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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEANNA MCKEEHAN, Plaintiff-Below/Appellant, v. DELAWARE NEUROSURGICAL GROUP and PAUL T. BOULOS, M.D., Defendants-Below/Appellees.	No. 56, 2025 On Appeal from the Superior Court of the State of Delaware C.A. No. N21C-11-174 VLM

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE OF THE PROCEEDINGS

The question presented on this appeal is whether a limiting instruction is appropriate when a medical negligence defendant interjects a "risk of the procedure" defense into a trial not involving an informed consent claim. This issue is one of first impression.

The underlying case involved an alleged breach in the standard of care in the medical treatment of patient Deanna McKeehan ("Mrs. McKeehan"). On September 18, 2019, Mrs. McKeehan underwent elective neurosurgery by Paul T. Boulos, M.D. ("Dr. Boulos") (collectively with Delaware Neurosurgical Group, "Defendants"), to clip two unruptured aneurysms. The alleged negligence was Dr. Boulos's decision not to adjust the newly-placed clip after motor signal was lost on the contralateral side, which caused Mrs. McKeehan to suffer a right-sided brain stroke after it was placed.

The case proceeded to trial on January 6, 2025, during which Defendants interjected the "risk of the procedure" defense throughout the examinations of witnesses and during closing arguments. As a result of Defendant's actions, prior to the prayer conference on January 13, 2025, Mrs. McKeehan requested a limiting instruction to address the "risk of the procedure" testimony and argument.

Mrs. McKeehan's proposed instruction read:

> During this trial you have heard witnesses testify that a stroke is a risk of the procedure done in this case. You must not consider that evidence on the issue of whether defendants breached the applicable standard of care.

(A-753).

The trial judge suggested modifying the instruction to read:

> During this trial you have heard witnesses testify that a stroke is a risk of the procedure done in this case. The fact that a procedure has risks in and of itself does not excuse defendants of liability for any negligence.

(A-772-773: 21-5), stating that she believed the revised limiting instruction to be an accurate statement of the law. (Id; 21-22 and 5-6). Plaintiff agreed to the revised instruction (A-773:7), but Defendants objected based on an incorrect assertion that the medical negligence pattern jury instructions covered the "risk of the procedure" issue. (A-773:14-20). Despite acknowledging that the revised instruction was an accurate statement of the law, the trial judge ultimately ruled, through an email sent January 13, 2025, that she was not going to give a limiting instruction on the "risk of the procedure." (Exhibit A)

SUMMARY OF ARGUMENT

Mrs. McKeehan appeals the trial judge's decision refusing to give the jury a limiting instruction regarding "risk of the procedure." The Supreme Court should reverse and find that Mrs. McKeehan is entitled to a new trial because the trial judge erred in holding that the pattern negligence jury instructions adequately covered the risks of the procedure when, in fact, the pattern instructions do not mention the risks of the procedure, nor do they instruct the jury on how to consider such evidence.

STATEMENT OF FACTS

A. Mrs. McKeehan's Injury

On August 29, 2019, Mrs. McKeehan was involved in a motor vehicle accident. (A-210). She was subsequently transported to Christiana Care Hospital where she received a CT scan of her brain. (*Id*). The CT scan revealed an incidental finding of two unruptured brain aneurysms in Mrs. McKeehan's middle cerebral artery. (*Id*). Mrs. McKeehan was referred to Dr. Boulos for a neurosurgical evaluation. (*Id*). At the evaluation, Dr. Boulos recommended surgery, which occurred on September 18, 2019 and included a right craniotomy for clip ligation of the two unruptured aneurysms. (*Id*).

During the procedure, the attending electrophysiologist notified Dr. Boulos that there was a motor signal loss to the contralateral extremities, likely due to the loss of blood flow to the area of the brain perfused by the middle cerebral artery. (A-62 ¶ 15). Despite the electrophysiologist's warning, Dr. Boulos completed the surgery without adjusting the newly-placed clip. (A-210-211). During her post-operative neurologic examination, Mrs. McKeehan showed abnormal symptoms including facial droop and flexion movement to the left arm and leg. (A-211). Four hours later, a physician assistant ordered a STAT CT scan of the brain that showed a right-sided brain stroke. (*Id*). Specifically, the CT scan showed that the middle cerebral artery was narrowed at the site of the treated aneurysm. (*Id*). The next

morning, a CTA confirmed the stroke occurred where the clip was placed during surgery the day prior. (*Id*.)

B. Procedural History

Mrs. McKeehan commenced a medical negligence action by filing a complaint on November 19, 2021. (A-33-58). On January 7, 2022, Defendants filed an Answer to the Complaint denying the negligence allegations and asserting affirmative defenses. (A-66-80).

Trial commenced on January 7, 2025. (A-290). During the trial, Defendants interjected stroke as a "risk of the procedure" throughout the examinations of the witnesses and during closing arguments. *See infra* § C. As a result, Mrs. McKeehan requested a limiting instruction to contextualize the "risk of the procedure" evidence. (A-752-754). Defendants objected to the limiting instruction, arguing incorrectly that the pattern negligence jury instructions adequately covered the issue. (A-773:14-20). The parties submitted letters on the issue to the trial judge, (A-752-756), who ruled she was declining to give a limiting instruction. (Exhibit A). The jury returned a defense verdict on January 15, 2025, after deliberating for two days. (A-880-881).

On February 11, 2025, Mrs. McKeehan filed a Notice of Appeal with the Supreme Court appealing the trial judge's refusal to give a limiting instruction. (A-882-886). This is the Plaintiff's Opening Brief.

C. Jury Trial Testimony at Issue

Defendants interjected "risk of the procedure" testimony multiple times during the trial.[1]

First, during the cross-examination of Mrs. McKeehan's neurosurgeon expert, Dr. John Diaz Day ("Dr. Day"), Defendants cross-examined Dr. Day on the risks of the procedure:

> Q: And the reason you're using things like SSE, MEP, burst suppression, all that stuff, you are trying to reduce the number of complications like stroke that patients are having intraoperatively; correct?
>
> A: Correct.
>
> Q: Because stroke is a known complication of a procedure like this; correct?
>
> A: Sure.
>
> Q: And despite these measures, patients can still have a stroke following the craniotomy with aneurysm clipping?
>
> A: They can.
>
> Q: And patients can have complications like a stroke following a procedure like this even absent any negligence; correct?
>
> A: They can.
>
> Q: And you have had patients suffer strokes during an aneurysm clipping as well as in your career?

[1] It is undisputed that Plaintiff was not pursuing a claim for "informed consent" at trial.

A: Thankfully rare, but it's happened.

(A-383-384:13-10)

***

Q: And we talked about stroke being a known risk of a procedure like this. So if we're dealing with brain surgery, there are a number of complications that can occur with brain surgery, including stroke; right?

A: Of course.

Q: Bleeding, infections, brain swelling, loss of mental function, nerve damage, all these types of things; right?

A: Yes.

Q: And the longer the procedure is, the greater the risk a patient is to have some of these complications?

A: Well, yes and no.

(A-393:9-22). This testimony was the first instance where the Defendants interjected the "risk of the procedure" during trial.

Second, Defendants interjected the risk of stroke during direct examination of Defendant, Paul T. Boulos, M.D, asking:

Q: Is a stroke a known complication of a procedure like this?

A: Yes…

(A-490:3-5).

Third, Defendants interjected the risk of stroke during direct examination of their neurosurgical expert, Dr. William Broadus:

Q: Is stroke one of the known complications?

A: It's probably one of the most significant and unfortunately more common, too.

Q: Okay. Why is that?

A: Well, you're - - the surgery actually is focused on modifying the blood vessels that are providing arterial blood flow to the brain, so the ones that are keeping the brain alive by providing oxygen and sugar, glucose to the brain. Those are the things that brain cells need to stay alive. So there's a significant risk of causing some problem with those vessels in such a way that it can alter blood flow to a part of the brain and result in a stroke.

(A-669:3-16)

***

Q: Is that why you concluded this with this is an example of why post-operative stroke is a well-known complication associated with aneurysm surgery?

A: Yes.

(A-726:8-12).

Fourth, after the trial court heard argument over the proposed limiting instruction and declined to give it, Defendants discussed the "risk of the procedure" in closing argument:

Stroke's a known complication of the procedure that can occur without negligence. It happened to Dr. Day before. It happened with Dr. Boulos, Dr. Broaddus. It happened to all the experts you've heard from.

(A-818:11-15).

D. The Jury Instructions[2]

These are the actual medical negligence instructions that were given by the trial judge:

> In order to prove a medical negligence claim, Plaintiff must prove three things by a preponderance of the evidence: (1) that Defendants breached the standard of care; (2) that the breach of the standard of care was a proximate cause of harm; and (3) Plaintiff suffered damages. If you find that Plaintiff has failed to prove even one of these elements by a preponderance of the evidence, your verdict must be for the Defendants. On the other hand, if you find that Plaintiff has proven all of these elements by a preponderance of the evidence, your verdict must be for the Plaintiff.

(A-857).

Second, the trial court also read the definition of medical negligence:

> A healthcare provider who does not meet the applicable standard of care is liable for medical negligence. The law states that:
>
> > The standard of skill and care required of every healthcare provider in rendering professional services or healthcare to a patient shall be that degree of skill and care ordinarily employed, in the same or similar field of medicine as the defendant, and the use of reasonable care and diligence.
>
> The law requires that a health care provider's conduct be judged by the degree of care, skill, and diligence exercised by health care providers of the same or similar medical specialty, practicing at the time when the alleged medical negligence occurred.
>
> On the one hand, if you find that Defendants failed to meet this standard, and that this failure was a proximate cause of harm, then your verdict must be for the Plaintiff. (I shall explain what "proximate

[2] The cited jury instructions are those that were read to the jury and that Plaintiff identifies as those encompassing what the trial judge referred to as "pattern negligence jury instructions."

> cause" means in a moment.) On the other hand, if you find that Defendants met this standard, then your verdict must be against the Plaintiff, and in favor of Defendants.
>
> Every healthcare provider is held to the standard of care and knowledge commonly possessed by members in good standing of his or her profession and specialty. It is not the standard of care of the most highly skilled, nor is it necessarily that of average members of this profession, since those who have somewhat less than average skills may still possess the degree of skill and care to treat patients competently. Plaintiff cannot prove that Defendants were negligent merely by showing that another healthcare provider would have acted differently.
>
> Delaware law further requires that to prove liability, the Plaintiff must present "expert medical testimony" showing that "the alleged deviation from the applicable standard of care" caused harm. You may not guess about the standard of care that applies to Defendants, or whether a departure from that standard caused harm to Plaintiff. You must consider only expert testimony when you determine the applicable standard, decide whether it was met, and - - if it was not - - determine what caused the injury alleged in this case. If the expert witnesses have disagreed on the applicable standard of care, on whether it was met, or on the question of cause, you must decide which view is correct.
>
> No presumption of medical negligence arises from the mere fact that the patient's treatment had an undesirable result. Medical negligence is never presumed. The fact that a patient has suffered injury while in the care of a healthcare provider does not mean that the healthcare provider is negligent for medical negligence.

(A-860-861).

None of the pattern jury instructions provided to the jury offered guidance on how to consider the "risk of the procedure" testimony and argument that Defendants injected into the trial.

ARGUMENT

THE "RISK OF THE PROCEDURE" TESTIMONY AND ARGUMENT BY COUNSEL CREATED A DANGER OF JURY CONFUSION THAT REQUIRED MITIGATION BY THE TRIAL COURT THROUGH THE USE OF A SPECIFIC JURY INSTRUCTION BECAUSE THE PATTERN JURY INSTRUCTIONS DID NOT ADDRESS THE DANGER.

A. Question Presented

Whether the trial court committed legal error in refusing to give a requested limiting instruction regarding "risk of the procedure" testimony and argument as it applied to stroke during the clipping of an aneurysm. This issue was preserved by letter from counsel to the trial judge on January 13, 2025. (A-752-754).

B. Scope of Review

On appeal, the Supreme Court reviews the trial court's jury instructions *de novo*. *Express Scripts, Inc. v. Bracket Holdings Corp.*, 248 A.3d 824, 829 (Del. 2021) (holding that defendant was entitled to a correct statement of the law and remanding for a new trial).Reversal is warranted "if the alleged deficiency in the jury instructions undermined the jury's ability to intelligently perform its duty in returning a verdict." *Id*. at 835 (citation omitted).

C. Merits of the Argument

"Jury instructions must give a correct statement of the substance of the law and must be 'reasonably informative and not misleading.'" *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002) (citation omitted). The objective is to give instructions

sufficient for the jury to "intelligently perform its duty in returning a verdict." *Storey v. Castner*, 314 A.2d 187, 194 (Del. 1973). Although a party does not have a right to an instruction in a particular form, a party "does have the unqualified right to have the jury instructed on a correct statement on the substance of the law." *R.T. Vanderbilt Co., Inc. v. Galliher*, 98 A.3d 122, 125 (Del. 2014) (citations omitted).

"When the appropriate requests are made by prayers presented to the court, each party is entitled to such general and specific instructions to the jury on the applicable law..." *Greenplate v. Lowth*, 199 A. 659, 662 (Del. Super. 1938) (citations omitted). In the interest of justice, "the trial court will usually endeavor to cover all possible issues in charging the jury, both in its statement of the claims of the parties, and in specific instructions, based on the facts..." *Id*. at 663. The refusal to give a proper instruction when requested "is usually error." *Id*.

If the jury misunderstands the law, "its ability to perform its duty is undermined and substantial rights of the parties are affected." *Duphily v. Del. Elec. Co-op., Inc.*, 662 A.2d 821, 834 (Del. 1995). While pattern instructions are a valuable resource to instructing the jury, "they are not dispositive." *Corbitt*, 804 A.2d at 1062 (citation omitted). Because they are not all-encompassing, "[t]he pattern instructions may require modification or supplementation, depending upon the issues of fact and law presented at the trial." *Id*.

The pattern instructions presented to the jury in the instant case required supplementation because the defense repeatedly interjected testimony and argument about the "risks of the procedure" (collectively, for ease of discussion, "risk evidence"). The trial judge concluded that the negligence pattern jury instructions ("pattern instructions") provided sufficient guidance for the jury. However, none of the pattern instructions addressed a key concern that a specific instruction would have obviated: the jury considering "risk of the procedure" as a complete defense for negligence rather than as a factor to consider when evaluating the standard of care for a treating physician. The risk of stroke during the procedure Dr. Boulos performed on Mrs. McKeehan did not obviate Dr. Boulos' duty to perform the procedure according to the standard of care. Likewise, the risk of stroke did not mean that Mrs. McKeehan's stroke would have occurred absent the specific negligence alleged (Dr. Boulos' failure to adjust the clip after intra-operative monitoring demonstrated loss of blood flow). Absent an instruction providing the jury guidance about risk evidence, the jury could reasonably conclude that since stroke was a risk of the procedure, Mrs. McKeehan's stroke could not legally have been the result of negligence.

Appellant requested the trial judge mitigate the danger of potential jury confusion posed by the risk evidence by giving an instruction on use of this

evidence.[3] The trial judge responded by suggesting modified language,[4] which she stated was an accurate statement of the law. (A-772:21-22 and 773:5-6). Despite acknowledging that the revised instruction was an accurate statement of the law, the trial judge ruled no instruction on risk of the procedure would be given. The trial judge's ruling is contrary to this Court's holding that a party has "the unqualified right to have the jury instructed on a correct statement on the substance of the law." *R.T. Vanderbilt*, 98 A.3d at 125 (citations omitted). *See also Greenplate*, 199 A. at 662-663 ("When the appropriate requests are made by prayers presented to the court, each party is entitled to such general and specific instructions to the jury on the applicable law..." because the interest of justice require the trial court to "endeavor to cover all possible issues in charging the jury, both in its statement of the claims of the parties, and in specific instructions, based on the facts...". The refusal to give a proper instruction when requested "is usually error.") and *Corbitt*, 804 A.2d at 1062 (pattern jury instructions are not dispositive and may require modification or supplementation, depending upon the issues of fact and law presented at the trial.").

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[3] "RISK OF PROCEDURE: During this trial, you have heard witnesses testify that stroke is a risk of the procedure done in this case. You must not consider that evidence on the issue of whether defendants breached the applicable standard of care. The fact that a procedure has risks does not excuse defendants of liability for any negligence." (A-753)

[4] During this trial you have heard witnesses testify that a stroke is a risk of the procedure done in this case. The fact that a procedure has risks in and of itself does not excuse defendants of liability for any negligence. (A-772-773: 21-4)

The importance of the jury having the information it needs to intelligently perform its duty is best elucidated by this Court's decision in *Baird v. Owczarek*, 93 A.3d 1222 (Del. 2014). Although discussing informed consent evidence, this Court's decision is instructive by analogy. In *Baird*, the provider entered into evidence the "informed consent forms" plaintiff had signed prior to surgery. *Id*. at 1231-1233. Plaintiff sought to exclude this evidence on relevancy grounds. *Id*. at 1231. The trial judge admitted the evidence, but gave the jury a limiting instruction as follows:

> When determining whether or not Dr. Owczarek committed medical negligence, you may not, and should not, consider any evidence of Mr. Baird's consent or any warnings given by Dr. Owczarek, as evidence that Mr. Baird consented to Dr. Owczarek's negligence, if any.

Id. at 1231-32. Of note, the limiting instruction given by the *Baird* trial court is similar in scope to that requested in the instant case.

On appeal in *Baird*, this Court found that absent an allegation the defendant failed to provide relevant information, the informed consent forms were neither material nor probative of whether defendant met the standard of care and, as such, the forms should have been excluded. *Id*. at 1233. In reaching its decision, the *Baird* Court noted that absent a claim for failure to inform, "[e]vidence of informed consent… *could confuse the jury* by creating the impression that consent to the surgery was consent to the injury. Therefore, because [this] evidence… carried a *clear danger of confusing the jury*, even if the evidence would have been otherwise

relevant, it should have been excluded..." *Id*. (emphasis added) (internal citations omitted).

While the *Baird* Court reversed the trial judge on the basis that the informed consent evidence was erroneously admitted, the case remains illustrative. *Baird* recognized that "a clear danger of confusing the jury" must be mitigated by the trial judge, even if it required the exclusion of relevant evidence. Moreover, the *Baird* trial judge's willingness to give a limiting instruction similar to that sought by Appellant in the instant case demonstrates that Appellant's requested instruction was well within the bounds of the trial court's authority.

Our sister state of Pennsylvania has acknowledged that the admission of evidence relating to the risk of a procedure may create jury confusion that could result in the mistaken conclusion "that an injury was merely a risk or complication of a surgery, rather than as a result of negligence." *Mitchell v. Shikora*, 209 A.3d 307, 320 (Pa. 2019). To address this potential for jury confusion, the Pennsylvania Supreme Court relies on its trial court judges to employ "*instruction* and comment" to "ensure that juries understand the proper role of such evidence at trial." *Id*. (emphasis added).

By refusing to give a limiting instruction in the instant case, the trial judge created a "clear danger" of jury confusion that allowed for the jury to conclude that because stroke was a risk of the procedure, the defendant could not be held liable if

(as it did) a stroke occurred. This "if/then" application of the risk evidence is not Delaware law and was not addressed by the pattern instructions, thereby "undermining the jury's ability to intelligently perform its duty in returning a verdict." *Express Scripts*, 248 A.3d at 835 (citation omitted) As this Court has recognized, the issues of fact and law presented at trial may require supplementation of the pattern instructions, *Corbitt*, 804 A.2d at 1062, because when the jury misunderstands the law, "its ability to perform its duty is undermined and substantial rights of the parties are affected." *Duphily*, 662 A.2d at 834.

The "clear danger" of jury confusion in the instant case was preventable with a single limiting instruction. Because the instruction requested by Appellant was a correct statement of the substance of Delaware law,[5] Appellant had an "unqualified right" to have the jury so instructed. *See R.T. Vanderbilt Co.*, 98 A.3d at 125. The trial court's refusal to give the requested limiting instruction is reversible error. *See Pennsylvania Railroad Company v. Goldenbaum*, 269 A.2d 229, 234 (Del. 1970) (holding that the trial court's use of a pattern instruction in lieu of a specific jury instruction that had been requested, and that was necessary to properly consider the law, was reversible error that required a new trial). As such, Mrs. McKeehan asks

[5] The trial judge acknowledged this on the record. (A-772:21-22 and 773:5-6).

this Court to reverse the trial court's decision and remand the case for a new trial with an order that a proper limiting jury instruction be given at trial.

CONCLUSION

The judgment below should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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