

Circuit Court for Prince George's County
Case No.: CAL22-05514

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND

Nos. 345

September Term, 2024

VANESSA FOSS

v.

NORMAN MCKOY, M.D.

Nazarian,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: May 9, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Vanessa Foss, filed a survival and wrongful death suit against appellee, Norman McKoy, M.D., in the Circuit Court for Prince George’s County related to the death of her husband, Charles L. Foss.¹ A jury found that Dr. McKoy did not breach the standard of care, and the circuit court entered judgment in favor of Dr. McKoy.

Appellant presents four questions for our review,² which we have consolidated to a single question:

¹ For clarity, we will refer to Vanessa Foss as “appellant,” and Charles Foss as “Mr. Foss.” Appellant and Mr. Foss’s children, Charles D. Foss and Noelle Foss, were also plaintiffs in the circuit court, but the Foss children are not parties to this appeal.

² Appellant presents the following questions in her brief:

1. Whether the Circuit Court erroneously instructed the jury on the standard of care by grafting a but for causation element onto the definition of the term?
2. Whether the Circuit Court erroneously instructed the jury that Appellant was required to establish, via expert testimony, that “the causal connection between the [negligent] conduct and the outcome was more medically probable than not” when:
 - a. some of the evidence relevant to causation was permissibly offered through fact witnesses and involved human behavior, not medicine, and,
 - b. it was only necessary to prove that but for Dr. McKoy’s negligence, Mr. Foss most likely would not have died?
3. Whether instructing the jury that a plaintiff’s claims “must be supported by expert testimony establishing that the causal connection between the conduct and the outcome was more medically probabl[e] than not” impermissibly vested the jury with the power to decide whether Appellant’s proof was legally sufficient, which was properly the province of the court?

(continued)

Did the circuit court correctly instruct the jury on the elements of negligence in a medical malpractice context?

Finding no error, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On February 15, 2020, Mr. Foss died due to a heart arrhythmia. The underlying cause of that arrhythmia and whether Mr. Foss’s primary care physician, Dr. McKoy, could have prevented his death were the primary issues at trial.

Mr. Foss’s father and uncles died from heart disease. Because of this, Mr. Foss tried to lead an active and healthy life. On February 10, 2020, Mr. Foss began experiencing chest pain, with symptoms improving when he drank hot tea. On February 13, 2020, Mr. Foss consulted with Dr. McKoy about his ongoing symptoms. Dr. McKoy conducted an EKG, which showed abnormal results. The parties disagree about what happened at the appointment after the EKG. Appellant alleges that Dr. McKoy did not sufficiently emphasize to Mr. Foss the abnormal EKG results, diagnosed him with GERD³ and

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4. Whether Appellant was prejudiced as a result of the court’s incorrect standard of care and causation instructions, in light of the court’s erroneous handling of related evidentiary issues and faulty arguments offered by Appellees, when the jury found that Appellant had not proven a violation of the standard of care and it is impossible to determine if the jury found Appellees not negligent or that Appellant failed to establish a “medically probable” link between the doctor’s negligence and his patient’s death?

(First alteration in original).

³ GERD, Gastroesophageal Reflux Disease, “is a common condition in which the stomach contents move up into the esophagus. Reflux becomes a disease when it causes
(continued)

esophageal spasms, gave him referrals to a gastroenterologist and a cardiologist, and asked him to follow up in one month. Dr. McKoy testified that he discussed the abnormal EKG results with Mr. Foss and encouraged him to go to the emergency room. When Mr. Foss indicated that he did not intend to seek immediate medical care, Dr. McKoy gave him referrals to a gastroenterologist and a cardiologist. Dr. McKoy did not document the abnormal EKG and referral to the emergency room in his medical record.

Unfortunately, Mr. Foss did not seek immediate medical care after his appointment with Dr. McKoy. On February 15, 2020, Mr. Foss was found dead at home.

Appellant arranged for a private autopsy with Dr. Maritza Romero-Gutierrez. In her autopsy report, Dr. Romero-Gutierrez noted that three of Mr. Foss’s major arteries were significantly narrowed due to plaque build-up indicative of atherosclerotic cardiovascular disease. She concluded that “[t]he cause of death is attributed to cardiac arrhythmia due to a right coronary (posterior descending) thrombus in a background of significant atherosclerosis.”⁴

On March 10, 2022, appellant filed a complaint against Dr. McKoy alleging medical negligence, and in late March and early April 2024, the circuit court held a five-day jury trial.

frequent or severe symptoms or injury.” *Gastroesophageal Reflux Disease (GERD)*, Johns Hopkins Medicine, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/gastroesophageal-reflux-disease-gerd> (last accessed May 5, 2025).

⁴ At trial, the experts defined a thrombus as a blood clot. Whether a thrombus existed was hotly contested at trial, but because the jury determined that Dr. McKoy did not breach the standard of care, this issue is not particularly relevant on appeal.

We summarize the parties’ competing expert testimony. Appellant’s first expert, Dr. Marc Itskowitz, testified that, in the context of Mr. Foss’s chest pain, family history of heart disease, and “markedly abnormal” EKG, the standard of care required “this patient to be immediately evaluated in a hospital setting for a cardiac process.” Concerning documentation, Dr. Itskowitz stated that the standard of care required that Mr. Foss’s medical record include a note about the abnormal EKG and his refusal to go to the emergency room. He opined that the cause of death was an arrhythmia caused by atherosclerosis. Appellant’s second expert was Dr. Brian Swirsky. Dr. Swirsky opined that “there is no standard of care [related] to documentation.” He testified that Mr. Foss died due to an arrhythmia caused by underlying atherosclerosis. Appellant’s third expert witness, Dr. Matthew Thompson, attributed the cause of Mr. Foss’s death to “complications of atherosclerotic disease.” One of Dr. McKoy’s experts, Dr. Michael Yaffe, opined that “the standard of care did not require Dr. McKoy to send Mr. Foss to the hospital.” Another of Dr. McKoy’s experts, Dr. Edward Platia, testified that the cause of death was “pure primary sudden death, where there is no abnormality to point to in a coronary artery causing the death.”

Dr. McKoy proposed two jury instructions to be given in addition to the pattern instructions.⁵ The first proposed non-pattern instruction, Instruction 1, stated:

In order to prevail in a medical malpractice action, the Plaintiff must prove,
by a preponderance of the evidence:

⁵ Defense counsel had originally proposed five additional instructions, but ultimately requested only Instruction 1 and Instruction 5.

- (1) The standard of care and skill expected of reasonably competent health care providers with similar training and experience as the Defendant, situated in the same or similar communities as the Defendant, and acting in similar circumstances at the time of the alleged acts giving rise to the cause of action; and
- (2) That the Defendant failed to comply with the standard of care; and
- (3) That the failure of the Defendant to comply with that standard was a cause of the damages claimed by the Plaintiff.

The second proposed non-pattern instruction, referred to as Instruction 5, provided:

Plaintiff's claims must be supported by expert testimony establishing that the causal connection between the conduct and the outcome was more medically probable than not.

Appellant objected to both of these instructions in the following colloquy:

[Appellant's Counsel]: These are not standard. They're covered by the pattern instructions. They're unnecessary. They're duplicative and leads to a different standard of proof that the Plaintiff does not need to show in this case.

THE COURT: Well, which one is that that you're saying goes to a different standard of proof?

[Appellant's Counsel]: Number one, I mean, is just a different level of proof that's shown throughout the three elements. It is, on, one hand, [Dr. McKoy's counsel] argues more detail that follows the law, but, on the other hand, the pattern instruction is the pattern instruction and it is there for a reason and does define the elements of medical negligence, which is 27:1, and the standard of care, which is 27:2.

It's Plaintiff's position that nothing more should be needed besides those two.

THE COURT: Okay. So you're not saying that it's an error in what it describes? You're saying it's just duplicitous. Because you said it's not correct.

[Appellant's Counsel]: Your Honor, let me clarify what I think -- what I'm saying is that there's a different set of circumstances set forth in the instruction than what is necessary to show under the pattern; not that it's any higher or lower or different level of proof, it's just unnecessary, duplicative and not something that need to be read to the jury. That's our position.

THE COURT: Okay. And to jury instruction number five? Defense instruction number five, I'm sorry.

[Appellant's Counsel]: Similar. Same. We'll -- same objections. It's subsumed within 27:2 and the pattern instruction says everything the Plaintiff needs to prove and our position is that we should not need to prove anything more than what's shown there; or should not be read to the jury anything more than what's in 27:2.

In addition to the pattern jury instructions, the court gave the non-pattern Instructions 1 and 5.

The jury was given a verdict sheet containing six questions. The first question asked, "Do you find that Plaintiffs have proven by a preponderance of the evidence that Defendant Norman McKoy, M.D. departed from the standard of care in his treatment of Charles L. Foss on February 13, 2020[?]" The second and third questions were "Do you find that the Plaintiffs have proven by a preponderance of the evidence that Defendant Norman McKoy, M.D.[']s departure from the standard of care is a cause of the wrongful death and damages alleged by Plaintiffs?" and "Do you find that Charles L. Foss caused or contributed to the injuries claimed by the Plaintiffs in this case?" The remaining questions concerned damages. On April 2, 2024, the jury reached a verdict, answering "No" to the first question. Accordingly, the jury did not answer the remaining five questions on the verdict sheet.

DISCUSSION

“To prevail in a medical malpractice negligence action, a plaintiff must prove four elements: ‘(1) the defendant’s duty based on an applicable standard of care, (2) a breach of that duty, (3) that the breach caused the injury claimed, and (4) damages.’” *Frankel v. Deane*, 480 Md. 682, 699 (2022) (quoting *Am. Radiology Servs., LLC v. Reiss*, 470 Md. 555, 579 (2020)).

Appellant argues that the court erred by giving Instruction 1 and Instruction 5 to the jury. According to appellant, Instruction 1 adds a causation element to the definition of “standard of care” and Instruction 5 incorrectly requires causation to be proven by expert testimony. Because the evidence related to causation was complex and contradictory, appellant argues that the court’s jury instructions and the first question on the verdict sheet (which she also alleges contained a causation element) make it “impossible to determine whether the jury reached its decision based on the standard of care” or causation.⁶ According to appellant, the jury instructions as a whole “spotlighted” causation, and “[t]he jury must have focused on what the court repeatedly spotlighted.”

We begin with appellant’s challenge to Instruction 1. Appellant contends that Instruction 1 is improper for two reasons: 1) the court “improperly added a causation element to the standard of care instruction even though it also instructed separately on

⁶ As noted, the first question on the verdict sheet read: “Do you find that Plaintiffs have proven by a preponderance of the evidence that Defendant Norman McKoy, M.D. departed from the standard of care in his treatment of Charles L. Foss on February 13, 2020[?]” Appellant’s argument that this question “combined” negligence and causation is simply incorrect. Nothing in the question mentions causation.

causation”; and 2) the court erred by instructing the jury on the standard of care multiple times, because “[a] redundant instruction is erroneous.”⁷

“As a general rule, an appellate court reviews a trial court’s decision to give a particular jury instruction under an abuse of discretion standard.” *Armacost v. Davis*, 462 Md. 504, 523 (2019). “In assessing an instruction given by a trial court, a reviewing court must determine if the instruction at issue was a correct exposition of law and whether it was applicable to the case at hand.” *Id.* (citing *State v. Bircher*, 446 Md. 458, 462-63 (2016)). “The party that seeks to overturn the jury verdict in a civil case on the basis of an erroneous jury instruction has the burden of demonstrating that prejudice was not just possible, but probable, in the context of the particular case.” *Id.* at 524 (citing *Barksdale v. Wilkowsky*, 419 Md. 649, 658-70 (2011)).

The court here provided the jury with five instructions related to the elements of negligence in a medical malpractice case:

MPJI-Cv 27:1

Elements of a Medical Negligence Claim

To recover in a medical negligence case, the plaintiff must establish:

- A. What the standard of care required at the time the medical care was provided;
- B. That the defendant breached the standard of care; and
- C. That this breach caused the injury claimed.

⁷ Appellant also challenges the legal correctness of Instruction 5. Because the jury found that Dr. McKoy did not breach the standard of care, the jury did not reach the causation issue. Thus, any potential error in Instruction 5 is harmless.

MPJI-Cv 27:2

Standard of Care—Defined

The standard of care for a health care provider is that degree of care and skill that would be used by a reasonably competent health care provider engaged in a similar practice and acting in similar circumstances.

Δ's INSTRUCTION #01 – STANDARD OF CARE

In order to prevail in a medical malpractice action, the Plaintiff must prove, by a preponderance of the evidence:

- (1) The standard of care and skill expected of reasonably competent health care providers with similar training and experience as the Defendant, situated in the same or similar communities as the Defendant, and acting in similar circumstances at the time of the alleged acts giving rise to the cause of action; and
- (2) That the Defendant failed to comply with the standard of care; and
- (3) That the failure of the Defendant to comply with that standard was a cause of the damages claimed by the Plaintiff.

MPJI-Cv 19:10

Causation - Definition

For the plaintiff to recover damages, the plaintiff's injuries must result from and be a reasonably foreseeable consequence of the defendant's negligence.

Δ's INSTRUCTION #05:

Plaintiff's claims must be supported by expert testimony establishing that the causal connection between the conduct and the outcome was more medically probable than not.

We initially note that appellant did not assert in the trial court that the standard of care instructions erroneously incorporated a causation element. Thus, appellant's argument on appeal that the court improperly added a causation element is not preserved. At trial, appellant argued that Dr. McKoy's proposed instructions were "not standard" and "unnecessary" because they were "covered by the pattern instructions." Appellant additionally argued that the proposed instructions "lead[] to a different standard of proof," but later conceded that Instruction 1 "follows the law" and Instruction 5 does not set out

“any higher or lower or different level of proof[.]” Although appellant’s argument on appeal that the court improperly included “causation” into its standard of care instruction is not preserved, we nevertheless fail to see any suggestion that the court “added a causation element to the standard of care instruction.”

As to appellant’s argument that the non-pattern instructions were redundant, and therefore erroneous, we disagree. Appellant supports her argument by citing to two cases. The first is a 2020 unreported opinion from this Court, which is neither precedential nor persuasive authority under Rule 1-104(a).⁸ Second, appellant relies on *Armacost v. Davis*, 462 Md. 504 (2019). In *Armacost*, the Supreme Court of Maryland considered whether the trial court erred by giving both the general negligence pattern instruction and a pattern instruction specific to the standard of care for health care providers. The Court discussed several cases from other states that had considered the issue, noting that only one case, from Georgia, concluded that a trial court erred by giving both instructions. *Id.* at 530-31 (citing *Southeastern Pain Specialists, P.C. v. Brown*, 811 S.E.2d 360 (Ga. 2018)).

The Georgia case involved a plaintiff asserting alternative theories of liability against a single health care provider—one for breach of the medical standard of care and one for “breach of the standard of care applicable to ‘ordinarily careful persons.’” *Id.* at 530-31 (quoting *Brown*, 811 S.E.2d at 364). Because Georgia law contained a presumption

⁸ Rule 1-104(a)(2) provides: “An unreported opinion of the Supreme Court or the Appellate Court [issued prior to July 1, 2023,] may not be cited as precedent within the rule of stare decisis or . . . as persuasive authority.” None of the exceptions provided in the Rule are applicable here.

that health care providers “act[] with due care[,]” the general negligence instruction was erroneously given. *Id.* at 531 (quoting *Brown*, 811 S.E.2d at 366). The *Armacost* Court easily distinguished that case, noting that Maryland law does not include a “presumption” of due care for medical providers and, unlike *Brown*, there were not alternative theories of liability against the appellee doctor. *Id.* at 531. Although the Court acknowledged that, in some circumstances, giving both instructions might lead to jury confusion, the Court concluded that “the probability of prejudice” under the facts of the case “appears close to nil” because the evidence, arguments, and instructions as a whole did not “suggest[] that [the health care provider’s] conduct was to be measured against that of a reasonable lay person.” *Id.* at 532-33; *see also Marlow v. Cerino*, 19 Md. App. 619, 626 (1974) (““While undue repetition, in an instruction, of any of the points contained therein is not to be recommended, a violation of this rule is not reversible error, unless it reasonably appears that the jury has been misled.’ . . . In the instant case there is nothing to indicate that the jury was misled or confused by repetitive instructions.” (quoting *Ager v. Balt. Transit Co.*, 213 Md. 414, 423 (1957))); *Pillard v. Chesapeake S.S. Co. of Balt.*, 124 Md. 468 (1915) (repetitive instruction was not prejudicial).

Similarly, in the present case there is no indication in the evidence, arguments, or instructions that the redundant instructions might have confused the jury. The jury decided this case solely on standard of care and did not reach the causation issue, where appellant alleges the confusion lies. The arguments and evidence related to standard of care were straightforward. Appellant argued that the standard of care required Dr. McKoy to inform

Mr. Foss that his EKG was abnormal, encourage him to go to the emergency room or to see a cardiologist the same day, and to document that conversation. Dr. McKoy testified that he discussed the EKG results with Mr. Foss and encouraged him to go to the emergency room, but failed to document that conversation. Appellant’s own expert testified that documentation is not required by the standard of care. Neither party argued that the jury needed to determine causation prior to determining whether the standard of care had been violated. Contrary to appellant’s assertions, neither the jury instructions nor the verdict sheet combined causation and standard of care. The jury therefore did not need to and was not encouraged to consider causation in its deliberations pertaining to standard of care. “Jurors are presumed to have followed the instructions provided to them by the court, ‘[o]ur legal system necessarily proceeds upon’ that presumption.” *Collins v. Nat’l R.R. Passenger Corp.*, 417 Md. 217, 252 (2010) (alteration in original) (quoting *State v. Moulden*, 292 Md. 666, 678 (1982)); see also *Lamalfa v. Hearn*, 457 Md. 350, 387 (2018) (“[A] jury is presumed to follow a trial court’s instruction.”). This presumption has not been overcome here.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**