button hole" flap is a known complication of the LASIK procedure (App. 29, 31). Dr. McGlothan believed that a microkeratome malfunction was the cause of the problem, so he checked the equipment and replaced all of the changeable pieces (App. 21A; DE A, 65-66, 67). Dr. McGlothan then proceeded to apply the microkeratome to the left eye (App. 21A; DE A, 66). Unfortunately, another "button hole" flap complication occurred (App. 28; Trans., 26). Dr. McGlothan put bandage contact lenses on both eyes and informed Tracey and her husband Eric of the complications (App. 21A; DE A, 68:4-9).

Tracey returned to see Dr. McGlothan the next day, April 26, 2002, and again on April 29, 2002, for further treatment and evaluation of her left and right eyes (TE A, 18-19). Tracey was scheduled to return for further follow-up on May 3, 2002, but cancelled this visit and never returned to Dr. McGlothan's office (TE A, 18-19).

Following her appointment with Dr. McGlothan on April 29, 2002, Tracey presented to Donald E. Connor, O.D., an optometrist, in Terre Haute, Indiana, for a second opinion (App. 94). Tracey filled out a patient history form at Dr. Connor's office which noted, in part, a history of trouble seeing at night, sensitivity to light and problems with glare and reflection, particularly when driving at night (SA 11-12; App. 94-95). Dr. Conner examined Tracey and immediately referred her to Francis Price, M.D., an Indianapolis, Indiana based ophthalmologist for further evaluation and treatment (TE B, 4-5).

Tracey saw Dr. Price the next day, April 30, 2002 (TE C, 12). Her presenting history was noted to be an "aborted LASIK" procedure on April 25, 2002, and a history of wearing glasses or contact lenses since age ten. (App. 99-100). When she presented to Dr. Price she was wearing bandage contact lenses and claimed her eyes were uncomfortable with some light sensitivity (App. 99). Her pain was moderate and was aggravated by light and sunlight (App. 99).

Tracey continued to see Dr. Price and subsequently underwent a corrective flap lift procedure of the left eye on May 1, 2002 to smooth out the "button hole" complication created by Dr. McGlothan's LASIK surgery (App. 101, 102). Shortly thereafter, on July 20, 2002, Tracey received a new Illinois drivers license (App. 20, 141-

143). On the sworn affidavit section of the Illinois Secretary of State application, Tracey indicated that she had no "...physical condition that would interfere with safe driving" (App. 141-143; TE K).

Thereafter, Tracey continued to see Dr. Connor and Dr. Price (TE B and C). On June 20, 2003, Dr. Price noted that Tracey's left cornea had scarring that was much improved but there were still irregularities to the corneal surface (TE C, 69). Accordingly, on July 11, 2003, Tracey underwent a laser procedure (PRK)³ to remove scar tissue on her left eye (TE C, 81-82).

After this second procedure, Dr. Price noted that both of Tracey's eyes looked better than when he initially saw her, but that she would need additional treatment on both eyes (TE C, 82). On July 15, 2003, Tracey indicated she wanted to proceed with laser treatment on the right eye, but Dr. Price wanted to wait to see how she did with healing in the left eye (TE C, 87).

On July 21, 2003, Dr. Price noted that Tracey was improving and the central area of the left cornea was clear. Dr. Price also noted that there was trace residual scarring but the recent PRK procedure would continue to improve her left eye for up to six months (TE C, 90). On September 22, 2003, Tracey reported the glare in her right eye

³ Photorefractive keratectomy (PRK) is a laser eye surgery procedure intended to correct a person's vision, reducing dependency on glasses or [contact lenses](#). PRK, like LASIK, permanently changes the shape of the anterior central [cornea](#) using an [excimer laser](#) to ablate a small amount of tissue from the [corneal stroma](#) at the front of the eye, just under the [corneal epithelium](#). See <http://en.wikipedia.org/wiki/Keratotomy>

was worse than the left eye, and Dr. Price noted she may not need any further treatment on the left eye (App.103-104). On November 11, 2003, Tracey's uncorrected visual acuity in the left eye was 20/40, and her left cornea looked clear with a very mild peripheral haze. Dr. Price noted he could barely see any scarring in the left eye (App. 105).

Tracey next saw Dr. Price on April 23, 2004 (TE C, 120-122 and 137-139). At this visit, Tracey was told about a possible new retreatment that would be available later that year. She was instructed to call Dr. Price's office in three months to discuss this new treatment (TE C, 139). In a May 11, 2004 letter to Tracey's counsel, Dr. Price indicated that they were waiting for new software to come out to see if they could further improve the vision in the left eye, and expected that to happen at the end of summer, 2004 (TE C, 143).

Tracey did not see Dr. Price again for over two years. Her next and last visit with Dr. Price occurred on June 29, 2006 (App. 106-109; TE C, 149-152). Dr. Price noted that Tracey was wearing her contact lenses 12-15 hours a day and the left lens was coated and scratched (App. 106,108; TE C, 149, 151). When Tracey complained of continued "ghosting" at night, Dr. Price noted that there was no haze in the left eye and she should be seeing well in the left eye with her contact lens (App. 109; TE C, 152). Tracey acknowledged that she could not tell if it was the left eye or the right eye that was causing the ghosting (App. 108-109).

On September 29, 2004, Tracey was examined by Maurice John, M.D. ("Dr. John"), an ophthalmologist in Jeffersonville, Indiana, who served as an independent

medical examiner on behalf of the defendant, Dr. McGlothan (TE E). Dr. John conducted multiple tests on Tracey and summarized the test results and his conclusions in a written report (TE E, 1-18). In his report, Dr. John indicated that he saw some very subtle micro striae on the right cornea and that the left cornea looked even better (App. 111; TE E, 16). In the left cornea, there were some foreign body remnant noted that could have been left over from the original surgery or from Dr. Price lifting the flap (App. 111). However, Dr. John noted these were inconsequential and had absolutely no effect on her vision (App. 111).

Dr. John also expressed concerns about the results of his “hard contact lens” and “pin hole” tests, which eliminate any irregularities in the cornea and should correct the vision. Tracey actually did worse on these tests (App. 111). Dr. John considered these results mysterious and medically difficult to explain (App. 112). In conclusion Dr. John was unable to explain her test results and felt she was malingering (App. 113).

Allegations of the Complaint and Motions for Summary Judgement

The Wallaces, in their complaint before the district court, alleged that Dr. McGlothan’s care and treatment of Tracey breached the applicable standard of care, and that as a result they sustained damages proximately caused by Dr. McGlothan’s negligence (D1). During the course of the suit, both the Wallaces and Dr. McGlothan filed motions for partial summary judgment to narrow the issues (D 71, 77). The Wallaces’ motion for partial summary judgment on the “breach” element of Plaintiffs’ claim was granted and limited the trial to causation and damages only (D 83). Dr. McGlothan’s motion for partial summary judgment was also granted, further limiting

the triable issues to the left eye only, because the right eye was the first eye done and the “buttonhole” flap was a known complication (D 83). Therefore the only issue for trial was the amount of damages proximately caused by the injury to Tracey’s left eye (D 71, 77, 83).

The Wallaces’ Written Discovery Responses

Tracey answered Dr. McGlothan’s first set of written interrogatories in this case on October 2, 2003 (App. 114-125). At that time, she claimed that her damages included an inability to drive at night due to ghosting and excessive glare of headlights, trouble seeing some stop light colors in certain light conditions, difficulty driving when raining or in weather conditions that were not favorable, and an inability to focus during target shooting (App. 120; TE I, paragraph 1.13). Tracey further stated, under oath, that she had never suffered any other illnesses, injuries or damages to her eyes other than her current problems (App. 121; TE I, paragraph 1.17). She also claimed that she felt the injuries were permanent and she was continuing to seek treatment because her eyes had not reached a quiescent state (App. 122; TE I, paragraph 1.20).

Tracey subsequently answered these same interrogatories, two and one half years later, on May 1, 2006 and simply referred to the answers given in October of 2003 (App. 126-140).

Tracey’s Deposition Testimony

Tracey’s discovery deposition was taken on July 31, 2006 (App. 19). During her deposition, she was specifically asked, in reference to her self-documented history on Dr. McGlothan’s and Dr. Connor’s patient history forms (App. 93-95; TE A, 5; TE B, 1-2),

if she ever had problems with glare, halos, or other visual disturbances *prior* to being operated on by Dr. McGlothan. She denied having any type of visual disturbances or other problems prior to the April 2002, LASIK surgery (App. 21; DE A 54: 6-16).

During her deposition Tracey also testified that when she applied for her Illinois drivers' license in July, 2002, three months after the subject LASIK surgery, that if asked about any visual difficulties that affected her driving, she would have disclosed her night driving issues (App. 20; DE A 49: 15 to 50:9).

Trial Testimony Regarding The Left Eye Injury

At trial, Plaintiffs presented two treating physician witnesses, Dr. Connor and Dr. Price, as their experts (Trans., 63-139; 139-141). The Wallaces first called Dr. Connor, who had not seen Tracey for an examination for more than two and a half years, since March 10, 2005 (App. 34; Trans., 63). Next, Dr. Price testified at trial, by deposition taken on July 19, 2006 (App. 14; DE E, 1).

At trial, Dr. Connor testified as follows:

- He had never seen Tracey prior to the subject LASIK procedure and did not know if she had any pre-existing problems (App. 45).
- Tracey indicated on Dr. Connor's patient history form (SA 11-12; App. 94-95) that she had a history of trouble seeing at night, sensitivity to light and was bothered by glare when driving at night. Dr. Connor testified that he does not have any record that he asked her anything about these problems (App. 48-49).
- Dr. Connor had never seen a corneal injury due to a LASIK procedure and the treatment of a buttonhole flap was outside his realm of expertise (App. 44).
- Dr. Connor would defer to Dr. Price in terms of any available technologies to further treat Tracey (App. 53).

- Dr. Connor agreed that there are other things that can cause glare or reflection besides the LASIK procedure, including problems with the optical system (which he ruled out), and problems with the lens of the eye, (which he did not rule out) (App. 50).
- Anyone that wears hard contact lenses can have a problem with glare or reflection (App. 46-47).
- He had no basis to agree or disagree with Dr. Price's assessment that there was no reason why Tracey should not be seeing well in the left eye when using a contact lens (App. 54).
- Dr. Connor would expect Tracey to tell the Illinois Secretary of State that she had safety issues with driving at night, when she applied for her license in July, 2002 (App. 51).
- Dr. Connor was unable to tell if Tracey's complaints about driving at night were related to the left eye or the right eye (App. 35-36, 55).⁴

Following Dr. Connor's testimony, the Wallaces then read portions of the July 19, 2006 discovery deposition of Dr. Price to the jury. Pertinent portions of Dr. Price's testimony established:

- Tracey's **right** eye comported with her symptoms and it was the **right** eye that had residual scarring and irregularity (App. 16; DE E 73: 8-13).
- On slit lamp (microscopic) examination, her right eye was worse than the left but this scarring was getting hard to see (App. 16-17).
- Dr. Price never determined whether her visual complaints were caused by the left eye or the right eye (App. 16).
- At the last visit Dr. Price had with Tracey on June 29, 2006, he was unable to tell what her condition was because she was wearing her contact lenses.

⁴ At the pre-trial conference of this matter on October 17, 2007, any evidence regarding Tracey's visit to Dr. Connor approximately two weeks before trial was excluded by the district court because it was new and undisclosed medical evidence (App; 23-26).

Accordingly, she would have to come back to be examined with her contact lenses out (App. 17; DE E, 91: 25 to 92:3).

- Regarding limitations from activities due to her eye condition, Dr. Price replied that she should not be a race car driver, should not work around any machinery with her fingers, and should not be a truck driver at night, although some people do have jobs driving trucks at night with the same vision, but he did not recommend it (App. 18; DE E, 97: 8-23).

After reading Dr. Price's deposition, the Wallaces then called Eric Wallace. He testified as follows:

- The weekend following the procedure, Tracey laid around the house with her eyes shut or dark glasses on and tried to keep the house as dark as possible (App. 57).
- Dr. Price was Tracey's primary caregiver for her eyes (App. 58).
- There were two to four times Tracey got "caught" driving home from work after it turned dark (App. 60).
- Dr. Price did say that the left eye was healed and if there were problems with glare and halo they had to be related to the right eye (App. 61).
- Tracey had a history of scratched corneas, approximately six to seven months prior to seeing Dr. McGlothan (App. 62).
- Dr. Price never told Tracey she could not drive at night (App. 63).

Next, Tracey Wallace testified as the last witness for the Wallaces. She testified as follows:

- Tracey had not sought treatment for her eyes for more than two and one half years (App. 66).
- Tracey initially denied any pre-existing eye problems, stating that her eye problems all started after the LASIK procedure (App. 65; Trans., 223: 4-7).

- Tracey did not follow up on any of the recommendations Dr. Price made with respect to things that could be done for the right eye to help improve vision (App. 73).
- Tracey acknowledged that it was untruthful to state on her 2006 answers to interrogatories that she was continuing to seek treatment for her eyes, when she was not (App. 66).
- Tracey acknowledged that she was untruthful on her July 20, 2002, sworn affidavit to the Illinois Secretary of State when she denied having any physical condition that would interfere with safe driving, despite stating in her deposition that had she been asked such a question she would have answered affirmatively (App. 67-68, 141-143).
- The weekend after the LASIK procedure Tracey did not go anywhere or do anything. She stayed home the entire time with the drapes drawn and the lights dimmed (App.69-70).

With regard to the issue of whether the conditions allegedly caused by the subject LASIK surgery were preexisting conditions, Tracey testified as follows:

Q. How about the second page of Dr. Conner's exhibit there, ma'am? It's page B2 in the exhibit book. Left-hand side about halfway down, you were asked the question, "Are you bothered by glare or reflection, particularly when driving at night?" Do you see that question?

A. Yes.

Q. And on 4/29 [April 29, 2002], the first time you saw Dr. Conner, you told him that, correct?

A. Yes.

Q. How did you know, ma'am, that you were bothered by glare or reflections -- I want to make sure I have it right -- that you were bothered by glare or reflections, particularly when driving at night if you had been home with the shades drawn all weekend long and pretty much ever since you had this surgery?

A. I've always had problems with it, and it's just been aggravated since the surgery.

Q. So you're telling us now, today, in October of 2007, that you've always had trouble with glare or reflections, particularly when driving at night?

A. Yeah, and the surgery has aggravated it.

Q. So now, in October of 2007, you're telling us for the first time that this is an aggravation of a condition you had before you ever had LASIK surgery?

A. It wasn't as bad.

(App. 32-33).

At the close of plaintiffs' case, the Wallaces' asked the court to take judicial notice of Tracey's life expectancy of 44.72 years (App. 74). Dr. McGlothan objected because there was no evidence to establish permanency, a pre-requisite to instructing on life expectancy (App. 74). The court overruled the objection (App. 74).

After the Wallaces rested, Dr. McGlothan, indicated he had a motion to make outside the presence of the jury (App. 75). The district court stated the motion would be taken up later and asked Dr. McGlothan to proceed with his case (App. 75).

Dr. McGlothan called Gary Fitzgerald, M.D., Tracey's primary care physician (App. 75). Dr. Fitzgerald testified as follows:

- On July 26, 2001, Tracey saw him for corneal abrasions that had been treated in the emergency room (App. 76).
- Dr. Fitzgerald saw Tracey on July 2, 2002, eight to nine weeks after the LASIK procedure, for complaints of aches and pains and fatigue, and she never mentioned the LASIK procedure (App. 77, 110).
- Dr. Fitzgerald also saw Tracey on November 7, 2002 for depression that she related to stress and tension at work. He has no notes indicating she ever told him about the problems with her eyes, including any information regarding restrictions in driving at night (App. 78-79).

Finally, Dr. McGlothan called Maurice John, M.D., an independent medical examiner, who evaluated Tracey on September 29, 2004 (App. 80). Dr. John testified:

- The left cornea looked even better than the right and on the left cornea there were little microdot opacities. He did not know if these were from the foreign bodies from the washout by Dr. Price but they were benign and the visual axis looked fine (App. 81).
- Dr. John performed a hard contact lens test, which serves as a perfect correction for the eyeball because it smoothes out the eye and eliminates a bumpy cornea. With this test a patient's vision should go to 20/20. In Tracey's right eye she had measurements of 20/40. When the hard contact lens was put in her vision went to 20/20. However, in the left eye, which had the better looking cornea, the vision went from 20/30 to 20/40, which put up a red flag (App. 82-84).
- Dr. John did a visual field test on the right and left eyes. The results indicated a lack of effort on the person being tested, also a red flag (App. 85).
- After his examination, Dr. John concluded that Tracey was capable of seeing much better than the tests indicated and there was no medical explanation for her test results. His conclusion was that she had a lack of effort and was not trying her best (App. 86-87).

After the testimony of Dr. John, Dr. McGlothan rested his case. He then moved for entry of judgment in favor of Dr. McGlothan pursuant to Fed. R. Civ. P. 50 on the issue of permanency (App. 88). Dr. McGlothan argued there was no evidence indicating any degree of permanency to the injury to the left eye (App. 88-91). Dr. McGlothan argued that medical testimony is required to prove proximate cause and damages and that here the Wallaces failed to establish a permanent injury or a permanent restriction from a physician prohibiting Tracey from driving at night (App. 88-91; Trans., 349-352). The defense argued that the undisputed expert testimony at trial also showed the left eye was healed and no expert quantified the injuries relating

either to the left eye or the right eye (App. 88-91). The district court denied the defendant's Rule 50 motion for judgment as a matter of law (App. 91).

The jury subsequently found in favor of the Wallaces and awarded Tracey damages in the amount of \$555, 813.57 and Eric damages totaling \$122,980.00 (SA, 2-8; D, 114-116).

Dr. McGlothan filed post trial motions pursuant to Fed. R. Civ. Pro. 50(b), 59 and 60 (D 117, 119-120). The court denied these motions and the jury verdict stood (SA, 9; D 122).

SUMMARY OF ARGUMENT

The district court sitting in diversity and bound by Indiana substantive law committed reversible error when it denied Dr. McGlothan's trial and post-judgment motions for judgment on the evidence. This was a jury trial limited to the issue of the nature and extent of damages proximately caused to Tracey's left eye only. The Wallaces claimed that the injuries to the left eye were permanent, and were manifested by Tracey's inability to drive at night for the remainder of her life. The Wallaces wholly failed to prove their case.

In an Indiana medical malpractice action, the plaintiff must prove, by expert testimony, that the defendant physician's conduct fell below the applicable standard of care and that the physician's care proximately caused a compensable injury. Here, the Wallaces failed to meet this burden, as their only two physician witnesses, Dr. Connor and Dr. Price, could not differentiate between whether the left eye or the right eye was causing Tracey's alleged complaints. Nor did either expert testify that Tracey could not

drive at night as a result of her left eye injury. Moreover, Dr. Price, the primary care physician treating Tracey for the post-LASIK complication, documented in his medical records that Tracey's left eye was healed and she should have no problems seeing out of the left eye. Therefore, because there was no legally sufficient evidentiary basis for a jury to find a permanent left eye injury, the district court should have granted judgment as a matter of law in favor of Dr. McGlothan.

Next, at trial, Tracey disclosed for the first time that the vision problems she complained of actually *pre-existed* the alleged malpractice in this case. Thus, instead of the LASIK surgery causing the claimed injuries, as alleged by the Wallaces throughout this case and confirmed repeatedly under oath in interrogatory responses and deposition testimony, Dr. McGlothan learned at trial that the LASIK surgery had, at most, aggravated a pre-existing condition.

Under Indiana law, when there is a pre-existing condition that is aggravated by a defendant's negligence, the defendant is only liable for the extent to which his conduct resulted in an aggravation of the pre-existing condition, and not for the condition as it was. Moreover, the plaintiff must establish, through expert testimony, an apportionment between the pre-existing condition and the extent of aggravation, or, alternatively, that these differences are unable to be determined. Of course, considering the "late disclosure" at trial of this pre-existing condition, the Wallaces presented no expert testimony necessary to prove the apportionment of damages required as a matter of law.

In addition, the admissibility of the expert testimony is governed by the Federal Rules of Evidence. The trial testimony by Tracey's treating physician experts must be relevant and reliable in order to be admissible. To meet the admissibility standard under Fed. R. Evid. 702, the opinion testimony must be based on sufficient data and on more than subjective beliefs or unsupported speculation.

Here, neither of the Wallaces' expert witnesses had ever considered Tracey's pre-existing eye problems when they testified as to the nature and extent of her alleged damages. Indeed, the Wallaces offered no evidence whatsoever quantifying the extent of any aggravation of the pre-existing conditions allegedly caused by Dr. McGlothan. Therefore, because of this missing critical information, the district court should have granted Dr. McGlothan's motion for judgment as a matter of law at trial, or his post-trial motions following the verdict, which addressed this insufficiency of reliable expert testimony issue.

Finally, because the Wallaces falsified their interrogatory answers, deposition testimony and initial trial testimony, regarding the pre-existing eye condition, Dr. McGlothan was denied his fundamental right to a fair trial, including his right to cross-examine the Wallaces' expert witnesses upon whose testimony this jury verdict rests. As such, Dr. McGlothan was unable to engage in appropriate discovery regarding the pre-existing condition and was unable to mitigate, quantify, or otherwise challenge the damages attributable to him, all because of Tracey's repeated and continued dishonesty.

The Wallaces had the burden to establish, by admissible evidence, permanent damages and the extent of any aggravation of a pre-existing condition. They failed to

do this. Moreover, Tracey committed perjury, violating the discovery process. These repeated and deliberate falsehoods and contumacious conduct require that this matter be reversed and remanded to the district court with instructions to enter judgment in favor of Dr. McGlothan.

ARGUMENT

I. THE STANDARD OF REVIEW.

The standard of review for the denial of a motion for judgment as a matter of law is *de novo*. *Wilson v. AM Gen. Corp.*, 167 F.3d 1114, 1119 (7th Cir. 1999). Rule 50 of the Fed. R. Civ. P. permits a court to grant a motion for judgment as a matter of law when “there is no legally sufficient evidentiary basis for a reasonable jury to find for [a] party on [an] issue.” Fed. R. Civ. P. 50. Moreover, because in this diversity case, the district court reached its legal conclusions which are the subject of this appeal based on its reading of state law, the appellate court, likewise, must review the decision *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225 (1991).

II. THE DISTRICT COURT ERRED IN DENYING DR. MCGLOTHAN’S MOTION FOR JUDGMENT AS A MATTER OF LAW, BECAUSE THE WALLACES FAILED TO PRESENT ANY EXPERT TESTIMONY PROVING TRACEY’S LEFT EYE INJURY WAS PERMANENT.

A. Applicable Law

1. Indiana Law Applies to the Substantive Matters in this Case.

This medical malpractice case was brought before the district court under federal diversity jurisdiction. 28 U.S.C. §1332. A federal court, sitting in diversity, must apply the substantive laws of the state in which it sits. *Lasley v. Moss*, 500 F.3d 586, 589 (7th Cir. 2007).

2. The Federal Rules of Civil Procedure Apply to an Evaluation of the Sufficiency of the Evidence.

In a diversity action, in which a party moves for Judgment as a Matter of Law, the Court must apply Fed. R. Civ. P. 50 standards to determine whether the evidence was sufficient. *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 343 (7th Cir. 1995). Under Rule 50(a), the Court can grant a party's motion for judgment as a matter of law if the Court determines that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on a dispositive issue. Fed. R. Civ. P. 50(a)(1). A court's inquiry, in reviewing a decision in regards to a motion for judgment as a matter of law, is limited to the question "whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed." *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 629 (7th Cir. 1996).

When considering a renewed motion for judgment as a matter of law after the jury verdict, the court must evaluate whether the evidence presented, based on the record as a whole, combined with all reasonable inferences drawn from the evidence, is sufficient to support the verdict when viewed in the light most favorable to the non-moving party. *Futrell v. J.I. Case*, 38 F.3d 342, 346 (7th Cir. 1994). There must be substantial evidence to support the jury verdict; a mere scintilla of evidence will not suffice. *Id.*

B. In an Indiana Medical Malpractice Action, the Plaintiff Must Prove Causation and Damages with Expert Testimony.

In an Indiana medical malpractice case, the plaintiff must prove that the defendant's conduct fell below the applicable standard of care and that the defendant's care proximately caused a compensable injury. *Chi Yo Hun v. Frye*, 880 N.E.2d 1192, 1201 (Ind. 2008); *Oelling v. Rao*, 593 N.E.2d 189, 190 (Ind. 1992). This generally requires expert testimony. *Chi Yo Hun, supra*, 880 N.E.2d at 1201; *Etienne v. Caputi*, 679 N.E.2d 922, 924 (Ind. Ct. App 1997).

Here, the Wallaces' medical malpractice suit alleged permanent injury and damages based on Tracey's claims that she cannot drive a car at night. However, the Wallaces failed to present any necessary expert testimony (or documentary evidence) at trial to support these claims, even when viewed in a light most favorable to the Wallaces.

The Wallaces presented two medical witnesses at trial, Donald Connor, D.O., Tracey's optometrist and Francis Price, M.D., Tracey's ophthalmologist. In relevant part, the testimony of these "expert" witnesses established only the following: (1) there was an injury to the left eye caused by the subject LASIK procedure; (2) this injury required treatment and care to the left eye for several years; and (3) the injury to the left eye was healed by June, 2006.

Tracey saw Dr. Connor from April 26, 2002 through March 10, 2005, primarily for contact lens and glasses prescriptions (TE B).⁵ On October 14, 2002, nine months prior to the corrective PRK procedure performed on Tracey's left eye by Dr. Price, Dr. Connor did write a note to Tracey's employer stating that her hours should be adjusted so that she didn't have to drive at night (App. 96). However, after Tracey switched jobs, and after the remedial PRK procedure, no similar requests were ever made. Indeed, at her last visit to Dr. Connor on March 10, 2005, Tracey only complained of dryness, without specifying a particular eye, and indicated on a questionnaire that her vision was "good" (App. 97-98).

Tracey saw Dr. Price between April 30, 2002 and June 29, 2006, well over one year longer than she saw Dr. Connor (TE C). At her final June 29, 2006 visit, Tracey's subjective complaints included problems driving at night, blurred vision without contact lenses, and ghosting and shadowing effects, more prominent around lights (App. 106-109). Of note, she could not specify whether the problems were caused by the treated left eye or the untreated right eye (App. 106-109). During the slit lamp (microscopic) exam of the subject left eye, Dr. Price noted that the cornea appeared clear

⁵ Tracey also saw Dr. Conner in October of 2007, approximately one week before trial. The records of this visit were deemed inadmissible by the district court, as a number of tests were performed by Dr. Connor immediately before trial which had never been previously done on Tracey. The district court determined this new and undisclosed medical evidence conducted after the close of discovery was inadmissible (App. 23-26; Transcript of Pre-Trial Hearing on October 17, 2007, pp. 4-7)

(App. 108).⁶ Moreover, there is **no evidence of any scarring or aberrations on the left eye** documented in Dr. Price's note at this final visit. Indeed, Dr. Price informed Tracey: "I would hope that with the contact lens you would see well in the left eye. There is no haze in the left eye, you should be seeing well in the left eye with the contact lens" (App. 109). Nowhere in Dr. Price's records does he ever indicate that Tracey should not drive at night or otherwise restrict her activities.

Likewise, Dr. Price never indicates in the medical records that Tracey has any permanent injury to her left eye; instead, he continually noted improvements in the left eye, up to and including his final impression in June, 2006, that her left cornea was clear and her vision should be fine (App. 108-109). Furthermore, even Tracey admitted to Dr. Price, at this last visit, that she could not tell which eye was causing the visual disturbances she was claiming, the left eye or the right eye (App. 108). Absent any testimonial or documentary evidence in this regard, the jury was simply left to speculate or guess on these crucial evidentiary points.

It is indisputable that Dr. Price's records fail to support any claim of permanent damage to Tracey's left eye. Instead, this evidence demonstrates that the left eye was healed and there were no physical finding to support continued visual problems in that eye. Moreover, while Dr. Price offered additional treatment for the right eye, there was

⁶ While the right eye is not at issue in this case, the June 29, 2006 examination of the right eye noted some rough epithelium (scar tissue) in the right cornea that Dr. Price attributed to Tracey's extended use of her contact lens (App. 16-17).

no mention of any further treatment that needed to be done on the left eye (App. 108-109).⁷

At trial, the Wallaces presented Dr. Price by reading portions of his discovery deposition to the jury. In his deposition, there was absolutely no testimony establishing that Tracey's left eye injuries were permanent or restricted her ability to drive at night. Rather Dr. Price testified that with the slit lamp (microscopic) exam of the **right** eye, he noticed scarring and irregularities, which were congruent with her subjective complaints of ghosting and starbursts at night and difficulty driving (App. 15). He also stated that he did not know if the ghosting was in both eyes and he never did anything to determine which eye was causing her complaints (App. 15). Finally, Dr. Price noted he would only be able to tell if Tracey's problems were quiescent or if she was continuing to get better if she returned after keeping her contact lenses out for 2 to 3 days (App. 17). Unfortunately, Tracey never returned to Dr. Price for this determination and so there is no way to know if there was any further improvement (App. 17, 108-109; DE E, 91: 25 to 92:3; TE C, 151-152). Dr. Price's testimony and records were simply insufficient expert testimony to prove causation or damages.

At trial, the Wallaces relied solely on Dr. Connor's live testimony to establish the permanency of the left eye injury and Tracey's claimed inability to drive at night.

⁷ Dr. Price had offered Tracey treatment for her right eye, which upon examination on June 29, 2006 had some rough epithelium that Dr. Price attributed to her contact lenses. He noted under the "follow up" section of his office note that her right eye could be treated with a new technique, the Artemis exam, and she needed to leave her contact lenses out for 2-3 days prior to this. However, Tracey never returned for this recommended treatment (App. 108-109).

However, his testimony likewise fell short, in that he was unable to provide any evidence contradicting Dr. Price's June 29, 2006 evaluation and conclusion that Tracey's left eye had healed (App. 97-98; TE B, 106-107).⁸

At trial, Dr. Conner specifically testified that he had never seen a corneal injury from a LASIK procedure and that the treatment of a "buttonhole flap" complication was outside his realm of expertise (App. 44). Furthermore, Dr. Connor testified that he would defer to Dr. Price in terms of any available technologies to further treat Tracey (App. 53). Finally, and most strikingly, Dr. Connor testified that because he had not seen Tracey Wallace at any time around the time of Dr. Price's last visit, he had no basis to agree or disagree with Dr. Price's assessment that there was no reason why Tracey should not be seeing well in the left eye (App. 54). Accordingly, as a matter of law, the testimony of both Dr. Price and Dr. Connor, is wholly insufficient to meet the Plaintiffs' burden of proof.

In *Etienne v. Caputi*, 679 N.E.2d 922 (Ind. App. Ct. 1997), the plaintiff brought suit against a physician alleging a misdiagnosis of breast cancer. A medical review panel found there was a violation of the standard of care by the defendant, however, it did not cause the plaintiff's alleged damages. *Etienne, supra*, 679 N.E.2d at 924. The plaintiff's expert provided an affidavit stating that the misdiagnosis, three months prior to the actual diagnosis, had virtually no impact on the ultimate outcome. *Id.*

⁸ There were additional entries in Dr. Connor's records for March 15, 2005, March 31, 2005 and April 1, 2005; however these entries all related to the ordering of contact lenses and the distribution of contact lenses. The last record of any eye examination by Dr. Connor was on March 10, 2005)(TE B, 106-111).

Accordingly, the trial court granted summary judgment for the physician and the plaintiff appealed. *Id.* at 922. The court of appeals affirmed summary judgment holding that the plaintiff failed to establish the defendant physician caused the plaintiff's alleged injuries. In affirming the trial court's ruling, the court, noting that the plaintiff's expert only stated there was a slim chance of causation by Dr. Caputi's misdiagnosis, concluded that the plaintiff did not satisfy her burden to establish causation and the defendant's summary judgment was properly granted. *Id.* at 925.⁹

As in *Etienne*, the Wallace's failed to provide the necessary expert testimony to establish a permanent injury to the left eye. While Tracey still has subjective complaints related to her vision, there was absolutely no necessary expert testimony that this injury was permanent or related to the subject left eye. Rather, the medical records and testimony presented by the Wallaces established that the injuries to the right and left eyes continually improved throughout the time Tracey sought treatment up until June, 2006. Moreover, even Dr. Price admitted he did not know if the improvements had ceased, as Tracey never returned to see him, without her contact lenses in, as he had requested at her last visit (App. 17, 108-109).

While the records and testimony arguably suggest that Tracey still had subjective complaints of ghosting, glare and problems driving at night, the Wallaces never proved that Tracey's left eye was the cause of these problems. Instead, all evidence presented

⁹ *Etienne v. Caputi*, 679 N.E.2d 922 (Ind. App. Ct. 1997) has been overturned in regards to the holding on negligent infliction of emotional distress. The points of law relied on here still stand and have not been overturned.

at trial demonstrated that if these problems did exist, they were caused by the right eye, which was never treated due to Tracey's failure to return to Dr. Price for a further examination. Furthermore, neither of Tracey's physicians placed a permanent restriction on Tracey's ability to drive.

The district court erred in denying Dr. McGlothan's motion for judgment as a matter of law, because the Wallaces failed to prove, by required expert testimony, that Tracey's left eye was permanently damaged. Therefore, there was no legally sufficient evidentiary basis for a reasonable jury to find for the Wallaces. *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 629 (7th Cir. 1996).

III. THE DISTRICT COURT ERRED IN DENYING DR. MCGLOTHAN'S MOTIONS FOR JUDGMENT AS A MATTER OF LAW, BECAUSE THE WALLACES NEVER PRESENTED REQUIRED EXPERT TESTIMONY THAT HER CLAIMED LEFT EYE VISION PROBLEMS WERE PROXIMATELY CAUSED BY DR. MCGLOTHAN'S MALPRACTICE RATHER THAN A PREEXISTING CONDITION.

A. Expert Testimony is Required to Establish Whether a Claimed Injury is Attributable to Pre-Existing Condition or the Result of the Alleged Acts of Malpractice.

In order for a plaintiff to meet the burden of proof required in a malpractice action, the evidence must establish the element of proximate cause connecting the alleged negligent act with the resulting injury. *Dunn v. Cadiente*, 516 N.E.2d 52, 55 (Ind. 1987) (*reh'g denied*). In Indiana, a defendant is liable only for the extent to which his conduct has resulted in an aggravation of the pre-existing condition, and not for the condition as it was. *Cole v. Bertsch Vending Co., Inc.*, 766 F.2d 327 (7th Cir. 1985); *Alexander v. Scheid*, 726 N.E.2d 272, 284 (Ind. 2000).

In *Dunn v. Cadiente, supra*, the plaintiff slipped and fell at work suffering bilateral inguinal hernias. The defendant doctor surgically repaired the hernias, but two subsequent surgeries needed to be done for continued symptoms. During the third surgery, it was discovered that Mr. Dunn had a thrombosed right saphenous vein and was then diagnosed with deep venous insufficiency, for which he had to undergo extensive further treatment. Following three years of treatment, it was discovered Mr. Dunn suffered from a congenitally absent right inferior vena cava. The plaintiff's experts acknowledged that the vascular impairments suffered by the plaintiff were, to some extent, inevitable notwithstanding the alleged delayed diagnosis. *Dunn, supra*, 516 N.E.2d at 54.

A bench trial resulted in a judgment for the plaintiff, which he appealed based on an inadequate award of damages. After the Court of Appeals reversed the judgment and remanded the case for a new trial, the Indiana Supreme Court, on further review, affirmed the trial court's award, finding the trial court's award was sufficient absent a further causal connection between the alleged damages and the negligence. In reach this conclusion the Indiana Supreme Court stated:

It is axiomatic that, before liability can be imposed, there must be proof that the defendant's negligence proximately caused the plaintiff's harm. An essential element of recovery in a negligence action is that the injury be the proximate result of the defendant's negligence...

Just because there is proof that *some* of the claimed injury and loss was caused by the breach of duty does not necessarily mean that *all* damages resulted from the breach.

Dunn, supra, 516 N.E.2d at 55 (citations omitted). After stating this general rule on proximate cause, the Supreme Court instructed:

[However] a defendant is only liable “for the extent to which his conduct has resulted in an aggravation of the pre-existing condition, and not for the condition as it was.” Prosser, *Law of Torts*, 4th Edition, p. 262.

A pre-existing condition or susceptibility, if aggravated by a defendant's conduct, may result in a defendant's full liability for the resulting injury and loss. However, if the pre-existing condition, standing alone, independently causes injury and loss, a defendant will not be liable for such damages. ...

Where a logical basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which he has in fact caused, it may be expected that the division will be made. Where no such basis can be found and any division must be purely arbitrary, there is no practical course except to hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it. Prosser, *supra.*, p. 314.

Dunn, 516 N.E.2d at 56.

In *Dunn*, unlike the present case, the court (and the experts) had the benefit of knowledge as to the pre-existing problems and could factor that into their evaluation of causation and damages. The Indiana Supreme Court makes it clear that when a pre-existing condition is involved and a subsequent injury aggravates it, the damages allegedly caused by the defendant's negligence must be apportioned or, alternatively, the plaintiff must prove the absence of any basis for apportionment. Because Tracey failed to disclose her pre-existing condition, and none of her treators considered a basis from which to quantify her pre-existing vision problems from the alleged aggravation

of those problems, the Wallaces failed to prove that **all** (or any) of their damages resulted from Dr. McGlothan's alleged malpractice.

Of note, this case is distinguishable from *Dunn, supra*, as well as the other cases cited (*Cole, supra*, 766 F.2d 327 ; *Alexander, supra*, 726 N.E.2d 272, 284), because in those cases, *there was a disclosure* of the pre-existing condition and the rulings of the court were based on whether there was sufficient evidence to either support apportionment of damages resulting from the injury or not. Tracey attempted, of her own accord, to bypass her legal burden to prove the absence of a basis for apportionment by repeatedly denying her pre-existing condition. Without doubt, her failure to disclose her pre-existing condition and address it at trial, means she failed to establish the extent to which Dr. McGlothan's malpractice proximately caused, or more appropriately, aggravated, Tracey's injuries.

The question of a causal connection between a permanent condition, an injury and a pre-existing condition is a complicated medical question. *Topp v. Leffers*, 838 N.E.2d 1027, 1032 (Ind. Ct. App. 2005); *Roberson v. Hicks*, 694 N.E.2d 1161, 1163 (Ind.Ct. App. 1998). Whether the injuries a plaintiff is seeking recovery for are attributable to original injuries or resulted from the alleged acts of malpractice are questions of science necessarily dependent on the testimony of physicians and surgeons learned in such matters. *Brown v. Terre Haute Regional Hospital*, 537 N.E.2d 54, 61 (Ind. Ct. App. 1989). An expert's opinion is insufficient to establish causation when it is based only upon a temporal relationship between an event and a subsequent medical condition. *Outlaw v. Erbrich Products Co.*, 777 N.E.2d 14, 29 (Ind. Ct. App. 2003). Therefore, as a matter of

law, the Wallaces were required to prove, through expert testimony, the extent of the aggravation of Tracey's pre-existing condition and to quantify, or apportion, the liability attributable to Dr. McGlothan. They wholly failed to do this and instead chose to keep secret from the defense and from her treating physicians the fact that the limitations she claimed were caused by Dr. McGlothan's LASIK surgery actually pre-existed the subject surgical procedure.

B. Expert Opinion Testimony Must Be Based Upon More than Subjective Belief or Unsupported Speculation.

The admissibility of expert testimony in diversity cases is governed by the Federal Rules of Evidence. *Comer v. American Electric Power*, 63 F. Supp.2d 927, 930 (N.D. Ind., 1999). Expert testimony, in federal court, is governed by Fed. R. of Evid. 702 and 703. Under Rule 702 if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness, qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702. Moreover, the facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived or made known to the expert at or before the hearing. Fed. R. Evid. 703.

The trial judge must ensure that any and all scientific testimony or evidence admitted at trial is relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals*, 509

U.S. 579, 589 (1993). In addition, the trial court must also be the gate keeper for other non-scientific expert testimony, including the testimony of experts with specialized knowledge, who are not scientists. *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 141(1999). The gatekeeping inquiry of the court must be tied to the facts of a particular case. *Kumho*, 526 U.S. at 150. Rule 702 establishes a standard of evidentiary reliability and requires a valid connection to the pertinent inquiry as a precondition to admissibility. *Id.*

Under Rule 702 the word “knowledge” connotes more than subjective belief or unsupported speculation. *Daubert*, 509 U.S. at 589. Where the factual basis, data, principles, methods or application of an expert’s testimony is sufficiently called into question the trial judge must determine whether the testimony has “a reliable basis in the knowledge and experience of the relevant discipline.” *Kumho*, 526 U.S. at 150. In some cases the relevant reliability concerns may focus upon personal knowledge or experience. *Kumho*, 526 U.S. at 150. However, proposed expert testimony must be supported by appropriate validation, in other words, good grounds based upon what is known. *Daubert*, 509 U.S. at 589.

C. The Testimony of the Wallaces’ Experts was Inadmissible Because Tracey’s Pre-Existing Condition was not Considered.

On cross-examination, Tracey disclosed for the first time, despite being asked on multiple occasions throughout the discovery process, that the complaints she attributed to the injuries from the subject LASIK procedure, actually pre-existed her treatment by Dr. McGlothan:

Q. How about the second page of Dr. Conner's exhibit there, ma'am? It's page B2 in the exhibit book. Left-hand side about halfway down, you were asked the question, "Are you bothered by glare or reflection, particularly when driving at night?" Do you see that question?

A. Yes.

Q. And on 4-29 [April 29, 2002], the first time you saw Dr. Conner, you told him that, correct?

A. Yes.

Q. How did you know, ma'am, that you were bothered by glare or reflections -- I want to make sure I have it right -- that you were bothered by glare or reflections, particularly when driving at night if you had been home with the shades drawn all weekend long and pretty much ever since you had this [LASIK] surgery?

A. **I've always had problems with it, and it's just been aggravated since the surgery.**

Q. So you're telling us now, today, in October of 2007, that you've always had trouble with glare or reflections, particularly when driving at night?

A. **Yeah, and the surgery has aggravated it.**

Q. So now, in October of 2007, you're telling us for the first time that this is an aggravation of a condition you had before you ever had LASIK surgery?

A. **It wasn't as bad.**

(App. 71-72; Trans., 248: 11 through 249: 10).

Given this astounding revelation at trial, the testimony presented by Dr. Connor and Dr. Price should have been found inadmissible and excluded by the district court under Indiana substantive law and the Federal Rules of Evidence. *Roberson, supra*, 694 N.E.2d at 1163; *Brown, supra*, 537 N.E.2d at 61; Fed. R. Evid. 702, 703. Based on Tracey's

testimony, she had a pre-existing condition that was “aggravated” by Dr. McGlothan’s malpractice. Therefore, Dr. McGlothan can only be liable for the aggravation of that pre-existing condition. *Cole, supra*, 766 F.2d 327; *Dunn, supra*, 516 N.E.2d at 56. Pursuant to Indiana law, the Wallaces had to establish a causal connection between a permanent condition, an injury and a pre-existing condition through either the testimony of Dr. Connor and Dr. Price, or another expert. *Roberson, supra*, 694 N.E.2d at 1163; *Brown, supra*, 537 N.E.2d at 61. Moreover, if the Wallaces wanted to establish the absence of a causal connection between the Tracey’s alleged permanent damages and her pre-existing condition, the burden was upon them to do this. *Dunn, supra*, 516 N.E.2d 52 at 56.

Neither Dr. Connor nor Dr. Price testified as to these pre-existing problems and quantified the difference between the pre-existing problems and the aggravation of the problems. In their testimony, and earlier medical evaluation of Tracey’s injury, Dr. Connor and Dr. Price never considered the pre-existing problems that are a central issue to the question of damages and were the sole issue at trial. Because their testimony was based on insufficient foundational facts and data, critical to the question of causation and damages here, it was both unreliable and irrelevant and therefore inadmissible. Fed. R. Evid. 702, 703; *Daubert, supra*, 509 U.S. at 589-590.

While Dr. McGlothan is not questioning the qualifications of either Dr. Connor or Dr. Price to testify as to the alleged damages Tracey Wallace experienced, he is setting forth specific insufficiencies in the facts that they had available to them in arriving at their conclusions. Dr. Connor testified Tracey’s complaints of difficulty seeing in dim

light and driving at night were consistent with someone who has irregularities on the cornea of her left eye (App. 35). Of critical note, he also testified that he was unaware of any pre-existing condition as he never examined Tracey Wallace prior to his first visit with her following the subject LASIK procedure (App. 45). Furthermore, while Tracey did indicate on Dr. Connor's patient history forms (SA 11-12; App. 94-95), completed at her first visit with him, that she had similar problems with her vision, Dr. Connor stated that there is no record that he ever asked Tracey about the complaints she marked on the form, particularly complaints of trouble seeing at night, sensitivity to light and glare or reflection, as well as being bothered by glare and reflection when driving at night (App. 48-49).

Moreover, Dr. Connor agreed that there are other things besides the subject LASIK procedure that can cause a patient to have glare, halos and difficulty driving, such as optical system problems, the use of hard contact lenses and problems with the lens of the eye (App. 46-47, 50). While Dr. Connor indicated, at trial, that he ruled out optical system problems, he did not consider or rule out any of the others, nor did he differentiate the pre-existing problems versus the aggravation of the problems, in the context of these other factors that can cause the same complaints (App. 50; Trans. 107:13-22).¹⁰

¹⁰ Other evidence of pre-existing injury to the cornea that was never considered by Dr. Connor in his conclusions about damages, were corneal abrasions Tracey experienced prior to the subject April, 2002 LASIK procedure. She had a corneal abrasion to the right eye on April 16, 2001 and one to the left eye on July 25, 2001. (TE D, 8, 49-5).

While, Dr. Connor admitted that patients notoriously give incomplete histories, he did nothing with the information Tracey gave him regarding her pre-existing history of halos, glares and difficulty driving at night at her first visit (App. 52). Furthermore, Dr. Connor not only failed to quantify the difference between Tracey's pre-existing visual difficulties and any claimed aggravations, he totally discounted the pre-existing problems in his testimony. Therefore, his testimony as to the extent of her damages is unreliable and inadmissible as he never took into consideration the extent of the pre-existing visual problems when testifying as to the damages Tracey experienced to the left eye as a result of the subject LASIK procedure. *Roberson, supra*, 694 N.E.2d at 1163. As a matter of law, this "expert" opinion testimony is inadmissible and, in any event, insufficient to sustain the jury's verdict.

Unlike Dr. Connor, Dr. Price had absolutely **no information** regarding Tracey Wallace's **pre-existing condition**. The only history pertinent to her eyes that he was provided was information about the subject LASIK procedure. There is no reference whatsoever in his medical records, or in his deposition transcript, that Tracey ever told him of any pre-existing problems with her vision. Furthermore, during discovery Dr. McGlothan was unable to ask Dr. Price (or Dr. Connor) about any pre-existing condition, as Tracey denied the existence of a pre-existing condition up until her surprise disclosure at the very end of the Wallaces' case-in-chief.

Once Tracey's pre-existing condition was brought to the district court's attention, together with the fact that the testifying physicians had either not considered this information or had no knowledge of the pre-existing problems in forming their

conclusions, the testimony of Dr. Connor and Dr. Price should have been excluded and ruled inadmissible because it was unreliable and irrelevant pursuant to Fed. R. Evid. 702 and 703. Clearly, the only experts proffered by the Wallaces at trial simply lacked any proper factual foundation for their opinions, making their testimony little more than unreliable and unscientific speculation. *Comer v. American Electric Power*, 63 F. Supp. 927, 934 citing *Rosen v. CibaGeigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996). The district court, therefore, should have excluded this expert testimony in considering Dr. McGlothan's motion for judgment on the evidence or related post-trial motions.

If the district court properly ignored the purported testimony, the Wallaces would not have had sufficient evidence to establish causation or damages in this medical malpractice case and Dr. McGlothan, accordingly, would be entitled to judgment as a matter of law. Fed. R. Civ. P. 50; *Roberson, supra*, 694 N.E.2d at 1163. The district court committed reversible error when it refused to vacate the judgment on the jury's verdict because there was simply no valid expert basis upon which this verdict can rest.

IV. DR. MCGLOTHAN WAS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL BECAUSE HE HAD NO OPPORTUNITY TO CROSS EXAMINE THE WALLACES' EXPERT WITNESSES ABOUT THE AGGRAVATION OF TRACEY'S UNDISCLOSED PRE-EXISTING CONDITION.

A. A Fair Trial is a Fundamental Right of all Litigants.

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant as a minimal requirement by the United States Constitution. *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388, 393 (1938). This right to

a fair trial by jury is guaranteed by the Seventh Amendment of the Constitution, and codified in Fed. R. Civ. P. 38.

One essential principle of a fair trial is the right to cross-examine an adverse witness. Fed. R. Evid. 611. Indeed, cross-examination is so highly regarded as a mechanism for testing the meaning and limits of testimony, and for testing the knowledge, capacity, and truthfulness of witnesses, that it is considered a fundamental right of litigants. 3 Mueller and Kirkpatrick, *Federal Evidence* § 6:69 (3d ed. 2007). This right is recognized in civil cases where it has roots in our notions of due process. *Id.*

The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 176 (1970) (Black, J., concurring). Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. *Daubert*, 509 U.S. at 596.

B. Dr. McGlothan's Right to Cross-Examination was Violated By Tracey's Discovery Violations and Perjury.

At trial, it became evident, and indeed Tracey acknowledged, that she provided false testimony and discovery responses throughout the course of this case. For example, at Tracey's initial visit to Dr. McGlothan she indicated on her history form that she had trouble reading fine print, trouble driving at night and trouble driving in bright

sunshine (App. 93; TE A, 5). Likewise, at her first visit with Dr. Conner on April 29, 2002, she noted on her patient history form that she had trouble seeing at night, sensitivity to light and problems with glare and reflection, particularly when driving at night (SA 11-12; App. 94-95; TE B, 1-2).

As a result of this documented history, and despite required disclosure of a pre-existing condition under Fed. R. Civ. P. 26, Tracey was asked multiple times, while under oath, via formal written discovery and during her pretrial discovery deposition, about any eye problems that pre-existed the subject LASIK procedure. In sworn responses to Interrogatories, Tracey denied any preexisting eye problem (App. 121, 132; TE I and J, paragraphs 1.17).¹¹

Later, Tracey denied any history of vision problems pre-existing the subject LASIK procedure during her July 31, 2006 deposition. Even when asked specific questions regarding the patient history form she filled out at her first visit to Dr. Conner (SA 11-12; App. 94-95), she continued to deny any pre-existing conditions:

Q: Did you ever have problems with vision glare before you got operated on?

A: No.

Q: Did you ever have any problems with halos before you got operated on for your eyes?

A: No.

¹¹ Interrogatory Number 1.17 asked: **QUESTION:** Have you ever suffered other illness, injury, or damage to the areas of your body which you claim have been injured or damaged by the occurrences and circumstances alleged in your Complaint? If so, state the approximate date and nature of each such injury, and the name and address of any examining or treating physician or institution. **ANSWER: No.** (App. 121, 132)

Q: Did you ever have any type of visual problems or visual disturbances prior to your operation - -

A: No.

Q: - - other than the fact that you needed corrective lenses?

A: No.

(App. 21).

Finally, at the trial of this matter, consistent with all of her earlier sworn discovery responses, Tracey initially denied any pre-existing conditions:

Q. And it's your testimony those difficulties began just after Dr. McGlothan did the surgery in April of 2002 up until the present, October of 2007?

A. Correct.

(App. 65).

Notwithstanding these repeated sworn denials of any pre-existing eye problems, Tracey was next confronted with the patient history form she completed at Dr. Conner's office just five days after surgery together with the trial testimony by her husband, Eric, regarding the condition she was in after the subject LASIK procedure.¹² When confronted with this contradiction (e.g., how could she possibly know that she had difficulty with "halos and driving at night" if she was at home with the blinds drawn for the five days between Dr. McGlothan's LASIK surgery and her first visit to Dr.

¹² At trial, Tracey's husband Eric testified that in the five (5) days between Tracey's LASIK procedure and her first visit to Dr. Connor, Tracey laid around the house with her eyes shut or with dark glasses on and would try to keep the house as dark as she could (App. 57; Trans. 151:8-10). This was the first indication to the defense that Tracey's vision problems, documented on Dr. Connor's form, pre-existed the aborted LASIK procedure rather than started after the procedure as the Wallaces had consistently maintained.

Connor on April 29, 2002), Tracey admitted, for the first time, that the problems she complained about and that she and her treating physician experts directly attributed to the subject LASIK procedure, actually pre-existed the procedure: “I’ve always had problems with it, and its just been aggravated since the surgery.” (App. 71-72).

Because Tracey failed to disclose (and instead secreted) these pre-existing problems, in complete disregard of her obligation to do so pursuant to Fed. R. Civ. P. 26, 30 and 33, Dr. McGlothan was denied his fundamental rights to a fair trial and to cross-examine the Wallaces’ expert witnesses, specifically Dr. Connor and Dr. Price, about this material issue. Fed. R. Evid. 611; *Adickes, supra*, 398 U.S. at 176.

A parties’ right to cross-examination is hindered when another party commits a deliberate falsehood. *A.B.F. Feight Systems v. National Labor Relations Board*, 510 U.S. 317, 323 (1994). (“In any proceeding, whether judicial or administrative, deliberate falsehoods well may affect the dearest concerns of a party before a tribunal,” and may put the factfinder and parties “to the disadvantage, hinderance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation or other collateral means.” *ABF, supra*, 510 US at 323, citing *United States v. Norris*, 300 U.S. 564, 574 (1937)). If a calling party’s opponent cannot subject a witness to cross-examination for reasons that are not his fault, some remedy is necessary. If cross-examination is permanently blocked, the direct testimony should usually be stricken in both civil and criminal cases, or a mistrial declared if the direct testimony is critical and striking it would not be effective. 3 Koeller and Kirkpatrick, *Federal Evidence* § 6:69 (3d ed. 2007).

Here, Tracey's failure to disclose her pre-existing condition until the very end of the Wallaces' case-in-chief was a deliberate falsehood that went to the very core of her claim for damages. The Wallaces had ample opportunity to disclose this information and failed to do so when asked in written interrogatories and at deposition. Moreover, the failure to disclose cannot be construed as inadvertent because Tracey continued to perpetrate this falsehood, under oath while at trial, until she was forced into a corner with her own medical records and the testimony of her husband, Eric.¹³

False testimony in a formal proceeding is intolerable. It must neither be rewarded or condoned as it is a "flagrant affront" to the truth seeking function of adversary proceedings. *A.B.F. Freight Systems, supra*, 510 U.S. at 323. "Such wrongdoing is so inconsistent with the rudimentary demands of justice that it can vitiate a judgment, even after it has become final. *Id.* citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1937). Perjury should be severely sanctioned in every appropriate case. *Id.*

The sole issue of this trial was the damages Tracey and Eric sustained as a proximate cause of Dr. McGlothan's treatment of Tracey's left eye. Without the necessary information regarding the pre-existing condition, Dr. McGlothan was unable to properly cross-examine Dr. Connor or Dr. Price. Because Tracey only disclosed this

¹³ The Wallaces were apparently willing to say anything under oath in their efforts to obtain a favorable jury verdict. For example, on cross examination Tracey was compelled to acknowledge that she *falsely* answered sworn interrogatories ("Q: You think that's truthful in 2006 to tell us you're continuing to seek treatment for this situation? A: No, I don't.") (App. 66) Next, she again admitted that she was *untruthful* on her July, 2002 sworn application for an Illinois driver's license ("Q: I'm not asking if you remember it ma'am. You've seen it. Its got your signature. You told them, "No." Would you agree that that was untruthful? A: Yes, I guess.") (App. 68).

information at trial, Dr. McGlothan was unable to properly defend himself through additional discovery or depositions, retention of additional experts of his own, or cross-examination the Wallaces' experts. The failure of the Wallaces to allow Dr. McGlothan a reasonable opportunity to defend himself, by limiting his ability to cross-examine a witness in order to demonstrate how some of Tracey's conditions were pre-existing and, therefore, unrelated to Dr. McGlothan's treatment, constitutes reversible error. *Armstrong v. Gordon*, 871 N.E.2d 287, 296-297 (Ind. App. Ct. 2007) (*reh'g denied*). It is simply inconsistent with substantial justice because the Wallaces' misconduct directly implicated the heart of the matter the jury was asked to decide: the extent to which Tracey's damages were attributable to Dr. McGlothan's LASIK surgery. *Id.*

The fact that this case was allowed to proceed and a jury verdict entered and later upheld by the district court, in favor of the plaintiff, in light of Tracey's wilful, deliberate and contumacious conduct, is a denial of Dr. McGlothan's fundamental rights under the United States Constitution and therefore constitutes reversible error. *A.B.F. Freight Systems, supra*, 510 U.S. at 323; *Armstrong, supra*, 871 N.E.2d at 296-297.

C. Tracey's Conduct is Sanctionable Pursuant to Federal Rules of Civil Procedure.

When Tracey disclosed, for the first time at trial, that her alleged visual disturbances actually pre-existed the subject LASIK procedure, she indisputably violated the discovery requirements under the rules of trial procedure. Fed. R. Civ. P. 26, 30 and 33. There is no question that these rules are critical to the just and orderly disposition of lawsuits and that infractions of these rules should not be tolerated.

Otherwise, the rules will not be taken seriously, and eventually they may exist in name only, honored in the breach. *Kovilic Construction Co., Inc. v. Missbrenner*, 106 F.3d 768, 770 (7th Cir.1997).

Federal Rule of Civil Procedure 37(c) provides:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not disclosed. In addition to or in lieu of this sanction, the court, by motion and after affording an opportunity to be heard, may impose other appropriate sanctions.

These sanctions include the dismissal of the action or the rendering of a judgment in default against the party that failed to make the disclosure. Fed. R. Evid. 37(b)(2)(A-C) and 37(c)(1).

The United States Supreme Court has held that a case may be dismissed for discovery violations if the violations were done willfully, in bad faith or at the fault of the party whom is being charged with violating the discovery rules. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 640 (1976). Moreover, dismissal as a sanction must be available, not merely to penalize conduct warranting a sanction, but to deter those who might be tempted to such conduct in the absence of a deterrent. *Dotson v. Bravo*, 202 F.R.D. 559 (N.D. Ill. 2001), *aff'd*, 321 F.3d 663, 667 (7th Cir. 2003).

This Court has stated that dismissal of a case may be appropriate in any one of three instances: where the noncomplying party acted *either* with willfulness, bad faith or fault. *Marrocco v. General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992). Although

dismissal with prejudice is a harsh sanction which should usually be employed only in extreme situations, where, like here, there is a clear record of delay or contumacious conduct, dismissal is appropriate. *Id.* A lesser sanction need not be explored if the circumstances justify imposition of dismissal. *Dotson, supra*, 321 F.3d at 667.

While the Seventh Circuit Court has upheld dismissal of numerous cases relating to discovery violations, there is no case directly on point with the facts currently before the Court, e.g. a plaintiff's wilful, deliberate and contumacious conduct in concealing material evidence throughout discovery and up to and including the trial. See e.g. *Marrocco, supra*, 966 F.2d 224 (case dismissed for violation of protective orders); *Hindmon v. National-Ben Franklin Life Insurance Corp.*, 677 F.2d 617 (7th Cir. 1982) (complaint dismissed for failure to appear for deposition and failure to follow order compelling discovery); *Locitite v. Fel-Pro, Inc.*, 667 F.2d 577 (7th Cir. 1981) (plaintiff's case dismissed for failure to produce relevant documents). The lack on any legal authority directly addressing the Wallaces' misconduct perhaps best underscores the outrageous nature of the concealment by the Wallaces of this critical information.

Of note, the Tenth Circuit Court of Appeals has affirmed the dismissal of a case in which the plaintiff provided false and misleading discovery answers regarding her pre-existing history of lower back pain. *Archibeque v. Atchison, Topeka and Santa Fe Railway Company*, 70 F.3d 1172 (10th Cir. 1995). In *Archibeque*, the plaintiff filed a complaint for work related back injuries under the Federal Employers Liability Act. In answers to interrogatories and a discovery deposition, the plaintiff stated she had no recollection of having prior back injuries. It was later discovered, prior to the trial of the

matter, that the plaintiff indeed had an extensive history of seeking treatment for lower back injuries. *Id.* In addressing the appropriate sanctions to impose against the plaintiff, the Tenth Circuit considered the fact that the plaintiff never amended her discovery responses, nor explain her conduct. Accordingly, the court held that the plaintiff's actions irreparably prejudiced the defendant in their preparation of a defense and seriously interfered with the judicial process. *Id.* at 1174.

Adopting the Supreme Court's analysis in *National Hockey, supra*, the Tenth Circuit, in evaluating the appropriate sanctions to be imposed, noted that *due process* required that a discovery violation must be predicated upon willfulness, bad faith or fault by the petitioner. *Id.* at 1174. The *Archibeque* court determined that the plaintiff's conduct fulfilled these requirements and therefore affirmed the district court's dismissal of the case. *Id.* at 1175.

Here, Tracey knowingly falsified her written interrogatory answers relating to any pre-existing condition (App. 121, 132; TE I and J, 1.17). Knowingly incomplete and misleading answers to written interrogatories constitutes perjury and fraud. *Dotson, supra*, 202 F.R.D. at 572. While credibility and veracity issues are among ultimate factually disputed issues in a trial, and are not to be resolved beforehand or otherwise be used as a basis for sanctions, admitted perjury, as happened here, is quite another matter. *Id.*

Next, Tracey also knowingly and willfully testified falsely during her deposition regarding her pre-existing conditions (App. 21). Then, her conduct became yet more wilful, offensive and egregious when, as set forth, *supra*, in that she committed perjury

during the trial of this matter (App. 65, 71-72). As a direct result of this pre-trial and trial misconduct, Dr. McGlothan was denied his fundamental right to cross-examine Dr. Connor and Dr. Price. The defense simply could not attempt to show that the injuries claimed by Tracey were not *caused*, but rather were than *aggravated* by Dr. McGlothan, as a way to mitigate the alleged damages. Tracey's misconduct interfered with and obstructed the "judicial process" - a process which "clearly includes a party's right to full, complete and truthful discovery." *Dotson, supra*, 202 F.R.D. at 573, citing *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama on September 22, 1993*, 136 F.Supp.2d 1251, 1258 (S.D. Ala.2001).

In situations of fraudulent and egregious misconduct, which goes to the heart of the triable issues in the case and affect the orderly administration of justice and the dignity of the courts, the defendants need not quantify their harm or prejudice. *Dotson, supra*, 202 F.R.D. at 573. Willful deceit and conduct otherwise utterly inconsistent with the orderly administration of justice is prejudicial, if, as here, the deceit relates to the merits of the controversy. *Id.* The harm to Dr. McGlothan must be presumed because it is intrinsic to our truthfinding adversary system and, therefore, is intangible and immeasurable. *Id.* The defendants have a right to expect that if they abide by the rules, the opposing party will also. *Id.*

The only issue at trial was whether the Wallace's damages, which were based on an alleged permanent left eye injury to Tracey, rendered her unable to drive at night. The expert witnesses called by the Wallaces to establish these damages were Dr. Connor and Dr. Price. Because Dr. McGlothan had no knowledge of Tracey's pre-existing

condition, despite multiple attempts to confirm Tracey's reported history, he was prejudiced at trial because he was unable to cross-examine the Wallaces' experts and thereby attempt to quantify the extent of the aggravation of the condition that was attributable to the subject LASIK surgery.

When a deliberate falsehoods is told in proceedings, a court cannot allow such conduct to go unchecked. Turning a blind eye to false testimony erodes the public's confidence in the outcome of judicial decisions, calls into question the legitimacy of courts, and threatens the entire judicial system. *Dotson, supra*, 202 F.R.D. at 573.

Dr. McGlothan was denied his fundamental right to a fair trial and cross-examination as a direct result of Tracey's deliberate, wilful, contumacious and egregious conduct and her blatant disregard for the judicial process and system. As a direct result of this misconduct, in falsifying discovery answers and giving false testimony while under oath before and during this trial, the testimony of Dr. Connor and Dr. Price was simply insufficient to prove causation, thereby leaving the Wallaces with no expert testimony to prove the nature and extent of Tracey's damages.

While the inadmissibility of the proffered expert testimony is, by itself, grounds for granting the defendant's motion for judgment as a matter of law, Tracey's conduct underlying this insufficient evidence is sanctionable by dismissal of this case.

CONCLUSION

For the foregoing reasons, defendant, Jonathan S. McGlothan, M.D., requests that this Court reverse and enter judgment as a matter of law in his favor, dismiss the matter with prejudice as a penalty for Tracey Wallace's discovery violations, and assess costs against the plaintiffs and for such other relief as this Court deems proper.

Respectfully submitted,

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CERTIFICATES

RULE 32(A)(7) CERTIFICATE OF COMPLIANCE

This brief complies with the type-column limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 13046 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii), according to MicroSoft Word. The undersigned also certifies that the accompanying disk is virus free.

RULE 30(D) CERTIFICATE

All materials required by Cir. R. 30(a) and (b) are included in the required short appendix.
