IN THE

Supreme Court of Virginia

RECORD NO. 151985

MATTHEW T. MAYR, *et al.*,

Appellants,

v.

CATHERINE OSBORNE, ADMINISTRATOR of the ESTATE of MICHAEL J. OSBORNE,

Appellee.

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

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A Division of Lantagne Duplicating Services

SCV: Submitted on 08-11-2016 16:21:37 EDT for filing on 08-11-2016

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The Virginia Trial Lawyers' Association ("VTLA") submits this brief as Amicus Curiae in support of the Appellee, Catherine Osborne, Administrator of the Estate of Michael J. Osborne, deceased.

The Circuit Court's holding below was consistent with established precedent and correct in all respects. The Assignments of Error now advanced by the Appellants were neither presented nor preserved in the trial court. Should the Court adopt the Appellants' arguments, it would overrule decades of established Virginia tort law and erect new legal hurdles that were never even hinted at by the General Assembly. The VTLA writes to focus on the practical effects of the trial court's ruling, as that is where its interests lie.

Statement of the Case

VTLA adopts the statement of the case in the Appellee's briefs.

Statement of Facts

VTLA adopts the statement of facts in the Appellee's briefs.

Assignments of Error

This appeal involves two assignments of error, neither of which were preserved – or even presented – in the court below, and both of which are squarely rejected by this Court's precedent. VTLA's arguments relate to both assignments of error.

Summary of Argument

Assignment of Error No. 1 ("AOE 1") should be dismissed pursuant to Rule 5:25. It is overbroad, and it asks this Court to reverse the circuit court on the basis of arguments the Appellants never raised at trial. All parties in the trial court conceded that this was a "scope of consent" case. Dr. Mayr's evidence was that the wrong-level surgery was a "complication" that was <u>within the scope</u> of consent; Ms. Osborne's evidence was that the wrong-level surgery was <u>outside the scope</u> of consent. The trial court, sitting as the finder of fact, resolved this conflicting evidence in favor of Ms. Osborne, finding that the wrong-level surgery was outside the scope of consent and therefore an unconsented-to touching (*i.e.*, a battery). Dr. Mayr now asks this Court to disregard the trial court's factual determination, adopt his rejected defense, and resolve a question that was neither presented nor preserved in the court below: whether a hypothetical "slipped scalpel" constitutes a battery. This assignment should be dismissed without further consideration.

Assignment of Error No. 2 ("AOE 2") erroneously suggests that the Virginia Medical Malpractice Act ("VMMA") eliminated battery and all other potential torts against health care providers other than "medical malpractice." This argument is unsupported by the VMMA and decades of

case law analyzing – and permitting – "medical battery" claims against health care providers. If the General Assembly had given doctors such immunity, it would not have taken this Court, doctors, and their attorneys over 40 years to realize it.

Argument

1. Standard of review.

When reviewing a decision on a motion to strike, the Court must "review the evidence in the light most favorable to the non-moving party." Kiddell v. Labowitz, 284 Va. 611, 629, 733 S.E.2d 622, 632 (2012). The non-moving party must be given "the benefit of all substantial conflict in the evidence, and all fair inferences that may be drawn therefrom." Hadeed v. Medic-24, Ltd., 237 Va. 277, 281, 377 S.E.2d 589, 590 (1989) (internal quotation marks and citation omitted).

Where, as here, the circuit court denied a motion to strike, the Court should review the evidence to determine if the action was in error because either "it is conclusively apparent that [the] plaintiff has proven no cause of action against [the] defendant," or "it plainly appears that the [circuit] court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it." Blue Ridge Serv. Corp. v. Saxon Shoes,

Inc., 271 Va. 206, 218, 624 S.E.2d 55, 62 (2006) (internal quotation marks and citation omitted).

The Appellants incorrectly suggest that the Court may engage in *de novo* review. As set forth herein, the Appellants conceded that this was a "scope of consent" case. This Court has repeatedly held that "scope of consent" is a question of fact, not law. See Washburn v. Klara, 263 Va. 586, 588, 561 S.E.2d 682, 683 (2002) (concluding the "plaintiff presented sufficient evidence to create a factual dispute on this [scope of consent] issue, which a jury must resolve"); Woodbury v. Courtney, 239 Va. 651, 654, 391 S.E.2d 293, 295 (1990) ("A factual issue was created and the jury should have been allowed to determine the extent of the permission Woodbury granted to Dr. Courtney and whether he exceeded the scope of that permission."); Pugsley v. Privette, 220 Va. 892, 896, 263 S.E.2d 69, 72 (1980) ("The critical issue in this case is a factual one, and it is whether Mrs. Privette revoked the consent she gave Dr. Pugsley…"). This Court reviews questions of fact in the light most favorable to the prevailing party, and will not disturb a finding of fact unless clearly erroneous or without evidence to support it. Moorman v. Blackstock, Inc., 276 Va. 64, 73-74, 661 S.E.2d 404, 409 (2008) (citing Va. Code § 8.01-680).

2. Assignment of Error No. 1 should be dismissed.

a. This issue was neither presented nor preserved.

Contrary to the wording of Assignment of Error No. 1, this case did not present the issue of whether "a cause of action for the negligent performance of a consented-to medical/surgical procedure" may be maintained as a cause of action for battery. The trial court never heard argument on that point. It didn't have to, because all of the parties in the trial court admitted that this was a "scope of consent case."

Dr. Mayr repeatedly conceded, and put on evidence, that this was a "scope of consent" case. See J.A. at pp. 31 ("The issue is whether there was a complication or there was operating outside the scope of consent."); pp. 44 ("Q: Was what happened to him … within the scope of that risk? A: That was within the scope of risk.") (expert testimony); pp. 68 ("Your Honor, the issue here is the scope of the consent that was given by the patient"); pp. 70 ("The scope of the consent was adequate for the complication that occurred. There was no operation that occurred outside the scope of the consent that was given by Mr. Osborne…. It was within the scope of consent.").

Dr. Mayr's counsel even responded to extensive questioning from the court as to whether a wrong-leg procedure (Id. at pp. 71-72) or a distant

wrong-site procedure (*e.g.*, operating many spinal levels away from the consented-to target) would be beyond the scope of express or implied consent. Id. at pp. 72-73. Dr. Mayr's counsel attempted to distinguish these scenarios by arguing that the disclosure of the risk of "misplacement of screws" on Dr. Mayr's signed consent form brought his wrong-level surgery within the "scope of consent." Id. at pp. 71.

For her part, Ms. Osborne tried the case below as a "scope of consent" case. Id. at pp. 35-36 ("Mr. Osborne gave consent solely for the purpose of surgery at C5-C6…. [W]e have conclusively established that Dr. Mayr went beyond the scope of consent that he was given in performing the surgery at C6-C7… [H]e operated on a level for which he was not given consent. And the Supreme Court of Virginia says that's a battery.") (emphasis added).

The trial court also confirmed the parties' jointly-held position that this was a "scope of consent" case:

THE COURT:	[If defense counsel] Mr Rawls, … says if this case goes to the scope of consent, you agree with that?
MR. MIMS:	Yes, for any battery, of course it would.
THE COURT:	This is a scope of consent case?
MR. MIMS:	Yes. …
THE COURT:	Everybody agrees that this is a scope of the consent case?
MR. MIMS:	Absolutely.
THE COURT:	Okay.

Id. at pp. 73-74 (emphasis added).

The trial court went on to further clarify the precise matter at issue:

MR. MIMS:	Our case is that the June 15 surgery was not performed as anticipated.
THE COURT:	It was beyond the scope.
MR. MIMS:	Beyond the scope.
THE COURT:	I understand.

Id. at pp. 82-83 (emphasis added).

Thus, this case presented the issue of whether the surgery actually performed was within the scope of the consent actually given. The Plaintiff contended that it was outside the scope of consent, relying upon Dr. Mayr's responses to requests for admission wherein he admitted that he actually operated at the C6-7 (wrong) level, Id. at pp. 123 (RFA 9), and "that the intended surgery was at a different level." Id. at pp. 124 (RFA 11). In defense, Dr. Mayr contended that this was an "unintentional" "complication" which was within the scope of consent. Id. at pp. 41-44, 62.[1]

The trial court denied Dr. Mayr's motion to strike the evidence and, sitting as the finder of fact, resolved the conflict in the evidence by concluding that Dr. Mayr's wrong-level procedure was outside the scope of

[1] "Intent" was never an issue at trial; only the scope of consent. Contrary to the Appellant's argument on appeal, there is nothing in the record suggesting that the trial court concluded that the wrong level procedure was a "per se 'technical battery.'" (Appellant's Br. at 14.)

consent. To the extent the Court evaluates this finding of fact, it must afford the Appellee "the benefit of all substantial conflict in the evidence, and all fair inferences that may be drawn therefrom." Hadeed, 237 Va. at 281, 377 S.E.2d at 590 (internal quotation marks and citation omitted).

With this background, it is abundantly clear that this case did not involve, as Dr. Mayr now suggests, "a cause of action for the negligent performance of a consented to medical/surgical procedure…" Instead, it was a "scope of consent" case. Thus, because Assignment of Error No. 1 was neither presented nor preserved in the trial court, the Court should simply dismiss it pursuant to Rule 5:25.

b. Even if Dr. Mayr preserved the First Assignment of Error, the evidence revealed that he committed a "medical battery."

Dr. Mayr did, in fact, commit a "technical battery," also known as a "medical battery." Dr. Mayr had consent to fuse C5-C6. Instead, he fused C6-C7, which was not within the scope of his consent. His touching was intentional (a fact that was actually uncontested) and was not consented to. Under Virginia law, this is a battery.

Battery is "an unwanted touching which is neither consented to, excused, nor justified." Koffman v. Garnett, 265 Va. 12, 574 S.E.2d 258,

261 (2003). Because the physician-patient relationship is a consensual one, Lyons v. Grether, 218 Va. 630, 633, 239 S.E.2d 103, 105 (1977), a physician or surgeon must first obtain consent before treating or operating on a patient. Washburn, 263 Va. at 590, 561 S.E.2d at 685. This Court has long held that "[a]n unauthorized operation is a wrongful and unlawful act for which the surgeon will be held liable in damages." Id. (quoting Pugsley, 220 Va. at 899, 263 S.E.2d at 74).

This Court has been able to distinguish between a medical battery and medical negligence since at least 1808. See Taylor v. Rainbow, 12 Va. 423, 1808 Va. LEXIS 54, 2 Hen. & M. 423 (1808). The defendant in Taylor discharged a firearm in a public place, causing the loss of the plaintiff's leg. The plaintiff pursued an action of trespass *vi et armis* ("trespass by force and arms"), a common law action that has evolved into the modern torts of battery, trespass to chattels, and conversion. The defendant contended that he did not "intend" the outcome, but this Court did not permit his defense. Analogizing to a medical battery, this Court reasoned that an action of trespass *vi et armis* would be justified where a surgeon performed an amputation on the wrong leg. Id. at 438. In contrast, if the amputation was consented to but was performed improperly, "an action of trespass on the case, (founded upon his ignorance and

unskilfulness in performing what he had undertaken,) would seem to be the proper remedy…" Id. at 438. The Court then set forth the battery/negligence distinction that still holds true today:

> where the act done is, in itself, an immediate injury to another's person or property, there trespass vi et armis will lie; but where the act is not immediately injurious, but only by consequence, and collaterally, there no action of trespass vi et armis will lie, but a special action on the case for the damages consequent on such act.

Id. Thus, because the "law is so jealous of the sanctity of the person," an operation performed without consent, or outside the scope of consent, constitutes an "immediate injury" giving rise to a battery claim. Pugsley, 220 Va. at 899-900, 263 S.E.2d at 74.

c. Even if Dr. Mayr preserved the First Assignment of Error, the Court has already held that Virginia is a "single intent" state.

To truly engage with Assignment of Error No. 1, and for that Assignment to present a question of law subject to *de novo* review, the Court would need to decide whether Virginia is a "single intent" or a "dual intent" state. The "dual-intent" approach requires both an intent to make contact and an intent either to harm or offend. White v. Muniz, 999 P.2d 814, 814 (Colo. 2000) (Alzheimer's patient found not liable for battery because she did not appreciate offensiveness of her conduct). The "single

intent" approach requires only an intent to contact. White v. Univ. of Idaho, 797 P.2d 108, 109 (Idaho 1990) (piano teacher liable for touching student's back, despite no intent to harm). But this Court cannot answer the "single vs. dual intent" question because the Circuit Court was never called upon to answer it. See Goins v. Commonwealth, 251 Va. 442, 463, 470 S.E.2d 114, 128 (1996) (citing Rule 5:25). Rather, the defendants framed the issue at trial as "scope of consent," a question of fact ultimately resolved in Ms. Osborne's favor. Dr. Mayr must live with the case he tried, not the case he wishes he tried.

Even if the "single vs. dual intent" issue were presented and preserved, this Court has already made clear that Virginia is a single intent state. In Washburn, the defendant contended that if a wrong-level surgery occurred, it could not have been a battery because "it resulted from his negligence or lack of skill and not because he intentionally operated at that level." 263 Va. at 592, 561 S.E.2d at 686. The Court rejected this "dual intent" argument, concluding that "evidence presented by Washburn was sufficient to present a factual issue, for the jury's determination, whether [the defendant doctor] intentionally performed a cervical diskectomy at two levels of Washburn's spine, thus exceeding the scope of her consent." Id. In remanding for a new trial, this Court reiterated the single-intent standard:

"if a surgeon exceeds the scope of a patient's consent, then the doctor has committed a battery." Id. (quoting Woodbury, 239 Va. at 654, 391 S.E.2d at 295).

d. The VMMA did not create any expert testimony requirement.

Dr. Mayr also suggests that any "medical battery" claim must be supported by expert testimony as to the applicable standard of care. This cannot be true for two reasons. First, the "standard of care" defined by Va. Code § 8.01-581.20(A) cannot apply to battery claims because no standard of care applies to intentional torts. Second, this Court has already held that plaintiffs are "not required to present expert medical testimony in order to prove … allegations of [medical] battery." Washburn, 263 Va. at 591, 561 S.E.2d at 686; see also Woodbury, 239 Va. at 654, 391 S.E.2d at 295 ("Woodbury is not required to prove her allegations of battery with expert medical testimony…").

e. There is no reason for the Court to answer Dr. Mayr's inapplicable hypothetical questions.

Dr. Mayr suggests that if this Court does not reverse the trial court on the First Assignment of Error, it will open a "Pandora's box" in which run-of-the mill "nicked bowel" cases will become "technical batteries," thereby

causing "all medical negligence cases that involve surgical complications to adjoining structures … [to] be removed from the realm of medical negligence," relieving plaintiffs "of any duty to provide expert testimony as to standard of care and causation." (Appellant's Br. at 11.)

The "nicked bowel = battery" argument is a strawman. This Court's "technical battery" jurisprudence has existed since at least 1980. See Pugsley, 220 Va. 892, 263 S.E.2d 69. In the 36 years since Pugsley, Plaintiffs have not flooded courthouses and overwhelmed health care providers with frivolous battery cases based upon mere surgical misadventures such as a "nicked bowel."[2] The dearth of such cases over

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[2] "Medical battery" cases are neither new, nor common. Other than Pugsley, Woodbury, and Washburn, the only other reported Virginia cases involving battery claims against health care providers and "arising out of health care" located by VTLA are Glisson v. Loxley, 235 Va. 62, 366 S.E.2d 68 (1988) (alleged unauthorized knee surgery); Walters v. Leecost, 29 Va. Cir. 258 (Richmond City Cir. Ct. 1992) (jury determined surgery to first toe was not within scope of consent where surgery to fourth and fifth toes was intended); Hagan v. Antonio, 240 Va. 347, 397 S.E.2d 810 (1990) (alleged sexual battery during physical examination); McDonald v. Hoard, 48 Va. Cir. 421, 428 (Charlottesville City Cir. Ct. 1999) (battery claim against dentist alleging lack of consent); Wallace v. Zoller, 52 Va. Cir. 80, 81 (Winchester City Cir. Ct. 2000) (alleging failure to obtain consent prior to manipulation of arm under anesthesia); and Dell v. French, 38 Va. Cir. 91, 92 (Fairfax Co. Cir. Ct. 1995) (surgery on wrong side of brain).

the last 36 years, standing alone, answers the Appellants' hypothetical concerns.

Plaintiffs have not flooded the courthouse gates to file "technical battery" claims, and could not do so if the Court rejects AOE 1, because competent physicians obtain consent after disclosing realistic risks and complications, thereby protecting themselves from battery claims while benefiting patients with the information necessary to decide whether to consent to a procedure. If Dr. Mayr's argument is accepted, then the delicate balance between physicians' incentives (money, reputation, etc.) and patients' right to consent will be destroyed. Physicians will become surrogate consent providers for patients. What will protect physicians from their own self-incentives to operate? The current state of the law does so because physicians understand the risk of battery claims if full consent is not obtained, and the scope of that consent adhered to.

While consent in a medical negligence case (or any negligence case) is never relevant as a matter of public policy, Wright v. Kaye, 267 Va. 510, 529, 593 S.E.2d 307, 317 (2004), consent in a battery case is the central issue and provides an affirmative defense. This does not present anything novel or dangerous. Instead, the factual issue of "scope of consent" in medical cases will remain the same situation facing battery claims in the

rest of society. Did the law student consent to the professor tapping her shoulder in class?[3] Did the female deputy consent to a kiss from the Sheriff? King v. McMillan, 594 F.3d 301, 312 (4th Cir. 2010) (holding "[t]he question of whether a touching was consented to is for the jury."). Did the 13-year old football player give consent to a 260-pound adult coach tackling him? Koffman v. Garnett, 265 Va. 12, 17, 574 S.E.2d 258, 261 (2003).

The Appellants' inapplicable hypotheticals neglect a serious, real-world concern. Wrong-site, wrong-procedure, and wrong-patient errors ("WSPEs") are termed "never events" by the U.S. Department of Health and Human Service's Agency for Healthcare Research and Quality for a reason: they should never occur, and their occurrence indicates serious underlying safety problems.[4] It is estimated that WSPEs occur in at least 1 in 112,000 surgeries, and the incidence is believed to increase if procedures performed outside the operating room are included.[5]

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[3] *Was Class Lesson Assault?*, THE FREE LANCE STAR, March 26, 2002, at C1.

[4] Agency for Healthcare Research and Quality, *Patient Safety Primer: Never Events*, https://psnet.ahrq.gov/primers/primer/3, (last visited August 9, 2016).

[5] Agency for Healthcare Research and Quality, *Patient Safety Primer: Wrong-Site, Wrong-Procedure, and Wrong-Patient Surgery,* https://psnet.ahrq.gov/primers/primer/18/wrong-site-wrong-procedure-and-wrong-patient-surgery, (last visited August 9, 2016).

The Appellants fail to address how, if at all, their novel legal interpretation would address WSPEs. Under their theory, if Plaintiff #1 had the wrong leg amputated, or if Plaintiff #2 received a "wrong-patient" surgery intended for a different patient altogether, each Plaintiff would be forbidden from pursuing a battery claim, and would have to pay to put on expert testimony that operating on the wrong leg (Plaintiff #1) – or even the wrong patient (Plaintiff #2) – was a breach of the standard of care. How such expert testimony could possibly help the finder of fact remains unclear. This is not the result intended by the General Assembly and it is not a result supported by forty years of this Court's precedent.

Worse, in each of these WSPE cases, the defendants would contend that the WSPE is a "risk" that is "recognized," is "known to occur," and that "just happened" in the absence of negligence. In fact, that is exactly what Dr. Mayr tried to do in this case. See J.A. at pp. 32 (Mr. Rawls: "… no one has ever disputed there was a complication arising out of this surgery"); pp. 41 (Defense Expert Dr. Shaffrey: "It is a recognized complication."); pp. 42 (Dr. Shaffrey: "Even operating on the wrong level … falls also within the spectrum of complications.").

The Court should see Dr. Mayr's argument for what it is: an attempt to roll back decades of case law to permit health care providers to defend

"malpractice" suits by contending that consent to surgery is tantamount to consent to negligence. See Wright, 267 Va. 510, 593 S.E.2d 307 (holding that consent to surgery is never consent to negligence); Holley v. Pambianco, 270 Va. 180, 613 S.E.2d 425 (2005) (same); and Fiorucci v. Chinn, 288 Va. 444, 764 S.E.2d 85 (2014) (same).

Of course, the Court need not address Assignment of Error No. 1 just to answer hypotheticals posed by either party. This is because the law of "technical battery" in Virginia does not pose the crisis the Appellants suggest. The Appellants' argument is a solution (*i.e.*, an effort to immunize health care providers from tort liability) looking for a problem (*i.e.*, the inapplicable "nicked bowel = battery" hypothetical) that simply does not exist.

In summary, there is no reason for this Court to address Assignment of Error No. 1 because (1) it was neither presented nor preserved in the trial court; and (2) even if presented and preserved, it has already been repeatedly rejected by this Court.

3. Response to Assignment of Error No. 2 – The Virginia General Assembly did not immunize health care providers from tort liability via the Medical Malpractice Act.

In his Second Assignment of Error, Dr. Mayr argues that because he is a health care provider being sued for a tort arising out of health care, Ms. Osborne was required to bring any tort claim as a claim for "medical malpractice."[6] This argument is wrong for two reasons. First, and most importantly, the Court has repeatedly rejected the exact argument Dr. Mayr now raises for the first time on appeal. Second, the VMMA did not create any new causes of action or eliminate any pre-existing causes of action.

a. For at least 36 years, this Court has repeatedly rejected Dr. Mayr's argument that a battery claim is not cognizable in the health care context.

Dr. Mayr argues that intentional torts such as battery are barred by the VMMA, and must be pleaded and proven as "medical malpractice." This is actually a veiled term for medical negligence given his argument (in AOE 1) that all claims must be supported by expert testimony as to the standard

[6] Assignment of Error No. 2 only applies to causes of action "arising out of healthcare." It does not apply to causes of action that do not arise out of health care. See Hagan v. Antonio, 240 Va. 347, 351, 397 S.E.2d 810, 812 (1990) (holding certain torts "could never arguably be classified as an inseparable part of examination or treatment."); Alcoy v. Valley Nursing Homes, Inc., 272 Va. 37, 630 S.E.2d 301 (2006) (administrative, personnel, and security decisions unrelated to patient care are not covered by the VMMA).

of care. This argument has already been rejected by this Court. This Court should apply *stare decisis*.

The Virginia General Assembly passed the VMMA in 1976. 1976 Va. Acts. ch. 611. In the ensuing forty years, this Court has never once held that there is no tort "other than 'medical malpractice'" cognizable against health care providers. To the contrary, the Court has permitted numerous "medical battery" claims to proceed.

Four years after the VMMA was enacted, this Court held that "given the proper factual conditions and circumstances, a patient can maintain against a physician an action based on assault and battery for acts arising out of the physician's professional conduct." Pugsley v. Privette, 220 Va. 892, 899, 263 S.E.2d 69, 74 (1980). This holding alone, and the strong presumption in favor of *stare decisis*, is sufficient for this Court to reject Appellants' argument that "a cause of action arising out of health care … may not be pleaded and pursued as 'battery' or as any tort other than 'medical malpractice.'"

But Pugsley was not a one-off decision. Ten years later, in Woodbury v. Courtney, 239 Va. 651, 391 S.E.2d 293 (1990), this Court confronted another "medical battery" case in which the plaintiff claimed that she had only consented to a biopsy, not a partial mastectomy. The

defendant contended that she had implicitly consented to a partial mastectomy. Id. at 654, 391 S.E.2d at 295. The trial court held that the plaintiff's battery claim required expert testimony rebutting the defense of consent. Id. This Court was very clear in reversing the trial court's ruling:

> Woodbury is not required to prove her allegations of battery with expert medical testimony simply because Dr. Courtney intends to use expert medical testimony in his defense. A factual issue was created and the jury should have been allowed to determine the extent of the permission Woodbury granted to Dr. Courtney and whether he exceeded the scope of that permission. If Dr. Courtney exceeded the scope of that permission, then he committed a battery.

Id. (emphasis added).

Woodbury is completely dispositive of this appeal. The Court in Woodbury recognized that plaintiffs are not restricted to "medical malpractice" claims and can bring claims for battery arising out of health care. Id. Furthermore, the Court held that on remand, the Plaintiff "was not entitled to inject issues of negligence in this litigation because those issues were not relevant to her battery claim." Id. at 655, 391 S.E.2d at 296. That is, Woodbury held that a plaintiff pursuing a "medical battery" claim could not inject issues of negligence, as Dr. Mayr now argues is *required*.

Twelve years later, in Washburn v. Klara, this Court rejected for the third time the contentions Dr. Mayr now advances. 263 Va. 586, 561

S.E.2d 682 (2002). Washburn, just like this case, was a "scope of consent" case: Washburn contended that Dr. Borden, the defendant physician, exceeded the scope of consent by performing a cervical discectomy at both the intended level and an additional level. Id. at 591-92, 561 S.E.2d at 686. Dr Borden contended that the plaintiff had not established a battery "because there was no evidence that he intentionally exceeded the scope of Washburn's consent" and the wrong-level surgery occurred, at worst, due to "his negligence or lack of skill and not because he intentionally operated at that level." Id. at 592, 561 S.E.2d at 686.

This Court rejected Dr. Borden's intent argument, holding that there was sufficient evidence that "Dr. Borden performed a cervical diskectomy at two levels of Washburn's spine, thereby exceeding the scope of her consent." Id. at 590, 561 S.E.2d at 685 (emphasis added). This Court remanded for a new trial, reaffirmed that expert testimony was not required in "medical battery" cases, and held that where a doctor exceeds the scope of his consent, he commits a battery. Id. at 592, 561 S.E.2d at 686.

In summary, Dr. Mayr's Second Assignment of Error completely rehashes, almost verbatim, the exact arguments that this Court rejected 14 years ago in Washburn, 26 years ago in Woodbury, and 36 years ago in

Pugsley. This argument should be rejected again or, in the alternative, dismissed pursuant to Rule 5:25.

b. The VMMA did not create or eliminate any causes of action.

At its core, the VMMA does only two things. First, it defines the applicable standard of care in negligence actions based on health care against health care providers. Va. Code § 8.01-581.20(A). Second, in Va. Code Ann. § 8.01-581.1, it utilizes a broad definitional umbrella for "malpractice" ("any tort action … based on health care … by a health care provider") (emphasis added)) to impose an inflation-adjusted damages cap. Va. Code § 8.01-581.15.

The VMMA did not create or recognize a cause of action for "medical malpractice." There is not and never has been such a cause of action. "Malpractice," rather than being a standalone cause of action, is simply a broad, catch-all definition which includes causes of action for medical negligence, which are premised upon a statutorily-defined duty, and "any tort" other than medical negligence – including battery. If the General Assembly intended all causes of action against health care providers to be delineated as causes of action for "medical malpractice," it should have plainly manifested that intent. "The common law is not to be considered as altered or changed by statute unless the legislative intent be plainly

manifested." Hannabass v. Ryan, 164 Va. 519, 525, 180 S.E. 416, 418 (1935); see also Va. Code Ann. § 1-200 ("The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.") Further, "[s]tatutes in derogation of the common law must be strictly construed. A statutory change in the common law is limited to what is expressly stated or necessarily implied, because there is a presumption no change was intended." Mitchem v. Counts, 259 Va. 179, 186, 523 S.E.2d 246, 250 (2000).

The VMMA also did not eliminate any existing causes of action against health care providers. If the General Assembly wished to grant all health care providers immunity from all intentional torts based on health care, it could have done so expressly. It did not. Instead, the General Assembly stood by for 36 years after the Court in Pugsley held that "medical battery" claims against health care providers were cognizable under the VMMA. See Tazewell County Sch. Bd. v. Brown, 267 Va. 150, 163, 591 S.E. 2d 671, 677 (2004) ("We have repeatedly held that the General Assembly is presumed to have knowledge of the …interpretation

of statutes, and the General Assembly's failure to make corrective amendments evinces legislative acquiescence…”).

In conclusion, there simply is no authority supporting Dr. Mayr’s argument that every tort claim based on health care must be pled as “medical malpractice.”

Conclusion

The stakes of this case are high. If the Court adopts the Appellants’ arguments, it would rewrite both the VMMA and decades of case law by granting tort immunity to health care providers that has gone undiscovered for over 40 years. The Court should simply dismiss this appeal or, in the alternative, affirm the trial court’s judgment.

Dated: August 11, 2016

Respectfully submitted,

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Certificate

The undersigned hereby certifies that the foregoing complies with Rules 5:26, 5:27, and 5:30. The undersigned further certifies that, on this 11th day of August, 2016, one electronic version, in Adobe Acrobat Portable Document Format (PDF) format, was filed by hand with the Clerk of this Court and served on counsel of record by electronic mail. In addition, the correct number of printed copies were filed with the Clerk of this Court by hand and one copy were served on the following counsel of record by United States Mail, first class postage prepaid:

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