19-P-1789 Appeals Court

JENNIFER PAIVA[1] vs. RANDY KAPLAN.

No. 19-P-1789.

Bristol. December 11, 2020. – May 28, 2021.

Present: Vuono, Milkey, & Ditkoff, JJ.

Medical Malpractice, Standard of care. Negligence, Medical malpractice. Practice, Civil, Instructions to jury.

Civil action commenced in the Superior Court Department on November 18, 2015.

The case was tried before Merita A. Hopkins, J.

Kathy Jo Cook for the plaintiff.
J. Peter Kelley for the defendant.

DITKOFF, J. The plaintiff, Jennifer Paiva, in her individual capacity and as parent and next friend of Noah and

[1] Individually, and as parent and next friend of Noah and Chad Paiva. Prior to trial, Jeremy Paiva individually, and as parent and next friend of Noah and Chad Paiva, stipulated to dismissal of his individual claims and his claims as parent and next friend of Noah and Chad Paiva.

Chad Paiva, appeals from a judgment for the defendant, Dr. Randy Kaplan, following a jury trial. The primary issue on appeal is whether the trial judge erred in giving an "errors of judgment" instruction that informs a jury in a medical malpractice case that an error of judgment by a doctor is not negligent if the doctor's decision was within the standard of care. Put another way, such an instruction informs a jury that a doctor faced with multiple treatment options, all within the standard of care, is not liable for negligence if the doctor chooses an option that leads to an adverse outcome. Concluding that such an instruction correctly reflects Massachusetts law, and that the plaintiff's remaining challenges to the specific wording of the instruction have been waived, we affirm.

1. Background.[2] a. Paiva's care and treatment. This medical malpractice case arose in connection with the care and treatment of Jennifer Paiva at Charlton Memorial Hospital by Dr. Kaplan. On August 16, 2013, just before 1 A.M., Paiva presented at the emergency room with sudden onset abdominal

[2] Paiva has not provided us with a transcript of the evidence presented at trial, which limits our ability to review her claims. See Roby v. Superintendent, Mass. Correctional Inst., Concord, 94 Mass. App. Ct. 410, 412 (2018), quoting Commonwealth v. Woody, 429 Mass. 95, 97 (1999) ("it is the appellant's responsibility to ensure that the record is adequate for appellate review"). To provide context, we recite the facts found in Paiva's medical records, which appear largely uncontested.

pain, which began about an hour before she arrived. Paiva had a history of gastric bypass surgery and a hernia repair, and had had her gall bladder removed two weeks earlier. Ultimately, her symptoms, including nausea, vomiting, diarrhea, and severe abdominal pain, led Dr. Kaplan to believe that there might be an issue of bowel ischemia (or a blockage of blood to the intestines). Minutes after she arrived, Paiva reported her pain to be at a ten out of ten.

Shortly after 1 A.M., Dr. Kaplan ordered an abdominal and pelvic computed tomography (CT) scan with contrast in an effort to determine the cause of the pain. At 2:42 A.M., Paiva reported that her pain had decreased to a six out of ten, and she was taken for the CT scan at approximately 3 A.M. Paiva returned from her CT scan at 3:55 A.M. The report from the CT scan indicated that findings were "worrisome for ischemic bowel," and possibly small bowel obstruction.

After Dr. Kaplan had a discussion with the bariatric surgeon at Tobey Hospital, an order was entered to transfer the patient by ambulance for surgery at 4:23 A.M. At 4:50 A.M., when she was reassessed by the nurse, she again reported her pain as a ten out of ten. The ambulance arrived at Tobey Hospital at 5:30 A.M. At 6:30 A.M., Paiva was in surgery.

The surgeon determined that Paiva, in fact, did suffer from an ischemic bowel, which was caused by a hernia. The surgeon

removed twenty-five inches of small bowel. Paiva asserts that she suffers severe and permanent disabilities as a result of this episode.

The main dispute at trial was whether Dr. Kaplan acted within the standard of care by ordering the CT scan and waiting for the results, or whether he instead should have contacted a surgeon earlier.

b. The plaintiff's motion in limine and the jury instructions. Prior to trial, Paiva filed a motion in limine "to preclude evidence or testimony of the defendant . . . having exercised his 'judgment' in the care and treatment of [Paiva]." In addition to the request that no references be made to Dr. Kaplan's exercising his "best judgment, professional judgment, reasonable judgment, etc.," Paiva moved to exclude "any jury instruction to the effect that a defendant physician is 'allowed a wide range in the reasonable exercise of his or her professional judgment.'" Dr. Kaplan opposed this motion, citing the jury instruction recommended in § 4.3.2 of the Massachusetts Superior Court Civil Practice Jury Instructions (Mass. Cont. Legal Educ. 3d ed., 2d supp. 2018). The judge deferred ruling on the motion until the charge conference. At the charge conference, the judge stated that she "put in the model instruction that includes discussing the judgment of a physician."

The jury instruction that the judge ultimately gave on the standard of care tracked the instruction in § 4.3.2 of the Massachusetts Superior Court Civil Practice Jury Instructions, supra. The judge stated that Dr. Kaplan was required "to exercise the degree of skill and care of the average physician practicing in the defendant's area of specialty, which is emergency medicine." After explaining this concept in more detail, the judge stated the following:

> "All right, ladies and gentlem[e]n, part of the standard of care is that the physician will use his or her judgment in accordance with accepted medical practice for a physician in the same area of specialty.
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> "If, in retrospect, the physician's judgment was incorrect, it is not, in and of itself, enough to prove medical malpractice or negligence.
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> "Doctors are allowed a range in the reasonable exercise of professional judgment and they are not liable for mere errors of judgment so long as that judgment does not represent a departure from the standard of care resulting in a failure to do something that the standard of care requires or in doing something that should not be done under the standard of care.
>
> "In other words, a doctor is liable for errors of judgment only if those errors represent a departure from the standard of care.
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> . . .
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> "Evidence that a doctor who testified in this case or any other doctor might or would have undertaken a different course of treatment is not in itself evidence that the defendant's treatment was negligent because doctors are entitled to a range of medical judgment that falls within the standard of care."

After the judge gave her instructions Paiva objected "on the issue of the standard of care specifically and the question of the doctor's judgment. . . . We would just rely on the reasons set forth in our motion in limine." The jury were also given a written copy of the jury instructions for use during their deliberations.

c. The jury question. After about three hours of deliberations, the jury sent a question to the judge, asking if they could have "a further explanation on the paragraph regarding professional judgment," which corresponds to the first three paragraphs of the block quotation supra. Paiva again objected to "any instruction regarding a doctor's individual judgment and request[ed] that the instruction be given as provided in [Paiva's] motion in limine which set[] forth purely objective standards for the jury's consideration."[3] Further, her counsel stated, "[T]he appropriate explanation would be . . . to restate the paragraph and explain to the jury that a doctor, when exercising judgment, must comply with the standard of

[3] So far as we can discern on this record, there were no requested jury instructions attached to Paiva's motion in limine.

care. If . . . their judgment violates the standard of care, . . . they may be held liable."[4]

The judge brought the jury back into the court room, and reread the entire instruction on the standard of care that she had previously given, without further explanation. When the jury returned to deliberations, Paiva restated her objection to "the judgment instruction" and requested "the instruction that was in our motion in limine." About twelve minutes later, the jury returned with a verdict for the defendant.

2. Standard of review. "The trial judge has wide discretion in framing the language used in jury instructions." Kiely v. Teradyne, Inc., 85 Mass. App. Ct. 431, 441 (2014). "An appellate court considers the adequacy of the instructions as a whole, not by fragments." Selmark Assocs. v. Ehrlich, 467 Mass. 525, 547 (2014). "An error in jury instructions is not grounds for setting aside a verdict unless the error was prejudicial -- that is, unless the result might have differed absent the error." Patriot Power, LLC v. New Rounder, LLC, 91 Mass. App. Ct. 175, 181 (2017), quoting Blackstone v. Cashman, 448 Mass. 255, 270 (2007). The burden is on the plaintiffs to make a "plausible showing that the trier of fact might have reached a

[4] The judge responded, "Which is exactly what the instruction says right now," to which Paiva acknowledged, "That is exactly what I read the instruction to say, yes."

different result," absent any erroneous instruction. Campbell v. Cape & Islands Healthcare Servs., Inc., 81 Mass. App. Ct. 252, 258 (2012), quoting Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 275 (1990).

3. The "errors of judgment" instruction. In a medical malpractice action, "[o]ne holding himself out as a specialist should be held to the standard of care and skill of the average member of the profession practi[c]ing the specialty, taking into account the advances in the profession." Brune v. Belinkoff, 354 Mass. 102, 109 (1968). "Because the standard of care is based on the care that the average qualified physician would provide in similar circumstances, the actions that a particular physician, no matter how skilled, would have taken are not determinative." Palandjian v. Foster, 446 Mass. 100, 104-105 (2006). As the basis for the standard of care rests on the average qualified physician, or specialist, "this standard does not require physicians to provide the best care possible," id. at 105, or to guarantee a good outcome. See Schwartz v. Goldstein, 400 Mass. 152, 155 (1987).

In Riggs v. Christie, 342 Mass. 402, 405-406 (1961), the Supreme Judicial Court held that "the undertaking of a physician as implied by law is that he possesses and will use the reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession in the

community where he practi[c]es . . . and that he will in cases of doubt use his best judgment as to the treatment to be given in order to produce a good result." There, the court concluded that the physician's decision not to visit the plaintiff on either the date of discharge or the following day was "a question of professional judgment to be exercised by the defendant." Id. at 406. "In the usual case where matters of professional judgment are involved, a tribunal of fact, whether court or jury . . . should not retrospectively substitute its judgment for that of the person whose judgment had been sought and given." Id. at 407. See Morlino v. Medical Ctr. of Ocean County, 152 N.J. 563, 584 (1998) ("Not recognizing the role of judgment in making a diagnosis or in deciding on a course of treatment would be to deny an essential element in the practice of medicine"). Accordingly, the Riggs court recognized that a physician is entitled to exercise judgment within the standard of care. See Riggs, 342 Mass. at 405-406.

The Supreme Judicial Court further expounded on this principle in Barrette v. Hight, 353 Mass. 268, 275 n.7 (1967), finding that a judge "correctly charged, . . . concerning the duty owed by a physician to his patient, including 'that in all cases of doubt, he will use his best judgment as to the course to pursue in the treatment of . . . cases.'" See id. at 277 (without expert testimony to the contrary, evidence did not

warrant jury's conclusion that physician's decision was not within scope of his "professional judgment and discretion").

We discussed the propriety of an instruction on a physician's use of judgment in Grassis v. Retik, 25 Mass. App. Ct. 595 (1988). There, the judge instructed the jury, in addition to a discussion of the standard of care, "If [the physician] makes a mistake in his judgment, in the exercise of his judgment, the plaintiff cannot recover." Id. at 602. We concluded that this instruction "was wrong if taken to mean that a physician was not chargeable with any mistake of judgment made by him in good faith," as the standard of care is not subjective, but objective. Id. Conversely, "when 'judgment' is taken as a shorthand reference back to the competent professional judgment described in the Brune case," this instruction was proper. Grassis, supra. Although "[t]he judge would have done better to spell out the point," the jury who received the instructions as a whole "could not have imagined that the defendant physicians could escape liability simply by being of good heart." Id. at 602-603. Accordingly, both this court and the Supreme Judicial Court have approved of the use of a jury instruction on "errors of judgment," provided that it is properly formulated.

To be sure, as the plaintiff points out, not all States permit an instruction on "errors of judgment" in a medical

malpractice case. See Hirahara v. Tanaka, 87 Haw. 460, 464 (1998) ("any jury instruction that states that a physician is not necessarily liable for an 'error in judgment' is confusing and misleading and should not be given to the jury"); Rogers v. Meridian Park Hosp., 307 Ore. 612, 620 (1989) ("the court should not instruct the jury [on errors in judgment]; such instructions not only confuse, but they are also incorrect because they suggest that substandard conduct is permissible if it is garbed as an 'exercise of judgment'"); Passarello v. Grumbine, 624 Pa. 564, 597 (2014) ("error in judgment instructions should not be used in jury charges in medical malpractice cases"); Papke v. Harbert, 738 N.W.2d 510, 527 (S.D. 2007) ("Because error in judgment or any similar language in no way further defines or explains the applicable standard of care to the jury, we hold that such language should not be used in ordinary medical malpractice actions").

Nonetheless, many States agree with us and permit its use. See Fraijo v. Hartland Hosp., 99 Cal. App. 3d 331, 341 n.8, 343 (1979) (correct to instruct jury "[i]t is possible for a physician or nurse to err in judgment . . . without being negligent" as it "tells the jury that an error in medical judgment is not considered in a vacuum but must be weighed in terms of the professional standard of care"); Hill v. Rhinehart, 45 N.E.3d 427, 439, 441 (Ind. Ct. App. 2015) (proper to instruct

jury "a physician will not be negligent if he exercises such reasonable care and ordinary skill, even though he mistakes a diagnosis, makes an error during treatment, or fails to appreciate the seriousness of the patient's problem," as this "reminds the jury that a poor outcome does not constitute negligence if the physician exercises the requisite standard of care"); Ward v. Glover, 206 S.W.3d 17, 41 (Tenn. Ct. App. 2006) (although other jurisdictions have found error in judgment charges erroneous, "they are at odds with Tennessee law, which has consistently held that [the error in judgment] charge is appropriate").

Lastly, a few States have held that the instruction is appropriate only where there is evidence at trial that the physician chose from one of several medically acceptable alternatives. See Anderson v. House of Good Samaritan Hosp., 44 A.D.3d 135, 139 (N.Y. 2007), quoting Spadaccini v. Dolan, 63 A.D.2d 110, 120 (N.Y. 1978) ("[a]n error [in] judgment charge is appropriate in a case where a doctor is confronted with several alternatives and, in determining appropriate treatment to be rendered, exercises his [or her] judgment by following one course of action in lieu of another"); Watson v. Hockett, 107 Wash. 2d 158, 165 (1986) ("error in judgment principle" is "limited to situations where the doctor is confronted with a choice among competing therapeutic techniques or among medical

diagnoses"); Kobos v. Everts, 768 P.2d 534, 538 (Wyo. 1989) ("It is noteworthy where a careful examination is given and clear alternative treatment courses exist, that an error of judgment charge may additionally be appropriate").

For good reason, however, Massachusetts is in the group of States that recognizes the utility of an "errors in judgment" instruction. If properly formulated, such an instruction focuses the jury's attention on the standard of care, rather than the particular results in a case. The instruction also recognizes the reality that, like all professionals, medical professionals need to make judgment calls between various acceptable courses of actions and they should not be found liable unless those judgment calls fall outside the standard of care.

Here, the judge followed this case law, and specifically Riggs, Barrette, and Grassis. Wherever the judge mentioned the physician's use of judgment, the judge referred back to the accepted standard of care. For example, the judge instructed that "part of the standard of care is that the physician will use his or her judgment in accordance with accepted medical practice for a physician in the same area of specialty." The judge instructed that "[d]octors are allowed a range in the reasonable exercise of professional judgment and they are not liable for mere errors of judgment so long as that judgment does

not represent a departure from the standard of care." And the judge instructed that "a doctor is liable for errors of judgment only if those errors represent a departure from the standard of care." In each instance, the judge directed the jury to the standard of care, correctly conveying the concept that, so long as the doctor's actions were consistent with the standard of care, any errors of judgment are not negligent. The judge's instructions accurately stated the law in Massachusetts on the standard of care in a medical malpractice case, and properly discussed a physician's judgment as important to consider in determining whether a physician was negligent. See Palandjian, 446 Mass. at 104-105; Barrette, 353 Mass. at 275 n.7; Riggs, 342 Mass. at 405-406.[5]

Although we agree that the judge properly instructed the jury on the concept that errors in judgment are not negligent if they are within the standard of care, that does not mean that we necessarily approve of the precise manner in which the instruction was formulated here. Several States have rejected

[5] The plaintiff takes issue with the judge's repetition of the word "judgment" "seven times in five sentences." The judge's repetition of "judgment," however, is of no moment, as the physician's judgment is important to consider, and the word "judgment" is not innately favorable to the physician, nor the plaintiff. See Morlino, 152 N.J. at 590 (where "exercise of judgment" repeated eleven times, "[t]he number eleven is not a talisman. The word 'judgment,' moreover, can be used to inculpate as well as exculpate a physician").

reference to a "mere" error in judgment. See Riggins v. Mauriello, 603 A.2d 827, 831 (Del. 1992) ("The 'mere error of judgment' language . . . permits too much"); Francoeur v. Piper, 146 N.H. 525, 530-531 (2001); Rooney v. Medical Ctr. Hosp. of Vt., Inc., 162 Vt. 513, 521 (1994). In Francoeur, the New Hampshire Supreme Court opined that this instruction "improperly introduces a subjective element regarding the standard of care," and implies, erroneously, that some errors "are not serious enough to be actionable." Francoeur, supra at 530. The Vermont Supreme Court, in Rooney, supra, stated that this instruction "begs for a meaning." In addition to the potential for confusion, this language may suggest that "a physician is not liable for malpractice even if he or she is negligent in administering the treatment selected." Riggins, supra.[6]

[6] Other phrases, not appearing in the instruction in this case, that have been criticized by courts in other States include "good faith," "honest," and "bona fide." See Shumaker v. Johnson, 571 So. 2d 991, 994 (Ala. 1990), quoting Connery v. Sasser, 565 So. 2d 50, 53 (Ala. 1990) (Hornsby, C.J., concurring specially) (terms "good-faith error," "'honest mistake' and 'bona fide error' have no place in jury instructions dealing with negligence in medical malpractice cases"); Sleavin v. Greenwich Gynecology & Obstetrics, P.C., 6 Conn. App. 340, 348 (1986) ("bona fide error" language erroneous); Ouellette v. Subak, 391 N.W.2d 810, 816 (Minn. 1986) ("honest error in judgment" language inappropriate); Morlino, 152 N.J. at 587-588 ("terms such as 'good faith,' 'honest,' and 'bona fide'" misleading); DiFranco v. Klein, 657 A.2d 145, 149 (R.I. 1995) (such phrases improperly "inject the physician's subjective intent or belief" into standard of care).

In addition, several States have concluded that an instruction that physicians are allowed a "range in the reasonable exercise of professional judgment" may be one that is appropriate only in cases where the trial evidence in fact shows a range of acceptable treatment options within the standard of care. As discussed supra, a number of jurisdictions allow "errors of judgment" instructions only where there is evidence that the physician chose from two or more alternative courses of treatment. See Anderson, 44 A.D.3d at 139; Watson, 107 Wash. 2d at 165; Kobos, 768 P.2d at 538. It may be the case that there are some instances in which there is not a "range in the reasonable exercise of professional judgment," but only one acceptable course of action meeting the standard of care under the circumstances.[7]

Nevertheless, here, although Paiva preserved an objection to any instruction on the concept of "errors of judgment," Paiva did not preserve any objection to the specific language of the instruction. Paiva's appellate challenge to the use of "range of medical judgment" and "mere errors of judgment" is not preserved, as Paiva did not make a "specific objection on point" to the trial judge. Matsuyama v. Birnbaum, 452 Mass. 1, 35

[7] On the record before us, without a transcript of the evidence at trial, we are unable to determine whether Dr. Kaplan was presented with alternative courses of treatment within the standard of care.

(2008). In the motion in limine, Paiva requested that the judge not state "that a defendant physician is 'allowed a wide range in the reasonable exercise of his or her professional judgment'" (emphasis added). At the charge conference, Paiva asked the judge to replace "accepted medical practice" with "standard of care" in one place. The judge granted both requests.

Following the jury charge, Paiva objected, stating, "[O]n the issue of the standard of care specifically and the question of the doctor's judgment. . . . We would just rely on the reasons set forth in our motion in limine." Lastly, after the jury question, Paiva objected to "any instruction regarding a doctor's individual judgment and request[ed] that the instruction be given as provided in the plaintiff's motion in limine which set[] forth purely objective standards for the jury's consideration." As Paiva did not object at trial to the use of the particular phrases challenged now, Paiva's argument on this point is waived. See Carrel v. National Cord & Braid Corp., 447 Mass. 431, 442 (2006) (issue not preserved where party's objection below was on grounds other than those argued on appeal). A party's objection to an instruction does not relieve that party of the obligation to assist the judge by objecting to any errors in the language of the instruction. If the party fails to do so, the party may not on appeal quibble about the specific language used by the judge. Accordingly, as

the only preserved objection was to giving an "errors of judgment" instruction, and such instruction was properly given, we affirm.

Judgment affirmed.