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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 Court
v.	)	of the State of Delaware
	)	
DELAWARE NEUROSURGICAL GROUP and PAUL T. BOULOS, M.D.,	)	C.A. No. N21C-11-174 VLM
	)	
Defendants-Below/ Appellees.	)	

APPELLANT'S REPLY BRIEF

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ARGUMENT IN REPLY

I. THE COURT SHOULD REVIEW THE TRIAL JUDGE'S DENIAL OF THE REQUESTED INSTRUCTION *DE NOVO* SINCE THIS IS A DISPUTE OVER A DENIED INSTRUCTION, RATHER THAN A DISPUTE OVER THE PHRASING OF A GIVEN INSTRUCTION.

Under well-established Delaware law, this Court reviews a trial court's denial of a jury instruction *de novo*. *Ayers v. State*, 844 A.2d 304, 309 (Del. 2004) (citing *Yocum v. State*, 777 A.2d 782, 784 (Del. 2001)); *Express Scripts, Inc. v. Bracket Holdings Corp.*, 248 A.3d 824, 829 (Del. 2021). The Appellees, however, point to *Wright v. State*, 953 A.2d 144 (Del. 2008), and *Miller v. State*, 893 A.2d 937 (Del. 2006), in an attempt to divert from this clear analytical distinction. Through these cases and their progeny, this Court has established a distinction in the standard of review when a trial court denies a particular *phrasing* or *choice of words* for a jury instruction requested by a party, rather than, as here, where a trial judge refuses to give an instruction in any form.

In cases involving phrasing of an instruction, this Court reviews the decision only for an abuse of discretion by the lower court since "[t]he decision to give a *particular* jury instruction is within the sound discretion of the trial judge . . . ." *Miller*, 893 A.2d at 949 (emphasis added); *Wright*, 953 A.2d at 148 ("This Court . . . will review 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.") (emphasis added).[1] Critically, as these cases reiterate, when "the requested instruction [is] not given in any form," this Court still reviews the "claim *de novo*." *Wright*, 953 A.2d at 149.

It is undisputed that the trial judge in the instant case refused to give the requested instruction in *any* form—both in Appellant's originally-requested form and in the revised form proposed by the court and agreed to by Appellant (hereafter "Revised Instruction"). *See* Appellant's Corrected Op. Br. Ex. A (informing parties that the court "won't be giving the instruction."). The Appellees, therefore, resort to an assertion that the Revised Instruction is already contained in the pattern jury instructions, just not in the "specific language" requested. Appellees' Corrected Ans. Br. at 16. Of note, Appellees do not cite to a pattern instruction in support of their assertion. The lack of citation supports Appellant's position that the pattern instructions do not cover risk-of-the-procedure evidence. Indeed, a careful reading of the pattern instructions reveals that they do not once guide the jury on "known

[1] We flag for the Court that this differs from the standard expressed by Appellees under *Scott v. State*, 737 A.2d 531 (Del. 1999), as the standard of review articulated therein was explicitly overruled by Appellees' own leading case, *Wright v. State*. *See* Appellees' Corrected Ans. Br. at 16 n.47 citing *Scott* for the proposition that "[t]his 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." The standard of review set forth in *Scott* was explicitly overturned by this Court in *Wright,* 953 A.2d at 148 ("To the extent that some of our previous decisions appear to suggest a standard of review different from that announced here, we overrule them." (citing, "*e.g.*, . . . *Scott v. State*, 1999 WL 652054 (Del.Supr.)").

complications" or "risks of a procedure," *see* A-851-881 (jury instructions given in the instant case), despite Appellees' representations[2] to the contrary.

The remaining alternative argument made by Appellees—namely, that the Revised Instruction is an inaccurate and misleading statement of the law—belies the validity of Appellees' primary argument. If, as Appellees claim, the Revised Instruction is an "improper instruction limiting that admissible evidence," Appellees' Ans. Br. at 19, then the pattern instructions could not possibly cover the topic since the pattern instructions would not include an incorrect statement of the law. Here, the Revised Instruction is not simply a phrasing difference, as is required under *Miller* for the abuse of discretion standard to apply. Rather, as Appellees unknowingly acknowledge, this is not a matter of choice of words, but rather one focused on the trial judge's denial of the requested instruction in any form, the merits of which are addressed in the following sections.

Likewise, any argument made by Appellees regarding the admissibility of the risk evidence serves only as a red herring, particularly as it relates to the Court's standard of review in this case. There is no dispute that risk evidence is admissible. Appellant's lack of objection to its admittance does not serve as a waiver of

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[2] Appellees' Corrected Ans. Br. at 19 ("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).") (emphasis added).

Appellant's "unqualified right to have the jury instructed on a correct statement of the substance of the law," *R.T. Vanderbilt Co. Inc. v. Galliher*, 98 A.3d 122, 125 (Del. 2014) (citation omitted),[3] as Appellees seem to suggest.

[3] S*ee also, generally, Williams v. State*, 796 A.2d 1281, 1290 (Del. 2002) (holding that, although not constituting plain error, the lower court "erred in failing to issue a limiting instruction" even though there was no objection made to admitting the evidence); *U.S. v. Mile*s, 468 F.2d 482, 489–490 (3d Cir. 1972) (holding that, although evidence of flight in a criminal case "has been consistently held admissible as circumstantial evidence of guilt . . . [t]here was sufficient evidence to justify the trial court's instruction to the jury on the issue of flight"); *U.S. v. Van Orden*, 469 F.2d 461, 463–64 (3d Cir. 1972) (rejecting the defendant's argument that the trial court erred in allowing certain evidence since "counsel asked for and received a limiting instruction to the jury . . . [and yet defendant's] counsel made no effort to have these conversations stricken by the court.").

II. THE TRIAL JUDGE ERRED IN DENYING THE REVISED VERSION OF THE REQUESTED INSTRUCTION.

1. The Revised Instruction was an accurate statement of law and did not risk confusing the jury.

a) The Revised Instruction was an accurate statement of law.

For clarity, the only instruction at issue in this appeal is the Revised Instruction proposed by the trial judge and agreed upon by the Appellant[4]. As recognized by the trial judge, this instruction is a correct statement of Delaware law. *Id*. at 21-22 and 5-6. Appellees' claim that the requested instruction is an improper or inaccurate statement of law[5] is mistakenly directed at the originally-requested instruction, which is not at issue here. *See* A-753.

Instead, under the Revised Instruction, the jury is free to consider the admissible risk evidence and is guided on its limited purpose in the medical negligence context. As Appellees note, this purpose can be extrapolated from *DeBussy v. Graybeal*, which held that a "jury will find it helpful to understand that [the] injury is a known complication of [the procedure], *while also understanding that the injury could have occurred through negligence*." 2016 WL 8379214, at *1

[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: 21-5.

[5] *See*, *e.g.*, Appellees' Corrected Ans. Br. at 19 ("she is seeking an improper instruction limiting that admissible evidence."); *Id*. at 22 ("her argument still fails because the instruction she authored was a misstatement of the law . . . .").

(Del. Super. Dec. 2, 2016) (emphasis added). The Revised Instruction provides exactly the context needed for the latter half of this purpose—to understand that the risks of the procedure do not "in and of" themselves excuse any potential negligence. The Revised Instruction, therefore, is an accurate statement of Delaware law, providing essential context to the limited purpose of admissible risk evidence.

b) The Revised Instruction was not covered by the pattern instructions.

As this Court has held, "[i]n evaluating the propriety of a jury charge, the entire instruction must be considered with no statement to be viewed in a vacuum." *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983). Viewed in their entirety, the pattern instructions do not address "risks of a procedure" or "known complications," despite Appellees' representations to the contrary. *See* n.2, *supra*. Instead, Appellees assume that jurors will naturally find a "logical corollary" in the pattern instructions to discover what the Revised Instruction would have provided to them directly. Appellees' Corrected Ans. Br. at 16. Appellees argue that the pattern instructions "specifically reference the fact that no presumption of negligence arises from an undesirable outcome." *Id*. (*citing* Del. Super. Patt. Jury Instructions 7.2 Medical Negligence). Appellees then offer to this Court that "[t]he logical corollary is that undesirable outcomes can happen absent negligence…" *Id*. at 16. *Black's Law Dictionary* defines "corollary" as "[a] proposition that follows from a proven proposition with little or no additional proof; something that naturally follows."

Appellees' proffered "logical corollary" is not a concept that "naturally follows" from Instruction 7.2, but rather a restatement of the same principle. In essence, Instruction 7.2, as well as Appellee's expressed "logical corollary," convey that a bad outcome is not negligence *per se*. This is simply a reminder to the jury that proximate cause is the plaintiff's burden.

Next, Appellees' reliance on *Chavin v. Cope*, 243 A.2d 694 (Del. 1968) in support of this claim is misguided. Unlike in *Chavin*, the trial judge here did not "instruct the jury upon th[e] . . . subject[] adequately and correctly." *Id*. at 698. Appellees again seem to be confusing the present case with one involving a refusal to give "a *particular* instruction in *particular* language." *Id*. (emphasis added). Instead, the case at bar involves a trial court's refusal to instruct on an issue altogether. *See* Arg. Sec. I, *supra*. As such, the requested instruction here would not have been "meaningless," as it was in *Chavin*, since the jurors were not given any instructions on risk evidence. *Id.*

This leaves only Appellees' catch-all claim that "[a] party is not entitled to specific supplemental instructions if the issue is fairly covered by the other instructions given." Appellees' Corrected Ans. Br. at 26. In support of this assertion, Appellees cite *Manlove v. State*, 867 A.2d 902 (Del. 2005). In that case, the defendant appealed his conviction of, *inter alia*, possession with intent to deliver cocaine, arguing that the trial court erred in refusing to instruct the jury "that mere

presence at the scene of a crime is insufficient to find guilt." *Id*. In affirming the lower court's decision to refuse the instruction, this Court held that "[t]he jury instructions as a whole clearly conveyed that more than the defendant's mere presence in the apartment was required to prove his guilt." *Id*. This reasoning was recently reaffirmed in *Boyce v. State*, 2025 WL 1411854 (Del. May 15, 2025). In *Boyce*, this Court held that a "mere presence" instruction is clearly conveyed by the jury instructions as a whole, even when the contraband is not found at a home related to the defendant. *Id*. at *5.

Though appealing at first glance, this line of reasoning struggles outside of the criminal context. As the Court analyzed in *Boyce*, the "mere presence" instruction is clearly conveyed since, "[f]rom the onset, the jury [is] made aware of [the defendant's] presumption of innocence and the State's burden of proof." *Id*. This clear presumption in favor of the party requesting a clarifying instruction does not exist in the medical negligence context. In fact, in the instant case the pattern instructions potentially influence the jury *against* the Appellant (who requested the clarifying instruction). *See* A-861 ("The fact that a patient has suffered injury while in the care of a healthcare provider does not mean that the healthcare provider is liable for medical negligence.").

Without the clear and substantial burden provided in a criminal context, it is much harder to intuit that any legal conclusion is "clearly conveyed" by the overall

instructions. Therefore, unlike in *Manlove* and *Boyce*, without an additional instruction, there was a clear danger of jury confusion in that they could mistakenly believe that since stroke was a risk of the procedure, Appellant's stroke could not legally have been the result of negligence. As noted in Appellant's Corrected Opening Brief at 11-12, "[t]he 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)." This is not possible when the jury is confused about the law.

c) The Revised Instruction was not likely to confuse the jury.

Finally, in a kitchen-sink alternative argument, Appellees assert that the "court's proposed instruction . . . carried the real risk of confusing the jury," and that the "revised instruction could be reasonably interpreted to imply negligence on the part of the Defendants and was thus not congruent with the law." Appellees' Corrected Ans. Br. at 26–27. Appellees fail to provide any authority in support of this speculative conclusion. Likewise, as previously stated, Appellees' analysis is directly contradicted by the trial judge's recognition that the Revised Instruction is an accurate statement of the law. *See* (A-772-773: 21-6).

Despite Appellees' representations, an instruction supplementing the pattern instructions does not inherently confuse the jury. Here, the Revised Instruction offers an entirely different principle than anything found in the pattern instructions. The Revised Instruction delineates that the occurrence of a known risk does not

obviate negligence as the cause of the occurrence. While Appellees assert that Appellant argued this in closing, the jurors were instructed to disregard argument of counsel. Without the Revised Instruction, the argument offered by Appellant's counsel was to be viewed by the jury as just that, not as a statement of Delaware law that governed their decision-making. Thus, rather than confuse the jury, the Revised Instruction would have allowed it to "intelligently perform its duty" as it relates to the risk evidence. *Storey,* 314 A.2d at 194.

2. Appellant's Opening Brief acknowledged that *Baird* was an informed consent case that was nonetheless instructive by analogy and illustrative as to a trial judge's obligation to mitigate jury confusion.

Next, Appellees attack Appellant's reliance on *Baird*[6] as "misplaced," arguing that the Court's holding in *Baird* excluding informed consent evidence is irrelevant to the instant case where there was no evidence relating to informed consent. Appellees' Corrected Ans. Br. at 29. Appellees' argument fails to appreciate that Appellant cited the Court to *Baird* not for the ultimate holding, but rather as a case that is "instructive by analogy," Appellant's Corrected Op. Br. at 15 ("Although discussing informed consent evidence, this Court's decision is instructive by analogy."), and illustrative of a trial judge's obligation to mitigate risks of jury confusion. *Id*. at 16 ("While the *Baird* Court reversed the trial judge on the basis that the informed consent evidence was erroneously admitted, the case remains

[6] *Baird v. Owczarek*, 93 A.3d 1222, 1233 (Del. 2014).

illustrative."). Appellant reiterates her reliance on *Baird*, wherein this Court recognized that when evidence creates "a clear danger of confusing the jury," the trial judge is required to mitigate that danger. *Baird*, 93 A.3d at 1233.

While it is the case that mitigation under the facts in *Baird* required exclusion of the evidence in the first instance, exclusion is not always necessary. Rather, the trial judge may mitigate by providing the jury with instructions that allow the jury to "intelligently perform its duty in returning a verdict," *Storey*, 314 A.2d at 194, employing "specific instructions, based on the facts," *Greenplate v. Lowth*, 199 A. 659, 663 (Del. Super. Ct. 1938), in accordance with a party's "unqualified right to have the jury instructed on a correct statement of the substance of the law." *R.T. Vanderbilt Co., Inc.*, 98 A.3d at 125 (citation omitted).

While Appellees object to Appellant's reliance on *Baird*, Appellees agree with Appellant that our sister state's decision in *Mitchell v. Shikora*, 209 A.3d 307 (Pa. 2019) is "persuasive authority" in the instant case, going so far as to acknowledge that it is "far more applicable to this case" than *Baird*. Appellees' Corrected Ans. Br. at 31. While Appellees focus on the facts of the case and the court's discussion of the distinction between informed consent and risk of the procedure (a distinction recognized by Appellant as evidenced by the fact that Appellant did not object to the admissibility of the risk evidence), that is not the relevant aspect of *Mitchell* to the instant case. The relevancy lies in the Pennsylvania Supreme Court's recognition

that evidence of the risk of a procedure may create jury confusion, and, more importantly, in the court's reliance on trial judges to mitigate this risk via "instruction and comment." *Mitchell*, 209 A.3d at 320. In the instant case, the trial judge failed to mitigate the danger of jury confusion inherent in the risk evidence despite acknowledging that instruction language existed that was an accurate statement of the law. (A-772-773: 21-4). That failure is the basis of Appellant's appeal for reversal and remand.

3. The trial court's refusal to give the Revised Instruction constituted reversible error.

Finally, Appellees claim that there is broad discretion afforded to trial judges in "tailoring jury instructions as long as those instructions fairly and adequately cover the issues presented." Appellees' Corrected Ans. Br. at 32 (citing *Atkins v. State*, 523 A.2d 539 (Del. 1987)). Therefore, as they argue, "[e]ven if this court finds that the trial court's proposed . . . 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." *Id*. at 32. Here, Appellees once again conflate the relevant standards of review for this Court in determining reversible error. In each of Appellees' supporting cases, this Court was faced with a dispute over particular words or phrasing used in the "tailoring" of instructions that

were otherwise permitted by the trial judge.[7] As previously demonstrated, discretion is not afforded where an instruction is refused altogether.[8] *See* Arg. Sec. I, *supra*. In the instant case, a *de novo* review, looking at the "charge to the jury . . . as a whole,"[9] reveals that the jury was left completely in the dark regarding the risk evidence. Unlike in Appellees' authority, the parties were not "adequately instructed"[10] on risk evidence in that nothing in the pattern instructions educate the jury that while an injury may be a known complication of a procedure that occurs in the absence of negligence, it also could have occurred through negligence (including

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[7] *Atkins v. State*, 523 A.2d 539, 549 (Del. 1987) (rejecting the defendant's claim "that the failure to repeatedly identify [a party] in the jury instructions as the person who [defendant] aided (in the case of his vicarious liability) and as the person with whom he had to conspire, created the possibility of confusion."); *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983) (rejecting the defendant's "claim[] that the vagueness of the instructions . . . failed to channel the jury's discretion in imposing sentence."); *Corbitt v. Tatagari*, 804 A.2d 1057, 1061 (Del. 2002) (rejecting the defendant's argument that the trial court "improperly characterized the standard of care as a subjective determination and that there was no evidence to support an alternative treatment instruction."); *Sammons v. Drs. for Emergency Servs., P.A.*, 913 A.2d 519, 540 (Del. 2006) (rejecting the defendant's request to add language to a cross claim instruction to inform the "jury about the bases for the cross claims," since "the jury did not need to know the specific details about the cross claims.").

[8] In similar fashion to *Scott v. State* (n.1, *supra*), we flag for the Court that this differs from the standard expressed under *Dunning v. Barnes*, 2002 WL 31814525, at *1 (Del. Super. Nov. 4, 2002) (quoting *McNally v. Eckman*, 466 A.2d 363, 370 (Del. 1983), cited in Appellees' Corrected Ans. Br. at 33 n.85. The standard of review expressed in *McNally* was explicitly overruled by Appellees' own leading case, *Wright v. State*, 953 A.2d at 148 n.12.

[9] *Atkins*, 523 A.2d at 549.

[10] *Sammons*, 913 A.2d at 540.

because the provider failed to prevent, mitigate, or manage the risk). *See DeBussy*, 2016 WL 8379214, at *1.

Instead, "[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." *R.T. Vanderbilt Co., Inc.*, 98 A.3d at 125 (citing *North v. Owens–Corning Fiberglas Corp.*, 704 A.2d 835, 838 (Del. 1997)). In *R.T. Vanderbilt*, this Court found reversible error by a trial court when it, *sua sponte*, refused to give an instruction that "left the jury without a correct statement of the applicable law." *Id*. at 127. This analysis applies to the case at bar. In both cases, the jury was not provided with "*any* statement of the law," leaving them in the dark on that matter of law. *Id*. Such a deficiency "undermine[s] . . . the jury's ability to intelligently perform its duty in returning a verdict," and constitutes reversible error. *Storey*, 314 A.2d at 194.

Although not raised by Appellees directly, Appellees essentially are asking this Court to conclude that the trial judge's error was not harmless error. Appellees' counsel elicited from every expert and the treating defendant that stroke was a risk of the procedure and further argued it in closing, suggesting at each turn that the defendant was not liable for the occurrence of the stroke suffered by Appellant. As such, the error cannot be said to be harmless because the jury was not instructed how to contextualize this information. Absent instruction, the risk evidence poses the danger, recognized by the *Mitchell* court, that the jury would be confused by the

mistaken belief that the law prohibits a finding of responsibility on a medical provider for an outcome that was known to be a possibility. *See Mitchell*, 209 A.3d at 320. When evidence creates "a clear danger of confusing the jury," the trial judge is obligated to mitigate this danger. See *Baird*, 93 A.3d at 1233. Failure to do so is not harmless error. See *Storey*, 314 A.2d at 194 (where the jury is not provided with "*any* statement of the law," leaving them in the dark on that matter of law, the "jury's ability to intelligently perform its duty in returning a verdict" is undermined and constitutes reversible error).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case remanded for further proceedings.

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