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18 WAP 2020

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 18 WAP 2020

ROBERT KIRKSEY, JR.,

Appellant,

v.

CHILDREN'S HOSPITAL OF PITTSBURGH OF UPMC, UNIVERSITY OF PITTSBURGH PHYSICIANS and SATYANARAYANA GEDELA, M.D.,

Appellees

BRIEF *AMICUS CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY

Appeal from the Order of the Superior Court, entered October 9, 2019, at No. 421 W.D.A. 2018, affirming the Order of the Court of Common Pleas of Allegheny County, entered February 21, 2018, at No. GD 14-010939

LAMB McERLANE PC
Maureen M. McBride
James C. Sargent, Jr.
Attorney I.D. Nos. 57668/28642
24 East Market Street, Box 565
West Chester, PA 19381-0565
(610) 430-8000

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

I. STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Pa.R.A.P. 531(a), *Amici Curiae*, the American Medical Association and the Pennsylvania Medical Society, file this Brief in Support of Appellees.

Amicus Curiae, the American Medical Association (the "AMA"), is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Pennsylvania.

Amicus Curiae, the Pennsylvania Medical Society (the "Medical Society"), is a Pennsylvania non-profit corporation that represents physicians of all specialties and is the Commonwealth's largest physician organization. The Medical Society regularly participates as *amicus curiae* before this Court in cases raising important health care issues, including issues that have the potential to adversely affect the quality of medical care.

The AMA and the Medical Society submit this brief on their own behalf and

as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

The above organizations have a unique and substantial interest in the resolution of the instant case as they were concerned, prior to *Mitchell,* that preclusion of important medical evidence regarding risks and complications would transform medical malpractice actions into strict liability cases rendering physicians the unwitting guarantors of patient safety. They were also concerned that the preclusion of such evidence would have an adverse effect on healthcare providers' ability to obtain cost-effective malpractice insurance. *Amici* believe that *Mitchell* was properly decided and should not be disturbed.

The AMA and the Pennsylvania Medical Society submit that they are appropriate *amici* under Rule 531 of the Pennsylvania Rules of Appellate Procedure. *Amici* urge this Honorable Court to consider the legal and policy considerations advanced in this Brief *Amicus Curiae*, which compels the conclusion that the Superior Court's decision should be affirmed.

II. INTRODUCTION

Only fourteen short months ago, in a closely-watched case, this Court decided whether, and to what extent, evidence of the risks and complications of surgery may be admissible in a medical malpractice case. In *Mitchell v. Shikora* 209 A.3d 307 (Pa. 2019), a group of healthcare Appellants explained that risks and complications evidence is relevant and necessary to educate lay jurors about the risks of surgery and, in particular, about the fact that not all adverse surgical outcomes are caused by negligent conduct. Moreover, Appellants (along with various *Amici*) explained, without such evidence, healthcare providers would face strict liability that would, in turn, wreak havoc on health care providers and their insurers, increase healthcare costs, and directly undermine the quality of health care overall.

After careful review of the parties' arguments, this Court agreed that "evidence of risks and complications of surgery may be admissible at trial," *Id.,* at 319. Specifically, the Court recognized that, "without the admission of testimony of known risks or complications, where appropriate, a jury may be deprived of information that a certain injury can occur absent negligence, and, thus, would be encouraged to infer that a physician is a guarantor of a particular outcome." *Id.* Because this Court considered an outcome that would render a physician the guarantor of a good outcome "inconsistent with the principle that certain injuries

happen even in the absence of negligent conduct," *Id*., it concluded that risk and complications evidence *is* admissible in a medical malpractice case.

Plaintiff now asks this Court to revisit this recently-rendered precedent (which Plaintiff did not once address at trial or in his Superior Court brief), under the guise of asking whether the trial court erred in failing to provide a limiting instruction in a case where risk and complication evidence was presented. Plaintiff makes this request notwithstanding that Plaintiff never asked the trial court to issue a limiting instruction, but instead asked the Court to instruct the jury on the "assumption of the risk" doctrine, which the trial court concluded was unwarranted in light of the fact that it had not been raised by Defendants.

Amici submit that *Mitchell* was correctly decided and that there is no need to revisit that holding now. *Amici* particularly believe that there is no need for this Court to revisit *Mitchell* in a case where there is no *Mitchell*-related question presented or preserved and the lower courts' refusal to issue an assumption of the risk instruction (the only request made) was correct.

Accordingly, *Amici* urge this Court to affirm the Superior Court's decision in its entirety.

III. FACTS

This Court granted Plaintiff's Petition for Allowance of Appeal to decide the following question, as framed by Plaintiff:

In an issue of first impression and substantial public importance, whether the Superior Court's holding directly conflicts with this Honorable Court's holding in *Mitchell v. Shikora*, 209 A.3d 307 (Pa. June 18, 2019), which instructs that when evidence of general risks and complications is admitted in a medical negligence claim to establish the applicable standard of care a limiting instruction is warranted as was requested here but was denied by the trial court and glossed over by the Superior Court?

IV. ARGUMENT

A. Plaintiff Waived the Issue this Court has Accepted for Review.

Amici respectfully submit that this case provides a poor vehicle for this Court to address the issue Plaintiff has presented. Plaintiff asks this Court to decide whether *Mitchell* required the trial court to provide the jury with a limiting instruction with regard to medical evidence of risks and complications in this non-surgical medical malpractice case. However, Plaintiff *never once mentioned Mitchell*—the case on which he bases his entire application to this Court—at trial or in his Superior Court brief. By not raising or including an argument that the trial court abused its discretion by not providing a "limiting instruction" in his post-trial or appellate brief, Plaintiff failed to preserve a request for that limiting instruction below.

As this Court is aware, a limiting instruction is usually given when the rules of evidence permit admission of particular testimony or exhibits, but only for a particular purpose, or only against certain parties and not others. For example, a hearsay document that may not be used to prove the truth of the matter asserted may be admissible to show notice, and evidence of other crimes may be admitted for the limited purpose of proving motive, but that same document may not be used to show the defendant committed the specific crime in the case. Limiting instructions also may be used when multiple defendants are joined into a single trial and evidence is admissible against only one defendant.

In this case, Plaintiff's counsel never requested a specific limiting instruction when the evidence at issue was admitted. Plaintiff did not do so when the evidence was introduced and did not do so at the charging conference or before the jury deliberated. Rather, the record reveals, at the end of trial, Plaintiff asked the trial court to issue an "assumption of the risk" instruction—an entirely different request—which the trial court and Superior Court correctly recognized was unwarranted in a proceeding where no party had referenced, raised or argued the assumption of the risk doctrine as an affirmative defense. In light of the request actually made and the absence of a request for limiting instruction, there is no basis for this Court to reverse the Superior Court's decision or to grant a new trial.

Amici thus urge this Court to deny Plaintiff relief on the grounds that Plaintiff waived and/or failed to preserve the issue presented.

B. Plaintiff's Request for a Limiting Instruction Finds No Support in *Mitchell.*

Even if not waived, Plaintiff's argument that the trial court was required to provide a limiting instruction under *Mitchell* is entirely misguided.

This Court did not hold in *Mitchell*, as *Amici* and Plaintiff assert, that evidence of risks and complications must be limited, or that a limiting instruction must be issued where risks and complications evidence is introduced. Likewise, this Court did not hold that a limiting instruction must be provided even when no such instruction is requested.[1] Rather, this Court wisely left it to the trial courts to determine whether to include such an instruction in the proper exercise of their discretion. *Id.* ("[w]e are confident that trial judges will serve their evidentiary gate-keeping function in this regard and, through instruction and comment, ensure that juries understand the proper role of such evidence at trial").[2] In so doing, this Court expressly declined to enact the bright-line rule Plaintiff requests.

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[1] *See Commonwealth v. Jones*, 460 A.2d 739, 741 (Pa. 1983) (finding prosecutorial misconduct claim waived where defense counsel immediately objected to the prosecutor's conduct but failed to request mistrial or curative instructions).

[2] This is consistent with the discretion trial courts are provided in determining what evidence to be admitted. *See Commonwealth v. Crews*, 640 A.2d 395, 402 (Pa. 1994) ("[a]dmissibility depends on relevance and probative value"); *Commonwealth v. Spiewak*, 617 A.2d 696, 699 (Pa. 1992) ("[e]vidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material fact.").

Amici believe that, as a policy matter, this Court's decision to allow trial courts discretion with regard to the handling of risks and complications evidence makes perfect sense. Trial courts on the front lines are in the best position to determine the scope of evidence as well as the circumstances where limiting instructions should be issued. Any bright-line rule requiring a limiting instruction in all cases where risks and complications evidence is found to be admissible would be unworkable, allow a plaintiff to present argument disguised as a jury instruction, and tilt the proper balance of court instructions in plaintiff's favor. The trial court assiduously followed this Court's guidance when it restricted the risks and complications evidence to proof of the risks of rash generally and not the risk of Stevens-Johnson Syndrome, *see* R. 644a-57a,[3] in a manner faithful to, and not violative of *Mitchell.* There is no basis on this record to disturb the trial court's decision.

Moreover, even if this issue had been preserved, Plaintiff's contention that risk evidence was submitted in a manner at odds with *Mitchell* is completely undermined by Plaintiff's own actions below. As Plaintiff himself admits, Plaintiff expressly *agreed* that evidence regarding the risks of medication was both admissible and relevant. *See* Brief of Appellant, at 16 ("it was specifically acknowledged and agreed

[3] Plaintiff did not object when the evidence of risks was presented; moreover, with regard to defense counsel's opening and closing statements, Plaintiff objected to other references (to Motrin and Tylenol), not to evidence of risks or any evidence that Plaintiff assumed those risks.

by Robert's counsel that *everyone in the case could discuss the fact* that Lamical, particularly combined with Depakote, carried the risk of Stevens-Johnson Syndrome"). Moreover, Plaintiff introduced his own *evidence* on the subject. Thus, Plaintiff not only waived any objection to the admission of risk and complication evidence, his own strategy invited it.

Against this backdrop, it would have made no sense for the trial court to limit defense evidence (even if Plaintiff had preserved such a request), while allowing Plaintiff free rein to present his own testimony on this subject. For this reason as well, Plaintiff's arguments are meritless and should be rejected by this Court.

C. There Likewise is No Need for this Court to Apply its Decision in *Brady v. Urbas*.

Contrary to Plaintiff's suggestions, there also is no reason to revisit or apply this Court's decision in *Brady v. Urbas,* 111 A.3d 1155 (Pa. 2015). *Brady* is completely distinguishable from this case because it involved the admissibility of informed consent forms in a medical malpractice case where the plaintiff did not plead a battery claim and the plaintiff's executed informed consent form was unrelated to issues regarding the standard of care.

Plaintiff's attempts to shoehorn the facts of this case into *Brady* fail. In this case, the trial court did not improperly permit the introduction of an informed consent form (since this case did not involve surgery, there is no evidence that any such form was completed). Moreover, while Plaintiff obliquely references a medical

record note memorializing discussions with Plaintiff's family, Brief of Appellants, at 23, Plaintiff admits that the word "consent" does not appear anywhere in the document. Similarly, while Plaintiff's *Amicus* cites to "considerable argument and testimony regarding the involvement of the family and the 'team' approach to this treatment," *Amicus* Brief at 7, *Amicus* fails to explain how evidence regarding family discussions rises to the level of "consent" evidence. Most importantly, however, Plaintiff never objected to any of this testimony. Thus, while Plaintiff's *Amici* (at page 6-7 of its Brief), cites to pages 772a, 1323a, 1210a-13a, 1227a-47a, 1339-41a, 1432a-33a, 1438a-39a, as occasions on which defense counsel or witnesses discussed the family's involvement or "conversations" with family members regarding the pros and cons of certain medications, in *not one of these instances* did Plaintiff's counsel object to the testimony or arguments.

Thus, there is nothing in the record to substantiate Plaintiff's claim that Defendant improperly presented evidence suggesting that Plaintiff "consented" to Defendants' purported negligence. *Brady's* holding—that an informed consent form is inadmissible in a straightforward negligence case—is not implicated here. This entire issue is a red herring and there is no need for this Court to analyze it. Plaintiff's and *Amici's* reliance on *Brady* is misplaced.

D. Plaintiff was Not Entitled to an Assumption of the Risk Instruction.

Even if the issue had been preserved and accepted by this Court, there is also no basis for any "assumption of the risk" instruction here. As the courts below recognized, "assumption of the risk" is an affirmative defense, the essence of which is that a plaintiff should not be able to recover for injuries after he or she willingly assumed the risk inherent in the activity that caused the injury. While the "continuing vitality of the assumption of risk doctrine remains in doubt," *Zeidman v. Fisher*, 980 A.2d 637, 640 (Pa. Super. 2009); *Montagazzi v. Crisci*, 994 A.2d 626, 635 (2010) (recognizing that the assumption of the risk operates merely as a corollary of the absence of a duty), a defendant who asserts the assumption of the risk as an affirmative defense must prove that a plaintiff was subjectively aware of a specific risk, voluntarily accepted it and acted in spite of that risk, and suffered harm contemplated by that specific risk. *Zeidman,* 980 A.2d at 64,.

The plain fact in this case is that Defendants never made such a claim or argument here. Defendants did not claim that Plaintiff assumed the risk of complications from the medication or that, as a consequence, Plaintiff should be barred from any recovery. Thus, instructing the jury on a theory that Defendant did not raise would confuse the jury, not educate it.

Plaintiff's request, if granted, also would constitute an improper commentary on the evidence. A plaintiff is entitled to one closing argument that he delivers to the

jury; he is not entitled to a second closing argument, delivered by the trial judge. Yet, that is clearly what Plaintiff hoped to accomplish through his requested "assumption of the risk" jury instruction. Even if Plaintiff's statement is true— and Plaintiff did not "assume" the risk of this disease—the fact remains that correct, but unnecessary, statements of the law can be erroneous. *See, e.g., Fluor Daniel, Inc. v. Boyd*, 941 S.W.2d 292, 295 (Tex. App. 1996) ("superfluous instruction amounts to an improper comment on the case as a whole when the case is 'closely contested' and the excess instruction may tilt the jury by emphasizing extraneous factors."). The gravamen of this lawsuit is negligence, and the jury instructions the trial court gave properly instructed the jury on the relevant issues. The assumption of the risk jury instruction was unnecessary to the jury's understanding and application of the relevant law. Giving undue prominence to this straw man argument in light of concepts of "primacy and recency" and the timing of jury instructions to a jury,[4] would have been extremely prejudicial to Defendants.

The ramifications of a rule that usurped the role of the trial court on jury instructions issues would also contravene longstanding Pennsylvania jurisprudence[5]

[4] *Dudley v. State*, 951 P.2d 1176, 1180 (Wyo. 1998) (recognizing the psychological impact that testimony at the beginning and end of case has under concepts of "primacy" and "recency").

[5] It has long been the accepted rule in Pennsylvania that trial courts are afforded broad discretion instructing juries. A jury charge will be deemed erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. *Passarello v. Grumbine*, 87 A.3d 285, 296-297 (Pa. 2014) (citation omitted). A charge is (continued) . . .

and interfere with the wide latitude trial courts enjoy with regard to such matters. This Court has never held that a trial court is required to give every charge that is requested by the parties or that its refusal to give a requested charge require reversal unless the appellant was prejudiced by that refusal. *See Commonwealth v. Thomas*, 904 A.2d 964, 970 (Pa. Super. 2006); *see also Commonwealth v. Hornberger*, 74 A.3d 279, 282 (Pa. Super. 2013) ("[W]hen reviewing jury instructions for error, the charge must be read as a whole to determine whether it was fair or prejudicial. The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration.").

Here, the trial court properly discharged its responsibility by allowing the jury to consider evidence relevant to the standard of care and by allowing the case to be presented to the jury in a meaningful and understandable way. There is every reason to believe that the jury properly considered the evidence and reached a just decision on the merits; there is no indication that the jury was confused. In such circumstances, the trial court should be applauded, not reversed.

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considered adequate unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error. *Id.*

V. CONCLUSION

WHEREFORE, for the foregoing reasons, *Amici Curiae*, respectfully request that the Supreme Court of Pennsylvania AFFIRM the Order of the Superior Court.

Respectfully submitted,

LAMB McERLANE PC

Dated: October 16, 2020

By: /s/ Maureen M. McBride

Maureen M. McBride
James C. Sargent, Jr.
Attorney I.D. No. 57668/28642
24 East Market Street, Box 565
West Chester, PA 19381-0565
mmcbride@lambmcerlane.com
(610) 430-8000

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Signature: /s/ Maureen M. McBride
Maureen M. McBride
Attorney I.D. No.: 57668

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IN THE SUPREME COURT OF PENNSYLVANIA

Robert Kirksey, Jr., Appellant	:	18 WAP 2020
	:	
v.	:	
Children's Hospital of Pittsburgh of UPMC, University of Pittsburgh Physicians, and Satyanarayana Gedela, M.D., Appellees		

PROOF OF SERVICE

I hereby certify that this 16th day of October, 2020, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	George Paul Kachulis
Service Method:	eService
Email:	gkachulis@dmclaw.com
Service Date:	10/16/2020
Address:	Suite 400 Two PPG Place Pittsburgh, PA 15222
Phone:	412--39-2-5354
Representing:	Appellee Children's Hospital of Pittsburgh of UPMC Appellee Satyanarayana Gedela Appellee University of Pittsburgh Physicians

Served:	Jason Albert Archinaco
Service Method:	eService
Email:	jarchinaco@archlawgroup.com
Service Date:	10/16/2020
Address:	1100 Liberty Avenue Suite C-6 Pittsburgh, PA 15222
Phone:	412--43-4-0555
Representing:	Appellant Robert Kirksey Jr.

IN THE SUPREME COURT OF PENNSYLVANIA

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Served:	Michael Andrew O'Leary
Service Method:	eService
Email:	moleary@archlawgroup.com
Service Date:	10/16/2020
Address:	1100 Liberty Avenue Suite C6 Pittsburgh, PA 15222
Phone:	412-434-0555
Representing:	Appellant Robert Kirksey Jr.

Served:	Sally Anne Frick
Service Method:	eService
Email:	sfrick@dmclaw.com
Service Date:	10/16/2020
Address:	2 ppg place, suite 400 pittsburgh, PA 15222
Phone:	412-932-5645
Representing:	Appellee Children's Hospital of Pittsburgh of UPMC Appellee Satyanarayana Gedela Appellee University of Pittsburgh Physicians

Served:	Steven Lawrence Ettinger
Service Method:	eService
Email:	settinger@dmclaw.com
Service Date:	10/16/2020
Address:	120 Oak Glen Road Pittsburgh, PA 15237
Phone:	215-917-1670
Representing:	Appellee Children's Hospital of Pittsburgh of UPMC Appellee Satyanarayana Gedela Appellee University of Pittsburgh Physicians

IN THE SUPREME COURT OF PENNSYLVANIA

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Courtesy Copy

Served:	Clifford Alan Rieders
Service Method:	eService
Email:	crieders@riederstravis.com
Service Date:	10/16/2020
Address:	161 West Third Street Williamsport, PA 17701
Phone:	570--32-3-8711
Representing:	Amicus Curiae Pennsylvania Association for Justice

/s/ Maureen Murphy McBride

(Signature of Person Serving)

Person Serving:	McBride, Maureen Murphy
Attorney Registration No:	057668
Law Firm:	Lamb McErlane, PC
Address:	Lamb Mcerlane Pc Po Box 565 West Chester, PA 193810565
Representing:	Amicus Curiae The American Medical Association Amicus Curiae The Pennsylvania Medical Society