VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 28th day of December, 2017.

Carlena Chapple-Brooks, Appellant,

against Record No. 161812
Circuit Court No. CL-2013-12769

Ben L. Nguyen, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Fairfax County.

Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of opinion that there is no reversible error in the judgment that is the subject of this appeal.

BACKGROUND

On August 9, 2013, Carlena Chapple-Brooks (Chapple-Brooks) filed a complaint against Dr. Ben L. Nguyen (Dr. Nguyen) in the Circuit Court of Fairfax County. In her complaint, Chapple-Brooks alleged that "[o]n or about February 19, 2010," Dr. Nguyen injured her by "deviat[ing] from the standard of care" when he "performed surgical revision and replacement of [a] spinal cord stimulator and replacement of a pulse generator."

The circuit court held a jury trial, during which the undisputed evidence was that on February 19, 2010, Chapple-Brooks underwent spinal surgery conducted by Dr. Nguyen. The surgery lasted approximately four to five hours and ended around 4:00 p.m. on February 19, 2010.

Around 6:30 p.m. that same day, while Chapple-Brooks was in a hospital recovery room, she began experiencing severe pain and weakness in her right leg. Dr. Nguyen stopped her pain medications and, around 7:00 p.m., ordered a CT scan to determine whether a hematoma—a blood clot—had developed or if the stimulator "lead" he had implanted in her spine was misplaced.[1] Dr. Nguyen and a radiologist reviewed the CT scan, concluding that there was no hematoma and that the lead was not misplaced. Accordingly, Dr. Nguyen deduced that Chapple-

[1] A "lead" contains electrodes that conduct an electrical signal to the spinal cord.

Brooks' spinal cord must have been injured during surgery and informed Chapple-Brooks that she had sustained a spinal cord contusion—a bruise—in the course of the surgery. As a result of the spinal injury, Chapple-Brooks lost strength and mobility in both legs.

On February 26, 2010, Chapple-Brooks was discharged from the hospital. Dr. Nguyen continued to treat Chapple-Brooks until October 2010 and Chapple-Brooks experienced some improvement in strength and her ability to stand. Despite Dr. Nguyen continuing to prescribe physical therapy, Chapple-Brooks stopped attending such sessions in August 2010 and, at the time of trial, still had a very limited ability to walk without crutches or some other assistive device.

Dr. Giancarlo Barolat (Dr. Barolat) testified at trial on behalf of Chapple-Brooks as an expert in neurosurgery. He opined that Dr. Nguyen deviated from the standard of care of a reasonably prudent neurosurgeon by (1) failing to use intraoperative neurophysiological monitoring (Neuromonitoring) to monitor her spinal cord during surgery, (2) failing to administer steroids intravenously to reduce swelling of her spinal cord during surgery, and (3) failing to order a CT myelogram or an MRI after surgery.

Dr. Barolat opined that, after the CT scan showed there was no hematoma, a reasonably prudent surgeon would have ordered either an MRI or a CT myelogram to determine whether the spinal cord itself was experiencing pressure, because these scans show the spinal cord as distinct from the spinal fluid, whereas a CT scan only shows the spinal canal as a whole. When asked whether "there [was] still a window of opportunity" for Dr. Nguyen to address any spinal cord compression if he had become aware of such compression after the surgery, Dr. Barolat answered affirmatively, but explained that "it's a window of hours."

Dr. Jeffrey Laurent (Dr. Laurent) testified on behalf of Dr. Nguyen as an expert in neurosurgery that, in his opinion, Dr. Nguyen complied with the standard of care for a reasonably prudent neurosurgeon in Virginia in 2010. Dr. Laurent asserted that Dr. Nguyen did not deviate from the standard of care when he ordered a CT scan instead of a CT myelogram or an MRI after surgery because a CT scan allows the surgeon to address the primary concern in a spinal cord surgery, a hematoma, which is treatable. Dr. Laurent further testified that he did not believe a CT myelogram or MRI would have aided the postoperative care of Chapple-Brooks, because trauma sustained by the spinal cord itself is irreversible and because the CT scan showed the position of the stimulator's lead and its position did not indicate swelling of the spinal cord.

Dr. Laurent also testified that the fact that the spinal cord was bruised did not mean that Dr. Nguyen was negligent, because bruising or a contusion is a "known risk of the procedure," even in proper performance of the surgery.

After the parties presented their evidence, Chapple-Brooks and Dr. Nguyen proffered jury instructions. Dr. Nguyen proffered Instruction M, which read: "The fact that a doctor's efforts on behalf of his patient were unsuccessful does not, by itself, establish negligence." Chapple-Brooks objected to the instruction because "it is not only repetitive of all the other instructions that the plaintiff carries the burden in the case, but it borders on the line of [being] argumentative." She contended that the instruction was cumulative and would not aid the jury. The circuit court gave the instruction, finding that it had a long history of acceptance and was supported by the evidence presented in the case.

During the course of its deliberations, the jury sent a written question to the court. The jury asked, "Is there a limited time frame to which we should limit our considerations of negligence and, if so, when? For example, from February through August 2010 or from surgery from discharge from the hospital."

Chapple-Brooks and Dr. Nguyen disagreed on how the circuit court should respond. Chapple-Brooks argued that the question was confusing and, accordingly, "the only safe alternative is to say that they're limited by the evidence they have and the instructions they have been given." She explained that she was "not sure that there [was] any evidence that the CT myelogram had to be [done on February] the 19th [of 2010]," and the jury could conclude that "[Dr. Nguyen] should have done a CT myelogram later to see when the compression was occurring or to see if the compression had stopped." Further, she contended that her complaint alleged that negligence occurred "on or about" February 19, 2010, rather than "on" any particular date.

By contrast, Dr. Nguyen contended that the question was not confusing, and the alleged breach was not continuous but was only alleged to have occurred on February 19, 2010. He insisted that Chapple-Brooks' evidence asserted that Neuromonitoring and the administration of steroids should have occurred during the surgery, and the CT myelogram or MRI should have occurred either in place of or immediately after the CT scan, and no later than February 19, 2010. Accordingly, he argued that the circuit court should respond, "You are limited—the limited time frame is February 19, 2010."

The circuit court concluded that it "did not understand [Chapple-Brooks] to be trying to prove something happened from February 20th through February 26th" and, accordingly, answered the jury's question by stating: "The lawsuit alleges negligence that occurred on February 19th, 2010." Subsequently, the jury rendered its verdict in favor of Dr. Nguyen, and the circuit court entered judgment consistent with the verdict. This Court granted Chapple-Brooks an appeal.

Chapple-Brooks asserts that two errors were committed by the circuit court.[2] First, she asserts that the circuit court erred when it granted Instruction M because the instruction is an incomplete and incorrect statement of the law, as well as argumentative and cumulative. Second, she claims that the circuit court erred when it answered the jury's question regarding the time frame for the alleged negligence, by stating "the lawsuit alleges negligence that occurred on February 19th, 2010."

ANALYSIS

1. Instruction M

As an initial matter, we note that, before the circuit court, Chapple-Brooks objected to Instruction M on the grounds that the instruction was argumentative and cumulative. This Court will not consider her additional objections to the instruction made for the first time on appeal. Rule 5:25; *Faizi-Bilal Int'l Corp. v. Burka*, 248 Va. 219, 222, 445 S.E.2d 125, 126 (1994) ("[U]nless an objection is stated with reasonable certainty at the time of the ruling, we will not consider the question for the first time on appeal."). We therefore need only discern whether the instruction was impermissibly argumentative or cumulative.

"As a general rule, the matter of granting and denying instructions does rest in the sound discretion of the trial court." *Cooper v. Commonwealth*, 277 Va. 377, 381, 673 S.E.2d 185, 187 (2009).

> [T]he office of an instruction is to fully and fairly inform the jury as to the law of the case applicable to the particular facts, and not to confuse them. . . . If an instruction may reasonably be regarded as having a tendency to mislead the jury, it is error to give it. We will not find error when a jury was instructed correctly as to the law and the surrounding circumstances assure us that the jury was not confused about its obligations.

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[2] In her opening brief, Chapple-Brooks abandoned a third assignment of error that was granted by this Court.

Castle v. Lester, 272 Va. 591, 605, 636 S.E.2d 342, 349 (2006) (citations and internal quotation marks omitted). "An instruction which is confusing, argumentative, long, and merely an attempt . . . to have the court . . . agree with [a party's] theory of the case should be refused." *H. W. Miller Trucking Co. v. Flood*, 203 Va. 934, 937, 128 S.E.2d 437, 440 (1962).

This Court has repeatedly cautioned against the indiscriminate use in jury instructions of statements from appellate opinions that include "'argumentative language' about legal matters . . . inappropriate for consideration by the jury." *Cain v. Lee*, 290 Va. 129, 135, 772 S.E.2d 894, 897 (2015) (internal quotation marks omitted); *see also Abernathy v. Emporia Mfg. Co.*, 122 Va. 406, 413, 95 S.E. 418, 420 (1918) ("The appellate judge frequently uses argumentative language and also freely expresses his opinion upon the facts of the cases, neither of which would be appropriate in an instruction to the jury."). For example, a jury instruction that referred to punitive damages as "generally not favored" in a case for which punitive damages were statutorily permitted was argumentative, because that instruction did not explain the law on awarding punitive damages, but only served to confuse or mislead the jury and did not "assist the jury in any way" or "aid the jury in arriving at a proper verdict." *Cain*, 290 Va. at 135, 772 S.E.2d at 897.

Unlike the instruction in *Cain*, Instruction M was not derived from an opinion's commentary on the law. Instead the instruction explained the law concerning the extent to which an unsuccessful treatment or diagnosis can establish a physician's negligence. Instruction M was copied verbatim from the Virginia Model Jury Instructions—Civil, No. 35.040 (2016), and derives its language from the holdings of several of this Court's opinions, the most recent of which was *Brown v. Koulizakis*, 229 Va. 524, 331 S.E.2d 440 (1985). In *Brown*, this Court reversed a decision to strike the plaintiff's evidence in a medical malpractice action, reiterating the rule that,

> *A physician is not an insurer of the success of his diagnosis and treatment* nor is he held to the highest degree of care known to his profession. *The mere fact that he has failed to effect a cure or that his diagnosis and treatment have been detrimental to the patient's health does not raise a presumption of negligence.* Nevertheless, a physician must demonstrate that degree of skill and diligence in the diagnosis and treatment of the patient employed by a reasonably prudent practitioner in his field of practice or specialty.

Id. at 532, 331 S.E.2d at 445 (emphases added).

The language in Instruction M was not derived from an opinion's "argumentative language." Instruction M's recitation of the rule that negligence cannot be presumed from an unsuccessful diagnosis or treatment was not inappropriate for the jury's consideration. In this case, although it was uncontested that Dr. Nguyen injured Chapple-Brooks' spine during surgery, the instruction explained that the fact that an injury occurred was not dispositive in determining whether Dr. Nguyen was negligent. Thus, Instruction M was not argumentative and did not have the tendency to mislead or confuse the jury.

Additionally, while "the granting of instructions that are merely repetitious and cumulative is discouraged," *Medlar v. Mohan*, 242 Va. 162, 168-69, 409 S.E.2d 123, 127 (1991), Instruction M's statement of the law—that negligence could not be presumed from an unsuccessful treatment or diagnosis—was not stated in other jury instructions. Neither was Instruction M merely a reiteration of Chapple-Brooks' burden of proof; rather, the instruction clarified that the unsuccessful outcome of Chapple-Brooks' surgery was insufficient, on its own, to establish that Dr. Nguyen was negligent. Therefore, Instruction M was not merely repetitious and cumulative of other instructions.

Accordingly, because Instruction M was neither argumentative nor cumulative, the circuit court did not abuse its discretion when it gave the instruction.

2. Answer to the jury's question

"It is the practice of trial courts throughout the Commonwealth to give additional instruction to the jury after the case has been submitted to them if they or counsel request it, and the court, in its discretion, deems it proper." *Robinson v. Commonwealth*, 186 Va. 992, 996, 45 S.E.2d 162, 163 (1947). In so doing, it is "proper for the court to fully and completely respond to inquiry which might come from the jury for information touching their duties." *Witt v. Merricks*, 210 Va. 70, 74, 168 S.E.2d 517, 520 (1969) (internal quotation marks omitted).

This Court reviews a circuit court's "answers to questions propounded by the jury for abuse of discretion." *Lawlor v. Commonwealth*, 285 Va. 187, 261, 738 S.E.2d 847, 889 (2013). "[T]he phrase 'abuse of discretion' means that the circuit court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." *Sauder v. Ferguson*, 289 Va. 449, 459, 771 S.E.2d 664, 670 (2015) (citations and internal quotation marks omitted).

Here, the circuit court answered the jury's question regarding the time frame for negligence by stating: "The lawsuit alleges negligence that occurred on February 19th, 2010." This answer was supported by Chapple-Brooks' complaint, which alleged that the surgery occurred "on or about February 19, 2010," that the injury occurred during the course of surgery, and that "the manner in which [Dr. Nguyen] performed the surgical procedures" deviated from the standard of care. Further, the only positive evidence of negligence Chapple-Brooks offered during trial was that Dr. Nguyen bruised her spinal cord during surgery, failed to utilize Neuromonitoring or administer steroids during surgery, and failed to order a CT myelogram or MRI within hours after the surgery ended at 4 p.m. on February 19, 2010. While a better practice may have been for the court to simply refer the jury to its best recollection of the evidence and avoid any commentary on the evidence, the court's response to the jury's question was not erroneous as a matter of law because it was consistent with the evidence presented at trial. Thus, the circuit court did not abuse its discretion in giving that response to the question the jury posed.

Further, assuming arguendo that the response was given in error, such error was harmless because there was no evidence of any negligence by Dr. Nguyen after February 19, 2010, which was alleged to have been a proximate cause of any of Chapple-Brooks' injuries. This Court will not reverse a judgment "[w]hen it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached." Code § 8.01-678.

Accordingly, for the above reasons, we affirm the judgment of the circuit court. The appellant shall pay to the appellee two hundred and fifty dollars damages.

This order shall be certified to the Circuit Court of Fairfax County.

A Copy,

Teste: Joan L Harrington

Clerk