IN THE

Supreme Court of Virginia

RECORD NO. 151985

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

v.

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

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

Catherine Osborne, Administrator of the Estate of Michael J. Osborne ("Appellee" or "Ms. Osborne"), by counsel, pursuant to the Rules of the Supreme Court of Virginia, submits the following Brief of Appellee in this appeal against Matthew T. Mayr, M.D. ("Dr. Mayr") and Mid-Atlantic Spine Specialists, P.C. ("Mid-Atlantic") (collectively, the "Appellants"):

STATEMENT OF THE CASE

The Statement of the Case in the Brief of Appellants, including the facts stated therein, requires some correction.

As Dr. Mayr[1] correctly notes, Ms. Osborne nonsuited her negligence claim and proceeded to trial solely on her battery claim.[2] J.A. at 6-7. At trial, Ms. Osborne's evidence consisted of her testimony, J.A. at 8-16, and responses to requests for admission that were read into evidence, J.A. at 16-23. After the responses were read into evidence, the Court received the requests and corresponding responses as Plaintiff's Exhibit 1 without objection. J.A. at 23; *see also* J.A. at 91-127 (for Plaintiff's Exhibit 1).

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[1] Although Dr. Mayr and Mid-Atlantic are both Appellants, for ease of reference, this brief will only refer to Dr. Mayr because Mid-Atlantic's liability is vicarious under the doctrine of *respondeat superior*.

[2] Ms. Osborne, in her capacity as Administrator of the Estate of Michael J. Osborne (the "Decedent"), was substituted as the plaintiff after the Decedent died.

The consent form signed by the Decedent was attached to the requests for admission. J.A. at 98. Through this form, the Decedent consented to a "posterior cervical foraminotomy at cervical 5-6 (right)" and a "posterior cervical fusion at cervical 5-6." *Id.* Dr. Mayr admitted that the consent form was signed by the Decedent. J.A. at 122 (Request for Admission ("RFA") 4). Instead of operating at the C5-6 level pursuant to the consent given by the Decedent, Dr. Mayr admitted that he operated at the C6-7 level. J.A. at 123 (RFA 9).

Importantly, Dr. Mayr then admitted "that the intended surgery was at a different level." J.A. at 124 (RFA 11). Indeed, Dr. Mayr never contested that he acted intentionally in the responses to the requests for admission; rather, he made it clear that he was not acting maliciously when he operated at the wrong level. J.A. at 124-125 (RFAs 11-14, denying each request to the extent it "implies any sort of dishonesty or neglect on the part of Dr. Mayr").

Dr. Mayr moved to strike Ms. Osborne's case. J.A. at 31. The Court denied the motion. J.A. at 38. After Dr. Mayr presented his case-in-chief and Ms. Osborne presented rebuttal evidence, Dr. Mayr renewed his motion to strike. J.A. at 66. In addition to oral argument, Dr. Mayr submitted Defendants' Memorandum in Support of Motion to Strike Battery

Action. J.A. at 85; *see also* J.A. at 133-137 (a copy of the Motion). The trial court then took a recess. J.A. at 85-86.

When the trial court returned from its recess, it stated the following:

> Here's the decision. The Court has read the deposition of Dr. Childs, reviewed the testimony and the exhibits that have been presented.
>
> 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, interest from the date of June 15, 2006, her costs jointly and severally against the Defendant.

J.A. at 86. The trial court did not rule on Dr. Mayr's renewed motion to strike. *Id.* Moreover, the orders subsequently entered by the trial court made no reference to the renewed motion to strike. J.A. at 147-151.

SUMMARY OF ARGUMENT

This Court may only review rulings actually made by the trial court, and it may not consider arguments or issues raised for the first time on appeal. The trial court did not rule on Dr. Mayr's renewed motion to strike, and Dr. Mayr did not object to the trial court's failure to rule. Dr. Mayr has, therefore, waived the objections now asserted in the Assignments of Error.

Moreover, Dr. Mayr raises issues that were not presented to the trial court. Specifically, Dr. Mayr did not submit argument to the trial court that Ms. Osborne's claim was improperly labeled as a battery claim or that a

battery claim is not permitted under the Virginia Medical Malpractice Act. Dr. Mayr suggests that these arguments were preserved in a pleading styled Defendants' Memorandum in Support of Motion to Strike Plaintiff's Case. There is no record of Dr. Mayr submitting this pleading to the trial court, unlike Defendant's Memorandum in Support of Motion to Strike Battery Action, which the trial court expressly acknowledged receiving on the record. Since these arguments were not submitted to the trial court, this Court cannot consider them on appeal.

Putting aside Dr. Mayr's procedural defects, the trial court's decision should be affirmed. Ms. Osborne presented evidence that Dr. Mayr exceeded the scope of consent and committed a battery. Dr. Mayr disputed this claim, presenting evidence that his mistake was a known complication of the procedure and therefore covered by the patient's consent. The trial court weighed the evidence, including the credibility of the witnesses, rejected the argument that the Decedent's consent included an operation at the wrong level, and found that Dr. Mayr did exceed the scope of consent and therefore committed a battery. Since there was evidence that Dr. Mayr acted intentionally and operated beyond the scope of consent, the trial court's judgment should be affirmed.

Finally, the Virginia Medical Malpractice Act, which is in derogation of the common law and must be strictly construed, does not prohibit battery claims against health care providers. Instead, it afforded Dr. Mayr the protection of the medical malpractice cap in this battery case. Moreover, pursuant to *Woodbury v. Courtney*, Ms. Osborne was not required to present expert witnesses on whether Dr. Mayr exceeded the scope of consent and committed a battery.

For these reasons, this Court should affirm the judgment of the trial court.

STANDARD OF REVIEW, ARGUMENT, AND AUTHORITIES

This case presents two issues on appeal. First, is the trial court's decision reviewable on appeal? Second, if it is, should the trial court's decision be affirmed?

I. Standard of Review

The trial court was fact finder and found in favor of Ms. Osborne, so she "occupies the most favored position known in the law." *Tri-State Coach Corp. v. Walsh*, 188 Va. 299, 303-04 (1948).

Dr. Mayr assigns error to the trial court's failure to grant the motions to strike. As an initial matter, the trial court's denial of Dr. Mayr's motion to strike made at the conclusion of Ms. Osborne's case is not reviewable on

appeal. When a defendant introduces evidence in his defense after the motion to strike is denied, that defendant must renew the motion to strike at the conclusion of the evidence. *United Leasing Corp. v. Lehner Family Bus. Trust*, 279 Va. 510, 517 (2010); *see also Estate of Taylor v. Flair Property Assocs.*, 248 Va. 410, 414 (1994) (stating that the defendant waived his objection to the trial court's denial of his first motion to strike by presenting evidence on his own behalf). Thus, the renewed motion to strike, which was made at the conclusion of all the evidence, is the only matter reviewable by this Court. *See United Leasing Corp.*, 279 Va. at 517-18; *Estate of Taylor*, 248 Va. at 414.

When the trial court's decision on a motion to strike is challenged, this Court must "review the evidence in the light most favorable to the non-moving party." *Egan v. Butler*, 772 S.E.2d 765, 772 (2015) (quoting *Kiddell v. Labowitz*, 284 Va. 611, 629 (2012)). As the non-moving party, Ms. Osborne gets "the benefit of all substantial conflict in the evidence, and all fair inferences that may be drawn therefrom." *Id.* (quoting *Hadeed v. Medic-24, Ltd.*, 237 Va. 277, 281 (1989)). When the trial court denies a motion to strike, as is the case here, this Court reviews the trial court's decision to determine if "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." *Id.* (quoting *Blue Ridge Serv. Corp. v. Saxon Shoes, Inc.*, 271 Va. 206, 218 (2006)).

The Assignments of Error presented by Dr. Mayr also present questions of law, which this Court reviews under the *de novo* standard. *Wilby v. Gostel*, 265 Va. 437, 440 (2003) (citing *Transcontinental Ins. Co. v. RBMW, Inc.*, 262 Va. 502, 514 (2001)).

II. The Trial Court Did Not Rule On the Renewed Motion to Strike; Accordingly, Dr. Mayr Waived the Arguments He Raises on Appeal (Assignments of Error 1 and 2)

An appellant must preserve its issues for appeal, and failure to do so is fatal. "No ruling of the trial court … will be considered a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling." Va. Sup. Ct. R. 5:25. Moreover, this Court will not consider "issues or objections raised for the first time on appeal." *Buck v. Jordan*, 256 Va. 535, 545-46 (1988).

Although seemingly obvious, this Court can only review rulings ***actually made*** by the trial court. Indeed, if a motion or objection is made—or any argument for that matter—and the trial court fails to rule, this Court has repeatedly refused to consider the issue on appeal. *See, e.g., Taylor v. Commonwealth*, 208 Va. 316, 324 (1967). In *Taylor*, the defendant

objected to statements made during closing argument. *Id.* The trial court failed to rule on the objection. *Id.* This Court held that "the objection was not saved for our consideration." *Id. See also Lenz v. Commonwealth*, 261 Va. 451, 462-63 (2001) (finding a claim was waived because the trial court did not rule on the issue); *Buck*, 256 Va. at 545 (refusing to consider an issue on appeal because the trial court failed "to decide whether the misrepresentation regarding how the Account was held was one of law or fact").

Importantly, when a trial court fails to rule, the burden is on the party asking for the ruling to insist upon one from the trial court. *See Taylor*, 208 Va. at 324 (faulting the appellant because "[c]ounsel for defendant did not insist that the court rule"). If the trial court fails to rule on a motion and the party making the motion fails to request a ruling from the trial court, then the issue is waived on appeal. *See Lenz*, 261 Va. at 463 (stating that "the defendant waived his claim because he was required to request a ruling from the circuit court, and he failed to do so"); *Buck*, 256 Va. at 545-46 (finding that the appellant "waived the assignment of error as presented" because it "never objected to the court's failure" to rule). *See also Fisher v. Commonwealth*, 16 Va. App. 447, 454 (1993) (refusing to consider an issue because the appellant "failed to obtain a ruling from the court"); *Hogan v.*

Commonwealth, 5 Va. App. 36, 45 (1987) (stating that there was "no ruling of the trial court to review" because the appellant "failed to obtain a ruling from the trial court on his present contention").

In the present case, Dr. Mayr renewed his motion to strike, the trial court heard oral argument on the motion, and the trial court took a recess without ruling on the motion. J.A. at 85-86. When the trial court returned, it stated that it was awarding judgment in favor of Ms. Osborne. J.A. at 86. The trial court made no mention of Dr. Mayr's renewed motion to strike, much less rule on it. *Id.* Likewise, the orders subsequently entered by the court did not rule on the renewed motion to strike or preserve any objection to the trial court's failure to rule. J.A. at 147-151.

Both of Dr. Mary's Assignments of Error in this case arise from the renewed motion to strike; in fact, both begin by stating that "[t]he trial court erred by denying Defendants' motions to strike the evidence." J.A. at 152. The trial court failed to rule on Dr. Mayr's renewed motion to strike; indeed, when offering its ruling, the trial court made no mention of the motion. Pursuant to *Taylor*, *Lenz*, and *Buck*, Dr. Mayr had an obligation to obtain a ruling from the trial court. At the very least, Dr. Mayr should have objected to the trial court's failure to rule. In failing to meet his burden, Dr. Mayr

waived the issues and arguments made in his renewed motion to strike, and this Court cannot consider them on appeal.

This Court should not excuse Dr. Mary's failure to obtain a ruling by making assumptions about whether the trial court implicitly intended to rule on the renewed motion to strike when it, as fact finder, found in favor of Ms. Osborne. A basic tenant of this Court—or any appellate court, for that matter—is that it reviews trial courts by only looking to the record. This Court is "limited to the record of the proceedings which have taken place in the lower court," and "extrinsic evidence may not be received by [the Court] to contradict or add to the record." *Ward v. Charlton*, 177 Va. 101, 108 (1941). This Court has explained how it reviews the record:

> [I]t is limited to the record of the proceedings which have taken place in the lower court. It does not search the record to ascertain if any error may perchance have inadvertently crept into it, but it reviews the rulings and judgments of the trial courts on matters brought to their attention and decided by them.

Scott v. Commonwealth, 191 Va. 73, 80 (1950) (quoting 1 M.J., Appeal and Error, section 189).

In the present case, the record is devoid of any ruling from the trial court on Dr. Mayr's renewed motion to strike. Although Dr. Mayr contends that the trial court denied the motion, he can point to no place in the record where the court explicitly stated that the motion was denied. The orders

entered by the court—and endorsed by Dr. Mayr's counsel—make no mention of the trial court denying the renewed motion. On appeal, this Court should limit itself to the record, which contains no ruling.

Dr. Mayr failed to comply with the requirements of *Taylor* and obtain a ruling on the record on his renewed motion to strike the evidence. This failure is fatal to Dr. Mayr's appeal, and the issues raised in both Assignments of Error have been waived.

III. Even If the Court Excuses Dr. Mayr's Failure to Obtain a Ruling, It May Not Consider Arguments That Were Not Presented to the Trial Court (Assignments of Error 1 and 2)

As noted above, this Court will only consider objections "stated with reasonable certainty at the time of the ruling." Va. Sup. Ct. R. 5:25. This Court will not consider "issues or objections raised for the first time on appeal." *Buck v. Jordan*, 256 Va. 535, 545-46 (1988).

In this case, after Ms. Osborne rested her case-in-chief, Dr. Mayr moved the trial court to strike the evidence. J.A. at 31. Dr. Mayr counsel noted that the issue was whether Dr. Mayr "was operating outside of the scope of the consent." *Id.* Dr. Mayr argued that Ms. Osborne's claim was essentially a claim for negligence, so she was required to produce an expert witness to pass a motion to strike. J.A. at 32. The trial court denied the motion. J.A. at 38.

After Dr. Mayr presented his case-in-chief, he renewed his motion to strike the evidence. J.A. at 66. Dr. Mayr again conceded that "the issue here is the scope of the consent that was given by the patient." J.A. at 68. Dr. Mayr argued that the case was "a complication of the surgery … [so] this case is really saying that the surgery on June 15th was a negligent surgery, … which requires the patient to have expert testimony, which they do not." *Id.*

Finally, Dr. Mayr submitted Defendant's Memorandum in Support of Motion to Strike Battery Action, which the trial court acknowledged receiving. J.A. at 85; *see also* J.A. at 133-37 (the Memorandum). In the Memorandum, Dr. Mayr makes similar arguments to those stated on the record in open court. J.A. at 133-37. That is, Dr. Mayr argued that Ms. Osborne failed to prove that Dr. Mayr exceeded the scope of consent. J.A. at 134 ("Plaintiff also failed to prove that Dr. Mayr *intentionally* exceeded the scope of Mr. Osborne's consent"); J.A. at 136 ("Plaintiff failed to prove that Dr. Mayr exceeded the scope of Mr. Osborne's consent").

On appeal, Dr. Mayr raises for the first time arguments that were never presented to the trial court. Specifically, the argument concerning the Virginia Medical Malpractice Act, Va. Code § 8.01-581.1, *et seq.* (the "Act"), and the argument that Ms. Osborne's claim was improperly labeled

as a claim for negligence were not argued at trial. These arguments are contained in Defendant's Memorandum in Support of Motion to Strike Plaintiff's Case. J.A. at 138-46.

During this appeal, Dr. Mayr has contended that the Defendant's Memorandum in Support of Motion to Strike Plaintiff's Case was submitted to the trial court for its consideration. *See* Appellant's Pet. at 3 ("At the time of trial the defense also filed and served a Motion to Strike Plaintiff's Case"); Appellant's Br. at 4 ("At the time of trial the defense also filed and served a Memorandum in Support of Motion to Strike Plaintiff's Case"). Ms. Osborne has reviewed the transcript from the trial, and there is no record of the trial court receiving this Memorandum, much less considering it when ruling on the renewed motion to strike. In contrast, the trial court acknowledged on the record receiving Defendant's Memorandum in Support of Motion to Strike Battery Action(which is a separate pleading) and Plaintiff's Bench Brief on the Issue Intent as a Defense to Battery. J.A. at 26, 85; *see also* J.A. at 128-32, 133-37 (the Memoranda).

Since the record does not substantiate that the trial court received Defendant's Memorandum in Support of Motion to Strike Plaintiff's Case, Rule 5:25 and *Buck* prohibit the Court from considering the arguments contained therein on appeal. Thus, this Court should not consider

Assignment of Error 2, which relates to the Act. Moreover, the Court should not consider Dr. Mayr's argument that Ms. Osborne's claim was "really a claim for negligence" when considering Assignment of Error 1.

IV. Ms. Osborne's Claim For Battery Was That Dr. Mayr Exceeded the Scope of Consent, and the Evidence Supported the Trier of Fact's Finding That Dr. Mayr Exceeded That Scope (Assignment of Error 1)

As discussed in Part II above, this Court should dismiss this appeal and affirm the trial court because the renewed motion to strike was not ruled upon. If this Court considers the merits of the appeal, then it still should affirm the trial court because its decision was supported by the evidence. This Court will "view the evidence in the light most favorable to the party prevailing in the court below," so the evidence should be viewed in the light most favorable to Ms. Osborne. *Morrissey v. Va. State Bar*, 248 Va. 334, 340 (1994).

Ms. Osborne nonsuited her negligence claim prior to trial, so the only claim tried was battery. J.A. at 1-7. A battery is "an unwanted touching which is neither consented to, excused, nor justified." *Koffman v. Garnett*, 265 Va. 12, 16 (2003). This Court has had occasion to discuss battery in the context of the physician-patient relationship. *See Washburn v. Klara*, 263 Va. 586 (2002); *Woodbury v. Courtney*, 239 Va. 651 (1990); *Pugsley v. Privette*, 220 Va. 892 (1980).

In *Pugsley*, the plaintiff told the defendant that she did not want a procedure performed unless a specific surgeon was present. 220 Va. at 897. The defendant contested whether such statements were made. *Id.* at 898. This Court stated 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." *Id.* at 899. This is so because "[a] surgical operation on the body of a person is a technical battery or trespass unless he or some authorized person consented to it." *Id.* (quoting 61 Am. Jur. 2d *Physicians, Surgeons, Etc.* § 155 (1972)). The issue was whether the plaintiff revoked her consent, and this Court held that there was evidence from which the jury could have concluded that consent was revoked. *Id.* at 900-01. This Court affirmed the jury's verdict that a battery was committed, specifically noting that "[i]t is immaterial to the issue of battery that the jury found that the operation was not negligently performed." *Id.*

In *Woodbury*, the plaintiff gave consent for biopsy of a breast mass, but the defendant performed a partial mastectomy. 239 Va. at 652-53. The trial court granted summary judgment on the plaintiff's battery claim because she did not have an expert witness and the defendant's expert witnesses would have testified that "biopsy" and "partial mastectomy" are

the same procedure. *Id.* at 654. This Court reversed, holding that the plaintiff did not need an expert witness and that "[a] factual issue was created and the jury should have been allowed to determine the extent of the permission … and whether [the defendant] exceeded the scope of that permission." *Id.*

In *Washburn*, the plaintiff signed a consent form agreeing to surgery at the C6-7 level of the spine. 263 Va. at 588. The plaintiff presented evidence that the defendant operated at the C6-7 level ***and*** the C7-T1 level. *Id.* at 589. The defendant "denied that he operated, either intentionally or unintentionally, at the C7-T1 level." *Id.* The trial court granted a motion to strike the plaintiff's case, finding that there was no evidence that the defendant exceeded the scope of consent. *Id.* This Court reversed, holding that there was a factual dispute whether the defendant exceeded the scope of consent. *Id.* at 590. The defendant argued that if he operated at the wrong level, he did so negligently, not intentionally. *Id.* at 592. This Court stated that the jury should weight that argument and determine whether the defendant "intentionally performed a cervical diskectomy at two levels …, thus, exceeding the scope of her consent." *Id.*

In the case before the Court, Dr. Mayr has drafted Assignment of Error 1 in a way that misconstrues Ms. Osborne's claim and ignores the findings of fact made by the trial court. The Assignment encourages this Court to adopt the theory of the case advocated by Dr. Mayr during trial, which was rejected by the finder of fact.

Dr. Mayr argues that a negligently performed, consented-to procedure is not a battery. There is no question that this argument is correct—if Dr. Mayr had consent to operate at C6-7, then there can be no battery. At trial, Dr. Mayr produced evidence and argued that he had consent to operate at C6-7. Although the consent form signed by the Decedent made no reference to the possibility that the procedure could occur at the wrong level, Dr. Mayr argued it was implicit that this was a known complication of the procedure. Despite this, on cross examination, Dr. Mayr admitted that he never told the Decedent that he might operate at C6-7 instead of C5-6. J.A. at 56. The trial court rejected Dr. Mayr's argument when it found in favor of Plaintiff. On appeal, Dr. Mayr ignores the trial court's findings of fact and suggests that his theory of the case was the only evidence submitted at trial. This position is not supported by the record.

Despite the differences in the circumstances giving rise to each case, *Pugsley*, *Woodbury*, and *Washburn* all stand for the same proposition: the finder of fact should determine whether a defendant-physician exceeded the scope of consent and committed a battery. The case presently before the Court involved the same issue at trial: did Dr. Mayr exceed the scope of consent? Indeed, Dr. Mayr conceded this was the issue multiple times at trial. J.A. at 31 ("The issue is whether that was a complication or there [sic] was operating outside the scope of consent"); J.A. at 68 ("Your Honor, the issue here is the scope of the consent that was given by the patient"). The trial court likewise clarified that the issue being tried was the scope of consent. J.A. at 74 ("Everybody agrees that this case is a scope of the consent case?").

The issue this Court must resolve, then, is whether there was evidence that Dr. Mayr exceeded the scope of consent. As noted above, Ms. Osborne occupies the most favored position known in the law. *Walsh*, 188 Va. at 303-04. This Court should only overturn the trial court if it finds it is "conclusively apparent" that Ms. Osborne did not prove her case or it is "plainly appears" there was no evidence to support the verdict. *Egan*, 772 S.E.2d at 772. The evidence is viewed in the light most favorable to Ms.

Osborne. *Id.* If there was evidence that Dr. Mayr exceeded the scope of consent, then the trial court's judgment should stand.

The evidence presented at trial included the following:

1. The Decedent consented to a procedure at the C5-6 level of the spine. J.A. at 98.
2. Dr. Mayr operated at the C6-7 level. J.A. at 123 (RFA 9).
3. Dr. Mayr admitted that "the intended surgery was at a different level," meaning he intended to operate at C5-6. J.A. at 124 (RFA 11).
4. Dr. Mayr made clear that he was not acting maliciously because he denied "any sort of dishonesty or neglect" on his part. *Id.*

There was, accordingly, evidence that Dr. Mayr had consent to operate at the C5-6 and exceeded the scope of that consent by operating at C6-7. Pursuant to *Woodbury* and *Washburn*, the trier of fact should have weighed that evidence and determined whether the scope was exceeded. The trial court, as trier of fact, did just that and found that the scope was exceeded. The trial court's decision should, therefore, be affirmed.

At trial, Dr. Mayr's theory was that although the procedure was done at the wrong level, there was no evidence that Dr. Mayr knew he was

operating at the wrong level. Dr. Mayr argued that the absence of knowledge precludes a battery claim, suggesting that the intent element of battery required knowledge that he was operating at the wrong level. He presented evidence that operating at the wrong level was a "recognized complication" of the procedure. J.A. at 41.

Dr. Mayr asks this Court to adopt a narrow, specific reading of the word intent in an effort to have this Court adopt his theory of the case at trial. Dr. Mayr argues that he did not know he was operating at the wrong level, and so by definition his acts were unintentional and therefore could not constitute a battery. Dr. Mayr confuses intent and knowledge. There is no question that Dr. Mayr purposefully performed a posterior cervical foraminotomy and cervical fusion at C6-7 (instead of C5-6). His scalpel did not slip and cut in the wrong place, nor did cut more than he intended. Instead, he opened his patient, observed the spine, and then, for whatever reason, operated at the wrong level. Until he observed a radiological scan after surgery, Dr. Mayr believed the surgery was successfully performed. This is the intent required to establish a battery—purposeful action that results in an unwanted touching.

Knowledge, on the other hand, is not an element of battery in the context of a physician-patient relationship. It is not necessary that Dr. Mayr

knew he was operating at the wrong level. Indeed, if he did, his actions would have been criminal. Moreover, Dr. Mayr did not need to intend to injure the Decedent to commit a battery. If knowledge or intent to injure is a necessary element of battery, it would be hard to imagine a situation where a physician could commit a battery absent malicious, criminal intent.

In *Pugsley*, *Woodbury*, and *Washburn*, the defendant-physician certainly did not intend to injure their patient-plaintiffs, yet this Court said that the jury should decide whether a battery was committed on the sole issue of whether the physician exceeded the scope of consent. In *Washburn*, the defendant-physician contended that he did not intentionally operate at the wrong level (making an argument strikingly similar to Dr. Mayr), and this Court said that the jury should determine whether the defendant exceeded the scope of consent. 263 Va. at 592. The trial court in the present case did exactly what was instructed in *Washburn*: it received the evidence on the consent granted by the Decedent, weighed the evidence, and determined Dr. Mayr exceeded the scope of consent.

Dr. Mayr suggests that any act of negligence by a physician could be pleaded as a battery claim, using as an example a scenario in which a physician nicks an adjacent organ "and that this type of event is a common and accepted risk or complication of [the] procedure," and argues that this

would relieve the plaintiff from the need to provide expert testimony. Appellant's Br. at 11. This hypothetical is premised upon the assumption that the "nick" was a common and accepted risk of the procedure. In the case at bar, there was a conflict in the evidence as to whether the patient was ever told by Dr. Myer that he might operate at the wrong level. Furthermore, this example highlights the difference between negligence and battery. In this case, Dr. Mayr operated purposefully and found out later it was at the wrong level. In his example, the physician did not act purposefully—the scalpel slips and nicks an organ. That is not a battery, though it may be negligence.

The facts of this case are similar to *Washburn*. The Court said the jury should decide whether the scope of consent was exceeded. In this case, the trial court did just that—weighed the evidence, and found that Dr. Mayr exceeded the scope of consent. The trial court should therefore be affirmed.

V. The Virginia Medical Malpractice Act Does Not Prohibit Claims for Battery Against Health Care Providers (Assignment of Error 2)

In Assignment of Error 2, Dr. Mayr contends that Ms. Osborne was required to plead her claim against him as "medical malpractice," rather than battery. As discussed in Part III above, this Court should not consider

this issue because Dr. Mayr failed to present this issue to the trial court for its consideration. Even if this Court considers the merits of Assignment of Error 2, it should affirm the trial court because plaintiffs may maintain battery claims against physicians.

The Act limits the total amount recoverable "against a health care provider in an action for malpractice." Va. Code § 8.01-581.15. The Act defines "health care provider" to include physicians licensed to practice medicine in the Commonwealth. Va. Code § 8.01-581.15. It also defines "malpractice" 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." *Id.*

In the context of the Act, this Court has stated that a "tort" is "any civil wrong or injury; a wrongful act (not involving a breach of contract) for which an action will lie." *Glisson v. Loxley*, 235 Va. 62, 67 (1998) (quoting *Jewett v. Ware*, 107 Va. 802, 806 (1908)), *abrogated on other grounds by* Va. Code § 8.01-581.1. A battery is a tort "arising from 'malpractice' within the clear meaning of the malpractice statutes." *Id.* at 69.

Dr. Mayr suggests that since malpractice under the Act includes battery, plaintiffs are only permitted to plead a battery claim as

"malpractice." As this Court is well aware, "[s]tatutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms." *Giodarno v. McBar Indus.*, 284 Va. 259, n. 8 (2012) (quoting *Chesapeake v. Ohio Ry. Co. v. Kinser*, 206 Va. 175, 181 (1965)). This Court has held that the Act's medical malpractice cap is in derogation of the common law and must be strictly construed. *Schwartz v. Brownlee*, 253 Va. 159, 166 (1997); *see also Alcoy v. Valley Nursing Homes, Inc.*, 272 Va. 37, 42 (2006) (stating that this Court applies the plain meaning of the Act's language).

The express terms of the Act does not require a plaintiff to plead all claims against health care providers as "malpractice." Since the Act must be strictly construed, this Court should not impose that requirement. Moreover, the Act states that malpractice includes "any tort" committed by a health care provider. The Act did not substitute malpractice for causes of action; instead, it afforded protection to health care providers for all tort causes of action that meet the definition of "malpractice."

In other words, the Act does not create a cause of action; it simply states that torts committed by certain health care providers will be afforded certain protections under the Act. If a cause of action meets the definition of malpractice under the Act, then the provider gets the protections.

This view of the Act is consistent with *Pugsley*, *Woodburn*, and *Washburn*, all of which involved claims of ***battery*** against a health care provider, not "malpractice." In *Bulala v. Boyd*, this Court stated that a plaintiff may advance multiple theories against a defendant-physician when it stated that "in a medical malpractice action, the total damages recoverable for injury to a 'patient' are limited to the statutory amount, ***regardless of the number of legal theories upon which the claims are based***." 239 Va. 218, 228 (1990). Even *Glisson*, which Dr. Mayr relies upon, does not stand for the proposition that all claims brought against health care providers must be styled as "malpractice."

Ms. Osborne brought her battery claim against Dr. Mayr. Consistent with *Washburn* and its progeny, the claim was predicated on Dr. Mayr exceeding the scope of consent. Ms. Osborne's claim was properly brought and styled, and since it meets the definition of malpractice, Dr. Mayr received the protections of the Act, nothing more or less. For these reasons, the Court should reject the argument in Assignment of Error 2.

VI. Ms. Osborne Was Not Required to Have an Expert Witness Testify For Her Battery Claim (Assignment of Error 1)

Dr. Mayr argues that Ms. Osborne's claim was really a claim for negligence. Dr. Mayr continues to argue his trial theory, contending that Ms. Osborne needed an expert witness at trial. As discussed in detail in

Parts IV and V above, Ms. Osborne's battery claim was that Dr. Mayr exceeded the scope of consent, and the fact finder found he did batter the Decedent when he exceeded that scope.

Pursuant to the Act, a plaintiff is required to have an expert witness testify to the standard of care in medical negligence cases. Va. Code § 8.01-581.20(A). This Court has unequivocally stated that an expert witness is not necessary to prove a battery claim against a physician, even if the physician uses an expert in his defense. *Woodbury*, 239 Va. at 654. Thus, Ms. Osborne did not need an expert witness to testify in her case. Instead, she presented evidence that Dr. Mayr exceeded the scope of consent and battered the Decedent, and the trial court found in her favor.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 5:26(h)

I certify that on August 12, 2016, I filed one electronic copy and ten printed copies of the foregoing Brief of Appellee with the Clerk of the Supreme Court of Virginia, with an electronic copy being served on counsel for Appellee, J. Jonathan Schraub, Esq., and Paige Levy Smith, Esq., Sands Anderson PC, 1497 Chain Bridge Road, Suite 202, McLean, Virginia 22101, jjschraub@sandsanderson.com, plevy@sandsanderson.com. I further certify that I have complied with Rule 5:26.

Counsel