In The

Supreme Court of Virginia

RECORD NO. 160314

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

Appellants,

v.

DEBORAH BROWN,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF FACTS

Ms. Brown is a 53-year-old public-school teacher who underwent a double mastectomy, chemotherapy, and radiation treatment for breast cancer. A. at 281. She engaged Dr. David W. Allison, a plastic surgeon, to reconstruct her breasts.

On October 23, 2013, Ms. Brown timely filed a Complaint alleging that on November 22, 2011, Dr. Allison operated on her wrong breast. A. at 3. ("Defendant Allison performed implant replacement surgery on the wrong breast.") Ms. Brown further alleged that Dr. Allison "performed surgery on the wrong breast," and "replaced the implant on the wrong breast." A. at 5. Ms. Brown alleged that as result of the wrong-sided surgery she suffered complications that resulted in the need for seven additional surgeries and that she has been left permanently impaired and disfigured.

Dr. Allison did not file a Demurrer to the Complaint. Dr. Allison never moved for a Bill of Particulars. Dr. Allison never challenged the adequacy of the pleadings, or claimed not to be aware of the claims Ms. Brown was pursuing. Since the filing of Ms. Brown's Complaint in 2013, she has alleged that Dr. Allison operated negligently, that he operated without

consent (technical battery), and that he operated without informed consent. A. at 1-6.

The case has been tried twice based on the negligence, lack of consent (technical battery), and lack of informed consent allegations contained in the Complaint. It was first tried from October 6 to 10, 2014 with the Honorable Robert J. Smith presiding. A mistrial was declared at the conclusion of the first trial.[1] The case was tried a second time before Judge Smith from November 16 to 19, 2015. After just over one hour of deliberation, the jury returned a unanimous verdict in favor of Ms. Brown. A. at 519.

Ms. Brown's trial evidence was overwhelming and largely consisted of medical records either authored by Dr. Allison or that were created pursuant to the scheduling of the surgery by his office. These records unquestionably established that Dr. Allison mistakenly placed an implant in Ms. Brown's left breast instead of her right breast:

- In Dr. Allison's own November 7, 2011 pre-operative progress note, he wrote: In speaking to her again, **she really is only concerned [with] the right breast**. She is unhappy [with] the lack of upper pole volume. I think that inserting a slightly larger implant and revising the pocket will address these issues. S.A. at 1; Trial Exhibit (T.E.) 4 (Emphasis added).

[1] Based on conversations with jurors, the first jury deadlocked 6-1 in Ms. Brown's favor, with the lone holdout being a doctor juror.

- Before anesthetizing Ms. Brown, Dr. Allison only marked Ms. Brown's right breast as the breast to be operated on. S.A. at 2-3; T.E. 13.

- In the Operative Report dictated and signed by Dr. Allison, he reversed the left and right breast in his description of the patient's history. *Id.*

- In the Universal Protocol Checklist, a document prepared to avoid wrong-sided surgeries, Dr. Allison failed to identify the body part to be operated on. S.A. at 4; T.E. 24.

- The hospital booking sheet, which is populated by a call from Dr. Allison's office to schedule the surgery, indicated that the procedure was to be right-breast surgery. S.A. at 5-6; T.E. 19.

- The hospital surgical schedule, which is populated by the procedure scheduled by Dr. Allison, indicated that the procedure to be performed was right-breast surgery. S.A. at 7; T.E. 20.

- The hospital intra-operative record identified the posted procedure as right breast reconstruction. S.A. at 8-10; T.E. 22.

Despite this overwhelming, unbiased evidence from medical records that only a right-breast surgery was to be performed, Dr. Allison attempted to convince the jury that Ms. Brown agreed to left-breast surgery. This defense was wholly dependent upon a single informed consent form prepared by Dr. Allison that failed to specify the procedure he would perform. S.A. at 11; T.E. 18.

While the medical records conclusively established that Dr. Allison operated on the wrong breast, Ms. Brown nevertheless buttressed her proof with sound expert witness evidence. Hubert Weinberg, M.D., a board-certified plastic surgeon, was timely designated to testify that Dr. Allison breached the standard of care. Dr. Weinberg's standard-of-care opinions were that Dr. Allison failed to conduct an appropriate pre-surgical body part verification, failed to correctly mark the body part(s) to be operated on, and failed to communicate with Ms. Brown to verify the body part before beginning surgery. A. at 6-7. Dr. Weinberg also was designated to testify that Dr. Allison operated without consent (technical battery) (A. at 10, 12), and that Dr. Allison operated without providing informed consent. A. at 12.

Fully aware of the allegations against him from the Complaint, Dr. Allison designated expert witnesses to rebut Dr. Weinberg's opinions. Dr. Allison designated Drs. Goldberg and Leithauser as experts to testify that Dr. Allison met the standard of care with regard to conducting an appropriate pre-surgical body part verification, marking the body part(s) to be operated on, and communicating with the patient before beginning surgery to make sure there was agreement. A. at 956 & 968. Dr. Allison further expressly designated Drs. Goldberg and Leithauser to "rebut

plaintiff's allegation that Dr. Allison failed to obtain Ms. Brown's consent," (technical battery) and to "testify that Dr. Allison had an appropriate informed consent conversation with Ms. Brown." *Id.* at 955-56 & 967-68.

Consistent with Dr. Weinberg's expert designation, he testified at trial that Dr. Allison breached the standard of care (A. at 221-22, 327-328, 329), that Dr. Allison operated without consent (technical battery) (A. at 318-19, 321), and that Dr. Alison operated without informed consent (A. at 330, 356).

With no objection from Dr. Allison, the parties submitted a verdict form that did not differentiate among the claims. A. at 519. After one hour of deliberation, the jury found in favor of Ms. Brown. *Id.*

THE PROCEDURAL HISTORY

Prior to the first trial of the case, Ms. Brown sought to amend her Complaint by adding a separate Count (Count III) for intentional tort common law battery. A. at 44. One Fairfax County judge granted leave for the amendment. A. at 62. On September 12, 2014, a different Fairfax County judge granted a plea in bar dismissing Count III based on the statute of limitations. A. at 97. The dismissal of Count III (intentional tort common law battery) left the remainder of the Amended Complaint intact. In other words, the Amended Complaint was the same as the original

Complaint, alleging facts that supported negligence, lack of consent (technical battery), and lack of informed consent. A. at 5.

The first case was tried from October 6 to 10, 2014. Dr. Allison, aware that lack of consent (technical battery) had been pled since the case's inception, and both sides having designated experts to address this claim, raised no objection to that claim going to the jury. After declaring a mistrial because of the lack of unanimity in the verdict, Judge Smith set a new trial date of November 16, 2015 and entered a new scheduling order for the filing of pre-trial motions. Dr. Allison filed several motions in limine, but filed no motions with respect to the lack of consent (technical battery) claim.

On November 16, 2015, the first day of the second trial, with a jury panel waiting (14 months since the Court's ruling on Count III and after a full trial on the merits of the lack of consent claim), Dr. Allison's counsel orally argued that the dismissal of Count III (intentional tort common law battery) had the effect of prohibiting Ms. Brown from pursuing the lack of consent claim (technical battery) that had been alleged via the pled facts since the inception of the Complaint. Seeing this for what it was Judge Smith denied the motion, recognizing that this claim had been pled since

the inception of the case. A. at 127 ("All right. Whatever this is, a demurrer, a request for a bill of particulars, a motion to dismiss, is denied.")

Judge Smith subsequently denied Dr. Allison's post-trial motions, and entered a Final Order. A. at 520.

STANDARD OF REVIEW

Ms. Brown was the prevailing party after a jury trial, which requires that on appeal the evidence and all the inferences be taken in a manner that is most favorable to Ms. Brown.

> As the prevailing party in the trial court, [plaintiff] is entitled to have the evidence and all inferences reasonably drawn from it viewed in the light most favorable to her. *Norfolk S. Ry. Co. v. Rogers*, 270 Va. 468, 478, 621 S.E.2d 59, 65 (2005). Armed with a jury verdict approved by the circuit court, [plaintiff] occupies the "most favored position known to the law." *Bennett*, 282 Va. at 54, 710 S.E.2d at 739 (internal quotation marks omitted). The circuit court's judgment "is presumed to be correct, and we will not set it aside unless the judgment is plainly wrong or without evidence to support it." Id.

RGR, LLC v. Settle, 288 Va. 260, 283 (2014). Dr. Allison concedes, as he must, that he can only prevail by demonstrating plain error.

The motion to strike is highly disfavored in Virginia, and should be overruled "where there is any doubt."

> The principle of tort litigation that issues of negligence and proximate cause ordinarily are questions of fact for the jury applies with no less force to medical malpractice cases. When the sufficiency of a plaintiff's evidence is challenged upon a motion to strike the evidence at the conclusion of the plaintiff's

> case-in-chief, the trial court should in every case overrule the motion where there is any doubt on the question.

Brown v. Koulizakis, 229 Va. 524, 531 (1985). As Dr. Allison concedes by citing *Banks v. Mario Industries*, 274 Va. 438, 454-455 (2007), a motion to strike should only be granted where "it is conclusively apparent that plaintiff has proven no cause of action against defendant…."

This Court conducts a *de novo* review of challenges to jury instructions. *See Alcoy v. Valley Nursing Homes, Inc.*, 272 Va. 37, 41 (2006).

SUMMARY OF ARGUMENT

Dr. Allison has waived his right to appeal the pleading issues pursuant to Rule of Supreme Court of Virginia 5:25 and the "invited error" doctrine. By agreeing to the verdict form, which did not differentiate among the theories of liability, Dr. Allison ensured that it would be impossible to determine which theory or theories of liability the jury accepted.

Ms. Brown's Complaint more than adequately put Dr. Allison on notice that she intended to prove lack of consent (technical battery), lack of informed consent, and professional negligence theories of liability. The record shows that Dr. Allison was expressly aware that Ms. Brown was pursuing each of these claims throughout this litigation.

The trial court appropriately tailored the model jury instructions to Ms. Brown's theories of liability, appropriately declined to give jury instructions that were not applicable and which would have confused the jury, and appropriately declined to give Dr. Allison's self-serving, invented jury instruction regarding a standard used to determine whether evidence is admissible.

Finally, Dr. Allison has failed to demonstrate prejudice arising from any alleged error. The verdict of the jury and the Final Order must be affirmed.

ARGUMENT

I. Dr. Allison has waived his right to appeal pursuant to Rule 5:25 and the "Invited Error" doctrine

The gravamen of Dr. Allison's appeal is that the jury should not have been allowed to rule against him on either a theory of lack of consent (technical battery) or lack of informed consent. Dr. Allison, however, agreed to the verdict form, which failed to differentiate the theories of liability. A. at 519. As a result, it is impossible to determine whether the jury found against Dr. Allison on the lack of consent (technical battery) claim, the lack of informed consent claim, or the professional liability claim.

Pursuant to Rule of Supreme Court 5:25, the Court will not consider an issue on appeal unless it was objected to below.[2] Similarly, pursuant to the "invited error" doctrine, "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 v. Norfolk & W. Ry. Co.*, 245 Va. 160, 170 (1993).

When Dr. Allison was presented with the verdict form prepared by the parties, he agreed to it.[3] S.A. at 21; Trial Transcript (T.T.) at 1059. The verdict form did not differentiate among the theories that went to the jury: lack of informed consent, lack of consent (technical battery), and professional negligence. By ensuring it is impossible to determine the theory or theories on which the jury found Dr. Allison liable, Dr. Allison invited error. *See*, *e.g.*, *Walgreen Partners, Inc. v. McGuirewoods, LLP*, 280 Va. 374, 379 (2010) ("Because Wintergreen neither objected nor assigned error to . . . the verdict form, [it] became the law of the case.");

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[2] The only exception is for good cause shown, which is a burden Dr. Allison has not met.

[3] Defense counsel: Then, your Honor, with regard to the verdict form –
Court: Yes, sir.
Defense counsel: -- with the – I think we both are agreed on what Mr. Perry has handed up.

see also Lenz v. Commonwealth, 261 Va. 451, 472 (2001) (holding that defendant's failure to object to the verdict form was fatal under Rule 5:25).

Judge Smith denied Dr. Allison's oral motion seeking to prohibit Ms. Brown from proving her lack of consent (technical battery) claim on day one of the trial before a jury had been empaneled. Thus, Dr. Allison understood that if there was a plaintiff's verdict, this was an issue he would want to raise on appeal. He was also aware that if the jury found against Dr. Allison on a theory other than lack of consent (technical battery), or lack of informed consent, an appeal would be moot.

By agreeing to and not objecting to the verdict form, Dr. Allison invited error. He intentionally made it impossible for this Court to determine which theory or theories of liability the jury accepted.[4]

II. Ms. Brown properly and timely pled lack of consent (technical battery), which was never dismissed from the case, and was appropriately tried

Since its inception, this case always has been about Dr. Allison performing surgery on the wrong breast and the damages suffered by Ms. Brown as a result. The Complaint (and Amended Complaint) plainly stated that the basis of the claim was that Dr. Allison "performed surgery on the wrong breast" and "replaced the implant on the wrong breast." A. at 5. It

[4] Pursuant to Code of Virginia § 8.01-379.3, Dr. Allison had the right to request that special interrogatories be submitted to the jury. He did not.

sought damages arising from Dr. Allison's "negligent" and "reckless[]" conduct, and from his "breach of the standard of care." A. at 43.

In Virginia, a cause of action is apparent from the facts pled in the lawsuit, and not necessarily any labels or conclusions adorning the Complaint. Code of Virginia § 8.01-275 expressly states:

> No action or suit shall abate for want of form where the motion for judgment or bill of complaint sets forth sufficient matter of substance for the court to proceed upon the merits of the cause. The court shall not regard any defect or imperfection in the pleading, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgment, according to law and the very right of the cause, cannot be given.

Similarly, Rule 1:4(d) of the Rules of the Supreme Court of Virginia clarifies that a pleading "shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense." This is commonly referred to as the notice pleading standard. Further, Code of Virginia § 8.01-281(A) allows a plaintiff to plead alternative facts and theories of recovery. Virginia long has adhered to these basic principles of pleading and practice.

This Court also long has adhered to the notice pleading standard, which refuses to elevate form over substance. Thus, in *Stonegap Colliery Co. v. Hamilton*, 119 Va. 271 (1916), a cause of action for trespass was adequately pled where:

> without stating whether it was trespass on the case, or trespass vi et armis, could not affect the real character of the declaration, which is really, by the facts alleged, a declaration in trespass on the case, setting forth sufficient matter of substance for the court to proceed upon the merits of the cause.

Id. at 279. *See also Balzer & Assocs. v. Lakes on 360*, 250 Va. 527, 531 (1995) ("The requirements for stating a cause of action are not so strict as to demand specificity beyond that necessary to plainly inform the defendants of the nature of the claims made, such that a plaintiff adequately pled theories of both fraudulent and voidable voluntary transfer.")

The purpose of a notice pleading is to inform the opposing side of the nature of the claim. There is no credible way to argue that Ms. Brown failed to inform Dr. Allison of the nature of her claims. This is clearly demonstrated by the discovery in the case, which extensively explored Ms. Brown's theories of Dr. Allison's negligence, lack of consent (technical battery), and lack of informed consent.

Pursuant to the allegations in the Complaint, both parties designated experts to testify regarding whether Dr. Allison obtained Ms. Brown's consent (technical battery). Dr. Weinberg, Ms. Brown's expert, was designated to testify that "[t]he standard of care requires a surgeon to only

operate on the body part that the patient has consented to being operated on." A. at 10. In response, Dr. Allison designated two experts to testify:

> Dr. Goldberg [Leithauser] is expected to rebut **plaintiff's allegation** that Dr. Allison failed to obtain Ms. Brown's consent for the November 22, 2011 surgery.

A. at 955 (emphasis supplied)[5]. The expert witness designations conclusively establish that Dr. Allison was aware that Ms. Brown intended to pursue a lack of consent (technical battery) theory.

Using these expert designations, the case went to trial for the first time from October 6 to 10, 2014. Ms. Brown pursued the lack of consent (technical battery) claim and the jury was instructed on that claim. At no time during the first trial did Dr. Allison object that the Complaint or Amended Complaint was inadequate to put him on notice of Ms. Brown's lack of consent (technical battery) claim.

Indeed, in motions in limine filed by Dr. Allison before the second trial (filed on March 13, 2015), Dr. Allison expressly described this case as follows to the trial court:

> The key issue in this case is whether plaintiff consented to bilateral breast surgery on November 22, 2011.

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[5] Dr. Allison identified two standard of care experts whose designations were virtually identical.

S.A. at 12; Dr. Allison's Memo in Support of Motion in Limine to Preclude Introduction of the Preoperative Evaluation Form.

Judge Smith, who presided over both trials, was aware of this background. He previously had presided over a four-day trial in which the central issue was whether Dr. Allison committed a technical battery. Seeing this for the ruse that it was when Dr. Allison orally raised it on the first day of the second trial, Judge Smith was not plainly wrong to determine that Ms. Brown's lack of consent (technical battery) claim was adequately pled and that Dr. Allison long had been on notice of the claim. Indeed, the trial court was squarely correct.

Given the procedural background of this case and the fact that Dr. Allison was unquestionably on notice of the lack of consent (technical battery) claim, Dr. Allison's reliance on *Ted Lansing Supply v. Royal Alum.*, 221 Va. 1139 (1981), and related jurisprudence is unavailing. *Ted Lansing* stands for the uncontroversial principle that litigants should not be permitted to go forward "upon a right which has not been pleaded and claimed." *Id*. at 1141. Here, the right was pleaded and claimed, and Dr. Allison was aware of it since the inception of the case.

Dr. Allison's entire argument is little more than an assertion that Ms. Brown should have been barred from proceeding with her lack of consent

(technical battery) claim because the word "battery" is not expressly used in the Complaint or Amended Complaint. This is an unreasonable, strained, and cynical reading of *Ted Lansing*. It is particularly so here where this Court has the benefit of a fulsome record developed throughout two years of litigation and two trials that makes clear that Dr. Allison was aware of the claim. Adopting Dr. Allison's extreme position would elevate form over substance to an absurdity. It would allow a defendant who is expressly aware of the very claim at issue to feign ignorance on the day trial begins. It would also be completely inconsistent with *Stonegap Colliery Co. v. Hamilton*, 119 Va. 271 (1916), and *Balzer & Assocs. v. Lakes on 360*, 250 Va. 527, 531 (1995).

A. <u>The trial court acted correctly by instructing the jury on the applicable claims</u>

Dr. Allison correctly notes that this Court long has held that when a doctor exceeds the scope of his consent, he commits a "technical battery." But the trio of cases upon which he relies do not stand for the proposition that a Complaint is insufficient if it fails to expressly include a count for intentional tort common law battery when a patient seeks to pursue a lack of consent (technical battery) claim. *See Washburn v. Klara*, 263 Va. 586, 592 (2002); *Woodbury v. Courtney*, 239 Va. 651, 654 (1990); *Pugsley v. Privette*, 220 Va. 892, 902 (1980). To the contrary, by referring to lack of

consent in the medical malpractice context as a "technical" battery, these cases acknowledge that very distinction. In other words, lack of consent is a species of medical malpractice that is akin to battery, but is not the same as intentional tort common law battery.

This is borne out by the fact that Virginia has a specific model jury instruction for lack of consent (technical battery) claims, which is a Professional Liability instruction. *See* MJI 35.070 (Treatment Without Consent). A lack of consent (technical battery) claim is unique to medical malpractice claims because it arises out of the physician/patient relationship:

> A doctor has a duty to obtain the consent of a patient before treating him. If a doctor treats without first obtaining his patient's consent, then he is liable for any injury to the patient which proximately results from the treatment, even though he exercised reasonable skill and diligence in providing the treatment.

Id. This instruction would never be applicable to an intentional tort common law battery claim. Battery occurs in the doctor-patient context when a surgeon operates on a body part without consent. This differs from an intentional tort common law battery outside of the doctor-patient context with respect to intent. While a doctor operating without consent intended the result, he did not act with the intention of harming the patient. This is why the Court consistently has referred to lack of consent in the medical

malpractice context as "technical" battery, rather than simply intentional tort common law battery as is usually coupled with assault and battery:

> 'It is well established 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' and that '[a] surgical operation on the body of a person is a technical battery or trespass[6] unless he or some authorized person consented to it.'

Washburn v. Klara, 263 Va. 586, 591 (2002) (quoting *Pugsley v. Privette*, 220 Va. 892, 899 (1980)); *see also Woodbury v. Courtney*, 239 Va. 651 (1990) (holding trial court erred in granting summary judgment in favor of defendant surgeon because expert witness testimony was not needed to prove technical battery); *Pugsley*, *supra*, (recognizing that surgeon may be held responsible for technical battery even where patient initially consented, but later revoked consent). Because lack of consent is unique to the doctor-patient relationship, it is called a "technical" battery. *See Washburn*, 263 Va. at 591; *see also Lane v. U.S.*, 225 F. Supp. 850 (E.D. Va. 1964) (recognizing the difference between doctor-patient technical assault, which does not require common law intent, and common law battery which requires intent) (cited with approval by this Court in

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[6] If the Court were to follow Dr. Allison's strained interpretation of pleading requirements to its logical conclusion, Ms. Brown would also be required to explicitly plead that her body had been "trespassed" upon. That is not the law.

Washburn, *id*.). And by pleading that Dr. Allison "performed surgery on the wrong breast," Ms. Brown has pled technical battery. A. at 4-5.

Adhering to this important distinction regarding intent, the trial court was careful when instructing the jury by only incorporating the portions of the intentional tort common law battery instruction (MJI 36.070) that were appropriate to a lack of consent (technical battery) claim. For example, element one of the finding instruction for intentional tort common law battery provides that the jury must find that "the defendant intentionally touched the plaintiff." *Id.* The finding instruction used at trial here was modified to read that the jury must find that the "defendant operated on the plaintiff without consent." A. at 511. This expressly dealt with the intent issue not applicable in lack of consent (technical battery) cases.[7]

B. <u>The Order sustaining the plea in bar as to intentional tort common law battery did not strike the lack of consent (technical battery) allegations</u>

When Ms. Brown deposed Dr. Allison, he took the position that his plan always was to operate on the left breast despite Ms. Brown's express

[7] There was nothing inappropriate in the trial court borrowing from the relevant portions of the intentional tort common law battery instruction. Doing so allowed the jury to have a full understanding of their function given that there is no model jury finding instruction for a lack of consent (technical battery) claim. This also explains why Dr. Allison is wrong in claiming that all the intentional tort common law battery instructions should have been given. As explained later, the instructions not given simply were not relevant to the claims tried.

desire to only operate on the right breast. Because this conflicted with Ms. Brown's plan as documented in her medical records, Ms. Brown thought there was sufficient evidence to support an intentional tort common law battery claim, *i.e.* there was evidence of common law intent. Based on this belief, Ms. Brown amended her Complaint to add Count III, an intentional tort common law battery claim, in addition to her already-pled lack of consent (technical battery) claim.

Dr. Allison filed a Plea in Bar *only* as to Count III. The Plea in Bar did not challenge any other allegation or claim contained in the Complaint since its inception. While the natural statute of limitations had run, Ms. Brown argued that Count III related back to the timely filed Complaint. The Friday motions judge (not the trial judge who would later preside over the case) disagreed, finding that pursuant to Code of Virginia § 8.01-6.1, while meeting the other two factors, Ms. Brown had not been reasonably diligent in pursuing the intentional tort common law battery claim.[8]

The motions judge did not, and could not, strike any other aspect of Ms. Brown's timely-filed Complaint or Amended Complaint. Thus, after the motion judge's ruling, the parties were operating under the original theories

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[8] Ms. Brown disagreed with this ruling and noted her objection to it. Content to pursue the pending claims, Ms. Brown did not move for reconsideration, nor was she required to do so.

set forth in both in the Complaint and the Amended Complaint, which always included the lack of consent claim (technical battery).

III. Ms. Brown properly pled and adduced sufficient evidence to prove her lack of informed consent claim

Dr. Allison similarly argues that Ms. Brown did not adequately plead her lack of informed consent claim. On the contrary, Ms. Brown adequately pled a lack of informed consent claim. In several paragraphs, Ms. Brown alleged that Dr. Allison lacked consent when he operated on her left breast. A. at 41 (¶¶9-11); 42 (¶¶16b, 16c); 43 (¶¶21b, 21c). And a lack of consent, by its definition, means there was a lack of informed consent: "The law requires informed consent, not mere consent, and the failure to obtain informed consent is tantamount to no consent." *Rizzo v. Schiller*, 248 Va. 155 (1994).

As to the sufficiency of the pleading on this issue, Ms. Brown refers this Court to her discussion above of the pleading standards and of Dr. Allison's admissions prior to the second trial demonstrating his awareness of the claims. To add additional support that Dr. Allison was on express notice of this claim, this Court need only look at Dr. Allison's expert witness designation, which stated that her expert "is expected to testify that Dr. Allison had an appropriate *informed consent* conversation with Ms. Brown." A. at 955 (emphasis added).

Dr. Allison's designation goes on to provide that "Dr. Allison advised Ms. Brown about the risks, benefits, and alternatives. He answered her questions about the procedure. After having a complete conversation about the planned surgery, Dr. Allison had Ms. Brown sign the consent form." *Id.* at 956. Dr. Allison would not have designated experts to defend a claim of lack of informed consent unless he knew Ms. Brown intended to prove lack of informed consent.

Dr. Allison's citation to *Wright v. Kaye*, 267 Va. 510 (2004), is inapposite. Ms. Brown put on evidence regarding lack of informed consent to prove that claim.[9]

A. Ms. Brown adequately designated her expert's opinions regarding the lack of informed consent claim

As to the challenge based upon *John Crane*, *Inc. v. Jones*, 274 Va. 581 (2007), and the trial court's scheduling order, Ms. Brown adequately described Dr. Weinberg's informed consent opinions in her expert designation. The designation provided, *inter alia*, that "Dr. Weinberg will explain that the standard of care requires a surgeon to prepare a consent

[9] Dr. Allison's counsel is the same counsel that represented Dr. Kaye on appeal. Thus, they are aware that *Wright* dealt with a doctor-defendant's ability to put on evidence regarding informed consent where the plaintiff-patient *did not seek to prove* a lack of informed consent claim. *See Wright,* 267 Va. at 529 ("Wright's awareness of the general risks of surgery is not a defense available to Dr. Kaye against the claim of a deviation from the standard of care.")

form with sufficient specific information to allow the patient to understand the procedure that is to occur. At minimum, the consent form should state the specific breast that the surgeon intends to operate on. If, as Dr. Allison has testified, it was his intent to revise and repair the right-side nipple and areola and replace the left breast implant, the standard of care required Dr. Allison to set that out in any consent form." A. at 12.

This designation adequately put Dr. Allison on notice of Dr. Weinberg's opinions as evidenced by Dr. Allison's counter designation, which expressly provided that his experts would explain that there was informed consent. A at 955-56. By any reasonable measure, Ms. Brown's expert witness designation was more than sufficient to satisfy the purpose of Rule 4:1(b)(4)(A)(i) of the Rules of the Supreme Court of Virginia. There are no legitimate grounds to support a *John Crane* argument.

This Court clearly stated in *John Crane* that the analysis begins by "determining whether the opinion at issue was disclosed in any form." *Id*. at 591. This Court clarified in *Condo. Servs. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 576, 709 S.E.2d 163, 172 (2011) that "It was within the discretion of the circuit court to determine whether the interrogatory response sufficiently disclosed the subject matter on which [the expert] was going to testify, the substance of [the expert's]

opinions and a summary of the grounds for [the expert's] opinions." No different conclusion can be reached. The trial court did not abuse its discretion in finding that Ms. Brown had sufficiently disclosed.

B. Ms. Brown adequately proved her lack of informed consent claim

Dr. Allison sets up a false premise to argue that Ms. Brown did not prove her lack of informed consent claim. Dr. Allison claims that Ms. Brown's lack of informed consent claim was *only* based on Dr. Allison's failure to inform her of the risks of operating on an irradiated breast. But this was only one component of Ms. Brown's lack of informed consent claim. Ms. Brown also proved the more fundamental fact that Dr. Allison failed to inform Ms. Brown on which breast he was going to operate. It is this failure to inform that formed the crux of Ms. Brown's lack of informed consent claim.

The same evidence that supports a no consent claim (technical battery) can also support a lack of informed consent claim. If there is no consent, there cannot be informed consent. *See Rizzo*, 248 Va. at 159. This is reflected in the model instruction for lack of informed consent, which provides that the doctor must give "all information **about the treatment** and its risks that would be given to a patient by a reasonably prudent practitioner in the doctor's field of practice or specialty." MJI 35.080

(Treatment Without Informed Consent) (emphasis added). Thus, an informed consent claim may be based on a surgeon's failure to give the patient all information about the surgery, *or* based on his failure to discuss all the surgery's risks, *or* both. *See Tashman v. Gibbs*, 263 Va. 65, 73 (2002). Disclosure of risks is irrelevant when the lack of informed consent claim is based on a failure to provide information about the treatment, rather than on a failure to disclose certain risks.

When, as here, a surgeon fails to disclose which body part he will operate on, the jury is free to find that the patient lacked informed consent because she was not given all information about the treatment that a reasonably prudent doctor would provide; namely, the body part on which he planned to operate. Because Dr. Allison does not challenge the quantum of proof elicited at trial on this issue, his argument regarding the lack of informed consent claim fails.

C. Dr. Weinberg established the standard of care and Dr. Allison's breach with regard to informed consent

To the extent this Court considers Dr. Allison's argument regarding the sufficiency of Ms. Brown's evidence regarding informed consent as to radiation risks in light of the fact that Ms. Brown proved lack of informed consent based on the failure to identify the body part, that argument, too, fails.

Dr. Allison claims that Plaintiff' expert, Dr. Weinberg, did not testify as to what risks the standard of care required Dr. Allison to disclose to Ms. Brown relating to surgery on an irradiated breast, and that Dr. Weinberg did not focus on what was actually discussed between Dr. Allison and Ms. Brown. This is simply incorrect. At trial, Dr. Weinberg was asked to read aloud to the jury Dr. Allison's progress note documenting the scope of the procedure and the risks that Dr. Allison discussed with Ms. Brown. A. at 210. After reading the note, Dr. Weinberg testified as follows:

> Plaintiff's counsel: If Dr. Allison were to testify that this was going to be a left-sided surgery, **would that description of the risks and benefits be sufficient?**
>
> Dr. Weinberg: **No.**

A. at 210 (emphasis added). Thus, Dr. Weinberg testified that Dr. Allison's description of the surgery was insufficient to inform Ms. Brown.

Dr. Weinberg was next asked why Dr. Allison's description of the risks of surgery failed to adequately inform Ms. Brown. A. at 311. Dr. Weinberg responded:

> The left breast we talked about had radiation and, as such – and we talked about what radiation causes – well, what – because of the effects of radiation when you operate on a breast and go back and operate on a breast that has been radiated, there are increased dangers of problems with the breast, **namely that you have problems with wound healing; you have problems with extrusion; you have more problems with infection; you have more problems with**

> **capsule contrac[ure]].** It is much more significant with a radiated breast than with a nonradiated breast. **And, as such, that has to be mentioned** 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 311 (emphasis added). Thus, Dr. Weinberg testified that it was insufficient to simply mention that there are risks when operating on an irradiated breast. Rather, the standard of care required specific discussion of what those risks were, which included wound healing problems, chance of breast implant extrusion (which later occurred), infection, and capsular contracture. *Id.*

Dr. Weinberg was then asked whether the consent form signed by Ms. Brown was sufficient to establish informed consent. He responded:

> No. [The form] provides [Ms. Brown] with absolutely nothing at all about what will be performed. It says nothing at all about whether a larger implant will be used, a smaller implant, whether the implants are exchanged, whether a capsulotomy, whether pockets are revised. It says nothing. It says, "a revision." "Revision" is so broad it means nothing."

A. at 318-19.

Once he had testified as to his reasons for determining that Dr. Allison breached the standard of care with regard to informed consent, Dr. Weinberg then directly testified that Dr. Allison breached the standard of care with regard to informed consent:

> Q: Finally, Dr. Weinberg, are you of the opinion to a reasonable degree of medical certainty that Dr. Allison breached the standard of care with regard to the informed consent process with Ms. Brown on November 22, 2011?
>
> A: Yes.

A. at 356. Nothing more is required.

Dr. Allison relies upon *Tashman v. Gibbs*, 263 Va. 65 (2002), to support the notion that Ms. Brown somehow failed to put on evidence of her informed consent claim at trial. On the contrary, the evidence in the record easily supports an informed consent claim precisely because Ms. Brown established through "expert testimony whether and to what extent any information should have been disclosed." *Id*. at 73. Quite simply, Ms. Brown established that Dr. Allison failed to inform her of specific risks of surgery on her left breast on November 22, 2011.

D. Ms. Brown did not know of the specific risks at issue

Dr. Allison next claims that because Ms. Brown had generalized knowledge that operating on an irradiated breast can cause problems, she was aware of the specific risk.

Dr. Allison, again, focuses only on one aspect of a lack of informed consent claim (disclosure of risks), rather than on the other aspect proved here (failure to inform which body part was to be operated on). Even if the Court were to consider this argument, Ms. Brown's generalized knowledge

that radiation affects skin could not defeat her claim. Dr. Weinberg explained that Dr. Allison was required to have a discussion of the *specific* risks, which included likelihood of extrusion (which in fact occurred here after the wrong-sided surgery), infection, and capsular contracture. A. at 312. There was no testimony by Ms. Brown that she was aware of these specific risks because, in fact, she was not.

Thus, as often occurs in medical malpractice cases, this was a battle of the experts. Plaintiff's expert testified that the standard of care required a more specific risk discussion to fully inform the patient. Defendants' expert testified that a general risk discussion was sufficient to meet the standard of care. The jury found that the standard of care required more specific information to be imparted. There was no error.

E. Ms. Brown established that she would not have consented to left side surgery

Dr. Allison's last argument on the informed consent claim is his oddest. Dr. Allison argues that Ms. Brown did not adequately testify that she would not have undergone the surgery had she been informed of the procedure and of its risks. Yet, the whole premise of Ms. Brown's case was that if she had known Dr. Allison was going to operate on her left breast, she would not have permitted it.

Pursuant to *Tashman v. Gibbs*, 263 Va. 65 (2002), and the model jury instruction, Ms. Brown needed only to evince sufficient evidence for a jury to conclude that she would have refused the treatment:

> If a doctor fails to perform this duty, then he is negligent and is liable for any injury proximately resulting from the doctor's treatment **if you believe from the evidence that the patient would have refused the treatment if the doctor had disclosed the information.**

MJI 35.080; ("Treatment Without Informed Consent") (emphasis added).

No magic words are required to establish this fact. Ms. Brown's testimony, especially given all inferences due her, unequivocally established that she would not have allowed left breast surgery:

> Q: And when you expressed this to Dr. Allison, what was his reaction?
>
> A: He was, like, "That's fine. We can do a revision to your right breast."

A. at 602. Once establishing for the jury that she consented only to right breast surgery, Ms. Brown then testified repeatedly that she would not have consented to left breast surgery. For example, Ms. Brown testified that when a nurse suggested this was to be bilateral surgery, Ms. Brown corrected her:

> Q: And did you have to correct that person?
>
> A: I did. When she told me what the proposed procedure was, she said "breast – bilateral breast reconstruction

> modification," at which time I stopped her and I said, "We're not doing both breasts. We are only working on my right breast."
>
> Q: And did you observe her write that on her paperwork?
>
> A: Yes. She crossed out the word – in this case, it was just "BIL" for "bilateral" and changed it to "right."

S.A. at 13; T.T. at 620.

On cross examination regarding her interaction with the nurse, Ms. Brown reiterated that she would not allow surgery on her left side:

> Q: So in speaking to that nurse, she said to you that morning, "Hey, you're here for a bilateral surgery," and you stopped her and said, "No, no, no. I only want surgery on my right side."
>
> A: I didn't say, "only wanted." I said, "No. We are only doing surgery on my right side."

S.A. at 14; T.T. at 667.

Ms. Brown further testified that immediately prior to the surgery, she made clear to Dr. Allison that she would not consent to surgery on the left side:

> Q: Are you positive that [Dr. Allison] only marked your right breast?
>
> A: Yes, I am. Had he marked my left breast, I would have stopped him and asked why was he marking my left breast when we were only supposed to be working on my right breast.

A. at 294. On cross examination she testified the same:

> Q: So, it's your memory today that you recall specifically there was no marking done on your left breast.
>
> A: [Dr. Allison] marked on my right breast only. Had he marked on my left breast or started to mark on my left breast, I would have said something.
>
> . . .
>
> Q: So, isn't is possible, then, since you don't remember what he marked or where, that he did, in fact, initial both your right and left breasts?
>
> A: No. I knew that I was having a right surgery only. Had he marked on my left breast, I would have questioned, "Why are you marking on my left breast?" I know I would have done that.

A. at 306-07.

Ms. Brown further testified that after surgery, when she took the bandages off, she was shocked to see that Dr. Allison had operated on the left breast:

> A: I removed the bandages and I was extremely shocked to see that there had been work done on my left side. I was pretty much in disbelief that that could happen.

S.A. at 15; T.T. at 623 (emphasis added).

Finally, Ms. Brown testified that she confronted Dr. Allison to tell him he had operated on the wrong side:

> A: And when Dr. Allison came in, he asked how I was doing, and I told him that, you know, something had been done wrong, that you had – that he had worked on my left side.

S.A. at 16-17; T.T. at 624-25.

Simply put, there was extensive testimony from Ms. Brown supporting a jury finding that she would not have consented to left breast surgery had Dr. Allison adequately informed her. No error occurred.[10]

IV. The trial court did not err when instructing the jury

A trial court should not give a jury instruction that incorrectly states the law or which would be confusing or misleading to the jury. *See Bruce v. Commonwealth*, 9 Va. App. 298, 300 (1990). Jury instructions should be simple, impartial, clear, concise statements of the law. *See Gottlieb v. Commonwealth*, 126 Va. 807, 813 (1920). Jury instructions are meant to aid the jury in its deliberations, not to make such deliberations more difficult. *See Gaalaas v. Morrison*, 233 Va. 148, 156 (1987).

The trial court did not err by giving the model collateral source jury instruction or by refusing to give a self-serving defense-invented jury instruction regarding a rule of evidence. And the trial court did not err in refusing to give portions of intentional tort common law battery instructions

[10] For the reasons set out in the arguments above, the trial court did not err in denying Dr. Allison's motion to strike or his motion to set aside the verdict. Furthermore, Dr. Allison has not provided this Court with a basis to reverse judgment and enter a judgment in Dr. Allison's favor.

that were not applicable to a lack of consent (technical battery) claim arising from the physician-patient relationship.

A. The trial court appropriately instructed the jury regarding collateral sources

The trial court committed no reversible error by giving model jury instruction 9.015 regarding collateral sources. In his appeal, Dr. Brown focuses solely on *liability* insurance, claiming (with no evidence) that the mere mention of liability insurance in the model jury instruction prejudiced him. He omits, however, that the collateral source instruction was appropriate regarding *health* insurance as it related to the damages claimed by Ms. Brown.

A significant portion of Ms. Brown's damages claim stemmed from the seven additional surgeries necessitated by Dr. Allison's errors. The jury learned that the cost of these surgeries totaled more than $177,000, and that future surgeries were likely necessary. The jury was also aware that Ms. Brown was a teacher in a public school. A. at 281. Common sense would have compelled the jurors to realize that the significant surgical costs were covered by Ms. Brown's health insurance. Thus, to avoid manifest prejudice to Ms. Brown via improper consideration of a collateral source, it was important for the jury to know that it was not to consider insurance in arriving at its damage award.

The proper way to ensure that a jury does not misapply law regarding whether collateral sources should factor into their decision-making is to give the neutrally-worded model jury instruction 9.015. This is precisely what the Court did and there was no prejudice to Dr. Allison.

The case law cited by Dr. Allison does nothing to advance his empty claim of prejudice. The case law warns against injecting *evidence* of liability insurance into a medical malpractice case. For example, Dr. Allison cites to *Lombard v. Rohrbaugh*, 262 Va. 484, 492 (2001), where the Court posed the issue as "the trial court's decision allowing presentation of *evidence* of insurance." (Emphasis added). Indeed, not only was *evidence* of insurance the concern in *Lombard*, the Court went on to approve the trial court giving the jury a cautionary instruction as to the existence of liability insurance. *Id.* at 497.

The other cases relied upon by Dr. Allison generally involve preventing counsel for a plaintiff from expressly asking about liability insurance during voir dire examination. *See Speet v. Bacaj*, 237 Va. 290, 295 (1989) ("[T]he trial court did not abuse its discretion in refusing to allow the Speets to examine the jury panel about the medical malpractice insurance crisis."). *See also Davis v. Maynard*, 215 Va. 407, 408 (1975) (holding that mistrial should have been granted where "[t]he obvious

purpose and effect of the detailed examination of Evans by plaintiff's counsel were to inform the members of the jury panel that the defendant had insurance coverage.")

In this case, Ms. Brown's counsel did not introduce evidence of Dr. Allison's liability insurance. Rather, the collateral source instruction was appropriately used to address the commonsense conclusion that as a teacher Ms. Brown's surgical costs were largely covered by her health insurance.

Finally, if Dr. Allison believed that carving *liability* insurance out of the model collateral source instruction would be favorable, Dr. Allison was required to request such relief with the trial court. He did not.

B. The trial court's decision not to give Dr. Allison's self-serving non-model jury instruction regarding habit evidence was appropriate

Dr. Allison argues that the trial court was required to give his invented jury instruction that restated a rule of evidence regarding habit and practice. Dr. Allison relies on the general principle that a party is entitled to a jury instruction if it accurately states the law and was supported by some evidence. But that argument is misplaced here.

A rule of evidence is not a basis to craft a jury instruction. A rule of evidence is designed to guide a trial judge as to whether proffered

testimony or a document should be admitted into evidence for consideration by the jury. Dr. Allison has provided no support in Virginia jurisprudence for converting rules of evidence into jury instructions. On the contrary, this Court frequently has cautioned against "the danger of the indiscriminate use of language from appellate opinions in a jury instruction." *Clohessy v. Weiler*, 250 Va. 249, 255 (1995) (quoting *Blondel v. Hayes*, 241 Va. 467, 474 (1991)). Plucking favorable language from rules of evidence to fashion jury instructions makes even less sense than using language from appellate opinions for that purpose, and is similarly inappropriate. Given that the rules of evidence are relied on to resolve virtually every question regarding admissibility at trial, such a holding would result in an unending battle of the evidentiary instructions, with each party attempting to cull favorable language.

Dr. Allison argues that he was prejudiced by the court's decision because his defense "relied heavily upon his testimony regarding his habit."[11] Brief at 45. Implicit in this statement is the fact that the trial court

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[11] Ms. Brown objected to Dr. Allison's introduction of habit testimony. Rule of Evidence 2:406 defines habit as a "person's regular response to repeated specific situations." Given that every patient-doctor interaction is unique to the patient's individual circumstances and presentation, such interactions cannot be "repeated specific situations" such as driving the same route to work each day. Put simply, what Dr. Allison tells one patient

allowed Dr. Allison to testify extensively about his habit. The trial court placed no limit on the alleged habit testimony Dr. Allison sought to introduce. Moreover, in closing argument, Dr. Allison's counsel argued at length that his habit testimony trumped Ms. Brown's specific memory.[12] S.A. at 18-19; T.T. at 1103-04. She further informed the jury of the very principle that she wanted the Court to instruct on, that Dr. Allison "has no reason to believe he deviated from his habit in this case. *And that's strong evidence that he conformed to that habit with Ms. Brown*." S.A. at 20; T.T. at 1116. (Emphasis added). *See Hancock-Underwood v. Knight*, 277 Va. 127, 136 (2009) (recognizing that prejudice, if any, was ameliorated where counsel was allowed to introduce the evidence and argue the theory to the jury).

Dr. Allison was allowed over objection to both testify as to his alleged habit and to explain to the jury why (in his counsel's view) that supported his defense. He suffered no prejudice.

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is not evidence of what he told Ms. Brown given her unique circumstances. The trial court, however, overruled Ms. Brown's objection.

[12] Defense counsel: It's something he does in every surgical case, thousands of times over the course of his career. That is his habit. That's powerful. All right? That's powerful. In some ways, that's even more powerful than claiming to have a memory four years later."

C. The trial court's decision not to instruct the jury regarding irrelevant portions of the intentional tort common law battery instructions was appropriate

As explained repeatedly above, the "battery" alleged in this case was lack of consent (technical battery) arising from the doctor-patient relationship. Proposed instruction W defined intentional tort common law battery, which is different from lack of consent (technical battery). A. at 517. Instruction W would have confused the jury because it would have introduced the concept of intent, which was not at issue. Instead, the trial court gave model jury instruction 35.070 (Treatment Without Consent):

> A doctor has a duty to obtain the consent of a patient before treating him. If a doctor treats without first obtaining his patient's consent, then he is liable for any injury to the patient which proximately results from the treatment, even though he exercised reasonable skill and diligence in providing the treatment.

This instruction correctly and adequately instructed the jury on the applicable claim.

The trial court did not commit reversible error in choosing to give model jury instruction 35.070 and refusing to give the Chapter 36 (Assault and Battery) intentional tort common law definition of battery. Giving both instructions would have been confusing to the jury because the common law definition does not fit the context of technical battery in the doctor-patient relationship.

For the same reasons, the trial court did not commit reversible error by refusing to give Instruction Z (MJI 36.090), the intentional tort common-law battery damages instruction. That instruction did not fit the facts of a technical battery case and would have confused the jury. For example, the refused instruction 36.090 tells the jury that it may consider "the insulting character of the injury, the defendant's reason for injuring the plaintiff, and any other circumstances which make the injury more serious, if any of these things are shown by the evidence." MJI 36.090. But this had no application in to a lack of consent (technical battery) case. Had this instruction been given the jury would have had to determine Dr. Allison's "reason for injuring" Ms. Brown. But this is irrelevant under lack of consent (technical battery) because all that matters is whether the doctor had consent. *See* MJI 35.070 (Treatment Without Consent).

The trial court appropriately ruled that MJI 9.000 (General Personal Injury and Property Damage) correctly set out the recoverable damages. Thus, a separate damages instruction for the lack of consent (technical battery) claim would have been duplicative, unnecessary, and confusing to the jury. Further, Dr. Allison could not have been prejudiced by the trial court's refusal to give Instruction Z as it could only have *increased* the damage award because it contains additional elements of damage.

The trial court's decision not to give certain intentional tort common law battery instructions shows that it carefully maintained the distinction between lack of consent (technical battery) and intentional tort common law battery. There was no error.

CONCLUSION

Ms. Brown's pleading adequately put Dr. Allison on notice of her claims. The pleadings, the discovery conducted, and the procedural history of this case undisputedly establish that Dr. Allison had express knowledge of the claims Ms. Brown sought to pursue. After full discovery in which both sides designated expert witnesses to address the claims Dr. Allison now challenges, there is no question that Dr. Allison received two fair jury trials. There was no surprise.

With a favorable jury verdict, Ms. Brown occupies the most favored position known to law. Dr. Allison has set forth no basis to require a third trial in this case where the overwhelming evidence established that Dr. Allison operated on the wrong breast. Especially because a motion to strike should only be granted where it is conclusively apparent that plaintiff has proven no cause of action against defendant, the jury's verdict and the Final Order must be affirmed.

Dated: November 14, 2016 Respectfully submitted,

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CERTIFICATE

I hereby certify, in compliance with Rule 5:26(h), that on this 14th day of November, 2016, electronic copies of the Brief of Appellee and Supplemental Appendix were filed, via VACES, and ten paper copies of the Brief of Appellee and three paper copies of the Supplemental Appendix were hand-filed with the Clerk of this Court. On this same day, electronic copies of the Brief of Appellee and Supplemental Appendix were served, via email, upon:

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