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.

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is an appeal of a judgment against Matthew Mayr, M.D. ("Dr. Mayr") and Mid-Atlantic Spine Specialists, P.C., arising out of a battery claim. Plaintiff Michael J. Osborne ("Mr. Osborne") filed his Complaint in the Circuit Court of Henrico County on June 30, 2010. Joint Appendix ("J.A.") at pp. 1-5. The Complaint originally alleged two causes of action against Dr. Mayr: negligence and battery, arising out of Dr. Mayr's neurosurgical care and treatment of Mr. Osborne.[1] Id. The essential factual allegation against Dr. Mayr (and his professional practice) was that Dr. Mayr intended to fuse the patient's spinal C5/6 disks, but instead fused the C6/7 spinal disks.

Following discovery, on July 10, 2015 the Court entered an Order of Partial Nonsuit, by which Plaintiff nonsuited the cause of action based on negligence, leaving only the battery cause of action to be tried. Id. at pp. 6-7.

[1] On July 23, 2014 Mr. Osborne passed away. On May 5, 2015 the Circuit Court entered an Order by which Mr. Osborne's widow, in her capacity as Administrator of Mr. Osborne's estate, was substituted as the party plaintiff.

A bench trial proceeded on July 21, 2015.[2] The facts of this case were straightforward. Mr. Osborne consented to a discectomy to be performed by Dr. Mayr that was intended to occur at level C5-6. Dr. Mayr performed the surgery and at all times intended and believed he was in fact operating at the target (intended) level. As a result of an error – conceded by Plaintiff to **not** be an intentional act (i.e., negligence) – the operation occurred at the next adjacent level, C6-7. Instead of pursuing at trial a claim against Dr. Mayr as a negligence claim for medical malpractice, Mr. Osborne proceeded on a theory of battery.

Mr. Osborne did not claim and admitted that there was no evidence of any intentional, wrongful conduct by Dr. Mayr. Further, Mr. Osborne produced no expert witness to provide testimony as to any applicable standard of care or violation thereof given the facts of this case. Defendants produced two experts who testified that under the facts of this case, there was no breach of any standard of care.[3]

At trial Plaintiff called one witness, Mr. Osborne's widow (Catherine Osborne), and read into evidence certain requests for admission and

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[2] On July 6, 2015 the Circuit Court entered an Agreed Order to waive the jury.

[3] One of the defense experts, Dr. Christopher Shaffrey, testified in person at the trial. J.A. at pp. 40-44. The other expert, Dr. Ronald Childs, provided testimony by deposition, which was read and considered by the trial court. Id. at pp. 62, 73 and 86.

responses. Plaintiff then rested. Dr. Mayr moved to strike the evidence on the strictly legal grounds that the issue presented was one of medical negligence and Plaintiff needed, but did not produce, an expert witness to testify that the conduct fell below a standard of care, as opposed to being a complication of the procedure itself. See J.A. at pp. 31-33. Plaintiff took the position that, as this was a claim for battery, expert testimony was not required. See id. at pp. 33-34. Plaintiff further claimed that, as Dr. Mayr negligently operated on the level adjacent to the intended site, his conduct was a battery and the issue of intent was irrelevant. Id. at pp. 14 ("Our case is that by doing C6-C7 instead of C5-C6, that constituted a battery."); 35-36 ("We don't contest that it was a mistake. We don't contest that he didn't intend to do it."); 39 ("whether Dr. Mayr intended to do C5-6 or C6-C7 is not relevant in the case."); 67 ("This is an assault – I mean a battery in this case. There was – intent's not important, intent's not relevant."); 76 ("But this, we all agree, is surgery that was done at the wrong level, not intended by the doctor . . . ."). Plaintiff contended that the surgery at the wrong site was unconsented to, and thus a "technical battery."

Dr. Mayr argued that the surgical procedure performed (a spinal fusion) was the procedure that had been consented to and it was only as a

result of a surgical error (either justifiable or not) that an immediately adjacent site (C6-7 instead of the intended C5-6) was affected.

At the close of the evidence, Dr. Mayr renewed his motion to strike. Id. at p. 66. At that time the defense also filed and served a written motion and accompanying memorandum. See id. at p. 85. Specifically, Defendants filed a Memorandum in Support of Motion to Strike Battery Action, arguing that (1) Plaintiff, having advanced only a theory of battery at trial, failed to prove an intentional act by Dr. Mayr and (2) Plaintiff failed to prove a "technical" battery. Id. at pp. 133-37. At the time of trial the defense also filed and served a Memorandum in Support of Motion to Strike Plaintiff's Case, arguing that Plaintiff's "battery claim," having arisen from a physician-patient relationship, is really a claim of negligence, or medical malpractice within the purview of the Virginia Medical Malpractice Act, and therefore expert testimony was required for Plaintiff to prove a prima facie case. See J.A. at pp. 138-46.

The Court denied Defendants' motion to strike and entered judgment for Plaintiff in the amount of $150,000, with interest from the date of the injury, June 15, 2006. J.A. at pp. 147-49. Defendants filed a post-trial motion pursuant to Virginia Code § 8.01-35.1, to reduce the amount of the damages awarded by a stipulated offset amount of $100,000 (per a release

and covenant not to sue). On October 30, 2015 the Court granted that Motion and entered a final Judgment in the amount of $50,000, plus pre-judgment interest. J.A. at p. 150.

ASSIGNMENTS OF ERROR

1. The trial court erred by denying Defendants' motions to strike the evidence, as a cause of action for the negligent performance of a consented to medical/surgical procedure, with no evidence of intentional tortious conduct, may not, as a matter of law, be maintained as a cause of action for an intentional tort of battery. The trial court further erred by denying Defendants' motions to strike the evidence because Plaintiff introduced no qualified medical expert testimony to prove a breach of a standard of care and proximate causation. (Preserved at J.A. at pp. 31-38 and 66-78; J.A. at pp. 133-37).[4]

2. The trial court erred by denying Defendants' motions to strike the evidence because a cause of action arising out of health care or professional services rendered, and which therefore falls within Virginia's Medical Malpractice Act, Va. Code § 8.01-581.1 et seq., may not be pleaded and pursued as "battery" or as any tort other than "medical malpractice." (Preserved at J.A. at pp. 138-46).

SUMMARY OF ARGUMENT

This appeal, which arises following a bench trial involving a physician's neurosurgical care of a patient, presents the issue of whether a

[4] See Virginia Code § 8.01-384(A). ("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.").

plaintiff may proceed with a single claim for an intentional tort (battery), while conceding that the defendant acted only negligently, and without any intent to injure or cause harm to him. Specifically, the issue raised is whether and to what extent, if at all, a medical error conceded by the plaintiff to be negligent only, may be transformed into an intentional tort of battery merely by placing the term "technical" before the word battery and further, by doing so, may the plaintiff then avoid all the requirements of proving through expert testimony a breach of a standard of care and proximate causation of damages, as is required to prove medical negligence under the Virginia Medical Malpractice Act (VMMA), Virginia Code §§ 8.01-581.1 et seq.

In this case there was no dispute that the defendant neurosurgeon operated at an unintended level on the patient's spine. It was also undisputed that the conduct was, at worst, a simple error. There was no evidence or argument that the physician made any decision to proceed intentionally at any level other than the level for which consent had been given, or that he believed he was doing so. Although the concept of a "technical battery" has been recognized by this Court in some factual situations, under the specific facts of this case, Plaintiff's theory of "technical battery" was inappropriate as a matter of law and could not

obviate totally the necessity for a showing of intent in a claim for an intentional tort or to transform a claim of negligence into a claim for intentional battery.

This case also presents the issue of whether, in a case arising out of a physician's allegedly negligent treatment of a patient, any claim other than "medical malpractice" may be alleged. The VMMA, together with this Court's precedent, dictate that when a plaintiff sues a **health care provider** for a **tort** based on **health care** or **professional services**, his claim must be brought as one for alleged medical malpractice and proved with required expert testimony.

Finally, as noted above, to the extent the claim may be properly brought as a claim of medical negligence requiring expert testimony on the standard of care, this appeal also presents the issue of whether such a claim may be pursued instead as a "technical battery," without expert testimony establishing a breach of the standard of care by the physician. As argued herein, **expert testimony** on critical elements of Plaintiff's claim -- **completely absent at the trial below** -- rendered that claim subject to dismissal on a motion to strike the evidence.

STANDARD OF REVIEW

Because we are asking this Court to review pure questions of law, the standard of review is de novo. Alcoy v. Valley Nursing Homes, Inc., 272 Va. 37, 41, 630 S.E.2d 301, 303 (2006).

ARGUMENT AND AUTHORITIES: THE TRIAL COURT ERRED IN DECLINING TO STRIKE THE EVIDENCE AT THE CLOSE OF PLAINTIFF'S CASE-IN-CHIEF AND AT THE CLOSE OF ALL EVIDENCE.

I. A Cause of Action for the Negligent Performance of a Consented to Medical/Surgical Procedure May Not be Maintained As An Intentional Tort of Battery and Cannot Prevail in the Absence of Qualified Medical Expert Testimony.

However pleaded, this is a case of alleged medical negligence (and in fact was so pleaded by Plaintiff in the original Complaint). Ultimately, however, instead of pursuing a claim against Dr. Mayr as a negligence claim for medical malpractice, Plaintiff proceeded at trial solely on a theory of battery, arguing that the surgery constituted an unconsented-to touching and therefore a "technical battery." To support his claim, Plaintiff relied on cases from this Court that have held that surgery that goes beyond the scope of the patient's consent may, under certain circumstances, constitute a "technical battery." See J.A. at pp. 33-35; see also Washburn v. Klara, 263 Va. 586, 561 S.E.2d 682 (2000); Woodbury v. Courtney, 239 Va. 651, 391 S.E.2d 293 (1990); Pugsley v. Privette, 220 Va. 892, 263 S.E.2d 69

(1980). But these cases have little to do with the actual issue presented here.

In Washburn, a jury issue was presented as to whether or not the doctor had intentionally operated at two different levels of the plaintiff's spine – one, at the consented-to spinal level and the other, at a separate site – thus exceeding the scope of the patient's consent. 263 Va. at 592, 561 S.E.2d at 686. In this case there was no allegation of two surgical procedures or of any intentional conduct of any sort by Dr. Mayr which may have exceeded the scope of the surgical consent. The only allegation is negligence in the performance of the single, consented-to procedure. See J.A. at pp. 35-36 ("We don't contest that it was a mistake. We don't contest that he didn't intend to do it.").

In Pugsley the patient requested that one surgeon perform the consented to surgery and that she not be anesthetized until that surgeon was present. 220 Va. at 897, 263 S.E.2d at 73. In fact, the patient was anesthetized and the surgery proceeded with another surgeon. Id. Such action by the obligated surgeon was intentionally in derogation of the express terms of the consent. There was no negligent or unintentional conduct involved.

In Woodbury the patient consented to a biopsy of her breast to explore a suspicious mass. 239 Va. at 652, 391 S.E.2d at 294. Instead of a biopsy, the surgeon performed a partial mastectomy and removed one-quarter of the breast. Id. ("Woodbury signed a consent form which stated: 'I hereby give my consent and authorize Dr. Courtney to perform the following medical or surgical procedure(s): left breast biopsy only.' On July 23, 1984, Dr. Courtney performed a partial mastectomy on Woodbury. He removed a quarter of her left breast. Woodbury contends that the procedure was performed without her permission and that she gave him permission to remove only approximately one centimeter of tissue from her breast for the biopsy."). Again, this case has little factual similarity to our case. The doctor in Woodbury made **an intentional decision** to expand the consented-to, limited 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 Plaintiff -- is that Dr. Mayr performed that single, consented-to procedure negligently.

The fact that Dr. Mayr may have been negligent in how he performed that procedure does not transform a wholly unintentional act of negligence into an intentional tort. If that is not the case, then a host of consequences

which must be considered unintended follow from a strict application of the "technical battery" rule. Suppose, for instance, a surgeon, while operating on a specific organ in a consented-to procedure, accidently nicks an immediately adjacent structure. Suppose further that this type of event is a common and accepted risk or complication of such a procedure. Is the mere fact that the surgeon's scalpel "touched" an unconsented-to organ during the course of the surgery sufficient to invoke the "technical battery" rule? If so, virtually any and all medical negligence cases that involve surgical complications to adjoining structures will be removed from the realm of medical negligence and plaintiffs will be relieved of any duty to provide expert testimony as to standard of care and causation. This cannot be what this Court intended in allowing for a claim of "technical battery" to be maintained "**given the proper factual conditions and circumstances**." Pugsley, cited above, 220 Va. at 899, 263 S.E.2d at 74 (emphasis added).

It is a basic and essential part of our jurisprudence to guard jealously the distinction between intentional and unintentional actions. See Koffman v. Garnett, 265 Va. 12, 19, 574 S.E.2d 258, 262 (2003) (Kinser, dissenting) ("We must also not blur the lines between gross negligence and battery because the latter is an intentional tort. I agree fully that the plaintiffs

alleged sufficient facts to proceed with their claim of gross negligence."). Indeed, contrary to Plaintiff's arguments below, the only time that a conceded, unintentional act of negligence may be pursed as an intentional tort of battery is where the conduct is a "wanton, reckless and dangerous act which may result in injury to any one of a number of others, such as shooting into a crowd . . . ." Bannister v. Mitchell, 127 Va. 578, 584, 104 S.E. 800, 801 (1920). In that situation, the actor may be "guilty of assault and battery, though he has no specific intention to injure any particular person." Id. Accord, Fentress Families Trust v. Va. Elec. & Power Co., 81 Va. Cir. 67 (City of Chesapeake July 29, 2010);[5] Neurology Servs. v. Fairfax Med. PWH, LLC, 67 Va. Cir. 1 (Fairfax County January 3, 2005);[6]

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[5] In Fentress, id. at 85, the defendant was accused of acting "willfully and recklessly" to cause coal ash to be released and ingested by the plaintiffs. The trial court sustained the defendant's demurrer noting, "[e]ven considering that the intent for battery may be that of wantonness or recklessness, the Plaintiffs have failed to adequately allege facts upon which a claim for battery may proceed." Id.

[6] In Neurology Services, id. at 12, Plaintiffs alleged "that 'Defendants caused an offensive touching' through the construction and creation of a hazardous environment, to which Plaintiffs were subsequently exposed. Plaintiffs warned Fairfax Medical of the presence of asbestos, a known health hazard, and the health hazard posed by the construction. Defendants continued on course of action with knowledge of the probable consequences. While the Defendants may have sent the asbestos fibers into the air, the Court finds no 'intent' to 'cause an offensive touching.'"

Foret v. Kellogg, Brown & Root Services, 79 Va. Cir. 76 (City of Chesapeake May 26, 2009).[7]

In this case there was no dispute that the conduct of the doctor was unintentional. There was also no dispute that the patient had consented to the surgery that the doctor intended to perform and believed he was performing. At most, it was strictly and solely as a result of negligence that an adjacent body part was touched. There was no issue in this case of "wanton, reckless or dangerous" conduct that would excuse turning an unintended action into the basis for an intentional tort.

II. Pleading an Intentional Tort of "Technical Battery" In This Case Was Precluded Where Misplacement of Surgical Devices at An Immediately Adjacent Disc Level Was A Disclosed Risk.

The evidence in this case indicated that Mr. Osborne had signed a written consent form in connection with his surgery and in connection with the consent process. It was Dr. Mayr's custom and practice "in every case"

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[7] In Foret, id. at 78, the claim was that the plaintiff allowed a propane gas explosion which injured a number of people. Plaintiff made claims both for negligence and battery. Id. The Court sustained the demurrer to the battery claim, noting that "[a]lthough assault and battery are intentional torts, there are certain instances where reckless behavior rises to the level of intent." Id. at 80. "For example, when 'one commits a wanton, reckless, and dangerous act, which may result in injury to any one of a number of others, such as shooting into a crowd, he is guilty of assault and battery, though he has no specific intention to injure any particular person.'" Id. (quoting Bannister v. Mitchell).

to advise the patient of a number of specific risks which were not itemized on the general, written consent form. J.A. at pp. 52-53. Among those was that "hardware can be misplaced and that that may have to be revised down the road." J.A. at p. 53. Dr. Mayr testified he would have had such a discussion with Mr. Osborne, as it is the same discussion he has with all of his patients undergoing this type of procedure. J.A. at pp. 56-57.[8] At best, this evidence created a triable issue of fact as to what was the scope of the consent and what risks were disclosed by the physician to the patient. But that issue was not squarely addressed in the trial court because the Court accepted Plaintiff's position that the mere fact that the screws and hardware had been negligently placed in an adjoining spinal level constituted a per se "technical battery," and there was no consent given for Dr. Mayr to act negligently. But that argument misstates the point. No one is suggesting that a patient may consent to negligence. The issue was whether the conduct was in fact culpable negligence, or rather, constituted

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[8] Dr. Mayr was cross-examined on his deposition testimony, wherein he stated that he did not tell Mr. Osborne specifically that screws could go in the "wrong level" but did say, consistent with his deposition testimony, that "screws or hardware can go in the wrong place, which may necessitate more surgery down the road." J.A. at pp. 53-54. Mrs. Osborne testified that, although she did not recall Dr. Mayr advising her husband about the possible misplacement of hardware, she admitted that Dr. Mayr advised her husband of a number of possible complications, none of which were specifically listed on the printed consent form. Id. at pp. 64-65.

a disclosed risk and complication of surgery, which, taken together with the expert testimony that the defense introduced, did not constitute a breach of the standard of care. That entire line of evidence was superseded by Plaintiff's position, presumably adopted by the trial court in its ruling, that this was a battery and that Plaintiff need not introduce any expert testimony as to the type of risk involved.

The rule 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,"[9] is flexible enough to allow for a battery cause of action where the doctor acts intentionally or recklessly in disregard of the patient's consent (e.g., intentionally going beyond the scope of consent by deliberately choosing, in addition to the intended surgery, to operate on an unconsented-to area of the body), while still maintaining the critical distinction and "not blur[ring] the line"[10] between negligence and battery in

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[9] Pugsley, cited above, 220 Va. at 899, 263 S.E.2d at 74 (emphasis added).

[10] Koffman v. Garnett, cited above, 265 Va. at 19, 574 S.E.2d at 262 (Kinser, dissenting).

cases such as this one, where there is no evidence of intentional conduct or wanton or reckless behavior.[11]

III. In Virginia, All Torts Arising out of the Provision of Health Care are Considered "Medical Malpractice;" Therefore, a Cause of Action for Battery That Arises out of Medical Treatment is Subject to Dismissal.

In sum and substance, Plaintiff's single cause of action against Defendants for battery was a claim for medical malpractice and therefore governed by the VMMA. "Malpractice" is defined in the VMMA as: "**any tort** action or breach of contract action for personal injuries . . ., **based on health care or professional services rendered, or which should have been rendered, by a health care provider to a patient**." Va. Code § 8.01-581.1 (emphasis added). Thus, when a plaintiff sues a **health care provider** for a **tort** based on **health care** or **professional services**, his claim must be brought as one for alleged medical malpractice.

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[11] Some acts which might possibly be argued to be "negligence," such as mistakenly operating on the wrong leg or arm, are so extreme that they should also fall within the purview of an intentional tort based on the proposition that a person is "presumed to intend the usual and natural consequences of his acts." Keppler v. City of Richmond, 124 Va. 592, 611, 98 S.E. 747, 753 (1919). That extraordinary facts might exist in certain cases does not mean that the entire distinction between intentional torts and unintentional torts should be cast aside in cases such as this involving claims of garden-variety negligence and especially where, as here, there is expert testimony that the conduct was not, in fact, beneath an accepted standard of care, but rather a known complication or risk of the consented-to procedure.

Dr. Mayr is a health care provider (see Complaint (J.A. at pp. 1-5) at ¶ 2) being sued for **a tort** based on health care or professional services. Therefore, the VMMA required that Plaintiff's claim for battery be brought as malpractice, and, unless falling in the very narrow range of cases for which expert testimony is not required, proven with expert testimony.[12]

In Glisson v. Loxley, 235 Va. 62, 366 S.E.2d 68 (1988), a plaintiff sued her physician, alleging that he was liable for a number of torts (including battery) and a breach of contract. The alleged battery was the performance by the physician of an unconsented-to arthroscopic surgery. 235 Va. at 64, 366 S.E.2d at 69. This Court held that the trial court did not err in dismissing the battery claim because it was subsumed by the VMMA.[13] 235 Va. at 69-70, 366 S.E.2d at 72 ("The plaintiff alleged that the defendant committed a battery upon her. A battery is a tort. [Citation omitted.] 'Malpractice' means *'any* tort based on health care.' Therefore, a

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[12] Only in certain rare cases, where the alleged negligent acts or omissions lie within the range of a jury's common knowledge and experience, is expert testimony considered unnecessary to prove medical malpractice. See e.g., Dickerson v. Fatehi, 253 Va. 324, 484 S.E.2d 880 (1997) (hypodermic needle left in patient's body by surgeon); see also Beverly Enterprises-Virginia, Inc. v. Nichols, 247 Va. 264, 267, 441 S.E.2d 1, 3 (1994) (nursing home resident unable to feed herself and with history of two prior serious choking incidents left unattended to eat).

[13] That portion of Glisson v. Loxley relating to the propriety of alleging, in a medical malpractice action, a separate breach of contract claim, has been overruled by statute. See Va. Code § 8.01-581.1 (defining "Malpractice" to include "any tort," as well as "breach of contract action.").

battery arising from health care is 'malpractice' within the clear meaning of the malpractice statutes . . . .") (italics in original). See also Pierce v. Caday, 244 Va. 285, 291, 422 S.E.2d 371, 374 (1992) (plaintiff who brought a breach of confidentiality claim "unsuccessfully attempt[ed] to package her allegations as some sort of special contract, express or implied, to avoid the requirements of the [Medical Malpractice] Act"); Hagan v. Antonio, 240 Va. 247, 352, 297 S.E.2d 810, 812 (1990) (lynchpin question is whether the action is "based upon conduct that was an inseparable part of the healthcare being rendered").[14]

More recently, this Court reaffirmed the relevant principle of Glisson v. Loxley, in Alcoy v. Valley Nursing Homes, Inc., 272 Va. 37, 630 S.E.2d 301 (2006). In that case a plaintiff brought causes of action for negligence and sexual assault and battery, based on the alleged failure of nursing home personnel to ensure the safety of one of its residents. The defendant nursing home argued that "any duty it had to protect Alcoy arose from the patient-health care provider relationship and therefore is subject to the

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[14] Accord Gedrich v. Fairfax County Dep't of Family Services, 282 F. Supp. 2d 439, 477 (E.D. Va. 2003) ("Thus, all tort claims based on the provision of health care services against health care providers are considered malpractice claims and are governed by *the Virginia Medical Malpractice Act*. Conversely, as a result, plaintiffs' claims of gross negligence against health care provider defendants are properly considered malpractice claims.") (italics in original).

provisions of the [Virginia Medical Malpractice] Act." 272 Va. at 41, 630 S.E.2d at 303. While this Court found that the conduct by the defendant fell outside the Act because it "involve[d] administrative, personnel, and security decisions related to the operation of the . . . facility, rather than to care of any particular patients," it fully endorsed the rule stated in Glisson that conduct **within** the Act is "malpractice," nothing more:

> The portions of the Act defining the terms 'malpractice' and 'health care' are central to the issue before us. The term 'malpractice' is defined in *Code § 8.01-581.1* as 'any tort action or breach of contract action for personal injuries or wrongful death, based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient.'
>
> The term 'health care,' also defined in *Code § 8.01-581.1*, 'means any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical diagnosis, care, treatment or confinement.'

272 Va. at 42-43, 630 S.E.2d at 303-04 (distinguishing Hagan v. Antonio and Glisson v. Loxley, where this Court found that the VMMA did apply to foreclose a tort claim other than "malpractice") ("Initially, we observe that the allegations in the present case do not involve a tort committed during the course of a medical procedure or treatment administered on a patient's behalf during the course of patient care. Therefore, the facts here are

different from several prior decisions in which we held that the torts alleged were subject to the provisions of the Act.”).

Notably, the label a plaintiff places upon a statement of the claim is “not conclusive upon the court in assessing whether it is legally cognizable as the one or the other.” Lee v. Winston, 717 F.2d 888, 893 n.4 (4th Cir. 1983) (citing Hamlin v. Warren, 664 F.2d 29 (4th Cir. 1981)); McDermott v. Reynolds, 260 Va. 98, 102, 530 S.E.2d 902, 904 (2000) (“We must consider the nature of the cause of action pleaded, not merely its form, in determining whether a plaintiff has stated a cause of action that will permit recovery of damages for the conduct alleged.”). To determine the true nature of an action, the court will look at the factual allegations made by the plaintiff in the complaint. Glisson, 235 Va. at 68, 366 S.E.2d at 71-72; Philip Morris, Inc. v. Emerson, 235 Va. 380, 407, 368 S.E.2d 268, 282 (1988).[15] See also Richmond Met. Auth. v. McDevitt Street Bovis, Inc., 256

[15] In Philip Morris this Court held that “[m]erely attaching the label ‘nuisance’ to an action for personal injuries does not alter the nature of the action.” 235 Va. at 407, 368 S.E.2d at 283. “Where the acts or omissions constituting negligence are the identical acts which it is asserted give rise to a cause of action for nuisance, the rules applicable to negligence will be applied.” Id. In sum, this Court prohibited the plaintiff from claiming to recover in nuisance for what was in effect a claim for negligence, where the plaintiff sought to avoid the rules of negligence law that could adversely affect his claim. See also Fentress Families Trust, cited above, 81 Va. Cir. at 71 (discussing Philip Morris).

Va. 553, 558-59, 507 S.E.2d 344, 347-48 (1998) (a party may not turn a breach of contract claim into a fraud claim).

In this case Mr. Osborne pleaded two causes of action in the Complaint -- negligence and battery -- based on the identical set of facts. See Complaint (J.A. at pp. 1-5). But, given that the causes of action arose from a physician's medical care and treatment of a patient, Mr. Osborne's claims were really only cognizable as medical malpractice, or medical negligence -- regardless of the "labels" Mr. Osborne attached to the claim. Merely attaching the label "battery" cannot alter the true nature of the case. As pleaded in the Complaint, the acts or omissions constituting Plaintiff's so-called battery action are the same acts or omissions which Plaintiff pleaded gave rise to the nonsuited negligence claim. Without any doubt, Plaintiff's cause of action was for medical malpractice, not battery.

IV. Plaintiff Was Not Excused From the Requirement to Prove a Breach of a Standard of Care and Proximate Causation With Qualified Expert Testimony.

At trial Dr. Mayr introduced expert testimony to establish that the conduct at issue was a known complication of the consented-to surgical procedure and thus not a deviation from any applicable standard of care. Plaintiff did not meet or counter this evidence with any expert testimony, as he argued he was exempt from any such obligation or burden of proof

because he was proceeding on a theory of "technical battery." Because, however, Plaintiff's claim fell strictly within the purview of the VMMA, expert testimony was required. See Raines v. Lutz, 231 Va. 110, 113, 341 S.E.2d 194, 196 (1986) and Bly v. Rhoads, 216 Va. 645, 653, 222 S.E.2d 783, 789 (1976). See also Alcoy, 272 Va. at 43, 630 S.E.2d at 304.

To allow a medical malpractice claim which, as in this case, has contested facts relating to the issue of the standard of care and allows for nothing worse than a finding of negligence to be transformed mirabile dictu into a claim of intentional tort and thus shielded from the central burdens of proof incumbent on any plaintiff seeking to prove damages causally related to a medical error, would gut the proof requirements for medical negligence claims in virtually all cases and would constitute a novel, serious and utterly unjustified expansion of the actions for intentional torts into a sphere of pure negligence.

CONCLUSION

Dr. Mayr and Mid-Atlantic Spine Specialists, P.C. respectfully request that this Court reverse the Judgment of the trial court and enter final Judgment in their favor.

DATED: July 18, 2016

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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 18th day of July, 2016, that electronic copies of the Brief of Appellants and Joint Appendix have been e-filed, via VACES, and ten bound copies of the Brief of Appellants and three bound copies of the Joint Appendix have been hand-filed with the Clerk of this Court. An electronic copy of the Brief of Appellants was served, via e-mail, and electronic copies of the Brief of Appellants and Joint Appendix on CD, were served, via UPS Ground Transportation 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, VA 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, VA 20186 (540) 347-9223, spierce@walkerjoneslaw.com.

Given under my hand this 18th day of July, 2016.

Paige Levy Smith