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)

REPLY BRIEF OF APPELLANTS

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April 7, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2023, I caused a true and exact copy of the foregoing to be electronically filed with the Court's electronic Filing system:

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I. APPELLANTS PROPERLY PRESERVED THEIR OBJECTIONS TO THE VERDICT FORM.

a. The Parties Never "Jointly Submitted A Jury Verdict Form."

Appellees argue that the parties "jointly submitted a jury verdict form." Specifically, Appellees assert at page 4 of their brief that "[f]ollowing the conclusion of the evidence, and at the trial's court's request, the parties jointly worked together to submit a proposed jury verdict form on the evening of September 7, 2021." This statement is not accurate.

At the close of evidence, the trial court heard lengthy argument on the jury instructions commencing at App. 1299. At App. 1310, the trial court clearly instructed the parties that the trial court would work on finalizing the jury verdict form over night, but it was counsel for Appellees who indicated that that would give the parties time to work out issues with the verdict form. This was not a directive of the court nor was there a joint submission. Included in the conversation of the parties working on the verdict form issues is commentary from Appellants' counsel indicated that the parties had been holding conversations over the verdict firm. (App. 1310 – 1311).

Appellees rely upon an email that was objected to as part of the Appendix by Appellants because it was not a part of the record and because it fails to document the lengthy conversations that were held between the parties on the verdict form.

Specifically, Appellees demanded that the informed consent issue be separated in the erroneous manner that it was submitted.

Appellees' assertion that the email submitted by Appellees' counsel with a draft of the verdict from on the eve of September 7, 2021 for the purposes of arguing the verdict form on September 8, 2021 was a "joint submission" is simply false. Additionally, the asserted "joint submission" was never filed in the Court system and never joined in by any signature of Appellants' counsel. Any argument asserting this was a joint submission should fail.

b. <u>Appellants Were Specifically Advised Their Objections Were Preserved In The Midst Of Arguing The Verdict Form.</u>

Appellees assert that Appellant did not preserve their object by indicating that the argument was not raised between App. 1484 – 1486. Appellees, however, fail to take note that the argument on the verdict form advances far beyond App. 1486. In fact, Appellants' argument was expressly cut off by the first jury question and the Court's recognition to Appellant that they need not re-address their objections:

> THE COURT: Okay. That's what we're talking. Mr. Nace, I know you made the record extensively.
>
> MR. MATTHEW NACE: Did you say I already – I don't have to object again?
>
> THE COURT: You don't have to – year, you don't have to object again. Do you need this back? Yeah, let me – would you come back?

(App. 1512).

Thus, in the middle of the time that was provided for Appellants to argue the verdict form, the Court received a jury note asking for the verdict form; the trial court advised Appellants that their objections were preserved in order to get a verdict form the jury; the verdict form was then printed out and given to the jury. To suggest that Appellants did not preserve their objection in the face of the Court specifically advising counsel that the objections were preserved should not be considered by this Court.

II. APPELLANTS HAVE ASSERTED A CHALLENGE TO THE LEGAL SUFFICIENCY OF THE VERDICT FORM REQUIRING A *DE NOVO* REVIEW.

Appellees contention that Appellants have not challenged the substantive content of the verdict form is erroneous. Appellants have specifically argued that the verdict form provided a legally deficient finding by the jury, which must be reviewed *de novo*.

Appellees' reliance upon *Blackwell v. Dass*, 6 A.3d 1274 (D.C. 2010) is unavailing and not applicable to this matter. In *Blackwel*, the trial court simply decided to merge two questions into one. *Id.* at 1277. In this matter, Appellants assert that the use of the term "proximate cause" was legally erroneous and that the jury's question seeking guidance on an undefined legal term demonstrated a prejudicial verdict.

Furthermore, Appellants allege that the insertion of question 4 on the verdict form was also legally erroneous. Appellees assert that such a question was appropriate because *Lasley v. Georgetown University*, 688 A.2d 1381 (D.C. 1997) requires a finding of causation in informed consent cases. Appellants do not dispute this. Appellants argument, however, is that the instructions given to the jury on informed consent require the finding of causation: "

> 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.

(Pattern Jury Instruction 9.08) (emphasis added). Thus, the question of causation is subsumed in the finding of a failure to obtain informed consent.

It has been Appellants contention that once the jury compared the jury instructions to question 3 in answering the question "Do you find Dr. Bolen failed to obtain informed consent from Mr. Hankins," the jury made a finding that "the undisclosed risk caused the harm of which Plaintiff complains." Question 4 then requesting the jury to determine if "proximate cause" had been established without a definition of "proximate cause" was both legally erroneous and a legal nullity because the required finding of causation had already been reached in the answering of question 3.

III. APPELLEES FAIL TO RECOGNIZE THAT "CAUSE" HAS MULTIPLE DEFINITIONS WITHIN THE JURY INSTRUCTIONS AND THE MATTER COULD NOT BE CURED.

Appellees argue that Appellants denied the trial court the ability to answer the question posed by the jury. Appellees fail to appreciate, however, that the definition of "causes" is different between D.C. Std. Civ. Jury Instr. Nos. 5-12 and 9-10. Appellees even directly quote to the instructions in their brief and fail to take notice that the definitions are different.

While D.C. Std. Civ. Jury Instr. No. 5-12 defines causation "[a]n act, or a failure to act, causes harm if it played a substantial part in bring about harm," D.C. Std. Civ. Jury Instr. No. 9-10 defines causation as "[a]n act, or failure to act, is deemed to have caused harm if it was a substantial factor in bringing about the harm." These definitions are not the same and apply to different burdens of proof. As addressed during argument by Appellants' counsel, neither the Court nor the parties knew whether the jury was addressing a factual determination to be determined under Instructions Nos. 5-12 or 9-10.

Again, Appellees attempt to rely upon *Blackwell* to assert that the court can presume the jury followed the trial court's instructions; however, in this matter, the jury was NOT instructed on the term "proximate cause." Thus, the only presumption that this Court can make is that jury felt that Appellants did not meet their burden of establishing this legal phrase of "proximate cause" because "proximate cause" was

never mentioned until long after they had begun their deliberations and were suddenly provided a verdict form with this legal phrase before them. What this Court can presume under *Blackwell*, however, is that in answering question 3 the jury did follow the jury instructions and found that causation was established under the jury instruction for failure to obtain informed consent.

IV. APPELLEES FAIL TO RECOGNIZE THAT "INFORMED CONSENT" IS A DEFINED TERM UNDER THE JURY INSTRUCTIONS AS PROVIDED TO THE JURY.

Appellees argue that Appellants assertion on the second question is "belied by the jury instructions." In making such a statement, Appellees fail to take notice of what the jury instruction states and what questions were asked of the jury.

> 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.

(Pattern Jury Instruction 9.08). The verdict form did not ask as question 3: "Do you find that Defendant failed to inform Plaintiff of all significant risks and benefits of the proposed treatment and of the alternatives, including no treatment." Instead, question 3 asked if the jury found that the Defendant failed to obtain informed consent, which, under *Blackwell v. Dass*, 6 A.3d 1274, 1278 (D.C. 2010), this Court

should presume that the jury followed the trial court's instructions on what a failure to obtain informed consent claim consisted of.

At page 32 of Appellees Brief, they state that "the jury responded in the affirmative that Defendants failed to obtain informed consent from Mr. Hankins." That is true as both a matter of law and a matter of fact. What Appellees do not appreciate is that question number 3 did not ask whether the jury found that "Dr. Bolen failed to inform Plaintiff of all significant risks and benefits of the proposed treatment and of the alternatives, including no treatment." Appellees cannot have it both ways.

Appellees also cite to *Gordon v. Neviaser*, 478 A.2d 292, 295 (D.C. 1984) for the proposition that "even if the jury had found that appellee breached his duty to disclose this risk to appellant, it would have also have had to find a causal connection between the undisclosed risk and the subsequent injury." Again, this case is distinguishable from *Gordon* because the jury did not simply find that Dr. Bolen breached his duty to disclose the risk, but instead this jury expressly found that Dr. Bolen failed to obtain informed consent. The two findings are not synonymous. By asking the jury in this matter if they found Dr. Bolen failed to obtain informed consent instead of asking the jury if Dr. Bolen breached his duty to disclose the risk, the trial court combined both questions at issue in *Gordon* into one question in this matter, which the jury answered affirmatively in Plaintiffs' favor.

Appellees entire argument advanced on page 34 for the proposition that the jury did not consider causation in answering question number 3 flies in the face of *Blackwell* and asks this Court to assume that the jury specifically refused to follow the directions of trial court's jury instructions. Such a finding by the jury was appropriate under *Cantebury v. Spence*, 464 F.2d 772 (1972).

V. THE TRIAL COURT'S DETERMINATION TO ALLOW THE DEFENSE OF CONTRIBUTORY NEGLIGENCE TO BE ADVANCED IS NOT MOOT.

a. Appellee's Presentation Of A Claim Of Contributory Negligence Before The Date Of The Malpractice Was Erroneous Because Any Failure On Mr. Hankins' Part Was Cured On The Day Of The Treatment In Question.

Appellees were allowed to assert before the jury that Mr. Hankins was contributorily negligent on January 20, 2016 for failing to provide a complete medical history. Such a claim was wholly irrelevant to this matter under *Durphy v. Kaiser Found. Health Plan of Mid-Atlantic States*, 698 A.2d 459 (D.C. 1997) because any failure was cured by Mr. Hankins on the date of the surgery in advance of the surgery. The jury has already found that Dr. Bolen was negligent for failing to look at the medication reconciliation form, and that issue is not relevant to this appeal. Thus, any failures to advise Dr. Bolen of his Plavix treatment in January were cured by Mr. Hankins.

As pertains to the Appellees assertion that Mr. Bolen was contributorily negligent on January 20, 2016 for failing to disclose at that time that he had PAD or

had undergone multiple surgeries to insert stents to address his PAD, Appellees did not adduce and causation testimony to support a claim for contributory negligence and have failed to indicate how such information led to an unreasonable risk of treatment. Even if such evidence was adduced by Appellees, there is no testimony that the PAD or stents created any such risk; instead, it was solely the anticoagulation therapy that created the risk, which was cured by Mr. Hankins on the day of the procedure.

b. Dr. Miller's Testimony Failed The *Daubert* Standard

While Appellees erroneously may assert that Appellants arguments "reflect a fundamental misunderstanding of medicine" (Opposition at p. 41), Appellants argument reflects a fundamental understanding of the law and arithmetic.

Dr. Miller's study demonstrated that "69% of patients with hyperlipidemia had poor responsiveness to aspirin." (App. 930). Dr. Miller went on to agree that Aspirin "doesn't achieve the goal of stopping the platelet aggregation specifically in people with hyperlipidemia." (App. 931). If 69% of patients with hyperlipidemia have poor response to Aspirin treatment and do not achieve the goal of stopping the platelet aggregation in people with hyperlipidemia, then by virtue of simple arithmetic, only 31% of people with hyperlipidemia do. 31% is less than 50%. Thus, it cannot stand under the science that the failure to take Aspirin within a reasonable degree of medical probability (or greater than 50%) was a cause of any clotting

suffered by Mr. Hankins. Our court systems deals with probabilities not possibilities. Dr. Miller's testimony and theory was merely a possibility and, thus, irrelevant and inadmissible.

Additionally, *Motorola Inc. v. Murray*, 147 A.3d 751 (D.C. 2016), adopted the *Daubert* standard and incorporated Federal Rule of Evidence 702. Dr. Miller did not provide any scientific study, peer reviewed article, or any form of supportive basis to suggest that Mr. Hankins' condition was not contained within his prior study that he indicated was reflective of all patients with hyperlipidemia. All that he offered to combat his actual published study was *ipse dixit* testimony. His methodology failed the *Daubert* standard as previously addressed.

Thus, the math demonstrates that Aspirin could not be indicated to more likely than not within a reasonable degree of medical certainty have caused the clots and the law dictates that such testimony is not reasonable and should not have been allowed.

c. Appellees Wholly Misrepresent The Testimony Of Dr. Jim, Appellants' Expert Witness.

Appellees assert at page 44 of their brief that Dr. Jim testified that "had [Mr. Hankins] remained on Aspirin from February 28 through March 6, that he would have been able to avoid the occlusion and ultimately his demise. App. 779 – 780."

That was not the testimony as clearly transcribed and Appellees simply misrepresent. The answer provided by Dr. Jim was: "I don't think I said he was going

to be able to avoid it. I think having some aspirin on board was going to be more beneficial. Certainly having Plavix on board is going to be much more beneficial as well." Appellees citation comes from a prior deposition that Dr. Jim corrected.

d. The Alleged Failure To Provide A Complete Medical History Preceded The Negligent Conduct And Was Not Concurrent Or Continuing.

Appellees attempt to distinguish this case from *Durphy* by asserting at page 45 of their Brief that Mr. Hankins' failure to provide a complete medical history was "continuing and concurrent contributory negligence." This argument is simply erroneous as Mr. Hankins provided Dr. Bolen with his medical history after the January appointment, and Dr. Bolen failed to appreciate it in the record. Thus, Mr. Hankins alleged contributory negligence was cured and negated prior to the alleged negligent conduct and ceased to be an available affirmative defense.

VI. Appellants Produced The Required Expert Testimony In Order To Prevail On A Claim Of Informed Consent.

Appellees assert that Appellants' claim were not supported by expert testimony. Again, such a statement is erroneous. As cited by Appellees, expert testimony is only "required to establish the nature of the risks inherent in a particular treatment, the probabilities of therapeutic success, the frequency of the occurrence of particular risk, the nature of available alternatives to treatment and whether or not disclosure would be detrimental to a patient." *Cleary v. Group Health Ass'n*, 691 A.2d 148, 155 (D.C. 1997), quoting *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014,

1024 (Md. 1997). *Cleary* also goes on to further elaborate on what an expert is required to testify to and what is within the jury's province to determine:

> "Once the physician has ascertained the risks and alternatives, and has communicated this information to the patient," *id*., the second step is reached, where
>
> > it is the patient's exclusive right to weigh these risks together with his individual subjective fears and hopes and to determine whether or not to place his body in the hands of the surgeon or physician. No question requiring the exercise of medical judgment ever arises at this stage of the decision-making process.
>
> *Id*. (citations omitted). *See also Canterbury, supra*, 150 U.S. App. D.C. at 282-83, 464 F.2d at 791-92 (**experts are required to identify and elucidate the risks of therapy, but lay witnesses can competently establish failure to disclose risk information, a patient's lack of knowledge of the risk, and the adverse consequences following treatment**); *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 10, 104 Cal. Rptr. 505 (Cal. 1972); *Festa, supra*, 511 A.2d at 1376-78

Cleary v. Grp. Health Ass'n, 691 A.2d 148, 154 (D.C. 1997)(emphasis added).

Both Drs. Eisner and Jim testified extensively to the inherent risk of the development of clots in the discontinuation of his Plavix. That was all that was required, and it was provided.

CONCLUSION

Appellees have not addressed the issues raised in Appellants' Brief and have instead attempted to recharacterize both the facts and law at issue. Appellants preserved their appeal, did not submit a "joint verdict form," and were expressly cut off from continued argument over the verdict form and advised that their objections

were preserved by the trial court. Appellants challenged the legal sufficiency of the verdict form calling for a *de novo* review. Citation to a specific jury instruction was not an appropriate remedy to the jury's question because the term "proximate cause" was not defined anywhere and the parties and Court could not know what question the jury was address at the time the question was raised. The jury instructions specifically required the jury to find causation in addressing whether Dr. Bolen failed to obtain informed consent, and in accordance with *Blackwell*, the Court should presume the jury followed the instructions. Contributory negligence was not appropriate in this case as any alleged contributory negligence on the part of Mr. Hankins preceded the medical treatment as was cured by Mr. Hankins prior to the alleged negligent conduct. Appellants provided adequate expert testimony on the risk of clotting that were required in order for Dr. Bolen to have obtained informed consent. For these reasons, the relief sought by Appellant should be granted.

Respectfully Submitted,

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District of Columbia
Court of Appeals

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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
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   - 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	22-CV-354
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