In The
Supreme Court of Virginia

RECORD NO. 131869

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

Appellants,

v.

STEPHEN CHINN,

Appellee.

BRIEF OF *AMICUS CURIAE*
VIRGINIA TRIAL LAWYERS ASSOCIATION
IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. STATEMENT OF *AMICUS* INTEREST 1

B. STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS 2

C. STATEMENT OF FACTS 2

D. ASSIGNMENTS OF ERROR 2

E. STANDARD OF REVIEW 3

F. APPLICABLE LAW 3

G. ARGUMENT 4

I. The Trial Court Was Correct In Ruling That Evidence of Informed Consent Was Not Admissible At Trial 4

H. CONCLUSION 9

I. CERTIFICATE 11

TABLE OF AUTHORITIES

Page(s)

CASES

Holley v. Pambianco,
270 Va. 180 (2005) 3, 6, 7, 8

Waller v. Aggarwal,
116 Ohio App. 3d 355,
688 N.E.2d 274 (Ohio Ct. App. 1996) 4

Wright v. Kaye,
267 Va. 510 (2004) .....*passim*

RULE

Va. S. Ct. R. 5:30 2

A. STATEMENT OF *AMICUS* INTEREST[1]

The Virginia Trial Lawyers Association ("VTLA") is an organization of over twenty-five hundred Virginia attorneys dedicated to promoting professionalism within the trial bar, enhancing the competence of trial lawyers, protecting and preserving individual liberties and access to justice, and supporting an efficient and constitutionally sound judicial system.

This appeal presents issues that are important to Virginia law and trial practice in Virginia Courts. It concerns and implicates not only the rights of the parties to this case, but also the rights of litigants and the nature of trial practice throughout the Commonwealth.

The VTLA writes on brief *amicus curiae* addressing only Assignment of Error I because this case presents an important opportunity for this Court to firmly and conclusively articulate the scope of *Wright v. Kaye*, 267 Va. 510 (2004) and to hold any

[1] The VTLA affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, and its counsel made a monetary contribution to its preparation or submission. However, counsel for Appellee is a member of the VTLA.

evidence of informed consent is not admissible in evidence at the trial of a medical malpractice case unless the concept of informed consent is truly at issue in the case.

Counsel for both parties have consented to the filing of VTLA's brief *amicus curiae*, pursuant to Va. S. Ct. R. 5:30.

B. STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

The VTLA adopts Appellee, Stephen Chinn's (hereinafter, "Chinn"), Statement of the Case.

C. STATEMENT OF FACTS

The VTLA adopts Appellee, Chinn's, Statement of Facts.

D. ASSIGNMENTS OF ERROR

I. The trial court erred in precluding evidence of the informed consent discussions between Dr. Fiorucci and plaintiff because *Wright's* holding does not apply to this case.

I.A. *Wright's* holding does not apply because Dr. Fiorucci was accused of negligence in performing the procedure in the first place and because plaintiff opened the door to the informed consent discussions through his own testimony, comments in *voir dire*, and the statements of his expert witness.

I.B. The trial court erred in granting plaintiff's Motion *in Limine* on this issue, in refusing to admit Defense Exhibit 1, page 9 and Exhibit 14, pages 1-4, in

> precluding defense counsel from questioning plaintiff and Dr. Fiorucci about the informed consent discussions, and in all other rulings it made throughout the trial precluding such evidence.

E. STANDARD OF REVIEW

The VTLA agrees with, and incorporates herein by reference, Appellee, Chinn's, analyses of the standard of review.

F. APPLICABLE LAW

In *Wright v. Kaye*, 267 Va. 510 (2004), this Court

> held that where a lack of informed consent is not an issue in a medical malpractice case, *evidence of information given to the patient concerning the risks of surgery is irrelevant* to the sole issue in the case: Whether the physician departed from the standard of care. [This Court] observed that such evidence 'could only serve to confuse the jury because the jury could conclude…that consent to the surgery was tantamount to consent to the injury….'

Holley v. Pambianco, 270 Va. 180 (2005)(quoting *Wright v. Kaye*, *supra*)(emphasis added)(internal citation omitted).

"While…[a]…patient may consent to risks, she does not consent to negligence." *Wright*, 267 Va. at 529.

In cases like the instant case, "admission of such evidence concerning a plaintiff's consent could only serve to confuse the

jury, because the jury could conclude, contrary to the law and the evidence, that consent to the surgery was tantamount to consent to the injury which resulted from that surgery." *Wright v. Kaye*, 267 Va. at 529. "In effect, the jury could conclude that consent amounted to a waiver, which is plainly wrong." *Id*. (citing *Waller v. Aggarwal*, 116 Ohio App. 3d 355, 688 N.E.2d 274, 275-76 (Ohio Ct. App. 1996)).

"Knowledge by the trier of fact of informed consent to risk, *where lack of informed consent is not an issue*, does not help the plaintiff prove negligence. Nor does it help the defendant show that he was not negligent." *Id.* (emphasis added).

G. ARGUMENT

I. The Trial Court Was Correct In Ruling That Evidence of Informed Consent Was Not Admissible At Trial.

Dr. Fiorucci and the Virginia Association of Defense Attorneys (hereinafter "VADA") in its brief *amicus curiae* have created issues that are not present in this case in an apparent effort to distract this Court from arriving at a conclusion consistent with its well-established jurisprudence.

The *only* issue in this case, as was true in *Wright v. Kaye*, *supra*, is whether the dentist departed from the standard of care. Dr. Fiorucci and the VADA's attempt to distinguish the facts of this case from those in *Wright*, are reaching at best; and, to the extent there are any distinctions, they are distinctions without differences.[2] Whether a doctor negligently operates on a patient, negligently fails to diagnose a condition, negligently provides unsound medical advice or negligently recommends a procedure, that doctor is liable for injuries her negligence causes to a patient. This is true irrespective of whether informed consent was properly obtained or whether a patient was warned about risks associated with treatment.

To adopt Dr. Fiorucci's argument would be to turn essentially all medical malpractice actions into informed consent, warning of the risks cases. When this Court spoke in *Wright*, it made clear

[2] The VADA and Dr. Fiorucci make much of this Court's language "under the facts of this case" in *Wright* to suggest somehow that the holding in that case is confined solely to its facts. It is indeed telling that this Court has used that *exact* phrase no fewer than 376 times in its jurisprudence. That does not include any of the many variations of that phrase this Court has used in its opinions. To argue that the use of that phrase renders those opinions not precedent for future cases would be absurd.

that evidence of informed consent may only be introduced to the finder of fact when informed consent is at issue in the case.

As in *Wright*, informed consent is not at issue here. Nowhere did Chinn plead or allege Dr. Fiorucci failed to sufficiently secure informed consent or to inform him of the risks of the surgery.[3]

Contrary to the VADA's suggestion otherwise, nowhere did Chinn plead or allege Dr. Fiorucci was negligent in recommending the surgery. Despite the VADA's repeated averments that "Chinn alleged that Dr. Fiorucci was negligent in *recommending* the surgery," (*see*, *e.g*., VADA brief *amicus curiae* at pp. 4, 5, 6, 7, 8), a quick review of the Complaint reveals this is simply untrue.

However, even if it were true that Chinn alleged Dr. Fiorucci was negligent in recommending surgery, the analysis and the conclusion would remain the same. This Court's holdings in *Wright* and *Holley* require that informed consent be at issue in the case. Unless there was a dispute as to whether Dr. Fiorucci

[3] It is worth noting Dr. Fiorucci concedes, as he must, that "Mr. Chinn did not plead a lack of informed consent claim." Opening Brief of Appellants at p. 10.

properly obtained informed consent before recommending the surgery, evidence of informed consent should not be presented to the jury. Whether Dr. Fiorucci negligently recommended surgery does not require evidence of informed consent. Dr. Fiorucci could obtain informed consent and nevertheless negligently recommend surgery, and to allow evidence of informed consent to go to the jury would suggest that somehow Chinn agreed to consent to the negligent recommendation.

Since Chinn nowhere alleges Dr. Fiorucci was negligent in recommending surgery, the VADA's assertions to the contrary must be ignored; however, even if Chinn did so allege, the result in this case should be the same.

The VADA cites, in passing, *Holley v. Pambianco*, 270 Va. 180 (2005) for the proposition that "*Wright* did not create a blanket exclusion of preoperative informed consent discussions." (VADA brief *amicus curiae* at p. 4) In *Holley*, however, one of the central issues in the case, and one of the affirmative defenses, was whether the plaintiff had followed the defendant doctor's pre-

surgical instructions to promptly report symptoms that might appear post-surgically.

The *only* reason the evidence of the plaintiff's being warned of the danger of complications of the procedure was for the defendant doctor to attempt to show the plaintiff had not taken "appropriate and timely remedial steps" to "mitigate his damages," and the jury was so instructed. *Holley*, 270 Va. at 185.

Mitigation of damages is not an issue in this case, and it is not the VTLA's position that evidence of informed consent should not have been properly permitted in *Holley.* *Holley* is distinguishable from the instant case, because there was evidence the plaintiff in *Holley* failed to act properly *after* the procedure was complete. Differently, in the instant case, the only issue is whether Dr. Fiorucci negligently performed the surgery on Chinn.

It has long been axiomatic that a patient does not release a healthcare provider from liability for negligence by providing informed consent. See, e.g., *Wright*, 267 Va. 529. Contrary to

the suggestions of Dr. Fiorucci and the VADA, the VTLA does *not* take the position that evidence of the presence or absence of informed consent should *never* be introduced in a medical malpractice case; rather, the VTLA submits this Court has made clear that evidence of informed consent, or lack thereof, is *only* admissible when informed consent is an issue in the case. This case is *Wright v. Kaye.*

Whether or not informed consent was obtained, Dr. Fiorucci is liable for any negligent treatment of Chinn. Thus, the introduction of evidence of informed consent would only "serve to confuse the jury" and to suggest to the jury that Chinn's giving informed consent, or being warned of the risks of the surgery, would be "tantamount to consent to the injury." *Wright*, 267 Va. at 529.

H. CONCLUSION

For the reasons stated above, the VTLA respectfully requests that this Court affirm the decisions of the trial Court and enter final judgment in favor of Appellee Chinn.

Respectfully Submitted,

VIRGINIA TRIAL LAWYERS ASSOCIATION

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I. CERTIFICATE

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, counsel for *Amicus Curiae*, the Virginia Trial Lawyers Association (VTLA), certifies that on this 27th day of June, 2014, fifteen (15) paper copies and one (1) electronic copy on CD of the foregoing Brief of *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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