In The

Supreme Court of Virginia

RECORD NO. 151985

MATTHEW T. MAYR, M.D. and MID-ATLANTIC SPINE SPECIALISTS, P.C.,

Appellants,

v.

CATHERINE OSBORNE, Administrator of the Estate of Michael J. Osborne,

Appellee.

REPLY BRIEF OF APPELLANTS

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Appellee's (Mrs. Osborne's) Brief unnecessarily complicates and obfuscates the issues in this appeal. At its heart, this appeal presents an issue that is fundamental to our jurisprudence for centuries – the distinction between claims of intentional tortious conduct versus claims of negligence. By permitting the plaintiff below to proceed to judgment on a cause of action for battery, where the plaintiff conceded that she had no claim of any intentional conduct by the defendant, the trial court effectively dissolved that distinction. That constitutes fundamental and plain error.

I. This Appeal Presents Issues of Law Appropriate for De Novo Review.

Although Mrs. Osborne contends that in this appeal Dr. Mayr is challenging a factual finding by the trial court on the issue of the "scope of consent," we are not appealing the trial court's ruling on a question of fact. Regardless of any issue involving the "scope of consent," there was no claim in this case of intentional conduct to support a claim for an intentional tort (battery) and there was no expert testimony put on by Mrs. Osborne to support a finding of medical malpractice against Dr. Mayr. Both of these deficiencies are matters of law and must be reviewed de novo. In this case Mrs. Osborne's sole cause of action for battery should have been stricken.[1]

[1] Although Mrs. Osborne does argue for a more favorable (to her position) standard of review, she ultimately concedes that "[t]he

II. The Issues Raised on Appeal Were All Properly Preserved Below. If this Court Deems The Issues to Have Not Been Properly Preserved in the Trial Court, This Court Should Still Consider and Rule on the Issues "To Attain the Ends of Justice."

The issues raised on this appeal were preserved below by the presentation of appropriate oral motions and written memoranda to the trial court. See Brief of Appellee at p. 9 ("Both of Dr. Mary's [sic] Assignments of Error in this case arise from the renewed motion to strike . . . ."). As Mrs. Osborne acknowledges, Dr. Mayr, by counsel, orally argued to the trial court his motions to strike, in which he raised the arguments that (1) Mrs. Osborne's sole allegation was negligence (as opposed to intentional conduct) by Dr. Mayr,[2] and (2) there was a fatal absence of expert testimony to support the plaintiff's case. J.A. at pp. 31-38 and 66-77.

Assignments of Error presented by Dr. Mayr also present questions of law, which this Court reviews under the de novo standard." Brief of Appellee at p. 7.

[2] More specifically in this regard, Dr. Mayr's counsel argued:

> What this is is basically saying that Dr. Mayr was negligent in the performance of the June 15th, surgery**. And they can try to wrap this up any way they like by trying to call it a battery case, but the issue is that he was negligent in the performance of that surgery,** and for that in a malpractice case, they have got to have an expert. They don't have one here.

See J.A. at p. 32. Thus, Mrs. Osborne's statement that, "Dr. Mayr did not submit argument to the trial court that Ms. Osborne's claim was improperly labeled as a battery claim," is inaccurate. See Brief of Appellee at p. 3.

Because all of the issues raised on this appeal were presented to the trial court by way of written memoranda (and, other than the issues related to the application of the Virginia Medical Malpractice Act, were subsequently argued to the court), issues were properly preserved for appeal. See J.A. at pp. 133-46. See Virginia Code § 8.01-384 **("Arguments made at trial via written pleading, memorandum,** recital of objections in a final order, **oral argument reduced to transcript,** or agreed written statements of facts shall, **unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.")** (emphasis added). See Rhoten v. Commonwealth, 286 Va. 262, 268 (2013) ("Code § 8.01-384(A) controls the interpretation of Rule 5:25.") (citing Helms v. Manspile, 277 Va. 1, 7 (2009)).[3] The Code section, thus,

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See also J.A. at pp. 139-40 (Dr. Mayr's trial Memorandum arguing "Plaintiff Improperly Labeled Case as Battery Action").

[3] Helms v. Manspile holds:

> **. . . Code § 8.01-384(A) . . . is controlling over Rule 5:25, and we must apply the statutory provision.** Va. Const. Art. VI § 5; Dorn v. Dorn, 222 Va. 288, 291, 279 S.E.2d 393, 384-95 (1981); Turner v. Commonwealth, 221 Va. 513, 519-20, 273 S.E.2d 36, 40 (1980)).

277 Va. at 7 (emphasis added). That portion of Code § 8.01-384 cited herein was added to the statute by 1992 Va. Acts. Ch. 564. According to Professor Hamilton Bryson, the amendment was enacted to "clarify" the law in response to Lee v. Lee, 12 Va. App. 512, 404 S.E.2d 736 (1991), which held that "neither the Code nor Rule 5A:18 is complied with merely by objecting generally to an order. Since the rule provides that '[a] mere statement that the judgment or award is contrary to the law and evidence is

governs over any contrary holding in the cases cited by Mrs. Osborne. See Brief of Appellee at pp. 7-9 and 11.[4]

Mrs. Osborne questions several times in her Brief whether or not Dr. Mayr raised through written memorandum his argument regarding the applicability of the Virginia Medical Malpractice Act (the "VMMA"). See Brief of Appellee at pp. 3-4 and 13. Dr. Mayr, by counsel, raised this issue in his filed Memorandum in Support of Motion to Strike Plaintiff's Case, in which he argued that a separate battery claim is not permitted under the VMMA. See J.A. at pp. 138-46. Although the trial court did not orally acknowledge receipt of that Memorandum, it was part of the record below.

In the end, even if some deficiency can be found in the efforts to preserve all issues, the appellate issue presented is so fundamental to our established jurisprudence that review is provided for pursuant to Virginia Supreme Court Rule 5:25, which recognizes the need for appellate review

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not sufficient,' it follows that a statement that an order is 'seen and objected to' must also be insufficient. Id. at 515, 404 S.E.2d at 738." See Bryson on Virginia Civil Procedure § 12.02 n.14 (4th ed. 2005).

[4] "Once a party has preserved an argument for appeal, to waive the argument under Code § 8.01-384(A), the party must abandon it or show intent to abandon by the party's conduct." Id. "There must be 'clear and unmistakable proof' of the intent to waive the argument before" implied waiver is concluded. Id. (citing Chawla v. BurgerBusters, 255 Va. 616, 623 (1998)). Here, there was no waiver or abandonment of any issue argued orally or by written memoranda, and Mrs. Osborne concedes that by virtue of the fact that she never raises it.

where there is "good cause shown or to enable this Court to attain the ends of justice." See Rule 5:25; see also Gheorghiu v. Commonwealth, 280 Va. 678, 689 (2010) ("Rule 5:25 . . . allows us to consider matters not preserved for appeal to attain the ends of justice. Whether the ends of justice provision should be applied involves two questions: (1) whether there is error as contended by the appellant; and (2) whether the failure to apply the ends of justice provision would result in a grave injustice.") (citing Charles v. Commonwealth, 270 Va. 14, 17 (2005)).

In this case the question of whether a trial court may permit a litigant to pursue a claim for an **intentional tort** in the face of an unequivocal concession that there was **no intentional conduct** implicates fundamental issues of fairness and the doctrine of plain error. See Banks v. Mario Industries of Virginia, Inc., 274 Va. 438 (2007) (recognizing the doctrine but finding no plain error where party objected to use of a verdict form but had made "no objection concerning the verdict form").

In cases such as this – and these are rare cases – no specific method of preservation of issues for appeal is required. It is simply contrary to our fundamental jurisprudence (and in this case contrary as well to the statutory mandate of the VMMA) to obliterate the distinction between intentional and unintentional torts by permitting a battery case to proceed in

the face of a simple admission by the plaintiff that the case involves no claim of any intentional conduct by the defendant.

III. The Lack of a Specific Ruling by the Trial Court on Dr. Mayr's Motion to Strike the Evidence Does Not Preclude Review on Appeal.

Following Dr. Mayr's renewal of his motion to strike the evidence at the conclusion of his case-in-chief, the trial court entered judgment in favor of Mrs. Osborne. Unquestionably, implicit in granting judgment in favor of Mrs. Osborne, the trial court denied Dr. Mayr's motion to strike.[5] The general requirement that the trial court issue rulings does not obviate all notions of plain common sense that when a court enters judgment over a pending motion to strike, the motion to strike has been effectively denied.

The cases cited by Mrs. Osborne are inapposite. In Buck v. Jordan, 256 Va. 535 (1998), this Court refused to consider an issue on appeal that was never pleaded and never raised in the trial court. See Brief of Appellee at pp. 7-9. By contrast, here Dr. Mayr clearly raised to the trial court his motion to strike the evidence, and the trial court obviously denied that motion by granting judgment in favor of Mrs. Osborne.

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[5] After trial, the circuit court entered an Order finding in favor of Mrs. Osborne and awarding damages in the amount of $150,000. J.A. at pp. 147-49. Counsel for Dr. Mayr endorsed that Order as "Seen and objected to for the grounds and reasons stated in open court." Id.

In Taylor v. Commonwealth, 208 Va. 316 (1967), this Court refused to consider allegedly "improper and prejudicial remarks to the jury in . . . closing argument . . . .," id. at p. 324, because, although the opponent had made an oral objection to the remarks, the trial court never announced any ruling on that objection. See Brief of Appellee at pp. 8-9. This appeal, of course, is not dealing with objected-to remarks during a closing argument, and is distinguishable because the final result, i.e., the judgment in favor of Mrs. Osborne, means that the trial court effectively ruled on Dr. Mayr's motion to strike the evidence.

In Lenz v. Commonwealth, 261 Va. 451 (2001), this Court dealt with an appeal regarding a pretrial "motion to poll individual jurors." Id. at pp. 462-63. See Brief of Appellee at pp. 7-9. Although the pretrial motion was filed, the trial court never granted or denied it and entered no order with respect to it. Again, the facts and circumstances here are much different, as Dr. Mayr made an oral motion on the record during trial, and the Court granted Judgment in favor of Mrs. Osborne, thereby denying the motion to strike the evidence.[6]

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[6] Fisher v. Commonwealth, 16 Va. App. 447, 454 (Ct. App. 1993) (refusing to consider issue where appellant "failed to object properly and sought no relief from the trial court") and Hogan v. Commonwealth, 5 Va. App. 36, 45 (1987) (appellant "made no motion before or during trial" and

Regardless of whether the trial court explicitly ruled on all motions orally raised, as argued above, Virginia Code § 8.01-384(A), serves to preserve for appeal the issues raised during the course of trial.

IV. Negligent (At Most) Conduct By a Physician During the Treatment of a Patient Cannot Suffice to Prove a Cause of Action for the Intentional Tort of Battery.

Mr. Osborne filed a lawsuit claiming both medical negligence and battery. He then voluntarily dismissed his medical negligence claim and elected to proceed to trial solely on a theory of an intentional tort – battery. Notwithstanding this election, Mr. Osborne (and, subsequently, Mrs. Osborne) repeatedly conceded that there was **no intentional conduct in the case**. J.A. at pp. 14 and 34-36. The only conduct by Dr. Mayr alleged was unintentional, negligent conduct. So the simple question is: How can a claim of straightforward negligent conduct all of a sudden become a claim of intentional conduct such that all of the requirements of proving medical negligence recognized by our legislature in the VMMA are rendered inapplicable?

Mrs. Osborne misapplies the limited notion of "technical battery" as it has been used in the past by this Court. The precedent of the Court in this area has never been so broad as to wipe out any and all distinction

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"failed to obtain a ruling from the trial court"), cited at Brief of Appellee at pp. 8-9, are similarly distinguishable.

between intentional torts and unintentional torts. This Court has never sanctioned the use of any concept of "technical battery" in a case such as this one, where no intentional conduct whatsoever is alleged or proven.

None of the prior cases of this Court that have addressed the issue of "technical battery" in the context of medical care and treatment deal with any situation analogous to this one, and all reflect a very limited scope and utility for the concept. Washburn v. Klara, 263 Va. 586, 561 S.E.2d 682 (2000), Woodbury v. Courtney, 239 Va. 651, 391 S.E.2d 293 (1990) and Pugsley v. Privette, 220 Va. 892, 263 S.E.2d 69 (1980), all cited by Mrs. Osborne (see Brief of Appellee at pp. 14-16) and Amicus Curiae (see Brief Amicus Curiae at pp. 9, 11),[7] are markedly distinguishable -- and fundamentally different in nature -- from the facts and claim here and all of those cases involved circumstances much different than in this case. Those cases involved: a patient who consented to spinal fusion at one level and the defendant physician fused at two levels (Washburn); a patient who consented to a surgical procedure by only one, particular surgeon, and

[7] On August 11, 2016 the Virginia Trial Lawyers Association (the "VTLA") filed a Motion for Leave to File Brief Amicus Curiae, together with a Brief Amicus Curiae of the VTLA in Support of Appellee. Dr. Mayr, by counsel, opposed that motion. At the time of the filing of this Reply Brief of Appellants, the VTLA's motion remains pending. Because this is Dr. Mayr's only opportunity to respond to points made by the VTLA in its Brief Amicus Curiae, he does so without waiving his previously filed objections to same.

another surgeon performed the surgery (Pugsley); and a physician who performed a partial mastectomy when the patient had only consented to a breast biopsy (Woodbury). See Brief of Appellants at pp. 8-11. In other words, all three of those cases were truly situations where the surgeon's conduct **intentionally** exceeded the "scope of consent" that the patient had given.

Notably, the Complaint filed by Mr. Osborne speaks in terms of negligence, even with respect to the plea for damages relating to the battery cause of action. See J.A. at pp. 1-5. In that portion of the Complaint (which was never amended by Mr. Osborne, or his wife as the personal representative of Mr. Osborne's Estate) which pleads a request for damages flowing from both the negligence and the battery causes of action, the only terminology used was that of negligence: "That as a direct and proximate result of **the negligent acts and omissions** of the defendant the plaintiff was caused to sustain serious and permanent injuries . . . ." Id. at p. 4 (¶ 16) (emphasis added). The point is that, although prior to trial Mrs. Osborne non-suited her cause of action for negligence (see J.A. at p. 6), in this case her "battery" claim, unlike the battery claims in Washburn, Woodbury and Pugsley, was premised on an allegation of negligent conduct. Thereafter, the entire issue of "scope of

consent" was tried in the context of a claim of negligent, non-intentional conduct.[8]

V. Mrs. Osborne Tried One Cause of Action: Battery. There is No Cause of Action or Specifically Recognized Claim in Virginia for "Exceeding the Scope of Consent."

Mrs. Osborne asserts that the case below presented only an issue of "scope of consent." See Brief of Appellee at pp. 4, 12, 14 and 18-19; see also Brief Amicus Curiae at pp. 2, 5-7. This is untrue.[9] Certainly, "scope of consent" was a contested factual issue. But, as noted above, the fundamental issue presented to this Court has to do with intentional versus unintentional conduct – **regardless of the scope of consent**. There is no question in this case but that Mr. Osborne consented to the surgery that

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[8] The 1808 case cited and relied upon by the VTLA in its Brief Amicus Curiae for the proposition that this Court distinguishes "between a medical battery and medical negligence," Taylor v. Rainbow, 12 Va. 423, 1808 Va. LEXIS 54, 2 Hen. & M. 423 (1808), was decided over a century before the Virginia legislature enacted the VMMA and has little or no practical, precedential value on the question presented here. See Brief Amicus Curiae at pp. 9-10.

[9] The Brief Amicus Curiae, at pp. 7-8, states that "[t]he 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 consent." However, the trial court never expressly "conclude[ed] that Dr. Mayr's wrong-level procedure was outside the scope of consent." Id. All that the trial court decided on the record was that it would award damages in favor of the plaintiff. J.A. at p. 86 ("Here's the decision. . . . The Court has made a determination as to the credibility of the witnesses and given that the appropriate weight upon the evidence presented and the review of the testimony, the Court awards the Plaintiff the sum of $150,000 . . . .").

Dr. Mayr planned to provide and thought at all times he was providing. The only reason Mr. Osborne did not receive the result of the consented-to surgery that was anticipated was because Dr. Mayr, at most, made a mistake and operated on the next adjacent level. The issue on this appeal is whether such straightforward claims of negligence may -- by a mere act of pleading and labeling the claim as "battery" -- be transformed into an intentional tort and further, if by doing so, the plaintiff can effectively circumvent all of the requirements in the VMMA for proving medical negligence, including the need for an expert on standard of care.

This is especially relevant here, where Dr. Mayr had two experts to testify that his conduct in the case did not amount to negligence, but was rather a foreseeable complication of the procedure. J.A. at pp. 38-44, 70 and 73. The trial court did not require Mrs. Osborne to meet any of this evidence with experts of her own because the trial court adopted Mrs. Osborne's position that the case was pleaded as a battery case.

VI. The VMMA Requires All Torts Pleaded Against a Health Care Provider in the Context of Rendering "Health Care" to be Pleaded as Medical Malpractice.

The Virginia General Assembly has comprehensively legislated in the area of medical malpractice. That legislation, the VMMA, states explicitly that all tort claims against health care providers that arise out of the

provision of "health care" are claims of medical negligence to be brought under the auspices of the VMMA.[10] There is no ambiguity in this statutory scheme and there is no need to apply any tenets of statutory interpretation -- such as the suggestion of Mrs. Osborne -- that the statute be construed "strictly." See Brief of Appellee at pp. 5 and 24; see also Brief Amicus Curiae at p. 23. When the statute says "**any tort . . . claim"** is covered under the act as medical negligence, it means **all tort claims. The term "any" does not require any judicial interpretation**.[11]

Contrary to the argument of Amicus Curiae, the plain interpretation of the VMMA to prohibit claims of intentional torts does not provide any

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[10] The VMMA obviously does not cover conduct by a health care provider that is clearly outside the scope of the rendering of "health care," e.g., crimes or intentional torts like rape, fraud, fraudulent concealment or robbery. See Hagan v. Antonio, 240 Va. 347, 351 (1990) ("It is undisputed that a breast examination, including the touching, is an inseparable part of a typical, complete physical examination of a woman. Rape or robbery during such an examination, or during treatment of a patient, could never arguably be classified as an inseparable part of examination or treatment."). Here, all of Dr. Mayr's conduct during the course of Mr. Osborne's surgery constituted an "inseparable part of [his] . . . treatment" of Mr. Osborne. **Nowhere in this case did Mrs. Osborne ever plead or argue that Dr. Mayr's alleged acts or omissions were outside the context of "health care" as that is defined in the VMMA.**

[11] Mrs. Osborne claims that any reliance on the VMMA should not be permitted because it was not argued below. But not every argument in support of an issue raised below needs to have been articulated and orally argued to the trial court, as long as the issue itself was raised during trial. Virginia Code § 8.01-384. In this case, Dr. Mayr raised the issue of the inapplicability of a battery claim in the context of a medical malpractice action. J.A. at pp. 138-46.

"immunity" for health care providers from tort liability. See Brief Amicus Curiae at pp. 2-3, 18 and 23. **Negligence is tort liability.** What the statutory scheme does is provide a comprehensive scheme governing tort liability in cases of alleged medical negligence and as part of doing so eliminates any other type of tort liability – including claims for battery -- as a substitution for a claim that could and should proceed as a straightforward claim of negligence.

VII. In the Context of the Factual Allegations Pleaded in this Case, Expert Testimony Was Required.

Relying solely upon Woodbury v. Courtney, 239 Va. 654, Mrs. Osborne argues that she was not required to have at trial any expert witness to testify in her case-in-chief. See Brief of Appellee at pp. 5 and 26. But, as discussed above and in the opening Brief of Appellants (at pp. 8-10), Woodbury involved circumstances where a surgeon made an intentional decision to expand the consented-to, limited breast biopsy procedure. In this case Dr. Mayr indisputably made no intentional decision to do anything other than the consented-to procedure. The most that could be said -- or was said by Mrs. Osborne -- is that Dr. Mayr performed that single, consented-to procedure negligently and on those facts expert testimony was required in support of Mrs. Osborne's claim.

Indeed, permitting the use of "technical battery" as a cause of action in cases such as this, which presents only facts supporting common law negligence, would have the effect of turning garden variety medical negligence claims into **strict liability** torts and obviating any requirement of expert testimony to support a breach of the standard of care or proximate causation of damages. There is no indication that the legislature in promulgating the VMMA intended that health care providers be subject to strict liability for unintentional (i.e., negligent) performance of services.[12]

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[12] Virginia law allows for strict liability when an ultra-hazardous activity is involved. However, this Court has taken a narrow view in determining what qualifies as an ultra-hazardous activity. This Court considers the Restatement (Second) of Torts in determining whether an activity is abnormally dangerous. See Philip Morris, Inc. v. Emerson, 235 Va. 380, 406 (1988). The factors listed in the Restatement are: the existence of a high degree of risk of some harm to the person, land, or chattels of others; a likelihood that the harm that results from it will be great; an inability to eliminate the risk by the exercise of reasonable care; the extent to which the activity is not a matter of common usage; the inappropriateness of the activity to the place where it is carried on; and the extent to which its value to the community is outweighed by its dangerous attributes. Restatement (Second) of Torts § 520 (1965). This Court, in Philip Morris, focused its examination of the factors on the ability to eliminate the risk by the exercise of reasonable care. The Court found that the danger involved with the chemical pentaborane could have been eliminated by the use of reasonable care. Certainly, none of the factors supporting the application of strict liability are relevant or pertain to the routine provision of health care services by health care professionals.

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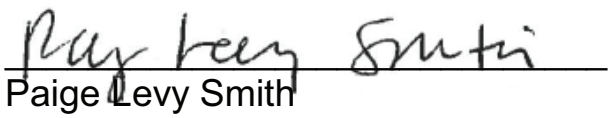
CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, I hereby certify on this 25th day of August, 2016, that an electronic copy of the Reply Brief of Appellants has been e-filed, via VACES, and ten bound copies of the Reply Brief of Appellants have been hand-filed with the Clerk of this Court. An electronic copy of the Reply Brief of Appellants was served, via e-mail, to counsel for Appellee, Gary B. Mims, VSB #19184, Zachary J. Desmond, VSB #68096 and Matthew C. Perushek, VSB #84308, Sickels, Frei & Mims, PC, 3925 Chain Bridge Road, Suite 402, Fairfax, Virginia 22030, (703) 925-0500, gary.mims@sfmlawyers.com, zachary.desmond@sfmlawyers.com, matthew.perushek@sfmlawyers.com and Susan F. Pierce, VSB #26795, Walker Jones, P.C., 31 Winchester Street, Warrenton, Virginia 20186, (540) 347-9223, spierce@walkerjoneslaw.com, and counsel for *Amicus Curiae* Les S. Bowers, VSB #77840, Gentry Locke, Attorneys, SunTrust Plaza, 10 Franklin Road, S.E., Suite 800, Roanoke, VA 24011, (540) 983-9300, bowers@gentrylocke.com.

Given under my hand this 25th day of August, 2016.



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