

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 1st day of June, 2017.*

Charles B. Scott, Administrator of the Estate of  
Scarlet O. Scott, Appellant,

against Record No. 160913  
Circuit Court No. CL14000582-00

Central Virginia Family Physicians, Inc., et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Lynchburg.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no reversible error in the judgment of the circuit court.

On July 19, 2013, Scarlet Scott went to the Lynchburg General Hospital emergency room complaining of a headache. She reported her pain level as ten out of ten. She reported that she had been suffering a headache for about four days and had tried over-the-counter pain medication and hydrocodone without relief. She also reported nausea, vomiting, and dizziness upon standing. She reported that light made the headache worse.

Scarlet was examined by William N. Moore, M.D. Dr. Moore diagnosed her with tension headache and administered intravenous pain, anti-histamine, and anti-nausea medication. He prescribed a non-steroid anti-inflammatory, discharged her, and instructed that she follow-up with a primary care physician but that she should return to the emergency room if her headache returned or her symptoms worsened.

On July 21, Scarlet went to an urgent care facility again complaining of a headache. She reported that her headache had gone away after her treatment at the emergency room but that it had returned on July 20. She reported her pain level as eight or nine out of ten. She again reported dizziness upon standing but no nausea or vomiting.

Scarlet was examined by Paul E. Foster, a certified physician assistant. Like Dr. Moore, Foster diagnosed her with tension headache and administered pain, anti-histamine, and anti-nausea medication. She thereafter reported that her pain level had decreased to five out of ten. Foster prescribed a muscle relaxant, discharged her, and instructed that she “go home and rest. If [it] gets worse, then . . . go to the” emergency room.

In the days that followed, Scarlet was mostly bed-ridden because of continuing head pain and sensitivity to sound and light. In addition to her prescription medications, she used various over-the-counter pain medications and also tried smoking marijuana to alleviate her pain. However, she did not seek further medical treatment by returning to the emergency room or the urgent care facility.

On July 29, Scarlet’s family found her unresponsive. She was taken by ambulance to Lynchburg General Hospital, where a CT angiogram revealed that she had a ruptured aneurysm. She was medevaced to the University of Virginia Hospital for a higher level of care. There, Kenneth Liu, M.D., discovered a 11-12 millimeter pericallosal aneurysm. He performed a craniectomy to relieve pressure to her brain and attempted to clip the aneurysm. Despite these efforts, Scarlet died on August 3, 2013.

In his capacity as administrator of Scarlet’s estate, her husband, Charles Scott, filed an amended complaint under Code § 8.01-50 against Foster and his employer, Central Virginia Family Physicians, Inc. (collectively, “Foster”). Charles alleged that Foster breached the standard of care and that his negligence caused Scarlet’s death. Among the damages he sought were the medical expenses incurred for her treatment from July 29 through her death.

Prior to trial, Charles moved to exclude all argument, evidence, and comment on Scarlet’s marijuana use. At a hearing, he argued that evidence of her marijuana use was inadmissible under Rule 2:403 because its prejudicial effect outweighed its probative value. Foster argued that evidence of her marijuana use was important to show that her pain between July 21 and July 29 was so intense that she reached for all possible options to alleviate it. Foster argued that fact was relevant to his defense of mitigation, i.e., that she had a duty to comply with his discharge instructions to go to the emergency room to offset her damages. If she had returned to the emergency room as instructed, he argued, her aneurysm would have been detected and treated before it ruptured. The costs of an endoscopic coiling procedure used to

treat unruptured aneurysms is significantly less than the cost of the craniectomy and clipping procedure Dr. Liu was required to perform after Scarlet's aneurysm ruptured. The circuit court took Charles's motion under advisement.

At trial, Foster cross-examined Charles outside the presence of the jury to proffer the evidence of marijuana use to the court. Foster again argued that he sought to introduce the evidence only to establish that Scarlet's head pain was so bad that she had resorted to extraordinary measures to obtain relief, yet she failed to go to the emergency room as he had instructed her to do. The circuit court agreed with Foster that the evidence was relevant to the issue of whether her pain worsened and whether she breached her duty to mitigate her damages by failing to go back to the emergency room as instructed. It ruled that the probative value of the evidence outweighed any prejudicial effect and that it would be admitted.

When the jury returned, Foster elicited the following testimony from Charles on cross-examination:

- Q: And she didn't just take Sudafed, did she? She also smoked marijuana that week to try to relieve her headache pain?
- A: Yes, sir.
- Q: And that was a yes, she smoked marijuana to try and relieve her headache pain?
- A: Yes, sir.
- Q: And that's during the 22nd to the 26th?
- A: Yes, sir.
- Q: Was that something she was doing before the 22nd and the 26th for headache pain?
- A: I don't know. I just know that she smoked. I don't know what she smoked. I know she smoked one or two. That's all I know.
- Q: And that's because she was having severe headache pain?
- A: Yes, sir.

During closing argument, Foster relied on that testimony to argue that Scarlet "even smoked marijuana once or twice tr[ying] to get some pain relief. That tells us that her pain didn't stay at a[n] 8 or 9 out of 10 or a 5 of out 10, but that it in fact got worse." He compared this to his discharge instructions that said "[i]f your headache gets worse, you need to follow up" by going to the emergency room.

At the conclusion of trial, Foster submitted Jury Instruction 16A, which told jurors that

A patient who is injured as a result of a physician assistant's negligence has the duty to use ordinary care to avoid loss or minimize or lessen the resulting damages.

If a patient fails to perform this duty, she may recover for the injuries, including death, caused by her physician assistant's negligence but not for the aggravation of any injuries, including death, or increase of damages resulting from her failure to use ordinary care.

On this issue the defendants have the burden of proof.

Charles objected to the jury instruction. He argued that Scarlet had never been advised that she might have a lethal condition. She was told only to go back to the emergency room if she got worse. Thus, he argued, there was no evidence to support a mitigation jury instruction. He contended that Foster's mitigation argument served only one purpose, which was to get Charles's testimony about her marijuana use in front of the jury to suggest that she was a bad person.

Foster responded that whether Scarlet used ordinary care to mitigate her damages was a question for the jury. The jury therefore had to know what the discharge instructions were and whether she complied with them. The facts that Scarlet was sensitive to light and bed-ridden because of her head pain, extensively used over-the-counter pain medication, and even tried marijuana showed that her pain got worse but that she did not go to the emergency room as instructed. Thus, the evidence was sufficient to support the jury instruction.

The circuit court ruled that whether Scarlet mitigated her damages was a jury question and that the evidence was sufficient to support the jury instruction. The jury thereafter returned a defense verdict upon which the circuit court entered final judgment for Foster. Charles appeals.

In his first assignment of error, Charles asserts that the circuit court erred by admitting any evidence of mitigation. He argues that the defense does not apply here because Foster did not give Scarlet specific discharge instructions or warn her that she may have had a life-threatening condition. Rather, he simply gave her a generic, boilerplate discharge instruction to seek further treatment if her symptoms got worse. That instruction left it for her to decide what "worse" meant. She had already been experiencing pain that she rated between eight and ten out of ten. Because Foster did not warn her about the possibility of an aneurysm, he concludes, she

had no way to know the gravity of her situation to make a reasonable judgment about whether and when to seek further treatment.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Lee v. Spoden*, 290 Va. 235, 251, 776 S.E.2d 798, 806 (2015).

A medical professional's discharge instruction is sufficient to create a burden to mitigate damages if it informs the patient to take steps for his own protection. *Holley v. Pambianco*, 270 Va. 180, 186, 613 S.E.2d 425, 428 (2005). In *Holley*, the patient suffered a perforated colon as a result of a colonoscopy and polypectomy procedure. He was informed only that the procedure carried a risk of perforated colon and that common minor adverse symptoms of the procedure (not of the perforation) included bloating, gas, and cramping. The Court ruled that this information was inadequate to impose a duty to mitigate because there was no instruction to do anything, or any indicator of what symptom(s) should prompt the patient to do it. *Id.*

That is not the case here. It is not disputed that Foster instructed Scarlet to go to the emergency room if the pain got worse. While Charles argues that "worse" is vague, and that it is not clear whether Foster meant worse than the eight or nine out of ten she presented with or the five out of ten she reported when she was discharged, these arguments are not persuasive. First, although "worse" is subjective, it is not vague. Pain is subjective. Whether pain is better or worse can only be evaluated by the individual experiencing it. Although pain may worsen incrementally, so that one may not immediately appreciate that it is worsening, there is nevertheless an appreciable difference between pain that worsens and pain that improves. Second, because the discharge instructions were given when Scarlet was discharged, "worse" clearly referred to the five out of ten she reported at that time, not the eight or nine out of ten she initially presented with.

Accordingly, Foster's discharge instructions were sufficient to impose a duty to mitigate damages, and the circuit court did not abuse its discretion by allowing him to adduce evidence that Scarlet failed to follow them.

In his fourth assignment of error, Charles asserts that the circuit court erred by admitting his testimony that Scarlet had used marijuana. He argues that it should not have been admitted under Rule 2:403 because the prejudicial effect of the evidence outweighed its probative value and because it was misleading. He argues that the only purpose for the evidence was to paint

Scarlet in a negative light as a drug user. He contends that although he testified that she used marijuana to try to alleviate her pain, he did not testify that her pain had gotten worse.

[I]n determining whether relevant evidence should be admitted, the circuit court must apply a balancing test to assess the probative value of the evidence and its prejudicial effect.

Further, this balancing test requires that the probative value of the evidence be substantially outweighed by the danger of *unfair* prejudice. The requirement under Rule 2:403 that only “unfair” prejudice may be considered reflects the fact that all probative direct evidence generally has a prejudicial effect to the opposing party. Any prejudice in the form of the jury’s perception of the claims of a party is not unfair prejudice such that its admission could properly be barred under [Rule] 2:403(a). Instead, “unfair prejudice” refers to the tendency of some proof to inflame the passions of the trier of fact, or to invite decision based upon a factor unrelated to the elements of the claims and defenses in the pending case.

The term “unfair prejudice” speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt or liability on a ground different from proof specific to the case elements. “Unfair prejudice” within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

Thus, the mere fact that evidence is highly prejudicial to a party’s claim or defense is not a proper consideration in applying the balancing test. Rather, a trial court must determine whether the probative value of the evidence is substantially outweighed by its unfair or unduly prejudicial effects.

*Lee*, 290 Va. at 251-52, 776 S.E.2d at 806-07 (internal quotation marks, citations, alterations, and omissions omitted) (emphasis in original).

Foster did not seek to adduce the evidence of Scarlet’s marijuana use for the purpose of impugning her character or presenting her to the jury as a drug user. He did not ask Charles whether Scarlet used marijuana for recreational purposes. His cross-examination questions were limited to whether she used marijuana to alleviate her pain. This is consistent with how he used the evidence in closing argument and the argument he made to the circuit court to support admitting the testimony. Quite contrary to implying that she regularly used marijuana, Foster sought to establish that her marijuana use was an extraordinary measure she tried once or twice during that eight-day period, thereby showing how bad her pain was and how desperate she was to find anything that would make it go away. That fact was relevant to the disputed question of fact as to whether her pain got worse, thereby imposing on her a duty to go to the emergency room according to his discharge instructions.

Accordingly, Charles's testimony about Scarlet's marijuana use was probative of a factual issue in question and was not unfairly prejudicial. The circuit court therefore did not abuse its discretion by admitting it.

In his second assignment of error, Charles asserts that the circuit court erred by giving Jury Instruction 16A because there was no evidence to support it. He again argues that Foster's discharge instruction was insufficiently specific to create a duty to mitigate her damages but that even if it was, there was no evidence that her pain got worse.

"[J]ury instructions are proper only if supported by the evidence, and more than a scintilla of evidence is required." *Lawlor v. Commonwealth*, 285 Va. 187, 228-29, 738 S.E.2d 847, 870-71 (2013) (internal quotation marks and citations omitted). The Court views the evidence in the light most favorable to Foster. *See Virginia Electric & Power Co. v. Winesett*, 225 Va. 459, 462, 303 S.E.2d 868, 870 (1983); *see also Herr v. Wheeler*, 272 Va. 310, 312, 634 S.E.2d 317, 318 (2006).

Charles testified that beginning on July 15, he came home to find Scarlet lying in bed in his granddaughter's room. She was lying there because it was the darkest room in the house and she didn't want to hear any sound. On the morning of July 20, after Dr. Moore treated her at the emergency room, she told him she was feeling good. When he returned home from work that day, she again could not stand light.

On July 21, she got up and still could not stand light. Her pain was so bad that she could hardly walk and Charles had to help her to the urgent care facility where she saw Foster. The following week, Charles continued to go to work and he only saw her in the evenings when he came home. She was again sensitive to light and mostly laid in bed. During cross-examination, he repeatedly insisted that her headache was the same from when she went to the emergency room through the end, but he conceded that it improved the night Dr. Moore treated her. He testified that before seeing Foster on July 21, she had been taking Ibuprofen and Excedrin. Afterwards, she continued taking those over-the-counter pain medications, plus the medications prescribed by Dr. Moore and Foster, as well as Sudafed, and even tried marijuana once or twice.

Viewing the evidence in the light most favorable to Foster, the prevailing party below, Scarlet added Sudafed and marijuana to her existing over-the-counter medications, as well as her prescription medications. The Court must accept the favorable inference that taking additional

drugs, including marijuana, implied that Scarlet's pain got worse after Foster discharged her. Because that symptom imposed a duty to go to the emergency room under Foster's discharge instructions, there is more than a scintilla of evidence that she failed to mitigate her damages and the circuit court did not err by giving the jury instruction.

In his third assignment of error, Charles asserts that the court erred by giving Jury Instruction 16A because it was confusing. He argues that by instructing the jury that Scarlet could not recover "for the aggravation of any injuries, including death . . . resulting from her failure to use ordinary care," the circuit court essentially gave Foster a contributory negligence defense. He argues that this Court limited the use of that defense in medical malpractice cases in *Lawrence v. Wirth*, 226 Va. 408, 309 S.E.2d 315 (1983), because patients are entitled to rely on the assurances made by health care professionals. This was a wrongful death action, he argues, and the jury instruction told the jury that Charles could not recover for Scarlet's death if she failed to use ordinary care. Because juries are presumed to follow their instructions, he concludes, this error is the most likely cause of the jury's defense verdict and cannot be harmless error.

The Court "read[s] the granted jury instructions together and consider[s] them as a whole. The determination whether a jury instruction accurately states the relevant law is a question of law [reviewed] de novo." *Hawthorne v. VanMarter*, 279 Va. 566, 586, 692 S.E.2d 226, 238 (2010) (citations omitted).

Reading all the given jury instructions together and considering them as a whole, Jury Instruction 16A cannot be interpreted as giving Foster a contributory negligence defense. Jury Instruction 9A informed the jury that there were three separate issues: "(1) Whether [Foster] . . . was negligent; and (2) If [Foster] was negligent, was this negligent the proximate cause of [Scarlet's] death; and (3) If [Charles] is to recover, what is the amount of his damages?" This jury instruction separates the question of damages from the question of liability. Jury Instruction 11A directed the jury to find for Charles "if he has proven by the greater weight of the evidence that: (1) [Foster] was negligent; and that (2) [Foster's] negligence was the proximate cause of [Scarlet's] death." This jury instruction directed the jury how to reach its verdict on the question of liability. Jury Instruction 14 directed the jury to find that Foster was negligent if he failed to meet the standard of care.

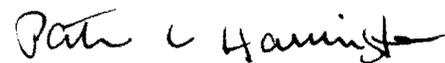
The Court presumes that the jury follows the trial court's instructions unless the record shows otherwise. *Gilliam v. Immel*, \_\_\_ Va. \_\_\_, \_\_\_, 795 S.E.2d 458, 463 (2017). Nothing in the record here indicates that the jury's verdict was based on anything other than a conclusion that Charles failed to meet his burden to prove both that Foster was negligent because he failed to meet the standard of care, and that any such negligence was the proximate cause of Scarlet's death. The jury never reached the issue of whether Scarlet had an obligation to mitigate her damages, or whether she had fulfilled any such obligation.

Accordingly, the Court affirms the judgment of the circuit court. The appellant shall pay to the appellees two hundred and fifty dollars damages.

This order shall be certified to the Circuit Court of the City of Lynchburg.

A Copy,

Teste:

A handwritten signature in black ink, appearing to read "Pat C. Hamming". The signature is written in a cursive style with a horizontal line at the end.

Clerk