In the

Supreme Court of Virginia

At Richmond

Record No. 160314

DAVID W. ALLISON, M.D. and DAVID W. ALLISON, P.C.,

Appellants,

– v. –

DEBORAH BROWN,

Appellee.

OPENING BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Appellants David W. Allison, M.D. and his practice[1] are entitled to judgment because Appellee Deborah Brown failed to prove at trial the claims made in her Complaint. In it, Ms. Brown alleged Dr. Allison was negligent by performing wrong side breast surgery. This is a case of surgical negligence. Rather than trying to prove that case—Ms. Brown advanced two other theories: (1) battery and (2) a failure to obtain Ms. Brown's informed consent.

At a hearing before trial, the court dismissed Ms. Brown's battery claim with prejudice. That Order was never disturbed during or after trial, yet Ms. Brown put on evidence and received jury instructions on battery.

Further, a lack of informed consent claim was never pleaded in her Complaint. But Ms. Brown put on evidence and received jury instructions solely on that allegation of negligence. Despite that, she failed to prove a cause of action for lack of informed consent.

For these reasons, the trial court's judgment should be reversed, and judgment entered in favor of Dr. Allison.

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[1] The Appellants are David W. Allison, P.C. and David W. Allison, M.D.—the employee for whom the professional corporation admitted it was vicariously liable. Both will be referred to collectively as Dr. Allison.

If Dr. Allison is not awarded judgment, the trial court's judgment should nonetheless be reversed and this matter should be remanded for further proceedings. The trial court erred in admitting evidence pertaining to, and instructing the jury on, battery and a lack of informed consent negligence claim. Furthermore, it was reversible error for the trial court to instruct the jury on liability and other insurance, not instruct the jury as to habit evidence, and, if cognizable, by failing to fully instruct the jury on the battery claim.

ASSIGNMENTS OF ERROR

I. The trial court erred in permitting Ms. Brown to put on evidence of a battery claim and in allowing the jury to consider battery because that claim was dismissed with prejudice from this case by Order dated September 26, 2014.

Preserved at: A. at 102-111, 114-150, 309-312, 326-329, 332-337, 372-380, 382-387, 415-418, 432-433, 457, 520-527, 531 892-910, 919-920, 928-933, 935-936.

A. The trial court erred in denying Dr. Allison's Motion *in Limine*, Motion to Strike, Renewed Motion to Strike, and Motion to Set Aside the Verdict, in instructing the jury on battery (Instructions H1, K, I1, X, S, Y), and in all other rulings it made throughout and following trial permitting such evidence.

Preserved at: A. at 102-111, 114-150, 309-312, 326-329, 332-337, 372-380, 382-387, 415-418, 432-433, 457, 520-527, 531, 892-910, 919-920, 928-933, 935-936.

II. The trial court erred in allowing the jury to consider Ms. Brown's informed consent claim because she failed to offer sufficient evidence to support it.

Preserved at: A. at 102-111, 114-150, 188, 210-212, 312-320, 327-329, 332-337, 415-418, 432-433, 457, 520-524, 527-531, 910-920, 931-933, 935-936.

A. Ms. Brown's standard of care expert, Hubert Weinberg, M.D., should not have offered testimony regarding the alleged deficiencies in Dr. Allison's informed consent conversation with Ms. Brown because Ms. Brown did not designate Dr. Weinberg to offer that testimony.

Preserved at: A. at 102-111, 114-150, 188, 210-212, 312-320, 327-329, 332-337, 415-416, 457, 520-524, 527-531, 910-920, 931-933, 935-936.

B. The trial court erred in denying Dr. Allison's Motion to Strike, Renewed Motion to Strike, and Motion to Set Aside the Verdict, in instructing the jury on informed consent (Instructions H1, K, I1, R, V, S), and in all other rulings it made throughout and following trial permitting such evidence.

Preserved at: A. at 102-111, 114-150, 188, 210-212, 312-320, 327-329, 332-337, 415-418, 432-433, 457, 520-524, 527-531, 910-920, 931-933, 935-936.

III. The trial court erred when it refused Dr. Allison's proffered Instruction F, an instruction on habit evidence, because that Instruction correctly states the law and was supported by the evidence.

Preserved at: A. at 444-450, 459-460, 495-508, 520-524, 531-533, 920, 931-933, 935-936.

IV. The trial court erred when it gave Ms. Brown's Instruction 18 because that Instruction improperly injected insurance into the case and was not supported by the evidence.

Preserved at: A. at 443-444, 459-460, 520-524, 534, 920, 931-933, 935-936.

V. Alternatively, if a battery claim was properly in the case, the trial court erred when it refused Dr. Allison's proffered Instructions W and Z because those Instructions were correct statements of the law and supported by ample evidence at trial.

Preserved at: A. at 417-420, 452-453, 456-457, 520-524, 533, 920, 931-933, 935-936.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On October 23, 2013, Deborah Brown sued Dr. Allison in the Fairfax County Circuit Court for medical negligence. *See generally* A. at 1-6. Specifically, she claimed that Dr. Allison breached the standard of care by performing surgery on the wrong breast. *Id.* at ¶ 20. She alleged she incurred injuries and damages as a result of Dr. Allison's negligence. *Id.* at ¶ 21. She did not allege Dr. Allison breached the standard of care by failing to obtain her informed consent. *See generally id.* She did not allege Dr. Allison committed a battery.

On November 15, 2013, Dr. Allison timely responded to the Complaint. On July 8, 2014, Ms. Brown filed her expert witness designation. *See generally* A. at 7-33. Ms. Brown's sole retained expert witness, Hubert Weinberg, M.D., was not designated to testify Dr. Allison breached the standard of care by failing to obtain her informed consent. *Id.*[2]

[2] Dr. Weinberg was designated to say Dr. Allison battered Ms. Brown by performing surgery bilaterally rather than just her right breast. This does

On July 10, 2014, Ms. Brown moved the trial court for leave to amend the Complaint, in order to allege a cause of action for battery. A. at 34-45. On July 25, 2014, over Dr. Allison's objections, the trial court granted Ms. Brown's motion. A. at 62-63. Dr. Allison timely responded to the First Amended Complaint, which included a Plea in Bar of the Statute of Limitations. A. at 64-69.

On September 26, 2014, the Honorable Michael F. Devine sustained Dr. Allison's Plea in Bar and dismissed the battery count with prejudice. A. at 97.

On October 6-10, 14, 2014, Ms. Brown and Dr. Allison tried the case before a jury with the Honorable Robert J. Smith presiding. On October 14, 2014, the trial court ordered a mistrial because the jury could not reach an unanimous verdict.

On November 16-19, 2015, Ms. Brown and Dr. Allison tried the case before a jury with Judge Smith again presiding. Ms. Brown presented evidence in support of two theories of liability at the second trial: (1) Dr. Allison committed a battery by performing a wrong-sided surgery; and (2) Dr. Allison failed to obtain her informed consent to perform surgery on her

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not support a lack of informed consent claim, but a lack of consent (i.e. battery) claim. A. at 7-33.

previously radiated left breast. This appeal only concerns the trial court's rulings on several issues which arose during this second trial.

I. Evidence of battery

On the first day of trial, prior to the jury being empaneled, Dr. Allison, consistent with Judge Devine's September 26, 2014 Order, moved the trial court *in limine* for an order precluding Ms. Brown from offering any evidence, argument, or testimony in support of her battery claim. The trial court denied the motion. A. at 144.

From that point on, there can be no question regarding Ms. Brown's primary theory at trial. Ms. Brown testified at length regarding an alleged battery. A. at 285-289, 292-296. She testified that her impression upon leaving her preoperative appointment with Dr. Allison on November 7, 2011 was that Dr. Allison would be operating on her right breast only: "My November 22nd surgery, he was going to place a larger implant into my right side and adjusting the nipple on my right side." A. at 289. Additionally, Ms. Brown testified that, on the morning of her surgery, she informed a nurse, "[w]e're not doing both breasts. We are only working on my right breast." A. at 295. Ms. Brown presented testimony from three fact witnesses—Barbara Ann Cioffi, Kayla Brown, and Lisa Poignee—in support

of her theory that Dr. Allison operated on her left breast without her consent.

Ms. Brown's sole standard of care expert, Hubert Weinberg, M.D., testified that Dr. Allison performed surgery without Ms. Brown's consent, "Ms. Brown had agreed to only having her right-side surgery performed. That was the only side that she was unhappy with. Dr. [Allison] decided, for whatever reason, that he performed surgery on her left side. That was not her wish. That was not what she had consented to." A. at 256-257.

At the close of Ms. Brown's evidence, Dr. Allison moved to strike the evidence she offered to support a claim of battery. A. at 309-328. The trial court took the motion under advisement. A. at 329.

During argument on jury instructions, Judge Smith acknowledged that battery was dismissed from the case, "We know the battery is gone." A. at 376. But, Judge Smith denied Dr. Allison's Motion to Strike. A. at 386. Thereafter, Judge Smith again recognized that the battery claim had been dismissed prior to trial: "Well, there is no battery claim right now. It's the informed consent. The battery was stricken by Judge Devine." A. at 453. Yet, Judge Smith proceeded to instruct the jury on battery. A. at 463, 509-512, 514.

But even in doing so, the trial court improperly instructed the jury on battery. Without waiving his objection regarding the battery claim, Dr. Allison offered Instruction W, which defined battery, and Instruction Z, which set forth the damages recoverable in a battery action. A. at 452-455, 517-518. The trial court refused both instructions. A. at 456.

Ms. Brown's counsel strenuously argued her battery theory to the jury in closing arguments. His first substantive remark framed her claim, "That's what this case is all about. We told you that right up front in the beginning. This is a wrong-sided surgery." A. at 466-467.

Dr. Allison filed a Motion to Set Aside the Verdict. Judge Smith denied the Motion. In ruling on the motion, Judge Smith observed, "I think I agree with you, I can't add it [the battery claim] back in now." A. at 931. Judge Smith further remarked, "I mean, I believe the trial was sufficient the way it was, other than the battery case having been—count having been dismissed and it shouldn't have been." A. at 931-932.

II. Evidence of informed consent

Ms. Brown's Complaint alleged that Dr. Allison was negligent because he breached the standard of care by performing surgery on the left breast and the right breast, not just the right breast. A. at 1-6. She amended her Complaint to re-allege that claim and to add a cause of action

for battery, which was later dismissed with prejudice. A. at 40-45. Her Complaint and First Amended Complaint did not contain a lack of informed consent claim.

In discovery, Dr. Allison asked Ms. Brown to detail her allegations of negligence against him. A. at 583-584. Ms. Brown's response did not include a claim that Dr. Allison breached the standard of care by failing to obtain her informed consent. *Id.*

Ms. Brown designated one expert to testify at the trial of this case, Dr. Weinberg. Ms. Brown did not designate Dr. Weinberg to offer criticism regarding Dr. Allison's informed consent conversation with Ms. Brown. A. at 7-33. Instead, Ms. Brown designated Dr. Weinberg to testify that Dr. Allison breached the standard of care by committing a battery—*i.e.*, by performing surgery on the wrong breast without Ms. Brown's consent. *Id*.

At trial, Dr. Weinberg testified regarding the risks associated with operating on a radiated breast. A. at 210-211. Only Ms. Brown's left breast had received radiation. A. at 191. He also testified that Dr. Allison breached the standard of care by failing to document in his November 11, 2011 office note that, "I explained to the patient the effects of radiation and I explained to the patient that a radiated breast may, indeed, have more problems than

a normal nonradiated tissue." A. at 211. Dr. Allison objected to this testimony. *Id*. The trial court overruled the objection. *Id.*

At trial, Ms. Brown testified that she was aware of the risks inherent in surgery on a radiated breast. A. at 286. She testified that she knew her left breast would more likely suffer post-operative complications than her right breast due to her prior course of radiation. *Id*. She never testified that she would not have undergone surgery on her left breast had Dr. Allison informed her of the risks inherent in surgery on radiated tissue; rather, she testified she consented to right sided only surgery because her left breast had received radiation therapy and could have more problems healing. *Id*. She knew the risk.

At the close of Ms. Brown's evidence, Dr. Allison moved to strike her informed consent claim on the grounds that, among other things, Ms. Brown had not met her evidentiary burden. A. at 309-329. The trial court denied the motion. A. at 329. Dr. Allison raised his Motion to Strike again at the close of all evidence. A. at 417-418. The trial court again denied it and instructed the jury on informed consent. A. at 417-418, 463, 509, 513. The only negligence claim the jury was instructed on was a lack of informed consent. A. at 509, 513.

III. Jury Instructions

Apart from erroneously instructing the jury on battery and informed consent, the trial court committed additional errors in instructing the jury.

A. Insurance

The jury did not hear any evidence regarding insurance during the trial. Indeed, the trial court sustained Dr. Allison's objection to the only exhibit that referenced insurance. A. at 743-747. Yet, over Dr. Allison's objection, the trial court erroneously injected insurance into the case by granting and reading Ms. Brown's Instruction 18 to the jury. A. at 463, 515.

B. Habit

Ms. Brown testified that she had a distinct memory of her November 7, 2011 preoperative appointment with Dr. Allison, including the discussions they had regarding the scope of her November 22, 2011 surgery. A. at 283-289. Dr. Allison readily admitted that he did not have an actual memory of the November 7, 2011 preoperative appointment. A. at 341. But he did testify as to his habit for conducting pre-operative appointments, A. at 345, obtaining a patient's consent, *id.*, and informing patients about the risk of operating on radiated tissue, A. at 348-349. Ms. Brown offered habit evidence too. She testified that prior to each of her

numerous breast reconstruction revision surgeries, she would talk with someone at the hospital on the telephone. A. at 303.

Dr. Allison offered Instruction F, a jury instruction pertaining to habit evidence: "You may consider evidence of a witness's habit as evidence that the witness's conduct on a particular occasion was in conformity with that habit." A. at 495-508, 516. The trial court erroneously refused the Instruction. A. at 460.

On November 19, 2015, the jury returned a $1,300,000 verdict against Dr. Allison. A. at 519. The trial court entered a Final Order on December 4, 2015. A. at 520-522. On December 10, 2015, Dr. Allison requested that the trial court set aside the verdict, which Motion the court later denied. A. at 523-623, 935-936. This appeal followed.

STATEMENT OF FACTS

Ms. Brown is a 52-year-old woman with a history of breast cancer. As treatment for her breast cancer, she underwent chemotherapy, radiation, and bilateral mastectomies. A. at 281. Dr. Allison performed a total of seven surgeries on Ms. Brown. The first four surgeries involved deploying tissue expanders following Ms. Brown's mastectomy, bilateral removal of the expanders and insertion of implants, and two revisions of Ms. Brown's right breast. Trial Tr. at 850. Dr. Allison's fifth surgery was to reconstruct

her right nipple and areola. Trial Tr. at 851-52. The sixth surgery was the surgery at issue in this case.

Leading up to the sixth surgery, on October 3, 2011, Ms. Brown saw Dr. Allison for a follow-up visit. She complained that her right nipple was too long and that her left breast was too large and sat too high. A. at 282-283. Dr. Allison examined her and confirmed that her right nipple was too long and that her left breast sat higher and was slightly larger than the right breast. Trial Tr. at 852. Dr. Allison recommended surgery to revise Ms. Brown's right nipple and areola and her left breast. Trial Tr. at 853-54. Ms. Brown agreed to the plan. A. at 283.

Ms. Brown returned to Dr. Allison on November 7, 2011 for a pre-operative consultation. During the intervening time, Ms. Brown had grown accustomed to the size of her left breast. A. at 285. So she reported to Dr. Allison that she was only concerned with her right breast. *Id.* She felt her right breast sat lower than her left breast and did not have adequate upper pole volume. *Id.* Dr. Allison and Ms. Brown then had a discussion regarding the surgical options and the risks and benefits inherent in those options. A. 348-349.

At trial, Ms. Brown's main concern was what surgical procedure she agreed to during the November 7, 2011 appointment. Ms. Brown

contended that she agreed to a surgical revision of her right breast only. A. at 288-290. Dr. Allison responded that Ms. Brown consented to bilateral surgery. A. at 341. Dr. Allison presented Ms. Brown with a consent form on November 7, 2011 that identified the procedure as "Revision of Bilateral Breast Reconstructions." A. at 345-346. Ms. Brown signed that consent form. *Id*.

On November 22, 2011, Dr. Allison performed a bilateral breast reconstruction on Ms. Brown. A. at 292; 295-297. During that surgery, on her right breast, he revised Ms. Brown's right nipple. On her left breast, he attempted to achieve symmetry between her breasts.

Ms. Brown returned to Dr. Allison for a post-operative visit on November 28, 2011. A. at 756-758. At that appointment, Ms. Brown claims she confronted Dr. Allison and told him that she believed he had performed surgery on the wrong breast. *Id.* Dr. Allison agreed to perform a seventh surgery to further revise her breasts, which took place on January 10, 2012. A. at 758. Several weeks after that surgery, Ms. Brown's left breast incision began to open and the implant began to extrude. A. at 758-760. Dr. Allison recommended she quickly undergo surgery to correct the extrusion. *Id.* Ms. Brown opted to transition the management of her surgical care to a different plastic surgeon. A. at 760-762. That surgeon has since performed

several surgeries on Ms. Brown's left breast. A. at 766-768. This litigation followed.

STANDARD OF REVIEW

The trial court's rulings on Dr. Allison's Motions are reviewed according to the standard articulated in *Banks v. Mario Industries*:

> When the sufficiency of a plaintiff's evidence is challenged by a motion to strike, the trial court should resolve any reasonable doubt as to the sufficiency of the evidence in plaintiff's favor and should grant the motion only when it is conclusively apparent that plaintiff has proven no cause of action against defendant, or when it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it.

274 Va. 438, 454-55 (2007). These rulings were plainly wrong. *Id.* at 450-451.

The trial court's decision to permit Ms. Brown's expert to offer testimony regarding the informed consent claim is evaluated under an abuse of discretion standard, and the trial court's ruling must be left undisturbed unless plainly wrong. *See Condominium Services, Inc. v. First Owners' Association of Forty Six Hundred Condominium, Inc.*, 281 Va. 561, 575 (2011). The trial court's decision to permit Dr. Weinberg's testimony in support of the informed consent claim was plainly wrong.

The trial court's decision to give Instruction 18 and refusal to give Instructions F, W, and Z is reviewed *de novo* to ensure the law has been accurately stated and "that the instructions cover all issues which the evidence fairly raises." *Cain v. Lee*, 290 Va. 129, 134 (2015).

ARGUMENT SUMMARY

This Court should reverse the trial court and enter judgment for Dr. Allison because Ms. Brown put on evidence and argument and received jury instructions for two causes of action (battery and lack of informed consent), neither of which were before the trial court according to the pleadings. Ms. Brown failed to put on any evidence of the only cause of action which was before the court—namely that Dr. Allison breached the standard of care in deciding to operate on the left breast to attempt to make it symmetrical with the right breast.

If judgment is not awarded to Dr. Allison, the trial court also erroneously instructed the jury on liability and other insurance, and erroneously refused to instruct the jury about habit evidence. The trial court also failed to properly instruct the jury on battery—if instruction on battery was proper.

ARGUMENT

I. Dr. Allison is entitled to judgment because Ms. Brown failed to prove at trial the negligence she sued him for.

A. Ms. Brown's battery claim was dismissed with prejudice and should not have been heard by the jury (Assignment of Error I and its subpart)

1. The initial Complaint did not assert a battery claim

Ms. Brown's initial Complaint did *not* assert a cause of action for battery against Dr. Allison. A. at 1-6. Ms. Brown only alleged negligence. Both counts of her Complaint were styled as counts for "Negligence." *Id.* Notably, Ms. Brown alleged Dr. Allison "breached the required standard of care" by "perform[ing] surgery on the wrong breast." *Id.* at ¶ 15(B); ¶ 20(B). Furthermore, Ms. Brown's Complaint contends she suffered injuries and damages solely as a result of Dr. Allison's "negligence." *See id.* at ¶¶ 11-12; ¶¶ 16-17; ¶¶ 21-22.

In her initial Complaint, Ms. Brown elected to assert a single claim against Dr. Allison—a claim for negligence. She could not obtain judgment against Dr. Allison under any other theory of liability because:

> It is firmly established that no court can base its judgment or decree upon facts not alleged *or upon a right which has not been pleaded and claimed*. Pleadings are as essential as proof, and no relief should be granted that does not substantially accord with the case as made in the pleading.

Harrell v. Woodson, 233 Va. 117, 121 (1987) (emphasis added) (quoting *Ted Lansing Supply v. Royal Alum.*, 221 Va. 1139, 1141 (1981)). "The rationale supporting this basic rule is plain. […] '[e]very litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense. . . . The issues in a case are made by the pleadings.'" *Dabney v. Augusta Mut. Ins. Co.*, 282 Va. 78, 86 (2011) (citations omitted). Here, the only claim Ms. Brown pleaded and claimed against Dr. Allison was for negligence.

Battery is an intentional tort. *Glasco v. Ballard*, 249 Va. 61, 64 (1995); *Russo v. White*, 241 Va. 23, 26 (1991); *F.B.C. Stores v. Duncan*, 214 Va. 246, 249 (1973). "The tort of battery is an unwanted touching which is neither consented to, excused, nor justified." *Koffman v. Garnett*, 265 Va. 12, 16 (2003) (referencing *Washburn v. Klara*, 263 Va. 586 (2002); *Woodbury v. Courtney*, 239 Va. 651 (1990)).

A medical malpractice claim for battery is distinguishable from a medical malpractice claim for negligence. The former claimant need not prove a physician's conduct deviated from the standard of care. *See Pugsley v. Privette*, 220 Va. 892, 900-01 (1980). The latter does. *Bryan v. Burt*, 254 Va. 28, 34 (1997).

In her initial Complaint, Ms. Brown did not claim that Dr. Allison committed a battery. Therefore, per *Ted Lansing Supply* and its progeny, based on the initial Complaint, the trial court could not have entered judgment in Ms. Brown's favor with respect to a battery claim.

2. The battery claim was dismissed with prejudice

Ms. Brown realized she failed to plead a claim for battery in her Complaint, so she sought leave of court for the sole purpose of adding a battery claim to her case. Her First Amended Complaint removed the qualification that her factual allegations previously claimed—that she suffered injuries as a result of Dr. Allison's "negligence." A. at 40-45. Ms. Brown then added the new factual allegation—that she "made clear that she had only consented to an operation on her right breast." *Id.* at ¶ 9. Further, Ms. Brown alleged she did not consent to, or otherwise revoked her consent to, an operation on her left breast. *Id.* at ¶ 26.

At the July 25, 2014 hearing on Ms. Brown's Motion for Leave to Amend, her counsel acknowledged, "We have medical malpractice claims. *We're simply adding a battery claim*." A. at 55 (emphasis added). Ms. Brown sought to add the claim because "it simply allows for an additional instruction for the jury." *Id*. Over Dr. Allison's objections, the trial court

granted Ms. Brown's motion for leave to file an amended Complaint. A. at 62-63.

Again, at the hearing on Dr. Allison's Plea in Bar, Ms. Brown's counsel reiterated that the initial Complaint did *not* contain a battery claim:

> MS. BROWN'S COUNSEL: …To allege an intentional tort is a very serious matter, which I don't like to do. I don't like to allege intentional torts against physicians unless I have to. And so it was frankly a matter of prudence. In this court's teaching under the *Benitez* case, which is you don't bring claims unless they're well-founded. We took the deposition of the physician. He had no explanation that was colorable [or] credible and we decided to move forward with the secondary [claim of battery].

A. at 94. Judge Devine sustained Dr. Allison's Plea in Bar and dismissed the battery count with prejudice. A. at 97.

Ms. Brown noted an objection to the Order, but prior to the jury's verdict, made no efforts to seek reconsideration of that ruling or otherwise ask the Court to overturn it. The Order dismissing the battery claim was in full force and effect at the time of the trial of this case.

3. Ms. Brown did not revive her battery claim following dismissal

Ms. Brown has advanced two arguments as to why evidence and instructions pertaining to battery were appropriate: (1) the battery claim was actually asserted in the initial Complaint; and (2) Judge Smith overruled

and modified Judge Devine's September 26, 2014 Order dismissing the battery count. Both arguments fail.

Regardless of whether the facts alleged in the initial Complaint could have supported a claim for battery, Ms. Brown did not plead or claim battery in her initial Complaint. *See Ted Lansing Supply*, 221 Va. at 1141 (quoting *Potts* v. *Mathieson Alkali Works*, 165 Va. 196, 207 (1935) ("No court can […] render its judgment upon a right, however meritorious, which has not been pleaded and claimed. . . . Pleadings are as essential as proof, the one being unavailing without the other."). Indeed, in *Ted Lansing Supply*, this Court reversed the judgment against the defendant for breach of an implied warranty because the only theory actually pleaded was for breach of express warranty. *Id.* at 1141-42.

Even if the facts asserted in the initial Complaint could have supported a battery claim, Ms. Brown failed to seek recovery for battery because she failed to claim, or request relief against Dr. Allison, under a battery theory of liability. At the July 25, 2014 and September 26, 2014 hearings, Ms. Brown's counsel acknowledged she had not claimed battery from the outset of the case, and she needed to amend her Complaint in order to be entitled to a battery jury instruction.

Judge Smith did not overrule, modify, or change Judge Devine's September 26, 2014 Order. "It is well established in this Commonwealth that a circuit court speaks only through its written orders." *Roe v. Commonwealth*, 271 Va. 453, 457 (2006). The record is devoid of any Order overruling, modifying, or changing Judge Devine's September 26, 2014 Order. Moreover, the record is clear that Judge Smith's own belief was that he did not overrule Judge Devine's September 26, 2014 Order. Judge Smith repeatedly acknowledged during argument on the battery jury instructions and during the hearing on the post-trial motion that battery remained dismissed from the case. *See* A. at 376, 453-454, 931-932. Quite simply, Judge Devine's September 26, 2014 Order dismissing the battery claim remained in full force and effect throughout the entirety of trial.[3]

4. Ms. Brown was erroneously permitted to present evidence of battery in support of her negligence claim

Notwithstanding the clear dismissal of the battery claim from the litigation, virtually all of the evidence Ms. Brown presented was related to battery. Her own testimony centered on her claim that she only consented to surgery on her right breast. A. at 285-292. As just one example, she testified that when she removed her bandages and discovered that Dr.

[3] Ms. Brown did not assign cross-error to the September 26, 2014 Order in her Brief in Opposition to Petition for Appeal.

Allison had operated on her left breast she was "extremely shocked" and "in disbelief." A. at 755. She elicited testimony from three fact witnesses—Barbara Ann Cioffi, Kayla Brown, and Lisa Poignee—to bolster her theory. Ms. Brown's standard of care expert, Dr. Weinberg, testified that the "gravamen" of his criticism was that Dr. Allison did not obtain Ms. Brown's consent for surgery on her left breast, "when she agreed to having surgery on her right breast, she did not agree to surgery on her left breast, and that was not what she wanted to have done." A. at 550.

A plaintiff's claim that a physician operated on her without her consent sounds in battery, not negligence: "The relationship between a physician and patient is a consensual one and a surgical operation on the body of a person *is a technical battery* or trespass unless he or some authorized person consented to it." *Pugsley v. Privette*, 220 Va. 892, 899 (1980) (emphasis added) (citations omitted). This principle applies with equal force if a surgeon exceeds the scope of the patient's consent, as Ms. Brown alleges Dr. Allison did by operating, not only on the right breast—the breast to which she limited her consent—but by also performing surgery on the left breast, the breast for which he had no consent. *Id.*; *see also Washburn v. Klara*, 263 Va. 586, 590-91 (2002); *Woodbury v. Courtney*, 239 Va. 651, 654 (1990).

Virginia law does not permit Ms. Brown to pursue recovery for battery—an intentional tort—under a theory of negligence. Under *Pugsley, Woodbury, and Washburn*, Ms. Brown's claim that Dr. Allison exceeded her consent when he performed surgery on her left breast is a battery claim. And there is no dispute that Ms. Brown's battery claim was dismissed with prejudice on September 26, 2014. Evidence in support of that claim should not have been heard by the jury.

5. The trial court erroneously instructed the jury on battery

Despite the fact that Judge Devine dismissed the battery claim with prejudice, at the conclusion of the evidence, Judge Smith, the trial judge, instructed the jury on the law of battery. *See* Instructions H1, K, I1, X, S, Y; A. at 509-512, 514. Instruction H1 informed the jury that battery was an issue in the case, and Instruction K informed the jury that Ms. Brown had the burden of proving Dr. Allison committed a battery. Instruction I1 was a finding instruction, permitting the jury to find for Ms. Brown if Dr. Allison committed a battery. Instruction S informed the jury that Ms. Brown had the

burden to prove the damages caused by Dr. Allison's battery.[4] The trial court erred in offering the battery instructions.

B. Ms. Brown failed to plead or prove her negligence claim—lack of informed consent (Assignment of Error II and its subparts).

Ms. Brown's sole theory of negligence in her First Amended Complaint was surgical negligence by Dr. Allison. At trial, she abandoned her theory of surgical negligence in favor of a negligent lack of informed consent theory. No other negligence claim was pursued. Not only was it error to permit Ms. Brown to assert this undisclosed negligence theory, but she failed to meet her burden to prove it. Therefore, judgment should be entered for Dr. Allison on negligence.

1. Ms. Brown failed to properly plead or designate a lack of informed consent claim

Evidence and argument about the patient's lack of informed consent is neither relevant nor admissible in a medical malpractice trial claiming negligent surgery. *Wright v. Kaye*, 267 Va. 510, 529 (2004). When the standard of care regarding informed consent is not at issue, it is confusing to the jury for either party to introduce evidence of the risks of the surgery.

[4] Instructions X and Y do not contain the word "battery" but do address whether Dr. Allison obtained Ms. Brown's consent and whether she revoked it. Consent, of course, relates to battery, not negligence.

Fiorucci v. Chinn, 288 Va. 444, 448 (2014) (quoting *Wright v. Kaye*, 267 Va. 510, 529 (2004)).

A claim for lack of informed consent must be intentionally created. Mere mention of surgical risks during jury selection or when an expert mentions what he tells his patients about the risks of the surgery are not enough to make the risks of surgery a relevant issue. *Fiorucci*, 288 Va. at 448. Rather, intentional clarity is required to put the parties on notice as to when a negligence claim of lack of informed consent is at issue. Then, such evidence is relevant and admissible.

The Complaint repeatedly asserts this case is about surgical negligence, namely wrong-sided surgery; not a lack of informed consent. Paragraph 21 of the First Amended Complaint states:

> Notwithstanding the duties previously mentioned, Defendant Allison recklessly, carelessly and negligently treated the Plaintiff, and breached the required standard of care, in that he: a. failed to properly perform the surgery as previously described; b. performed surgery on the wrong breast; c. replaced the implant on the wrong breast; d. and failed to exercise the degree of skill and diligence practiced by a reasonably prudent practitioner in the field of medicine in this Commonwealth.

A. at 43.[5]

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[5] *See also* paragraph 16 of the First Amended Complaint for the same allegation against David W. Allison, P.C. A. at 42.

Also, Ms. Brown should not have been permitted to elicit any testimony from Dr. Weinberg on the standard of care for informed consent because she did not designate him to speak on that issue. Read together, the trial court's Scheduling Order and Rule 4:1(b)(4)(A)(i) required Ms. Brown to specify in her designation the opinions and grounds of the opinions her experts would offer at trial, regardless of whether the opinions were evident from any other source. *John Crane, Inc. v. Jones*, 274 Va. 581, 592 (2007). And, indeed, "[w]hen applying Rule 4:1(b)(4)(A)(i), this Court begins by 'determining whether the opinion at issue was disclosed in any form.'" *Condominium Services, Inc. v. First Owners' Association of Forty Six Hundred Condominium, Inc.*, 281 Va. 561, 576 (2011) (quoting *John Crane, Inc.*, 274 Va. at 591).

Here, Ms. Brown did not designate Dr. Weinberg to testify regarding any alleged deficiencies in Dr. Allison's informed consent conversation with Ms. Brown. A. at 7-33. She did not designate him to testify as to what risks the standard of care requires of plastic surgeons in discussing proposed surgery on a radiated breast. Nor did she designate Dr. Weinberg to testify that Dr. Allison failed to inform her of those risks. *Id.* Any opinions Dr. Weinberg offered at trial on a lack of informed consent were not properly or timely designated in any form as required by the Rules and the trial court's

Scheduling Order. *John Crane, Inc.*, 274 Va. at 592. Due to the fact that the negligence claim in the Complaint was for surgical negligence, not a lack of informed consent, it is understandable why Ms. Brown failed to designate Dr. Weinberg on any claims of a lack of informed consent. Yet at trial, a lack of informed consent claim became Ms. Brown's sole theory of negligence—a theory for which Dr. Weinberg was never designated.

Despite the fact that Ms. Brown never put Dr. Allison on notice through her pleadings that she would pursue a negligence theory of lack of informed consent at trial, Ms. Brown's only negligence claim at trial was that Dr. Allison breached the standard of care by failing to obtain her informed consent for surgery on her left, radiated breast. A. at 288. This point is most clearly illustrated through the negligence jury instructions given to the jury, particularly instructions H1 and V. A. at 509, 513.

Instruction H1 informs the jury that the issue in the case is, "was the defendant negligent in that he did not have informed consent?" A. at 509. Instruction V then explained what constitutes a lack of informed consent. A. at 513. There can be no doubt that the sole claim of negligence was a lack of informed consent.

Although Ms. Brown may argue she "meant" to plead a lack of informed consent claim, or that there is no surprise to Dr. Allison that the

trial would be about a lack of informed consent claim—this Court has explained that it has been "firmly established that no court can base its judgment or decree upon…a right which has not been pleaded and claimed…. [N]o relief should be granted that does not substantially accord with the case as made in the pleading." *Harrell v. Woodson*, 233 Va. 117, 121 (1987) (quoting *Ted Lansing Supply v. Royal Alum.*, 221 Va. 1139, 1141 (1981)). Because Ms. Brown did not prove the negligence pleaded in the First Amended Complaint—surgical negligence, judgment should be entered for Dr. Allison.

2. Ms. Brown cloaked her unlawful battery claim in an argument that it was a negligent failure to obtain informed consent

Ms. Brown argues that her negligence claim for lack of informed consent is as follows: (1) she consented to right-sided surgery only—giving no consent to surgery on the left breast due to heightened risks associated with surgery on a radiated breast; (2) nonetheless, Dr. Allison performed surgery on both breasts, but failed to inform her he would do so; and, (3) had she been told of his plan, she would not have consented to surgery at all. This theory fails as a matter of law since it is nothing more than a claim that Dr. Allison exceeded the scope of the consent Ms. Brown gave him. When a doctor exceeds the scope of surgery, he does not fail to obtain

informed consent, he commits a battery. *Washburn v. Klara*, 263 Va. 586, 592 (2002) ("If a surgeon exceeds the scope of a patient's consent, then the doctor has committed a battery."); *see also Woodbury v. Courtney*, 239 Va. 651, 654 (1990); *Pugsley v. Privette*, 220 Va. 892, 899 (1980).

3. Ms. Brown failed to provide sufficient evidence to prove her lack of informed consent claim

With respect to an informed consent claim in Virginia:

> A physician has a duty in the exercise of ordinary care to inform a patient of the dangers of, possible negative consequences of, and alternatives to a proposed medical treatment or procedure. […] To recover against a physician for failure to provide such information, the patient generally is required to establish by expert testimony whether and to what extent any information should have been disclosed.

Tashman v. Gibbs, 263 Va. 65, 73 (2002) (internal citation omitted). "Once a plaintiff has met the burden of establishing the standard of care and a deviation from that standard, she may establish by lay testimony that her physician did not disclose certain information regarding risks, and that she had no knowledge of those risks." *Id.* at 74 (citing *Bly v. Rhoads*, 216 Va. 645, 649-50 (1976)). Finally, the plaintiff must establish that if the physician-defendant had informed her of the risk at issue she would not have consented to surgery. *Tashman*, 263 Va. at 76.

Ms. Brown needed to provide competent expert testimony of what risks the standard of care required Dr. Allison to inform her of for surgery

on the radiated, left breast. She then needed to provide testimony that Dr. Allison did not disclose those risks to her *and* that she "had no knowledge of" those risks. *Id.* at 74. Finally, Ms. Brown needed to provide testimony that, had she known of that risk, she would not have consented to surgery on her left breast. Ms. Brown failed to provide such evidence.

a. Ms. Brown failed to prove the standard of care required Dr. Allison to properly warn her of the surgical risks.

Although Dr. Weinberg explained the increased risks inherent in performing surgery on a radiated breast, he did not testify what risks the standard of care requires a plastic surgeon to disclose to a patient contemplating surgery on a radiated breast. Rather, Dr. Weinberg focused on what Dr. Allison documented from the informed consent conversation he had with Ms. Brown. He did not focus on what was actually discussed between Dr. Allison and Ms. Brown.

First, Dr. Weinberg explained that surgery on a radiated breast has "increased dangers …, namely, that you have problems with wound healing; you have more problems with extrusion; you have more problems with infections; you have more problems with capsule contraction." A. at 211. Dr. Weinberg never testified that these are the risks the standard of

care requires a plastic surgeon to disclose to the patient before revision surgery of a reconstructed radiated breast.

Dr. Weinberg did criticize Dr. Allison's documentation, claiming that his November 7, 2011 office note should have mentioned, "I explained to the patient the effects of radiation and I explained to the patient that a radiated breast may, indeed, have more problems than a normal non-radiated tissue." A. at 211. But, Dr. Weinberg did not testify what a reasonably prudent plastic surgeon should disclose to a surgical candidate about the risks of surgery on a radiated breast. *Tashman*, 263 Va. at 76.

Although Dr. Weinberg explained what he normally tells his patients, he did not declare "whether and to what extent any information should have been disclosed" by Dr. Allison to Ms. Brown. *Tashman*, 263 Va. at 73. He did not testify that the standard of care required Dr. Allison to inform Ms. Brown of any specific risks of surgery on a radiated breast (as opposed to a non-radiated breast). Instead, Dr. Weinberg merely informed the jury of the increased risks inherent in operating on a radiated breast, and then criticized Dr. Allison's documentation. A. at 211.[6]

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[6] In her Brief in Opposition to Petition for Appeal, at p. 19-20, Ms. Brown argues Dr. Weinberg mentioned four risks of surgery on a radiated breast: wound healing, extrusion, infection and capsular contracture; and Ms. Brown only knew of the first. But, Dr. Weinberg never testified that the standard of care required each of these four risks to be disclosed to the

b. Ms. Brown knew of the risk at issue

Under *Tashman*, to prove her lack of informed consent claim against Dr. Allison, Ms. Brown needed to offer evidence that Dr. Allison failed to disclose to her a risk of performing surgery which she did not already know. *Tashman,* 263 Va. at 74 (if "a plaintiff has met the burden of establishing the standard of care and a deviation from that standard, she may establish by lay testimony that her physician did not disclose certain information regarding risks, and that she had no knowledge of those risks."); *see also Bly*, 216 Va. at 649-50.

Ms. Brown offered no testimony to support her claim that Dr. Allison, in fact, failed to disclose the risk of "hav[ing] more problems" after performing surgery on her radiated, left breast—as opposed to her non-radiated, right breast. A. at 211. Rather, she testified unequivocally that she was already aware of this risk.

Dr. Allison had previously performed revisions to both of her reconstructed breasts—both the radiated left breast, as well as the non-radiated right breast. A. at 220. Through those surgeries, Ms. Brown

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patient. *Tashman*, 263 Va. at 74. Dr. Weinberg testified he mentions the increased risks of healing, A. at 211, something, Ms. Brown already knew about. See discussion *infra*.

learned that surgery on a radiated breast had an increased risk of healing problems.

On October 3, 2011, Ms. Brown discussed with Dr. Allison the surgical revisions she wanted to her radiated left breast. A. at 282-283. Then, she testified that she changed her mind and "preferred" to only fix the right non-radiated breast, rather than have another surgery on her left breast. A. at 285. In requesting this change to the planned revision surgery, not only did Ms. Brown continue to seek to achieve symmetry, i.e., improve her appearance, but she wanted to avoid having more problems with her left, radiated breast after surgery.

MS. BROWN'S COUNSEL:	…[Were] there any other factors other than just appearance that was going through your mind in making that change?
MS. BROWN:	Yes. I indicated to him that that made me feel more comfortable and better because the right breast was my non-radiated breast, so I knew that it would heal better than if we worked on my left radiated breast."

A. at 285-286.

Offering no evidence on either of these first two compulsory elements for a lack of informed consent failed as a matter of law. *Tashman*, 263 Va. at 74.

c. Ms. Brown did not testify that the failure to inform her of additional risks of surgery affected her decision

Finally, to establish her informed consent claim, Ms. Brown needed to offer testimony that, had Dr. Allison informed her of the risks inherent in performing surgery on a radiated breast, she would not have moved forward with that surgery. *Tashman*, 263 Va. at 76.

Ms. Brown claimed she did not consent to left-sided surgery. A. at 285-292. But, she must show she did consent to the surgery, and would not have had she been properly informed of the risks. *Tashman*, 263 Va. at 76. By claiming Dr. Allison battered her by performing surgery on her left breast without consent, she cannot simultaneously claim she actually gave Dr. Allison her consent to left-sided breast surgery—but would not have had she known the increased risks surgery on her radiated breast.

Put plainly, Ms. Brown never testified that she would not have undergone left breast surgery had she known about the risks associated with surgery on a radiated breast.[7] Without that testimony, she cannot meet her burden under *Tashman*.

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[7] Even though a litigant may assert mutually inconsistent theories, Code § 8.01-281, a litigant cannot ignore their own factual testimony to assert mutually inconsistent theories:

Ms. Brown argued that she satisfied this prong of *Tashman* through her testimony that, when Dr. Allison allegedly agreed to perform surgery only on her right breast, she felt "more comfortable and better." A. at 286. She claimed that testimony created a "reasonable inference" that Dr. Allison did not adequately disclose the risk. A. at 323. It does not.

Ms. Brown's testimony that she felt "more comfortable" establishes, at most, that she preferred surgery on her right breast to surgery on her left breast. It does not speak to whether, had Dr. Allison informed her of the risk at issue, she would have *refused* left-sided surgery. Actually, it supports the conclusion that she was already aware that surgery on a

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> As a general rule when two or more witnesses introduced by a party litigant vary in their statements of fact, such party has the right to ask the court or jury to accept as true the statements most favorable to him…. This is not true, however, as to the testimony which he gives himself. No litigant can successfully ask a court or jury to believe that he has not told the truth. His statements of fact and the necessary inferences therefrom are binding upon him."

Massie v. Firmstone, 134 Va. 450, 462 (1922).

A surgical battery claim requires evidence of surgery *without* consent. A negligence claim of lack of informed consent requires evidence of surgery *with* consent, consent that was negligently obtained.

Ms. Brown, when supporting her battery claim, testified she knew that surgery on the left radiated breast had increased healing risks so she did not consent to surgery on that breast. A. at 285-286. She could not then, in support of her negligence claim, testify she would not have consented to surgery on that breast had she known there were increased risks associated with it.

radiated breast had increased risk of healing problems—the same issue Dr. Weinberg claims Dr. Allison should have documented in his office notes. A. at 211. This deficiency in her evidence is fatal to her claim. *Tashman*, 263 Va. at 76.

Ms. Brown claims in her Brief in Opposition to Petition for Appeal that the lack of informed consent claim is based on Dr. Allison's failure to tell her the scope of his planned surgery. As a matter of law, that sounds in battery, not negligence.

Because Ms. Brown did not offer competent evidence to support her informed consent claim, she did not meet her evidentiary burden. The claim should not have been submitted to the jury and the jury should not have been instructed on it.

C. The trial court erred in denying Dr. Allison's Motion to Strike Renewed Motion to Strike, and Motion to Set Aside the Verdict

A motion to strike should be granted "only when it is conclusively apparent that plaintiff has proven no cause of action against defendant, or when it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it." *Banks v. Mario Indus.*, 274 Va. 438, 454-55 (2007) (citing *Saks Fifth Avenue, Inc. v. James, Ltd.*, 272 Va. 177, 188 (2006)).

Ms. Brown presented evidence in support of two causes of action—battery and negligence (based on lack of informed consent). Her battery claim had been dismissed with prejudice, and she failed to plead and prove her lack of informed consent negligence claim. As Ms. Brown only presented evidence in support of two invalid claims, she failed to prove a cause of action against Dr. Allison. Judge Smith erred by not granting Dr. Allison's Motion to Strike, Renewed Motion to Strike, or Motion to Set Aside the Verdict.

D. The trial court's judgment should be reversed and judgment should be entered in Dr. Allison's favor

Code § 8.01-681 permits this Court to reverse the judgment of the trial court and to render a final judgment on the merits. *See Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 471 (1986) (observing "[t]his Court is required by Code § 8.01-681 to render final judgment upon the merits where the facts before the Court are such as to enable the Court to 'attain the ends of justice'").

Often, when a trial court has erroneously failed to grant a motion to strike, this Court will reverse that decision and enter judgment in favor of the defendants. *See, e.g.*, *CUNA Mut. Ins. Soc. v. Navy Yard Credit Union, Inc.*, 237 Va. 679, 685 (1989); *Cook v. Shoulder*, 200 Va. 281, 286 (1958); *Hardiman v. Dyson*, 194 Va. 116, 122 (1952).

Neither Ms. Brown's battery claim nor her informed consent claim was pleaded. In addition, Ms. Brown also failed to prove her informed consent claim.

Notwithstanding this failure of pleading and proof, Judge Smith erroneously denied Dr. Allison's Motion to Strike, Renewed Motion to Strike, and Motion to Set Aside the Verdict. This Court should reverse the trial court's denial of Dr. Allison's Motion to Strike, Renewed Motion to Strike, and Motion to Set Aside the Verdict. Judgment should be entered in Dr. Allison's favor.

II. If Dr. Allison is not granted judgment, the trial court's judgment should be reversed and the matter remanded for new trial.

If the Court believes reversal of these errors does not warrant entry of judgment for Dr. Allison, this Court should reverse and remand for a new trial solely on Ms. Brown's claims that this Court concludes are valid.

A. The trial court should not have instructed the jury on insurance (Assignment of Error IV)

No form of insurance was ever introduced into evidence at trial. Despite this truth, the jury was given an instruction regarding liability, health, and employment insurance. The mention of liability insurance was intentional by Ms. Brown, and it was prejudicial to Dr. Allison. Therefore, the trial court granting Instruction 18 was reversible error.

It is not in dispute whether insurance was mentioned during trial. It was not. Ms. Brown's counsel admitted: "I agree, your Honor, that the insurance didn't come into this case."[8] A. at 444.[9] Nevertheless, Ms. Brown asked the trial court to read Instruction 18 to the jury. It states:

> The presence or absence of insurance or benefits of any type, whether *liability* insurance, health insurance, or employment-related benefits for either the plaintiff or the defendant, is not to be considered by you in any way in deciding the issue of liability or, if you find your verdict for the plaintiff, in considering the issue of damages.
>
> The existence or lack of insurance or benefits shall not enter into your discussions or deliberations in any way in deciding the issues in this case. You shall decide this case solely on the basis of the testimony and evidence presented in the courtroom, as well as the other instructions given to you by the court.

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[8] The one time insurance could have entered into evidence, counsel for Dr. Allison objected. The trial court sustained Dr. Allison's objection to Ms. Brown's Exhibit 50 because the documents contained insurance information. A. at 743-747.

[9] Ms. Brown's counsel's statement was made during oral argument on whether to allow Instruction 18. He was responding to Dr. Allison's counsel's argument:

> "I mean we work hard in these cases to make sure we don't mention insurance to [the jury]. It seems counterintuitive to get to the jury instruction stage and invite them to start thinking about it." A. at 443.

Dr. Allison's counsel further argued, "I believe it's very prejudicial to Dr. Allison to suggest to this jury they start thinking about insurance." A. at 444.

A. at 463, 515 (emphasis added).

The mention of insurance has no place in a medical malpractice trial. Evidence as to whether or not a defendant has liability insurance is irrelevant to the question of liability and is normally inadmissible. *Lombard v. Rohrbaugh*, 262 Va. 484, 492 (2001). Otherwise, the jury may be unduly influenced to find for the plaintiff on liability. *Lombard*, 262 Va. at 492 (citing *Highway Express Lines, v. Fleming*, 185 Va. 666, 672 (1946)).

"It has been a long-standing rule in Virginia that, in a personal injury action, any comment deliberately made to inform the jury that a defendant is insured against the accident constitutes reversible error." *Speet v. Bacaj*, 237 Va. 290, 293 (1989).[10] "[I]t is reversible error not to grant a mistrial where the reference to insurance is *deliberate* and for improper purposes."

[10] Of course, this rule is not absolute. For example, the prejudice is waived when an insurance policy allows the insurer to be named as a defendant in the lawsuit, *Willard v. Aetna Casualty & Surety Co.*, 213 Va. 481, 483 (1973), or the prejudiced party introduces the subject of insurance themselves. *Medina v. Hegerberg*, 245 Va. 210, 214 (1993). Also, if an expert witness has a "substantial connection" with an insurer which has a financial interest in the outcome of the case, the right to cross-examine the expert for bias outweighs any prejudice to the defendant—so long as a cautionary instruction is given. In that setting, mentioning the expert's relationship to the insurer is permitted. *Lombard v. Rohrbaugh*, 262 Va. 484, 497 (2001).

Davis v. Maynard, 215 Va. 407, 408 (1975) (emphasis added).[11] Nothing can be more deliberate than to have Ms. Brown request, over strenuous objection by Dr. Allison, the granting of this jury instruction.

Even the practice commentary to the Virginia Model Jury Instruction 9.015 (i.e., the basis for Instruction 18), strongly cautions against ever using it. It says, "such an instruction is not routine and its appropriateness should be considered in the context of the case." This advice was not heeded by the trial court. There was no sound basis to give the instruction in this case. None was even offered. Counsel for Ms. Brown simply said: "this is a common sense instruction and it is a model instruction." A. at 444. It was on that argument that the trial court then granted the instruction. That decision was harmful error.

"It is a well-grounded matter of public policy in Virginia that the mention of insurance coverage in liability cases is to be avoided in order to prevent bias or prejudice on the part of the jury, and deliberate injection of insurance may constitute reversible error." *Willard v. Aetna Casualty &*

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[11] Even if insurance is *inadvertently* mentioned to the jury, it is still reversible error unless "substantial justice has been done." *Simmons v. Boyd*, 199 Va. 806, 813 (1958). That normally takes the form of curative instructions. *Medina v. Hegerberg*, 245 Va. 210, 213 (1993) (citing *Rinehart & Dennis Co. v. Brown*, 137 Va. 670, 676 (1923)).

Surety Co., 213 Va. 481, 483 (1973); *see also Allstate Ins. Co. v. Wade*, 265 Va. 383, 390-91 (2003); *Speet v. Bacaj*, 237 Va. 290, 293 (1989).[12]

The prejudice Dr. Allison suffered in this case was real. Not only did it probably impact the finding of liability, but the jury awarded Ms. Brown a

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[12] In her Brief in Opposition to Petition for Appeal, Ms. Brown accuses undersigned counsel with ignoring a key sentence from *Willard v. Aetna Casualty & Surety Co.*, 213 Va. 481 (1973) which states: "However, this is not a hard and fast rule, for mention of insurance may not be reversible error where there is an otherwise fair trial and substantial justice is done. *See Simmons v. Boyd*, 199 Va. 806, 812 (1958)." *Willard*, 213 Va. at 483.

As pointed out *supra* at footnote 13 *supra*, and as this Court explained in *Forsberg v. Harris*, 238 Va. 442, 444-45 (1989), there is a distinction between the *intentional* introduction of insurance and its *inadvertent* mention. As to the former, the *Forsberg* Court explained, "*Simmons* involved an *inadvertent* reference to insurance by a medical witness." *Id.* at 444 (emphasis added) (citing *Simmons v. Boyd*, 199 Va. 806, 812 (1958)). In that setting, it is error to allow the statement, but "such error is harmless if the statement is unintentionally made and ... substantial justice has been done...." *Id*. But, the *Forsberg* Court then reiterated what was previously made plain in *Davis v. Maynard*, 215 Va. 407 (1975) by explaining, "in *Davis*, we settled the issue of whether prejudice to the defendant must appear before requiring another trial after *intentional* reference to the defendant's possible insurance coverage." *Id.* at 445. (emphasis added). To remove any doubt, the *Forsberg* Court quoted what they had said in *Davis*:

> In actions to recover for personal injuries we have held that an inadvertent reference to insurance coverage is harmless error if it appears that the parties have had a fair trial on the merits and substantial justice has been done. In contrast, we have held that it is reversible error not to grant a mistrial where the reference to insurance is deliberate and for improper purposes.

Id. (citing *Davis v. Maynard,* 215 Va. at 408).

more generous verdict than she sought in closing argument. Immediately after the jury first heard any mention of liability insurance—during instruction by the judge—Ms. Brown's lawyer asked for $1,261,000 in closing argument. A. at 489. The jury awarded $1,300,000. A. at 519.

There was no evidence of insurance to support giving Instruction 18. Dr. Allison was prejudiced by the intentional mention of insurance in this case. Accordingly, the granting of Instruction 18 was reversible error.

B. The trial court should have instructed the jury on habit (Assignment of Error III)

Dr. Allison's Instruction F set forth the law of evidence on habit: "You may consider evidence of a witness's habit as evidence that the witness's conduct on a particular occasion was in conformity with that habit." A. at 516.

Dr. Allison was entitled to have the jury instructed on habit evidence. *Hodnett v. Friend*, 232 Va. 447, 452 (1987). Instruction F correctly states the law. It largely restates Code § 8.01-397.1 and Rule of Evidence 2:406(a). *Compare* Instruction F ("You may consider evidence of a witness's habit as evidence that the witness's conduct on a particular occasion was in conformity with the habit.") *with* Rule of Evidence 2:406(a) ("In a civil case, evidence of a person's habit or of an organization's routine practice, whether corroborated or not and regardless of the presence of

eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion conformed with the habit or routine practice.”).

Instruction F was supported by the evidence. Dr. Allison’s defense relied heavily upon his testimony regarding his habit. He testified regarding his habit of conducting pre-operative appointments, A. at 345; obtaining a patient’s consent, *id.*; and informing patients about the risk of operating on radiated tissue, A. at 348-349. Ms. Brown also offered habit evidence. She testified that prior to all of her surgeries, she spoke with hospital staff on the telephone. A. at 303.

Ms. Brown’s testimony on critical events conflicted with Dr. Allison’s habit, which made properly instructing the jury about habit “highly important.” *Trucking Co. v. Flood*, 203 Va. 934, 936 (1962). In light of this conflict in the evidence, the jury should have been instructed that they could consider evidence of Dr. Allison’s habit. Without such an instruction, the jury may not have understood that they were permitted to accept Dr. Allison’s habit testimony as proof of what he did with Ms. Brown. Or the jury may have unknowingly given more weight to Ms. Brown’s testimony because she claimed to have a memory of the events, as Ms. Brown’s counsel repeatedly invited them to do in his closing arguments. *See, e.g.* A.

at 477 ("Dr. Allison tells you, 'I have zero memory of this. None. But I know what my habit was. I know what I usually do.' And that's all he can tell us. You have the testimony from this woman she knows what happened. It was her body.").

Instruction F correctly stated the law and was supported by the evidence. And given the conflict in the evidence, the jury could not have been "fully and fairly" informed as to the law in this case without Instruction F. *Trucking Co.*, 203 Va. at 936. The trial court erred in refusing to give Instruction F.

C. Alternatively, the trial court erred in not fully instructing the jury on the law of battery (Assignment of Error V)

If the cause of action for battery was properly pursued at trial, the trial court erred in refusing to fully instruct the jury on the law of battery. At the conclusion of the evidence, and without waiving his objection to the battery claim being submitted to the jury, Dr. Allison offered Instructions W and Z. Instruction W defined battery: "A battery is an intentional and unwanted touching of another without justification, excuse, or the consent of the other." A. at 517. Instruction Z laid out the damages recoverable in a battery action. A. at 518. The trial court erred in refusing Instructions W and Z. A. at 456.

Instructions W and Z meet the *Hodnett* test. *See Hodnett v. Friend*, 232 Va. 447, 452 (1987). These Instructions are correct statements of the law. Indeed, they are taken from the Virginia Model Jury Instructions. *See* VMJI 36.000; VMJI 36.090. And, over Dr. Allison's objection, Ms. Brown offered evidence on battery during the trial.

The trial court's refusal to give Instructions W and Z undoubtedly affected the jury. As to Instruction W, the first time the jury heard the word "battery" was during jury instructions. The jury should have been instructed on the legal definition of the word. Without such an instruction, the jury was likely confused.

As to Instruction Z, as the Court submitted Ms. Brown's battery claim to the jury, it should have instructed them on the damages recoverable for that claim. Instead, the Court gave Instruction R, which outlined the damages available in a *negligence* case. But the damages available in a negligence case are different from those available in a battery case. For that reason, *Pugsley v. Privette*, 220 Va. 892, 902 (1980), approved of instructing a jury on the separate damages available to battery and to negligence actions.

If the trial court properly permitted recovery for a battery claim, Dr. Allison was entitled to have the jury properly and accurately instructed on

the definition of the claim and associated damages. The trial court erred in refusing to offer Instructions W and Z.

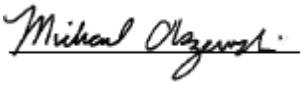
CONCLUSION

At trial, Ms. Brown offered evidence in support of two theories of liability—battery and negligent lack of informed consent. Neither were pleaded, and negligence was not proved. Accordingly, the record is devoid of evidence to support a valid claim and the jury's verdict was plainly wrong. The trial court's rulings denying Dr. Allison's Motion *in Limine*, Motion to Strike, Renewed Motion to Strike, and Motion to Set Aside the Verdict should be reversed, the jury verdict should be overturned, and judgment should be entered in favor of Dr. Allison.[13]

Failing such a reversal, the trial court's rulings refusing to offer Instructions F (habit), W and Z (battery) and accepting Instruction 18 (insurance) and its ruling denying the Motion to Set Aside the Verdict should be reversed, the jury verdict overturned, and the case remanded for a new trial.

[13] If this Court disagrees with Dr. Allison's arguments regarding only one of these claims, Dr. Allison acknowledges he is not entitled to entry of judgment in his favor. But Dr. Allison would be entitled to a new trial because the jury's verdict did not state the theory on which it was finding in favor of Ms. Brown. *B.G. Young & Sons, Inc. v. Kirk*, 202 Va. 176 (1960).

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 17, 2016, the Opening Brief and Appendix was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the brief and three of the appendix were hand delivered to the clerk's office. This same date, a copy of the Opening Brief and Appendix were sent via email to all counsel of record, at the email addresses below:

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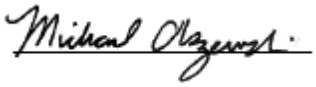
Counsel for the appellant does not waive oral argument.