IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 22-CV-354

KAREN HILL, INDIVIDUALLY AND AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANK HANKINS

Appellants,

v.

CAPITAL DIGESTIVE CARE, PLLC, *et al.*

Appellees.

On Appeal from the Superior Court of the District of Columbia
The Honorable Judge Heidi Pasichow, Superior Court Judge
Superior Court No. 2018-CA- 4998 M (Civil Division)

BRIEF OF APPELLANTS

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January 23, 2023

CERTIFICATE OF SERVICE

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RULE 28(a)(2) STATEMENT

Parties:

- Karen Hill, Individually and as Personal Representative of the Estate of Frank Hankins, Appellants
- Capital Digestive Care, PLLC, Appellee
- George Bolen, M.D., Appellee

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ASSERTION OF APPEAL

This appeal is brought as a result of a final judgment entered after jury verdict, which disposed of all parties' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. **WHETHER THE TRIAL COURT ERRED IN INCLUDING THE TERM "PROXIMATE CAUSE" ON THE VERDICT FORM.**

II. **WHETHER THE TRIAL COURT ERRED IN ALLOWING APPELLEES TO ADVANCE THE AFFIRMATIVE DEFENSE OF CONTRIBUTORY NEGLIGENCE.**

III. **WHETHER THE TRIAL COURT ERRED IN CRAFTING A VERDICT FORM THAT ASKED THE JURY TO BOTH FIND THAT THE APPELLEES FAILED TO OBTAIN INFORMED CONSENT AND FURTHER TO ASK IF THE FAILURE TO OBTAIN INFORMED CONSENT WAS A PROXIMATE CAUSE OF THE DAMAGES.**

IV. **WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR FOR NEW TRIAL.**

STATEMENT OF THE CASE

This is a medical malpractice action brought by the Appellants, Karen Hill, individually and as Administrator and Personal Representative of the Estate of Frank Hankins, against Appellees Capital Digestive Care, PLLC and George Bolen, M.D. Appellants alleged that the Appellees, a gastroenterologist and his business entity, failed to appreciate the medication list provided by the Decedent prior to an upper

endoscopy and colonoscopy procedure and then negligently and without the Decedent's informed consent ordered him to discontinue his blood thinner medication, Plavix. It was alleged that as a result of the discontinuation of the Plavix, Decedent developed a blood clot in his leg, which ultimately lead to amputation and his death.

The case was filed on July 13, 2018 and tried before the Honorable Heidi Pasichow on August 31, 2021. Prior to the trial, the parties had submitted proposed jury instructions and verdict forms to the trial court. Due to the COVID pandemic, this trial was continued and numerous pre-trial conferences and Webex meetings were held between counsel and the Court. Preliminary motions were argued and the court request supplementations and modifications to the parties' pre-trial submissions in accordance with its rulings. At the trial, the Appellants offered expert testimony on the national standard of care by a gastroenterologist concerning the breaches of Dr. Bolen, as well as expert testimony on causation. The experts offered by Appellants were not challenged via voir dire and were accepted as experts. Appellees also offered expert testimony. At the conclusion of the trial, the jury returned a verdict in which it found that Appellees had deviated from the standard of care but that such deviations did not "proximately" cause damages and that Appellees failed to obtain informed consent but that such a failure did not "proximately" cause damage. Appellants timely filed a Motion for Judgment

Notwithstanding the Verdict. Appellants' post-trial motion was denied, and Judgment was entered on September 9, 2021, in favor of the Appellees, and this Appeal followed.

STATEMENT OF FACTS

Statement of Facts and Evidence Presented at Trial

This is a medical malpractice action that stems from the care and treatment that Frank Hankins ("Decedent") received from George Bolen, M.D. at Capital Digestive Care, PLLC ("Appellees") on March 1, 2016. Decedent underwent and upper endoscopy and colonoscopy ("the Procedure") on that date. (App. 1547 - 1551). Prior to undergoing the Procedure, Decedent informed Appellees that he was on the blood thinner Plavix, and it was noted in the chart.

Plavix 75 mg tablet	2 days ago	Do not resume

(Pl. Ex. 1)(App. 1545).

It is undisputed that Dr. Bolen did not review the medication reconciliation form that documented Decedent's Plavix use prior to the Procedure. (T.T. p. 137)(App. 1224). It is undisputed that Dr. Bolen ordered Decedent to discontinue his Plavix after the Procedure. (App. 145 Initial Joint Pretrial Stipulation). It is undisputed that Dr. Bolen never spoke to Decedent's prescribing health care providers nor Decedent after the Procedure to advised him of the risks and benefits

of discontinuing his Plavix. (App. 145 Initial Joint Pretrial Stipulation)(T.T. Day 4 p. 153)(App. 1260).

On March 6, 2016, Decedent presented to the Emergency Department at Washington Hospital Center due to severe pain in his leg. Radiology studies demonstrated that a previously placed peripheral stent in his calf had become occluded from a blood clot. At that time, there was no evidence of ischemia to the leg, and he was advised to resume his Plavix and to consult with his treating physician. Decedent followed those directions and was scheduled to undergo a procedure. Prior to the scheduled procedure date, however, Decedent began to decline and sought treatment at Washington Hospital Center on April 5, 2016. By this point in time, his leg had become ischemic due to the occluded stent. The leg was amputated; however, Decedent did not recover from this second procedure and ultimately passed away on April 23, 2016.

After complying with the District of Columbia Medical Malpractice notice requirements, Appellants instituted this lawsuit on July 13, 2018. (App. 36). A companion lawsuit was filed on July 16, 2018 (App. 46), and both suits were consolidated on October 3, 2018. (App. 76 - 79). Appellees filed their Amended Answers on November 8, 2018. (App. 80 - 95).

After the close of discovery, Appellants filed "Plaintiffs' Motion in *Limine* to Preclude Defendants from Arguing Actions Taken Before March 1, 2016 by the

Plaintiff Form the Basis of Contributory Negligence," which was briefed by all parties. (App. 96 - 124). On February 26, 2021, the trial court issued its ruling on all motions in *limine* and denied Plaintiffs' motion to preclude argument on contributory negligence. (App. 125 – 137).

On June 15, 2021, the parties submitted the original Joint Pretrial Statement. (App. 138). Appellants than filed "Plaintiffs' Proposed Verdict Form" on June 21, 2021. (App. 172). Appellees also filed "Defendants' Proposed Verdict Form" on June 21, 2021. (App. 176). On June 29, 2021, at the direction of the trial court, the parties filed their "Supplemental Submission Following Pre-Trial Conference," to address some of the issues raised during the Pre-Trial Conference held on June 22, 2021. (App. 178 – 189). In addition to this document, the trial court requested additional submissions to be provided during the Pre-Trial Conference. Appellees submitted their submissions on July 14, 2021 and Appellants submitted their submissions on August 11, 2021. (App. 241 - 288). On August 23, 2021, the trial court issued its Final Pretrial Order. (App. 289 - 335). Trial then commenced on August 31, 2021.

On September 1, 2021, Appellants called as their first witness Todd Eisner, M.D. (T.T. Day 2 p. 49)(App. 703). Dr. Eisner was qualified as an expert witness in the field of gastroenterology without objection. (T.T. Day 2 p. 50 – 57)(App. 704 - 711). During his testimony, Plaintiffs' Exhibits 1, 2, 3, 4, and 11 were admitted into

evidence without objection. (T.T. Day 2. P. 59)(App. 713). Dr. Eisner testified within a reasonable degree of medical certainty as to the violations of the standard of care on the part of Dr. Bolen:

> **That there was a deviation from the standard of care in not knowing before the colonoscopy that the claimant was on Plavix, and that there was a deviation from the standard of care in having the patient stop the Plavix after the polypectomy without going into with other physicians why the patient was on the Plavix.**

(T.T. Day 2. P. 60)(App. 714).

In anticipation of Appellees argument that it was reasonable for Dr. Bolen to have relied upon the list of medications that had been provided by Decedent at the preceding visit over one month prior to the Procedure, Dr. Eisner testified that:

> **No, it was not acceptable. That was sometime in January, I believe around the 20th of January. And certainly medications that patients are taking can change in a day or two, but they can change certainly in a six-week period.**

(T.T. Day 2 p. 61)(App. 715). Dr. Eisner further testified that the standard of care of a gastroenterologist who became aware of a patient on Plavix the day of the procedure presented three possible actions: 1) cancel the procedure; 2) conduct the colonoscopy and if you remove a polyp then "use clips to close the defects where the polyp was removed to decrease the chance that the patient is going to have a post polypectomy bleed;" or 3) "assess with whoever is prescribing the Plavix, what the risks and benefits would be of continuing the Plavix after the procedure or stopping

the Plavix or using another agent to help keep the blood thin." (T.T. Day 2 P. 62 – 63)(App. 716 - 717). He further testified that in this patient "the standard of care would require speaking with the physician who is prescribing the Plavix and assess whether the Plavix needs to be restarted or not." (T.T. Day 2 p. 65)(App. 719).

Dr. Eisner also discussed the required conversation of a gastroenterologist who orders the discontinuation of Plavix. (T.T. Day 2. P. 68 – 70)(App. 722 - 724). Included in the required conversation needed for Dr. Bolen to have obtained informed consent, Dr. Eisner stated the following:

> **So the option before the procedure would have been to tell the patient that, you know, we can stop your Plavix if it's okay to stop the Plavix with your treating provider, or we can do – if they don't want you to stop the Plavix, then we can do the colonoscopy on the Plavix, hopefully you won't have a large polyp. If you do, then I can either take it out with an increased risk of bleeding or we can repeat the colonoscopy with you stopping the Plavix and maybe going on a blood thinner that can be stopped for a shorter period of time.**
>
> **. . .**
>
> **Because the last thing we want to do is have the patient stop the Plavix, have a normal colonoscopy, and then the patient has a stroke or throws a clot to his leg because they stop the Plavix that didn't even need to be stopped for the procedure. . . .**

(T.T. Day 2 p. 68 – 69)(App. 722 – 723).

Appellants then called Jeffrey Jim, M.D. (T.T. Day 2 p. 83)(App. 737). Dr. Jim was qualified as an expert witness in the field of vascular surgery and accepted by the trial court without objection. (T.T. Day 2 p. 83 – 94)(App. 737 - 748). Dr. Jim

was called to testify to the causative effects of discontinuing Decedent's Plavix. Dr. Jim offered his testimony within a reasonable degree of medical certainty. Specifically, Dr. Jim offered the following general causation testimony on Plavix:

> **So what the Plavix essentially does is it works on the platelets to really minimize the opportunity for them to clump together and stick to things. So really think of blood vessels in the body – and the way I explain to my patients is look at, you know, pipes in the walls wherever you're sitting at; at your home, in the courtroom, in some building, there are – you want things to flow along.**
>
> **If you put somebody on Plavix, the stuff that's flowing – the blood – will be a lot less sticky, so they're not going to have as much likelihood to stick to each other, against the stents, against the wall of the blood vessels, and because you do that, things will hopefully keep flowing longer.**

(T.T. Day 2 p. 97) (App. 751).

Dr. Jim then testified that on March 6, 2016, when Decedent presented to Washington Hospital Center, Decedent "certainly [had] some level of limb ischemia, but certainly was not what we call critical limb ischemia." (T.T. Day 2 p. 102)(App. 756). He further testified that "once the stent is occluded, it's pretty much occluded. So it's still occluded at that point from earlier in the month to where it is now." (T.T. Day 2 p. 103)(App. 757). Dr. Jim then offered his specific opinions on the causative effect of the discontinuation of Decedent's Plavix:

> **Q. In your opinion, Doctor, what was the cause of the clot, the vascular occlusion in his legs?**

A. Yeah, I think stopping the Plavix and having it run out, as you expect in that time frame, that ultimately made things clot in the preexisting stent that was already in the leg.

Q. And, Doctor, what was the cause of the amputation that took place?

A. It's the inability to – to perform the procedure to reestablish blood flow again and ultimately he ended up not having enough blood flow and it needed to be removed.

Q. And, Doctor, again, how do you – if at all, how do you go from vascular occlusion to death in this case? Explain that for us, please.

A. Sure. I mean, I think it's, again, sort of knowing what happened in the event. He ultimately had a severe enough symptom that required a treatment. The decision was made to proceed with treatment and the it became – he developed complications from that treatment, and it started leading to a pretty bad spiral that the – you know, weren't able to get him out of.

. . .

Q. My question to you, sir, is had the Plavix been continued, not stopped after the colonoscopy, more likely than not would the clot have formed when it did?

A. No, I – I – I've got to say this correctly. I – if the Plavix and the medications were continued, more likely than not, we would not be talking about a clotted stent.

Q. Let me ask you also, Doctor, about the – if there's any significance with respect to that when the clot did form after the Plavix was stopped five or six days afterwards, what is the significance of that, if any?

A. Sure. So we know that – you know, we're pretty comfortable knowing how long it takes for Plavix to be out of the system. And the reason we know this is I'm a – I'm a vascular

surgeon, so as weird as this sounds, I will take bleeding any day over clotting, but most of my other surgical colleagues don't think of it the same way.

So, for them, it's really important before doing an operation they want to stop the Plavix and have it out of the system. So it's pretty well known you stop it for about five to seven days before an operation before you do something elective.

So in this particular case it really fit into it almost perfectly or imperfectly, I guess, in a clinical sense where you stop the medication and the medication wears off as you would normally hope for five to seven days. In this case, obviously, not what we hoped, but it actually kind of fit.

. . .

Q. Okay. And, Doctor, again, within a reasonable degree of medical probability or certainty, if the occlusion had not happened, is there any reason to believe that this man would have died when he did?

A. No, there's no reason for him to have gone to go get more work done on his legs if everything is open. Because it was open, the reason they had to do something was because he had, you know, poor blood flow in that leg and then needed – you, know, had symptoms and then needed something to be done.

(T.T. Day 2 p. 114 – 117)(App. 768 - 771).

During re-direct, Dr. Jim was also asked about whether the re-administration of Plavix was a cause of the ultimate occlusion:

Q. All right. Doctor, also look at your deposition that you were asked about, on page 135 you were asked about aspirin. And the very next question that you weren't asked by Mr. Goodson, it says – on line 136 – page 136, line 4: Is it accurate that whether he was taking aspirin or not, if he had taken the

Plavix beginning back on – following the procedure on March 1, that more likely than not he would not have had the occlusion. And your answer was yes.

Is that still your testimony today?

A. Yes.

(T.T. Day 2 p. 141)(App. 795).

After the close of Appellants' case, Appellees called Michael Miller, M.D. as an expert witness in the field of cardiology without objection. (T.T. Day 3 p. 29)(App. 898). Appellees utilized Dr. Miller to advance a theory of contributory negligence for discontinuing the Aspirin that he was prescribed. (T.T. Day 3. P. 46 - 49)(App. 915 - 919).

On cross-examination, Dr. Miller agreed that Decedent had hyperlipidemia. (T.T. Day 3 p. 57)(App. 926). He was then confronted with his own published study that documented that "Risk factors for coronary heart disease may contribute to aspirin resistance. Inability of Aspirin to protect individuals from thrombotic complication. So aspirin may not be cardio protective in patients with hyperlipidemia." (T.T. Day 3 p. 58 – 59)(App. 927 - 928). Dr. Miller's own study found that 69% of patients with hyperlipidemia had poor responsiveness to aspirin and 86% of patients with poor responsiveness to aspirin were taking lipid lowering therapies such as Decedent was taken. (T.T. Day 3. P. 60 – 61)(App. 928 - 929). Despite efforts to deflect from his own research, Dr. Miller ended up agreeing that

he "wrote this because he thought other doctors should know about it." (T.T. Day 3. P. 63)(App. 932). Dr. Miller also testified that Plavix is "better than aspirin for platelet aggregation, but for inflammation aspirin far – is far superior to Plavix." (T.T. Day 3 p. 64)(App. 933). Dr. Miller also testified as follows as to the relationship between Plavix and Aspirin:

Q. But, Doctor, the Plavix – the purpose of the Plavix is to help prevent the development of the clot versus the inflammation, correct?

A. Correct. Both Plavix and aspirin do that.

(T.T. Day 3 p. 66 – 67)(App. 935 - 936).

Appellees next called Richard Bloomfeld as an expert witness in the field of gastroenterology to offer testimony on the standard of care who was admitted without objection. (T.T. Day 3 p. 107)(App. 976). Dr. Bloomfeld was called primarily to assert that Decedent was negligent for failing to inform Dr. Bolen of his medications during the January of 2016 office appointment. (T.T. Day 3 p. 112 – 147)(App. 981 - 1016). Dr. Bloomfeld testified that "not being on Plavix is associated with a high risk of platelet aggregation, yes." (T.T. Day 3 p. 203)(App. 1072). Additionally, Dr. Bloomfeld agreed that stopping the Plavix was a contributing factor to the development of the blood clot:

Q. Let's see if you can go this far, Doctor. You agree with me that stopping the Plavix and not having the Plavix for the

week was probably a contributing factor to the development of the blood clot, can you go that far?

A. Um –

Q. Or can't you do that?

A. Yeah, I – I would agree that he was off Plavix when it happened, but I don't think I'm the expert here to talk about, you know, how much that contributed. So I'm unable to say how much, you know, being off Plavix contributed to that thrombosis.

(T.T. Day 3 p. 204 – 205)(App. 1073 - 1074).

Finally, Appellees called Ying Wei Lum, M.D. as an expert witness in the field of vascular surgery and he was admitted without objection. (T.T. Day 3 p. 208 – 212)(App. 1077 - 1081). Dr. Lum testified that "Plavix is a blood thinner, I like to describe it to my patients as something stronger than aspirin." (T.T. Day 3 at 225)(App. 1094). Dr. Lum further testified that it is important to discontinue Plavix at least five days before a procedures because, "[i]t takes about five days for the medication to be completely out of the system and for its effects on the – on the platelets, which is the type of blood that it impacts to all be resolved;" (T.T. Day 3 p. 227 – 228)(App. 1096 - 1097); and "Stopping Plavix two days before the procedure probably decreases the risk of bleeding by a little bit, but it's not as much as stopping it, I'd say, five to seven days before the procedure. Because Plavix circulates in your blood and effects of Plavix remains for five to seven days;" (T.T. Day 4 p. 14)(App. 1121).

On cross-examination, Dr. Lum conceded causation in this matter:

Q. Do you agree that Mr. Hankins died of multi- multiple organ system failure?

A. Yes.

Q. Do you agree that the multiple organ system failure was in part caused by the Heparin-induced thrombocytopenia?

A. That's what it states in the death certificate.

. . .

Q. Okay. Do you agree that the multiple organ system failure was in part caused by the vascular occlusion?

A. Yes.

Q. And do you agree that the vascular occlusion was in part caused by the discontinuation of Plavix and aspirin?

Ms. Chrostowski: Objection to form.

BY Mr. Matthew Nace:

Q. Within a reasonable degree of medical probability.

A. The discontinuation of both aspirin and Plavix?

Q. Yes. Was that a cause of the vascular occlusion?

A. Yes, when you stop both aspirin and Plavix it caused the blockages.

(T.T. Day 4 p. 30 – 31)(App. 1137 - 1138).

Dr. Bolen was the final witness called in this matter. (T.T. Day 4 p. 61)(App. 1168). Dr. Bolen even testified that removal of Plavix can cause a blood clot to form:

Q. And you understood that if somebody was going to develop a clot from being off of Plavix, it was probably going to happen in the first five to seven days; isn't' that correct?

A. Well, it can happen at any time. But it takes about five days for the effects of Plavix to wear off, so it could be up to 10 to 14 days after that.

(T.T. Day 4 p. 157-58)(App. 1264 - 1265). Dr. Bolen further testified that had he known the patient was on Plavix before the Procedure, he would not have conducted the Procedure and/or would not have removed the polyp, which necessitated his order to discontinue the Plavix:

Q. So, Doctor, what you've got then is you've got, on March the 1st, what you agree was a serious significant change in the medication that he was taking that surprised you, that had you known about it, you would not have gone ahead and done the procedure where you took out – did a biopsy or you would have done the procedure not at all, correct?

A. That's correct.

. . .

Q. The proper thing here, the standard of care was to get ahold of him and tell him what's going on, you have a problem here with the Plavix and the aspirin; isn't that correct, that would have been the standard thing to do?

A. I would've – as I said, I attempted to do that, but I wasn't able to because he left. I attempted to call him, he did not respond to that. The damage, as I said earlier, had already been done. I had taken a large polyp out of an elderly gentleman in a bad location and I had just found out he was taking Plavix up until two days before the procedure. He was at high risk for developing a serious complication of bleeding.

I could not allow him to resume the medication on a short-term basis, but I did ask him to resume aspirin.

(T.T. Day 4 p. 158 & 164)(App. 1265 & 1271).

At the close of evidence, Appellants moved for directive verdict, which the trial court denied. (T.T. Day 4 p. 179 – 190)(App. 1286 – 1297)..

Factual Recitation on Jury Instructions and the Verdict Form

This matter was initially set for a pretrial conference and trial in 2020; unfortunately, due to the Covid pandemic, the matters were cancelled after the parties had begun to comply with the Superior Court's Rules and Scheduling Order. On June 15, 2021, the parties submitted a "Joint Pretrial Statement," (App. 138). It was unclear to the parties and the trial court at that time if the trial would even be held. As a result, the trial court and parties held several Webex meetings for "trial preparedness" purposes; this caused submissions to be made piecemeal as all were still adapting to the ability to try cases during Covid.[1] On June 21, 2021, all parties submitted Proposed Verdict Forms. (App. 171 - 178). On June 22, 2021, the parties participated in a Pretrial Readiness Hearing via Webex.

[1] It is believed by counsel that this was the first or second civil trial held once the pandemic closed the courthouse, and the first that Judge Pasichow held. As a result, the record does not appear as clean as prior trials that this Court may be accustomed to receiving.

Appellants' proposed verdict form specifically requested that any "causation" question omit the legal term "proximate cause" as opposed to Appellees' proposed verdict form. (Compare App. 171 with App. 176). The trial court made its determination to accept the Appellees' language utilizing "proximate cause" and asked the parties to submit additional comments on the trial court's drafted verdict form. That was done and was submitted on June 29, 2021. (App. 178).

On July 10, 2021, the parties then submitted an Amended Joint Pretrial Statement in compliance with the trial court's request after the Pretrial Readiness Hearing. On August 6, 2021, a second Pretrial Readiness Hearing was held. Appellants then filed supplemental submission to the trial court, again in response to the trial court's request, wherein they sought to include, among others, the "5-Series" of jury instructions, which included "5.12 – Cause Defined" (App. 257); the "9-Series" of jury instructions, which included "9.01 – Professional Liability – Elements of Claim for Medical Professional Negligence," (App. 259); and the Informed Consent Instruction identified as "9.08 – Disclosure of Medical Risks – Informed Consent." (App. 265).

On August 23, 2021, the trial court issued its Final Pretrial Order. (App. 289). The Final Pretrial Order included the language on "proximate cause" contrary to Appellants' initial argument and correctly only asked the jury one question on the count of informed consent: "3. Do you find that Dr. Bolen failed to obtain informed

consent from Mr. Hankins." (App. 334). In response, Appellants filed a motion to modify the proposed verdict form on September 6, 2021 during trial. (App. 336). At the commencement of the trial on September 7, 2021, Appellants' motion was raised in which Appellees' counsel consented to the inclusion of a second question on causation for the affirmative defenses and for the first time indicated that she believed "that a question as to causation needs to be included for the informed consent question." (T.T. Day 4 p. 4-5)(App. 1111 - 1112). During the cross-examination of the last witness, the trial court indicated that the verdict form was still being addressed by the clerks. (T.T. Day 4. p. 132 - 133)(App. 1239 - 1240). On September 8, 2021, the trial court addressed final edits of the jury instructions before closing arguments, but it was determined by the trial court to address the verdict form "once the jury begins their deliberations." (T.T. Day 5 p. 41)(App. 1361). At 3:15 P.M., the jury was excused to the jury room to begin deliberations. (T.T. Day 5 p. 163)(App. 1383). The trial court then began to address the verdict form on the record for the first time during trial and since the first Pretrial Preparedness Hearing. (T.T. Day 5 p. 164)(App. 1484). At 4:10 on the same day of trial, the jury presented its first note in which it asked "Hello, exclamation point. We did not see a verdict form included in the documents provided, please provide it. Thank you." (T.T. Day 5 p. 192 – 193)(App. 1512 - 1513).

On September 9, 2021, the jury submitted a second question to the trial court: "Hello, can you please provide a definition of proximate cause as featured in the verdict from. Thank you." (T.T. Day 5 p. 200)(App. 1520). The trial court recognized that the "term proximate has been removed from this instruction because it has no import to the layperson and may lead to confusion." (T.T. Day 5 p. 201)(App. 1521).

On September 9, 2021, the jury returned a verdict that found Appellees both deviated from the standard of care (Question 1) and failed to obtain informed consent (Question 3) but found that the deviation was not a proximate cause of Decedent's damages (Question 2) and that the failure to obtain informed consent was not a proximate cause of Decedent's damages (Question 4). (App. 343). Appellants than timely filed a motion for judgement notwithstanding the verdict and/or for new trial, which was briefed by all parties and denied by the trial court. (App. 346 – 3869). The trial court's opinion was silent on the issue of requiring the jury to find "proximate cause" despite the case law known to the trial court and the jury's submitted question.

SUMMARY OF ARGUMENT

The trial court erroneously allowed the verdict form to include the term "proximate causation," which was never defined to the jury. The term "proximate cause" has been eliminated from the jury instructions due to its nature to confuse the

jury. In the absence of any definition of "proximate cause" the jury voiced its confusion on how to address the verdict form and created a prejudicial verdict form.

The trial court erroneously allowed the Appellees to present an affirmative defense of contributory negligence in this matter when any potential contributory negligence occurred prior to medical care at issue. Because any potential contributory negligence on the part of the Decedent was cured by his instructions to the Appellees prior to the Procedure, such actions were irrelevant and should have been precluded. Instead, Appellees were allowed to present such evidence in order to create a defense of causation that was irrelevant to the matter.

The trial court erred in refusing to utilized Appellants' properly submitted Verdict Form as pertained to the count of Failure to Obtain Informed Consent by asking the jury to make a definitive finding that Appellees failed to obtain informed consent and then asking a follow-up question asking if the jury found that the failure to obtain informed consent was a "proximate cause" of the damages, which again lead to further confusion of the jury as indicated in their second question to the trial court.

Finally, the trial court erred in its rendering of its opinion to deny Appellants' Motion for JNOV and/or for New Trial by failing to distinguish between primary negligence on the part of the Appellees and potential contributory negligence on the part of Appellants. The trial court utilized a rationale that assumed that the jury made

a finding that Decedent was contributorily negligent in order to justify its reasoning when no such finding was ever made by the jury.

ARGUMENT

I. The Court Erred In Including The Term "Proximate Cause" On The Verdict Form.

"[W]hen reviewing for abuse of discretion, appellate court reviews legal determination of trial court de novo and factual findings for clear error." *Cerovic v. Stojkov*, 134 A.3d 766, 777 (D.C. 2016). The legal determination of the trial court to include "proximate cause" in the verdict for was a legal determination to be reviewed de novo." The standard of review "to determine if an erroneous jury instruction requires reversal, [the Court] must consider its prejudicial impact 'look[ing] at the instructions as a whole.'" *Naccache v. Taylor*, 72 A.3d 149 (D.C. 2013). "To find harmless error, we must be 'able to say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" *Id*.

As correctly addressed by the trial court when Juror Note 2 was presented, Comment 2 to the D.C. Pattern Jury Instructions states that "the term proximate has been removed from this instruction because it has no import to the layperson and may lead to confusion." (T.T. Day 5 p. 201)(App. 1521). The United States Supreme Court has stated that "[n]othing in today's opinion should encourage courts to use

'proximate cause,' or any term like it, in jury instructions. '[L]egal concepts such as 'proximate cause' and 'foreseeability' are best left to arguments between attorneys for consideration by judges or justices; they are not terms which are properly submitted to a lay jury, and when submitted can only serve to confuse jurors and distract them from deciding cases based on the merits." *Norfolk Southern Ry. v. Sorrell*, 549 U.S. 158, 180 (2007) citing to *Busta v. Columbus Hosp.*, 275 Mont. 342, 371 (1996).

Appellants first presented a proper verdict form with the omission of the legal term "proximate cause" on June 21, 2021, before the initial Pretrial Preparedness Hearing. (App. 172). Despite the argument advanced and objections to Appellees form, the trial court adopted that form that included the language of "proximate cause." (App. 343). Appellant then asserted generally all preserved objections on two separate occasions. (T.T. Day 5 p. 196)(App. 1516 - 1517). Even if this Court were to assert that Appellants' general objection was not specific enough, there is a long-standing history in this Court to accept assignments of error "where it is apparent from the face of the record that a 'miscarriage of justice' has occurred, [and it] properly may reverse based on an error to which no objection was made." *Weisman v. Middleton*, 390 A.2d 996, 1000 (D.C. 1978). Additionally, it should be noted that the trial court even specifically admonished Appellants' counsel for making redundant objections and informed Appellants' counsel that he need not

repeat objections that had already been ruled upon on the fifth day of trial after the jury instructions were read to the jury:

> **Mr. Matthew Nace: And, Your Honor, for the record we would like to renew our objections that we previously indicated. I think –**
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> **The Court: You don't have to keep renewing your objections to what you said four times. I'm sorry, but it's not necessary. At every stage, I understand it's important for you to say it at every single stage of review. But you made your record, you haven't retracted it. I'm noting it now for the fourth time at least. It's fine.**
>
> **If things come up during the jury's deliberations about it, if you say I objected to this four times before, it's really not going to advance the record, but we're going to deal with the fact that I ruled, and then I'll have to deal with that at some point if I do down the road.**
>
> **So okay. We have that. Any objection from the plaintiff?**

(T.T. Day 5 at 83)(App. 1403).

In this particular matter, the jury instructions failed to instruct the jury on the legal term "proximate cause" in compliance with *Norfolk Southern Ry. v. Sorrell*, 549 U.S. 158, 180 (2007) and the Comments to the D.C. Pattern Jury Instructions. (T.T. Day 5 at 47 – 77)(App. 1367 – 1397). The trial court provided the verdict form that contained the undefined term to the jury over the objection raised since the Pretrial Preparedness Hearing. The trial court admonished Appellants' counsel from making redundant objections. Then, to evidence the prejudice and erroneous nature of including the phrase on the verdict form, the jury specifically requested a definition of "proximate cause." (T.T. Day 5 at 200)(App. 1520).

The jury was properly advised that it was Appellants' burden to prove all elements of their claim by a preponderance of the evidence; however, because "proximate cause" was not defined in the jury instructions and was not addressed in such language to the jury, the jury had no way to conclude whether Appellants had proven "proximate cause."

Factually, the evidence presented at the trial was clear that the deviations of the standard of care in discontinuing the Plavix was a proximate cause of Mr. Hankins' subsequent medical treatment and death. Dr. Bolen agreed that the Plavix discontinuation caused the clot; Dr. Lum agreed that the Plavix discontinuation caused the clot; Dr. Jim agreed that the Plavix discontinuation caused the clot. It is clear that the inclusion of the term "proximate cause" on the verdict form allowed for a miscarriage of justice.

II. The Trial Court Erred In Allowing Appellees To Present The Affirmative Defense of Contributory Negligence.

The legal determination of the trial court to allow the affirmative defense of "contributory negligence" to be presented is to be reviewed de novo. *Cerovic v. Stojkov*, 134 A.3d 766, 777 (D.C. 2016). The standard of review of a trial court's ruling on an affirmative defense is *de novo*. "We review *de* novo the court's decision to trike [Appellees'] pretext defense." *Duk Hea Oh v. Nat'l Capital Revitalization Corp.*, 7 A.3d 997, FN4 (D.C. 2010) citing to *Franco v. Nat'l Captial Revitalization*

Corp., 930 A.2d 160, 166 (D.C. 2007). As pertains to the claim contained herein that the trial court erred in failing to strike Appellees' expert witness testimony, the standard of review is an abuse of discretion standard. *District of Columbia v. Tulin*, 994, A.2d 788 (D.C. 2010).

Pursuant to the District of Columbia Court of Appeals, "the burden of proving contributory negligence" is upon a defendant. *May v. Washington, Virginia & Maryland Coach Co.* 197 A.2d 267, 268(1964). The Court has also made it clear that as with any claim for negligence, a party asserting contributory negligence must establish that a party acted unreasonably *and* that such unreasonable conduct was a cause of the injuries:

> To establish contributory negligence, the party asserting the defense must prove by a preponderance of the evidence that the opposing party's negligence was a substantial factor in causing his or her injury, and that the injury or damage was either a direct result or a reasonably probable consequence of the negligent act or omission. "Contributory negligence is 'unreasonable conduct,' *i.e.*, "conduct 'which falls below the standard to which a plaintiff should conform for his [or her] own protection" and contributes to the plaintiff's injury.'"

Durphy v. Kaiser Found. Health Plan of Mid-Atlantic States, 698 A.2d 459, 465(1997)(Internal citations omitted)

Appellees staunchly defended this matter on the basis that Decedent was contributorily negligent for failing to disclose his peripheral artery disease ("PAD") and Plavix/Aspirin medication regime on January 20, 2016 and for discontinuing his

Aspirin two days prior to the Procedure. While the jury did not reach the question on contributory negligence on the verdict form and the only element of the causes of action on appeal in this matter are those of causation, the implications of this affirmative defense speak to the jury's findings on causation under Questions 2 and 4 of the verdict form.

Pursuant to *Durphy v. Kaiser Found. Health Plan of Mid-Atlantic States*, 698 A.2d 459, 467(1997), in medical malpractice actions, prior acts of negligence cannot be utilized to establish contributory negligence.

> In medical malpractice cases . . . contributory negligence is a *valid defense if the patient's negligent act concurs* with that of the physician and creates an unreasonable risk of improper medical treatment." *Weeda v. District of Columbia*, 521 A.2d 1156, 1167 (D.C. 1987) (citations omitted). ***However, where "the patient's negligent act merely precedes that of the physician and provides the occasion for medical treatment, contributory negligence is not a permissible defense***." *Id.* (citations omitted). Where that occurs, the doctor's negligent act is considered an intervening cause which does not bar the patient from recovering. *Id.*

Durphy at 698 A.2d 467(Emphasis added).

Appellees clear reason for advancing this argument was to allow Dr. Miller to present causation testimony to attempt to claim that Decedent was not forthcoming

with Appellees and that the discontinuation of Aspirin was the sole cause of the blood clot.[2]

It is undisputed that, prior to the Procedure, Decedent had provided Appellees with the knowledge that he was on Plavix and Aspirin and that he had last taken the medications two days prior to the Procedure. Once Decedent provided that information to Appellees, Appellees failure to look at the medication list became an intervening cause which does not bar recovery and precludes the assertion of contributory negligence according to *Durphy*. Dr. Bolen even testified that:

> **Q. So, Doctor, what you've got then is you've got, on March the 1st, what you agree was a serious significant change in the medication that he was taking that surprised you, that had you known about it, you would not have gone ahead and done the procedure where you took out – did a biopsy or you would have done the procedure not at all, correct?**
>
> **A. That's correct.**

(T.T. Day 4 p. 158)(App. 1265). Thus, the entire tainted argument presented to the jury that Decedent was not forthcoming was wholly irrelevant to this case; however, Appellees were erroneously allowed to present this argument to attempt to back door in a defense of contributory negligence through Dr. Miller. However, Dr. Miller's

[2] For reasons stated *infra*., this testimony should have been stricken as moved by Appellates.

testimony was also lacking in the establishment of the elements required to prove contributory negligence.

Dr. Miller offered the following testimony:

> **Yeah, my opinion is had Mr. Hankins resumed aspirin the day that Dr. Bolen suggested that – the colonoscopy or right after the colonoscopy, the[n] more likely than not the patient would not have had the occurrence of his lower extremity arthrosclerosis.**

(T.T. Day 3 p. 54)(App. 923). At no point in time did Dr. Miller offer the opinion that failure to resume the aspirin caused the blood clot that occluded Decedent's stent. "Arthrosclerosis" is not an occlusion and is instead build up of plaque on the arterial walls. This is consistent with Dr. Miller's testimony that "[Plavix] is better than aspirin for platelet aggregation, but for inflammation aspirin far – is far superior to Plavix." (T.T. Day 3 p. 64)(App. 933). He further testified that atherosclerosis is separate from a clot: "He had arthrosclerosis and clot. So he had a combination, but it's the arthrosclerosis, it's the inflammatory nature that leads to the platelets to come and aggregate. That's how the process works. It all begins with inflammation." (T.T. Day 3 p. 65)(App. 934).

Dr. Miller's testimony as to the causative effects of solely remaining on Aspirin was also moved to be stricken by Appellants' counsel under *Motorola, Inc. v. Murray*, 147 A.3d 751 (D.C. 2016). (T.T. Day 4 p. 183 - 186)(App. 1290 - 1293). As stated during the trial:

During his cross-examination he was asked about patients with hyperlipidemia and he conceded and acknowledged that Mr. Hankins had hyperlipidemia and then he was presented with his own research and his own study on hyper – patients with hyperlipidemia and the effects that aspirin has solely on stopping blood thinning.

And his study that he agreed with indicated that aspirin alone was 69 percent ineffective. That was his study. He agreed that the risk factors for coronary heart disease may contribute to aspirin resistance. The inability of aspirin to protect individuals from – from complications, so aspirin may not be cardio protective in patients with hyperlipidemia.

He did not, however, bolster or rehabilitate himself in any way, which brings up two – two issues here. On the firsthand he recognizes that the evidence is that 69 percent of those patients will not receive the effect from aspirin that he claims. And yet, just on his own h says, no, it did – it would have given them the relief. Which brings us to an issue under Motorola Inc. v. Murray, 147 A.3d 751, where this Court adopted the Daubert standard and incorporated Federal Rule of Evidence 702.

Motorola stated that, quote, like the general acceptance test, Rule 702 is concerned with the reliability of the principles and methods applied by the expert. Federal Rule of Evidence 702. But Rule 702(D) goes further and expressly requires a Court to determine whether the expert has reliably applied the principles and methods to the facts of the case. We conclude that Rule 702, with its expanded focus on whether reliable principles and methods have been reliably applied, states a rule that is preferable to the Frye test.

The ability to focus on the reliability of principles and methods and their application is a decided advantage that will lead to better decision making by juries and trial judges alike.

In this case, Dr. Miller offered no method or nor principles to counter his own study, his own test. He simply provided ipse dixit testimony and said I know what the studies show, I agree with it, but now I'm going to disagree with it on the stand. That testimony should not be permitted, the Court should strike the opinions that aspirin on its own led to the blood clot, in which case there is no causation to establish that Mr. Hankins was contributorily negligent.

(T.T. Day 4 p. 183 – 185)(App. 1290 -1292).

Dr. Miller's only deflection of his own study was to claim that his study was a general study; however, he admitted that his study was a study that applied to "anybody" with hyperlipidemia:

> **Q. It focused on patients –**
>
> **A. <u>A general group of patients with hyperlipidemia, so it could be anybody</u> that – you could have hyperlipidemia without risk factors, you could have hyperlipidemia with risk factors, it's very – nonspecific group.**

(T.T. Day 3 p. 60)(App. 929). Thus, Dr. Miller agreed that the science demonstrates that 69% of patients with hyperlipidemia do not receive the anticoagulant therapy that he claims Decedent would have received from Aspirin. In the absence of scientific studies to demonstrate that in this specific patient the Aspirin more likely than not would have provided the anticoagulation therapy that he claims, his testimony amounted to "junk science" supported by no more than *ipse dixit* testimony.

The admissibility of expert testimony is governed by Fed. R. Evid. 702, which states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702 sets up a two-part test: 1) is the witness qualified by knowledge, skill, experience, training or education; and 2) did the expert utilize his qualifications to employ an appropriate methodology to derive his/her opinion. The seminal case on the admissibility of expert opinion testimony is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in which Justice Blackmun stated,

> The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability-*of the principles that underlie a proposed submission*. *The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.*

Id. at 595. (Footnote omitted) (emphasis added).

Daubert was a case about scientific testimony which explained the liberalism of the Federal Rules of Evidence and overruled the Frye (*Frye v. United States*, 293 F. 1013 (1923)) opinion on expert scientific testimony.

Ambrosini v. Labarraque, 101 F.3d 129, 133 (D.C. Cir. 1996) was another case about scientific testimony in which a child was born with extensive musculoskeletal injuries after her mother ingested pharmaceutical products during

pregnancy. “Rule 703 explains that if ‘the facts or data in the particular case upon which an expert bases an opinion or inference’ are ‘of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.’" *Ambrosini v. Labarraque*, 322 U.S. App. D.C. 19, 101 F.3d 129, 133 (1996).

The *Daubert* Court stated that the focus “must be solely on principles and methodology, not on conclusions that they generate.” *Daubert* 509 U.S. at 595. The Court stated that the Federal Rules of Evidence are “designed not for exhaustive search for cosmic understanding but for particularized resolution of legal disputes.” *Daubert* 509 U.S. at 597. The Court further stated that “The subject of an expert’s testimony must be ‘scientific… knowledge.’” *Daubert* 509 U.S at 590.

The U.S. Supreme Court later expanded the *Daubert* standard past the finite realm of “scientific knowledge,” in determining that “the testimony of engineers and other experts who are not scientists” are also subject to the new more liberal standard. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

Pursuant to *Daubert* and *Kumho Tire,* a trial court is allowed to conduct a preliminary assessment of whether the methodology used by the expert is appropriate and that “[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.” The Court listed some examples as whether there has been peer review, what is the rate of error, what is the acceptance in the

scientific community, has there been empirical testing, etc., but the Court has made it crystal clear that the factors are to be expansive and particularized to each case accordingly.

As the Supreme Court stated in *Daubert*:

> ***Faced with a proffer of expert scientific testimony***, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. ***This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid*** and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate

Daubert at 509 U.S. at 592 – 93 (Emphasis added).

Daubert and thereby *Motorola* vests the court with the ability to determine if the witness employed a **method** that others in his/her field reasonably rely upon in order to arrive at an answer.

Recently, the United States 4th Circuit Court of Appeals relied upon *Small v. WellDyne, Inc.*, 927 F.3d 169, 177 (4th Cir. 2019) to reiterate that "[w]ithout testing, supporting literature in the pertinent field, peer reviewed publications[,] **or some basis to assess the level of reliability**, an expert opinion testimony can easily, but improperly, devolve into nothing more than proclaiming an opinion is true 'because

I say so.'" *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 292 (4th Cir. 2021)(emphasis added).

Dr. Miller acknowledged his own study, he agreed with the findings of his study, he disagreed with the application of the findings of his own study in this matter, and he failed to provide any indication that there existed testing, supporting literature, peer review publications, or any other basis to assess the level of reliability of his dispute with his study to assert this opinion. The failure to strike Dr. Miller's testimony in this regard was an abuse of discretion by the trial court.

To further delegitimize the assertion advanced by Appellees' counsel that Aspirin was the sole cause of the development of the clot, the following exchange took place on cross-examination:

> **Q. But, Doctor, the Plavix – the purpose of the Plavix is to help prevent the development of the clot versus the inflammation, correct?**
>
> **A. Correct. Both Plavix and aspirin do that.**

(T.T. Day 3 p. 67 – 68)(App. 936 - 937).

Thus, there is no testimony or evidence to suggest that the discontinuation of the Aspirin was the sole cause of the development of the clot; nor was there any testimony that the factual finding that Appellees violated the standard of care in discontinuing the Plavix was not a cause of the development of the clot and occluded stent. In fact, Appellees own expert witnesses agreed that the discontinuation of the

Plavix, which the jury found to be negligent on Question 1, was a cause of the clot formation.

Dr. Lum specifically conceded the same facts:

Q. And do you agree that the vascular occlusion was in part caused by the discontinuation of Plavix and aspirin?

Ms. Chrostowski: Objection to form.

BY Mr. Matthew Nace:

Q. Within a reasonable degree of medical probability.

A. The discontinuation of both aspirin and Plavix?

Q. Yes. Was that a cause of the vascular occlusion?

A. Yes, when you stop both aspirin and Plavix it caused the blockages.

(T.T. Day 4 p. 30 – 31)(App. 1137 - 1138).

Pursuant to D.C. Pattern Jury Instruction 9.01, as read and provided to the jury: "To succeed on a claim for medical professional negligence, plaintiff must prove each of four elements. One, that the defendant should have met the standard of care. Two, defendants did not meet the standard of care. Three, defendants' failure to meet the standard of care caused plaintiff's harm. . . ." (T.T. Day 5 p. 60)(App. 1380). Additionally, the trial court instructed the jury on D.C. Pattern Jury Instruction 9.10: "Plaintiff must prove that it is more likely than not that defendants' acts or failures – or act or failure to act caused the harm suffered by plaintiff. An act or failure to act is deemed to have caused harm if it was a substantial factor in

bringing about the harm." (T.T. Day 5 p. 65)(App. 1385). Finally, the trial court instructed the jury on D.C. Pattern Jury Instruction 5.13 – Multiple Causes: "There may be more than one cause of harm, several factors or circumstances or the acts or omissions of two or more persons may cause the same harm. Each of the acts or omissions that played a substantial part in the harm [is a] cause." (T.T. Day 5 p. 69)(App. 1389).

Once Appellants established that Appellees deviated from the standard of care in discontinuing the Plavix, the only question relevant to causation of that deviation was whether the discontinuation of Plavix was ***a*** cause of the damages. The role of Aspirin in potentially causing further atherosclerosis is irrelevant to the determination of the role of the discontinuation of Plavix in the formation of the clot. Once both of Appellees' expert witnesses conceded that Plavix plays a role in deterrence of blood clot formation and Dr. Lum conceded that it did play a role in the development of the clot in Decedent's stent, evidence pertaining to Aspirin became irrelevant and the defense of contributory negligence and the causative effects of Decedent's failure to take Aspirin for a time period should have been precluded.

III. The Trial Court Erred In Denying Appellants' Submitted Verdict Form And Allowing The Appellees Request To Propose Question 4 On The Verdict Form.

The legal determination of the trial court to allow the Appellees version of the verdict form over Appellants' requested verdict form is to be reviewed de novo. *Cerovic v. Stojkov*, 134 A.3d 766, 777 (D.C. 2016). The standard of review applicable is an abuse of discretion for failing to harmonize the verdict form. *District of Columbia v. Tulin*, 994 A.2d 788 (D.C. 2010).

In answering in the affirmative on Question No. 3, the jury determined all elements of causation required to award a Plaintiffs' verdict in this matter. The Court provided the following jury instruction to the jury on the question of informed consent:

9.08 - DISCLOSURE OF MEDICAL RISKS—INFORMED CONSENT

> Plaintiff contends that the Defendant failed to obtain the Plaintiff's informed consent to the treatment or procedure. Every person has the right to make an informed decision about whether or not he or she will undergo a particular treatment. Therefore, before providing medical treatment to a patient, a doctor has a duty to inform the patient of his or her medical condition, the nature of the proposed treatment, the likelihood and degree of the benefits and risks of the proposed treatment, any alternative treatments, and the likelihood and degree of benefits and risks of any alternative treatment, and the likelihood and degree of benefits and risks of not getting any treatment.
>
> You must decide whether Defendant informed Plaintiff of all significant risks and benefits of the proposed treatment and of the alternatives, including no treatment.

A risk is significant if it is a risk that a reasonable person, in what the doctor knows or should know to be the patient's position, would likely consider significant in deciding whether to undergo treatment.

Whether a risk is significant depends on the frequency and severity of harm resulting from the procedure. For example, a significant risk might be a great likelihood of relatively minor, though troublesome, harm. A significant risk might also be a very small chance of very serious harm. [A combination of very slight risks could also form a significant risk].

[There is, however, no duty to inform the patient of every insignificant risk of harm, of risks generally known to the average person, or of risks that the patient already knows.]

[If you find that [Defendant] adequately informed [Plaintiff] of all significant risks, then you must find for [Defendant].]

If you find that [Defendant] failed to inform [Plaintiff] of the nature and scope of a significant risk, then you must next determine whether that failure was a cause of [Plaintiff's] harm. Such a failure is a cause of [Plaintiff's] harm if a reasonable person in [Plaintiff's] position would have refused the proposed treatment and selected another option if that person had received adequate disclosure of the likely risks and benefits of the actual treatment, any alternative treatments, and of no treatment.

If you find that a reasonable person in Plaintiff's position would have refused the proposed treatment, then you must next determine whether the undisclosed risk caused the harm of which Plaintiff complains.

If you find that Plaintiff has proved that it is more likely than not that a reasonable person in Plaintiff's position would have refused the proposed treatment or selected a different option if given an adequate disclosure, and the undisclosed risk caused the harm of which Plaintiff

> complains, then you must find for Plaintiff. If Plaintiff has failed to prove any one of these elements is more likely than not, then you must find for Defendant on this claim.

Question 3 of the Verdict Form asked, "Do you find that Dr. Bolen **failed to obtain informed consent** from Mr. Hankins?" The jury answered in the affirmative. On that basis alone, the verdict must have been for Appellants.

The instruction makes clear that in order to find that Dr. Bolen failed to obtain informed consent four findings must have been made by the jurors:

1. Did Defendant informed Plaintiff of all significant risks and benefits of the proposed treatment and of the alternatives, including no treatment;
2. Was the risk significant;
3. Would a reasonable person in Plaintiff's position have refused the proposed treatment and selected another option if that person had received adequate disclosure of the likely risks and benefits of the actual treatment, any alternative treatments, and of no treatment;
4. Did the undisclosed risk cause the harm of which Plaintiff complains.

The only way a jury could answer "yes" to Question 3 was if it answered yes to all four of the above, including question 4: "Did the undisclosed risk cause the harm of which Plaintiff complains."

Asking the jury to then make another finding on causation after they had already found that the undisclosed risk caused the harm of which Appellants complained invited error and created an inconsistent verdict. Appellants were given two bites of the apple and such a process is inappropriate and inconsistent with the law. Specifically, Question No. 4 then asked "Was the failure to obtain informed

consent a proximate cause of Frank Hankins' damages?" Appellants had previously objected to the verdict form on numerous occasions including but not limited to on September 6, 2021 through Plaintiffs' Motion to Modify Proposed Verdict Form. Appellants had also provided an appropriate verdict form on June 21, 2021. The Court did not comply with Appellants' request and acknowledged that all of the prior objections and issues were noted and preserved. (T.T. Day 5 at 83)(App. 1403).

Comparing Questions 1 & 2 of the Verdict Form against Questions 3 & 4 in light of the jury instructions is informative on this matter. Questions 1 & 2 addressed Appellants' claim for medical malpractice. Rather than asking the jury, "Do you find by a preponderance of evidence that Dr. Bolen committed medical malpractice?" the elements of medical malpractice were broken down between "standard of care" and "causation." Questions 3 & 4 addressed Appellants' claim for failure to obtain informed consent. The verdict form did not break down the four elements as stated above and as is traditionally done with claims for medical malpractice; rather it specifically asked the jury in Question 3 to find for all elements of informed consent, which included "Did the undisclosed risk caused the harm of which Plaintiff complains." Thus, in answering "Yes" to Question 3, the jury answered the only relevant question on causation presented before it. Appellees' insertion of Question 4 and the trial court's inclusion of it in the Verdict Form was irrelevant and superfluous.

Additionally for the reasons stated above, the notion of "proximate" cause was not at any time provided to the jury in relation to the questions on informed consent. "Proximate" cause was not specifically required to be affirmatively answered to return a verdict in Appellants' favor as the law makes clear that the undisclosed risk need only be a cause of the harm. Furthermore, this proposition is even strengthened by the juror note that was provided to the Court in which the jury expressed confusion on the notion of "proximate cause." As a result, the jury instructions and verdict form in total were prejudicial, erroneous, and not in conformity with the law.

While numerous issues were in dispute in this case, it was Dr. Bolen's own testimony that if he was aware of Mr. Hankins' Aspirin and/or Plavix treatment, he would have discussed the entire treatment of those medications with Mr. Hankins. That discussion never happened. Even assuming *arguendo* that the jury were to have determined that Plavix did not prevent clots from happening and, taking all of the evidence in the light most favorable to Appellees, Aspirin did cause the clot formation, that was a significant risk that was not disclosed by Dr. Bolen. Dr. Bolen himself indicated he would have disclosed it if he had made himself aware of the medications listed on the medication reconciliation form, but he did not. It cannot be disputed that a clot formed. Regardless, if the clot formed because of the discontinuation of the Aspirin or the Plavix, the unidentified risk manifested.

Tulin further states that when faced with inconsistent findings, it is the Court's "duty to harmonize the answers, if it is reasonably possible to do so." *District of Columbia v. Tulin* at 994 A.2d 798. Appellants suggested in their Motion for J.N.O.V and/or for New Trial the following response to the necessity to harmonize the verdict form:[3]

- The jury found that Dr. Bolen failed to adhere to the standard of care but that the standard of care violation(s) were not a cause of Plaintiffs' injuries and that Dr. Bolen failed to obtain informed consent.

- The only reasonable harmonization that can be ascertained from this inconsistency is that the jury believed that the clot was formed solely by the lack of Aspirin and not by the discontinuation of Plavix as there was no other evidence to suggest that the clot was caused by anything else.

- That means that the jury determined that discontinuation of Aspirin could cause blood clots and did in fact cause the clots at issue in Mr. Hankins' case.

- The jury also found that Dr. Bolen failed to obtain informed consent, meaning that he failed to disclose the risk of clot formation to Mr. Hankins in the event that he did not resume his Aspirin and/or Plavix after the Procedure, which he admitted he would have discussed with Decedent had he held that conversation.

- The jury instructions do not require the jury to make a finding of "proximate causation" to establish a failure to obtain informed consent claim in Appellants' favor.

[3] Appellants do not concede their prior and subsequent arguments advanced in this brief; however, this portion of the brief is simply dedicated to an analysis on how the trial court should have and this Court could harmonize the inconsistent verdict form.

- The jury instructions did instruct that the jury that in order to find that Appellees failed to obtain informed consent, they had to find that the undisclosed risk cause the harm of which Plaintiff complains.

- Thus, Question No. 4 was irrelevant to find that the Appellees were liable for damages under the claim of informed consent and should be deemed a legal nullity.

The harmonization of the verdict form necessitated a finding in Appellants favor on the Count of Informed Consent as a matter of law and a new trial date to be set for a finding of fact on the damages incurred.

IV. The Trial Court Erred In Denying Appellants' Motion For JNOV And/Or For New Trial.

The standard of review for a denial of a Motion for JNOV and/or for New Trial is an abuse of discretion standard. *Newell v. District of Columbia*, 741 A.2d 28, 31 – 32 (D.C. 1999).

The jury determined as a matter of fact that Dr. Bolen violated the standard of care.

The jury determined as a matter of fact that Dr. Bolen failed to obtain informed consent.

Dr. Bolen admitted that if he had known about Mr. Hankins' medications, he would have discussed the entire gambit of the medical history and the risks and benefits for which both the Aspirin and Plavix were taken and what to do.

Dr. Bolen failed to do this.

All parties, all witnesses, and all of the evidence make it clear that the clot was formed by discontinuation of either the Aspirin or Plavix; thus, the material risk that Dr. Bolen failed to advise Mr. Hankins of materialized.

Additionally, all expert witnesses in this matter and even Dr. Bolen admitted that Plavix prevents blood clot formation; Dr. Lum, on behalf of Appellees, even expressly testified that the discontinuation of the Plavix was a cause of the development of the blood clot as cited *supra*.

On these undisputed findings of facts and agreed upon facts, the jury was obligated to answer questions 2 and 4 in the affirmative, and the law so requires it to be done now.

The trial court's opinion is factually and legally erroneous. The trial court stated that "the record shows that Mr. Hankins stopped taking Plavix several days before the surgery." (App. 386). The facts demonstrated in Exhibit 1 solely show that the "Last dose taken:" was 2 days ago. The medical records admitted in this case at Plaintiffs' Exhibit 11 page 20086 specifically state that "[Patient] normally takes [Aspirin] & Plavix, which were held for colonoscopy . . . 2/29 – 3/6." (T.T. Day 3 p. 42 – 43)(App. 1149 – 1150) This was not "several days" before the surgery, nor is there any indication that Mr. Hankins made any such determination on his own as the record evidence is clear that the medication was "held."

Next, the trial court stated that "the record also indicated that Mr. Hankins failed to consult with his doctors before discontinuing the Plavix." (App. 386). Such a proposition is an assertion of contributory negligence, not primary negligence upon Dr. Bolen. Appellees bore the burden of proving such a statement and did not provide any such evidence. Appellees' witnesses simply stated that they did not know. Furthermore, as an element of contributory negligence, the court was in error to interject such a basis for a finding on primary causation against Appellees. Had the jury answered "Yes" to the contributory negligence jury instructions, that may have been relevant; however, the jury did not answer "Yes" to those questions on the verdict form.

The trial court then stated, "even if Dr. Bolen had consulted Mr. Hankins' March 1 medication list, he would not have received completely accurate information." (App. 386). This statement by the trial court is absent any factual basis. It is undisputed that had Dr. Bolen consulted Mr. Hankins' March 1 medication list he would have received the accurate information needed to alter the decisions that he made. There is simply no evidence for this factual basis of the trial court's opinion.

Finally, the trial court opined that "[w]hile the clot may not have formed before March 1, it would have been reasonable to find that Mr. Hankins' discontinuation of Plavix, which ran concurrently with Dr. Bolen's negligence, was

the cause of Plaintiff's damages." (App. 386). Again, this argument speaks to contributory negligence, which was never addressed by the jury in the verdict form. Making such an assumption is erroneous. There is also no finding of fact by the jury that Mr. Hankins' "discontinuation" of Plavix two days prior to the Procedure was negligent. Thus, the trial court conflated the elements of primary negligence with the elements of contributory negligence. If the jury were not to have found Mr. Hankins negligent for the "discontinuation" of Plavix two days earlier, the jury would never have answered the question on causation as pertains to contributory negligence.

Furthermore, regardless of whether Mr. Hankins "discontinued" the Plavix two days earlier, Dr. Bolen was found negligent and had the medication list in his file prior to conducting the Procedure. Dr. Bolen then expressly ordered Mr. Hankins to discontinue the medication. Under *Durphy*, that creates a legal intervening action that precludes the exact argument advanced by the trial court. The only legal way that Mr. Hankins cessation of his Plavix could have avoided a Plaintiffs' verdict in this matter is if evidence had been provided that the blood clot formed between the date of cessation prior to the Procedure and the Procedure itself. No such evidence exists or was ever proffered.

CONCLUSION

In consideration of the whether Appellees' negligence was a cause of Decedent's development of a blood clot and subsequent sequelae and death, all

evidence indicates that the discontinuation of his Plavix medication was a cause of such damages. At best, Appellees' expert witnesses testified that it was the joint discontinuation of both the Plavix and Aspirin. Without a finding of fact that Decedent was contributorily negligent, the jury and the trial court were obligated to find that the discontinuation of Plavix was a cause of such damages.

The only possible way in which the jury could have reached the answers of "No" on Questions 2 and 4 of the Verdict Form was because they were not instructed on what "proximate cause" meant. Inclusion of this legal phrase on the verdict form was erroneous.

The clear weight of the evidence on causation established that the negligent conduct of Appellees caused the damages, and this Court should reverse the trial court's ruling.

Additionally, the inclusion of the word "proximate" was clearly prejudicial to Appellants and confusing to the jury, as evidenced by the jury's note. Question 3 appropriately answered all required elements of a claim for Informed Consent in Appellants' favor. This Court should rule that Question 4 was a legal nullity and harmonize the verdict from in Appellants' favor for the claim of Failure to Obtain Informed Consent.

The trial court's ruling must be reversed and this case returned to the trial court for a jury trial on damages.

Respectfully Submitted,

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayeridentification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Matthew A. Nace
Signature

22-CV-354
Case Number(s)

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