No. 22-CV-354

In the

District of Columbia Court of Appeals

KAREN HILL, Individually and as Administrator
and Personal Representative of the Estate of FRANK HANKINS,

Plaintiffs-Appellants,

v.

CAPITAL DIGESTIVE CARE, *et al.*,

Defendants-Appellees.

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

BRIEF FOR APPELLEES GEORGE BOLEN, M.D. AND CAPITAL DIGESTIVE CARE LLC

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CERTIFICATE REQUIRED BY RULE 28(a)(2) OF THE RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

The undersigned counsel of record for George Bolen, M.D. and Capital Digestive Care LLC, certifies that the following listed parties appeared below and/or will appear before this Court:

1. Plaintiffs below and Appellants herein: Karen Hill, Individually and as Personal Representative of the Estate of Frank Hankins.
2. Counsel for Appellants: Matthew A. Nace, Esq. and Christopher T. Nace, Esq. of the law firm of Paulson & Nace, PLLC.
3. Defendants below and Appellees herein: George Bolen, M.D., an individual, and Capital Digestive Care LLC, a limited liability company.
4. Pursuant to D.C. App. R. 26.1, Defendant-Appellee, Capital Digestive Care LLC, is a Limited Liability Company with no parent corporation. No publicly held corporation owns 10% or more of its stock.
5. Counsel for Appellees: Robert W. Goodson, Esq. and Jodi V. Terranova, Esq. of the law firm Wilson, Elser, Moskowitz, Edelman, & Dicker LLP.
6. There are no *amici*.

These representations are made in order that judges of this Court, *inter alia*, may evaluate possible disqualification or recusal.

/s/ Jodi V. Terranova
Jodi V. Terranova

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STATEMENT REGARDING APPELLATE JURISDICTION

In accordance with D.C. App. R. 28(a)(5), undersigned counsel of record for Defendants, George Bolen, M.D. and Capital Digestive Care LLC, assert that this is an appeal from a final order or judgment that disposes of all parties' claims, such that this Court has appellate jurisdiction.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether Plaintiff's untimely objections with respect to the wording of the jury verdict form are properly preserved on appeal, and if so, whether the trial court's decision pertaining to the same constituted an abuse of discretion and/or harmless error.

II. Whether the trial court appropriately charged the jury with respect to Plaintiff's informed consent claim.

III. Whether the trial court's decision to permit Defendants to assert the defense of contributory negligence is moot, because the jury did not reach this issue in their deliberations.

IV. Whether the trial court properly permitted Defendants to assert the defense of contributory negligence

V. Whether the jury's verdict in favor of Defendants is sufficiently supported by the facts.

STATEMENT OF THE CASE

The instant matter was a consolidated case; wherein, Plaintiff, Karen Hill, individually and as the Personal Representative of the Estate of Frank Hankins, her father (hereinafter, "Plaintiff"), initiated the subject action against Defendants, George Bolen, M.D. and Capital Digestive Care LLC (hereinafter, "Defendants"), alleging three causes of action sounding in medical malpractice: (1) Medical Negligence; (2) Wrongful Death; and (3) Informed Consent. App. 46, 50-55. In the trial of the underlying matter, Plaintiff generally claimed gastroenterologist, George Bolen, M.D. (hereinafter, "Dr. Bolen"), allegedly breached the standard of care by recommending that Plaintiff's decedent, Frank Hankins (hereinafter, "Mr. Hankins"), briefly discontinue taking his blood thinner, Plavix, following a colonoscopy during which a large two-centimeter polyp was identified and removed from Mr. Hankins' right colon. App. 142-144.

Conversely, Defendants argued at trial that Dr. Bolen complied with the standard of care in all respects in his care and treatment of Mr. Hankins. Defendants further averred that even if Dr. Bolen was negligent, such negligence was not the proximate cause of Mr. Hankins' demise. Finally, Defendants argued that Mr. Hankins was contributorily negligent and that such negligence was the cause of Mr. Hankins' death. App. 144-1445. Following a six-day trial, the jury returned a verdict in favor of the defense. App. 343-345. Plaintiff now takes this

appeal. As detailed below, it is respectfully submitted that the judgment in favor of Defendants should be affirmed.

STATEMENT OF FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

Procedural history of the case.

Plaintiff's complaints were filed on July 13 and 16, 2018. App. 44, 46. The Pre-Trial Conference for this matter occurred on June 22, 2021. App. 24. Prior to the Pre-Trial conference, the parties submitted their own proposed verdict forms. App. 172-173, 176-177. At the Pre-Trial Conference, the parties were instructed to file a "Supplemental Submission Following Pre-Trial Conference," which they ultimately did on June 29, 2021. App. 179. In this supplemental filing, the parties were permitted to make changes and object to the trial court's proposed verdict form. App. 182. Specifically, the filing states, "[a]ttached is a word version of the Court's proposed verdict form with track changes in red reflecting the [parties respective] requests." App. 182. Each parties' proposed changes, as well as the other's objections to the same, were reflected in this document. App. 182-184.

Pertinent to this appeal, the trial court's proposed question concerning the issue of negligence stated, "Do you find that Plaintiff has proven by a preponderance of the evidence that Dr. Bolen's breach of the standard of care proximately caused Frank Hankins' death?" App. 182. In lieu of this question, **Plaintiff** sought to have the question changed to, "Do you find that Plaintiff has

proven by a preponderance of the evidence that Dr. Bolen's breach of the standard of care was a proximate cause of Frank Hankins' death?" App. 182-183, 188.

The instant matter then proceeded to a jury trial on August 31, 2021. App. 421. By September 1, 2021, Plaintiff had concluded her case-in-chief. App. 657, 872. In support of Plaintiff's contentions, she relied on two expert witnesses, Todd Eisner, MD (gastroenterology), and Jeffery Jim, MD (vascular surgery), who respectively opined on the issues of standard of care and causation. App. 147, 657. At the conclusion of Plaintiff's case-and-chief, Defendants filed a motion for a judgment as a matter of law, which was denied on September 2, 2021. App. 962 – 970.

On September 2, 2021, Defendants began presenting their case-in-chief. App. 972. Defendants' relied on the following expert witnesses, Richard Bloomfeld, MD (gastroenterology / standard of care), Ying Wei Lum, M.D. (vascular surgery / causation and damages), and Michael Miller, M.D. (cardiology / causation and damages). App. 149-151. Defendants concluded their case-in-chief on September 7, 2021.

Following the conclusion of the evidence, and at the trial court's request, the parties jointly worked together to submit a proposed jury verdict form on the evening of September 7, 2021. App. 339. As reflected in the email exchange discussing the proposed verdict form, Plaintiff raised no objection to the wording

of questions one and two, which concerned Plaintiff's negligence claims. Further, Plaintiff's counsel stated, "I think we are ok with putting informed consent at 3 and 4." App. 1553.

This proposed verdict form was then submitted to the trial court. App. 339. As reflected in the email submitting the proposed jury verdict sheet to the trial court, there were only two disagreements between the parties with respect to the verdict form. App. 339. First, the parties disagreed concerning the directions following questions seven and eight. Second, Defendants further objected to the inclusion of a last clear chance question on the verdict form. No other objections were noted or made when the parties jointly submitted their proposed verdict form. App. 339. Instead, the parties agreed as to the form and content of the jointly submitted jury verdict form in all other respects.

This **jointly submitted jury verdict form** included the following questions pertinent to this appeal:

> 2. Do you find that Plaintiff has proven by a preponderance of the evidence that Dr. Bolen's breach of the standard of care was **a proximate cause of Mr. Hankins' damages?**
>
> 3. Do you find that Dr. Bolen failed to obtain informed consent from Mr. Hankins?
>
> **4. Was the failure to obtain informed consent a proximate cause of Frank Hankins' damages?**

App. 339 – 341. (Emphasis Added)

Following the parties' submission of their jointly proposed jury verdict form, the parties made respective motions for a judgment as a matter of law, which were both denied. App. 1285, 1296. The trial court then discussed the jury instructions with the parties, and the parties gave their respective closing arguments. App. 1405, 1438. Following closing arguments, the parties and the trial judge discussed the verdict form. During this discussion, the following colloquy transpired regarding the jointly submitted verdict form:

> **The Court:** So as to one, just so we're clear on this. Do you find by preponderance of the evidence that Dr. Bolen failed to adhere to the standard of care in his treatment of Frank Hankins? If the answer is yes to question 1, proceed to question 2, which is the causation question. Okay. If you answer no as to failing to adhere to the standard of care, proceed to 3, which is the informed consent issue. Okay. Agreement on all of that so far.
>
> ***
>
> Three: Do you find that Dr. Bolen failed to obtain informed consent from Mr. Hankins? If the answer is yes, proceed to question 4. If the answer is no to questions 2 and 3, then sign the verdict form. Is this supposed to be yes to questions 1, 2, and 3, instead of just 2 and 3?
>
> **Defendants' Counsel**: That's correct.
>
> **The Court**: Okay. So can I add the one? Anybody else want to comment on that one? Okay. Mr. Nace?
>
> **Plaintiff's Counsel**: I think technically it should be -- you mean for the no under Number 3, is that how we're trying to --
>
> **The Court**: Yes.

Plaintiff's Counsel: I think it should technically -- if you answered no to questions Number 1 or 2 and 3. Because if they answer question -- if they answer no to question 1, they're not going to get to question 2.

The Court: True.

***

The Court: Okay. So 1 or 2 and 3 now, then sign the verdict form and return it to the Court. Okay.

Question 4: Was the failure to obtain informed consent a proximate cause of Frank Hankins's damages? If you answer yes to question 4, proceed to 5. If you answer no to question --

Plaintiff's Counsel: I think that should, again, be 1 or 2 and 4.

The Court: Do you agree?

Defendants' Counsel: Yes.

The Court: Okay. Okay.

App. 1483-1486.

On September 8, 2021, the jury began deliberating. The jury was then provided with the jury verdict form. This jury verdict form included the same ten questions that were included in the jointly submitted jury verdict form. App. 340-342, 343-345. Following the submission of the verdict form to the jury, the jury sent a question to the trial court. The question was as follows: "Hello, can you please provide a definition for proximate cause as featured in the verdict form. Thank you." App. 1520.

In response to this question, the trial court and the parties had a discussion regarding how to respond. Two options were discussed during this discussion: first, the court and the parties considered directing the jury to D.C. Std. Civ. Jury Instr. No. 5-12 (cause defined) and 9-10 (professional liability – cause defined); and second, the court and the parties considered generally referring the jury back to the jury instructions without direction. App. 1520-1524. In addressing this issue, the following discussion occurred:

> **The Court**: So did you want me to simply cite the -- the -- the relevant jury instruction -- the jury instructions relevant to your question are 5.12 and 9.10.
>
> **Plaintiff's Counsel**: ... I don't believe you should instruct them on any of them because I think causation is throughout the instructions. There's also intervening cause, there's also --
>
> ***
>
> **The Court:** So just indicating that the answer to your question is to refer to the jury instructions, period.
>
> **Plaintiff's Counsel:** I believe that's the appropriate thing.

App. 1522-1523.

In compliance with **Plaintiff's request**, the trial court instructed the jury that, "[t]he answer to the question that you can take with you for tomorrow is that you need to refer to the jury instructions." App. 1524.

The next day, the jury returned a unanimous verdict in favor of Defendants. App. 345. Specifically, the jury found: 1) Dr. Bolen breached the standard of care

in his treatment of Mr. Hankins; 2) Dr. Bolen's breach in the standard of care was not the proximate cause of Mr. Hankins' damages; 3) Dr. Bolen failed to obtain Mr. Hankins' informed consent; and 4) Dr. Bolen's failure to obtain informed consent was not a proximate cause of Mr. Hankins' damages. App. 343-345. Notably, the jury did not reach the issue of Mr. Hankins' contributory negligence. App. 344.

On September 20, 2021, Plaintiff filed a Motion for a Judgment Notwithstanding the Verdict (hereinafter, "JNOV") and/or for a New Trial. App. 346. Plaintiff provided the trial court with two primary grounds for her motion: first, Plaintiff argued that the jury verdict form did not appropriately address the issues of informed consent and proximate cause; and second, Plaintiff argued that the jury was improperly permitted to consider the issue of Mr. Hankins' contributory negligence. App. 347-353. Defendants timely opposed Plaintiff's Motion. App. 361. In an Order dated May 16, 2022, the trial court denied Plaintiff's Motion for a JNOV and/or a New Trial. App. 379-389. Plaintiff timely filed and initiated this appeal following the superior court's ruling. App. 392.

Summation of Mr. Hankins' Treatment History.

On January 20, 2016, Mr. Hankins presented to the office of Dr. Bolen following symptoms of acute diverticulitis and left quadrant abdominal pain. App. 978, 1186-1187. At the time of his presentation, Mr. Hankins did not disclose that

he had peripheral arterial disease (Hereinafter "PAD"). App. 1184. Nor did he disclose his surgical history, which was positive for two angiograms and stent placement. App. 1085, 1184. He further failed to disclose that he was taking a dual-platelet therapy of Aspirin and Plavix to prevent blood clots. App. 981, 1184.

Due to Mr. Hankins' history of polyps, and recent symptoms of probable diverticulitis and left quadrant abdominal pain, Dr. Bolen recommended a follow up colonoscopy and esophagogastroduodenoscopy for Mr. Hankins. App. 1187. An esophagogastroduodenoscopy is a procedure that allows the doctor to examine the inside of the esophagus, stomach, and duodenum. The indications, techniques, alternatives, and potential risks were discussed with Mr. Hankins. App. 982-983, 1189-1191. The medical record reflected that Mr. Hankins understood the above, wished to proceed with the procedure, and gave his informed consent to undergo the procedure. App. 983.

On February 27, 2016, Mr. Hankins stopped taking his dual-platelet therapy of Aspirin and Plavix, without consulting his primary care physician, cardiologist, and/or any prescribing physician regarding the discontinuation of the same. App. 987-988, 1193-1194. Mr. Hankins then presented to the subject endoscopy center on March 1, 2016 for his colonoscopy. Upon his presentation, Mr. Hankins was again informed of the risks and benefits of the procedure. Evidence for the same is reflected by Mr. Hankins' signature on the informed consent form. App. 991, 1201.

Mr. Hankins was also provided written patient education information, which included pre-operative instructions. App. 986, 1194. These preoperative instructions stated, "if you take prescription medications, especially diabetes medication or anticoagulants (blood thinners) such as Coumadin & Plavix, you should check with your Primary Care Physician prior to your procedure as to how they should be adjusted." App. 986, 1103.

Notwithstanding these instructions, Mr. Hankins once again failed to disclose his full medical history when Dr. Bolen took it the day of the procedure. In point of fact, not only did Mr. Hankins fail to share pertinent medical data with Dr. Bolen, there is also no evidence that revealed that Mr. Hankins disclosed his full medical history to the anesthesiologist who would be assisting with the colonoscopy either. App. 1010, 1016, 1198, 1199-1201.

As a result, Dr. Bolen was unaware of Mr. Hankins' dual-platelet therapy prior to the procedure and could not create an individualized care plan for him. App. 988. Dr. Bolen testified that this information concerning Mr. Hankins' dual-platelet therapy was an important piece of information that should have been provided to him when he first saw Mr. Hankins in January 2016. Dr. Bolen further testified that if he had known Mr. Hankins' actual medical history, he would have acted differently. Specifically, Dr. Bolen testified at trial:

> Q. If, hypothetically, you were told that [Mr. Hankins] had a history of four procedures with a history of stents, with peripheral arterial

> disease, with a history of taking Plavix and Aspirin, what would you have done at that time?
>
> A. We either would have postponed the procedure so that we could contact the referring physician, the one who had prescribed these medications for him. Try to question him in more detail about what diagnoses were being treated with these medications, but normally we would have canceled the procedure, it would not have been safe to go forward if he had continued taking the medication.
>
> Q. Can you tell me how often you would be in contact with prescribing physicians for patients who have PAD or a history of Plavix and Aspirin?
>
> A. Well, we do it many times a week. Those are commonly used drugs nowadays and we have to insist that the patients get clearance from their prescribing doctor before we can safely go forward by stopping these drugs.

App. 1204-1205.

Unfortunately, information pertaining to Mr. Hankins' dual-platelet therapy was not conveyed to Dr. Bolen until after he had removed Mr. Hankins' two-centimeter polyp in his colon. App. 1209-1210. Upon learning that Mr. Hankins was on dual-platelet therapy, Dr. Bolen recommended that Mr. Hankins remain off Plavix for a brief period of time so as to reduce the risk of bleeding from the polyp removal. In addition, Dr. Bolen further recommended that Mr. Hankins resume taking his daily Aspirin. App. 951, 1212-1213. Dr. Bolen also sought to speak directly with Mr. Hankins regarding this therapy following the subject colonoscopy. App. 1211.

To ensure that Mr. Hankins followed his instructions, Dr. Bolen spoke with the discharge nurse and asked him to tell Mr. Hankins that he needed to wait to speak with Dr. Bolen before leaving. App. 1211. In addition, Mr. Hankins was provided with discharge instructions that advised him that, "[Dr. Bolen] will speak to you after your procedure and explain the findings of your examination, [he will] let you know if polyps or biopsies were taken." App. 991. Mr. Hankins was also instructed to call Defendants seven to ten days after the procedure and to refer to his medication reconciliation sheet with respect to when he should resume his medications. App. 950, 1219. This medication reconciliation form further instructed Mr. Hankins to resume taking his Aspirin immediately following the procedure. App. 951, 1212-1213.

Unfortunately, Mr. Hankins did not resume taking his Aspirin as instructed. Nor did he wait to speak with Dr. Bolen after the procedure. App. 1123-1124, 1222. As is customary, Dr. Bolen had anticipated that a nurse would call Mr. Hankins in the two days following the procedure. However, Mr. Hankins specifically instructed Defendants not to call him following the procedure. App. 1011-1012, 1275. Then, Dr. Bolen attempted to call Mr. Hankins; however, such efforts were to no avail. App. 1219. Furthermore, Mr. Hankins also failed to call Defendants' office within seven to ten days following the procedure, as instructed. App. 1012.

On March 6, 2016, Mr. Hankins presented to the Emergency Department at MedStar Washington Hospital Center due to the pain in his leg. Imaging studies revealed that he developed an occlusion in his leg. By the next day, Mr. Hankins reported a decrease in the pain in his leg following his resumption of Plavix and Aspirin. However, by April 5, 2016, Mr. Hankins' condition began to decline, and he again sought treatment at Washington Hospital Center. By this point in time, his leg had become ischemic due to an occluded stent. Consequently, Mr. Hankins' leg was amputated; however, he did not recover from the amputation and passed away on April 23, 2016.

Expert Evidence Presented at Trial.

In the trial of the instant matter, Plaintiff relied on two primary experts, Drs. Eisner and Jim to support respectively her contentions regarding standard of care and causation. Dr. Eisner opined Dr. Bolen breached the standard of care by: 1) not knowing that Mr. Hankins was on Plavix prior to the colonoscopy; 2) failing to discuss with Mr. Hankins' treating provider the reason for the Plavix prescription; 3) discontinuing Mr. Hankins' Plavix regimen; and 4) failing to discuss the risks of discontinuing Plavix with Mr. Hankins. App. 714, 720.

However, on cross-examination, Dr. Eisner conceded that Mr. Hankins failed to disclose to Dr. Bolen that he: 1) had PAD; 2) had undergone multiple surgeries to insert stents to address his PAD; and 3) was on Plavix or Aspirin at his

January 20, 2016, appointment. App. 730. He further conceded that he did not know: 1) how long Mr. Hankins had been on Plavix; 2) how many stents Mr. Hankins had; 3) where Mr. Hankins' stents were located; or 4) how long those stents had been in place. App. 730-731.

Critically, Dr. Eisner also testified that, if Dr. Bolen, after learning about the Plavix, had spoken to a prescribing cardiologist on March 1, and the decision of a cardiologist was to keep Mr. Hankins off Plavix for seven days, then Dr. Bolen would have complied with the standard of care if he would have adopted that recommendation. He further agreed that he had no opinions with respect to standard of care. App. 731.

Following the testimony of Dr. Eisner, Plaintiff called Dr. Jim as a witness. Dr. Jim had no opinions concerning the issue of standard of care. App. 752. Nor did he have **any opinions** with regard to informed consent. App. 790-791. Instead, Dr. Jim provided opinions concerning Mr. Hankins development of clots following the colonoscopy. In sum, Dr. Jim opined on direct examination that Mr. Hankins' development of a clot in his leg, and his subsequent unsuccessful treatment for the same, was caused by the cessation of his Plavix. App. 768 – 771.

Like Dr. Eisner, Dr. Jim testified that no one instructed or directed Mr. Hankins to cease taking Aspirin. App. 777. Furthermore, Dr. Jim conceded that Mr. Hankins was a non-compliant patient in that he failed to resume taking his

Aspirin as he was instructed. App. 779. As was also the case with Dr. Eisner, Dr. Jim also testified, that Mr. Hankins failed to disclose in his January 20, 2016 appointment with Dr. Bolen that he: 1) had PAD; 2) had undergone multiple surgeries to insert stents to address his PAD; and 3) was on Plavix or Aspirin. App. 788.

Dr. Jim further conceded that he would defer to the opinion of the gastroenterologist performing the colonoscopy as to whether Plavix should be discontinued for a period of time after the colonoscopy. App. 781. He also conceded that he did not know the incidence rate of bleeding during a colonoscopy, as well as whether the size or the location of the polyp increased that risk. App. 781-782. Additionally, Dr. Jim agreed that if Mr. Hankins had remained on Aspirin following the colonoscopy on March 1, as instructed by Dr. Bolen, Mr. Hankins **would have avoided the occlusion**. App. 780.

Defendants then called their cardiology expert, Michael Miller, MD. Dr. Miller testified that from the prospective of a cardiologist, it was appropriate for Dr. Bolen to instruct Mr. Hankins to refrain from taking his Plavix immediately following the colonoscopy. App. 920-921. He further opined that, it would have been important for Mr. Hankins to resume taking his daily dose of Aspirin as soon as the procedure was over. App. 921. Notwithstanding the importance of the Aspirin, and Dr. Bolen's instruction to resume taking the same immediately

following the colonoscopy, Mr. Hankins was a non-compliant patient and did not follow his physician's instructions. App. 922-923. Lastly, Dr. Miller opined that had Mr. Hankins complied with Dr. Bolen's instructions, the subject clots would not have occurred. App. 923.

Defendants next called Richard Bloomfield, MD, who served as their gastroenterology expert and opined on the issue of standard of care. Dr. Bloomfield opined that Dr. Bolen complied with the standard of care in all respects of his treatment of Mr. Hankins. App. 1015. Dr. Bloomfield also testified that the standard of care requires gastroenterologists that are treating patients such as Mr. Hankins, who are receiving dual-platelet therapy, to cease taking Plavix five days prior to the procedure, but to continue taking their daily Aspirin. App. 988.

Dr. Bloomfield further opined that Dr. Bolen complied with the standard of care by adequately taking Mr. Hankins' medical history prior to the subject colonoscopy. App. 995. Dr. Bloomfield further opined that Dr. Bolen complied with the standard of care when he recommended to Mr. Hankins that he resume his Aspirin regimen but not immediately resume taking Plavix. App. 1007. Dr. Bloomfield also opined that Dr. Bolen – rather than Mr. Hankins' primary care provider – was in the best possible position to make the determination as to whether Hankins should resume the Plavix. App. 1007-1008.

Lastly, Dr. Bloomfield opined that Mr. Hankins was a non-compliant patient in that he: 1) left the hospital following the procedure without speaking to Dr. Bolen first; 2) failed to resume taking the Aspirin as instructed; and 3) failed to discuss with the anesthesia team his history for PAD. App. 1014-1016.

Finally, the Defense called vascular surgeon Dr. Lum to opine on issues pertaining to causation. As with the above-referenced experts, Dr. Lum noted that Mr. Hankins was instructed to speak with his primary care physician if he was on Plavix and Aspirin prior to the subject procedure. App. 1103. Despite this instruction, Mr. Hankins failed to do so. App. 1103.

Dr. Lum further opined that, if Mr. Hankins or Dr. Bolen consulted with a physician prior to, or after, the colonoscopy, a reasonably competent vascular surgeon would have recommended the same course of treatment that Mr. Hankins' ultimately received. App. 1120. Lastly, Dr. Lum opined that Mr. Hankins was non-compliant in failing to resume taking his daily Aspirin as Dr. Bolen instructed, and that such negligence was the proximate cause of Mr. Hankins' death. App. 1125.

SUMMARY OF THE ARGUMENT

It is respectfully submitted that this Court should affirm the jury's judgment in favor of Defendants and the trial court's denial of Plaintiff's Motion for a JNOV and/or a New Trial. As detailed below, it is respectfully submitted that Plaintiff's contentions on appeal are wholly without merit.

Specifically, the facts and the record are clear: 1) Plaintiff's objections regarding the jury verdict form are unpreserved on appeal; 2) the trial court's inclusion of the phrase "proximate cause" in the verdict form was not an abuse of discretion; 3) even if including the phrase "proximate cause" in the verdict form was an abuse of discretion, the trial court appropriately cured Plaintiff's concerns such that the trial court's alleged error would constitute a harmless one; 4) the trial court appropriately charged the jury on the issue of informed consent; 5) Plaintiff's assertion that the trial court erred in allowing Defendants to present the defense of contributory negligence to the jury is moot, because the jury did not reach this issue; 6) the trial court properly permitted Defendants to assert the defense of contributory negligence; and 7) the evidence in this case supported a verdict in favor of Defendants. Accordingly, it is respectfully submitted that the jury's judgment in favor of Defendants and the trial court's decision to deny Plaintiff's Motion for a JNOV and/or New Trial should be affirmed.

ARGUMENT

I. PLAINTIFF'S OBJECTIONS REGARDING THE JOINTLY SUBMITTED JURY VERDICT FORM ARE UNPRESERVED ON APPEAL.

As a preliminary matter, it is important to note at the outset that Plaintiff did not specifically object to the wording of the verdict form questions that are at issue in this appeal. Under D.C. Law, this failure to preserve Plaintiff's objections is

fatal to her appeal on this issue. *Townsend v. Donaldson*, 933 A.2d 282, 289 n. 10 (D.C. 2007) (stating, "a party that fails to object to specific wording in a special verdict form at trial waives that issue for appeal") (Internal citations omitted); *see also Hubbard v. Chidel*, 790 A.2d 558, 567 (D.C. 2002) (stating, a party objecting to a verdict form is required to not only "request a special verdict form to preserve a claim of error relating to fewer than all of the theories of liability (or defenses thereto) on which the jury permissibly could have based its verdict, but [also] in requesting a special verdict form, counsel must state the request with sufficient precision to indicate the specific interrogatories that should be included in the special verdict form, **object to their noninclusion**, and include the proposed special verdict form in the record on appeal."). (Emphasis added).

Similarly, Plaintiff's action in jointly submitting the jury verdict form prevents Plaintiff from appealing the wording or questions contained therein. *See Preacher v. United States*, 934 A.2d 363, 368 (D.C. 2007) ("Generally, the invited error doctrine precludes a party from asserting as error on appeal a course that he or she has induced the trial court to take.").

As detailed above, Plaintiff specifically joined Defendants in providing the trial court with a proposed verdict form, which included the question "Do you find that Plaintiff has proven by a preponderance of the evidence that Dr. Bolen's breach of the standard of care was **a proximate** cause of Frank Hankins' death?"

App. 182-183, 188. (Emphasis added). For this reason alone, this Court should find that Plaintiff waived her objections related to the inclusion of the phrase "proximate" in the verdict form. However, this was not the only opportunity Plaintiff had to object to the verdict form.

As noted by the trial court in its Memorandum Opinion denying Plaintiff's Motion for a JNOV or New Trial, "[t]he Court specifically addressed the verdict form on the record and asked the parties to spend the evening of September 7, 2021 jointly reviewing the form." App. 339, 385. Following this instruction, the parties conferred with one another to create a jointly proposed jury verdict form. App. 339, 1553.

In making such a submission to the trial court, Plaintiff specifically objected to the verdict form's instructions related to questions seven and eight. However, Plaintiff raised no objection to the term "proximate cause" being on the jury verdict form. Nor did Plaintiff object to the informed consent issue being split into two questions – questions three and four. In point of fact, Plaintiff took the opposite position stating, "I think we are ok with putting informed consent at **3 and 4**." App. 1553. (Emphasis added). The jury verdict form that was ultimately submitted by both parties to the trial court contained the same questions about which Plaintiff now complains. App. 339-341, 343-344. Moreover, this was also not the last time that Plaintiff had an opportunity to object to the verdict form.

Following the conclusion of closing arguments, the trial court and the parties once again discussed the jury verdict form. During this discussion of the jointly submitted jury verdict form, Plaintiff had every opportunity to object to the term "proximate cause" being included. However, as outlined in detail above, Plaintiff did not. App. 1483-1486. Plaintiff additionally had the ability to object to the informed consent issue being split into two questions. However, as with the term "proximate cause," Plaintiff did not do so. App. 1483-1486.

Given the foregoing, it is clear that Plaintiff waived any objection to the subject verdict form and that her contentions are without merit. Indeed, Plaintiff's contention that her submission of a separate jury verdict form – nearly three months prior to trial – is sufficient to preserve her objections on this issue has been previously rejected by this Court. *Townsend*, 933 A.2d at 289 n.10.

In *Townsend*, although this Court stated that it did not reach the defendant's contentions with respect to the verdict form, it nonetheless specifically noted, "[w]hile [the defendant]'s proffer of his own verdict form was sufficient to preserve his general objection to [the plaintiff]'s [verdict] form, a party that fails to object to specific wording in a special verdict form at trial waives that issue for appeal." *Id.* The Court of Appeals further elaborated, "[t]he policy behind this rule, providing the trial court with notice and an opportunity to correct so that a verdict is not jeopardized, applies with particular force here, where the jury sat for over

two weeks on a case involving numerous witnesses that had taken several years to prepare." *Id.*

In the instant matter, the facts and circumstances weigh even more heavily against the party that did not object, here Plaintiff, than they did in *Townsend*. In *Townsend*, the verdict form at issue was the plaintiff's proposed verdict form, and the defendant failed to object to the specific wording of the form at trial. *Id*. In the present case, the verdict form at issue was a **joint submission**, at least with respect to the questions at issue on this appeal. App. 339, 1553. Moreover, Plaintiff failed to object to her own verdict form when the trial court reviewed the same on the record. App. 1484-1486. Therefore, as was the case in *Townsend*, this Court should reject Plaintiff's contentions in this appeal.

In sum, this Court should affirm the trial court's decision to deny Plaintiff's Motion for a JNOV and/or New Trial for two reasons. First, Plaintiff jointly submitted the jury verdict form at issue in this appeal, which bars her from objecting now to its form and content. Second, even if the joint submission of the jury form were not enough to affirm the trial court's ruling, Plaintiff's failure to object to the questions at issue is sufficient. Again, following the joint submission, and as outlined above, the trial court specifically reviewed each and every question contained within the jury verdict form with counsel for the parties. App. 1483-1486. As detailed above, Plaintiff did not raise a single objection, concern, or

complaint regarding the propriety of the questions at issue in this appeal. App. 1484-1486. Given the foregoing, it is clear that Plaintiff's untimely objections that she now asserts on appeal are unpreserved.

II. THE COURT'S INCLUSION OF THE TERM "PROXIMATE CAUSE" IN THE VERDICT FORM WAS NOT AN ABUSE OF DISCRETION.

While this Court reviews the legal accuracy of the contents of a jury charge *de novo,* there is a separate standard of review when the appealing party is merely objecting to the phrasing of a jury charge. *Steinke v. P5 Solutions, Inc.*, 282 A.3d 1076, 1091-1092 (D.C. 2022*)*; *Brown v.* United States, 139 A.3d 870, 875 (D.C. 2016). Indeed, '[a] trial court has **broad discretion** in fashioning appropriate jury instructions, and its refusal to grant a request for a particular instruction is not a ground for reversal if the court's charge, considered as a whole, fairly and accurately states the applicable law." *Fisher v. Latney*, 146 A.3d 88 (D.C. 2016); (internal quotations and citations omitted); *see also Steinke,* 282 A.3d 1091 (D.C. 2022) (stating, this Court reviews a trial court's decision to refuse "a particular jury instruction for abuse of discretion, 'which may be found if the court's charge as a whole does not fairly and accurately state the applicable law.'") (internal citations omitted).

Taking this law together, this appeal as it relates to the phrasing of the questions on the jury verdict form are reviewed for abuse of discretion; whereas,

the substantive content of the instructions are reviewed *de novo*. In the instant matter, abuse of discretion is the applicable standard of review for this appeal, because Plaintiff's contentions do not suggest that the trial court's jury instructions are wrong on the law. Instead, Plaintiff takes issue with the trial court's supposed refusal to issue Plaintiff's particular jury verdict form. *See Blackwell v. Dass*, 6 A.3d 1274 (D.C. 2010).

In *Blackwell*, the jury was originally provided with a verdict form that separated the plaintiff's medical malpractice claim into two questions. *Id.* at 1276. "Question one, addressing breach of the standard of care, asked: 'Do you find by a preponderance of the evidence that [the defendant] breached the applicable standard of care in his care and treatment of [the plaintiff]?' Question two, addressing causation, asked, 'Do you find by a preponderance of the evidence that a breach in the standard of care by [the defendant] was a proximate cause of [the plaintiff's] death?'" *Id.* After the jury became deadlocked on question one, they requested the trial court revise the verdict form. *Id.* at 1277.

Over the objection of the plaintiff, the trial court revised the verdict form to state, "Do you find by a preponderance of the evidence that [the defendant], breached the applicable standard of care in his care and treatment of [the plaintiff] and that a breach in the standard of care by [the defendant] was a **proximate cause** of [the plaintiff's] death?") (Emphasis added). *Id.* Shortly thereafter, the jury

returned a verdict in favor of the defendant. *Id.* The plaintiff then filed an appeal. In affirming the trial court's decision, this Court held that, given the broad discretion empowered in trial courts to fashion jury instructions, it was not an abuse of discretion to revise the verdict form. *Id.* at 1279-1280.

Plaintiff's complaints with regard to questions two and four on the jury verdict form relate to the inclusion of the word "proximate" in the following questions:

> 2. Do you find that Plaintiff has proven by a preponderance of the evidence that Dr. Bolen's breach of the standard of care was a proximate cause of Mr. Hankins' damages?
>
> 4. Was the failure to obtain informed consent a proximate cause of Frank Hankins' damages?

See Pltf. Br. at pp. 21-24.

As noted above, reversal is not warranted unless Plaintiff could demonstrate that these questions, considered as a whole, do not fairly and accurately state the applicable law. Clearly, this is not the case in the instant matter. As it pertains to jury instruction number two, "[i]t is well-established that claims sounding in negligence must show (1) that the defendant owed a duty to the plaintiff, (2) breach of that duty, and (3) injury to the plaintiff that was proximately caused by the breach. *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 793 (D.C. 2011) (citing *Columbia v. Cooper*, 483 A.2d 317, 321 (D.C. 1984). Given this, it is clear

that the Court's second charge to the jury fairly and accurately stated the applicable law. As such, reversal is not warranted.

Similarly, "[f]or a Plaintiff to prevail on an informed consent claim, Plaintiff must prove that (1) there was an undisclosed risk that was material; (2) that risk materialized; and (3) Plaintiff would not have consented to the recommendations if he had been informed of the risk." *Miller-McGee v. Washington Hosp. Ctr.*, 920 A.2d 430, 440 (D.C. 2007). In answering a certified question from the United States Court of Appeals for the D.C. Circuit, this Court provided the following statement of law regarding informed consent:

> Ordinarily, in a medical malpractice case, expert testimony is required in order to prove … causation. This requirement in medical malpractice cases generally also applies to that class of malpractice cases specifically claiming lack of informed consent. For example, proof of causation remains an element of such a claim. As in malpractice actions generally, there must be a causal relationship between the physician's failure to adequately divulge and damage to the patient.

Lasley v. Georgetown University, 688 A.2d 1381 (D.C. 1997) (internal citations and quotations omitted).

Given this clear statement of law by this Court, there can be no question that the trial court's jury charges on causation were a correct statement of law such that a denial of Plaintiff's appeal is warranted in this case. Furthermore, while Plaintiff is correct that the DC Standardized Jury Instructions removed the word "proximate" from its instructions, she has failed to provide this Court with any law

whatsoever that stands for the proposition that including the term "proximate" in a verdict form question is an abuse of discretion, let alone one that requires reversal.

Plaintiff does not provide such law, because it does not exist. Indeed, the second comment to this jury instruction (upon which Plaintiff relies) notes, "[t]he term 'proximate' has been removed from this Instruction because it has **no import** for the layperson and may lead to confusion." (Emphasis added). Clearly, something that is considered to be of "no import" cannot now be considered of such importance that it warranted the granting of Plaintiff's Motion for a JNOV and/or a New Trial. Therefore, it is respectfully submitted that this Court should affirm the trial court's ruling and deny Plaintiff's appeal.

III. EVEN IF INCLUDING THE PHRASE "PROXIMATE CAUSE" IN THE VERDICT FORM WAS AN ABUSE OF DISCRETION, THE TRIAL COURT APPROPRIATELY CURED PLAINTIFF'S CONCERNS.

Assuming *arguendo* this Court finds that Plaintiff timely raised an objection to the inclusion of the word "proximate" in the verdict form, and that the inclusion of the word "proximate" in the verdict form was an abuse of discretion (or that it was an improper instruction under *de novo* review), there was no prejudice or harm to Plaintiff by the term's inclusion in the verdict form. Following the submission of the verdict form to the jury, the jury sent a question to the trial court. The question was as follows: "Hello, can you please provide a definition for proximate cause as featured in the verdict form. Thank you." App. 1520.

In response to this question, the trial court and the parties had a discussion regarding how to respond. Two options were debated during this discussion: first, the court and the parties considered directing the jury to DC Standardized Jury Instructions 5.12 (cause defined) and 9.10 (professional liability – cause defined); and second, the court and the parties considered generally referring the jury back to the jury instructions without direction. App. 1520-1524. Had Plaintiff's counsel consented, the jury would have been instructed proximate cause meant:

> An act, or a failure to act, causes harm if it played a substantial part in bringing about the harm. In addition, the harm must be either a direct result or a reasonably probable consequence of the act or failure to act.

D.C. Std. Civ. Jury Instr. No. 5-12

> An act, or failure to act, is deemed to have caused harm if it was a substantial factor in bringing about the harm. In addition, the harm must be either a direct result or a reasonably probable consequence of [Defendant's] act(s) or failure(s) to act.
>
> If [Plaintiff] would have suffered the same harm even if [Defendant's] conduct had not been negligent, then [Defendant's] conduct is not a substantial factor in causing the harm.

D.C. Std. Civ. Jury Instr. No. 9-10.

However, Plaintiff's counsel did not want the trial court to direct the jury to the above-referenced definitions of "cause" in response to their question as to what "proximate cause" meant. App. 1524. In compliance with **Plaintiff's request**, the trial court instructed the jury that, "[t]he answer to the question that you can take

with you for tomorrow is that you need to refer to the jury instructions." App. 1524.

Based on the foregoing, there are only two conclusions that can be reached. First, this Court can rightfully presume that the jury followed the trial court's instructions. Such a presumption would be consistent with black-letter law. *Blackwell*, 6 A.3d at 1278 (stating, this Court presumes the jury follows the trial court's instructions except in exceptional circumstances). If this presumption is made, the Court must conclude that the jury referred to the jury instructions they were provided pertaining to causation and determined the definition of "proximate cause." Under this scenario, any deficiencies in the jury verdict form caused by the inclusion of the phrase "proximate cause" would be cured by the jury's actions during deliberations.

The only other conclusion is that the jury was not appropriately instructed as to the proper definition of cause, because the trial court did not direct them to D.C. Std. Civ. Jury Instr. Nos. 5-12 or 9-10. However, even if this were true, this would have been solely because of Plaintiff's above-referenced request. Indeed, the trial court was originally inclined to direct the jury to a definition of "proximate cause" that is not only accurate, but also the precise wording Plaintiff now contends should have been in the jury verdict form. App. 1521-1524. However, Plaintiff cannot have it both ways: either the alleged error was cured by her requested

instruction or it was not cured because of her requested instruction. App. 1521. Under either scenario, it is respectfully submitted that this Court should affirm the trial court's decision not to grant Plaintiff's Motion for a JNOV and/or a New Trial.

IV. THE TRIAL COURT APPROPRIATELY CHARGED THE JURY ON THE ISSUE OF INFORMED CONSENT.

The trial court appropriately charged the jury with respect to Plaintiff's informed consent claim. As noted above, the jury verdict form at issue in the instant case contained two questions concerning informed consent. First, the jury was asked in question three, "[d]o you find that Dr. Bolen failed to obtain informed consent from Mr. Hankins?" App. 343. If the answer to that question was "yes," then the jury was instructed to proceed to question four. App. 343. Question four asked the jury, "[w]as the failure to obtain informed consent a proximate cause of Frank Hankins' damages?" App. 344. The trial court's decision to split the elements of Plaintiff's informed consent claim into two questions is reviewed for abuse of discretion. *Blackwell*, 6 A.3d at 1276.

In essence, Plaintiff alleges that the jury verdict form should have only contained one question on informed consent, and it should not have included any reference to causation. However, Plaintiff's position is belied by the jury instructions on which she relies. Pursuant to the DC Standard Jury Instructions, the jury must find *inter alia*: "whether Defendant informed Plaintiff of all significant

risks and benefits of the proposed treatment and of the alternatives, including no treatment." Then, the jury is also instructed, "[i]f 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.** D.C. Std. Civ. Jury Instr. No. 9-8. (Emphasis added).

In the present case, the jury responded in the affirmative that Defendants failed to obtain informed consent from Mr. Hankins. App. 343. However, this is only step one in the analysis for an informed consent cause of action. As set forth above, the jury was still required to answer in the affirmative the question of causation before they could find for Plaintiff on this issue. *See*, *Hall v. Carter*, 825 A.2d 954 (D.C. 2003). In *Carter*, this Court found that when a jury concludes that a doctor obtained informed consent, it is the equivalent of the jury finding that the doctor was not negligent. *Id.* at 959. Therefore, the inverse must also be true. If a jury finds that a doctor did not obtain informed consent, it merely means that the doctor was negligent and nothing more. However, a finding of negligence alone is not the same thing as a finding of liability, which is precisely what Plaintiff contends. *Becker v. Colonial Parking, Inc.*, 409 F.2d 1130, (D.C. 1969) (stating, "[i]t is a settled maxim of tort law that both negligence *and* causation must be proved before the plaintiff can have a verdict.") (Internal quotations omitted).

Defendants' reading of the DC Standardized Jury Instructions is also supported by the seminal case law on this issue. The Court of Appeals confirmed in *Gordon v. Neviaser*, 478 A.2d 292, 295 (D.C. 1984) that, "even if the jury had found that appellee breached his duty to disclose this risk to appellant, it would also have had to find a causal connection between the undisclosed risk and the subsequent injury." *Id*. In order to establish causation, "the jury would have had to determine whether a reasonably prudent person in appellant's position would have declined to go through with the operation if he had been told that there was a possibility that his shoulder condition might deteriorate as a result of the surgery." *Id*. The case in *Gordon*, however, never got to the jury because the trial court decided the claim of informed consent on a motion for directed verdict. This Court affirmed the judgment in favor of appellee, and determined that the appellant's evidence was insufficient to enable the jury to determine whether it was more probable than not that the conduct of the defendant brought about the injury." *Id.* at 296.

Likewise, in *Cantebury v. Spence*, it was held that, "there must be a causal relationship between the physician's failure to adequately divulge and damage to the patient." 464 F.2d 772, 790 (1972). The *Cantebury* Court further opined that, "a causal connection exists when, but only when, the disclosure of significant risks incidental to treatment would have resulted in a decision against it." *Id.*

Specifically, the Court set the objective standard by which informed consent cases are decided, requiring the factfinder to determine "what a prudent person in the patient's position would have decided if suitability informed of all perils bearing significance." *Id.* at 791.

Plaintiff contends that, "[i]n answering in the affirmative on question No. 3, the jury determined all elements of causation required to award a Plaintiffs' verdict in this matter." Pltf. Br. at p. 37. Given the foregoing, this contention is plainly false. When the jury answered "yes" to question three of the verdict form, they did not need to make a determination as to whether the lack of informed consent caused the Plaintiff's damages, which is the critical and final element of the claim. In answering "yes" to Question 3, the only determination that the jury made was "whether Defendant informed Plaintiff of all significant risks and benefits of the proposed treatment and of the alternatives, including no treatment." D.C. Std. Civ. Jury Instr. § 9.08. Contrary to Plaintiff's contention, the jury was not tasked with finding the causal connection between the undisclosed risks until question four. App. 343-344.

Once the jury wrongly found that Dr. Bolen failed to obtain informed consent, the jury was then tasked with determining whether his failure to obtain Mr. Hankins' informed consent was the proximate cause of Mr. Hankins' injuries. App. 343-344. Specifically, the jury had to determine whether a reasonable person

in Mr. Hankins' 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, and that the undisclosed risk was the cause of Mr. Hankins' damages. D.C. Std. Civ. Jury Instr. § 9.08. The jury rightly concluded that there was either a different cause of Mr. Hankins' death, and/or he would have undergone the procedure notwithstanding the risks. App. 343-344.

In sum, it is clear that the trial court's charges with respect to the informed consent claim were appropriate and certainly not an abuse of discretion. Nor would it warrant reversal under a *de novo* review. Therefore, this Court should affirm the trial court's decision to deny Plaintiff's Motion for a JNOV and/or New Trial.

V. PLAINTIFF'S ASSERTION THAT THE TRIAL COURT ERRED IN ALLOWING DEFENDANTS TO PRESENT THE DEFENSE OF CONTRIBUTORY NEGLIGENCE TO THE JURY IS MOOT, BECAUSE THE JURY DID NOT REACH THIS ISSUE.

While the propriety of the trial court's inclusion of evidence reflecting Mr. Hankins' contributory negligence is addressed in detail below, it is critical to note the mootness of this issue prior to addressing its merits. An error with respect to jury instructions does not warrant reversal, if the error was harmless. *Dennis v. Jones*, 928 A.2d 672 (D.C. 2007). That is to say, this Court will not reverse the trial court's decision, where it can 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.* at 678; *see also Nelson v. McCreary*, 694 A.2d 897, 902 (D.C. 1997) (applying harmless error analysis to a trial judge's erroneous refusal to instruct the jury on a party's theory of the case). In reviewing the trial court's instructions and record on appeal as a whole, it is clear that the jury's judgment was "not substantially swayed" by the inclusion of an instruction on contributory negligence.

Without yet addressing the merits of Plaintiff's assertions, the issue of the propriety of the trial court's decision to: 1) permit the admission of evidence pertaining to Mr. Hankins' contributory negligence; 2) instruct the jury on the issue of contributory negligence; and 3) include questions on the verdict form related to contributory negligence are all moot such that those decisions were harmless and cannot result in reversal. There are two elements to a contributory negligence defense. D.C. Std. Civ. Jury Instr. No. 5-15. First, a defendant must establish that plaintiff was negligent. *Id.* Second, the defendant must be able to establish that the plaintiff's negligence was the cause of his or her injuries. *Id.* It is only when both elements are met that a defendant establishes the defense of contributory negligence. *Id.*

In the instant matter, the jury found that Defendants breached the standard of care in their care and treatment of Mr. Hankins. App. 343. Similarly, the jury found that Defendants failed to obtain Mr. Hankins' informed consent. App. 343.

However, as noted above, the jury found that Defendants' breach in the standard of care, and failure to obtain informed consent, was not a cause of Plaintiff's damages. App. 343-344. Therefore, the jury never considered or addressed the issue of whether Mr. Hankins' actions constituted contributory negligence. *Blackwell*, 6 A.3d at 1278 (stating, this Court presumes the jury follows the trial court's instructions except in exceptional circumstances).

Because the jury did not address this issue, it necessarily could not have considered the questions, doctrines, and evidence pertaining to contributory negligence. Accordingly, any alleged errors by the trial court in admitting evidence pertaining to, instructing the jury on, and including a question in the verdict form concerning, contributory negligence, were, in fact, harmless. Given the foregoing, it is respectfully submitted that the trial court's decision should be affirmed.

VI. THE TRIAL COURT PROPERLY PERMITTED DEFENDANTS TO ASSERT THE DEFENSE OF CONTRIBUTORY NEGLIGENCE.

Generally speaking, "[this Court] review[s] a trial court's decision regarding the admission or exclusion of evidence for abuse of discretion, but where the evidentiary ruling is based on the trial court's determination of a question of law, appellate review of that determination is de novo." *Magdalene Campbell & Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.*, 55 A.3d 379, 385 (D.C. 2012). As noted by Plaintiff, this Court applies an abuse of discretion standard when reviewing a trial court's decision to permit or exclude expert testimony.

Savage v. Burgess, 71 A.3d 718, 720 (D.C. 2013). In *Savage*, this Court held it was an abuse of discretion for the trial court to exclude an expert's testimony, where she had presented a "'minimally sufficient' foundation for her testimony." *Id*. Such foundation included merely that she was a board-certified dermatologist and that she was relying on literature in her field. *Id.*

A party is entitled to present evidence, and obtain a jury instruction pertaining to their affirmative defenses; even where the evidence submitted is minimal. *Nelson*, 694 A.2d at 901. Indeed, "[a]ll that is necessary is that there be some evidence supporting a party's theory of the case. If such evidence presents a question of fact for the jury, [the requesting party] is entitled to an appropriate instruction." *Id.*

In a medical malpractice case, contributory negligence is a valid defense, if the patient's negligence creates an unreasonable risk of improper medical treatment. *Weeda v. District of Columbia*, 521 A.2d 1156, 1167 (D.C. 1987). "[T]he defense is allowed because the injuries directly result from the particular hazard or risk which made the conduct negligent." *Metcalf v. United States,* 1990 U.S. Dist. LEXIS 2236 *59 (Mar. 1, 1990) citing *Weeda*, 521 A.2d 1156 at 1167.

This Court addressed a similar issue in the matter of *Dennis v. Jones*. 928 A.2d at 674. In *Dennis*, the issue before the Court was whether the trial court had properly denied the defendant's request for a jury instruction on the issue of

assumption of the risk. *Id.* at 677. At issue in the case was whether or not the plastic surgeon failed to inform the plaintiff of the risks associated with smoking in advance of plastic surgery. *Id.* The trial court provided the jury an instruction that permitted the jury to consider whether the plaintiff's smoking constituted contributory negligence. *Id.* However, the trial court did not provide an instruction related to whether the jury could find that Plaintiff's smoking constituted an assumption of the risk. *Id.*

While this Court did not rule on the merits of the trial court's decision not to provide an assumption of the risk instruction, it did conclude that such an instruction would have been duplicative of the contributory negligence instruction, and therefore, would have constituted harmless error at worst. *Id.* at 678-679. Critical to this appeal, this necessarily means that this Court found that a plaintiff's actions could constitute contributory negligence, even if such actions pre-dated some of the alleged acts of the defendant's negligence and/or ran concurrent to the alleged acts of medical malpractice. Indeed, while acknowledging that there was a "dearth of case law on this subject," this Court also concluded that, the jury could have found that [Plaintiff] proximately caused her own injuries by continuing to smoke (contrary to the doctor's instructions) and by falsely assuring the doctor that she had stopped smoking." *Id.* at 678. Given the foregoing, this Court has clearly expressed an inclination that it is permissible for a defendant to assert a

contributory negligence defense, where, as here, the patient failed to disclose pertinent information that could have caused his own injuries.

Similarly, in *Metcalf*, the United States District Court for the District of Columbia, applying District of Columbia law, concluded that the plaintiff's failure to provide complete and truthful information about his diabetic condition and prior medical history created an unreasonable risk of improper medical treatment and directly contributed to the injuries to which he complained. *Metcalf*, 1990 U.S. Dist. LEXIS 2236, *61-62. Specifically, the Court found that the plaintiff:

> owed a duty to provide full and truthful information to the treating physicians at the VAMC to enable them to make the proper diagnosis and prescribe the appropriate treatment plan. [The p]laintiff gave false information and misleading information regarding his past psychiatric treatment, symptoms, addictions, and medical condition which created an unreasonable risk of improper medical treatment by the VAMC physicians and staff.…

Id. at 60-61.

The court noted that the defendant-treating physician reasonably and properly relied on the false and misleading information provided to him by the plaintiff to determine the plaintiff's post-operative plan, which was the subject of the plaintiff's claim of medical negligence against the treating physicians. *See id.* at 23-39. The court concluded that the false and misleading information provided by the plaintiff *before* the alleged medical negligence transpired created an unreasonable risk of improper medical treatment. *See id.* at 60-61. This amounted

to contributory negligence, barring any recovery. *Id.*, at 60-63; *see also Robinson v. Washington Internal Medicine Associates*, 647 A.2d 1140, 1158 (D.C. 1994) (acknowledging acceptable basis for contributory negligence defense where patient provides information or symptoms that are false or misleading).

In the present case, the trial court properly permitted Defendants to present evidence of Plaintiff's contributory negligence and included a jury instruction pertaining to the same. Although, as noted above, the jury did not reach this issue, and therefore, this question is moot. App. 343-344. Nonetheless, Plaintiffs' brief misses the forest for the trees.

At the outset, it is important to note that Plaintiff misstates the record with respect to the testimony of Dr. Miller. Defendants shall address each of Plaintiff's contentions in turn. First, Plaintiff seemingly argues that Dr. Miller's testimony contradicted an article he wrote twenty years prior to the trial. *See* Pltf. Br. at p. 11; App. 928. However, Plaintiff's arguments reflect a fundamental misunderstanding of medicine. As a preliminary matter, Dr. Miller outlined that the two studies were not focused on patients who had PAD, such as Mr. Hankins. App 0928-929. Instead, they were studies of anyone, without respect to whether or not they had PAD. For this reason alone, the results of this study were immaterial. App 0929.

Secondly, the two studies to which Plaintiff referenced had a combined total of 27 patients. As such, they were too small to draw any conclusions. App. 929,

931-932. Even if this were not the case, as Plaintiff noted during the trial, the studies did not reflect that the patients with hyperlipidemia had no response to taking Aspirin; instead, it merely reflected that such patients did not have as high a response rate as other patients. App. 929. As succinctly described by Dr. Miller to Plaintiff's counsel during trial:

> Q. So, if anything, this particular gentleman fit your category of hyperlipidemia, not responding as well to Aspirin as those who don't have hyperlipidemia, correct?
>
> A. I would disagree with that …. Our study looked at patients who we found in our outpatient clinic who had hyperlipidemia. Some of them were young, had no risk factors for heart disease, some may have had others, we did not purely --
>
> To make the generalization that you're suggesting would be to study exclusively a population of patients with PAD similar to Mr. Hankins and then trying to narrow the kind of comorbidities that Mr. Hankins had using Aspirin versus non-Aspirin. But what you're saying here is not generalizable to this case.

App. 930.

Given the foregoing, Dr. Miller properly described why Plaintiff's contentions during the trial of this matter, and in the instant appeal, reflect a fundamental misunderstanding of medicine. App. 930 - 0932. As this is the only foundation upon which Plaintiff based her contention that the trial court should have stricken Dr. Miller's testimony, the trial court clearly did not abuse its discretion in permitting Dr. Miller's testimony. Accordingly, the trial court's

decision to permit Defendants to introduce evidence pertaining to Mr. Hankins' contributory negligence was appropriate.

However, even if this were not the case, and the trial court abused its discretion in admitting Dr. Miller's testimony, which Defendants do not concede, his testimony was not the only evidence upon which Defendants' contributory negligence defense was based. Therefore, irrespective of the admissibility of Dr. Miller's testimony, the trial court would have still properly permitted Defendants to argue that Mr. Hankins' contributory negligence was the proximate cause of his death.

There was clearly sufficient evidence that Mr. Hankins did not provide up to date, accurate, and complete information regarding his past medical history and current medications, which created an unreasonable risk of improper medical treatment, to warrant the assertion of a contributory negligence defense. As noted above, Plaintiff's own standard of care expert, Dr. Eisner, conceded that Mr. Hankins failed to disclose to Dr. Bolen that he: 1) had PAD; 2) had undergone multiple surgeries to insert stents to address his PAD; and 3) was on Plavix or Aspirin in his January 20, 2016, appointment. App. 730. Clearly, such failures present "some evidence" of contributory negligence. The evidence also established that Dr. Bolen reasonably and properly relied on the information Mr. Hankins

provided to him during this office visit in the subsequent care and treatment rendered to Mr. Hankins. App. 995, 1015, 1204-1205.

Similarly, Dr. Jim essentially conceded that Mr. Hankins was negligent, when he: 1) stopped taking his Aspirin without an instruction from a physician; 2) failed to resume taking his Aspirin, when he was instructed to do so; and 3) failed to disclose that he had PAD, had undergone multiple surgeries to insert stents to address his PAD, and was on Plavix or Aspirin. App. 788. Critically, Plaintiff's expert then essentially testified that Mr. Hankins' own actions were the cause of his death when he agreed that if Mr. Hankins had 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.

Given the foregoing testimony alone, the jury could have concluded that Mr. Hankins was contributorily negligent and that such negligence was the proximate cause of his injuries. Nonetheless, Defendants' arguments with respect to this issue were further supported by Defendants' experts.

Defendants' experts also agreed with Plaintiff's experts with regard to Mr. Hankins' non-compliance. Each of Defendants' experts opined that Mr. Hankins was a non-compliant patient in that he failed to provide Dr. Bolen an accurate medical history and resume his Aspirin as instructed. They further opined that Mr. Hankins was a non-compliant patient in that he failed to resume taking Aspirin as

instructed. App. 922-923, 1014-1016, 1123-1125. Lastly, Defendants' experts provided testimony that such non-compliance was the proximate cause of Mr. Hankins' death. Thus, there was clearly sufficient foundation for Defendants' affirmative defense of contributory negligence.

Plaintiff's continued reliance on *Durphy v. Kaiser Found. Health Plan of Mid-Atlantic States*, 698 A.2d 459, 467 (D.C. 1997) is misplaced. There, the defendant Kaiser presented evidence that the plaintiff "failed to maintain a diabetic diet, follow the advice of his doctors to take his medicine, wear protective coverings for his feet, and be hospitalized when recommended." *Id.* at 464. The defendant alleged that the patient's "conduct proximately caused the onset and progression of his osteomyelitis which resulted in the loss of his foot." *Id*. The D.C. Court of Appeals held that any negligence on the part of the patient occurring before March 1988 that preceded Kaiser's negligence did not constitute contributory negligence, because it did not create an unreasonable risk of improper medical treatment and did not proximately cause the loss of his foot. *See id.* at 465-468. Importantly, what Plaintiff seems to ignore in this appeal is that the Court stated, 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*. at 467. The *Durphy* decision does not apply to continuing and concurrent contributory negligence.

The issues in *Durphy* are clearly distinct from the circumstances giving rise to the defense of contributory negligence in the case at bar. Here, Mr. Hankins' actions and inactions prior to March 1 created an unreasonable risk of improper medical treatment, which is the basis of the claim of negligence, and directly contributed to his own alleged injuries and damages. This is a recognized and accepted basis for a defense of contributory negligence as noted above.

Given the foregoing, Defendants were properly permitted to present all of its evidence, testimony, and opinions on Mr. Hankins' contributory negligence that led to the alleged negligent actions and/or inactions of Dr. Bolen. Evidence of Mr. Hankins' actions and/or inactions during the course of his treatment with Dr. Bolen was clearly relevant to Defendants' claim of contributory negligence, and the trial court properly permitted the defense to argue the same. Therefore, it is respectfully submitted that this Court should affirm the trial court's ruling.

VII. THE MERITS OF THIS CASE WARRANTED THE JURY'S VERDICT IN FAVOR OF DEFENDANTS.

As noted by Plaintiff, this Court applies an abuse of discretion standard when reviewing the trial court's decision to deny her Motion for a JNOV and/or a New Trial. *Newell v. District of Columbia,* 741 A.2d 28, 31 (D.C. 1999). As the *Newell* court further noted, a motion for a JNOV is "granted only in extreme cases." *Id.* (Internal quotations omitted). Indeed, a trial court only grants a motion for a new trial if it finds that the verdict was against the weight of the evidence, or

that there would be a miscarriage of justice if the verdict is allowed to stand. *Id*. at 32. Similarly, this court only reverses a trial court's denial of a party's motion for a JNOV "if no reasonable person, viewing the evidence in the light most favorable to the prevailing party, could reach a verdict for that party." *Id.* (internal citation omitted)). Viewing the evidence in the light most favorable to the prevailing party, here Defendants, it is clear that a reasonable jury could, and did, find in favor of Defendants.

In the present case, Plaintiff avers that the jury was obligated as a matter of law to answer questions two and four (the causation questions) in the affirmative; however, the facts and evidence in this case make clear that Plaintiff's assertions are meritless. *See* Pltf. Br. at pp. 42-46. Indeed, there was clearly sufficient evidence presented during the trial of this matter for the jury to conclude that Plaintiff failed to meet her burden on the issue of causation.

As noted above, Plaintiff's own expert conceded that had Mr. Hankins continued taking Aspirin, this would have prevented the formation of his clot. App. 780. Plaintiff contends that such evidence is irrelevant to the question of whether Defendants' breaches in the standard of care caused Mr. Hankins' death. It is not. Pursuant to D.C. Std. Civ. Jury Instr. No. 9-10, "[i]f [Mr. Hankins] would have suffered the same harm even if [Dr. Bolen's] conduct had not been negligent, then [Dr. Bolen's] conduct is not a substantial factor in causing the harm."

Taken together, the facts and the law in this case compelled the jury to conclude that Mr. Hankins' death was not proximately caused by Dr. Bolen's actions. Again, Dr. Jim's testimony is proof positive on this issue. He testified that Mr. Hankins' death would have been prevented had he continued taking his Aspirin. App. 780. This testimony makes clear that regardless of what Dr. Bolen did (or failed to do); Mr. Hankins' demise was unavoidable. The question of whether or not this constituted contributory negligence is an entirely separate question. Indeed, the jury may have concluded (had it reached the issue of contributory negligence) that Mr. Hankins' cessation of Aspirin was not contributory negligence, but that it nonetheless caused his death.

With respect to Plaintiff's informed consent claim, it is necessary to state at the outset that Plaintiff did not support her claim with expert testimony. In informed consent cases, expert testimony is "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 risks, 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. 1977)). Plaintiff attempts to make expert factual determinations within her brief. In this effort, Plaintiff fails. Neither Dr. Eisner nor Dr. Jim (Plaintiff's experts) provided any testimony at trial on the

issue of informed consent. Indeed, as noted above, Dr. Eisner confirmed he had no opinions in this case on the issue of informed consent. App. 731. Similarly, Dr. Jeffrey also confirmed he had no opinions on the issue of informed consent. App. 790-791.

Consequently, Plaintiff provided the jury with **no expert evidence** that Dr. Bolen failed to obtain Mr. Hankins' informed consent. Nor did Plaintiff provide the jury with any evidence that such a purported failure caused Mr. Hankins' death. App. 731, 790-791. Moreover, during the course of the trial, the jury heard evidence from the defense's experts that as treating providers, a reasonably prudent vascular surgeon, cardiologist, and gastroenterologist all would have recommended that Mr. Hankins discontinue his Plavix and resume taking Aspirin, which is exactly what Dr. Bolen instructed Mr. Hankins to do. App. 920-921, 988, App. 1120.

Plaintiff was therefore required to prove that a reasonable person would have then gone *against* the recommendations of both his gastroenterologist *and* his cardiologist or vascular surgeon in refusing the proposed treatment. Notwithstanding this burden, Plaintiff proffered no evidence that a reasonable person in Mr. Hankins' position would have refused the proposed treatment and selected another option, if he had received adequate disclosure of the likely risks

and benefits of the actual treatment, any alternative treatments, and of no treatment.

Based on the lack of evidence supporting such a contention, it was entirely reasonable for the jury to determine that a reasonable person in Mr. Hankins' position would not have refused the proposed treatment and selected another option, even if he had received adequate disclosure of the risks, benefits, and alternatives. In other words, it was perfectly reasonable for the jury to conclude that Mr. Hankins' outcome would have been the same, even if he had been adequately informed of the risks of the procedure.

Given the foregoing, after hearing all the evidence, the jury properly answered questions two and four on the verdict form in the negative, and the trial court properly exercised its discretion by electing not to disturb the jury's judgment. Therefore, it is respectfully submitted that this Court should affirm the trial court's decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the trial court below properly denied Plaintiff's Motion for a JNOV and/or a New Trial, and that its Order should be affirmed.

Dated: March 24, 2023

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

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REDACTION CERTIFICATE DISCLOSURE FORM

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 the foregoing Appeal 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 taxpayer identification 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).

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.

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Case. No.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 24, 2023, I caused a true copy of the foregoing Brief of Defendants-Appellees, George Bolen, M.D. and Capital Digestive Care LLC., to be served via the Court's Electronic Filing System upon:

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