
IN THE
Supreme Court of Virginia

RECORD NO. 081800

ESTHER H. HOWELL,

Appellant,

v.

AJMAL SOBHAN, MD
and
SOBHAN & HOPSON SURGICAL, PC,

Appellees.

BRIEF OF APPELLEES

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NATURE OF THE CASE

This is a medical malpractice case in which the defendant doctor, Ajmal Sobhan, M.D., successfully removed two precancerous polyps from plaintiff Esther Howell's colon. After surgery, Howell developed a "fistula"—a hole in the colon—that needed surgical repair. She also suffered diarrhea. Howell did *not* develop cancer. No one disputes that Howell needed surgery to remove the polyps. Howell simply claims that Dr. Sobhan took out too much colon. And she claims that this caused her fistula and her diarrhea.

Dr. Sobhan defended on the grounds that fistulas and diarrhea were common, albeit unfortunate, complication of intestinal surgery—complications that arise even in the absence of negligence. Howell's own experts agreed with this. Because she could not establish that she would not have suffered her alleged injuries in the absence of negligence, Howell failed to show causation. Thus, Defendants moved to strike at the close of all the evidence. The trial court granted this motion and entered summary judgment for Defendants.

On appeal, Howell assigns a phalanx of errors. Some of these assignments of error relate to the decision granting the motion to strike. Some relate to the trial court's decision to sustain a demurrer to an earlier

Complaint. Some relate to the court's decision to allow counsel to use a PowerPoint presentation during opening statements. And some relate to evidentiary rulings during trial. None of them, however, is stated with any particularity. To a one, the assignments of error fail to identify the specific errors in the rulings that they challenge. Accordingly Howell has not properly perfected her appeal.

Howell's arguments fail on the merits, as well. First, Howell failed to show "but for" causation at trial—i.e., that but for Dr. Sobhan's alleged negligence, she would not have suffered her alleged injuries. Second, Howell failed to adequately allege lack of informed consent and, in any event, has waived any objections to the ruling sustaining Defendants' demurrer because she dropped the informed-consent claim in her Second Amended Complaint. Third, Howell's arguments that she could introduce hundreds of pages of medical records, containing the opinions of absent physicians, runs directly contrary to the rulings of this Court. Fourth, her objections to the PowerPoint presentation are baseless, as the presentation did not show inadmissible evidence. The sole demonstrative exhibit in it was a simple diagram of the colon, which Plaintiff's counsel had himself already agreed was appropriate. Finally, Howell's objections to the various other evidentiary rulings of the trial court fail because the Court did

not abuse its discretion—either by keeping out irrelevant and inadmissible material or by preventing Plaintiff’s counsel’s cross-examination of witnesses from exceeding the scope of direct examination.

Because there was no error below, this Court should affirm.

QUESTIONS PRESENTED

- I. Did appellant fail to perfect her appeal where her assignments of error did not specify with “reasonable certainty” the particular errors of the trial court that she intended to challenge on appeal? (Assignments of Error I-V).
- II. Did the trial court correctly strike the evidence in a medical malpractice case where the plaintiff’s experts failed to establish but-for causation—i.e., that but for the alleged negligence of defendant, plaintiff would not have suffered her alleged injuries? (Assignment of Error I).
- III. Does a party waive any objections to a ruling sustaining a demurrer where, after that ruling, the party amends the complaint but fails to include or incorporate by reference the count that was stricken in the earlier ruling? (Assignment of Error II).
- IV. Does a plaintiff adequately state a claim for lack of informed consent where she does not allege that she would have made a different treatment decision if she had been properly informed? (Assignment of Error II).
- V. Did the trial court abuse its discretion by refusing to allow plaintiff to introduce a set of hundreds of pages of medical records through a lay witness where those records contained the hearsay medical opinions of absent physicians? (Assignment of Error III).
- VI. Did the trial court abuse its discretion in barring testimony about what a doctor told the patient prior to surgery where the complaint does not allege lack of informed consent and the conversations were not otherwise relevant to any issues in the case? (Assignment of Error V).

- VII. Did the trial court abuse its discretion in refusing to allow plaintiff to introduce hundreds of pages of medical records during cross-examination of a treating physician where (1) the records exceeded the scope of direct examination, (2) the witness did not authorize the documents, and (3) many of the documents expressed the hearsay medical opinions of absent physicians? (Assignment of Error III).
- VIII. Did the trial court abuse its discretion in allowing defendants to use a PowerPoint presentation during opening statement to explain their theory of the case to the jury? (Assignment of Error IV).
- IX. Did the trial court abuse its discretion in allowing a gastroenterologist to testify that certain kinds of medical procedures were “unusual” and *not* ones that a gastroenterologist commonly would perform? (Assignment of Error V).

STATEMENT OF FACTS¹

This case arises out of complications from surgery to remove two large, precancerous, polyps from Plaintiff Esther Howell's colon.

In late 2002, Esther Howell's family doctor diagnosed her as having blood in her stool. (JA 211, 338-39). Bloody stools are signs of possible colon cancer. (Tr. 670).² Howell, who was 72 at the time, had never had a

¹ Because this is an appeal from the trial court's decision to strike the plaintiff's evidence, the facts are recited in the light most favorable to Howell. *Graddy v. Hatchett*, 233 Va. 65, 67, 353 S.E.2d 741, 742 (1987).

² Pages that are in the trial transcript, but which have not been included in the Joint Appendix, will be designated “Tr.” For the Court's convenience, those pages are attached to this brief as an Addendum.

colonoscopy. (JA 143). So Howell's doctor referred her to Robin Corbett, M.D., a gastroenterologist, to investigate the matter further.³ (JA 141-42).

On January 10, 2003, Dr. Corbett performed a colonoscopy on Howell. (JA 338). During this procedure, Dr. Corbett discovered three masses in Ms. Howell's colon. (JA 339-44). Dr. Corbett was able to safely remove one mass. (JA 342). But she was unable to remove the other two, which were on opposite sides of the colon, because of their "large" size. (JA 341, 344).

One of these remaining polyps was growing on the ascending right colon, near where the small intestine joins the colon. (343-44). It was large, mostly flat, and "villous"—i.e., with tiny fingers of tissue projecting from it. (JA 343). The other remaining polyp was located on the descending left colon. (JA 339). This was a "pedunculated"—i.e., mushroom shaped—polyp. (*Id.*). It had an "extremely large" base, which made it a poor candidate for endoscopic removal.

Dr. Corbett testified that these two remaining polyps appeared to be cancerous or precancerous. (JA 343-44.) She biopsied the masses, taking

³ Howell claims that she did not know why—other than her age—she was referred to Dr. Corbett for a colonoscopy. But it is undisputed that her doctor had found "occult" (i.e., hidden) blood in her stool and that this was why her doctor referred her to a gastroenterologist.

sesame-seed sized tissue samples from them. (JA 304, 342, 344). These samples both turned out to be “adenomatous,” a type of cell that develops into the most common colon cancer. (Tr. 954-55). Although the biopsied tissues were precancerous, not cancerous, there was still a 40 percent chance that the polyps contained cancer in the unbiopsied area. (JA 307-08). And even if not yet cancerous, the tissue likely would develop into cancer if not removed. (JA 99, 103, 311).

In light of these facts, experts for both sides agreed that the two polyps needed to be removed surgically. (JA 57, 99, 103-04, 224, 228-41, 775, 304-10). Dr. Corbett referred Howell to Dr. Sobhan, a general surgeon, for a “probable subtotal colectomy.” (JA 345). This is a procedure in which more than half, but less than all, of the colon is removed. Dr. Sobhan agreed that a subtotal colectomy was the appropriate procedure for the circumstances. Accordingly, he removed a portion of Howell’s intestines that extended from the end of the small intestine to the sigmoid colon.⁴ He then spliced the remaining ends together—a connection called

⁴ Plaintiff’s experts conceded that approximately 10-15 centimeters—around six inches—of colon remained. (Tr. 220, 376).

an “anastomosis.”⁵ (JA 257). Because cancer had not yet been ruled out, Dr. Sobhan removed a wide “margin” of tissue surrounding the polyps to ensure that he excised all abnormal cells. (Tr. 1003-04). The removed tissue was sent to a pathologist for review. The pathologist concluded that the polyps had not yet developed into cancer.⁶ And he concluded that Dr. Sobhan had successfully removed all of the abnormal cells. (JA 45).

Howell subsequently developed a “fistula”—i.e., a hole that ultimately breaches the skin—at the anastomosis site between the small intestine and colon.⁷ Fistulas are, unfortunately, a common complication of intestinal surgery. (JA 64, 112). Neither of Howell’s experts claimed that Howell’s fistula was the result of any negligence by Dr. Sobhan. (JA 65, 113). One of Howell’s experts—Dr. Hercules—was also the treating physician who

⁵ See MERRIAM WEBSTER’S MEDICAL DESK DICTIONARY 32 (1993) (defining “anastomosis” as “the surgical union of parts and esp. hollow tubular parts”).

⁶ Howell characterizes the polyps as “benign.” But the undisputed evidence was that, left untreated, the polyps likely would have developed into cancer. They were “benign” only in the sense that they had not yet developed into cancer.

⁷ See MERRIAM WEBSTER’S MEDICAL DESK DICTIONARY 244 (1993) (defining “fistula” as “an abnormal passage leading from an abscess or hollow organ to the body surface or from one hollow organ to another and permitting passage of fluids or secretions.”)

attempted to repair this fistula.⁸ As it happened, another fistula developed after Dr. Hercules's attempted repair, requiring further surgical intervention. (JA 117). Ultimately, Howell's fistulas healed and she was released from the hospital.

Howell also complained of loose stools following her surgery.⁹ This, too, is a known complication of intestinal surgery—one that Howell's experts had experienced in their own practices. (JA 65, 326). Howell has not complained to her primary care physician of loose stools since sometime prior to March of 2006. (JA 316-22). As of the time of trial, Howell was 78, healthy, cancer free, and living independently in her own home.

⁸ Howell had also sued her expert, Dr. Hercules, for malpractice. Howell dropped the claims against him and Dr. Hercules then agreed to testify as an expert for her.

⁹ In her brief, Ms. Howell contends that she suffered from a bowel "obstruction" following her surgery with Dr. Sobhan. (Br. at 21). But neither of her experts ever mentioned this issue at trial. It is not, therefore, addressed in this brief.

ARGUMENT

- I. **Howell has not properly perfected her appeal because her assignments of error fail to “list the specific errors in the rulings below” upon which she intends to rely.**

Rule 5:17(c) requires an appellant to articulate the particular errors she wishes this Court to review on appeal:

Under a separate heading entitled “Assignments of Error,” the petition shall list the specific errors in the rulings below upon which the appellant intends to rely. Only errors assigned in the petition for appeal will be noticed by this Court.

In particular, the rule states that an assignment that merely states that the trial court’s ruling was contrary to the law or contrary to the evidence is insufficient:

An assignment of error which merely states that the judgment or award is contrary to the law and the evidence is not sufficient.

Id. The primary function for this rule is “to identify those errors made by a circuit court with reasonable certainty so that this Court and opposing counsel can consider the points on which an appellant seeks a reversal of judgment.” *Friedline v. Commonwealth*, 265 Va. 273, 278, 576 S.E.2d 491, 494 (2003). Failure to comply with it results in dismissal of the appeal. *Id.*

Howell’s assignments of error do not identify the trial court’s errors with the “reasonable certainty” required by Rule 5:17(c). Assignment I, for example, states that “THE TRIAL COURT ERRED IN STRIKING MS.

HOWELL'S EVIDENCE AND ENTERING SUMMARY JUDGMENT FOR THE DEFENDANTS." (Br. at 2). This assignment fails to identify the particular error the trial court committed in striking the evidence.¹⁰ It does not, for example, mention causation—the basis for her current arguments on brief. The assignment instead makes a generic objection to the entry of summary judgment against Howell. But as Rule 5:17(c) states, an assignment that simply states that "the judgment or award is contrary to the law and the evidence" is insufficient. Howell's first assignment of error is just such an assertion. It is, therefore, insufficient as a matter of law. Accordingly, this Court should not recognize Howell's first assignment of error.

Howell's other assignments suffer similar infirmities. The second assignment of error simply states that "THE TRIAL COURT ERRED IN SUSTAINING A DEMURRER ON THE ISSUE OF INFORMED CONSENT." (Br. at 2). Although this assignment registers Howell's disagreement with the demurrer ruling, it fails to "list the specific errors in the rulings below upon which" she intends to raise on appeal. It does not explain why this ruling was erroneous. Assignment three, which states that

¹⁰ The corresponding question presented is equally defective: "WHETHER THE TRIAL COURT ERRED IN STRIKING MS. HOWELL'S EVIDENCE AND ENTERING JUDGMENT FOR DR. SOBHAN." (Br. at 3).

“THE TRIAL COURT ERRED BY EXCLUDING MEDICAL RECORDS AND LIMITING CROSS-EXAMINATION OF DEFENSE WITNESSES,” is even worse, as it potentially encompasses many disparate rulings of the trial court. And as with Howell’s other assignments, it fails to identify the actual error that the trial court committed in making these rulings. Assignment four, which states, “THE TRIAL COURT ERRED IN ALLOWING DEFENSE COUNSEL TO USE A POWERPOINT PRESENTATION AND ‘DEMONSTRATIVES’ DURING OPENING STATEMENTS” likewise fails because it does not identify the error in this ruling. And assignment five, which states that “THE TRIAL COURT ERRED IN LIMITING THE DIRECT EXAMINATION OF MS. HOWELL AND IMPROPERLY QUALIFIED A DEFENSE EXPERT WITNESS,” is so broad and unspecific that it potentially could relate to dozens of trial court rulings.

The purpose of having proper assignments of error is to focus an appeal on discrete legal issues so that opposing counsel and the Court can properly respond to and analyze them. But far from providing “reasonable certainty” about the issues raised on appeal, Howell’s assignments simply amount to blank checks. Because they fail to specify the precise legal error in the trial court’s ruling, the assignments leave her at liberty to shift her arguments on appeal. That is exactly what Rule 5:17(c) is intended to

prevent. Because Howell's assignments of error violate Rule 5:17(c), this Court should summarily dismiss the present appeal.

II. The trial court correctly granted Defendants' motion to strike because Howell failed to establish a causal connection between Dr. Sobhan's alleged negligence and Howell's alleged injuries.

Although not referenced in her assignments of error, Howell's opening brief argues that the trial court erred in striking her case for lack of evidence of causation. This argument fails because (1) establishing causation in a medical-malpractice case requires expert testimony, and (2) neither of Howell's experts established that Dr. Sobhan proximately caused the injuries that Howell claims to have suffered.

A. Standard of review.

"When a motion to strike the plaintiff's evidence is made or renewed at the end of all evidence, the trial court may also consider the evidence presented during the defendant's case in considering the motion." *Austin v. Shoney's, Inc.*, 254 Va. 134, 138, 486 S.E.2d 285, 287 (1997). If, viewing the evidence in the light most favorable to the plaintiff, a verdict on behalf of the plaintiff cannot be sustained, the trial court's decision to strike the evidence must be affirmed. *Graddy*, 233 Va. at 69, 353 S.E.2d at 743 (citations omitted).

- B. A plaintiff in a medical-malpractice case must establish, through expert testimony, that the defendant's deviation from the standard of care caused her injuries.

As in other tort cases, a plaintiff in a medical-malpractice action must show causation: “[I]n any medical malpractice action, one of the elements that a plaintiff must prove is ‘a causal connection between the breach of duty and any claimed injury or damage.’ See *Fruiterman v. Granata*, 276 Va. 629, 637, 668 S.E.2d 127, 132 (2008) (quoting *Naccash v. Burger*, 223 Va. 406, 414, 290 S.E.2d 825, 829 (1982)); *Bryan v. Burt*, 254 Va. 28, 486 S.E.2d 536 (1997) (noting that in medical-malpractice cases, the plaintiff must show that “the negligent acts were the proximate cause of the injury or death.”).

“The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred.” *Doherty v. Aleck*, 273 Va. 421, 428, 641 S.E.2d 93, 97 (2007). In medical-malpractice cases, causation usually must be established through expert testimony. *Perdieu v. Blackstone Family Practice Ctr.*, 264 Va. 408, 568 S.E.2d 703 (2002) (affirming trial-court judgment granting defendants' motion to strike on grounds that plaintiff failed to present expert testimony on liability and causation issues). It is only in “rare instances”

that “expert testimony is not required to prove . . . that breach of the standard of care was a proximate cause of the claimed damages.”

Fruiterman, 276 Va. at 639, 668 S.E.2d at 133.

It is true that proximate cause is ordinarily an issue of fact for the jury to decide. *Fruiterman*, 276 Va. at 637, 668 S.E.2d at 132. But where the evidence on the question is such that “reasonable persons cannot differ,” the court must decide the issue. *Id.* See also *Bryan*, 254 Va. at 36-37, 486 S.E.2d at 540-41 (affirming trial court’s decision to strike the plaintiff’s evidence in a wrongful-death medical-malpractice case because the plaintiff had failed to present sufficient evidence linking the allegedly negligent conduct to the decedent’s death); *Graddy*, 233 Va. at 69, 353 S.E.2d at 743 (noting that “when reasonable persons could not disagree on the facts and inferences drawn from the evidence, [issues of negligence and causation] become questions of law for the court.”).

- C. Howell failed to establish that Dr. Sobhan’s alleged deviation from the standard of care caused her alleged injuries.

In the present case, Howell never established a causal connection between Dr. Sobhan’s alleged negligence and her alleged injuries. Although Howell developed a fistula and had frequent loose stools following surgery, none of the experts testified that Dr. Sobhan’s alleged negligence

caused those post-operative complications. Consequently, Judge Taylor correctly determined that Ms. Howell did not meet her burden of proving that Dr. Sobhan's alleged negligence was a proximate cause of her injuries, correctly struck her evidence, and correctly entered summary judgment for Dr. Sobhan.

As an initial matter, there was no dispute among the experts that the masses in Ms. Howell's colon were at least precancerous. (JA 61, 103-04, 224, 306-10). Nor was there any dispute that these precancerous masses needed to be surgically removed. (JA 57, 103-04, 228-41, 304-05). The only real dispute in this case was the *extent* of the surgery that should have been performed. Although Howell's experts testified that Dr. Sobhan should have performed a more limited resection of Ms. Howell's bowel, they nevertheless agreed that *some* surgery should have been done. More to the point, both of Howell's experts agreed that fistulas and diarrhea are known and predictable complications of *any* bowel surgery, including the limited resections that they recommended. (JA 64-65, 96, 112). And neither of them testified that any negligent act by Dr. Sobhan caused Ms. Howell's injuries.

Fistulas

Take, first, the issue of the fistula. Dr. Ludi admitted that a fistula is a known complication of any bowel surgery and that its development has nothing to do with the amount of colon removed:

Q: You would agree that a fistula is a known complication of any bowel surgery, correct?

A: Correct.

Q: And developing a fistula has nothing to do with the length of the colon removed, true?

A: True.

(JA 64). Relating those principles to the present case, Dr. Ludi agreed that Dr. Sobhan's alleged negligence—i.e., his decision to perform a subtotal colectomy rather than a more limited resection—did not cause Howell's later development of a fistula:

Q: It's not your opinion that any breach on the part of the standard of care caused Ms. Howell to develop a fistula, is it?

A: Correct.

(JA 65). So the testimony of Howell's first expert, Dr. Ludi, plainly did not support the theory that her fistula was caused by Dr. Sobhan's alleged negligence.

Howell's other expert, Dr. Hercules, likewise acknowledged that fistulas can occur any time a surgeon creates an anastomosis in intestinal surgery:

Q: We've heard a lot about anastomosis in this case. Any anastomosis can break down and develop into a fistula, correct?

A: Correct.

(JA 112). And as with Dr. Ludi, Dr. Hercules did not attribute the causation of Howell's fistula to any negligence by Dr. Sobhan. Indeed, Dr. Hercules acknowledged that a fistula could have occurred just as easily had Dr. Sobhan performed the alternative procedure(s) that he (Dr. Hercules) said should have been done:

Q: And you don't have any criticism of Dr. Sobhan as it relates to the development of a fistula in this case, correct?

A: No.

Q: And the fistula in the case could have developed even if he had done a segmental resection as you suggested in this case, correct?

A: Correct.

Q: Even if he had done [a] right hemicolectomy as you suggested?

A: Yes.

(JA 113). In short, Dr. Hercules testified that Dr. Sobhan's alleged negligence was not causally related to the fistula. Consequently, Howell's

claim failed the “but for” test for causation because the fistula would have occurred even if Dr. Sobhan had performed the more limited resection that Dr. Hercules recommended.

In her brief, however, Howell argues that her experts testified that “had Dr. Sobhan performed the correct procedure there was no chance that Ms. Howell would develop a fistula.” (Br. at 24). She cites nothing to support this assertion. In fact, the argument directly contradicts the testimony of Dr. Hercules, who—as noted above—expressly stated that fistulas were also a risk for the more limited resections that he recommended. (JA 113). And it is likewise inconsistent with Dr. Ludi’s testimony that Howell’s development of a fistula was unrelated to the amount of colon that was removed. (JA 64). Indeed, Dr. Hercules testified at trial that the risk of a fistula developing in a subtotal colectomy was identical to the risk of one developing in a more limited colon resection. (Tr. 350) (“[I]t’s still the same risk of fistula.”).¹¹ In short, a fistula can occur

¹¹ The only other testimony on this point was the statement of Defendants’ expert, Dr. Martin Evans, that doing a more limited resection would mean there were two anastomosis—two splicing locations—and, thus, this would actually *increase* the risk of fistulas developing because it would double the number of incisions. (JA 313) (“[Y]ou’ve doubled the risk. You’ve got two hookups and statistically you add those together.”).

whenever you cut the colon, and both of Howell's experts agreed that Howell's colon should have been cut to remove the precancerous polyps.

In her brief, Howell also asserts—again, without any record cites—that Dr. Hercules testified “the technique used for the anastomosis was not appropriate under the circumstances” and “Dr. Sobhan did not utilize appropriate techniques to minimize the possibility of a post surgical fistula to the greatest degree practicable.” (Br. at 23). But Dr. Hercules's only discussion of surgical technique appears at pages 85-86 of the Joint Appendix. There, he notes that Dr. Sobhan used a GIA stapler to splice the sections of colon back together, and that this was *not* a violation of the standard of care. (JA 85-86). Dr. Hercules does not find any fault in Dr. Sobhan's technique. Indeed, as noted above, he did not think that the fistula resulted from any negligence by Dr. Hercules. (JA 113).

At trial, and again on brief, Howell argues that a fistula would not have developed *in the particular place* where it did had Dr. Sobhan performed a more limited resection of the colon. Thus, she elicited testimony from Dr. Ludi and Dr. Hercules that if Dr. Sobhan had resected the bowel somewhere else, a leak would not have developed in the precise place where it actually occurred. (JA 54-55; 87).

That is true, but trivial. Fistulas develop from anastomoses—splicing locations—that do not properly close. (JA 112). If Dr. Sobhan had done a more limited resection, the splicing locations would have been different, so the fistulas would have developed at those locations instead. But as Dr. Hercules admitted on cross-examination, this only meant a change in *where* the fistula occurred. It would not change the fact *that* a fistula occurred:

Q: So the fact that she developed a fistula after this surgery is not the result of Dr. Sobhan doing a subtotal colectomy, is it?

A: The fact that she developed a fistula *where she did* was a result of his surgery because that's where he put the anastomosis, but *the fact that she got a fistula at all* after bowel surgery that unfortunately does occur.

(JA 114) (emphasis added). Dr. Hercules acknowledged that the particular location where the colon was spliced back together did not have an “appreciable” effect on whether a fistula developed:

Q: . . . Dr. Sobhan did not place Ms. Howell at a higher risk of developing a fistula, did he?

A: No, not appreciably. I don't think I said anything bad about her having a fistula other than it's unfortunate it happened.

(JA 114). Nor did Howell present any evidence that the consequences of having a fistula where she did would be worse than having a fistula at the splicing sites that her experts recommended. Indeed, Dr. Ludi testified that

even if the “appropriate” resection had been done, she still would have suffered equivalent injuries from the fistula:

Q: Can you say whether or not the subsequent care and treatment to treat the fistula would have occurred if Dr. Sobhan had done one of the appropriate procedures to a reasonable degree of medical certainty.

A: The answer is yes, he would have had to do all the subsequent treatment that occurred because the fistula was there.

(JA 55). So under a proximate cause analysis, the particular location of the anastomosis was irrelevant. It had no effect on (1) whether a fistula would occur in the first place or (2) the course of future treatment for the fistula. Thus, Howell cannot causally link the alleged negligence with any of her injuries or expenses relating to the fistula.

Diarrhea

Howell’s attempts to establish causation for her alleged chronic diarrhea fail for similar reasons. Again, her experts conceded that loose stools are a common consequence of intestinal surgery. Thus, Dr. Ludi agreed that “frequent multiple stools can be a risk of colon surgery or any intestinal surgery.” (JA 65). Dr. Hercules, too, conceded that he had had patients with “increased bowel movements following [intestinal] surgery.” (JA 96). So both of Howell’s experts supported the trial court’s conclusion

that Howell suffered the ordinary—if unfortunate—complications of bowel surgery.

Neither of Howell’s experts testified that Dr. Sobhan’s alleged negligence was a proximate cause of the loose stools that Ms. Howell allegedly now suffers. Nor could they. Neither of these experts had recently examined Howell. And the medical records that they reviewed did not show that she was currently suffering from any such problem. Indeed, Dr. Anthony Fisher—Howell’s family physician—testified that she had not complained of any diarrhea to him for at least two years prior to trial.¹² (JA 316-22). So even if Howell’s experts had wanted to express an opinion about whether Dr. Sobhan’s alleged negligence caused Howell’s alleged chronic condition, there was an inadequate factual basis for them to have reached that conclusion.

¹² Evidently disappointed with this testimony, opposing counsel took the highly improper step of approaching Dr. Fisher during a recess—while the witness was still on the stand—and buttonholing him about Howell’s condition. Plaintiff’s counsel initially denied this. But Dr. Fisher stated under oath that Plaintiff’s counsel “asked if I was aware that the patient had chronic diarrhea.” (JA 331). The Court ultimately found Plaintiff’s Counsel in criminal contempt for this misconduct.

D. Howell waived any argument that negligence caused her diarrhea.

Howell's diarrhea arguments also fail because they were not adequately made below. In opposing the Motion to Strike, Howell's arguments focused principally on causation of the fistula. (JA 386-87). Her arguments relating to diarrhea occupy the space of a single sentence, in which she asserted—without any supporting explanation or argument—that “the record is overly replete from their experts as well as ours that if you take out this much colon you're going to get diarrhea.” (JA 387).

This proposition is true, but irrelevant. It is consistent with Defendants' theory of the case—i.e., that diarrhea is a common complication of *any* intestinal surgery, including the procedures recommended by Howell's experts. And it is consistent with the trial court's finding that “she did have these complications but they were normal complications that just happened in this case.” (JA 391).

The but-for test required Howell to establish a completely different proposition in order to establish causation: i.e., that but for the alleged negligence, Howell would *not* have developed diarrhea. Thus, in opposing Defendants' motion to strike, it was incumbent upon Plaintiff's counsel to explain why Howell's particular injury was different from what she would have suffered in the absence of negligence. But Howell never argued this

proposition to the trial court—let alone pointed out where in the record his witnesses had established it.

It is too late now for her to do this, as Rule 5:25 bars Howell from presenting arguments to this Court for the first time. (“Error will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling”). “The primary purpose of requiring timely and *specific* objections is to allow the trial court an opportunity to rule intelligently on the issues presented, thereby avoiding unnecessary appeals and reversals.” *Shelton v. Commonwealth*, 274 Va. 121, 126, 645 S.E.2d 914, 916 (2007) (emphasis added). The trial court did not have the obligation *sua sponte* to scour the record of a five-day trial to search for evidence to support a proposition that Plaintiff never argued. Because Howell never argued but-for causation to the trial court, she cannot now establish that Dr. Sobhan’s alleged negligence caused her diarrhea.

- E. Howell’s causation arguments in her brief fail to show that she established “but for” causation.

In her brief, Howell makes a number of arguments to circumvent the problems with her experts’ testimony. First, she appears to argue that she did not need expert testimony to establish causation. (Br. at 19) (arguing that proof of proximate cause “does not have to come through an expert”

because “not . . . every medical malpractice case requires expert evidence on causation”). This argument is a nonstarter.

To begin, the argument was never made to the trial court and, hence, is waived under Rule 5:25. In her arguments opposing Defendants’ Motion to Strike, Howell never claimed that she could establish—or had established—causation without expert testimony. Thus, she is foreclosed from making that argument here.

The argument fails on its merits, too. Whether or not the complications that Howell suffered were the consequence of Dr. Sobhan’s decision to perform a subtotal colectomy instead of a more limited resection is obviously not something within the ordinary understanding of the jury. *Cf. Beverly Enterprises-Virginia, Inc. v. Nichols*, 247 Va. 264, 441 S.E.2d 1 (1994); *Coston v. Bio-Medical Applications of Virginia*, 275 Va. 1, 654 S.E.2d 560 (2008). It requires expert medical knowledge. *See Fruiterman*, 276 Va. at 637-38, 668 S.E.2d at 132; *Perdieu*, 264 Va. 408, 568 S.E.2d 703. Thus, this is not one of the “rare instances” where expert testimony was unnecessary. Howell’s experts’ failure to establish causation was fatal to her case.

Next, Howell cites *Bitar v. Rahman*, 272 Va. 130, 630 S.E.2d 319 (2006), for the proposition that an expert need not be “directly asked”

whether the breach in the standard of care caused the injury.¹³ Howell misapprehends the nature of Dr. Sobhan's argument. The problem was not with the questions posed to Howell's experts. The problem was with their answers. As noted above, they testified that similar complications would have occurred even in the absence of negligence. In *Bitar*, by contrast, the experts testified that the consequences were a "magnitude" different from what the plaintiff would have suffered in the absence of negligence: "I believe with a result of this magnitude something went horribly wrong." *Id.* at 142, 630 S.E.2d at 326. So *Bitar* is wholly unlike the present case.

Howell also relies heavily on *Doherty v. Aleck*, 273 Va. 421, 641 S.E.2d 93 (2007). She claims it shows that a plaintiff can establish causation regardless of whether the same untoward result would have occurred in the absence of negligence. (Br. at 22) ("The mere fact that the problem a patient incurs could have happened without the doctor being negligent does not mean the patient cannot prove causation."). Simply put,

¹³ Howell also cites *Bitar* for the proposition that an objection because physician testimony is not made to "a reasonable degree of medical probability" needs to be made contemporaneously. (Br. at 26-28). But the trial court ruled in *Howell's* favor on that point. (JA 206). And Defendants have not cross-appealed that ruling. So the issue is not before this Court.

she claims that *Doherty* eliminates the “but for” requirement for proximate causation.

Doherty stands for no such thing. In *Doherty*, the plaintiff was an elderly, insulin-dependent diabetic who had had minor surgery to remove a bone spur from his big toe. 273 Va. at 425, 641 S.E.2d at 94-95. As a result of the surgery, his toe became infected and had to be amputated. *Id.* The plaintiff claimed that surgery never should have been performed on him. His experts testified that his medical history made him a “poor candidate” for surgery, that surgery “was not medically necessary,” and that it was negligent to perform any surgery on him. *Id.* at 427, 641 S.E.2d at 96. In response, the defendant argued that there was nothing negligent in the way the surgeon performed the procedure.

In analyzing this argument, the Court observed that “the question in this case is not whether Dr. Aleck was negligent in the way she performed the spur-removal surgery on Doherty’s toe . . . , but whether she was negligent in performing the surgery at all.” *Id.* at 427, 641 S.E.2d at 96. And this Court emphasized that the record established that “but for Dr. Aleck’s surgery, Doherty would not have suffered the amputation of his toe.” *Id.* at 429, 641 S.E.2d at 97. In light of this evidence, the Court found proximate cause connecting the alleged negligence (i.e., performing any

surgery at all) and the alleged injury (i.e., the amputation of the toe). Thus, contrary to Howell's characterization, *Doherty* does not stand for the proposition that a physician can be held liable for an injury that would have occurred "without the doctor being negligent." Rather, the negligence at issue in *Doherty* was the decision to perform any surgery at all, given the poor condition of the patient.

In the present case, by contrast, all experts agreed that surgery was appropriate to remove Howell's precancerous polyps. The only dispute was the extent of the surgery that should have been performed. But as noted above, *all* experts agreed that diarrhea and fistulas are known and predictable complications of *any* bowel surgery, including the limited resections recommended by Howell's experts. (JA 64-65, 96, 112). So in the present case, unlike *Doherty*, the but-for test has *not* been met. Even considering all the evidence in the light most favorable to Howell, it simply is not true that but for Dr. Sobhan's negligence, Howell would not have had a fistula or more frequent loose stools. These complications unfortunately happen.

Finally, Howell argues that the present case "is analogous to cases where a physician leaves a sponge in the patient or where the doctor fails to diagnose appendicitis and the appendix ruptures." (Br. at 25) (citing

Easterling v. Walton, 208 Va. 214, 156 S.E.2d 787 (1967)). The point, apparently, is that by performing a subtotal colectomy rather than a more limited resection, Dr. Sobhan put Howell at a greater risk for a fistula, which in turn required future surgical intervention. But as noted above, there is no factual support for this argument. Howell's experts conceded that the procedure Dr. Sobhan used (1) did not put Howell at an appreciably higher risk of developing a fistula, and (2) did not necessitate any different care from what Howell would have needed if the fistula had developed from an "appropriate" procedure. So this is wholly unlike a malpractice case where physician error creates the need for future surgical intervention.

* * *

At the end of the day, Ms. Howell failed to meet her burden to "establish a causal connection between [Dr. Sobhan's] alleged negligence and the injury of which [she] complains." *Atrium Unit Owners Assoc. v. King*, 266 Va. 288, 295, 585 S.E.2d 545, 549 (2003). Because reasonable minds could not have differed on the issue of proximate cause, the trial court correctly granted the motion to strike and entered summary judgment for Dr. Sobhan.

III. The trial court correctly sustained the Demurrer to Howell's informed-consent claim.

In her second assignment of error, Howell claims that the trial court erred in sustaining Defendants' Demurrer to the informed-consent claim that she had included in her First Amended Complaint. This argument fails because (1) the informed-consent claim was not included in her Second Amended Complaint and, thus, the issue cannot be reached, (2) the trial court correctly sustained the demurrer to the informed-consent claim, and (3) Howell has not preserved the record on this issue.

- A. Howell's informed-consent argument is barred because she failed to allege lack of informed consent in her Second Amended Complaint.

Howell has appealed the trial court's March 28, 2007 ruling sustaining Defendants' Demurrer to the informed-consent claim in the First Amended Complaint. (JA 14-15; 20-21).¹⁴ On May 18, 2007, Howell filed a Second Amended Complaint, which omits any claim for informed-consent. (JA 8-13). She made no further amendments after this.

Where, as here, a party amends her complaint following a ruling sustaining a demurrer, she waives any right to object to that ruling unless

¹⁴ The First Amended Complaint was not made part of the Joint Appendix. The Joint Appendix references are to the trial court's letter opinion and order sustaining the demurrer.

the amended complaint incorporates or otherwise refers to the prior pleading. *Dodge v. Trustees of Randolph-Macon Women's College*, 276 Va. 10, 661 S.E.2d 805 (2008). In *Dodge*, the trial court sustained a demurrer to the plaintiffs' original complaint. The plaintiffs filed an amended complaint, and the trial court sustained a demurrer to that, too. On appeal, the plaintiffs argued that the trial court had erred in sustaining *both* demurrers. This Court, however, refused to entertain any arguments regarding the demurrer to the original complaint, noting that the amended complaint failed to incorporate or refer to it:

The plaintiffs contend that the circuit court erred by sustaining the demurrer to the complaint and the amended complaint. We will not consider the plaintiffs' contentions that relate to the circuit court's judgment sustaining the demurrer to the plaintiff's original complaint. The plaintiffs failed to incorporate or refer to their initial complaint in the amended complaint

Id. at 14, 661 S.E.2d at 807 (citing *Hubbard v. Dresser, Inc.*, 271 Va. 117, 119-20, 624 S.E.2d 1, 2 (2006)).

Like *Dodge*, the Second Amended Complaint in the present action does not "incorporate or refer to" the First Amended Complaint—the complaint as to which Howell claims the trial court improperly sustained the Demurrer. As in *Dodge*, therefore, this Court should refuse to "consider the plaintiff's contentions that relate to the circuit court's judgment sustaining the demurrer." *Id.*

- B. The trial court correctly sustained the demurrer to Howell's informed-consent claim because she failed to allege causation.

When reviewing a trial court's order sustaining a demurrer, this Court has held that "we are required to address the same issue that the trial court addressed, namely whether the amended [complaint] alleged sufficient facts to constitute a foundation of law for the judgment sought." *Eagle Harbor, L.L.C. v. Isle of Wight County*, 271 Va. 603, 611, 628 S.E.2d 298, 302 (2006). For a plaintiff to "survive a challenge by demurrer, [her amended complaint] must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *Id.* (internal quotation marks and citations omitted).

Lack of informed consent is a negligence-based claim, and a plaintiff therefore must allege a duty, breach, causation, and damages in order to plead a prima facie case of informed consent. See *Tashman v. Gibbs*, 263 Va. 65, 74, 556 S.E.2d 772, 777-78 (2002); *Bly v. Rhoads*, 216 Va. 645, 648, 222 S.E.2d 783, 785 (1976). In other words, Ms. Howell needed not only to plead that Dr. Sobhan failed to inform her of the risks of surgery, *but also* that those "negligent omissions were a proximate cause of the injury sustained." *Tashman*, 263 Va. at 76, 556 S.E.2d at 779. To allege proximate cause in an informed consent case, a plaintiff must allege that

she would have decided against having the procedure had she been fully advised of the risks of proceeding. *Id.*

Although Howell alleged that Dr. Sobhan failed to inform her of the risks of surgery, she failed to allege that she would not have undergone the surgery had she been advised of the risks. Therefore, she failed to state a claim for lack of informed consent under *Tashman* and *Bly*. Thus, the trial court correctly sustained the demurrer to the claim of lack of informed consent in Ms. Howell's Amended Complaint.

C. Howell failed to preserve her arguments regarding demurrer.

Even if Howell had properly stated a claim for lack of informed consent—and she did *not*—this Court cannot consider her objections to the demurrer because she failed to preserve her objections pursuant to Rule 5:25. Rule 5:25 states that “[e]rror will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling.” Howell’s counsel endorsed the court’s order as “seen and objected to for the reasons stated in the pleadings and at oral argument.” (JA 22). He did not reference the portion of the order to which he was objecting, and he gave no explanation of the grounds for his objection.

Furthermore, to the extent that Howell's attorney seeks to endorse the order with a general objection and a reference to another portion of the record, those portions of the record must be provided to this Court. As this Court has said before, "The record must contain all evidence necessary and material for the appellate court to determine the existence of errors in the trial court transcript." *Wansley v. Commonwealth*, 205 Va. 419, 422-23, 137 S.E.2d 870, 873 (1964). Howell, however, failed to file the transcripts of the hearing on the demurrers as required by Rule 5:11(b). Because Howell failed to file the transcripts of those hearings (which would arguably allow this Court to know what objections were made at oral argument) or a written transcript of the proceedings pursuant to Rule 5:11, "[a]ny assignments of error affected by the omission shall not be considered" by this Court. Rule 5:11(b); see also *Towler v. Commonwealth*, 216 Va. 533, 221 S.E.2d 119 (1976).¹⁵

¹⁵ The remaining Assignments of Error deal with issues unrelated to striking Howell's case, and are only relevant if Court finds a retrial to be necessary. They do not need to be addressed if the Court finds that the trial court appropriately struck Howell's case.

IV. The trial court did not abuse its discretion in refusing to allow the wholesale introduction of medical records that contained the opinions of absent treating physicians.

A. Standard of Review.

A trial court's evidentiary rulings are reviewed on appeal pursuant to an abuse of discretion standard. *Riverside Hospital, Inc. v. Johnson*, 272 Va. 518, 529, 636 S.E.2d 416, 422 (2006). Explaining this standard, this Court has clearly stated, “[w]e will not overturn a trial court’s exercise of its discretion in determining whether to admit or exclude evidence on appeal unless the evidence shows that the trial court abused its discretion. . . . A great deal must necessarily be left to the discretion of the court of trial in determining whether evidence is relevant to the issue or not.” *Id.* (internal quotations and citations omitted).

B. The medical records that Howell sought to introduce contained the inadmissible hearsay opinions of absent health care providers.

During her case-in-chief, Howell attempted to admit *all* of her medical records—comprising hundreds of pages of documents¹⁶—into evidence through her own testimony. (JA 192-97). Defendants objected on hearsay grounds, explaining that many of those records contained the opinions of

¹⁶ Some of these records appear at pages 392-859 of the Joint Appendix.

absent physicians and, thus, were inadmissible. (Tr. at 617¹⁷; JA 620-21). Although the trial court initially allowed this wholesale introduction of medical records, (JA 621), it subsequently reconsidered that ruling and held that the records could *not* be admitted in this omnibus fashion. (JA 742). This latter ruling was proper and should not be disturbed on appeal.

The trial court based its ruling on this Court's opinions in *Neeley v. Johnson*, 215 Va. 565, 211 S.E.2d 100 (1975) and *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989). In *Neely*, as here, the plaintiffs contended that "the whole hospital record should have been admitted under the business records exception to the hearsay rule." *Id.* Those records, as here, contained "handwritten and typewritten notes recording matters of fact intermingled with expressions of opinion." *Id.* This Court rejected the plaintiffs' arguments and "refuse[d] to extend the exception to include opinions and conclusions of others recorded in hospital records." *Id.*

In *McMunn*, this Court further explained the policy rationale for excluding the hearsay testimony of absent physicians. This was a dental malpractice case in which the defendant sought to introduce the records of one of the patient's treating physicians, who had opined that the plaintiff

¹⁷ This page was not included in the Joint Appendix. Counsel objected to the introduction of Plaintiff's Exhibits 1-9, stating "Obviously our objection on that is hearsay. It's hearsay records of providers"

might have a “factitious disease, you know, self induced.” 237 Va. at 563, 379 S.E.2d at 911. The physician who made that statement did not testify at trial. The Court held that this statement was inadmissible, noting the extreme unfairness of allowing the hearsay opinions of absent physicians to come into evidence:

The admission of hearsay expert opinion without the testing safeguard of cross-examination is fraught with overwhelming unfairness to the opposing party. No litigant in our judicial system is required to contend with the opinions of absent “experts” whose qualifications have not been established to the satisfaction of the court, whose demeanor cannot be observed by the trier of fact, and whose pronouncements are immune from cross-examination.

Id. at 566, 379 S.E.2d at 912.

In the present case, Howell failed to present testimony from the health care providers who actually authored the records she sought to introduce. Many of those records contain exactly the sort of medical opinions warned about in *Neeley* and *McMunn*. Howell made no effort to redact the hearsay opinions from those medical records. Nor did she ask the trial court to admit selected records or certain portions of those records. Instead, she attempted to enter several binders of medical records, containing hundreds of pages, into evidence. The trial court properly refused this request and denied her motion to introduce the records.

In her argument on appeal, Howell mischaracterizes the trial court's ruling. She claims that the court "*excluded* the medical records in their entirety." (Br. at 36) (emphasis added). But the court did no such thing. The matter was *not* a ruling on a motion to exclude. It was a ruling on Howell's motion to introduce these records *all at once*, without any supporting testimony by the various health care providers whose opinions the records contained. If Howell wanted to introduce those portions of the records that did not contain hearsay opinions of absent physicians, she could have moved to do so. And if Howell wished to present the testimony of the physicians whose opinions were expressed in those records, she could have done that, too. But she could *not* do what she actually attempted to do—introduce into evidence, without any redaction, notebooks full of medical records that were replete with the opinions of absent physicians. The trial court did not abuse its discretion in denying Howell's motion.

V. The trial court did not err in refusing to allow Howell to introduce medical records on cross-examination of Dr. Fisher that were never discussed during Defendants' direct examination of him.

Howell also attempted to introduce medical records during Dr. Sobhan's case-in-chief. Thus, during her cross-examination of Dr. Fisher, Howell's family doctor since 2006, she attempted to introduce all of

Howell's records that were in the possession of Dr. Fisher's practice. These included the voluminous records of *other* health care providers.¹⁸ (JA 324-29). Dr. Fisher was not the author of those records. (JA 329). And the records were not discussed during direct examination.¹⁹ Moreover, they contained the impressions and opinions of absent physicians and, thus, were inadmissible under *Neeley*. Defendants objected to Howell's attempt to introduce these records into evidence—both because the materials exceeded the scope of direct examination and because they contained inadmissible hearsay under *Neeley*.²⁰ (JA 324-30). The trial court agreed and refused to allow Howell's Exhibit 8 into evidence. This was not an abuse of discretion.

In her appeal, Howell fails to explain how the trial court erred in this ruling. To begin, she fails to show how any of the documents in question relate to Dr. Fisher's testimony during direct examination. This testimony,

¹⁸ These are reproduced on pages 681-853 of the Joint Appendix.

¹⁹ The documents discussed during direct examination were limited to those that Dr. Fisher had himself authored. (JA 325).

²⁰ In her brief, Howell complains about other rulings of the Court during cross-examination of defense witnesses. But she fails to explain—either in her questions presented or on brief—how these rulings were in error. Because she has completely failed to provide any legal support for her desultory critique of the trial judge's rulings, this Court should not consider these points.

which appears at pages 316-22 of the Joint Appendix, was very focused. In a nutshell, Dr. Fisher testified that (1) Howell never complained of diarrhea when he treated her, (2) none of the records that Dr. Fisher authored reflected any complaints of diarrhea, and (3) if Howell had complained to him of diarrhea, this would have been reflected in Dr. Fisher's records.

At trial—and again in her brief—Howell failed to explain how the records in the refused Exhibit 8 relate to Dr. Fisher's direct testimony. Instead, she makes much of the fact that—in a proffer outside the presence of the jury—she elicited testimony from Dr. Fisher that he reviewed the records from other health care providers when he treated her. But this was not relevant to any of the issues raised during direct examination. The quality of Dr. Fisher's care was not the subject of direct examination. Nor was his review of the records otherwise at issue. The sole line of inquiry was whether Howell had ever made any complaints to him about diarrhea. Most of the records in Exhibit 8 predated Fisher's care of Howell and did not speak to this question.²¹ Thus, the records—even if considered by Dr.

²¹ Some of the records in Exhibit 8 were Dr. Fisher's treatment notes, which had been admitted as Defendants' Exhibit 12, reproduced at pages 958-81 of the Joint Appendix.

Fisher—were beyond the scope of direct examination and, hence, were not the proper subject of cross-examination.

Howell also fails to explain how Exhibit 8, which contains hundreds of pages of records of absent health care providers (including their medical opinions), would be admissible under *Neely*. Thus, even if Dr. Fisher's opinions were at issue (and they were *not*), and even if he considered those documents when reaching those opinions, it still does not follow that those records would be admissible. For reasons explained in *Neely* (see *supra*) the records could not be admitted in the wholesale fashion that Howell attempted. The trial court did not abuse its discretion in disallowing it.

VI. The trial court did not abuse its discretion in limiting the scope of Dr. Sobhan's cross-examination.

A. The question is not properly presented on appeal.

On page 40 of her brief, Howell complains about a number of rulings made by Judge Taylor sustaining objections made by counsel for Dr. Sobhan. In her assignment of error, however, she failed to specify which of these rulings she believed was erroneous. "The purpose of exceptions in the court below and assignments of error in this court is to point out the specific error committed by the trial court. Counsel should be required to 'lay his finger on the error.'" *Omohundro v. County of Arlington*, 194 Va.

773, 778, 75 S.E.2d 496, 499 (1953) (citing *Bank v. Trigg Co.*, 106 Va. 327, 342, 56 S.E. 158, 163 (1907)). For this reason, this Court should not consider this Assignment of Error.

- B. What Dr. Sobhan told Howell about cancer was irrelevant because the informed-consent issues had been dropped from the case.

In the event this Court does consider this assignment, Howell's arguments should be rejected because the trial court's ruling was proper. During direct examination of Howell, Plaintiff's counsel asked whether "in any of the discussions" she had with Dr. Sobhan, the doctor had told her she "had cancer." (JA 150). This question arose in the context of a series of questions about what Dr. Sobhan told her about the procedure prior to surgery. Defendants objected, *inter alia*, because this was not relevant to any of the issues in the case—the informed consent claim had already been dropped. (*Id.*). The trial court sustained the objection. On appeal, Howell contends that this ruling was erroneous because the testimony was relevant inasmuch as "[t]he defense theory of the case . . . was that the surgery Dr. Sobhan performed was needed or proper because the polyps he removed were cancerous or precancerous." (Br. at 40).

This argument fails for two reasons. First, it was never made to the trial court, and hence was waived on appeal. Rule 5:25. Second, what Dr.

Sobhan *told* Howell was irrelevant because the informed-consent claim already had been stricken from the case. What mattered was what Dr. Sobhan *knew*, or should have known, at the time of surgery. And on that fact, there is no dispute. Dr. Sobhan had the results of the biopsies of the polyps and knew that—if not already cancerous—the polyps were a type that, if left untreated, were very likely to develop into cancer. Howell's testimony could shed no further light on that fact. The question was instead an obvious, and improper, attempt to inject informed-consent issues into the case. The trial court did not abuse its discretion in sustaining defendants' objection to this question.

VII. The trial court did not abuse its discretion by permitting the use of demonstrative aids during opening statements

During opening statements, defense counsel used a PowerPoint presentation to explain their theory of the case to the jury. The presentation contained a single diagram of the colon. There were no photographs, no videos, no drawings identifying tumors or other demonstrative exhibits within the PowerPoint. The remainder of the presentation contained bullet points of the words that counsel was speaking, akin to writing the same information on a large pad of paper propped on an easel in front of the jury.

The PowerPoint presentation was never made part of the record. Plaintiff instead bases her arguments on diagrams that were produced pursuant to the trial court's scheduling order. In particular, she objects to a diagram that depicted a cancerous colon.²² But this diagram was *not* used during Defendants' opening statement. Moreover, Plaintiff's counsel stipulated that it would be "fine" for Defense counsel to use any diagram that previously had been produced to him:

I've looked at their diagram, they've looked at mine. If they want to use the diagrams they produced to me, fine.

(Tr. 21). And at trial Howell did not object to any particular slide that was used. He just objected generically to the possible use of prejudicial demonstratives and diagrams in the PowerPoint.

The use of demonstrative aids is a matter that is entrusted to the sound discretion of the trial judge. See *Jackson v. Commonwealth*, 267 Va. 178, 203, 590 S.E.2d 520, 533 (2004). In determining what counsel for both parties could utilize during opening statements, Judge Taylor relied upon this Court's decision in *Baker Matthews Lumber Co. v. Lincoln Furniture Mfg. Co.*, 148 Va. 413, 139 S.E. 254 (1927). There, this Court

²² The sole mention of this diagram during Defendants' opening statement appears at page 140 of the trial transcript. This is a general discussion of the anatomy of the region. Cancer is not mentioned at all.

explained that the purpose of opening statements is to inform the jury at an early stage of the issues to be decided by them. *Baker*, 148 Va. at 420, 139 S.E. at 256. The scope of the opening statement is necessarily very wide, and “it is just as much under the control and judgment of the court as the introduction of evidence. . . .” *Id.*

The PowerPoint presentation was merely demonstrative. It was not evidence and was used, like the old pads of paper, to help counsel explain their theory of the case to the jury. Under the circumstances, one cannot say that it was an abuse of discretion to allow the use of demonstrative aids during opening statements.

VIII. The trial court did not abuse its discretion by permitting Dr. Heuman, a gastroenterologist, to rebut Howell’s assertion that a gastroenterologist should have participated in the surgery.

During his case-in-chief, Dr. Sobhan called Dr. Douglas Heuman, a gastroenterologist, to rebut testimony given by one of Howell’s experts, Dr. Hercules. Dr. Hercules had suggested that Dr. Sobhan should have had a gastroenterologist present during the surgery to resect one of the masses from Howell’s colon by inserting a “snare” into her rectum while she was open on the operating table. (JA 110-11). Defense counsel elicited testimony about Dr. Heuman’s qualifications. (JA 280-88). He was qualified as an expert in the fields of internal medicine and

gastroenterology to discuss, *inter alia*, whether it was the standard of care for gastroenterologists to participate in these types of procedures. (JA 292-93).

“[W]hether a witness is qualified to testify as an expert is largely within the sound discretion of the trial court.” *Dagner v. Anderson*, 274 Va. 678, 685, 651 S.E.2d 640, 644 (2007). Here, the trial court could consider the witness’s credentials and testimony to determine whether he was qualified to testify as an expert witness. Notably, Dr. Heuman testified that he had diagnosed and treated patients with colon polyps, removed colon polyps via endoscope and consulted with surgeons contemplating resection of the colon, including the difficulty of removing masses via endoscope. (JA 282, 286-87). He is board certified in two different specialties and serves as a professor at the Medical College of Virginia. (JA 282, 284). He was not being asked to testify about the performance of the subtotal colectomy. Rather, he was being asked whether gastroenterologists, like himself, participate in the types of procedures suggested by Dr. Hercules. Certainly, a board-certified physician with twenty-five years of experience was qualified to discuss this issue, and the trial court did not abuse its discretion in allowing Dr. Heuman to testify on the limited issue raised by Howell’s expert, Dr. Hercules.

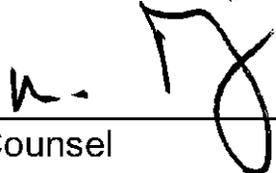
Howell, however, argues that Dr. Heuman was not qualified to testify because he had no experience with the procedure discussed by Dr. Hercules. (Br. at 41). But that was exactly the point. Dr. Heuman testified that he had never performed the procedure being suggested by Dr. Hercules because this was not a procedure performed by gastroenterologists and would, in fact, be “quite . . . unusual.” (JA 297-98). Indeed, in his twenty-five years as a gastroenterologist, he had never seen any of his associates perform this procedure. *Id.* Dr. Heuman testified that such an “unusual” procedure was *not* the standard of care in Virginia. (*Id.*)

Dr. Heuman was more than qualified to offer the opinions for which he was offered by Dr. Sobhan. There was, therefore, no abuse of discretion in allowing his testimony at trial.

CONCLUSION

Because there was no error below, Defendants respectfully request that this Court affirm the trial court’s judgment for Defendants.

AJMAL SOBHAN, MD, and
SOBHAN & HOPSON SURGICAL, PC,

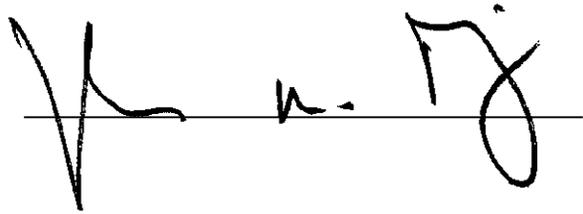


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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

The undersigned hereby certifies that on this 5th day of May, 2009, the requirements of Rule 5:26(d) have been complied with. On this same day, an electronic copy of this brief was delivered to the Clerk's Office of the Supreme Court of Virginia via e-mail.

A handwritten signature in black ink, appearing to be "K. N. J.", is written over a horizontal line.

1 medical record. Anything that was demonstrative in
2 nature that we may show has already been produced to
3 him.

4 We're certainly allowed to use a Power
5 Point presentation that shows our work product which
6 is our thoughts. It is no different than if he wanted
7 to get up and show his thoughts. We're not asking
8 Mr. Warren for his yellow legal pad and asking him to
9 read his opening statement, and that was what he was
10 asking us to do is give him essentially our yellow
11 legal pad and that is not appropriate.

12 We're not putting up anything that he
13 hasn't already seen in the way of a demonstrative.
14 It's no different, it's like me asking to read his
15 direct examination of Dr. Hercules just because in
16 that direct examination he might show Dr. Hercules a
17 diagram of the colon. That is not appropriate, Your
18 Honor. We're absolutely entitled to put up a Power
19 Point presentation, talk to this jury and tell them
20 what the evidence will show. Now we have to go on
21 ahead and show them that evidence. If we don't, well,
22 then that's our problem. The jury can consider that.
23 But as far as any demonstrative evidence that we show,
24 we have already produced to him.

25 We're not asking him for his notes because

1 Q That certainly indicates that Ms. Howell
2 was left with sigmoid colon, doesn't it?

3 A About 10 to 15 centimeters maybe sigmoid,
4 yes, but that's only the width of your hand.

5 Q 10 to 15 centimeters?

6 A 10 centimeters.

7 Q It's your testimony that if she has 30
8 centimeters now after two fistula repairs that she was
9 only left with 10 to 15 centimeters after Dr. Sobhan's
10 surgery of January 17th, 2003?

11 A Are you talking about sigmoid and/or
12 rectum or separate?

13 Q Separate.

14 A Yes. 10 to 15 centimeters of rectum and
15 the other 10, 15 centimeters would be rectosigmoid or
16 sigmoid.

17 Q You agree that nothing in Dr. Sobhan's
18 January 17th operative report suggests that he fell
19 below the standard of care in performing this surgery,
20 correct?

21 A Not in what he wrote.

22 Q And you agree, don't you, that it's not
23 always a breach of the standard of care when a patient
24 suffers a postoperative complication, true?

25 A True.

1 area having an anastomosis doesn't mean that another
2 area has a higher chance of having a fistula. It's
3 still the same risk of fistula.

4 Q And so it follows then that whether you do
5 an anastomosis as you contend here or whether it's
6 here or here, the patient is not at any greater risk
7 of developing the fistula, correct?

8 A Well, you only get the fistula the chances
9 where you put your anastomosis if it's an anastomotic
10 fistula.

11 Q I understand that, but my question is the
12 location of where your anastomosis is does not place
13 the patient at any greater risk of developing a
14 fistula, correct?

15 A No, it's probably a little slightly higher
16 down in the pelvis, but not much.

17 Q Can you say to a reasonable degree of
18 medical probability that is as you allege that the if
19 anastomosis is down here that placed Ms. Howell at
20 greater risk of developing a fistula?

21 A Slightly. Very slightly because it's
22 harder to work down in the pelvis and it's easier to
23 work other places in the bowel.

24 Q Was she at less chance of developing a
25 fistula if as you say?

1 Q And that's not where the anastomosis is?

2 A This is 10 centimeters from here to there
3 and I've measured. This is 10 centimeters.

4 Q And he had to go up 30 centimeters?

5 A From here, yes.

6 Q And he had to go up 30 centimeters before
7 he ever hit the anastomosis?

8 A Yes, if this is about 20 and the
9 anastomosis is at 10.

10 Q So now your testimony is from what?

11 A From anus to the top of the rectum is
12 between 17 and 20 cm. He went to 30 and encountered
13 the anastomosis so that there were 10 centimeters of
14 colon.

15 Q So your testimony is that the anus is how
16 big?

17 A Not the anus, the length from the anus to
18 the top of the rectum is 17 to 20 cm.

19 Q And then there was 10 centimeters left?

20 A Above that.

21 Q Right, before he hit the anastomosis?

22 A Correct.

23 Q So the anastomosis was not here, correct?

24 A Well, I'm saying that the rectum was
25 somewhere in here. This is not the rectum, that's

1 MS. FOSTER: We were never provided a copy
2 before he presented them to the witness so I have no
3 idea what they are.

4 MR. WARREN: They were all provided in
5 discovery. They subpoenaed each one of the documents
6 themselves and I have an extra copy if they want it.

7 THE COURT: We can just take their
8 objections, we can take them one by one and then we'll
9 just go from there and if we can do that now.

10 MS. FOSTER: My preference would be to
11 wait so we can get the next witness on and even take
12 up the motions after. I mean we are --

13 MR. WARREN: I strongly object. I have
14 moved these documents into evidence. I intend to use
15 them with different witnesses if they intend to call
16 any, and I move these into evidence so they can be
17 published to the jury.

18 THE COURT: Since he may have to use them,
19 assuming that whether they come in or not.

20 MS. FOSTER: I haven't seen them.

21 THE COURT: Let's take one, the book of
22 records.

23 MS. FOSTER: Obviously our objection on
24 that is hearsay. It's hearsay records of providers
25 that unless they're going to be called to testify or

1 A Yes, he performed the colonoscopy at that
2 time, or she.

3 Q And what was the reason, based on that
4 record, for her to perform that colonoscopy?

5 A There had been a instance where there was
6 some blood in the patient's stool which is an
7 indication of possible colon cancer or colon polyps.

8 Q And the remarkable findings on that
9 colonoscopy included a discussion regarding a polyp
10 and two lesions.

11 Can you tell the ladies and gentlemen of
12 the jury how she described the base of the polyp on
13 the left side of the colon?

14 A She described a large pedunculated polyp.
15 Pedunculated polyp is sort of like a mushroom and in
16 this case the top of the mushroom was quite large and
17 the stalk of the mushroom was also quite large
18 diameter-wise.

19 Q Is there any significance to the fact that
20 she described the base of that polyp as being
21 extremely broad?

22 A Well, that's similar to what I said, it's
23 a large, broad-based polyps which indicates that it
24 would be difficult or dangerous to try to remove this
25 polyp at a colonoscopy.

1 A Esther Howell, 1/10/03, CT of the abdomen
2 and pelvis, right colon mass, left colon mass, reason
3 for CAT scan, my signature and my office number at the
4 bottom of the page of the order.

5 (Corbett Exhibit 6 marked)

6 Q And do you recognize the report that I
7 have handed you?

8 A Yes, I do.

9 Q And what do you recognize it as?

10 A This is a pathology report.

11 Q And it looks like it was done by a Dr.
12 O'Connell?

13 A Yes.

14 Q On January 13th, 2003?

15 A Yes.

16 Q And do you believe that this was the one
17 that was done due to the biopsies that you took on the
18 10th?

19 A Yes.

20 Q Okay. Under diagnosis it states "(A),
21 Proximal ascending colon, Biopsy: Adenomatous polyp."

22 What is an adenomatous polyp?

23 A Adenomatous polyp, extensively papillary,
24 these are the polys that grow into colon cancer. Mild
25 dysplasia means that there were some precancerous

1 cells.

2 Papillary, just how the polyp looks under
3 the microscope.

4 Q Mild dysplasia means there was
5 precancerous cells?

6 A Yes.

7 Q Under B it also states adenomatous polyp
8 for the biopsy at 50 centimeters?

9 A Yes.

10 Q And this also states mild dysplasia?

11 A Yes.

12 Q So both the polyp on the left side and the
13 mass on the right side were precancerous, is that
14 true?

15 A True.

16 Q And both of them could have turned into
17 malignant cancer, true?

18 MR. WARREN: Objection to the form of the
19 question. Calls for speculation. You can answer.

20 A When we biopsy polyps, remember, our
21 biopsies are small, you know. We take biopsies at
22 different areas on a polyp. There's still areas where
23 there could be cancerous tissue, as in the right colon
24 or ascending colon polyp.

25 Q Based on these findings you could not rule

1 I do not believe in frozen section because
2 they're highly fraught with error and I have to do
3 cancer surgery and in doing cancer surgery in two
4 disparate areas of colon the first chance is the best
5 chance you have. And I wanted to do a conclusive and
6 appropriate surgery and that would be a subtotal
7 colectomy.

8 Q And when you say do a cancer surgery, what
9 do you mean when you say that?

10 A Cancer surgery requires you to take wide
11 margins. Consider the circulation. Consider the
12 lymphatic flow. It does not mean take a little bit
13 here. You have to go through the whole circulatory
14 process and the lymphatic journey and the meso colon
15 which wraps the colon along with the wall. So all
16 these intestines have their own artery supply and in
17 order to do cancer surgery you have to go to the root
18 of the mesentery. You have to go to the root of the
19 arteries and lymphatics and tie them off far away from
20 the lesion.

21 I don't want to get anywhere close to the
22 lesion. Anytime you handle by palpation or by doing
23 something to that lesion you have a great chance of
24 spreading cancer or spilling cancer. You treat it
25 gingerly, respectfully. Stay away from the lesion and

1 take a wide margin to remove the lesion and that's
2 cancer surgery. That's basic principle of cancer
3 surgery that I have known 30 years. I was taught it
4 in residency and I still believe it.

5 Q Did you consider that you didn't know for
6 sure that there was a malignancy or not a malignancy
7 prior to doing the subtotal colectomy?

8 A Yes, I did consider. That consideration
9 there, but I cannot find out the true form of this
10 lesion beforehand. I have to do the cancer surgery
11 hoping that if it is cancer I've removed it. If it is
12 not cancer, thank God for that because you have done
13 the proper surgery. You cannot get a diagnosis on the
14 spot because it will be very, very fraught with danger
15 and I may have to come back or I would not be
16 satisfied with that decision. It would not be the
17 right decision because you cannot find out the
18 diagnosis ahead of time.

19 The biopsy report gives you a preliminary
20 report. Other than that opening this lesion, sending
21 it during surgery, this is all inappropriate and
22 inadequate. You remove the lesion, do cancer surgery
23 and that is the best surgery for the patient. If it's
24 cancer it's out. If it's not, thank God. The chances
25 that she would have cancer is probably not at all