No. 28241 -- Jonella R. Yates and Donald Yates, her husband v. University of West Virginia Board of Trustees, a statutory West Virginia agency

Starcher, J., concurring:

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I agree with the majority opinion's reversal of the circuit court's judgment for the defendant in the instant case. The instructions given by the circuit court to the jury -- particularly the "mistake of judgment" instruction and the "multiple methods of treatment" instruction -- thoroughly muddled the duty of care that the jury could believe the defendant was required to exercise, and thereby adversely impacted upon the jury's verdict.

The mistake of judgment instruction and the multiple methods of treatment instruction take an objective standard of care and redefine the standard in a subjective, argumentative fashion. As the Court makes clear in the instant case, these instructions simply shouldn't be used.

The "mistake" or "error" of judgment instruction, given by the circuit court, was recently disapproved of by this Court in Syllabus Point 5 of *Pleasants v. Alliance Corporation*, 209 W.Va. 39, 543 S.E.2d 320 (2000) because the giving of a "mistake of judgment" instruction in a medical malpractice case -- or any case -- is fertile ground for jury confusion. A juror's attention should be focused on the essential elements of the action: did the defendant doctor owe the plaintiff a duty of due care, and did the defendant breach that duty? The question "did the doctor make an honest mistake?" wrongly adds moral subjectivity to what is supposed to be an objective duty of care.

The mistake of judgment instruction blatantly suggests that a lesser duty of care exists for medical providers. While the average citizen can be held liable for not being careful under the given circumstances, a "mistake of judgment" instruction implies that a doctor's conduct could be excused if the doctor made an "honest mistake." A juror could infer from the instruction that a doctor can only be held liable for making a "dishonest" mistake – which I guess would mean making a mistake and then lying about it -- or for intentionally harming the patient.

If a driver "honestly" just didn't see that a stoplight was red because he was adjusting the radio and drove through the light, hitting another car and injuring its occupants, and the driver admits that "whoops, I made a mistake, but it was an honest mistake," should we excuse the driver's carelessness? Should we excuse the driver's judgment call to adjust the radio knob rather than watch the road? Of course not. The driver's "mistake of judgment" in not paying attention to traffic signals cannot absolve the driver for any liability. An *amicus* brief filed by the West Virginia Trial Lawyers Association suggests that the "mistake of judgment" instruction in medical malpractice cases comes in many forms, and that a common theme in the instruction is the use of subjective, misleading, and argumentative terms to state the defendant doctor's standard of care. One variant is an "extraordinary or ideal standard of care" instruction, which states:

> Health care providers are bound to conform to the applicable standard of reasonable skill and care. The law does not require infallibility, prophetic insight, or even a satisfactory outcome. The Defendant [health care provider] cannot be held liable for a failure to exercise some extraordinary or ideal degree of care.

Another variation on the theme is a "no retrospect imposed" instruction:

> The jury is instructed that it must consider the conduct of the Defendant [health care provider] based on the circumstances at the time of her treatment of the Plaintiff's decedent; in other words what she knew or reasonably should have known at that time, and without the knowledge that Plaintiff's decedent would later die. Physicians are not charged with prophetic foresight before the fact; neither can they be judged on the benefit of perfect hindsight and retrospect after the fact. They are simply obliged to consider and act upon those things which they, in the exercise of reasonable care, know or should know at the time.

And lastly, there is an instruction that the outcome of a case is not guaranteed:

> You are instructed that under West Virginia law, in the absence of a written guarantee, and it is agreed that no such guarantee was made in this case, a claim against a health care provider cannot be based upon an alleged guarantee that treatment of a patient will be successful or that nothing unfortunate will occur in the process. Rather, the care giver's duty is to exercise that degree of reasonable care and skill which is ordinarily employed by others in the same profession or specialty. Physicians, by undertaking the care of a patient, do not and cannot guarantee against injury or other misfortune. Rather the law imposes only an obligation to use ordinary care. It is, of course, possible that an unfavorable result or consequence will occur notwithstanding the exercise of ordinary care.

Each one of these instructions employs argumentative terms, subjective terms, or terms designed to obfuscate the doctor's simple duty: to act as a reasonable health care provider under similar circumstances. The theme of these instructions is similar: people make mistakes, and when they do, they should be forgiven. While this may be a good rule by which to live, it is not the legal standard by which a tortfeasor is judged. Neither these instructions nor ones similar to them should be given to a jury.

The rule in every tort case is that a defendant owes the plaintiff a duty of care; when a breach of that duty proximately causes another harm, the defendant should be liable for that harm. Whether it was an honest "mistake of judgment," or whether the harm wasn't prophesied by the defendant is irrelevant. The majority's opinion makes clear that this same rule applies to the medical profession.

The multiple methods of treatment instruction[1] can have the same effect as the mistake of judgment instruction, if it is improperly used. A minority of jurisdictions have rejected the instruction outright, but most have simply modified the instruction to limit its use. The majority opinion makes clear that the burden is on a defendant to show that multiple methods of treatment were available to the reasonable prudent doctor to choose between, and these methods were generally recognized within the medical community.

It appears fair to advise a jury, in a complex medical case, that doctors have available varying means to treat patients, all of which might be scientifically accepted. (For that matter, it would be fair to advise any jury in any complex case that the parties' experts are presenting alternative courses of action.) The key, though, is that the instruction should not insinuate that the trial court has found the courses of action to be "accepted" or "appropriate."

The use of terms like "honest" or "best judgment" improperly introduce a "moral" element into the liability analysis. Virtually all errors of professional judgment are honest errors made in good faith. But the doctor's intent or state of mind is simply irrelevant in a negligence analysis.

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[1]One variant of the instruction is called an "alternative courses of action" instruction, which states (with emphasis on the subjective terms added):

> If you conclude by a preponderance of the evidence from [the opinions given by the expert witnesses] that two or more alternative courses of action *could have been* selected by the Defendant as *proper* under the circumstances and that she, in the reasonable exercise of her judgment and consistent with the applicable standard of care, elected one of these *proper* alternatives, you *may* return a verdict in favor of the Defendant, even though you may believe that a better outcome *may* have resulted if an alternative course of action had been elected.

See Amicus Brief on behalf of the West Virginia Trial Lawyers Association at 3-4.

Whether a method of treatment or course of action is "accepted" or "appropriate," and whether the defendant made an "honest" exercise of his/her "best judgment" choosing between those methods or courses, are all determinations which may be disputed by the witnesses, argued by the lawyers, and made final by the fact finder. The fact finder should not be distracted by subjectively-stated instructions which muddle the defendant's duty.

I therefore respectfully concur.