No. 07-4059

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JONATHAN S. McGLOTHAN, M.D., Defendant-Appellant, v. TRACEY WALLACE AND ERIC WALLACE, Plaintiffs-Appellees,	Appeal from the United States District Court for the Southern District of Indiana No. 2:05-CV-262 The Honorable Larry J. McKinney Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLEES
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CIRCUIT COURT 26.1 DISCLOSURE STATEMENT

Appellate Court No: 07-4059

Short Caption: McGlothan v. Wallace

1. The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App.P.26.1 by completing the item #3)
   Tracey Wallace and Eric Wallace

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
   Hunt Hassler & Lorenz LLP

3. If the party or amicus is a corporation:

   a. Identify all its parent corporations, if any; N/A

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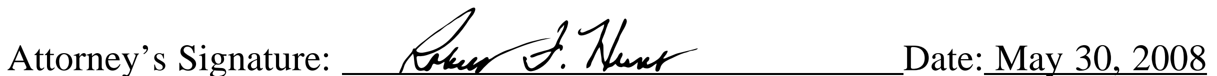

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JURISDICTIONAL STATEMENT

District Court Jurisdiction

The Plaintiffs/Appellees, Tracey Wallace (hereinafter referred to as "Tracey") and Eric Wallace (hereinafter referred to as "Eric") (collectively hereinafter referred to as the "Wallaces"), accept the District Court Jurisdictional Statement of the Defendant/Appellant, Jonathan S. McGlothan (hereinafter referred to as "McGlothan")[1] The Appellees agree that the Jurisdictional Summary in Appellant's Brief is complete and correct.

Appellate Court Jurisdiction

The Wallaces accept the Appellate Court Jurisdictional Statement of McGlothan. The Appellees agree that the Jurisdictional Summary in Appellant's Brief is complete and correct.

Timeliness of Appeal

The Wallaces accept McGlothan's statement as to the timeliness of this appeal.

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[1] The Wallaces also will utilize herein the abbreviations adopted by McGlothan in his Brief, as set out in Footnote 1 to the District Court Jurisdictional Statement. In addition, thereto, however, the Wallaces have submitted a Supplemental Appendix. References to it will be abbreviated as "Supp. App."

ADDITIONAL ISSUE PRESENTED FOR REVIEW

Did McGlothan forfeit (or waive) his right to assert that the District Court erred in denying his Motion for Judgment as a Matter of Law pertaining to a claim of a pre-existing condition, by virtue of the fact that such a basis for the motion was not mentioned when making it at trial?

STATEMENT OF THE CASE

The Wallaces accept the Statement of the Case as presented by McGlothan. However, they would add the following:

At the time of trial, when moving for judgment as a matter of law pursuant to Fed.R.Civ.P.50(a), the basis given for the motion was the claimed failure of the Wallaces to produce evidence of permanent injury to Tracey's right eye. (Trans., 349) (App. 88);

When post-trial motions were filed by McGlothan, on November 5, 2007, a Rule 50(b) motion was made in which the same ground was asserted as that made in the Rule 50(a) motion. (DE 2.)(Supp. App. 42.)

A post trial Rule 59 motion was filed by McGlothan, claiming that the Trial Court should grant a new trial because the Wallaces had failed to produce expert testimony pertaining to whether the injury to Tracey's left eye was proximately caused by McGlothan's malpractice rather than a pre-existing condition. (DE

3)(Supp. App. 45.)

STATEMENT OF FACTS

The Wallaces accept the Statement of Facts of McGlothan, with the following exceptions, and/or additions:

Background to this Litigation

On June 29, 2006, during her last visit with Dr. Price, when Tracey reported continued "ghosting" at night she stated that this ghosting was occurring with regard to her left eye. She also told Dr. Price that she could not tell if it was also occurring in her right eye. (App.108-109.)

Trial Testimony Regarding the Left Eye Injury

At trial, Dr. Connor testified as follows:

- When examining both of Tracey's eyes at the time of his first visit with her in April of 2002, he measured the reflection coming off of the cornea and found that it was all distorted. Instead of being smooth and round when he looked at her cornea he saw waves and an irregular distortion of them. (Trans. 67-69.) (Supp. App. 8.)

- He expected that Tracey would have had continually from the time of the aborted LASIK surgery visual problems seeing in dim light and driving at night because of oncoming headlights. This was due to the bump that he observed on the flap which caused the distortion. (Trans. 75 & 76.) (Supp. App. 11.)

- At the time that Dr. Price last saw Tracey Wallace, on November 4, 2003, her left eye had not returned to a normal condition. (Trans. 83.) (Supp. App. 13.) (Trans. 85.) (App. 35.)

- Tracey still has irregularities on the cornea of her left eye, which are consistent with difficulty seeing in dim light and driving at night. (Trans. 85.) (App. 35.)

- Based on seeing Tracey less than a month before the trial, he observed that the only change in her condition since his examination conducted in 2003 was that she had become more stable, but the irregularities and distortions, the aberrations, were still present. (Trans. 86.) (App. 36.)

- Someone who has corneal aberrations has difficulty seeing in dim light or with oncoming headlights. (Trans. 87.) (Supp. App. 16.)

- The prognosis for Tracey's visual problem when he first saw her was poor. (Trans. 88.) (Supp. App. 17.)

- Whenever there is an injury or surgery to the cornea, it will gradually improve, and after six months to a year, it is as good as it is going to get. Normally, it does not heal any beyond that. There will not be any further improvement for Tracey concerning the problem with the dim light driving situation. (Trans. 131.) (Supp. App. 20.)

- Based our their communications, at the time of his last office visit with Tracey, Dr. Price was still seeing an irregular surface of Tracey's cornea, and Dr. Price did not expect the scarring to change. (Trans. 132.) (Supp. App. 21.)

- There is going to be no further improvement in Tracey's vision. (Trans. 134.) (App. 53.)

- Tracey Wallace reported to Dr. Price, when she saw him in June, 2006, that her left eye was still ghosting at night, and that she could not tell if a car was in her lane or someone else's lane. She could not tell if the right eye was also making ghosting. (Trans. 137-138.) (Supp. App. 23.)

- Dr. Connor prepared a report to Tracey's employer in September of 2002 in which he advised that Tracey should not be driving at night. (Trans. 88.) (Supp. App. 17.) (App. 96.)

Testimony of Dr. Maurice John

Dr. John testified at trial as follows:

- The condition of the healing Tracey Wallace's eyes was as good as it was going to get when he saw her almost three years before the trial. (Trans. 346-347.) (Supp. App. 34.)

SUMMARY OF ARGUMENT

The contention of McGlothan that the District Court erred in failing to grant his Federal Rule of Civil Procedure 50(a) Motion for judgment on the evidence because there was no evidence presented at trial of permanent injury to Tracey's left eye is wholly without merit. Three experts and Tracey provided this testimony and evidence. Dr. Donald Conner, Tracey's optometrist, gave his testimony to that effect, and McGlothan's counsel in examining him expressly acknowledged that he did. Dr. Francis Price, Tracey's ophthalmologist, likewise testified. Even McGlothan's own expert, Dr. Maurice John, gave such an opinion in a written report which was introduced by McGlothan into the evidence, and in the form of his reaffirmation of that opinion in his cross-examination testimony at trial.

In addition, because the objective nature of Tracey's left eye injury, that is, it was seen by all of the physicians who examined her eyes, she was competent

under Indiana law to testify about the effects of it. She, too, told the jury that her left eye injury was a permanent condition.

Based upon all of this evidence, not only was there the minimal, inferential basis required for a reasonable jury to reach the conclusion that there was permanent injury, there was direct testimony on the subject from numerous witnesses. The Rule 50(a) Motion of McGlothan on the issue of permanency was properly denied by the District Court.

McGlothan also seeks to have this Court reverse the decision of the District Court for a failure to grant a Rule 50 Motion for judgment on the evidence on another ground. This is the claim that there was a pre-existing condition in Tracey's left eye, and that the jury should not have been allowed to proceed to make a finding on the damages without testimony regarding it. McGlothan has forfeited, or waived, the right to make such a motion in that it was not presented in any way at the trial, either in the form of such a motion, or in any other manner such as argument, summary judgment motion, or the motion in limine.

While McGlothan first sought to argue that there was a pre-existing condition in support of his post-trial, Rule 50(b) Motion renewing the trial motion, this position was never stated in the motion itself. The right to present this has been forfeited and/or waived.

Aside from the fact that the claim of McGlothan has been forfeited, or waived, there was no evidence that Tracey had a pre-existing condition regarding her left eye. McGlothan's entire argument is based on the fact that she filled out a form in her optometrist's office which contained a question as to whether she was "bothered by glare or reflection, particularly while driving at night", and that she answered affirmatively. No expert witness, nor Tracey, said that she had a pre-existing condition. As a consequence, Tracey had no burden of proving the absence of such condition, but McGlothan would have been required to assert it as an affirmative defense in order to raise it at trial, which he did not do.

Both of Tracey's expert witnesses testified that following the aborted LASIK surgery, Tracey could no longer safely drive at night. There was no evidence at all that was the circumstance before the surgery, and Tracey testified that she had always done so.

Although he argues to the contrary, the evidence concerning Tracey having completed the form for Dr. Price was in the possession of McGlothan for years prior to the trial of this action. It was not, in any fashion, newly discovered or surprise information. He had the ability and the opportunity to cross examine all of the witnesses regarding that evidence.

In the last, and largest, section of the Argument, McGlothan attempts to

create a new appellate remedy. Doubtless unaware of the short-comings of his arguments with respect to the other issues sought to be presented, this request for relief appears to be a statement that the District Court simply committed an error that he asserts was serious enough to require reversal. He also gives no guidance as to the standard of review by which the Court should be guided.

McGlothan acknowledges that neither this Court, nor any other court, has recognized that this type of appellate relief exists for what he claims has happened here. That is because of the recognized need to have the District Court be given the opportunity to consider objections, or motions prior to having them reviewed on appeal. Here, McGlothan gave the District Court no such opportunity at all. Because McGlothan made no objection, argument, or request to the District Court, he may not now be heard to claim that the Court generally erred in some respect. He should be denied the relief which he seeks, that is, to have this Court create a never before announced basis for the reversal of a District Court's decisions.

McGlothan was also not denied the opportunity to cross examine any witness at trial. His assertion that he was is incorrect. He simply never took the opportunity to examine such witnesses after he purportedly learned of new evidence during the testimony of Tracey. He could have re-called Dr. Connor to the stand, and/or requested a continuance of the trial to obtain further testimony

from Dr. Price. He did not do either, nor did he ask for any other form of relief, including an admonition to jury regarding considering the evidence, nor ask that the Wallaces be sanctioned for their claimed non-disclosure of information. By virtue of McGlothan's counsel making the conscious decision not to do anything, he has forfeited, or waived, all rights to present this argument on appeal.

Further, there was also no perjury or misrepresentation on the part of Tracey. By examining her testimony at trial, her deposition testimony and her written discovery answers, it is seen that they are basically consistent and that McGlothans' counsel's characterization of her words is inappropriate. To the extent that any inconsistencies were found to be present by the jury , it was its role to reconcile them. They plainly did so.

ARGUMENT

I. THREE MEDICAL EXPERTS AND TRACEY PRESENTED THE JURY WITH EVIDENCE OF HER PERMANENT LEFT EYE INJURY.

Within Section I(B) of the Argument portion of McGlothan's Brief, he has asserted that the Court should reach a different decision than that made by the District Court in this case and grant the Rule 50 Motion, which he made during the trial requesting a judgment as a matter of law. The basis of the Motion, which was both given at trial and in its reiterated post trial form, was that the jury should

not have been allowed to decide this matter because the Wallaces have " . . . failed to present any necessary expert testimony (or documentary evidence) at trial . . ." to support a claim that the damage to the Plaintiff's left eye, that was caused by the defendant, was, in fact, permanent. (McGlothan Brief, page 22.).[2] McGlothan says that this claimed deficiency is fatal to their case "even when viewed in a light most favorable to the Wallaces." (McGlothan Brief, page 22) and, presumably, (although not mentioned by McGlothan) when drawing all reasonable inferences from the evidence.

McGlothan goes on to state that the Wallaces' failed to produce such evidence, in the form of the expert witness testimony which was introduced in their case-in-chief, (McGlothan Brief page 4), and that this bars the Wallaces from having a jury consider the issue. McGlothan remains as wrong in this assertion now as he was at the time when it was made at trial.

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[2] Of course, there is no ability whatsoever for McGlothan to know that the jury made any award at all on the basis of a permanent injury to Tracey Wallace's left eye. It was well within the jury's prerogative to decide that the injury to that eye which McGlothan claims was healed within a few years (which contention the Wallaces absolutely dispute), and that the accompanying pain and suffering which was incurred, could have the value of the amount that it determined to award Tracey. Likewise, it was within the jury's prerogative, and it could have awarded the amount that it did to Eric Wallace simply based upon his loss of his wife's consortium for that same timeframe. Even McGlothan's counsel so acknowledged. (Trans. 352.) (Supp. App. 37.)

A resolution of this issue is actually quite simple. It merely involves an examination of the record to see if the testimony that McGlothan claims is missing, is actually there. By doing that, the inquiry comes to a swift end. There is testimony of three medical experts as to the permanent nature of the injury to Tracey's left eye.

First, there is the testimony of Dr. Connor, Tracey's optometrist. He first addressed the condition of Tracey's eyes at the time of his examination of her, a few days after the aborted LASIK surgery. He said:

Q: And that was the first time you saw Tracey?

A: Yes.

Q: Did you actually look into her eyeball?

A: Oh, yes.

Q: What did you see when you - -

A: It looked normal looking inside her eye.

Q: It was what?

A: It looked normal looking inside her eye. You're talking about the inside.

Q: Let's talk about the outside. What did you see when you looked at her cornea?

A: The waves.

Q: It was what?

A: The irregular - - the distortion of it. (Trans. 68-69.) (Supp. App. 9-10.)

Dr. Connor then talked about what he was seeing that was causing Tracey's visual complaints and he said:

Q: Doctor, the evidence in this case is going to be that Tracey Wallace has continually since that time of this aborted LASIK surgery had visual problems seeing in dim light and driving at night because of oncoming headlights. In view of what you have seen and treated her for, would that surprise you?

A: Oh, no. I expected that.

Q: Why did you expect that?

A: I expect it because of measuring her cornea and - - other than the central part too, all the part around the center part was a distortion. That's where this bump was, this flap which causes distortion.

When you are in bright light, your pupils are real tiny. So you concentrate on the bigger part. When you get in dimmer light, your pupils get larger. Then you start to pick up all the aberrations and distortions where that - - where the bumps are, the surgery bump - - flap was. (Trans. 75-76.) (Supp. App. 11-12)

He then testified that her left eye had not healed when he saw Tracey in November of 2003 and still had not healed when he examined her a few weeks before the trial.

Q: Dr. Connor, handing you again Plaintiff's Exhibit No.1, the last visit that's shown on this chart is November 4th of 2003, just about four years ago. As of that date, and based on your examination, had Tracey Wallace's left eye returned to a normal state.

A: No.

Q: In what way was it not normal.

A: It still has irregularities in the cornea.

Q: And are Tracey Wallace's complaints of difficulty seeing in dim light and driving at night consistent with someone who has those irregularities on the cornea of her left eye.

Q: As of November of 2003?

A: Yes. (Trans. 85.) (Supp. App.14.)

* * * *

Q: Let me ask you this, Doctor, as of the last time that you saw Tracey Wallace, has her eye - - her left eye, returned to a normal condition?

A: No. (Trans. 83.) (Supp. App. 13.)

* * * *

Q: As of how recently have you seen Tracey?

A: Within the last month.

Q: The visit that you have had with Tracey about a month ago, was there a change in her condition to what you were seeing in November of 2003?

A: Has there been in change in her condition since 2003? I think it's become more stable. But the irregularities, the distortion, the aberrations are still present; but they seem to have stabilized.

Q: Do you think there has been any change in those two time frames to the extent of the aberrations?

A: I think they are just the same. (Trans. 86-87.) (Supp. App. 15-16.)

Dr. Connor also told the jury of his prediction for Tracey's recovery, and said:

Q: When you first saw Tracey Wallace, what was your prognosis for her visual problems?

A: Poor. And in deposition. (Trans. 88.) (Supp. App. 17.)

Further, Dr. Connor testified on cross examination as follows:

Q: Aside from the visit a couple of weeks ago, Doctor, there's a two and one-half year gap between those records and the last time you saw Mrs. Wallace. Do you think its fair for you to come in and provide testimony to this expert - - or to this jury about the extent of the injury to her left eye when you hadn't even seen her for two and one-half years?

A: Oh, even more so because this is the result of what's left over. It's still persisted two and one-half years later. Yes, I think that's fair, as well as being correct and honest and under oath. (Trans. 98.) (Supp. App. 19.)

Dr. Connor then testified on re-direct examination:

Q: Based upon what you have just said, do you think there will be any further improvement for Tracey concerning her problem with the dim light situation or driving situation?

A: No, I can't foresee it. (Trans. 131.) (Supp. App. 20.)

Dr. Connor then told the jury about what Dr. Price was reporting to him about the condition of Tracey's eyes, when he said:

Q: At page 55, there's a letter from Dr. Price. Mr. O'Neill was talking to you about the first sentence "found that the corneas had decreasing

amounts of haze." The next sentence, Dr. Price says, "Unfortunately, the surface is still irregular from the irregular cuts that she had." He did comment on that part of what he was seeing at that point too then. In other words, he was still seeing an irregular surface on her cornea; is that correct?

A: Yes. Expect the hazing to decrease in six months to a year - - over six months to a year; but the scarring he did not expect to change. (Trans.131-132.) (Supp. App. 20-21.)

Upon being re-cross examined by McGlothan's counsel, Dr. Connor, quite significantly, testified as follows:

Q: *Before I ask you a question, some foundation of my own. You've testified that in your view, there is going to be no further improvement to Mrs. Wallace's vision. Correct*?

A: Um huh.

Q: *Is that right?*

A: *Right.* (Trans. 134.) (App. 53.) (Emphasis added.)

Thus, although not cited by McGlothan, there is express testimony from Dr. Connor that there is a permanent injury to Tracey's left eye.[3] In fact, McGlothan's counsel actually acknowledged this evidence during his trial cross-examination

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In addition to the trial testimony, there was also documentary evidence introduced during the Wallaces case-in-chief by McGlothan, to show that Dr. Connor wrote, as early as September 2002, that Tracy should not have been driving a car at night because of her vision. (App. 96.) There was no evidence that he ever changed his opinion, or would change it in the future, about that restriction.

of the witness. He even asked him to reiterate that testimony, which Dr. Connor did. Of course, McGlothan's counsel was absolutely correct in making that admission. Dr. Conner most certainly did so testify as to the permanency of Tracey vision problems, and he did so without any objection to his having the qualifications to do so (or even, for that matter, under a cross-examination review of those qualifications).

The existence of that evidence alone is enough to obviate any consideration of whether the District Court erred in not granting McGlothan's Rule 50 motions. There was unchallenged expert testimony from Dr. Connor that Tracey has suffered permanent injury to her left eye as a result of McGlothan's negligence. But that is certainly not the only evidence from an expert to that effect which was presented to the jury during the Wallaces' case-in-chief. There was much more.

Before beginning the cross examination of the first witness called by the Wallaces, who was McGlothan, his counsel entered into evidence a booklet containing copies of all of the stipulated medical records which had been generated by the treating doctors of Tracey, and, in addition, as Exhibit E, the records of the expert hired by McGlothan to examine her and testify at trial, Dr. Maurice John. (Trans. 38-39.) (Supp. App. 5-6.) Found within that Exhibit E, is a copy of his written report stating his findings and conclusions after his examination of Tracey.

(App. 111-113.) On the last page of that report, (App. 113), he writes:

> One of Ms. Wallace's complaints was about glare. I gave her a sample of Alphagan, which mildly constricts the pupil and has helped some refractive surgery patients with their night driving. It will not help at all with daytime glare, which is more central. However, in dim light all of our pupils dilate some and with modest constriction a few people see fewer halos and star bursts, etc. Ms. Wallace stated that *her eyes* are much, much better than they were immediately post op. I advised that I have a doctor friend in Sao Paolo, Brazil, who has seen tens of thousands of patients with corneal disease who told me that the cornea wants to heal. *I think some of her above statement is an example of that. However, in two and a half years, I doubt that Mother Nature is going to improve the situation much more*. (Emphasis added.)

This evidence, then, even without that of Drs. Conner and Price, establishes that in an examination which Dr. John conducted over three years before the trial, he, as McGlothan's expert, said that there was not going to be much change in Tracey Wallace's condition of vision pertaining to her glare problem that she reported to exist with "her eyes."

Thus, not only has Dr. Conner made the statements regarding permanency which McGlothan's counsel acknowledges, Dr. John has similarly made such a statement (which McGlothan has completely ignored in his analysis of the evidence). He also reaffirmed this opinion in his trial testimony. During the cross examination of Dr. John in the case-in-chief of McGlothan, he was specifically

asked about that statement. He then acknowledged that the interpretations stated herein are correct. He said the following:

Q: Dr. John, in the paragraph I was referring to in your report a few moments ago, about the medication that you gave to Tracey Wallace, in the second to last sentence of that same paragraph, you talked about the same circumstance that you discuss here today, about the cornea wanting to heal.

Now then, you go on to say, "I think that some of her above statement is an example of that. Lastly, you say, "However, in two and one-half years, I doubt that Mother Nature is going to improve the situation much more." Is that still your testimony?

A: Yes.

Q: So, what we saw when you did this report almost three years ago was as good a healing as Tracey Wallace was going to get?

A: Yes, give or take. (Trans. 346-347.)(Supp. App. 34-35.).

Yet this testimony of Drs. Conner and John is not all of the expert opinion evidence that the jury heard and was allowed to consider on the permanency of the injury. They also had Dr. Price's testimony. McGlothan's analysis of that evidence is, at best, incomplete. Dr. Price was asked this question, and gave this answer, regarding his last physical examination and Tracey's status at the time of his July 19, 2006 deposition:

Q: I may have already asked this, and if I did I beg your pardon. Does what you saw comport with her complaints of symptoms?

A: It does in the right eye. *The left eye – well, the left eye to some degree*, but primarily in the right eye I can see scarring and irregularity. (Emphasis added.) (App. 16)

We have, therefore, Dr. Price testimony acknowledging that what he was seeing in his examination conducted over four years after the negligently performed surgery showed that there was still a left eye injury which meshed with her low light glare and reflection problem *"to some degree."* This alone renders McGlothans' argument that there was no evidence from which the jury could determine (or infer) permanent injury, unsupportable.

However, McGlothan also does not quote Dr. Price's trial testimony (presented by deposition) as to what he further said in this regard. There is more to be considered. In his testimony, he also said:

Q: As her physician, are there any activities that you would limit her from doing as a result of her visual complaints?

A: Well, she shouldn't be a racecar driver.

Q: Other than driving racecars and things that ordinary folks do, is there anything that you would say "Don't do this, Mrs. Wallace"?

A: Probably wouldn't want her working around machinery with her fingers if she's having any difficulty seeing.

Q: Anything else you can think of?

A: Well, probably not - - I mean, I try to encourage my patients to work, but I wouldn't want her to be a truck driver, driving at night. Some

> people do that at night with vision like this, but I wouldn't recommend it. (App.18)

He also said:

Q: And the one thing you do know is she continues to complain of ghosting and shadows and glare and difficulty with night driving.

A: Correct. (Deposition transcript, page 95.) (Supp. App. 2.)

Finally, Dr. Price tells the jury that he simply did not do anything else to improve Tracey's vision as he did not " . . . have anything to offer her that I thought for sure I could really have a good feeling that I could for sure help her." (Deposition transcript, page 71.) (Supp. App. 1.)

Tracey also testified that her left eye condition has not improved from the effects of the surgery in that the glaring and reflection problems which had developed after it were such that it made it impossible for her to drive safely at night. She further said in her testimony, without any objection from the defendant, that she believed that this is a permanent condition.[4] (Trans. 212-214.) (Supp. App. 25.) Therefore, the jury, considering Dr. Price's quoted testimony, was presented with evidence that he saw in his examination, objective changes in Tracey's left

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[4] The District Court clearly agreed with the proposition that, under Indiana law, an injured person is competent to testify as to the permanency of the effects of that injury. This was discussed throughly in conjunction with the ruling on the motion in limine filed by McGlothan, (Trans. 8-9.)(Supp. App. 3.)

eye the presence of which explained her continuing complaints. When coupled with his statement that, in order for him to determine whether her visual disturbances had improved, it would be necessary to ask Tracey, and with Tracey's evidence that her condition had not improved, an entirely reasonable inference to be drawn by the jury was that the passage of five and a half years from the time of the incident, with no improvement, was sufficient to find that Tracey's condition was a permanent one.

Although McGlothan acknowledges that the jury was entitled to draw reasonable inferences from the evidence, in his purported evaluation of Dr. Price's evidence, he essentially ignores that they could have done so on this issue from what he and Tracey had said. The District Court, however, fully recognized that when it overruled McGlothan's Rule 50(a) motion at trial. (Trans. 351-352.)(Supp. App. 36-37.) The Court there expressly said that the jury could draw such reasonable inferences.

Thus, there was evidence presented from three separate healthcare provider experts, Drs. Conner, John and Price, upon which the jury could find the presence of a permanent injury to Tracey's left eye. The protestations of McGlothan to the contrary notwithstanding, that evidence existed, was presented and could have served as the basis for the determination of the jury's award.

In addition to discussing all of the expert testimony on this subject which was unequivocally presented, however, the Wallaces must address the statement that McGlothan has made that the evidence of their *damages* can only be presented through such expert testimony. (McGlothan Brief, page 22.) That is not a correct statement of the law of Indiana.

While the cases that McGlothan cites do stand for the proposition that evidence of whether a health care practitioner has committed malpractice can only come from an expert,[5] that is not the entire rule of law. In Indiana a witness, even though not an expert, can render testimony as to the effects of an *objective* injury, that is, one that is readily observable by a physician. *Roberson v. Hicks*, 694 N.E.2d 1161 (Ind. App.,1998); *Topp v. Leffers*, 838 N.E.2d 1027, (Ind. App., 2005), transfer denied, 855 N.E.2d 998 (Ind. Feb 21, 2006).

Here, the injury to the cornea of Tracey's left eye was readily observed by Drs. McGlothan, (Trans. 27.)(Supp. App. 4a.) Conner, (Trans. 68-69.)(Supp. App. 9-10.) Price (Supp. App. 1.)(App. 16.) and John (App. 111.). It was indisputably an objective injury. Because of that Tracey testified, without objection, about the continuing and permanent effects of her left eye injury (Trans. 212-214.) (Supp.

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[5] *Chi Yun Ho v. Frye*, 880 N.E.2d 1192 (Ind., 2008); *Oelling v. Rao*, 593 N.E.2d 189 (Ind., 1992) and *Etienne v. Caputi*, 679 N.E.2d 922 (Ind. App.,1997).

App. 25-26.) That testimony alone, even without that of the three doctors, was sufficient evidence to allow the jury to find a permanent injury and make a damage award for it.

In summary, then, there was expert evidence from three witnesses, and evidence from Tracey, which was presented to the jury in the case-in-chief of the Wallaces, and in McGlothans case-in-chief, as to the presence of a permanent injury in Tracey's left eye. There is absolutely no doubt that the District Court was correct in its earlier ruling that there was "substantial evidence" in the record to support the verdict which was given by the jury. It did not err in so ruling.

II. McGlothan has Forfeited (or Waived) his Ability to Raise What he Asserts to be the Second Basis for a Motion for Judgement as a Matter of Law.

Beginning at page 28 of his Brief, McGlothan asserts that the District Court erred in failing to grant his Motion, claimed to be made under Fed. R. Civ. P. 50, referring to the presence of a pre-existing condition which, he says, precluded the Wallaces from presenting their claims. Before addressing the lack of merit to such an assertion, it is to be noted that McGlothan has forfeited (or waived) his right to present that argument in this Court because he did not make it at the time of trial, as required by Rule 50(a) or in his post trial motion under Rule 50(b).

A forfeiture of the ability to present an argument occurs when there is the

failure to make the timely assertion of a right. A waiver is the "intentional relinquishment or abandonment of a known right." *U.S. v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Harper v. Albert* 400 F.3d 1052, 1062 -1063 (C.A.7 (Ill.),2005). Either, or both, descriptions apply here.

There is no dispute whatsoever that McGlothan only presented his Rule 50(a) Motion for Judgment on the Evidence on one basis. That was that the Wallaces did not produce sufficient evidence of permanent injury to allow the jury to consider that claim.[6] When making McGlothan's Rule 50(a) Motion at the close of all of the evidence at the trial, his counsel said:

> At this time the Defendant will move under Federal Rule of Civil Procedure 50 for entry of judgment in favor of Dr. McGlothan on the issue of permanency of this injury. (App. 88.)

After presenting his argument on the issue, but making no mention of a pre-existing condition (App. 88-91) McGlothan's counsel concluded his motion with the following statements:

> That evidence is missing; and for that reason, Your Honor, I think the Plaintiffs have failed in their burden of proof on the question of permanency. And this case should be limited to that two and a half-year period when treatment was being sought and the expenses related to that treatment.

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[6] The Wallaces have thoroughly addressed, and refuted this argument in Section I of this Brief.

> And, of course, if they decide they want to make an award during that two and a half years, I think that's up to them; but beyond that, I think the permanency question should be off the table. (App. 91.)

McGlothan simply did not present a Rule 50(a) Motion on any other basis. The District Court agreed with that assessment, when it announced its ruling on the motion, saying: "I'm going to give it to the jury *on the permanency issue*." (App.91) (Emphasis added.)

The Court did likewise in its formal minute entry on the motion. The Court there said:

> Out of the jury's presence, defendant moves for judgment on the evidence regarding the permanency issue. The Court denies defendant's motion and will allow that issue to proceed to the jury. (SA1.)

While McGlothan's counsel did, in his post-trial Rule 59 motion for a new trial, assert the claim that is now sought to be raised, he did not do so in the Rule 50(a) made at trial and he did not do so in his renewal of the motion under Rule 50(b). There, he specifically said that he was only renewing his Rule 50(a) motion on the basis of the permanency issue. (DE1.) (Supp. App. 41.) As he did not do so then, he cannot now do so because, as will be shown, he has forfeited (or waived) that right.

The provisions of Rule 50(a) expressly require that all of the grounds for

such a motion be made at the time of trial. In pertinent part, the Rule reads as follows:

> Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Furthermore, while Rule 50(b) provides for a *renewal* of a motion for judgment on the evidence which was made at trial under Rule 50(a), it most assuredly does not allow the raising of issues in such a post trial motion that were not also presented at trial. It only provides for the post trial consideration of " . . . the legal questions raised by the motion."[7]

Therefore, under the plain language of Rule 50(b), a Rule 50(a) motion for judgment as a matter of law must be made at the close of the evidence in order to be able to bring a post trial Rule 50(b) motion for judgment as a matter of law. *Laborers' Pension Fund v. A & C Environmental, Inc.*, 301 F.3d 768, 775-76 (7th Cir. 2002); *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1364 (7th Cir.1996); *Umpleby v. Potter & Brumfield, Inc*., 69 F.3d 209, 212 (7th Cir.1995); *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1139-40 (7th Cir.1994).

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[7] That is, by the Rule 50(a) trial motion.

Rule 50(a)(2) also requires that the motion made at trial ". . . specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Because of the that express condition, issues that were not adequately preserved in a Rule 50(a) motion made at the close of evidence may not be included in a Rule 50(b) motion. *A & C Environmental*, 301 F.3d at 777-78; *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1555-56 (7th Cir.1987); *Rankin v. Evans*, 133 F.3d 1425, 1431 (11th Cir.), cert. denied, 525 U.S. 823, 119 S.Ct. 67, 142 L.Ed.2d 52 (1998); *Advisory Committee Notes to the 1991 Amendments to Rule 50(b)*.

This Court has, on several occasions, expressly held that the purpose for requiring that all grounds for such a motion be made at trial is to provide the parties with the opportunity to address the claimed lack of evidence. *Szmaj v. AT & T Co.,* 291 F.3d 955, 957 (7th Cir.2002); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1388 (7th Cir.1984). By McGlothan's failure to do so, if he is permitted to do that now, the Wallaces were deprived of that opportunity.

By not making at trial such a contention about insufficient evidence about the nature and extent of a claimed pre-existing injury barring recovery, McGlothan has forfeited (and/or waived) his right to do so now. It is only those matters that have been properly raised in a Rule 50(a) motion that may be considered on

appeal. *Zelinski v. Columbia* 300, Inc., 335 F.3d 633, 638 (7th Cir.2003); *U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, (C.A.7,1995); *McCarty v. Pheasant Run, Inc.*, supra.

Of course, McGlothan without question knew, at the time he presented his Rule 50(a) Motion following the close of all of the evidence, each and every one of the facts and circumstances concerning the claim that he now belatedly seeks to raise. He simply chose not to include this basis in his Rule 50(a) motion. His counsel certainly examined Tracey extensively about her purported "pre-existing condition." He repeatedly asked Tracey asked about that specific topic, including tendering these questions:

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?

* * * *

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?

* * * *

Q: Did you tell us in your answers to interrogatories that this was a problem that preexisted LASIK surgery?

* * * *

Q: Did you tell us in your deposition that this was a problem that preceded LASIK surgery? (App. 72.)

We, thus, now have a situation in which McGlothan made a conscious decision not to raise this matter in the Rule 50(a) motion during the trial even though he had specifically asked Tracey questions about it. By doing this he has forfeited his right to have this Court review the ruling on the motion on that basis. *Zelinski v. Columbia* 300, Inc., supra; *U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd.*, supra, and *McCarty v. Pheasant Run, Inc.*, supra.

Nor was the issue of a pre-existing condition raised in any other fashion by McGlothan during the trial, as was not the situation in the case of *Urso v. U.S.,* 72 F.3d 59 (C.A.7,1995). There, this Court said that when a moving party has sought to present on appeal an issue regarding the denial of a Rule 50 motion that was not properly preserved, there was no bar to doing so *provided* that the matter had been "forcefully presented to the District Court." 72 F.3d at 61. Here, there was no such presentation at all, forcefully or otherwise. McGlothan has not shown this Court that it was. Moreover, he cannot, and will not, do so.

Because it was not presented in any manner to the District Court, either before or during the trial, McGlothan was obligated to include it in the Rule 50(a)

motion to allow the Wallaces to address it, or to forever hold his peace on the topic. That is the very purpose of the Rule 50(a) requirement. *Szmaj v. AT & T Co.,* supra; *McKinnon v. City of Berwyn*, supra. By McGlothan's conscious decision to not do so, the right of review has been forfeited (or waived). This Court should not consider the claim set out by McGlothan in Section III in his brief, regarding the District Court erring in denying a Motion for Judgment on the Evidence based on the failure to produce evidence about a pre-existing condition.

III. THERE WAS NO EVIDENCE PRESENTED AT THE TRIAL THAT TRACEY HAD A PRE-EXISTING CONDITION.

Even though a forfeiture or waiver of the issue has occurred, the Wallaces will nonetheless address the claim of McGlothan on this topic. McGlothan asserts, in Section III of his Brief, at page 28 that there was a "Pre-existing Condition" existing, affecting Tracey's vision. He then says that the Wallaces were required to produce expert testimony to show the extent of such a condition and how much worse it was made in order for the jury to have awarded damages. In addition to the fact that McGlothan never made this claim, argument or motion at the trial, such an assertion is a remarkable mis-statement of the trial evidence. McGlothan makes it because Tracey merely testified that, in her first visit with Dr. Connor, she had filled out a form in which she had answered affirmatively a preprinted form's

question asking if she was ". . . *bothered* by glare or reflection, particularly when driving at night?" (SA12) (Emphasis added.) That is the sum and substance of the medical record on this subject. No expert witness testified that Tracey had any pre-existing condition at all.

Certainly Tracey never told Dr. Conner, or the jury, that she had a pre-existing condition. She only testified, (as is quoted by McGlothan at page 34 of his Brief), to being "bothered" by that type of situation. There was no evidence which had even hinted at this being an actual impediment to her ability to see in dim light and to operate a vehicle at night before the LASIK surgery. Contrary to McGlothan's contention and claimed reliance on the decision in *Dunn v. Cadiente*, 516 N.E.2d 52 (Ind. 1987)(*reh'g denied*), Tracey had no burden of proof at all with regard to the issue of a pre-exiting condition. That is because she did not claim to have had such a condition and she had no burden to produce evidence on the subject. *Walker v. Cuppett*, 808 N.E.2d 85, 95 (Ind. App., 2004).

On the other hand, if McGlothan wanted to defend against the Wallaces' damage claim by saying that she had such a condition then that contention was an affirmative defense and required to be asserted by him under Fed. Rule of Civ. Pro. 8(c). He never contended that he was, and produced no expert evidence on the

subject at all.[8] Yet, it was his burden to produce evidence to support such a defense, if he wished to make it. *Molargik v. West Enterprises, Inc.,* 605 N.E.2d 1197,Ind.App. 5 Dist.,1993.

It is also no small irony that McGlothan says that Tracey is not able to testify about her own medical condition as only expert witnesses could do that (Brief, page 27) but then cites her as the sole source of evidence to support his claim that she had a pre-existing medical condition. (When, in fact, she did not say at any time that she had a pre-existing condition.)[9] How can she be incompetent to do one but not the other?

Although McGlothan says, at Brief page 36, that Tracey had "similar" problems with her vision before his act of malpractice, a look at the record cited by him shows that it contains no such statement. (SA 11-12.) (App. 94-95.) Tracey never told anyone that what she was reporting in answering the questions on the form was at all "similar" to what she was experiencing afterward.

Moreover, the event of the aborted LASIK surgery certainly was an injury

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As will be discussed, McGlothan's claim to have been surprised by the evidence is not true and can be summarily dismissed by examining the record. He knew of this information for several years before the trial.

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The Wallaces have already shown that Tracey could, and did, testify about her condition being permanent, see page 20, 22-23, supra.

to her eyes which thereafter left her with a permanent effect on her vision that was severe enough to prohibit her from being able to drive a motor vehicle at night.[10] (Trans. 215, 218, and 272.) (Supp. App. 28, 29,and 32.) There was no evidence at all that she could not do so before the surgery.

Two experts, Dr. Connor, and Dr. Price, told Tracey, and told the jury at trial, that, after the aborted surgery she should not be driving at night because of this injury to her eyes. Dr. Connor said this in the documentation that was provided to Tracey's employer, (App. 96.) and about which he testified at Trans. 88, Supp. App. 17. Dr. Price did so in his deposition testimony, which was presented to the jury at trial. (App. 18.) This occurred when he was asked about his opinions concerning the limitations that he would place on her activities and said that Tracey should not be driving a vehicle at night.[11] There was, of course, no evidence from those experts that suggested that she was under any such limitation or

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Tracey also testified that, after the surgery, it was very difficult for her to even be a passenger in a vehicle which was being operated at night, because of what she saw with respect to oncoming headlights, and that, as a result, she simply no longer went out at night very much. (Trans. 272.) (Supp. App. 32.)

11

The District Court, recognized the importance of this evidence, in conjunction with the issue of whether Tracey had suffered a permanent injury, when discussing the actual Rule 50(a) motion made by McGlothan, at App. 90.

restrictions before the LASIK surgery.[12] McGlothan certainly introduced no expert evidence to that effect.

Further, none of this expert testimony presented by the Wallaces was objected to by McGlothan, in any manner. Perhaps more importantly, McGlothan never moved to have the jury admonished to disregard the expert's evidence after having heard Tracey testify about this purported pre-existing condition.[13]

Remarkably, McGlothan now argues that, in spite of his never raising the admissibility about the experts' testimony during the trial, the District Court should have excluded it, (apparently on its own motion) and that it was error by the Court to fail to do so. (Brief, page 34.) Of course, that argument ignores the obligations of McGlothan to have objected to it or to have moved to strike it in order to preserve any such issue. Fed. Rules of Evid., Rule 103. By failing to object he forfeited (or waived) his ability to make this entire argument. *U.S. v. Swan*, 486

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[12] In the *Dunn v Cadiente* decision, supra, which is heavily relied on by McGlothan, the Court noted that the Plaintiff' medical expert testified about the presence of a pre-existing condition. 516 N.E.2d at 55-56. That is certainly not the case here. No expert said that Tracey had a pre-existing condition.

[13] McGlothan likewise has not shown that he either requested or tendered a jury instruction on the issue of a pre-existing condition. Nor has he shown that he objected to any of the instructions which the Court indicated that it would give. He has not shown these things because he did not do so.

F.3d 260, C.A.7 (Ill.),2007; *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, C.A.7 (Ind.),1999; *U.S. v. Field*, 875 F.2d 130, C.A.7 (Ind.), 1989.

IV. THERE WAS NO EVIDENCE WHICH WAS PRESENTED BY THE WALLACES AT THE TRIAL THAT MCGLOTHAN HAD NOT IN HIS POSSESSION FOR YEARS.

For McGlothan to suggest, as he does at Brief pages 30 through 33, that the information about Tracey's answers to the questions on the form of Dr. Connor was not previously disclosed in this case and that it came as new information at trial, is simply nonsensical.[14] As early as March of 2004 McGlothan's lawyers had copies of the form completed by Tracey containing that information as a part of Dr. Conner's records. This was fully three and a half years before the trial and even a year before the statutory Medical Review panel considered the case.

If McGlothan now thinks that the answers which Tracey gave on the form suddenly revealed a pre-existing condition, he certainly did not think so during the years that he had that same information and never inquired further about the form

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Although McGlothan did not supply the District Court (or this Court) with any verified statement to establish his claim that the information which he asserts to have been newly revealed was not in the possession of his counsel until the time of trial, the Wallaces have established that the contrary is true. The post trial Affidavit of Robert F. Hunt, attorney for the Wallaces, shows that this material containing the "new information" has been in the possession of McGlothan's counsel for years prior to the trial.(DE 4.)(Supp. App. 50.)

and her answers to its questions. Further, in all of the depositions of the experts taken by counsel for Wallace none were ever asked about any impact that her answers to those questions had.

The assertion which McGlothan makes at Brief page 37, that he was "unable" to ask Dr. Price or Dr. Connor about a "pre-existing condition" because Tracey "denied" the existence of it until the end of the Wallaces' case-in-chief also makes no sense whatsoever. McGlothan asserts that he learned of this "condition" from the form found in Dr. Connor's records. (Brief, page 34.) As noted above, he had that form and its information in his possession for years. (See page 35, footnote 14, supra.)

Yet, once McGlothan had this claimed surprise information he did not attempt to call either Dr. Connor or Dr. Price as a witness to ask them about the condition. He did not seek a continuance to obtain their additional testimony or ask for a mistrial. He did not seek sanctions under the discovery rules for a failure to disclose information and he did not make a motion under Rule 50(a) to take that issue away form the jury's consideration. In fact, he only moved under Rule 59 for relief based on it long after the jury was discharged and he has not appealed the denial of the relief sought under Rule 59.

V. TRACEY TESTIFIED AS TO THE EFFECTS OF THE ABORTED LASIK SURGERY

The statement that McGlothan makes at Brief, page 35, that Tracey was required to, but did not, present the jury with information about the difference between the extent of her having been so "bothered" by certain conditions and what happened to her dim light and night driving vision as a result of the negligence of McGlothan is equally incorrect. Tracey unequivocally testified that, before the aborted LASIK surgery, she regularly drove her car at night. (Trans. 273.) (Supp. App. 33.) She also said that after the aborted LASIK surgery took place she could no longer see well enough to safely drive her car at night. (Trans. 212, 271 and 272.) (Supp. App. 25, 31 and 32.) She further told the jury that her left eye vision was now such that she could not see with it to drive at night because of the glare and reflection effect that she had begun having. (Trans. 213.) (Supp. App. 26.) It is hard to conceive of what McGlothan asserts is lacking in her evidence. Tracey gave the jurors all of the information that they needed to have in order to resolve the issue. She certainly told them that before the LASIK surgery she could drive her vehicle at night and that after it had been aborted that she could not do so safely. She certainly did not say that she had a pre-existing condition. She also did not say that her ability to see in dim light or to drive at night was

limited or affected before the surgery. The Wallaces did provide unchallenged evidence as to the effects of the surgery on Tracey's vision.

VI. McGlothan Now Attempts to Create a Remedy Where None Exists.

In the last, and longest, portion of the Argument section of McGlothan's Brief, he presents what appears to be an effort to have this Court create a completely unrecognized legal doctrine. With virtually no pertinent legal authority given and without citing any appropriate standard for its consideration,[15] he attempts to create a brand new appellate remedy. This seems to be a variant of a request for a "plain error" type of review, although McGlothan never mentions that theory (most likely because he is aware that he could not fit within the rules for the application.). To his credit though, he does acknowledge that it has not been recognized by virtually any other court and certainly not by the Seventh Circuit. (Brief, page 46.) He tempers that candor, though, by an incomprehensible claim there that the reason for it not having been recognized anywhere is that this conduct is so egregious that the courts have not ever seen it. Of course, he provides no support for such a bald assertion.

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[15] McGlothan's failure to provide a standard for review would seem to be in violation of Fed. R. of App. P. 28(a)(9)(B).

McGlothan's decision to attempt to create this remedy undoubtedly results from a realization of the grave weaknesses of his two other appellate claims. He knows that the evidence in the form of expert testimony causes his first theory to fail and that he has forfeited (or waived) the right to even have the second considered. Well aware of this, McGlothan now tries to come up with something to present to this Court in order to seek a reversal of the District Courts' approval of the jury's decision. He fails badly in the attempt.

Plainly, the most notable omission on McGlothan's part in this effort is the failure to cite any authority to show that the specific relief sought has ever been utilized. Inherent in that failing is McGlothan's inability to provide the Court with any standard to which this Court could refer in seeking to determine whether the relief which he asks, that being a reversal, may be granted on such a basis. But as it has never been employed before, it is understandable why it is impossible for him to say when its use is appropriate.

The gist of McGlothan's argument is that Tracey's testimony prevented him from having an opportunity to cross examine other witnesses. (Brief, page 38.) Aside from the fact that, as will be shown, Tracey did not undertake the concealment about which he complains, McGlothan did actually cross examine the witnesses mentioned and he never attempted in any manner to call, or recall, any

witness after the time that he says that he obtained any of the "hidden" information.

A striking example of this is the further cross examination opportunity of Dr. Connor. McGlothan certainly did not ask the District Court for leave to recall Dr. Connor to the stand for the purpose of tendering omitted or additional questions after he had heard Tracey present her purported concealed information.[16] Nor did he seek to call Dr. Connor in his case-in-chief to ask him about this subject. Yet McGlothan does not give any explanation at all for the failure to take these steps if he deemed such further examination to be necessary.

In addition to not doing that, however, McGlothan did not do many other things. He also did not ask the Court for leave to call Dr. Price at any point in the trial;[17] he did not ask the Court to grant him a continuance of the trial to have an opportunity to question these witnesses; he did not ask the Court to strike any of the challenged testimony of Tracey, or her Doctors, because of this claimed new

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Dr. Connor was always in Terre Haute and subject to being recalled by subpoena at any time (Trans. 64.) (Supp. App. 7.)

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While McGlothan will likely assert that Dr, Price was in Indianapolis while the trial was being conducted in Terre Haute, (App. 14.) McGlothan did not hesitate to speak to the Court about a delay to permit him to do other things in the midst of it. (Trans. 94.) (Supp. App. 18.)

information; he did not ask the Court to grant him a mistrial or to apply the sanctions which he now asks this Court to apply.[18] Finally, he presented no jury instructions on the subjects of a pre-existing condition or concealment or misconduct, nor did he object to any of the instructions that the Court indicated that it would give.

The Court has held that issues and arguments not raised before the District Court cannot be first raised on appeal. *Textile Banking Co., Inc. v. Rentschler*, 657 F.2d 844, 853 (7th Cir.1981); *Republic Tobacco Co. v. North Atlantic Trading Co., Inc*., 381 F.3d 717 C.A.7 (Ill.), 2004. Yet that is what McGlothan now seeks, without excuse or explanation, to do.

In discussing that rule of law this Court has said:

> To reverse the district court on grounds not presented to it would undermine the essential function of the district court. This rule is not meant to be harsh, overly formalistic, or to punish careless litigators. Rather, the requirement that parties may raise on appeal only issues which have been presented to the district court maintains the efficiency, fairness, and integrity of the judicial system for all parties. *Republic Tobacco Co. v. North Atlantic Trading Co., Inc*., supra, 381 F3d. at 728 quoting from *Boyers v. Texaco Refining and Marketing, Inc.*,848 F.2d 809, C.A.7 (Ill.),1988.

18

As McGlothan notes, at Brief page 42, the remedies for the claimed misconduct are either sriking the evidence or a mistrial. Having said that though, he does not explain that he did not seek to have the District Court do either.

This Court has also had this to say on the subject:

> [I]t is helpful to consider why we have the waiver rule to begin with. One reason is to be certain that the trial court has had the first opportunity to pass on the appellant's theory and avoid error. *United States v. Payne*, 102 F.3d 289, 293 (7th Cir.1996); *In re Perez,* 30 F.3d 1209, 1213 (9th Cir.1994). Another is to avoid usurping the trial court's proper role by refusing to consider issues for the first time on appeal that require the factfinding abilities of the district judge. See *United States v. Andreas*, 150 F.3d 766, 769-70 (7th Cir.1998) (per curiam); *In re Newman*, 903 F.2d 1150, 1151 n. 1 (7th Cir.1990). Finally, proper presentation to the trial court helps ensure that we have an adequate record to review on appeal. See *Murphy v. Keystone Steel & Wire Co.,* 61 F.3d 560, 568 n. 4 (7th Cir.1995); *Perez*, 30 F.3d at 1213. *Bailey v. International Broth. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 374,* 175 F.3d 526 C.A.7 (Ind.),1999.

Keeping those statements in mind, then, there is simply no reason to allow McGlothan to seek the reversal of the Court below by claiming that it failed to address an issue that he did not raise or that it failed to grant a relief that he did not request. He has, once again, forfeited (or waived) that right.

VII. There was No Perjury or Misrepresentation on the part of Tracey.

Within his Brief, at pages 39 and 43 McGlothan has repeatedly referred to the "perjury" of Tracey Wallace, just as he repeatedly referred to lying and untruthfulness in his final argument to the jury at trial. (Trans. 383, 384 and 388.) (Supp. App. 38, 39 and 40.)[19] He also has repeatedly said that Tracey made

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[19] But, once again, McGlothan has never raised this in any way before the

misrepresentations in her discovery answers (Brief pages 40, 41, 42 43, 44 and 46.) and her trial testimony. None of these allegations are true.

In actuality, Tracey never said what McGlothan claims she did when asserting perjury and misrepresentation on her part. Rather, she only answered a series of pre-printed questions on a form given to her at the time of her first visit with Dr. Connor. There she replied affirmatively to being asked if she was "bothered by glare or reflection, particularly when driving at night" (SA12.)[20] When she was asked about this in her testimony she explained that being so bothered existed before the aborted lasik surgery. Thereafter, even though Tracey had never said that such a "bother" was a "condition" McGlothan immediately, and unilaterally, chose to designate it as one. (Trans. 249) (App. 72.).

Thus, it is solely through McGlothans' counsel's own characterization of something that Tracey never said that he attempts to create this controversy. There is simply no testimony or evidence in any form that Tracey had a pre-existing condition. (See Section III, page 30, supra.)

District Court.

[20] As discussed previously, McGlothan has had possession of a copy of that form for years before the trial (page 35, supra.) but did not seek to ask her about that answer in any way before the time of her cross examination.

It is also useful to examine the context of the deposition questions upon which McGlothan bases part of his claims. In his citation to the record given at Brief, page 40, he does not include the prior questions which set the scenario for the questions which he quotes. In those Tracey was asked:

Q. You spoke earlier about the fact that you had a hysterectomy as a young woman, I think 29 or 30 years old. Have you taken Premarin since that time?

A. Actually, they've switched me to Cenestin now.

Q. Did you ever have any problems with dry eyes after you had your hysterectomy but before you went to see Dr. McGlothan?

A. No.

Q. You never had to have artificial tears or anything like that to moisten your eyes?

A. They've given it to me in case I needed, but I haven't had to use it.

Q. That's not a symptom that you've suffered from as a result of your hysterectomy?

A. No. (App. 21.)

Tracey was then asked the first question upon which McGlothan bases his perjury claim. (Brief 40.)

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

A. No.

This means that Tracey was logically interpreting this question as asking about whether she had a glare "problem" in relation to the occurrence of her hysterectomy operation. That was the subject which was being discussed in this line of questioning.

This interpretation is bolstered by the very next question that she was asked. indicated that her counsel was shifting to a discussion of the aborted LASIK surgery. He there asked Tracey about ". . . problems with halos before you got operated *on for your eyes*?" (App. 21.) By then adding the last part of the question, "for your eyes" it would seem to indicate that McGlothan's counsel did so to distinguish it from his prior question which was about the operation that he had already been discussing, which was Tracey's hysterectomy. Regardless, the answer to that question was also perfectly consistent with her trial testimony as it asked her about "halos" while the form of Dr. Connor did not ask Tracey anything about halos. She had not said anything about them.

Aside from that selective consideration of her deposition testimony, though, the entire basis of McGlothan's perjury and inconsistency argument revolves

around the semantic gymnastics of his counsel. While, as previously discussed, there was the question of whether a "bother" and a "condition" were the same, here there was one of whether something which Tracey considered to be a "bother" was also considered as creating "difficulties" for her. (Trans. 223) (App. 65). If Tracey did not consider them to mean the same things, then her answers on the form, in her deposition and at trial were once again, perfectly consistent. It was plain from her testimony that to her they were not the same as what she was testifying about as to her post aborted LASIK surgery to her left eye.

As discussed earlier, Tracey explained carefully to the jury how, after the aborted surgery, she could no longer drive at night. There has never been a suggestion that the "bother" of glare or reflection had ever *limited* her driving in any way (See Section V., page 37, supra.)

Similarly, in both answers to an interrogatory (which was tendered to her twice) upon which McGlothan bases another challenge to Tracy's credibility, (Brief, page 47.) she said that she has not " . . . ever suffered other illness, injury, or damage . . . " to her left eye. (App. 121 and 132. Question 1.17.) As there was no evidence at all to say that Tracey having been so "bothered" resulted from any "illness, injury or damage," her answer to that question was absolutely true and perfectly consistent with her trial testimony. But not only is the claim of an

inconsistency in her interrogatory answers invalid, the claim that Tracey "knowingly falsified" these two interrogatory answers (Brief 47) is preposterous.

Yet, even giving McGlothan the benefit of the doubt for purposes of argument, Tracey's statements were, at the most, inconsistencies.[21] Of course, if there are such inconsistencies in the testimony, as the jury was instructed, they were to be resolved in their own minds believing that the witnesses testified truthfully. The Court's Final Jury Instruction Number 5, (DE 1.) (Supp. App. 41.) told the jury, in part, that:

> Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent mis-recollection, like failure of recollection, is not an uncommon experience. In weighing the effect of discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

There is no reason whatsoever to believe that the jury did not do exactly

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[21] At footnote 13, at Brief, page 43, McGlothan quotes Tracy's reply to a question about her interrogatory answers. While the quotation of the answer given is accurate, an examination of the series of questions which Tracy was being asked at that point, and the answers that she had given to them, make it seem likely that she simply misunderstood the particular question, and believed that she was being asked whether her earlier answer was "untruthful" rather than "truthful." McGlothan asked no follow up questions about the answer. (Trans. 224-225.)(Supp. App. 30.) (App. 66)

what it was instructed in that regard. In fact, the jurors did precisely what they were told. They decided if there were inconsistencies in the evidence. If they found that there were none, they need not have proceeded further into the inquiry. However, if they did find that there were inconsistencies in the information, as argued by McGlothan, those inconsistencies were resolved in their minds. There is no reason for this Court to take over that responsibility of the jury at this point, especially as McGlothan never asked the District Court to do so at trial.

Thus, what McGlothan calls perjury and falsifying is, in actuality, a matter of interpretation of the meaning of the words of the Wallaces. Regardless of whether there were inconsistencies in the testimony, though, it was the jury's function to resolve those and determine whether any were significant enough to discount the testimony of the witness in other areas. Merely because McGlothan does not like the manner in which the jury has done its job and reached its conclusions is not enough for this Court to say that its decision should be reversed. There has been no denial of any fundamental right to McGlothan, and he has received his fair day in court on this matter.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees, Tracey Wallace and Eric Wallace, request that this Court affirm the judgment in all respects and assess

costs against the Defendant-Appellant, Jonathan S. McGlothan, M.D., and for such other relief as this Court deems proper.

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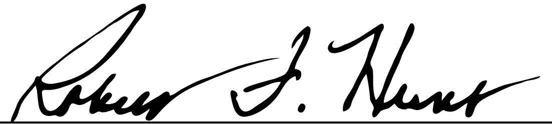
RULE 32(A)(7) CERTIFICATE OF COMPLIANCE

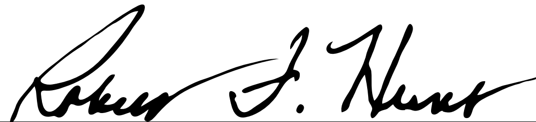
This brief complies with the type-column limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,894 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)((B)(iii), according to Corel Word Perfect, Version 10.0. The undersigned also certifies that the uploaded electronic version of this brief is virus free.



Robert F. Hunt

CERTIFICATE OF SERVICE

The Plaintiffs, Tracey Wallace and Eric Wallace, by their attorney, Robert F. Hunt, of Hunt Hassler & Lorenz LLP, hereby certify that 15 copies of their Brief, and 10 copies of the Supplemental Appendix have been mailed to the Clerk of the United States Court of Appeals for the Seventh Circuit, at Room 2722, 219 South Dearborn Street, Chicago, Illinois, 60604, in accordance with the provisions of Federal Rule of Appellate Procedure 25(a)(2)(B)(i) and that two copies of their Brief and one copy of their Supplemental Appendix was served upon Michael E. O'Neill and Kelly McFadden, *HINSHAW & CULBERTSON LLP*, 322 Indianapolis Blvd., Suite 201, Schererville, IN 46375, all by First-Class U.S. Certified Mail, Return Receipt Requested, this 30th day of May, 2008.



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