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.

REPLY BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Dr. Allison did not invite error. To the contrary, he consistently and repeatedly objected to Ms. Brown's battery and informed consent claims. His appellate issues have not been waived. Ms. Brown's Complaint did not assert a cause of action for battery. When she attempted to inject a battery claim into this litigation through an amended complaint, the trial court appropriately granted Dr. Allison's plea in bar. Notwithstanding the trial court's dismissal of her battery claim, Ms. Brown continued to pursue a battery theory under the auspices of a negligence claim. Dr. Allison anticipating this gambit, and attempting to defend against it, did not revive the dismissed battery claim.

ARGUMENT

I. Dr. Allison did not invite error or waive his appellate arguments

A. The "invited error" doctrine is inapplicable because Dr. Allison has not complained about the jury verdict form

"The invited error doctrine is essentially a waiver of the right to assign error under Rule 5:25." *Walsh v. Bennett*, 260 Va. 171, 178 (2000) (Lemons, J., dissenting) (citing *Wright v. Norfolk and Western Railway Co.*, 245 Va. 160, 170 (1993)). The "invited error doctrine" provides "a litigant will not be permitted to invite a trial court to commit error, either through

agreeing or failing to object, and then be permitted to successfully complain of such error on appeal." *Wright*, 245 Va. at 170.

But Dr. Allison has not complained about the jury verdict form in this appeal. Indeed, the verdict form was proper pursuant to Code § 8.01-379.3. Code § 8.01-379.3 provides that in negligence actions involving personal injury or wrongful death, such as this case, "the court shall submit to the jury a general verdict form only…." That is the norm. Interrogatories are only permitted in such a trial if there is an agreement by all parties. Code § 8.01-379.3. No such agreement was obtained in this case.

The "invited error doctrine" precludes a litigant from failing to object to an erroneous action, and then complaining of the error on appeal. The general verdict form was offered by Ms. Brown, and it complied with Code § 8.01-379.3. Dr. Allison agreed to the general verdict form—subject to his broader objections that will be addressed *infra*. A. at 463-464. Dr. Allison objected to the causes of action underlying the verdict form, but the form itself was not objectionable. The "invited error" doctrine is inapplicable and does not operate to waive Dr. Allison's appellate arguments.

B. Dr. Allison did not invite error through omission

Ms. Brown argues that Dr. Brown invited error by failing to object to the verdict form. Opposition at 9-11. The "invited error" doctrine operates

as a procedural waiver, *see, e.g.*, *Wright v. Norfolk and Western Railway Co.*, 245 Va. 160 (1993), because it deprives the trial court of an "opportunity to rule intelligently on the issues presented." *Weidman v. Babcock*, 241 Va. 40, 44-45 (1991). "In order for a procedural waiver [of a point on appeal] to apply, the record must show that a litigant invited a trial court to commit error, either by failing to object or by agreeing to the ruling." *State Farm Mut. Auto. Ins. Co. v. Kendrick*, 254 Va. 206, 208 n.2 (1997) (citing *Wright v. Norfolk and Western Railway Co.*, 245 Va. 160, 170 (1993)). But, if a litigant made plain to the trial court his position throughout the case—like Dr. Allison did in this case—one cannot be heard to claim that litigant failed to object.

For example, in *Wright*, the plaintiff asserted the defendant invited error, and waived its contributory negligence defense, by failing to object to the first paragraph of a two-paragraph jury instruction. 245 Va. at 167. The trial court rejected this argument because the defendant had made clear its position regarding the contributory negligence defense, and any failure to object to the first paragraph of the instruction did not constitute waiver. *Id.* at 168. *Wright* observed:

> This position [regarding plaintiff's contributory negligence] was taken throughout the trial, including when the motions to strike were made during trial, one made after the discussions on the instructions, and in the motion to set the verdict aside. Taken in

> context, the responses of the defendant's attorney clearly indicate that he voiced no objection to the form of Instruction 1B, and did not indicate any waiver of the issue.

Id. at 168. *Wright* affirmed the trial court's conclusion that the defendant did not invite error or waive his contributory negligence arguments by failing to object to the first paragraph of the jury instruction at issue. *Id.* at 168-170; *see also State Farm Mut. Auto Ins. Co. v. Kendrick*, 254 Va. 206, 208 n.2 (1997) (observing the failure to object to a damages jury instruction did not waive previously interposed objections because "[i]t is clear from the record in the present case that the trial court was fully aware throughout the trial of [defendant's] contention").

Dr. Allison made his objection to Ms. Brown's battery claim clear prior to trial. When Ms. Brown moved the trial court for leave to amend her complaint to add a battery claim ten months after filing her initial Complaint, Dr. Allison objected. A. at 46-51. Dr. Allison continued asserting his objection to the battery claim in his plea in bar. A. at 64-69, 74-78. Judge Devine granted the plea in bar. A. at 97.

During trial, Dr. Allison continued to interpose his objections to the viability of Ms. Brown's battery claim and informed consent claim. On the first day of trial, Dr. Allison objected to Ms. Brown being permitted to proceed on a battery claim or an informed consent claim. A. at 102-150. At

the close of Ms. Brown's evidence, Dr. Allison asserted a motion to strike. A. at 309-337. When the parties argued jury instructions prior to the close of the evidence, Dr. Allison again made clear his participation in the argument of jury instructions did not constitute a waiver of his objections. A. at 372-387. Indeed, the trial court confirmed it was well-aware of Dr. Allison's objections by remarking, "Well, briefly, Mr. Nagle, but I think your—*your position is well-known and is also preserved for the record*, but if you want to say something else, go on." A. at 372 (emphasis added). At the close of all of the evidence, Dr. Allison renewed his motion to strike. A. at 415-416. Thereafter, Dr. Allison again asserted that his participation in the argument of jury instructions did not constitute a waiver of his previous objections, and the trial court indicated its understanding. A. at 417-418. Dr. Allison asserted his objections again during arguments regarding jury instructions. A. at 433. Dr. Allison reiterated his objections again during jury instruction arguments. A. at 452. At the conclusion of arguments on the jury instructions, Dr. Allison reiterated his objections to the viability of the battery and informed consent claims. A. at 457. After this objection the trial court observed, "I think that's well-noted." A. at 457.

After the jury returned its verdict in favor of Ms. Brown, Dr. Allison noted his objection to the Final Order. A. at 520-522. Dr. Allison filed a

motion to set aside the verdict and a memorandum of points and authorities in support thereof. A. at 523-623. Dr. Allison requested that the trial court note his objection after his motion to set aside the verdict was denied. A. at 933. Dr. Allison noted his objection to the Order denying the motion to set aside the verdict. A. at 935-936.

It simply cannot be said that Dr. Allison was "permitted to invite a trial court to commit error, either through agreeing or failing to object, and then be permitted to successfully complain of such error on appeal." *Wright*, 245 Va. at 170. Dr. Allison did not "invite error" by failing to object to the verdict form.

C. Ms. Brown offered the general verdict form, and she should not be heard to complain about its use

Ms. Brown offered the verdict form. A. at 463-464. Ms. Brown cannot now complain about the verdict form. "It has long been settled in this jurisdiction that a party cannot complain of an instruction given at his instance." *Hilton v. Fayen*, 196 Va. 860, 866 (1955). "In other words, the parties cannot invite the court to commit an error, and then complain of it." *Id.* at 867.

Ms. Brown is complaining about the verdict form she offered. Ms. Brown submitted the verdict form used by the jury. She now complains that she might lose the verdict if the case is reversed on fewer than all of its

principle reasons—that battery was not properly before the court, that lack of informed consent was not before the court, or that it was not proven. It is not up to Dr. Allison to protect Ms. Brown's verdict. The verdict form submitted was not erroneous. It was a proper verdict form pursuant to Code § 8.01-379.3.

Ms. Brown offered a general verdict form—without interrogatories. She knew of the consistent objections lodged to her evidence, and the motions to strike the evidence. She did not make a record of seeking special interrogatories. Because the verdict form used was used at her insistence, she cannot now complain about it. *Hilton*, 196 Va. at 866.

D. Ms. Brown did not have a negligence claim independent from her battery and informed consent claims

Dr. Allison has attacked the viability of Ms. Brown's battery claim and the viability and sufficiency of her informed consent claim. In a curious new twist, Ms. Brown raises in her Opposition, the argument that she actually presented evidence to the jury regarding *three* separate claims: (1) battery; (2) lack of informed consent; and (3) a professional negligence claim. Opposition at 9-11.

Indeed, Ms. Brown argues she presented sufficient evidence in support of a claim independent from her battery and informed consent claims such that the jury could have granted the verdict in her favor based

on this independent "professional negligence" claim. Opposition at 11. She contends Dr. Allison's agreement to the general verdict form she prepared and offered deprived her of the ability to preserve the judgment in her favor with respect to this professional negligence claim, and that, Dr. Allison's appellate issues should be considered to be waived as a result. *Id.*

But, at the close of trial, Ms. Brown's counsel admitted she presented no evidence in support of a third claim, a professional negligence claim. Her counsel specifically requested a jury instruction refer to her "informed consent" claim specifically, rather than "negligence" generally, because the evidence Ms. Brown presented with respect to negligence was limited to lack of informed consent, not to professional negligence generally. A. at 432-437. It was Ms. Brown who requested that the finding instruction be limited to battery and informed consent only, because "for purposes of clarity, it tells the jury what the *two* actual claims are here." A. at 436-437 (emphasis added). There was no third claim raised by Ms. Brown.

If Ms. Brown had presented evidence in support of a separate negligence claim different from her lack of informed consent claim, then her counsel would not have requested that "informed consent" be substituted for "negligence" in the jury instructions. A. at 432-437. In fact, Ms. Brown secured a separate jury instruction which instructed the jury that the issue

in the case was whether Dr. Allison was “negligent in that he did not have informed consent?” A. at 509 (Jury Instruction H1). There was no third claim, a separate professional negligence claim. This argument is an attempt to distract from the real issues.

Furthermore, Ms. Brown blames Dr. Allison’s acquiescence to the general verdict form for unfairly depriving her of the opportunity to preserve judgment in her favor based upon this distinct professional negligence claim. This argument too should be rejected.

She requested that “informed consent” be substituted in for “negligence” in the finding instruction. A. at 432-437. Her counsel argued to the trial court that this case consisted of two, and only two, issues—battery and lack of informed consent. A. at 436-437. At her request, the jury was instructed that the only manner in which they may find Dr. Allison was negligent was if he failed to obtain Ms. Brown’s informed consent. A. at 509 (Jury Instruction H1). Then, her counsel offered the general verdict form. A. at 463-464.

Ms. Brown’s claim that Dr. Allison invited error and waived his appellate arguments should be rejected.

II. The trial court dismissed the entirety of Ms. Brown's battery claim

Ms. Brown continues to assert there are two separate causes of action in Virginia, one for an "intentional" battery, and one for a "technical" battery. Virginia jurisprudence creates no such division. *See Koffman v. Garnett*, 265 Va. 12, 16 (2003) (citing *Washburn v. Klara*, 263 Va. 586 (2002); *Woodbury v. Courtney*, 239 Va. 651 (1990)); *see also Pugsley v. Privette*, 220 Va. 892, 899 (1980) (citing *Crosswhite v. Barnes*, 139 Va. 471, 477 (1924)).

Ms. Brown conflates intent to act, which is necessary for a battery claim, with improper motive, which is *not*. As Friend has observed:

> In battery, if the defendant intended the contact, or deliberately engaged in an act that was substantially certain to result in contact, that is sufficient. The defendant's motive in causing the contact is irrelevant in establishing intent, because all that is required is the intent to make the contact; the reason for the intent is of no consequence on this point. For this reason, the defendant may be held liable for a deliberate contact even though the defendant's motive in making the contact was a benevolent one.

Charles E. Friend, Personal Injury Law in Virginia § 6.2.4 (3rd ed. 2003) (referencing *Pugsley v. Privette*, 220 Va. 892 (1980)).

As Friend correctly observed, a lack of malicious or improper motive does not distinguish the "intentional tort of common law battery" from a "technical battery" claim. To the contrary, battery is a singular intentional

tort. The motivation underlying the intent to act is of no matter. The intention to act, without consent, justification, or excuse—irrespective of the underlying motive—is dispositive.

As was fully set forth in Dr. Allison's Opening Brief, Ms. Brown voluntarily limited herself to a negligence cause of action in her initial Complaint. Battery is not negligence. Battery is an intentional tort. Battery remains an intentional tort whether the underlying motive for the intentional touching is malicious or benevolent. A benevolent underlying intent for a touching does not somehow operate to convert the resultant cause of action from the intentional tort of battery into negligence. Ms. Brown's initial Complaint seeking to recover only for negligence could not permit a recovery for the intentional tort of battery. As such, battery was *not* a cause of action asserted from the outset of this case, and Judge Devine dismissed the entirety of Ms. Brown's battery claim when he sustained Dr. Allison's plea in bar.

III. Dr. Allison's anticipation of Ms. Brown's attempt to pursue her battery and informed consent claims does not make those claims viable

Despite Judge Devine's dismissal of the battery claim, Ms. Brown pursued a battery claim at trial. Now, in her Opposition, Ms. Brown contends that because Dr. Allison knew she would ignore the dismissal

order and present a battery claim at trial, her battery claim was somehow properly before the court again. In the same vein, Ms. Brown asserts that because Dr. Allison's expert witnesses were designated to testify Dr. Allison obtained Ms. Brown's consent and informed consent that she should be absolved from her pleading and designation requirements with respect to an informed consent claim.

Ms. Brown's initial Complaint did not contain a battery claim. When Ms. Brown attempted to inject a battery claim through her First Amended Complaint, Dr. Allison utilized every available procedural remedy. He opposed the motion for leave to amend. A. at 46-51. He filed and argued a plea in bar to the battery claim. A. at 64-69, 74-78. Judge Devine granted the plea in bar, dismissing the battery claim with prejudice. A. at 97.

Even though Judge Devine dismissed the battery claim, Dr. Allison anticipated that Ms. Brown would doggedly pursue her previously dismissed battery claim. But simply because Ms. Brown continued to pursue the dismissed battery claim her claim did not become properly before the court. Moreover, Dr. Allison's anticipation that Ms. Brown would continue to pursue her dismissed claim does not mean that the original Complaint contained a battery claim. It did not.

Similarly, Dr. Allison's experts being designated to testify that Dr. Allison obtained both Ms. Brown's consent and informed consent does not excuse Ms. Brown from her obligation to properly designate Dr. Weinberg to testify regarding a lack of informed consent claim, which she failed to do. Rather, Dr. Allison presciently prepared for the possibility that the trial court would allow Ms. Brown to proceed on claims that had been dismissed or not properly plead and designated.

When this possibility became a reality despite Dr. Allison's consistent objections detailed *supra*, Dr. Allison's prudent anticipation of Ms. Brown's and the trial court's course of action allowed him to defend himself against those claims. But, he should not have been compelled to do so. Battery had been dismissed and lack of informed consent had not been pled or designated (and ultimately not proven). The case should not have proceeded to the jury.

The trial court charged the jury to decide the case, and Ms. Brown ultimately obtained a favorable verdict. But, these facts should not distract from the fatal flaws in her pleadings. Ms. Brown limited her initial Complaint to a negligence claim against Dr. Allison, a claim that did not include battery. She did not specifically allege an informed consent claim in her initial Complaint or First Amended Complaint, and she did not designate

her expert to say that Dr. Allison breached the standard of care with respect to a failure to obtain Ms. Brown's informed consent. Dr. Allison anticipating Ms. Brown would persist in these claims, notwithstanding their deficiencies, did not make the claims viable.

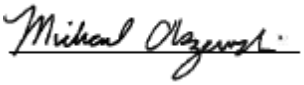
CONCLUSION

Dr. Allison did not invite error by failing to object to the general verdict form. Given Ms. Brown asserted Dr. Allison's negligence caused her a personal injury, the general verdict form was appropriate pursuant to Code § 8.01-379.3. Dr. Allison has not raised an issue with the general verdict form. Furthermore, Dr. Allison's lack of objection to the general verdict form cannot be removed from the overall context of this litigation. Dr. Allison consistently objected to the viability of the battery and informed consent claims. The trial court indicated its acknowledgment and understanding of Dr. Allison's objections. Dr. Allison did not invite error.

Contrary to Ms. Brown's contentions, she did not allege a cause of action against Dr. Allison for battery since the outset of this litigation. She claimed negligence; while battery is an intentional tort. The motivation underlying an unwanted touching does not transform the nature of an intentional tort of battery into negligence. An intentional tort cannot be pursued as a negligence claim.

Ms. Brown's battery claim was dismissed with prejudice. That ruling is not on appeal. Opposition at 20, n.8. Her informed consent claim was not plead or designated. Dr. Allison's awareness that Ms. Brown intended to pursue these claims anyway, did not somehow make it right.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 28, 2016, the Reply Brief was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the brief were sent shipped via overnight delivery to the clerk's office. This same date, a copy of the Reply Brief was sent via email to all counsel of record, at the email addresses below:

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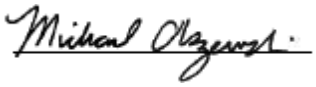
Counsel for the appellants does not waive oral argument.