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IN THE

Supreme Court Virginia

RECORD NO. 150552

DMITRY MIKHAYLOV,

Appellant,

v.

LISA SALES,

Appellee.

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The circuit court erred in granting Jury Instruction No. 13 which was confusing and misleading to the jury and did not provide the defendant an opportunity to explain the circumstances of his guilty plea, but resulted in de facto summary judgment against the defendant on the counts of assault and battery. App. at 645-46 (Tr. Day 3, 555:13-22, 556:1-22; 557:1-11) (Tr. Day 4, 645:11-22, 646:1-12).

2. The circuit court erred by not allowing the defendant to deny the allegations made by the plaintiff of an "attack" in the defendant's case in chief. App. at 540-41.

3. The circuit court erred in allowing testimony and evidence to be presented with regard to future medical treatment and costs as these areas were not part of the plaintiff's expert designation as required by Rule 4:1 and the pretrial order, nor were they provided in the deposition of the expert. As such, the circuit court additionally erred in granting Jury Instruction No. 9 as to all future medical costs and treatment. App. at 231-36, 612-13.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Plaintiff/Appellee, Lisa Sales ("Sales"), filed a Complaint against Defendant/Appellant, Dmitry Mikhaylov ("Mikhaylov"), on May 30, 2013, in

the Fairfax County Circuit Court. App. at 1. In her Complaint, Sales claims that Mikhaylov is liable for personal injuries she sustained on September 17, 2011. *Id.* at 2-3. As such, she sought damages for Battery (Count I); Assault (Count II); False Imprisonment (Count III); Intentional Infliction of Emotional Distress (Count IV); Breach of Contract (Count V); Conversion (Count VI); and Fraudulent Conveyance under Va. Code § 55-80 (Count VII). *Id.* at 6-11. That count was later severed from trial, and the conversion count was dismissed prior to trial.

This matter was set for trial May 5-7, 2014. On May 7, 2014, a mistrial was declared, and the matter was reset for a new trial. The new trial was held January 11-15, 2015. *Id.* at 220. This time, trial ended in a jury verdict for Sales on the counts of battery, assault, and intentional infliction of emotional distress. *Id.* at 165 (Final Order 1/15/15). Mikhaylov now respectfully seeks a ruling reversing the trial court and remanding for a new trial on liability and damages consistent therewith.

STATEMENT OF FACTS

This case arises from an incident which occurred in the late hours of September 16, 2011 into the early morning hours of September 17, 2011. App. at 2-4. In the spring of 2011, Ms. Sales had placed an ad on

roommates.com seeking to lease a bedroom of her house. *Id.* at 344, 530. In the spring 2011, Mr. Mikhaylov signed a lease to rent a room for a period of six months for $2,000 per month plus fifty-percent of the utilities. *Id.* at 341-42, 531. Mr. Mikhaylov moved into the room at the end of July 2011, after he provided a $2,000 security deposit. *Id.* at 530. A few weeks after he moved in, however, Mr. Mikhaylov discovered that his security deposit was not placed in trust or in escrow, but rather, was used to pay Ms. Sales' credit card. *Id.* at 534-35. Additionally, Mr. Mikhaylov discovered that Ms. Sales had changed the terms of the lease without his consent, writing in the lease that he was to pay $357 in utilities every month, instead of the agreed-upon fifty-percent. *Id.* at 533. Mr. Mikhaylov discovered this after he had provided a check to Ms. Sales to cover his portion of the utilities, and discovered that she had written in "$357" in the lease for the entire utility bill which was inconsistent with the terms of their lease agreement. *Id.* at 532-33, 539.

On September 16, 2011, Ms. Sales invited Mr. Mikhaylov to join her and some friends at a restaurant named Chili's. *Id.* at 536. Ms. Sales drove herself and Mr. Mikhaylov to the restaurant where they each enjoyed some alcoholic beverages. *Id.* at 347-48. On the way home that evening, Mr.

Mikhaylov began discussing his concerns about Ms. Sales using his security deposit to pay her credit card bills as well her changing the terms of the lease regarding the utility bills without his consent. *Id.* at 539. Ms. Sales alleges that Mr. Mikhaylov was intoxicated, and that when they arrived home, he began shouting at her and talking about the rent and utilities. *Id.* at 352, 354-55. She claims that after she went to her bedroom and changed into a "nighty" to go to bed, that Mr. Mikhaylov came "barreling in, flying through the doors of [her] bedroom." *Id.* at 353. She claims that Mr. Mikhaylov "threw [her] to the ground;" "sat on [her];" and "took his knees and he spread [her] legs." *Id.* at 353. She claims that for a few hours, she kept trying to get away from Mr. Mikhaylov, but that he kept grabbing her, pinning her to the floor, and pushing her. *Id.* at 354-56.

Mr. Mikhaylov denies Ms. Sales's claims in their entirety. He denies that he entered her bedroom or attacked her. *Id.* at 539. Instead, Mr. Mikhaylov states that he and Ms. Sales began discussing his living situation, and the concerns he had over the security deposit and the high utility bills. *Id.* at 538. They had this discussion in the kitchen of the house for about a half hour once they arrived home from Chili's. *Id.* at 537-38. Following this discussion, Mr. Mikhaylov went to bed. *Id.* at 544-45. The following

morning, Mr. Mikhaylov was awoken by the doorbell, which was rung by Samira Rutherford, a massage therapist, who was arriving at the home for Ms. Sales' pre-planned massage party. *Id.* at 358, 545. Ms. Sales, along with two other friends, participated in the massage therapy that morning. *Id.* at 359.

During the trial, Mr. Mikhaylov was not allowed to explain the assault and battery. *Id.* at 92. He was further prevented from denying that he "attacked" Ms. Sales, despite the order precluding only a denial of a plea of guilty to assault and battery. *Id.* at 539-42. As part of the jury instructions, the trial court instructed the jury as to the definition of an assault (*id.* at 126), it instructed the jury to make a factual determination if an assault occurred (*id.* at 127), but it also gave a finding instruction that an assault had occurred (*id.* at 128). The trial court did the same with the battery claim. *Id.* at 128, 131, 137.

Ms. Sales claims that as a result of the alleged incident on September 17, 2011, she sustained personal injuries, including bilateral knee injuries, a neck injury, and wrist injury.

During trial, Ms. Sales presented testimony about future medical care and treatment over objection. *Id*. at 432-45. Ms. Sales's expert, Dr.

Lippman, was not specifically designated to render opinions as to future medical care and treatment. *Id.* at 45. Ms. Sales's counsel acknowledged that the designation of her expert did not include opinions as to future medical care and treatment, but the trial court allowed testimony and evidence on that issue nonetheless, over a timely objection. *Id.* at 435-36, 444.

The jury returned a verdict in favor of Ms. Sales as follows: $90,000.00 in damages and $5000.00 in punitive damages as Count I-Battery; in the sum of $90,000.00 in damages and $5000.00 in punitive damages as to Count II-Assault; and $100,000.00 in damages and $12,000.00 in punitive damages as to Count IV-Intentional Infliction of Emotional Distress. *Id.* at 160-65. Ms. Sales was awarded compensatory damages in the amount of $280,000.00 and punitive damages in the amount of $22,000.00 for a total of $302,000.00. *Id.*

AUTHORITIES AND ARGUMENTS

Standard of Review

An appellate court reviews the substance of jury instructions given by a trial court *de novo* in order to determine whether "the law has been clearly stated and that the instructions cover all issues which the evidence fairly

raises." *Orthopedic & Sports Physical Therapy Assocs. v. Summit Group Props.,* 283 Va. 777, 782 (2012) (internal citations omitted).

"On appellate review, ordinarily, 'the determination of the admissibility of relevant evidence is within the sound discretion of the trial court subject to the test of abuse of that discretion.'" *Henderson v. Commonwealth*, 285 Va. 318, 329 (2013). "However, although a trial court exercises its discretion in admitting or excluding evidence, the court may not exercise its discretion to exclude admissible evidence." *Gardner v. Commonwealth*, 288 Va. 44, 50 (2014).

"This Court reviews a trial court's decision to admit or exclude expert testimony under an abuse of discretion standard." *John Crane, Inc. v. Jones*, 274 Va. 581, 591 (2007). *See also Blue Ridge Serv. Corp. v. Saxon Shoes, Inc.*, 271 Va. 206, 212 (2006) (citing *Tarmac Mid-Atlantic, Inc. v. Smiley Block Co.*, 250 Va. 161, 166 (1995)). "This must give deference to a trial court's ruling to exclude or admit expert testimony and that ruling will not be disturbed on appeal unless it is plainly wrong and amounts to an abuse of discretion." *Condominium Services, Inc. v. First Owners' Assoc. of Forty Six Hundred Condominium, Inc.*, 281 Va. 561(2011).

1. **The circuit court erred in granting Jury Instruction No. 13 which was confusing and misleading to the jury and did not provide the defendant an opportunity to explain the circumstances of his guilty plea, but resulted in de facto summary judgment against the defendant on the counts of assault and battery.**

A. Prejudicial Error in Failing to Allow for an Explanation

Following a pre-trial hearing on Sales's Motion for Partial Summary Judgment as to Counts I and II held on April 11, 2014, the circuit court ordered that the Motion for Partial Summary Judgment be denied, however, the Court found that Mikhaylov, due to his guilty plea related to criminal charges of assault and battery which arose out of the same incident or occurrence as this civil lawsuit, could not deny that he committed an assault and battery on the grounds of the judicial estoppel doctrine. App at 92. This is incorrect and prejudicial to Mikhaylov in his right to a fair trial.

The Court further ordered that Mikhaylov may argue "the nature and extent of the assault and battery, the alleged degree of the assault and battery, proximate cause, and the nature and extent of Sales's injuries and damages." *Id*. Mikhaylov made timely objections at that time to the circuit court's ruling. Specifically, Mikhaylov objected that the ruling was prejudicial to him as there are genuine issues of material fact in dispute as to the assault and battery claims, and that the court's ruling was inconsistent

with Va. Code § 8.01-418 and the judicial estoppel doctrine. *Id.* These objections were additionally raised during trial. *Id.* at 609. Although, the court specifically denied Sales's motion for partial summary judgment and ordered that Mikhaylov be given the opportunity to explain the circumstances of his guilty plea, which includes the factual circumstances related to Sales's allegations of assault and battery, at trial, Mikhaylov was denied his ability to provide a full and complete defense as to the claims of assault and battery, in both the jury instructions and his ability to explain his side of the events. *Id.* at 92.

The admissibility Mikhaylov's guilty plea of simple assault and battery in this civil action is governed by Virginia Code § 8.01-418, which states in pertinent part:

> Whenever, in a civil action, it is contended that any party thereto pled guilty. . .for a criminal offense. . . which arose out of the same occurrence upon which the civil action is based, evidence of said plea. . . as shown by the records of the criminal court shall be admissible. Where the records of the court in which such prosecution was had are silent or ambiguous as to whether or not a plea was made. . . the court hearing the civil case shall admit such evidence on the question of such plea.. .as may be relevant. . . and the question of whether such plea was made. . . shall be a question for the court to determine.

Sales's attempt to use the criminal plea of guilty is only admissible evidence under Va. Code § 8.01-418, but is not a conclusive factual

determination to allow a trial court to enter summary judgment as a matter of law, or what essentially amounts to a directed verdict. This is merely admissible evidence for the jury to determine, from the testimony, which witnesses are more credible to determine if an assault and/or battery actually occurred.

Admissible does not mean conclusively established as a matter of law. The Virginia Supreme Court has specifically stated that "this statute deals with the evidentiary question of admissions and apparently was enacted to change the rule enunciated in *Fulcher v. Whitlow*, 208 Va. 34, 41 (1967)." *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 265 (1987). In *Fulcher*, this Court adopted the trial court ruling that if the criminal records do not show the guilty plea, it is not admissible. 208 Va. at 41. The rule enunciated in *Fulcher* was premised on the trial court "ruling on the <u>admissibility</u> of the evidence." *Id.* The inadmissibility of the guilty plea was the underlying event that led to the enactment of the statute at issue and the Supreme Court has stated its purpose of that enactment was to reverse *Fulcher. Selected Risks Ins. Co.*, 233 Va. at 265.

When the legislature enacted this statute, it could have expressly stated that a guilty plea was a conclusive determination of civil liability as

well. However, it chose to only make the matter "admissible," meaning it is not conclusive proof. Second, common sense dictates that a guilty plea is not conclusive establishment of liability because the motivation underlying a guilty plea must be considered. The motivation for pleading guilty often times is something other than guilt, such as fear of a felony conviction record, jail time, stigma, employment issues, deportation, or security clearance, just to name a few. In the present case, although Mikhaylov testified that he was going to be incarcerated until trial and could not pay his attorney because he did not have his checkbook, and did not have any possessions including his cell phone, the trial court's ruling sustaining Sales's objection to the question "Did you attack", severely prejudiced Mikhaylov's presentation of his evidence. The trial court through its ruling essentially blessed Sales's version of events and did not allow Mikhaylov a full and fair opportunity to present his case.

This Court has established an "entire rule relating to criminal-civil preclusion." "For at least 118 years, this Court, in dealing with the preclusive effect of a criminal judgment upon a subsequent civil action arising from the same transaction, has recognized that the criminal charge and the civil action, 'though founded on the same fact, are distinct remedies,

prosecuted by different parties and for different purposes,' and that there is a 'want of mutuality.'" *Selected Risks Ins. Co.*, 233 Va. at 263 (citation omitted). "The reasons for the rule 'that a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered,' have also been articulated as follows: '(1) The parties are different in a criminal proceeding from those in a civil action; (2) the objects of the two proceedings are different; (3) the results and procedures of the two trials are different; and (4) there is a lack of mutuality.'" *Id.* at 263-64. An exception to this rule was the enactment of Va. Code § 8.01-418, making the guilty plea "admissible" but not requiring a conclusive finding.

The existing case law also does not support the trial court's ruling and instructions. For example, in *Koutsounadis v. England*, 238 Va. 128, 130 (1989), the defendant filed a motion in limine to exclude his guilty plea to reckless driving, in the subsequent personal injury civil action. The Virginia Supreme Court reversed the trial court's ruling on the motion in limine excluding this evidence, reasoning that the trial court shall admit evidence of a guilty plea. *Id.* at 133. This Court reversed and remanded for further proceedings; it did not reverse and enter judgment in the plaintiff's favor. *Id.*

This is telling that a guilty plea is not conclusive proof of liability and the issue must be submitted to the jury. If the evidence were conclusive proof, this Court would have reversed and entered judgment in the plaintiff's favor.

This Court also referred to the statutory change as "the evidentiary use of his admission" in *Ayala v. Aggressive Towing & Transp., Inc.*, 276 Va. 169, 174 (2008), where it declined to apply the evidentiary use given that the person making the admission was not a party.

In the case at bar, the guilty plea is clear and unambiguous by the court records, and was admitted into evidence as Plaintiff's Exhibit 37. *Id.* at 41 (Trial Transcript, Day 2, 416:10-17; 422:11-14). No additional documents were received into evidence with regard to the evidence surrounding the guilty plea. The jury was therefore left with a court record showing that Mikhaylov pled guilty to simple assault and battery, but had very little additional information about the facts surrounding the plea. *Id.* at 92, 539-42. The factual context is relevant and critical to be presented to a jury who must determine whether or not Sales's alleged liability and damages were a proximate cause of the tortious conduct, and whether the extent of damages she seeks are supported by the evidence of proximate cause.

There was room in this case for reasonable minds to differ on the

question of proximate cause, however jury instruction no. 13 removed that issue from the jury, effectively granting summary judgment against Mikhaylov on the counts of assault and battery. Summary judgment "is a drastic remedy which is available only where there are no material facts genuinely in dispute." *Turner v. Lotts*, 244 Va. 554, 555 (1992). Although at the summary judgment stage the facts must be viewed in the light most favorable to the nonmoving party, "'[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Scott v. Harris*, 550 U.S. 372, 380 (2007) (case in which videotape of car chase directly contradicted the nonmoving party's version of the facts and the Court stated, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.") Here, notwithstanding the admissibility of Mikhaylov's conviction, there were material facts genuinely in dispute with regard to the nature and extent of the claimed "attack", Sales's claimed injuries, the severity of her allegations against the defendant, and whether or not the Mikhaylov's actions were a proximate cause of her alleged injuries.

B. Error due to Conflicting Jury Instructions

The circuit court erred by instructing the jury that "the defendant cannot deny he assaulted and battered the plaintiff" without further instructing the jury that they did not have to accept Sales's version of the facts as true in determining liability, proximate cause, and damages. App. 128 (Tr. Day 4, 662:9-10, Jury Instruction No. 13). As such, jury instruction no. 13 amounted to summary judgment on counts I (Battery) and II (Assault) and usurped the function of the jury to weigh the evidence in making a determination with regard to liability, proximate cause, and damages related to these two counts. Furthermore, the instruction was further confusing to the jury since the jury was also separately instructed on the elements of assault and battery after being instructed that the defendant could not deny he assaulted and battered Sales. App. at 127, 128, 131 (Tr. Day 4, 661: 12-22, 662:1-2). These inconsistent instructions were misleading and were given in error.

"The giving of instructions which are inconsistent or contradictory to each other is error, for the reason that the jury will be as likely to follow the good as the bad, and it cannot be known which they have followed and which way soever they go, if there is an appeal. . .the judgment must be reversed."

Richmond Traction Co. v. Hildebrand, 99 Va. 48, 51 (1900). The giving of conflicting and inconsistent jury instructions "is error unless it plainly appears from the record that the jury could not have been misled by them." *Redd v. Ingram*, 207 Va. 939, 942 (1967) (internal citations omitted).

Jury instruction no. 13 was misleading and confusing to the jury because, while instructing that Mikhaylov could not deny he assaulted and battered Sales, it did not instruct the jury that they, as the fact finders, still needed to make a determination as to liability, proximate cause, and damages. For proximate cause, this Court has held "[u]nless there is no evidence to support a finding of proximate cause or the evidence leaves no room for reasonable minds to differ, proximate cause is a question of fact to be determined by juries rather than judges." *S&C Co. v. Horne*, 218 Va. 124, 131 (1977). As this court has long recognized, "juries are judges of the facts of a case, and an instruction which in any way invades the province of the jury in this respect, is erroneous, and ground for reversal." *Womack v. Circle*, 70 Va. 192, 211 (1877) (internal citations omitted). "An instruction which is susceptible of two interpretations, one of which is erroneous, and which may therefore mislead the jury should not be given." *Womack v. Circle*, at 211 (internal citations omitted). By that instruction, the jury was

told it did not need to weigh the evidence on those two counts because Mikhaylov could not deny them. The error lies that while Mikhaylov could not deny his guilty plea of assault and battery, he could deny the factual circumstances offered by Sales describing the nature, extent, and severity of the assault and battery.

C. Judicial Estoppel Does Not Apply

The trial court also erred in relying on the doctrine of judicial estoppel in preventing Mikhaylov from explaining the circumstances. App. at 92. "Judicial estoppel forbids parties from assuming successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory." *Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C.*, 269 Va. 315, 325 (2005) (*citing Lofton Ridge, LLC v. Norfolk S. Ry. Co.*, 268 Va. 377, 380-81 (2004)). "The doctrine of judicial estoppel may bar a party from taking inconsistent positions within a single action." *Lofton Ridge, LLC*, 268 Va. at 381. "The doctrine of judicial estoppel applies where the position taken is inconsistent relative 'to the same fact or state of facts.'" *Id.* (same).

However, "the doctrine of estoppel by inconsistent position [i.e., judicial estoppel] does not apply to a prior proceeding in which the parties are not the

same." *Id.* (same) (alteration in original); *accord Bentley Funding Group, L.L.C.*, 269 Va. at 325. It is clear that Virginia adopts the minority view requiring mutuality. *Bentley Funding Group, L.L.C.*, 269 Va. at 325. ("Although not a universally required element of judicial estoppel, it is clear **the doctrine applies in Virginia only when the parties to the disparate proceedings are the same**") (emphasis added). Here, there is no mutuality and the doctrine of judicial estoppel cannot be applied, even assuming the guilty plea was a factual position as opposed to a legal conclusion. "[The] Commonwealth and crime victim are not the same party for purposes of satisfying the mutuality requirement." *Ayala v. Aggressive Towing & Transp., Inc.*, 276 Va. 169, 173 (2008) (*citing Selected Risks Insurance Co. v. Dean*, 233 Va. 260, 263-64 (1987)).

Here, the jury was forced to accept that Mikhaylov could not deny that he assaulted and battered Sales without taking into account that Mikhaylov denies the factual claims made by Sales regarding the nature and extent of the assault and battery. This is prejudicial to a defendant where records of a guilty plea were entered into evidence that do not contain any explanation of the circumstances surrounding the plea, or the evidence possessed by the Commonwealth at the time of the plea. Further, the jury received separate

instructions on the elements of assault and the elements of battery which is confusing and misleading when read in conjunction with instruction no. 13. Based on the combination of instructions, the jury was to deliberate on the elements of assault and battery after being told that regardless, Mikhaylov could not deny any of those elements. For these reasons, Mikhaylov assigns error to granting jury instruction no. 13 which was confusing, misleading, and resulted in de facto summary judgment being granted against him and respectfully requests that this Court reverse the trial court and remand for further proceedings.

2. The circuit court erred by not allowing the defendant to deny the allegations made by the plaintiff of an "attack" in the defendant's case in chief.

The circuit court committed error in refusing to allow Mikhaylov to deny Sales's claims that he "attacked" her. App. at 539-42. By making this ruling, the court forced Mikhaylov to adopt Sales's characterization and description of the assault and battery claims which was misleading and confusing to the jury. The court further erred in failing to recognize that an assault and battery can occur absent an "attack" and the use of that term is prejudicial.

While on direct examination, defense counsel asked Mikhaylov if he

attacked Sales and Mikhaylov denied attacking her. *Id*. Sales's counsel objected stating that Mikhaylov could not deny that he attacked Sales. *Id.* The circuit court judge agreed, stating that Mikhaylov could not deny that he attacked Sales, asking, somewhat rhetorically, "How can you have an assault and battery without an attack?" *Id.* At that time, defense counsel explained that Mikhaylov was not denying the assault and battery due to his guilty plea, but that he was denying Sales's characterization of the assault and battery as an "attack." The court sustained Sales's objection, and instructed the jury to disregard Mikhaylov's statement that he did not attack Sales. *Id.* at 542. This instruction to the jury was prejudicial to Mikhaylov because it judicially approved Sales's version as the most accurate and credible, something that is improper, prejudicial, and reversible error.

In Virginia, the tort of assault is based on the common law, which "consists of an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in that other person's mind a reasonable apprehension of an imminent battery." *Koffman v. Garnett*, 265 Va. 12, 16 (2003). The tort of assault does not require physical touch. *Etherton v. Doe*, 268 Va. 209, 213 (2004). The tort of battery is defined as "an unwanted touching which is neither consented to,

excused, nor justified." *Koffman* 265 Va. at 16. Assault and battery are two separate and independent torts. *Bowie v. Murphy*, 271 Va. 126, 136 (2006) (*citing Koffman*, 265 Va. at 16). The term "attack," as defined in Webster's Dictionary has multiple definitions, some of which include, "to set upon with violent force;" "to criticize strongly or in a hostile manner;" and "to begin to affect harmfully." Webster's New College Dictionary, 72 (1st ed. 2001). None of these definitions of the term "attack" appear in the legal definition of assault or battery. Significantly, an assault cannot be by words alone without some overt action on the part of the defendant. *Clark v. Commonwealth*, 279 Va. 636, 641 (2010).

To satisfy the elements of assault and the elements of battery, a plaintiff need not allege that he or she was "attacked." Indeed, this Court has held, "the law is so jealous of the sanctity of the person that the slightest touching of another, . . .if done in a rude, insolent or angry manner, constitutes a battery for which the law affords redress. . ." *Pugsley v. Privette*, 220 Va. 892, 899 (1980) (*citing Crosswhite v. Barnes*, 139 Va. 471, 477 (1924)). In *Pugsley*, a jury found a doctor liable for battery upon a finding that the plaintiff had revoked her consent prior to the beginning of an exploratory surgery. *Pugsley*, 220 Va. at 899-900. Notably, the elements

of the tort of battery were met because the doctor engaged in an "unwanted touching" of the patient, even though the jury found the doctor acted within the standard of care while performing the surgery. *Id.* at 901. As another example, in *Koffman*, this Court found a plaintiff had pled sufficient facts to allege battery against defendant football coach after the coach, by trying to demonstrate proper tackling technique, broke the plaintiff's arm. *Koffman*, 574 S.E.2d at 259. In neither of these two cases was the term "attack" necessary to be used to define the legal term of "battery" and in both of these cases, defendants were found liable for actions constituting a battery that were not "attacks."

Because the legal definitions of assault and battery do not include the term "attack" or any of its various definitions, by forcing Mikhaylov to accept Sales's characterization, and the trial court's judicial approval of that term, that she was "attacked" by him, the jury was misled and Mikhaylov did not have a full and fair opportunity to present his version of the facts. The approval of the term "attack" by the trial court prejudiced Mikhaylov in all claims against him, including the claim of intentional infliction of emotional distress, as the jury was inflamed by the use and approval of such language. For these reasons, Mikhaylov respectfully requests that this Court reverse

the trial court and remand for further proceedings.

3. <u>The circuit court erred in allowing testimony and evidence to be presented with regard to future medical treatment and costs as these areas were not part of the plaintiff's expert designation as required by Rule 4:1 and the pretrial order, nor were they provided in the deposition of the expert. As such, the circuit court additionally erred in granting Jury Instruction No. 9 as to all future medical costs and treatment.</u>

Rule 4:1(b)(4)(A)(i) requires a party, when asked in an interrogatory, to identify its trial experts and "...to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion..." *Condo. Servs. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 576 (2011). When applying Rule 4:1(b)(4)(A)(i), this Court begins by "...determining whether the opinion at issue was disclosed in any form..." *Id.* at 575 (citing *John Crane, Inc.* v. *Jones*, 274 Va. 581, 591 (2007)).

An order of incorporation of discovery from the prior non-suited case was entered by the trial court on December 20, 2013. App. at 21-22. The order of incorporation did not incorporate the prior expert witness designations filed by the parties in the non-suited case. Sales did not refile her expert witness designation in this present case. Sales only filed a

rebuttal designation of Dr. Kenneth R. Lippman on March 19, 2014. App. at 45-47.

In this case, counsel for Sales admitted that nowhere in the designation of Dr. Lippman did Sales set forth any facts or a summary of the grounds of any opinions regarding future medical treatment and costs. App. at 435-36, 444. Further, counsel for Sales acknowledged that nowhere in the deposition of Dr. Lippman which was conducted on March 26, 2014 were there any facts or opinions regarding future medical treatment and costs. *Id*. The trial court did rule that any opinions contained in a supplemental report of Dr. Lippman provided on March 26, 2014 were inadmissible. However, the trial court allowed Sales to present evidence of future medical treatment and care over the objection of Mikhaylov based on Sales's argument that she provided supplemental answers to interrogatories. These answers were not in response to an expert interrogatory served on Sales. For example, counsel for Sales states ". . .in that answer, with regard to number 3, supplemental, it says, 'Plaintiff has been advised by her health care providers that she will only have long-term relief of the pain in her neck if she has surgery. Specifically, her health care providers have recommended she have a one-level anterior cervical discectomy and fusion

at C5-C6.'" *Id*. at 435. Counsel for Sales states further, . . . "In addition, she will continue to incur additional medical expenses, to include the cervical surgery and left knee surgery." *Id*. at 435. The supplementation from Sales was attributed to her healthcare providers and not her trial expert, Dr. Lippman. Counsel for Sales states, "Mr. Thorsen is correct. There is nothing in the designation or Dr. Lippman's deposition -- I'm not going to stretch it by saying that he never asked the question, but I think there was ample notice that we were going to be seeking future medical care." *Id*. at 435-36.

Sales failed to comply with the disclosure requirement of Rule 4:1(b)(4)(A)(i). Admittedly, through counsel, Sales did not disclose any opinions regarding future medical care and treatment in the designation of Dr. Lippman. As stated in *Crane*, . . . "a party is not relieved from its disclosure obligation under the Rule simply because the other party has some familiarity with the expert witness or the opportunity to depose the expert." 274 Va. at 592. Mikhaylov did depose Dr. Lippman and he did not disclose any facts or opinions at his deposition regarding future care or treatment.

Therefore, the trial court should not have allowed Sales's trial expert,

Dr. Lippman, to testify regarding any future treatment or care to the cervical spine or knees, or allow Sales to submit medical costs for future treatment or care. The trial court should not have instructed the jury that the plaintiff was entitled to any medical expenses that may be reasonably expected to be incurred in the future for treatment or care. App. at 140. For these reasons, Mikhaylov respectfully requests that this Court reverse the trial court and remand for further proceedings.

CONCLUSION

Mr. Mikhaylov respectfully requests that this Court find reversible error, reverse the rulings of the circuit court, and remand this case to the circuit court for further proceedings in accordance with this Court's Opinion.

Respectfully submitted,

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CERTIFICATE

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4. On this 7th day of December, 2015, ten (10) copies of the foregoing Appellant's Opening Brief were filed with the Clerk's Office of the Supreme Court of Virginia, along with an electronic copy filed through VACES, and a copy mailed to all counsel and Lisa Sales, appellee.

Michael E. Thorsen
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