In the

Supreme Court of Virginia

At Richmond

Record No. 131869

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

Appellants,

– v. –

STEPHEN CHINN,

Appellee.

OPENING BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

An opinion's holding should apply only to subsequent cases that are factually similar. *Wright v. Kaye*, 267 Va. 510 (2004) held that, *under the facts of that case*, informed consent discussions *before* surgery were irrelevant because (1) plaintiff claimed only that the surgeon was negligent *during* surgery and (2) plaintiff did not place the discussions in issue. Here, plaintiff placed the discussions in issue and alleged negligence *before* surgery began. *Wright's* holding should not apply.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

Stephen Chinn alleged in his complaint that Dr. Richard Fiorucci negligently extracted his wisdom teeth and caused nerve injury and numbness in his face, among other things. A. at 1-7. Mr. Chinn did not allege in his complaint that Dr. Fiorucci failed to obtain his informed consent for the wisdom tooth extraction procedure. Nor did he allege that Dr. Fiorucci negligently recommended he undergo the procedure. But both the decision to do the procedure and the informed consent discussions became issues at trial.

Mr. Chinn's experts, Dr. Gary Smagalski and Dr. Domenick Coletti, testified that Dr. Fiorucci should not have recommended Mr. Chinn undergo the procedure. Dr. Smagalski stated directly that he criticized Dr. Fiorucci

not only for how he did the procedure but also because he did the procedure at all. Dr. Smagalski was asked: "[O]ne of your criticisms of Dr. Fiorucci is not how he performed the surgery but that he performed the surgery; is that a fair characterization?" He answered: "That's the first criticism, yes, that he even decided to take either of those teeth out." A. at 696. Similarly, Dr. Coletti opined that if Mr. Chinn were his father, he "would have done nothing" and that his criticism was that "it should never have been done." A. at 790, 842.

The jury also heard evidence and argument that Mr. Chinn was given no option but to have the procedure because it was "medically necessary." Dr. Smagalski refused to agree that Mr. Chinn had the option of not having the procedure done. A. at 709. And Mr. Chinn's counsel argued in closing that the procedure was touted as "medically necessary." A. at 1218.

In addition to the decision to do the procedure, Mr. Chinn, his counsel, and Dr. Smagalski put the informed consent discussions in issue. Despite a pretrial ruling based on *Wright* that Mr. Chinn sought and obtained precluding discussion of procedural risks, his counsel told jurors during voir dire that "[w]e all know that both medical and dental procedures involve risks and they involve potential complications." A. at 61-67, 99, 180.

Mr. Chinn testified selectively about his preoperative consultations with Dr. Fiorucci. He was asked about his discussions with Dr. Fiorucci but he omitted any mention of the informed consent conversation and documents. He also claimed not to remember significant details about his discussions and that he did not meet with Dr. Fiorucci before the procedure. A. at 455, 487-488, 491, 503-504.

In the same vein, Dr. Smagalski said he was not aware of the preoperative discussion Dr. Fiorucci had with Mr. Chinn. A. at 699.

The impression that Mr. Chinn had little or no preoperative discussions with Dr. Fiorucci took on greater importance when Dr. Smagalski suggested one of his patients was better informed. Dr. Smagalski acknowledged that one of his patients experienced postoperative problems similar to those of Mr. Chinn. But he distinguished his patient from Mr. Chinn on the ground that his patient went into the procedure informed of the potential for a bad outcome:

> The situation that I had in these 8 to 10 patients very different from Dr. Fiorucci. . . . I had one patient with some degree of permanent numbness. . . . He was badly infected around the impacted tooth. It was intimately involved with the nerve. *We discussed that he probably would have numbness after we took the tooth out, although we tried to be as careful as we could be.* . . . Did not believe that we had damaged the nerve with any

> instrumentation but he had a degree of numbness afterwards. It persisted for about a year. He didn't seem too upset about it because it was a partial numbness. . . . *He went into the situation knowing that was the outcome.*

A. at 711-712 (emphasis added). Thus, comparing his patient to Mr. Chinn would be like "comparing apples and oranges." A. at 671-672.

Dr. Fiorucci tried to combat this one-sided presentation by offering evidence of the informed consent discussions. But the trial court would not allow it, so the evidence had to be proffered. Dr. Fiorucci's proffered testimony would have established that he had significant preoperative discussions with Mr. Chinn on April 29 and May 6, 2008 in which he utilized radiographic studies to discuss Mr. Chinn's anatomy the particular risks it posed. Specifically, Dr. Fiorucci told Mr. Chinn his would be a "difficult case" and that the extraction procedure may cause numbness and an opening of the sinus cavity. A. at 1165-1171. Mr. Chinn would have admitted that the potential complications of an opening of the sinus cavity and numbness due to nerve injury were explained, that he signed and understood all the risks laid out in the informed consent documents, and that it was his decision to do the surgery. A. at 523-534. The consent documents themselves laid out the specific risks in black and white and show that Mr. Chinn knew of the risks of the procedure, understood he had

the choice of not having any treatment at all, and elected to go forward with the procedure. A. at 1440-43.

At the conclusion of the case, Dr. Fiorucci offered a jury instruction that would have prohibited consideration of the informed consent issue. A. at 427. That instruction was denied.

A jury in the City of Alexandria Circuit Court returned a verdict for Mr. Chinn in the amount of $300,000. A. at 1294. The trial court denied Dr. Fiorucci's motion for a new trial, and he timely appealed. On a Petition for Rehearing, this Court awarded an appeal on April 24, 2014.

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 for 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.[1]

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[1] Assignment I and subparts were preserved at: 2/8/12 Order; A. at 1633-1641; 69-72; 78-79; 99; 180; 186-188; 214-231; 445; 447-448; 488-491; 503-504; 521-537; 578-579; 670-672; 696; 707-709; 711-712; 717-739; 802-810; 842-844; 858-859; 888-891; 900-901; 909-911; 937-938; 1061-1062; 1160-1180; 1189-1190; 1197-1198; 1444-1486; 1487-1488; 1584-1605;1611-1612; 1614.

ARGUMENT SUMMARY

The trial court erred in precluding Dr. Fiorucci from admitting the informed consent discussions for two reasons. First, *Wright* does not apply because Dr. Fiorucci was accused not only of performing the procedure incorrectly but also of being negligent for performing it at all. Second, Mr. Chinn and his experts put the discussions at issue because they denied they occurred and averred that a doctor does not commit malpractice if the patient knows of the potential for an adverse outcome in advance. The trial court's decision to apply *Wright* is a legal conclusion that is reviewed under a *de novo* standard. *Schisler v. State*, 907 A.2d 175, 184 (Md. 2006) (holding that even as to discretionary matters, a trial court's decision that involves interpretation of caselaw is reviewed *de novo*); *see City of Richmond v. SunTrust Bank*, 283 Va. 439, 442 (2012) (noting that issues of law are reviewed *de novo*).

ARGUMENT

I. The Trial Court Erred in Precluding the Informed Consent Discussions Because *Wright's* Holding Does Not Apply to this Factually Dissimilar Case

A. *Wright's* Holding Does Not Automatically Extend to Dissimilar Cases

If the facts of a subsequent case are different from those of an earlier case, the principles enunciated in the earlier case should be carefully examined before being applied to the subsequent case—if at all. This fundamental axiom of American jurisprudence is often applied but rarely elucidated. Its essence lurks in short words or phrases like *stare decisis*, *ratio decedendi*, *obiter dictum*, and *distinguishable*. But there are more revealing expositions, such as that offered by Chief Justice John Marshall in addressing a litigant's attempt to extend principles announced in *Marbury v. Madison* to a subsequent case:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate

> it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. 264, 399-400 (1821); *accord Morison v. Dominion Nat'l Bank*, 172 Va. 293, 299 (1939).

If this maxim is not to be disregarded when it comes to the question of applying *Marbury v. Madison*, surely it should not be disregarded when it comes to the question of applying *Wright v. Kaye*—especially when the "very point" of whether its "general expressions" should be extended to a subsequent case is "presented for decision."

B. Unlike in *Wright*, Dr. Fiorucci was accused of negligence for performing the procedure in the first place

The "general expression" in *Wright* that informed consent discussions are neither material nor relevant hinged on two important facts. First, the plaintiff did "not plead or otherwise place in issue any failure on the part of the defendant to obtain her informed consent." *Wright*, 267 Va. at 528. Second, the plaintiff's "claim [was] *simply* that Dr. Kaye was negligent by deviating from the standard of care in performing the medical procedure at issue" and, therefore, evidence of informed consent was "neither relevant nor material to the issue of standard of care." *Id.* at 529 (emphasis added). The Court's holding was specifically limited to those facts: "*Under the facts*

of this case, we hold the trial court's ruling to be erroneous." *Id.* at 528 (emphasis added).

Being limited to its facts, *Wright*'s holding in the context of this case was not, and could not be, considered because the facts of this case are materially different. Although Mr. Chinn did not plead a lack of informed consent claim, he argued more than that Dr. Fiorucci was negligent in *how* he performed the surgery; Mr. Chinn's experts opined that Dr. Fiorucci should not have done the procedure in the first place. A. at 696, 790, 842. Such an allegation was not present in *Wright*. Also not present in *Wright* was the argument here that Mr. Chinn was not truly given the option to proceed with surgery because it was touted as "medically necessary." This was not true, as Mr. Chinn's initials at paragraph 3 of the consent form demonstrate. A. at 1440. But the jury could not consider this evidence, and it did not hear the full story.

The full story is that Mr. Chinn, not Dr. Fiorucci, chose to have the procedure done after he was fully informed in two separate office visits of the risks involved. Dr. Fiorucci used Mr. Chinn's radiographs to show him the anatomy he would have to contend with during the procedure and to explain the adverse effects he may experience. Mr. Chinn also signed multiple pages of documents detailing the risks involved, some of which

came to fruition. In sum, Mr. Chinn knew of the risks and yet still elected to have the procedure.

Dr. Fiorucci should have been able to respond to Mr. Chinn's allegations that he was negligent in deciding to do the procedure by explaining these facts. Instead, a significant factual portion of two critical office visits were wiped from existence. This was not a fair result for Dr. Fiorucci—and not only because the jury was treated to a one-sided view of the evidence. It also was not fair because the trial court applied the holding in *Wright* to a case that is materially different from it.

Unlike in *Wright*, the claim here was not "simply" that Dr. Fiorucci was negligent in how he performed the procedure but also that he negligently decided to perform the procedure in the first place. An effective response to such a claim necessitates explaining why and how the decision was made. Only an explanation of the *reasons* for the decision could demonstrate that the decision was *reasonable*.

The primary reason the procedure went forward is that Mr. Chinn elected to proceed after being fully informed of the potential risks—a commonplace event in the physician-patient relationship. But Dr. Fiorcucci could not describe this common interaction, and therefore could not fully explain the reasons for doing the procedure. He should have been allowed

to do so to demonstrate the reasonableness of his decision in response to Mr. Chinn's allegations that the decision was unreasonable.

Wright did not involve these issues. If it had, the outcome in *Wright* may have been different—as it should be here.

II. *Wright* Does Not Apply Because Mr. Chinn Put the Informed Consent Discussions in Issue

Wright's holding also should not apply because Mr. Chinn, his counsel, and his experts put the informed consent discussions in issue in at least four ways.

First, Mr. Chinn's counsel injected the issue during voir dire when he told the jury that "[w]e all know that both medical and dental procedures involve risks and they involve potential complications." A. at 180. This statement was remarkable considering Mr. Chinn filed a pretrial motion seeking to prohibit any "discussion of risk of the procedure." A. at 61. Ostensibly, Mr. Chinn's counsel was trying to determine whether the jury could still find negligence if the patient has been informed there are risks to the procedure.

Second, Mr. Chinn's testimony gave the impression Dr. Fiorucci did not have any significant discussions with him and that he was rushed to surgery. On direct examination, Mr. Chinn was specifically asked about the content of his discussion with Dr. Fiorucci on the first visit when they

reviewed the radiographs. Mr. Chinn responded that Dr. Fiorucci said he saw tooth decay and that the teeth should be extracted. A. at 444-45. But this description was false in that it utterly failed to give a complete account of the significant discussion of the radiographs and what the anatomy on them revealed of the risks involved with doing the procedure. It also did not reveal that Dr. Fiorucci let Mr. Chinn decide whether to undergo the procedure after being informed of the risks and signing a document attesting to it. Additionally, Mr. Chinn was asked on direct examination what he recalled happening when he arrived on May 6 for the procedure. A. at 447. He said he went straight into surgery. A. at 447-448. This too was false because it omitted another informed consent discussion and document. On cross-examination, Mr. Chinn testified he could not remember significant details about his discussions and, remarkably, that he did not meet with Dr. Fiorucci before surgery. A. at 487-488, 491, 503-504.

Third, Dr. Smagalski buttressed Mr. Chinn's version of events when he testified he did not know what discussions Dr. Fiorucci had. A. at 699. Dr. Smagalski also refused to agree that Mr. Chinn was given the option to proceed and that no one told him that the procedure was required. A. at 709.

Fourth, Dr. Smagalski admitted he had at least one patient suffer a nerve injury similar to that experienced by Mr. Chinn. But he distinguished himself from Dr. Fiorucci and his patient from Mr. Chinn because, in part, his patient "went into the situation knowing that was the outcome." A. at 712.

Mr. Chinn's testimony, the comments by his counsel during voir dire, and Dr. Smagalski's statements put this case outside the scope of *Wright*'s holding—by *Wright*'s own terms. The "particularly salient" fact in *Wright* was that plaintiff did not "place in issue any failure of the defendant to obtain her informed consent." *Wright*, 267 Va. at 528. Thus, evidence of the informed consent discussion in that case would not "help the defendant show he was not negligent." *Id.* at 529.

Here, however, evidence of the informed consent discussions is the only thing that would have helped Dr. Fiorucci respond to Mr. Chinn's injection of it into the case.[2] "We all know that . . . dental procedures involve risks," and Mr. Chinn did too. He knew because he had lengthy discussions with Dr. Fiorucci before his extraction procedure—contrary to

[2] Despite Dr. Smagalski's attempt to distinguish his patient from Mr. Chinn on the ground that his patient was informed, the trial court would not even allow Dr. Fiorucci's counsel to ask Mr. Chinn's other expert Dr. Coletti whether it was reasonable and prudent for Dr. Fiorucci to have a discussion with Mr. Chinn the week before surgery. A. at 844.

his testimony and that of his expert. And just like Dr. Smagalski's patient, Mr. Chinn was aware of the potential for nerve injury. The situation was therefore not nearly as different as Dr. Smagalski made it out to be.

These points—all effective rebuttals to the injection of the informed consent issue into the case—could have been proved by admitting the informed consent documents and allowing a full examination of Dr. Fiorucci and Mr. Chinn. Defense counsel could have done so if the trial court applied *Wright* correctly—or if it had simply adhered to fundamental notions of fairness that allow a party to respond to an opponent's injection of irrelevant evidence. "A party who draws from his own witness irrelevant testimony, which is prejudicial to the opposing party, ought not to be heard to object to its contradiction on the ground of its irrelevancy." *Graham v. Commonwealth*, 127 Va. 808, 825 (1920); *see also Lupfer v. State*, 21 A.3d 1080, 1092-93 (Md. 2011) (addressing the "fair response" and "opening the door" doctrines); 29 Am. Jur. 2d *Evidence* § 364 ("In many situations, a party becomes entitled to introduce evidence, otherwise inadmissible, by reason of similar or related evidence that has been tendered by the opponent, to rebut it.").[3]

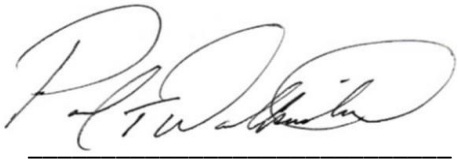
[3] "After one party has introduced evidence about a particular fact or transaction, the other party is entitled to introduce evidence in explanation

But Dr. Fiorucci was denied the ability to fully respond to Mr. Chinn's allegations and version of events. He was denied a fair trial.

CONCLUSION

For these reasons, the trial court's rulings regarding the informed consent issue should be reversed, the jury verdict and judgment overturned and vacated, and the case remanded for a fair trial.

Respectfully Submitted,



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or rebuttal of it, even though the latter evidence would be irrelevant had it been offered initially." 29 Am. Jur. 2d *Evidence* § 364.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 3rd day of June, 2014, three copies of Opening Brief of Appellants, and a copy on CD, were sent via third party commercial carrier to counsel for the appellee at the following addresses:

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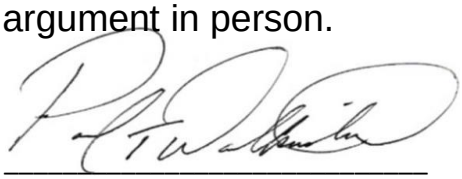
This same date, fifteen copies of the same, and a copy on CD, were hand delivered to the clerk's office.

Counsel for the appellants requests oral argument in person.



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