In The

Supreme Court of Virginia

RECORD NO. 131869

RICHARD D. FIORUCCI and RICHARD D. FIORUCCI, D.D.S., LTD.,

Petitioners – Appellants,

v.

STEPHEN CHINN,

Respondent – Appellee.

BRIEF OF AMICUS CURIAE VIRGINIA ASSOCIATION OF DEFENSE ATTORNEYS IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST

This Brief *Amicus Curiae* is submitted in support of the Appellants, Richard D. Fiorucci, D.D.S. and Richard D. Fiorucci, D.D.S.; LTD. ("Dr. Fiorucci"), by the Virginia Association of Defense Attorneys ("the VADA"), pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia. The VADA obtained written consent from all parties for filing this Brief *Amicus Curiae*.

The VADA is a non-profit, statewide bar organization of more than 700 members whose practice is devoted primarily to the defense of civil actions. The VADA seeks to promote fairness and integrity in the civil justice system. It submits briefs *amicus curiae* in appropriate cases involving significant legal issues, which, in the VADA's view, have the potential to upset the "level playing field" which the law of Virginia provides to all civil litigants.

In the instant matter, the trial court misapplied the holding in *Wright v. Kaye*, 267 Va. 510 (2004), in precluding the introduction of evidence of informed consent discussions between Dr. Fiorucci and Plaintiff Stephen Chinn ("Chinn"). The trial court further erred in refusing to permit Dr. Fiorucci to introduce this evidence even after Chinn raised the issue during trial. Not only does this appeal address the extent of the

holding in *Wright*, but the issue now before this Court has significant, broader implications concerning the ability of defendants to introduce rebuttal evidence to cure unfairness and prejudice caused by plaintiffs who present an incomplete story to the jury. Thus, the VADA has a substantial interest in ensuring that in future litigation defendants are not unfairly restricted at trial, and submits this brief *amicus curiae* to urge this Court to clarify its holding in *Wright v. Kaye*, reverse the jury verdict, and remand the case for a new trial.

STATEMENT OF THE CASE

The VADA adopts the Appellants' Statement of the Case.

STATEMENT OF FACTS

The VADA adopts the Appellants' Statement of Facts.

ASSIGNMENTS OF ERROR

The VADA adopts the Appellants' Assignments of Error.

STANDARD OF REVIEW

The VADA adopts the Standard of Review as set forth in the Appellants' Brief.

ARGUMENT

I. The Trial Court Improperly Expanded the Holding in *Wright v. Kaye*

Chinn filed a medical malpractice action against Dr. Fiorucci alleging that Dr. Fiorucci negligently recommended the extraction of three of his teeth and that he negligently performed the extraction of two of those teeth. Prior to trial, Chinn sought to preclude admission of evidence of pre-operative consent forms and discussions regarding the risks of the procedure. Dr. Fiorucci attempted to offer the evidence that he had fully informed Chinn of the risks and that Chinn agreed to the extractions with full knowledge and understanding of those risks, which included the very injuries he alleged to have suffered. However, the trial court, relying on *Wright*, granted Chinn's motion *in limine* concerning the informed consent discussions, holding that evidence of informed consent is not a defense to the issue of standard of care. Dr. Fiorucci was permitted only to present evidence that he offered Chinn the option of doing nothing.

In *Wright*, the Supreme Court of Virginia held that where a lack of informed consent is not "in issue" in a medical malpractice case, evidence of information given to the patient concerning risks of surgery is irrelevant as to whether the physician deviated from the standard of care in performing the surgery. The *Wright* Court excluded evidence of pre-

operative conversations between the plaintiff and her doctor in which the risks of surgery were discussed, holding that the plaintiff's awareness of general risks of surgery was not a defense available to the defendant against allegations of negligence.

However, *Wright* did not create a blanket exclusion of pre-operative informed consent discussions. *See, e.g.*, *Holley v. Pambianco*, 270 Va. 180 (2005) (holding that evidence that the plaintiff was warned of the dangers of complications which might result from surgery is admissible to prove that the plaintiff failed to mitigate damages). In *Wright*, which this Court noted was limited to the facts of that case, the plaintiff alleged that the doctor deviated from the standard of care and negligently performed the surgery. The *Wright* Court did **not** address whether pre-operative informed consent discussions would be relevant to counter a plaintiff's claim that his or her doctor negligently recommended a procedure.

Here, unlike *Wright*, Chinn alleged that Dr. Fiorucci was negligent in *recommending* the surgery. Thus, Dr. Fiorucci's pre-operative discussions with Chinn *are* relevant and probative on that issue, and the trial court erred in expanding the holding in *Wright* to include the circumstances of this case.

II. The Trial Court Erred in Precluding Dr. Fiorucci From Offering Informed Consent Discussions as Rebuttal Evidence

Even if the trial court's interpretation of *Wright* were correct, and informed consent discussions are not admissible where the plaintiff alleges that the defendant was negligent in recommending a procedure, the trial court erred in refusing to permit Dr. Fiorucci to introduce informed consent evidence once the issue was raised by Chinn at trial.

Generally, when a party introduces evidence or elicits testimony that is otherwise inadmissible, the opposing party must be afforded the opportunity to rebut that evidence to counter the unfair prejudicial advantage. *See, e.g.*, *Wilson v. Commonwealth*, 225 Va. 33, 39 (1983) (where the defendants first raised the issue of a prior encounter with the game warden, they "will not be heard to complain when the Commonwealth pursued the matter further to complete the inquiry"); *Harmon v. Commonwealth*, 212 Va. 442, 445 (1971) (where defendant testified that he had previously been convicted of a killing, "he opened the door and assumed the risk that the prosecution would ask on cross-examination the degree of the homicide"); *Scholz v. Standard Accident Ins. Co.*, 145 Va. 694 (1926)("a party who has voluntarily brought out evidence on cross-examination ... [may not] object to the same evidence when brought out by his adversary on a re-examination of the

same witness"); *Penny v. Commonwealth*, 6 Va. App. 494 (1988) ("a party may not sustain a challenge to evidence when that party has introduced evidence of the same nature").

Importantly, the Court in *Wright* found the informed consent discussions were not relevant because the plaintiff had not put informed consent "at issue." In this case, however, Chinn placed informed consent at issue through his own testimony, as well as that of his expert witnesses.

Chinn testified that Dr. Fiorucci told him that the extractions were medically necessary and that he was given no option but to have the procedure. In making this assertion, Chinn's claim became distinguishable from *Wright.* The pre-operative discussions between Chinn and Dr. Fiorucci became relevant and probative as to whether Dr. Fiorucci was negligent in recommending the surgery. Thus, unlike *Wright*, the discussions should not have been excluded as they are material to Dr. Fiorucci's defense that his recommendation was not negligent. The trial court denied Dr. Fiorucci the opportunity to tell the jury that he provided Chinn with full disclosure of the risks and offered several options. The jury was left with an incomplete picture of Dr. Fiorucci's actions.

Furthermore, Chinn put the informed consent discussions at issue by eliciting testimony from his expert. Gary W. Smagalski, D.D.S., one of

Chinn's standard of care experts, admitted that he had caused the very injury at issue to one of his own patients, but he contended it was not negligence because he had discussed the possible numbness with his patient and that the patient went into it knowing the outcome. Without the evidence of the informed consent discussions, the jury was misled to believe that while Dr. Smagalski wasn't negligent because his patient was informed of the risks, that Dr. Fiorucci was negligent because Chinn was not informed. This confusion of the jury is exactly what the Court in *Wright* sought to avoid.

Thus, Chinn opened the door by presenting the above evidence and, as a result, Dr. Fiorucci should have been able to put on evidence to rebut these assertions that the informed consent/risk discussions never occurred. The admission into evidence of the entirety of the discussions is imperative for Dr. Fiorucci to rebut the misconception that Dr. Fiorucci negligently and hastily recommended and performed the procedure. Therefore, despite the holding in *Wright*, the trial court erred in excluding the pre-operative informed consent discussions under the facts of this case.

CONCLUSION

For the reasons stated above, the VADA urges this Court to consider the implications the trial court's ruling will have on future litigation. The trial court expanded the holding *Wright* well beyond the facts of that case. As a

result, defendants in medical malpractice cases are now unfairly restricted in countering claims that they negligently recommended a procedure. Moreover, the trial court, in refusing to permit the introduction of informed consent discussions even after Chinn raised the issue, caused substantial prejudice to Dr. Fiorucci. The jury was presented with an incomplete picture at trial. Fairness dictates that a defendant shall be permitted to introduce rebuttal evidence of informed consent discussions when the plaintiff raises the issue. Accordingly, the VADA respectfully requests that this Court reverse the jury verdict and remand the case for a new trial.

Respectfully submitted,

VIRGINIA ASSOCIATION OF DEFENSE ATTORNEYS

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CERTIFICATE OF FILING AND SERVICE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, counsel for *Amicus Curiae*, the Virginia Association of Defense Attorneys, certifies that on this 3rd day of June, 2014, fifteen (15) paper copies and one (1) electronic copy on CD of the foregoing Brief *Amicus Curiae* were filed by hand in the office of the Clerk of this Court and that three (3) paper copies, and one (1) electronic copy on CD, were served, via UPS Ground Transportation, to the following:

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