

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 5th day of April, 2018.

Jordan J. Williams, Appellant,

against Record No. 170538
Circuit Court No. CL1101653F-15

Jon Swenson, et al., Appellees.

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

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

This appeal challenges the trial court's refusal to give jury instructions concerning foreseeability and challenges remarks of counsel referencing foreseeability during closing argument at trial of this medical malpractice action.

I.

The plaintiff, Jordan Williams, sought recovery for damage to the spinal nerve root resulting in paralysis¹ following hip replacement surgery. The defendants were Dr. Jon Swenson and Hampton Road Orthopedics (collectively, "the Orthopedists") and Dr. Patrick Higdon and the Tidewater Physicians Multispeciality Group (collectively, "the Hospitalists").

Parties argued competing theories of the case. Williams argued that failure of the Orthopedists and Hospitalists to properly care for his low blood pressure led to both the foreseeable injury of progressive kidney failure and the unforeseen but consequential damage of paralysis due to oxygen deprivation of the spinal nerve root. The Orthopedists argued that damage to the spinal nerve root was an unforeseen consequence of compression during the surgery due to the patient's morbid obesity, and did not represent a breach of the standard of

¹ While some testimony referenced recovery of limited sensation in the legs, the parties used the colloquial term "paralysis" as the plaintiff was unable to walk or have meaningful movement. The Court will adopt the trial court's terminology.

care. The Hospitalists argued that their post-surgical care for the kidney failure and blood pressure was within the standard of care. Regardless of their theories of causation, numerous experts testified that paralysis was an exceedingly rare complication of the procedure.

Williams argued that the evidence and his theory of the case entitled him to the following instruction as to each of the four defendants:

If you find that [the defendant] is negligent, then [the defendant] is liable for all the consequences of that negligence, whether foreseen or not. [The defendant] need not have foreseen the precise injury that occurred, but it is sufficient if a reasonably prudent healthcare provider would have foreseen that some injury would result.

After comparing the case to this Court's ruling in *Blondel v. Hays*, 241 Va. 467, 475, 403 S.E.2d 340, 344 (1991), the trial court refused the instruction.

Following a protracted conversation regarding foreseeability and refusal of the instruction and before closing argument, out of the presence of the jury, Williams requested a "clarification." He asked:

We understand that the court will not give the jury one of our foreseeability instructions. Is the court going to permit the defendant to argue in closing that they're not liable or they're not responsible for any injuries that are unforeseeable? Because if the court is going to allow them to do that, what we would ask is a continuing objection so we don't have to object to defense counsel's closing when they make arguments about foreseeability. We'd ask they not be allowed to make that, but if the court is going to allow them, we would ask for a continuing objection if the court would grant us that.

The trial court stated it would allow a continuing objection.

In closing, the Orthopedists' counsel made various references to the unforeseeable nature of the injury. Williams did not make any further objection or renew his objection, and he now seeks to challenge the substance of closing argument on appeal.

II.

The sole purpose of appellate review of jury instructions is "to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." *Dorman v. State Indus.*, 292 Va. 111, 125, 787 S.E.2d 132, 140 (2016) (quoting *Cain v. Lee*, 90 Va. 129, 772 S.E.2d 894, 896 (2015)). "[J]ury instructions are proper only if supported by the evidence, and more than a scintilla of evidence is required." *Id.* at 125, 787 S.E.2d at 141 (quoting *Lawlor v. Commonwealth*, 285 Va. 187, 228, 738 S.E.2d 847, 870-71 (2013)). While "[a] trial court's

decision whether to grant or refuse a proposed jury instruction is generally subject to appellate review for abuse of discretion,” *Howsare v. Commonwealth*, 293 Va. 439, 443, 799 S.E.2d 412, 514 (2017), the Court “review[s] de novo whether a jury instruction accurately states the law.” *RGR, LLC v. Settle*, 288 Va. 260, 275, 764 S.E.2d 8, 16 (2014). The record below and the majority of the briefing is dedicated to whether the plaintiff’s evidence and theory of the case supported the proffered instruction. However, the Court need not reach this question because the proffered instruction is not a correct statement of law.

The proffered instruction differs substantively from both the model jury instruction on foreseeable consequences, 1 Virginia Model Jury Instructions – Civil, No. 4.018, and the language set forth in *Blondel*, 241 Va. at 475, 403 S.E.2d at 344. In stating that the defendant is liable for “all of the consequences of that negligence, whether foreseen or not,” as opposed to “all the consequences that *naturally flow*,” as stated in *Blondel*, 241 Va. at 475, 403 S.E.2d at 344 (emphasis added), the instruction proffered in the present case became a strict liability instruction and an inaccurate statement of Virginia tort law.² This proffered instruction was also at odds with the appropriately given proximate cause instruction. Regardless of whether the proffered instruction was supported by the evidence, this Court cannot say that a trial court abused its discretion in refusing to give a proffered instruction when the proffered instruction is an inaccurate statement of law. Accordingly, the trial court did not err.

III.

The contemporaneous objection rule states, in relevant part: “No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling,” Rule 5:25. The rule “afford[s] the trial court an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals.”

² The Court acknowledges that, for civil cases, Code § 8.01-379.2 provides that a proposed instruction that accurately states the applicable law “shall not be withheld from the jury solely for its nonconformance with the model jury instructions.” In addition, it is “well settled that each party has the right to have presented to the jury its contention upon vital points in language to be chosen by it, *provided such language is in keeping with the law*.” *Jeffress v. Virginia Ry. & P. Co.*, 127 Va. 694, 714, 104 S.E. 393, 399 (1920) (emphasis added). However, as discussed, the jury instruction proffered in this case did not accurately state the applicable law. Accordingly, Code § 8.01-379.2 could not enable that nonconforming instruction to be given to the jury.

Weidman v. Babcock, 241 Va. 40, 44, 400 S.E.2d 164, 167 (1991). Accordingly, to satisfy the rule, “an objection must be made . . . at a point in the proceeding when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error.” *Johnson v. Raviotta*, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002).

“[T]he approved procedure for counsel to follow is to object to improper argument at the time, giving reasons for the objection, and to move for a mistrial or for a cautionary instruction to the jury to disregard the improper remarks.” *Reid v. Baumgardner*, 217 Va. 769, 773, 232 S.E.2d 778, 781 (1977) (citing *Chesapeake & O. Ry. v. Folkes*, 179 Va. 60, 68, 18 S.E.2d 309, 312 (1942)). This Court has said that failure to make a timely objection ordinarily constitutes a waiver; that objection should be made when the objectionable words are spoken; and that the trial court should be requested to instruct the jury to disregard improper argument. *Russo v. Commonwealth*, 207 Va. 251, 256-57, 148 S.E.2d 820, 824-25 (1966).

Here, the original “continuing objection” was not clear as to whether it addressed argument concerning foreseeability pertaining to the standard of care or causation or both. In this trial, the unforeseeable nature of the injury was raised numerous times in closing, not all of which may have constituted impermissible argument. The failure to renew the objection specifying how counsel’s remarks moved outside the scope of permissible argument deprived the trial judge of the opportunity to instruct the jury and avoid an appeal.

In *Reid v. Baumgardner*, 217 Va. at 774, 232 S.E.2d at 781, this Court considered counsel’s initially timely but overruled objection to argument to be preserved, even though counsel failed to specify grounds, because he subsequently renewed the objection, specified its grounds, and requested that the trial court direct the jury to disregard the improper argument. The Court said:

These acts, while coming late in the proceedings, came soon enough to permit corrective action to be taken by the court. If the court had failed to understand the basis for the original objection, the explication cleared up any misunderstanding and afforded an opportunity for reconsideration and reversal of its earlier ruling. There was still time for the court to caution the jury to disregard the objectionable remarks.

*Id.*³

Here, however, the objection to remarks contained within defense counsel's closing argument was not made in a manner that allowed the trial court to correct the alleged error. Counsel then failed to request relief in the manner of a curative instruction or motion for mistrial. See *Maxwell v. Commonwealth*, 287 Va. 258, 267, 754 S.E.2d 516, 520 (2014); *Schmitt v. Commonwealth*, 262 Va. 127, 148, 547 S.E.2d 186, 200 (2001). The Court must consider the objection waived.

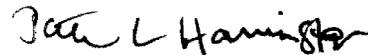
The judgment of the trial court is affirmed. The appellant shall pay to the appellees two hundred and fifty dollars damages.

Justice Mims took no part in the resolution of the appeal. Senior Justice Millette participated in the hearing and decision.

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

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Teste:



Clerk

³ “No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal.” Code § 8.01-384(A). The renewal in *Reid* clarified an otherwise ambiguous objection, whereas the nature of the objection in this instance remained unclear.