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Case Number 56,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

DEFENDANT BELOW, APPELLEES, DELAWARE NEUROSURGICAL GROUP AND PAUL T. BOULOS, M.D.'S CORRECTED ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

At issue in this appeal is whether a party is entitled to an instruction that contradicts the pattern jury instructions, misstates the law and has the potential to mislead and confuse the jury.

On November 19, 2021, Plaintiff Deanna McKeehan ("Plaintiff/Appellant") filed a Complaint against the Defendants Delaware Neurosurgical Group ("DNS") and Paul T. Boulos, M.D. ("Defendants/Appellees") alleging that in September 2019, Dr. Boulos negligently performed neurosurgery on her, causing her to suffer a stroke and subsequent partial paralysis.[1]

On December 6, 2024, a pretrial conference was held, and a Pretrial Stipulation and Order was entered.[2] The trial began with opening statements on January 7, 2025.[3] At trial, the standard of care expert neurosurgeons for both parties, as well as Defendant Dr. Boulos, testified that a stroke is a "known complication" of the procedure and can occur absent negligence. The Plaintiff did not object to this testimony when it was elicited. On January 13, 2025, before the evidence closed, the Plaintiff requested an additional non-pattern jury instruction on the "risks of the procedure," which would have directed the jury to disregard the unrebutted

[1] A – 31.
[2] A – 8, 210 – 241.
[3] A – 290.

testimony that stroke was a known complication of a craniotomy procedure.[4] This request was denied by the court.[5] During the prayer conference, the court noted that the testimony was not objected to during trial, and in her written ruling she found that the pattern jury instructions were sufficient and that the requested instruction was counter to the pattern jury instructions explicitly stating that negligence is not presumed.[6]

The jury returned a verdict in favor of the Defendants, finding that Dr. Boulos did not breach the standard of care during the craniotomy and aneurysm clipping surgery.[7] Since the jury found no breach in the standard of care, they did not reach the issue of causation.

On February 11, 2025, Plaintiff filed a timely Notice of Appeal of the verdict.[8] This is Defendants' Answering Brief.

[4] A 752- 753.
[5] Exhibit "A" to Opening Brief.
[6] *Id*.
[7] A – 1038.
[8] A – 882 – 886.

SUMMARY OF ARGUMENT

1. The Plaintiff's argument is denied, and she has utilized the incorrect standard of review in her brief. Under *Wright v State* and *Miller v. State*, this matter should be reviewed for an abuse of discretion because the instructions given by the Superior Court sufficiently covered "known complications" in medical negligence actions, just not in the form, content, or language proposed by the Plaintiff.

2. The Plaintiff's argument is denied. The Superior Court did not err in denying Plaintiff's request for a non-pattern jury instruction that was misleading and counter to the pattern jury instruction; the *Baird* case relied upon by the Plaintiff is not applicable; and the instructions in this case, examined as a whole, were sufficient because they allowed the jury to intelligently perform its function and render a verdict without any questions or other evidence suggesting they were confused.

STATEMENT OF FACTS

On August 30, 2019, Plaintiff Deanna McKeehan ("Mrs. McKeehan/the Plaintiff") presented to the ER at Christiana Hospital after a motor vehicle accident. A CT scan of her head during a trauma workup revealed two intracranial aneurysms.[9] She was referred to neurosurgery to address the aneurysms. Dr. Boulos evaluated her on September 5, 2019, and after discussing the case with the neurointerventional team, determined that the most appropriate treatment was a clipping procedure, wherein he would place small clips across the necks on the aneurysms to occlude blood flow to the aneurysm itself to prevent rupture.[10]

On September 18, 2019, Dr. Boulos performed a craniotomy with aneurysm clippings using neurological monitoring and fluorescent angiography (dye) to evaluate the patient intraoperatively.[11] During the procedure Dr. Boulos placed clips on the two aneurysms.[12] Prior to placing the clips, Dr. Boulos ran fluorescent dye and then he ran the dye again after placement of each clip, so he could confirm that blood was flowing properly to the different portions of her brain.[13] After the clips

[9] B – 011.
[10] B – 003 – 5. Plaintiff did not claim any breach or negligence in the decision to address the aneurysms with a clipping procedure.
[11] B – 023 – 25.
[12] *Id.*
[13] *Id.*

were placed, Plaintiff's neurological signals changed, although the angiography after clip placement confirmed adequate blood flow through those vessels.[14]

Dr. Boulos addressed the signal loss by 1) increasing the voltage on the monitoring device used to measure communication between the brain and extremities; 2) using the dye to assess blood flow; and 3) dissecting around the area of the aneurysm to look for any kinking in the vessel or occlusion.[15] After placing the leads directly on her brain, he was able to evoke a signal. Seeing no flow issues and no blockages, Dr. Boulos finished the surgery.

Mrs. McKeehan awoke with left-sided deficits, and a postoperative head cat scan with contrast was performed.[16] The interpreting radiologist documented what he believed to be "at least moderate stenosis" at the right M1 and M2 junction,[17] as well as a stroke in the basal ganglia.

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[14] *Id.*

[15] *Id.* Plaintiff's theory of the case was that all Dr. Boulos had to do was "adjust the clip." Dr. Boulos took other measures to address the signal loss and explained his reasoning at trial.

[16] A – 211, B – 26.

[17] *Id.* Dr. Boulos and the defense neurosurgery expert, Dr. Broaddus, opined that the stenosis of the M2 was actually an artifact, as the M2 was neither occluded nor narrowed at the end of the craniotomy, and Mrs. McKeehan did not suffer a stroke consistent with occluded blood flow to the M2. A – 511 - 514, Dr. Boulos, Direct Test. *See also* A – 515, 683, Dr. Broaddus, Direct Test. The defense neurology expert, Dr. Owen Samuels, also testified that the stroke was not caused by narrowing or stenosis of the M1/M2. B – 089, 96, Dr. Samuels Direct Test.

Mrs. McKeehan was treated at Christiana Hospital and on September 27, 2019, she was discharged to a rehabilitation facility to begin physical and occupational therapy for hemiparesis and other neurological defects.[18] On October 6, 2019, after being seen by Dr. Boulos and his partners, she returned emergently to Christiana Hospital to address fluid build-up at her craniotomy site and was subsequently discharged to Wilmington Rehabilitation on October 17, 2019. She left inpatient rehabilitation and began outpatient therapy on November 14, 2019.[19] As of the date of trial, the Plaintiff still suffered from sequelae of the stroke.

Trial in this case began on January 7, 2025. During opening statements, the parties outlined their respective cases on the standard of care and causation. The Plaintiff claimed that her stroke was caused by the MCA clips narrowing the M2 artery, leading to a downstream occlusion of the perforator arteries that supply the basal ganglia with blood. She further argued that Dr. Boulos did not meet the standard of care either intraoperatively or postoperatively with respect to the loss of signals on the left side. Plaintiff's theory was that the clip should have been adjusted intraoperatively, or alternatively, after obtaining an immediate CAT scan when she woke up with left-sided deficits, she could have been returned to the operating room to re-establish blood flow and reverse the neurological deficits.[20]

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[18] B – 027.
[19] *Id.*
[20] A – 210.

Defendants disputed both liability and causation. The defense neurosurgery expert, Dr. William Broaddus, opined that Dr. Boulos had acted within the standard of care intraoperatively and postoperatively (including dissecting around the aneurysm) to try and figure out why the signal was lost.[21] Dr. Owen Samuels, a practicing neurologist working in neuro-critical care, opined that Dr. Boulos's post operative care was appropriate as well, and that it was not necessary for Dr. Boulos to obtain an immediate CAT scan as he had just seen the flow intraoperatively with the ICG.[22] The defense theory was that 1) nothing Dr. Boulos did during or after the surgery violated the standard of care; and 2) the stroke was caused by the clipping of a perforator that directly supplied blood to the basal ganglia, a known and unavoidable complication of the procedure, not by narrowing of the MCA artery, which would have caused a stroke in the cortical region, which was not demonstrated on the postoperative imaging studies and inconsistent with her clinical picture.

Going to the gravamen of the issue on appeal, all three expert witnesses for both the Plaintiff and the Defendants, as well as Dr. Boulos, testified that stroke is a known complication of a craniotomy and clipping surgery. The parties differed on

[21] A – 679 – 683. Dr. Broaddus, Direct Test.

[22] B – 102. Dr. Samuels, Direct Test. The purpose of a postoperative CAT scan would be to ascertain whether blood flow was diminished through the vessel at issue by evaluating how quickly the dye passed through that vessel. However, Dr. Boulos had already performed multiple dye tests during the procedure confirming the patency of the vessel.

whether the stroke was foreseeable and preventable in this case, and whether Dr. Boulos's treatment was within the standard of care.

On direct examination, defense neurosurgery expert, Dr. Broaddus, testified that he was familiar with the craniotomy and clipping procedure at issue in this case and had performed it between 300 to 400 times over the course of his career.[23] Dr. Broaddus also testified that he was familiar with the complications associated with craniotomies with multiple aneurysm clippings and that stroke was not only one of the known complications, but "probably one of the most significant and unfortunately more common," complications.[24] The Plaintiff did not object to this line of questioning. Dr. Broaddus later testified, consistent with his expert report, that the stroke was caused by the impairment of a perforator artery that was clipped and was an unavoidable consequence of dealing with the life-threatening aneurysm:

> A. Well, again, the reason for being in the operating room is to clip the aneurysm that was threatening the patient's life for the rest of her life. And the aneurysm was successfully clipped. It carried with it the effect of this impairment of flow in the perforator that resulted in a stroke, but let's see. The need to control the aneurysm was sort of higher, stronger need than the -- well, in other words, there was no way of controlling the aneurysm without resulting in this perforator or impairment of the perforator flow that resulted in a stroke. So it was sort of a necessary result of controlling that aneurysm.
>
> Q. Do you have an opinion to a reasonable degree of medical probability whether the damage to the perforator intraoperatively was foreseeable?
>
> A. No, it was not foreseeable.

[23] A – 667 – 668.
[24] A 668 – 669, lines 19 – 23, 1 – 16.

Q. Okay. Well, was it preventable?

A. No.

Q. Is that why you concluded this with this [*sic*] is an example of why postoperative stroke is a well-known complication associated with the aneurysm surgery?

A. Yes.[25]

Once again, Plaintiff did not object to this testimony at the time it was offered.[26] On cross examination, in response to a question as to whether he had prevented strokes by adjusting clips, Dr. Broaddus testified that "bottom line is any time you do aneurysm surgery, you can cause a stroke."[27] The Plaintiff did not move to strike this testimony.

During cross examination, the Plaintiff's expert, Dr. John Diaz Day, agreed that stroke was a "known complication" of a craniotomy and aneurysm clipping procedure and that patients can have a complication like a stroke even absent negligence.

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 everything intraoperatively; correct?

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[25] A – 725 – 726, lines 11 – 23, 1-12.

[26] Appellant has not argued that the presentation of evidence that stroke is a known complication or risk of the procedure is inadmissible. Indeed, such presentation of evidence is commonplace in medical negligence cases in this jurisdiction. Rather, Appellant makes the assertion, incorrectly, that the pattern jury instructions fail to address the known complications/risks of the procedure.

[27] A – 730 – 731, line 1 – 3.

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 aneurism [*sic*] clipping?

A. They can.

Q. And patients can have complication like a stroke following a procedure like this even absent any negligence; correct?

A. They can.[28]

He later affirmed this during another line of questioning:

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.[29]

The Plaintiff did not object to this opinion testimony when it was elicited.

Defense counsel also elicited testimony regarding strokes as a known complication of neurosurgery from their neurology expert, Dr. Owen Samuels.

Q. Have you evaluated and treated patients who suffered a stroke during a craniotomy with aneurysm clip-in?

A. Yes. Routinely.

Q. How -- and I know it may be a hard question. How frequently, if you can give us an estimate, as to you would see a patient in that position?

[28] A – 382 – 383. Dr. Day, Cross Exam.,
[29] A – 393.

> A. Well, obviously the hope is that you have surgery and you don't have a stroke. Obviously that's the hope clearly. But it happens. I mean, it's the nature of -- nature of neurosurgery and aneurysms and neurosurgical-related issues.[30]

Once again, Plaintiff did not object to this line of questioning or to the answers as they were elicited.

Dr. Boulos also testified that stroke is a known complication of a craniotomy and clipping procedure.[31] The Plaintiff objected to testimony regarding the discussion Dr. Boulos had with the Plaintiff regarding the risks of the procedure, and defense counsel redirected the witness, as no informed consent claim was before the jury.[32] The Plaintiff did not object to the testimony that characterized stroke as a "known complication" of a craniotomy.

The Plaintiff did not, at any time during trial, move to exclude or strike the testimony regarding stroke as a "known complication" of craniotomy. Prior to the last defense witness testifying and closing arguments, Plaintiff requested the following non-pattern jury instruction:

> 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

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[30] B – 058.

[31] A – 490, lines 3 – 11. Dr. Boulos, Direct Test.

[32] *Id.* After Dr. Boulos stated that stroke was a known complication of this procedure, he started to testify about the discussion he would typically have with a patient and Plaintiff objected. Defense counsel stated "Okay. I don't want to go into the actual discussion." There was no other objection or motion to strike from the Plaintiff.

> a procedure has risks does not excuse defendants of liability for any negligence.[33]

The language requested was inconsistent with the Delaware Pattern Jury Instruction for medical negligence, which clearly states, in pertinent part:

> "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 committed medical negligence."[34]

The Defendants objected to the Plaintiff's proposed instruction as counter to the pattern instruction and likely confusing to the jury. Plaintiff's stated reasoning at the time was that by introducing evidence of stroke as "known complication" of the craniotomy procedure, the Defendants had injected an informed consent argument into the trial, although they did not argue that the evidence itself was inadmissible.[35] Defendants disagreed, noting that the testimony was elicited to show that "even absent negligence, things can happen, which has nothing to do with informed consent."[36] The court considered both written and oral arguments from both parties.

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[33] A – 752 – 754. In the letter to the court, the Plaintiff states that the Defendants have injected a "risks of the procedure defense" despite the pre-trial stipulation that informed consent would not be discussed at trial.
[34] Del. Super. Patt. Jury Instructions 7.2 Medical Negligence. A – 860 – 861.
[35] The Plaintiff's argument now seems to be that the pattern jury instructions do not adequately address "risks of the procedure evidence." For the reasons stated below, the Defendants disagree with this position.
[36] B – 046.

The court specifically noted that Appellant had not objected to the testimony at the time it was elicited:

> But then there was no objection that was requested when the testimony was elicited and if there had been an objection, then I could have instructed – there was no reason for the jury to have considered it, then on a proper objection I could have considered the motion to strike….So why would I now tell them you must not consider it on whether defendants breached the applicable standard of care when in fact that's – that's the testimony that was provided, which means they're free to consider it? Maybe procedurally I'm getting kind of in the weeds here, but it really should have been – there should have been an objection if it wasn't relevant and should have been considered, then I could have considered it on a proper motion.[37]

The court suggested an alternate instruction which was not as "absolute":

> During this trial you have heard witnesses testify that a stroke is a risk of a 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.[38]

The Plaintiff agreed to this revised instruction.[39] The Defendants objected to the court's revised instruction because it risked confusing the jury and the issue was adequately addressed by the pattern instruction.[40] The court ultimately ruled against giving the instruction, holding that the pattern jury instructions were sufficient and noting that the cases cited by Plaintiff dealt with informed consent and statistical evidence and "neither addressed whether a separate jury instruction is required once

[37] A – 770 – 771.
[38] A 772 – 773.
[39] A – 773.
[40] A 773 – 774.

that evidence is admitted without objection."[41] The jury heard closing arguments from both parties. During closing, the Plaintiff conceded that "There's risks with everything in medicine,"[42] but argued that Defendants had violate the standard of care in this specific case, stating:

> You heard and you heard again and again and again that this procedure had risks. Has risks. But do you know who didn't say that they knew it has risks? Deanna McKeehan and Dale. Folks, every procedure has risks. A doctor's job is to minimize those risks and prevent them from happening. That's why there's a standard of care. It's to protect the safety of the patient. This was a preventable stroke.[43]

The Jury deliberated for a day and a half, returning a verdict for the Defendants on January 17, 2025. The Plaintiff subsequently filed her appeal, claiming that the court abused its discretion in denying her requested jury instruction.

[41] Opening Brief Exhibit "A."
[42] B – 169.
[43] B – 200. Notably, Plaintiff attempted to insert an informed consent argument during rebuttal despite being adamant that such evidence was confusing.

ARGUMENT

I. THE COURT SHOULD REVIEW THE SUPERIOR COURT'S DENIAL OF THE REQUESTED INSTRUCTION UNDER THE ABUSE OF DISCRETION STANDARD PURSUANT TO ITS HOLDINGS IN *WRIGHT V. STATE* AND *MILLER V. STATE*.

A. Question Presented

Where the Superior Court has ruled that the pattern jury instruction on medical negligence sufficiently covered the issue of known complications and risks of the procedure, should this court follow its holdings in *Wright* and *Miller* and review the matter for an abuse of discretion?

B. Scope of Review

The decision to give a "particular jury instruction is within the sound discretion of the trial judge," and will not be reversed "absent an abuse of discretion."[44] While this court will review "a refusal to instruct on a defense theory (in any form)" *de novo*, it reviews a "refusal to give a "particular" instruction (that is, an instruction is given but not with the exact form, content or language requested) for an abuse of discretion."[45] In reviewing the refusal of a requested instruction, this court will focus "not on whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty."[46]

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[44] *Miller v. State*, 893 A.2d 937, 949 (Del. 2006) citing *Carter v. State*, 873 A.2d 1086, 1088 (Del. 2005). See also: *Sheeran v. State,* 526 A.2d 886, 893 (Del. 1987).
[45] *Wright v. State*, 953 A.2d 144, 148 (Del. 2008).
[46] *Miller* at 949 citing *Cabrera v. State*, 747 A.2d 543, 544 (Del. 2000).

C. Merits of Argument

The jury instructions in this case were a correct statement of the law that appropriately covered the issues generated in this trial and so the refusal to use the specific language of a non-pattern instruction requested by the Plaintiff should be reviewed under the abuse of discretion standard.[47] The Superior Court found that the pattern instructions were sufficient to instruct the jury on the issue of known complications because they specifically referenced the fact that no presumption of negligence arises from an undesirable outcome.[48] Per statute, medical negligence is not presumed (absent specific and limited circumstances not applicable in this case).[49] The logical corollary is that undesirable outcomes can happen absent negligence, which principle is reflected in the pattern instructions.

By contrast, The Plaintiff's requested instruction was:

> 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 the evidence on the issue of whether defendants breached the applicable standard of care"[50]

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[47] *Scott v. State*, 737 A.2d 531, 1999 WL 652054 *1 (Del. 1999). "This court reviews the trial court's denial of a requested jury instruction for abuse of discretion so long as the instruction given is a correct statement of the substantive law."
[48] Del. Super. Patt. Jury Instructions 7.2 Medical Negligence. A – 860 – 86, supra.
[49] 18 *Del. C*. § 6853(e): "No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death…Except as otherwise provided herein, there shall be no inference or presumption of negligence on the part of a health-care provider."
[50] A – 753.

This misstates the law. Because negligence is not presumed from a bad outcome, evidence that the Plaintiff suffered from one of the known complications or risks of a procedure is obviously admissible and relevant to a jury's consideration of whether negligence occurred.[51] Moreover, the Plaintiff did not object to this evidence at trial.[52] The requested instruction tells the jury to disregard the uncontradicted testimony they heard for the past week and can reasonably infer that if a bad outcome happens, it must be due to negligence: that is not the law nor the logical conclusion to be drawn from the evidence in this trial.

The court rejected the Plaintiff's proposed instruction, and the Plaintiff agreed with the proposed revised instruction:

> During this trial you have heard witnesses testify that a stroke is a risk of 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.[53]

The Defendants objected, as this instruction was both unnecessary and

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[51] *DeBussy v. Graybeal*, 2016 Del. Super. LEXIS 615 (Del. Super. December 2, 2016) at *3: "Whether or not this known complication comes into play turns on whether the procedure was performed in accord to the standard of care."

[52] Because the Plaintiff did not object to this trial testimony nor contend at trial that the "risks of the procedure" or "known complications" evidence is irrelevant or inadmissible, she has waived that issue on appeal by failing to preserve it. See Supr. Ct. R. 8; *Felton v. State,* 2003 Del. LEXIS 366 (Del. July 3, 2003) at *5, citing *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995). Should the court determine that the interests of justice require review, the Plaintiff must prove under the "plain error" standard that the refusal to give her requested instruction was "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[53] A – 773.

potentially confusing to the jury when read in context with the pattern instruction. The court ultimately agreed with the Defendants that the pattern instruction sufficiently addressed the known complications of medical procedures:

> The court is satisfied that the pattern negligence jury instructions are sufficient. Witnesses testified that stroke is a known complication of the procedure at issue here – and that the known risks and complications can occur absent any negligence. To then further instruct the jury that these risks do not excuse the defendants of liability for *ANY* negligence reads counter to that pattern instruction.[54]

The court's holding was correct. The testimony from the witnesses regarding "known complications" was consistent with Delaware's medical negligence statute and the pattern instructions. The instructions given to the jury did not preclude the Plaintiff from arguing that the Defendants were nonetheless negligent and that this stroke was due to negligence as opposed to one that could occur absent negligence. The jury was not instructed that the Defendants could not have been negligent because stroke is a known complication. The jury heard testimony from the Plaintiff's expert witness who opined that even though stroke is a known complication of the procedure, in this case the Defendants' negligence caused the stroke. There was no jury confusion as to the issues they were to decide.

Plaintiff's argument that the jury was not instructed with specific language regarding the "risks of the procedure" is unavailing under *Wright* and *Miller*. In

[54] Opening Brief, Exhibit "A."

Miller, this court found that the trial court acted within its discretion when denying a request for a pattern jury instruction where it was not determined necessary.[55] In so holding, the court noted that:

> Here, the instruction correctly stated the law and adequately guided the jury about how to conduct their deliberations. Further, not only did the trial judge's instruction correctly state the law and enable the jury to perform its duty, but the instruction also did not materially differ from Miller's proposed instruction. In sum, Miller simply quibbles over the denial of special words he preferred. We have consistently held that no particular form of words or phrases must be used in any instruction.[56]

A "risk of the procedure" is a "known complication" – i.e., an outcome that can happen absent negligence, which is in the pattern jury instruction defining medical negligence (and the medical negligence statute). The Plaintiff is not arguing now that the evidence is inadmissible or irrelevant; she is seeking an improper instruction limiting that admissible evidence.[57] Her proposed instruction was an argument as to how the testimony should be considered rather than a statement of the law.[58] Evidence that a certain outcome – in this case, a stroke – is a known

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[55] *Miller,* supra, at 949 – 951.
[56] *Id.* at 949.
[57] Compare to *Jones v. State*, 798 A.2d 1013, 1018 (Del. 2000). In rejecting Defendant's argument that the trial court committed an abuse of discretion in denying a requested limiting instruction on otherwise admissible hearsay: "the proposed instruction was not a correct statement of the substance of the law because it would have prevented the jury from using [defendant's] statements to their fullest admissible extent and from inferring that [victim] may have acted in response to [defendant's] intended plan to end the relationship and killed her."
[58] *Garden v. State,* 815 A.2d 327, 341 (Del. 2003): "The primary function of jury instructions is to inform the jury of the law and its application to the facts as the jury

complication of a medical procedure is relevant to the jury's determination of whether the medical provider was negligent.[59] It offers them an alternative factual and logical explanation for the undesirable outcome which they are free to accept or reject based on their evaluation of the evidence in its entirety. To instruct a jury to disregard this evidence leaves them with a patient who had a bad outcome and no alternative that they may consider as the cause, other than negligence.

Because there was no abuse of discretion in denying the Plaintiff's requested language in the jury instructions, this court should uphold the jury's verdict. Assuming arguendo that this court reviews the denial of the requested jury instruction *de novo,* the jury instructions given were sufficient, as explained below.

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finds them. Presenting the proposition that cross-racial identifications are less likely to be accurate in the context of a jury instruction raises that proposition to the level of a rule of law, which implies a degree of certainty that social science rarely achieves, and comes perilously close to a comment on the evidence contrary to the constitutional restriction. Delaware Constitution of 1897, art IV '19."

[59] *DeBussy*, supra at *3. See also *Mitchell v. Shikora,* 209 A.3d 307 (Pa. 2019), discussed *infra.*

II. THE SUPERIOR COURT DID NOT ERR WHEN IT DENIED PLAINTIFF'S REQUEST FOR A NON-PATTERN AND MISLEADING JURY INSTRUCTION THAT WAS INCONSISTENT WITH DELAWARE LAW.

A. Question Presented

Did the Superior Court err when it denied the Plaintiff's motion for a non-pattern jury instruction that was inconsistent with the Pattern Civil Jury Instructions and risked misleading and confusing the jury about how to consider the evidence properly admitted at trial?

B. Scope of Review

Assuming that this court finds that the requested instruction was not given at all and otherwise not covered by the instructions given, a trial court's denial of a requested jury instruction is reviewed *de novo*.[60] As a general rule, "a [party] is not entitled to a particular instruction, but he does have the unqualified right to a correct statement of the substance of the law."[61] In reviewing the denial of a requested instruction, this court will focus on whether the instructions as given correctly stated the law and enabled the jury to perform its duty.[62]

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[60] *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 540 (internal citations omitted)(Del. 2006)

[61] *Brittingham v. Layfield,* 2008 Del. LEXIS 523, *5-6; 962 A.2d 916 (Del. November 20, 2008).

[62] *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002); *Cabrera v. State*, supra.

C. Merits of Argument

1. The non-pattern instruction at issue was not an accurate statement of the law and risked confusing the jury.

Even if the court reviews the trial court's decision to deny the Plaintiff's requested opinion *de novo,* her argument still fails because the instruction she authored was a misstatement of the law that stood the risk of misleading or confusing the jury and the revised instruction provided by the court, that the Plaintiff agreed to, was already covered by the pattern instructions and likely to be confusing to the jury. Denying that request was not reversible error. Under Delaware law, a party "has no right to demand a particular instruction in particular language," and courts have found that "no error results from a refusal to so charge when the instructions given are correct statements of the law."[63]

Failure to give a requested instruction will constitute reversible error only "if the alleged deficiency in the jury instructions 'undermined … the jury's ability to intelligently perform its duty in returning a verdict'"[64] and "[a] trial court's instructions to the jury will not serve as grounds for reversible error if they are "reasonably informative and not misleading, judged by common practices and

[63] *Chavin v. Cope*, 243 A.2d 694, 698 (Del. 1968).
[64] *Bullock v. State*, 775 A.2d 1043, 1047 (Del. 2001) (quoting *Zimmerman v. State*, 565 A.2d 887, 890 (Del. 1989)).

standards of verbal communication."[65] This court "will examine the jury instructions as a whole to make [that] evaluation."[66] If an argument is not made, there is no need to instruct the jury to disregard it.[67] The Plaintiff cannot show that there were deficiencies in the jury instructions that did not allow the jury to perform its duty or that the instructions as a whole were deficient. The jury did not send any notes or questions to the court,[68] nor did they indicate that they were confused or had trouble deliberating on the case. Delaware law generally presumes that the jury followed the judge's instructions,[69] and in the absence of any evidence to the contrary, that presumption applies here.

The Plaintiff argues that the Defendants injected "risk of the procedure" evidence into the trial to introduce evidence of informed consent and thus confused

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[65] '*Probst v. State*, 547 A.2d 114, 119 (Del. 1988) (quoting *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983)); see also *Culver v. Bennett,* supra, at 1098, *Storey v. Castner,* Del. Supr., 314 A.2d 187, 194 (1973); *Baker v. Reid,* Del. Supr., 44 Del. 112, 57 A.2d 103, 109 (1948); *Haas v. United Technologies Corp.*, 450 A.2d 1173, 1179 (Del. Super. 1982); *Newnam v. Swetland,* Del. Supr., 338 A.2d 560, 561-62 (Del. 1975).

[66] *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983). See also: *Greenplate v. Lowth*, 39 Del. 350, 359 (Del. Super 1938) The refusal to give proper instructions warranted by the evidence in the case will constitute reversible error. "[t]he giving of instructions that are clearly and materially wrong and prejudicial, or the refusal to give proper instructions, when asked for, is usually error, but in most cases the failure to give either general or specific instructions that might have been proper, but which were not requested, is not error or a ground for a new trial."

[67] *Chavin*, supra, at 698.

[68] A – 5.

[69] *Brittingham* at *6 citing *Reinco v. State*, 906 A.2d 103, 112 n.20 (Del. 2006); see also *Fuller v. State*, 860 A.2d 324, 329 (Del. 2004).

the jury.[70] This conflates evidence of informed consent, which is not admissible if there is no informed consent claim, and evidence of the known complications of medical procedures, which is admissible and relevant in a medical negligence case (as Plaintiff herself concedes by her failure to object to such evidence). Throughout her brief, the Plaintiff classifies the trial testimony as "informed consent" evidence that confused the jury. No witness testified – and the Defendants did not argue – that the Plaintiff consented to the risk of a stroke. No witness testified – and Defendants did not argue – that Defendants were excused from liability because stroke is a risk or known complication of the procedure. As noted above, the testimony was elicited to show that a stroke can occur *absent any negligence* which is a factor the jury can consider when determining if Defendants were negligent. The testifying expert witnesses, including Plaintiff's expert witness, agreed that this was the case and that evidence was unrebutted. This is consistent with Delaware law and the pattern jury instructions stating that negligence is not presumed.[71]

It is not error for a trial court to refuse a specific instruction requested by one party when that instruction does not reflect the arguments of the parties. In the

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[70] A – 752 – 753: In her letter to the court requesting the proposed instruction, she argues that "Despite Defendants raising this issue (of informed consent) in the PTO, counsel for Defendants asked Plaintiff's neurosurgical expert, John Day M.D., on cross-examination, to admit that stroke is a known complication for a procedure like this."

[71] 18 *Del. C.* § 6853(e): *Debussy,* supra.

Chavin v. Cope case, where the trial court denied the plaintiff's requested instructions on loss of consortium and mitigation of damages this court held as follows:

> It is true that the trial judge did not give the precise instructions requested by the plaintiffs on loss of consortium and on sympathy for the parties. He did, however, instruct the jury upon those two subjects adequately and correctly. Since a party has no right to demand a particular instruction in particular language, no error results from a refusal to so charge when the instructions given are correct statements of the law.
>
> The plaintiff's wife requested that the jury be instructed that she had no obligation to undergo surgery in order to minimize damages. The trial judge refused to do so.
>
> We think the trial judge was correct in so doing. No contention was made on the defendant's behalf that Mrs. Chavin had an obligation to have surgery so as to minimize her damages. This being the fact, the requested instruction would have been meaningless. There was no error in denying it.[72]

Chavin is applicable here. There was no argument or contention that because stroke is a known complication of a craniotomy, the Defendants were excused of liability. The Defendants argued that they were not negligent AND that the stroke could have happened absent negligence, which argument is supported by undisputed record evidence. Instructing the jury that they could not consider the known complications of a procedure would be counter to the evidence and the law.

The fact that the court offered a revised instruction is not an availing argument, because the revised instruction was still unnecessary and potentially

[72] *Chavin* at 698.

confusing, a fact later recognized by the trial court in deciding not to give it. A party is not entitled to specific supplemental instructions if the issue is fairly covered by the other instructions given.[73] The court's proposed instruction included the language "[t]he fact that a procedure has risks in and of itself does not excuse defendants of liability for any negligence." This language, while not explicitly contradicting the pattern instructions, carried the real risk of confusing the jury and unfair prejudice to the Defendants, as it was worded in a way that may have presumed negligence. The Plaintiff has the burden of proof as to a medical negligence case, and language by court implying to the jury that the Defendants are negligent or liable violates that tenet of the law.

The precedent cited by Plaintiff is also inapposite to the present case. Defendants agree that the case law states that both parties have "the unqualified right to have the jury instructed on a correct statement on the substance of the law,"[74] but

[73] See *Manlove v. State*, 2005 Del. LEXIS 30 (Del. January 19, 2005) at *4, 867 A.2d 902 (Table): This court affirmed the trial court's denial of a requested jury instruction on "mere presence" even though it was a technically correct statement of the law. "However, a mere presence jury instruction was not required in view of all the other instructions given in this case. The trial court instructed the jury as to the defendant's presumption of innocence and the State's requirement to prove each and every element of the crimes charged. The jury instructions as a whole clearly conveyed that more than the defendant's mere presence in the apartment was required to prove his guilt. The trial court's refusal to provide a mere presence jury instruction did not constitute reversible error under the facts of this case."

[74] Contrast this case to *Overstock.com, Inc. v. State*, 234 A.3d 1175, 1185 (Del. 2020). This court found reversible error where the Superior court improperly

the Plaintiff's proposed instruction was not a correct statement on the substance of the law, but rather, a misleading statement on the substantive law to be applied to the facts. The court's revised instruction could be reasonably interpreted to imply negligence on the part of the Defendants and was thus not congruent with the law.

The instructions given in this case correctly stated the law and did not omit any affirmative claim or defense. In cases where failure to give a requested instruction constitutes a reversible error, it is generally because the requesting party has made an affirmative claim or raised a defense and the verdict reflects the fact that the jury was unable to evaluate the case due to incomplete or confusing instructions or a failure to instruct on a key point of law.[75] The holdings of those cases do not contemplate a situation where one party wants to preclude or limit the jury from considering relevant and admissible evidence during their deliberations.

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instructed the jury on a "reverse false claim" element of the DFCRA when there was not sufficient record evidence to support that claim.

[75] *R.T. Vanderbilt Co. v. Galliher*, 98 A.3d 122, 125 (Del. 2014). This court held that that "a trial court may not, *sua sponte*, refuse to instruct the jury on claims that have been pleaded and upon which evidence has been presented." In that case, the court failed to include an instruction regarding premises liability and duty of care when that was an affirmative claim in the case. See also *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 831 (Del. 1995), where the court found that there was a sufficient factual basis for the issue of superseding cause to go to the jury and thus the jury should have been given a superseding cause instruction.

The instruction proposed by the Plaintiff is premised on an argument that the defense did not make; namely, that because the procedure at issue has risks, Defendant could be "excused" from liability. The defense's argument was simply that the stroke could have happened absent any negligence because it is a known complication, which is a correct reflection of Delaware law as well as the facts of this case.

2. The Plaintiff's argument is a fundamental misreading of the *Baird* case and conflates informed consent with known complication evidence.

The Plaintiff's dependence on the *Baird* case as authority for her requested instruction is misplaced. The holding of *Baird* was that if the plaintiff in a medical negligence case does not make an informed consent claim, the defendant may not present evidence of informed consent, even with a limiting instruction, as that risks confusing the jury.[76] In this case, where the defendant did not present evidence of informed consent, *Baird* is not applicable, and her arguments are unavailing.

The holding in *Baird* on informed consent and the risks of the procedure turned on whether informed consent forms were improperly admitted for a peripheral purpose with a limiting jury instruction.[77] The *Baird* court held that "evidence of informed consent, such as consent forms, is both irrelevant and unduly prejudicial in medical malpractice cases without claims of lack of informed consent."[78] That is not the case here, because no evidence of informed consent was

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[76] *Baird v. Owczarek*, 93 A.3d 1222, 1232 (Del. 2014).

[77] *Baird* at 1231-1232. The jury instruction ultimately given read as follows:
"Informed consent is not a valid defense to a medical negligence action. Plaintiff-patient cannot consent to the negligence of a defendant-doctor. The fact that the defendant-doctor may have informed the plaintiff of certain known and accepted risks, does not excuse him of liability for any negligence.
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."

[78] *Id*.

presented to the jury. No testimony regarding the Plaintiff's state of mind was submitted by Defendants. No informed consent forms listing stroke as a "risk of the procedure" were submitted as evidence and there was no testimony or argument regarding "assumption of the risk." Per the *Baird* holding, evidence of informed consent is not relevant to whether a medical provider met the standard of care. But the *Baird* case does not preclude, or even mention, testimony and evidence regarding the known complications of a given medical procedure and whether a given complication can happen absent negligence. *Baird* is not applicable. Lack of informed consent is a distinct claim from a deviation of the standard of care.

Although not binding precedent, *Mitchell v. Shikora,* a Pennsylvania case cited by the Plaintiff in her opening brief, is instructive on the point of conflating "risks of the procedure/known complications" evidence with "informed consent" evidence.[79] In overturning a lower appellate court, the *Mitchell* court held that, in line with its earlier decisions, "evidence of the risks and complications of a surgical procedure, "in the form of either testimony or a list of such risks as they appear on an informed-consent sheet" could be "relevant in establishing the standard of care."[80] The court overruled a lower court holding that "blurred the distinction between informed consent evidence and evidence regarding the risks and complications of

[79] Mitchell v. Shikora, 209 A.3d 307, supra.
[80] *Mitchell* at 120 citing *Brady v. Urbas*, 631 Pa. 329, 111 A.3d at 1161 – 64 (Pa. 2015).

medical procedures" and went on to note that:

> Determining what constitutes the standard of care is complicated, involving considerations of anatomy and medical procedures, and attention to a procedure's risks and benefits. Further, a range of conduct may fall within the standard of care. While evidence that a specific injury is a known risk or complication does not definitively establish or disprove negligence, *it is axiomatic that complications may arise even in the absence of negligence.* We emphasize that "[t]he art of healing frequently calls for a balancing of risks and dangers to a patient. Consequently, if injury results from the course adopted, where no negligence or fault is present, liability should not be imposed upon the institution or agency actually seeking to assist the patient."…. As a result, risks and complications evidence may clarify the applicable standard of care, and may be essential to provide, in this area, a complete picture of that standard, as well as whether such standard was breached. Stated another way, risks and complications evidence may assist the jury in determining whether the harm suffered was more or less likely to be the result of negligence. Therefore, it may aid the jury in determining both the standard of care and whether the physician's conduct deviated from the standard of care...As such, we hold that evidence of the risks and complications of a procedure may be admissible in a medical negligence case for these purposes." (emphasis added)[81]

Thus, *Mitchell* is far more applicable to this case as persuasive authority than *Baird*, which is factually and legally distinct.

[81] *Mitchell* at 318 (internal citations omitted).

3. The jury instructions when taken as a whole were reasonably informative and not misleading such as to constitute grounds for reversal.

Even if this court finds that the trial court's proposed, and ultimately rejected, instruction regarding risks of the procedure was not a misstatement of the law or tending to confuse the jury, the court's ultimate decision not to give the instruction is not reversible error. In prior holdings, this court has stated that "[a] trial judge is given substantial latitude in tailoring jury instructions as long as those instructions fairly and adequately cover the issues presented. In considering an alleged insufficiency in instruction, the charge to the jury must be viewed as a whole."[82] If the instructions as a whole are reasonably informative and not misleading, they are not grounds for reversal.[83] A trial court's refusal to give a requested instruction is not grounds for reversal if the instructions on the whole were adequate and charged the jury correctly.[84] The standard for determining if a jury instruction is proper is

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[82] *Atkins v. State*, 523 A.2d 539 (Del. 1987); see also *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983).

[83] *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002). "The pattern instructions may require modification or supplementation, depending upon the issues of fact and law presented at the trial. This is a case in which it would have been prudent to modify the pattern instructions to more closely reflect the particular facts at issue. Nonetheless, on the whole, the instructions given by the trial judge were calculated to be reasonably informative and were not misleading."

[84] *Sammons v. Doctors for Emergency Servs., P.A.*, supra, at 541 (Del. 2006) "After consideration of the trial judge's ruling and the jury instructions as a whole, we find that the trial judge's refusal to instruct the jury about the bases of the cross claims did not constitute reversible error. The trial judge adequately instructed the jury regarding the cross claims so that they could make a reasoned and informed decision

"not whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty."[85]

The Plaintiff does not contest that the pattern medical negligence instruction is incorrect or misstates the law. She did not object below to testimony regarding known complications of craniotomies (the "risks of the procedure evidence" mentioned in her brief). Her appeal is premised solely on the fact that the jury was not instructed by the court to disregard record evidence about a known risk of the procedure. How much weight to assign that evidence was an argument that she was allowed to make below. Evidence that stroke is a known complication/risk of the procedure was presented to the jury so that they could address a question that may, without evidence, otherwise be irreconcilable: "How could Mrs. McKeehan have suffered a stroke during the procedure if it was not due to negligence?" They were presented with evidence to address this inquiry, were properly instructed by the court that the mere fact that a person has an undesirable result does not infer negligence and then asked to resolve the issue of negligence with all the relevant and admissible facts at their disposal.

The instructions given in this case did correctly state the law and did not omit

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in the case without confusing the jury by overburdening them with unnecessary information."

[85] *Dunning v. Barnes*, 2002 Del. Super. LEXIS 487, (Del. Super. November 4, 2002) at *6 citing *Cabrera v. State, supra,* at 545.

any affirmative claim or defense, appropriately covered all the issues generated by the evidence, and the court correctly denied the Plaintiff's request for a misleading and inaccurate charge. Further, there is no evidence in the record to suggest that the jury was misled or confused; the jury had no questions and their decision was unanimous.

CONCLUSION

The court did not abuse its discretion or otherwise err in denying Plaintiff's requested jury instruction and the jury's verdict below should be affirmed.