In The

Supreme Court of Virginia

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RECORD NO: 160377

ALEXIA SUMMERS,

Appellant,

v.

J. MICHAEL SYPTAK, M.D.;
HARRISONBURG FAMILY PRACTICE ASSOCIATES, P.C.,

Appellees.

ON APPEAL FROM
THE CIRCUIT COURT OF THE COUNTY OF ROCKINGHAM

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES iv

INTRODUCTION 1

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW 1

The Complaint 1

The Answer 3

The § 8.01-20.1 Motion to Dismiss 3

The Motion for Summary Judgment 4

The Ruling on the MSJ 5

STATEMENT OF FACTS 6

A. Ms. Summers received extensive care and treatment from HFPA through its employee, Dr. Nio, for serious injury as a result of workplace sexual harassment 6

1. Ms. Summers was subjected to unspeakably horrific and repeated sexual abuse starting when she was a young child 6

2. The horrifying abuse suffered by Ms. Summers left her extremely vulnerable to unwanted sexual conduct as an adult and thus, for 17 months, starting in 2010, Ms. Summers sought and obtained treatment from HFPA through Dr. Nio for serious health consequences due to unwanted sexual conduct and harassment at her workplace 7

3. HFPA through Dr. Nio treated Ms. Summers for PTSD resulting from unwanted sexual conduct 8

B. HFPA knew that the impact of unwanted sexual conduct on Ms. Summers could be extremely harmful to her health 9

C. Subsequently, HFPA's employee, Dr. Syptak, made vulgar and offensive sexually charged comments to Ms. Summer 10

D. Syptak's Conduct Caused Serious Injury to Ms. Summers 12

E. Neither HFPA nor Dr. Syptak disputed that HFPA had provided extended care and treatment to Ms. Summers and thus was aware of the risk of serious harm to her as a result of unwanted sexual behavior 13

F. Neither HFPA nor Dr. Syptak disputed that Dr. Syptak made the numerous vulgar, extremely offensive, grossly inappropriate sexually charged statements to Ms. Summers 14

G. The circuit court granted summary judgment and dismissed Ms. Summers' negligence claim ruling that Ms. Summers was required to have expert medical testimony establish that the standard of care "disallows" the vulgar and offensive sexually charged comments made by Dr. Syptak..... 14

ASSIGNMENT OF ERROR 16

STANDARD OF REVIEW 16

AUTHORITIES AND ARGUMENT 17

I. THE CONDUCT DID NOT INVOLVE THE EVALUATION OF ANY MEDICAL TREATMENT OR PROCEDURE, BUT RATHER WHETHER DR. SYPTAK SEXUALLY HARASSED MS. SUMMERS AND THE INJURIOUS EFFECT OF HIS HARASSMENT 17

A. The damage that words cause is a subject about which persons of ordinary intelligence are capable of comprehending, forming an intelligent opinion, and able to draw their own conclusions 17

B. The jury would not need the assistance of a medical expert in order to determine the harmful impact of words that have no relation to medical care or treatment 17

1. Expert testimony would be inadmissible since the conduct at issue involves a subject which persons of ordinary intelligence are capable of comprehending and evaluating 19

2. Dr. Syptak's conduct either did or did not breach the standard of care, and the notion that there could be competent expert testimony that conduct involving sexual harassment of a patient would not breach the standard of care is ludicrous 20

C. Had Ms. Summers been an employee of HFPA bringing a workplace sexual harassment claim for the same conduct, expert testimony would not have been required 21

II. THE CIRCUIT COURT WAS CORRECT IN ITS INITIAL DETERMINATION THAT THE ACTS OF NEGLIGENCE AT ISSUE "CLEALY [LAY] WITHIN THE RANGE OF THE JURY'S COMMON KNOWLEDGE AND EXPERIENCE." 23

III. THIS COURT HAS NOT SUBSCRIBED TO THE NOTION THAT SIMPLY BECAUSE CONDUCT OCCURS IN A MEDICAL FACILITY JURORS ARE INCAPABLE OF EVALUATING THE CONDUCT WITHOUT EXPERT TESTIMONY 24

CONCLUSION AND STATEMENT OF RELIEF SOUGHT 29

CERTIFICATE 31

TABLE OF AUTHORITIES

Page(s):

Cases:

Beverly Enterprises-Virginia v. Nichols,
247 Va. 264 (1994) 24, 25, 26

Board of Supervisors v. Lake Servs.,
247 Va. 293 (1994) 19

Coston v. Bio-Medical Applications of Virginia, Inc.,
275 Va. 1 (2008) 26, 27

Deutsche Bank Nat'l Trust co. v. Arrington,
290 Va. 109 (2015) 16

Dickerson v. Fatehi,
253 Va. 324 (1997) 28, 29

Diehl v. Butts,
255 Va. 482 (1998) 22

Estate of Parfiff v. Parfitt,
277 Va. 333 (2009) 22

Friendly Ice Cream Corp. v. Beckner,
268 Va. 23 (2004) 22

Fultz v. Delhaize America, Inc.,
278 Va. 84 (2009) 16

James v. Jane,
221 Va. 43 (1980) 22

Richmond Newspapers, Inc. v. Lipscomb,
234 Va. 277, 362 S.E.2d 32 (1987), *cert. denied*,
486 U.S. 1023, 100 L. Ed. 2d 228, 108 S. Ct. 1997 (1988) 19

Womack v. Eldridge,
215 Va. 338 (1974) 16

Statutes:

42 U.S.C. § 2000e, *et seq.* 21

Va. Code § 8.01-20.1 ..... 3, 4, 20, 23

Rule:

Va. Sup. Ct. R. 2:702 19

Other Authorities:

61 Am. Jur. 2d Physicians, Surgeons, Etc., § 166 22

Diagnostic and Statistical Manual of Mental Disorders, 5th Ed., 2013 ("*DSM-5*") 9

INTRODUCTION

This appeal results from the circuit court's pretrial dismissal of medical negligence claims against a corporate medical practice and one of its physician employees by way of summary judgment. The conduct at issue involves the harmful impact of common, ordinary words - not medical terms or words related in any way to medical care or treatment. In granting summary judgment dismissing the medical negligence claim, the circuit court held that expert testimony was necessary in order for a jury to determine whether a doctor's words amounting to sexual harassment of a patient would constitute a breach of the standard of care.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The Complaint. On July 18, 2014, Appellant Alexia Summers ("Ms. Summers") filed a complaint in the Circuit Court of Rockingham County against Appellees J. Michael Syptak, M.D. ("Dr. Syptak"), and Harrisonburg Family Practice Associates, P.C., ("HFPA"). Joint Appendix ("JA"), pp. 1-11. In her complaint, Ms. Summers alleged that starting on September, 23, 2010, through February 22, 2012, she had received care and treatment from HFPA through one of its physician employees, Deborah Nio, M.D. ("Dr. Nio") *Id.*, at ¶¶5 – 9(j).

Over this 17 month period, Ms. Summers was seen by Dr. Nio on eleven separate occasions. *Id.* The care and treatment provided to Ms. Summers was to address the serious harm to her health as a result of being sexually harassed at her workplace. *Id.* Ms. Summers' medical records, as maintained by HFPA, noted that the impact of the workplace sexual harassment on Ms. Summers' health was so serious that this treatment included prescribed medications and even hospitalization. *Id*.

After Ms. Summers had received extensive care and treatment from HFPA through Dr. Nio and her condition had improved, she subsequently was scheduled by HFPA to be seen by Dr. Syptak, another physician who was employed by HFPA. *Id.*, at ¶¶ 4 and 38. When Dr. Syptak saw Ms. Summers he proceeded to make vulgar and offensive sexually charged comments. *Id.*, at ¶ 12 a-l, JA, pp. 132-133. As a direct and proximate result of Appellees' conduct, Ms. Summers re-suffered and suffered anew the same kinds of serious harms for which she had previously been receiving care and treatment, including attempting to take her own life. JA, pp. 8-10, 132-133.

The complaint alleged liability against HFPA and Dr. Syptak for infliction of emotional distress and negligence with HFPA's liability being based on the doctrine of *respondeat superior*. JA, pp. 1-11.

The Answer. HFPA and Dr. Syptak filed joint responsive pleadings. In their answer, they admitted: 1) that HFPA was a Virginia Corporation engaged in the practice of medicine (JA, p. 37, at ¶ 3); 2) that Dr. Nio had been acting as HFPA's employee when she provided care and treatment to Ms. Summers for harm due to workplace sexual harassment (JA, p. 37, at ¶ 5); and, 3) that Dr. Syptak had been "acting within the scope of his employment and agency with HFPA" at all times when he was interacting with Ms. Summers as described in the complaint. JA, p. 43, at ¶ 38.

The § 8.01-20.1 Motion to Dismiss. At the outset of the litigation, HFPA and Dr. Syptak filed a Request for Expert Certification (the "Request") pursuant to § 8.01-20.1 of the *Code of Virginia* ("Va. Code") requesting that Ms. Summers provide written certification that she had obtained a written opinion from an expert witness that the alleged conduct deviated from the standard of care and that the deviation was a proximate cause of the injuries claimed. JA, pp. 15-16.

Ms. Summers responded to the Request asserting that whether the conduct alleged in the complaint constituted negligence and whether it proximately caused Ms. Summers' injuries were matters that were within the range of the jury's common knowledge and experience. JA, pp. 17-21.

Accordingly, Ms. Summers maintained that she did not need expert medical testimony.

Thereafter, HFPA and Dr. Syptak moved to dismiss the case on the ground that expert medical testimony was required and therefore the action had been filed in violation of Va. Code § 8.01-20.1. JA, pp. 23-25. However, the circuit court agreed with Ms. Summers that no expert certification was required and thus denied the motion. JA, pp. 65-69. This was because under § 8.01-20.1 certification is not required where "the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience." Va. Code § 8.01-20.1

The Motion for Summary Judgment. Subsequently, just two months before the scheduled trial date, HFPA and Dr. Syptak filed a motion for summary judgment (the "MSJ"). JA, pp. 72-73. The MSJ was based on the same ground as the prior motion to dismiss for lack of § 8.01-20.1 certification – that expert medical testimony was required in order to establish negligence and proximate cause. JA, pp. 78-82.

In support of their MSJ, HFPA and Dr. Syptak submitted no pleadings, orders, admissions, or interrogatories that disputed any of the allegations made in the complaint as to the conduct and/or knowledge of HFPA and Dr. Syptak. *Id*.

The Ruling on the MSJ. Although the MSJ did not challenge any of the factual allegations in the complaint, shortly before trial, and after the deadline to designate experts, the court changed its mind and in granting the MSJ ruled that expert testimony was going to be required in order to establish negligence. JA, pp. 291-294, 304-305.

Since the deadline for designating her experts had passed without the designation of such an expert, Ms. Summers' negligence claim against both HFPA and Dr. Syptak was dismissed. *Id*. As a result, only Ms. Summers' emotional distress claim was left for trial.[1] *Id*. Ms. Summers then non-suited her remaining claim and timely filed notice of this appeal of the dismissal of her negligence claim. JA, pp. 298-299, 301-302.

[1] Ms. Summers subsequently re-filed her emotional distress claim and although the circuit court had previously overruled defendants' demurrer to the identical allegations, it changed its ruling this time and sustained their demurrer in the re-filed action. Ms. Summers' has timely noted her appeal to that ruling.

STATEMENT OF FACTS

A. Ms. Summers received extensive care and treatment from HFPA through its employee, Dr. Nio, for serious injury as a result of workplace sexual harassment.

1. Ms. Summers was subjected to unspeakably horrific and repeated sexual abuse starting when she was a young child. Starting when she was in the third grade, Ms. Summers was sexually abused or raped by nine different men, some of whom were relatives and some of whom were not. JA, pp. 128-129, 222, 169-173.[2] The sickening victimization of Ms. Summers, starting in her early childhood, included the following:

> She was raped at age 10. She was subject to abuse so severe she experienced physical harm. The sexual abuse included rape, fondling, penetration, sexual comments and threat and being "sold" by an aunt for $50 for drug money. She was sexually abused by 9 adult men. In addition, she was sexually harassed by several different men in her former place of employment. The harassment included physical intimidation, touching, pinching, proposition and emailed pornography.

JA, pp. 222, 169-173.

[2] HFPA and Dr. Syptak put Ms. Summers' answers to interrogatories before the circuit court in support of their MSJ by submitting an incomplete portion of her answers. JA, pp. 99-104. Ms. Summers submitted a complete copy as part of her opposition. JA, pp. 157-176.

Ms. Summers is a true survivor, albeit one who understandably continues to suffer from Post-Traumatic Stress Disorder ("PTSD") as a result of unspeakable victimization.

2. The horrifying abuse suffered by Ms. Summers left her extremely vulnerable to unwanted sexual conduct as an adult and thus, for 17 months, starting in 2010, Ms. Summers sought and obtained treatment from HFPA through Dr. Nio for serious health consequences due to unwanted sexual conduct and harassment at her workplace. Over a 17 month period, between September 23, 2010 and February 22, 2012, Ms. Summers was seen at HFPA by Dr. Nio on eleven different occasions for care and treatment due to workplace sexual harassment. JA, pp. 147-156.

HFPA's records of Ms. Summers's treatment at HFPA by Dr. Nio over this 17 month period show the following:

1) "ER follow up . . . was having anxiety attacks stress @ work – sexually (sic) harassment" (9/22/10 appointment), JA, pp. 2, 147;

2) "Back @ work – Sx (i.e., symptoms) worse. . . . Re-hired co-worker who started harassment" (10/07/10 appointment), JA, pp. 3, 147;

3) "Still stress @ work/seeing counselor – thinks it's PTSD – also remembering abuse of childhood" (11/16/10 appointment), JA, pp. 3, 149;

4) "Still struggling w/ anxiety @ work – stems from harassment of co-workers . . . had episode w/ another co-worker (male) who told her to dress in mini-skirt/low tops" (1/14/11 appointment), JA, pp. 3, 150;

5) "Back @ work – hard to do but does. Anxiety attacks @ work. Fearful of most men now . . . Afraid to be out w/o husband" (3/11/11 appointment), JA, pp. 4, 151;

6) "Nervous/anxious @ work. Tearful often. Not functioning well. Afraid of another 'nervous breakdown.'" (4/4/11 appointment), JA, pp. 4-5, 152;

7) "Still seeing (her) counselor . . . counselor feels she's not ready to RTW (i.e., return to work) . . . upset @ coworkers - 'they lied'" (4/29/11 appointment), JA, p. 153;

8) Ms. Summers' depression had been "aggravated by recent work events" and Dr. Nio's assessment was that Ms. Summers suffered from anxiety, depression and PTSD from work/sexual harassment. (5/13/11 appointment) JA, p. 5.

9) "Still see(ing) counselor . . . Pt feels she is unable to RTW . . . Still fears crowds/people . . ." (6/29/11 appointment), JA, 154;

10) "Follow Up Terminated from work - lawyer looking into EEOC" (08/29/11 appointment), JA, pp. 5, 155; and,

11) "Waco thing is resolved in pt's favor. Relief now. Anxiety is better. Good days/bad days" (2/22/12 appointment), JA, p. 156.

3. HFPA through Dr. Nio treated Ms. Summers for PTSD resulting from unwanted sexual conduct. HFPA's notes from Ms. Summers' November 16, 2010, appointment state that she suffered from PTSD and that she was "remembering abuse of childhood." "Remembering"

may be too muted a term. In the *Diagnostic and Statistical Manual of Mental Disorders, 5th Ed.*, 2013 ("*DSM-5*") the primary descriptive term used in reference to PTSD is not "remember" but "re-experience." "The individual may experience dissociative states that last from a few seconds to several hours or even days, during which components of the event are relived and the individual behaves as if the event were occurring at that moment." *Id.*, at p. 275. Ms. Summers wasn't simply remembering the horrors, she was re-experiencing them.

B. HFPA knew that the impact of unwanted sexual conduct on Ms. Summers could be extremely harmful to her health. In a letter dated February 1, 2011, Dr. Nio confirmed that she had been treating Ms. Summers for PTSD "due to possible sexual harassment in her work place" including prescribing medications. JA, p. 177. By then Ms. Summers had been seen four times for care and treatment at HFPA by Dr. Nio.

On May 13, 2011, Dr. Nio completed a Physician's Statement in conjunction with Ms. Summers' application for disability benefits and noted as her primary diagnosis "PTSD, Anxiety, Depression." Dr. Nio further noted that Ms. Summers' PTSD, anxiety and depression were "work related" and "aggravated by work environment" and that the impact of unwanted sexual

harassment on Ms. Summers' health had become so serious that she had been hospitalized from February 23, to February 26, 2011. JA, pp. 178-179.

The hospitalization of Ms. Summers on February 23, 2011, was documented in HFPA's own records, which noted the following about Ms. Summers:

> She has been having crying spells, irritability, decreased concentration, racing thoughts. She cannot sleep. Her libido is disturbed. She has startle response. She is not eating, has low energy, and finally the suicidal and homicidal thinking. JA, pp. 4, 180-182.

By letter dated May 4, 2011, Dr. Nio acknowledged and further documented the serious impact of sexual harassment upon Ms. Summers, writing on HFPA letterhead that "returning Alexia Summers to work at her current work place would be detrimental to her mental health." JA, p. 183.

C. Subsequently, HFPA's employee, Dr. Syptak, made vulgar and offensive sexually charged comments to Ms. Summers. Commencing in March, 2014, Ms. Summers was seen at HFPA for treatment related to high blood pressure. Because Dr. Nio was not available, HFPA scheduled her to see another of its employee physicians, Dr. Syptak. JA, pp. 5, 184-185. Dr. Syptak ordered certain tests and lab work done and during Ms. Summers's follow-up appointments with him, Dr. Syptak made

numerous vulgar, extremely offensive, grossly inappropriate, sexually charged statements to Ms. Summers, including the following:

a. Dr. Syptak told Ms. Summers that if she lost weight she would look and feel sexy. JA, pp. 6, 164-165.

b. Dr. Syptak used the terms "Love," "Sweetpea," and "Sweets" in conversation with Ms. Summers when referring to her. JA, p. 6.

c. Dr. Syptak told Ms. Summers about a boy who had masturbated and ejaculated into his socks and as a result he didn't want his mother doing his laundry. JA, pp. 6, 187.

d. Dr. Syptak told Ms. Summers about his own sex life telling her that he had slowed down, but he's still like a "jack rabbit" and that perhaps that it why he has five kids. JA, pp. 6, 165.

d. Dr. Syptak told Ms. Summers that if his wife left him, he would ask "where's the nanny's old number" and that he would "have some fun now." JA, pp. 6, 191-192, 195.

e. Dr. Syptak made an "off-color" comment to Ms. Summers that the nasal spray he gave her should be used only in her nostrils, and not any other holes, and then he chuckled. JA, pp. 6, 188-189.

f. Dr. Syptak commented to Ms. Summers that the term "fiancé" around Harrisonburg was like "redneck layaway," that it's for people who are not getting married and who haven't decided if something better might come along, but they have babies anyway. JA, pp. 6, 194.

f. Dr. Syptak told Ms. Summers that he and his wife have a king size bed and that "having sex is like boarding a pirate ship." JA, pp. 7, 196.

D. Syptak's Conduct Caused Serious Injury to Ms. Summers. Just as in 2010 and 2011, when HFPA provided extensive care and treatment for the injury suffered by Ms. Summers due to PTSD, depression and anxiety that resulted from workplace sexual harassment, Dr. Syptak's vulgar and offensive sexual comments and "jokes" caused Ms. Summers to suffer serious injury. Ms. Summers described some of the impact of Dr. Syptak's conduct as follows:

> (Ms. Summers) Okay. I will say this and it's hard because -- it's just hard. But after this incident with Dr. Syptak, I just -- it overwhelmed me. And this is the last time I went to him and stuff. And because I didn't say anything to anybody, but I had it in my mind, I just didn't understand why this stuff was happening again, why to me again. What did I do to deserve it?
>
> And I got overwhelmed. And I actually took a handful of Tramadol, 50 milligram. And I was just to that point to where I just hoped that I would die. I was suicidal. And, of course, I didn't wake up until that morning real late. JA, p. 213.
>
> . . .
>
> Q. (Mr. Leitch) Your prior, and I don't want to talk about it specifically, but the stuff you've been through when you were younger, is that all a piece of this?
>
> A. Well, yeah, because it's a circle of things that you don't understand why it's happening to you. You know, it's like it just keeps on and on and on and on and on. And there's no ending unless you end it. JA, pp. 215-216.

Ms. Summers also suffered from physical harms as a result of being sexually harassed by Dr. Syptak, including increased physical pain, hair loss, unplanned weight loss, exacerbation of fibromyalgia symptoms, loss of sex life with her husband, increased anxiety and insomnia, and an increased need for prescribed medications for stress and anxiety with related costs and physical side effects. JA, pp. 167, 217-218.

E. Neither HFPA nor Dr. Syptak disputed that HFPA had provided extended care and treatment to Ms. Summers and thus was aware of the risk of serious harm to her as a result of unwanted sexual behavior. In support of their motion for summary judgment, HFPA and Dr. Syptak attached and referenced three exhibits. Exhibit A was a copy of the complaint; Exhibit B was a copy of selected excerpts from Ms. Summers' answers to interrogatories; and, Exhibit C was an incomplete copy of Ms. Summers' expert designation for her counselor. JA, pp. 74-111. HFPA and Dr. Syptak offered no summary judgment evidence, nor any argument, contending that Ms. Summers was not seen, treated, or suffered the serious harms from unwanted sexual conduct as were described in her complaint and in HFPA's own records. JA, pp. 72-111.

F. Neither HFPA nor Dr. Syptak disputed that Dr. Syptak made the numerous vulgar, extremely offensive, grossly inappropriate sexually charged statements to Ms. Summers. Nowhere in their motion for summary judgment did HFPA or Dr. Syptak dispute that Dr. Syptak had in fact made the outrageous and offensive comments described in the complaint. JA, pp. 72-111. HFPA and Dr. Syptak effectively conceded the truth of those allegations for purposes of their motion; arguing that, even if true, Ms. Summers was nevertheless not entitled to have her case heard by a jury without employing a medical expert.

G. The circuit court granted summary judgment and dismissed Ms. Summers' negligence claim ruling that Ms. Summers was required to have expert medical testimony establish that the standard of care "disallows" the vulgar and offensive sexually charged comments made by Dr. Syptak.[3] JA, pp. 291-294, 304-305.

In making its ruling that expert testimony would be required to establish the standard of care, the circuit court reasoned as follows:

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[3] Paradoxically, the circuit court allowed Ms. Summers' intentional infliction of emotional distress claim to proceed. As a result, the case was left with the apparent anomaly that the same conduct constituting an intentional tort would not be a breach of the standard of care owed to a patient (because the jury would need an expert to tell them that when a doctor commits an intentional tort against his patient, he violates the standard of care owed to that patient).

> Whether the standard of care for medical treatment of a patient disallows the types of comments at issue in this case - regardless of the defendants' knowledge - is a question requiring expert testimony. The language used by Dr. Syptak may be within the common knowledge and experience of the jury in judging politeness or discretion; however, this does not translate into a common knowledge of the standard of care for medical treatment. JA, p. 293.

The circuit court thus ruled that while the words used by Dr. Syptak were words that were within the common knowledge and experience of the jury, the jury would nevertheless need the assistance of a medical expert to evaluate those words and their impact on Ms. Summers. Essentially, the circuit court ruled that a male doctor's sexual harassment of a female patient must be regarded as medical treatment that a jury is incapable of judging without the assistance of a medical expert.

Moreover, the circuit court's ruling also appears to have been based on that court's determination that the crude, vulgar, sexually charged comments made by Dr. Syptak involved nothing more than matters of "politeness or discretion." This apparent characterization by the circuit court - that the vulgar and offensive conduct involved merely a question of "politeness or discretion" - was contradicted by its decision to allow Ms. Summers' intentional infliction of emotional distress claim to proceed, since one of the essential elements of that claim is that "the conduct was

outrageous or intolerable." *Womack v. Eldridge*, 215 Va. 338, 342 (1974), emphasis added.

ASSIGNMENT OF ERROR

The circuit court erred in holding that a jury would require expert medical testimony where the conduct at issue violated basic societal norms and involved no medical diagnosis or treatment. [Error preserved at JA, pp. 125-219, 261-262, 295-297, 304-305].

STANDARD OF REVIEW

A circuit court's decision to grant summary judgment is subject to *de novo* review by this Court. *Deutsche Bank Nat'l Trust co. v. Arrington*, 290 Va. 109, 114 (2015). On appeal, the same standard is applied that "a trial court must adopt in reviewing a motion for summary judgment, accepting as true those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason." *Fultz v. Delhaize America, Inc.*, 278 Va. 84, 88 (2009).

AUTHORITIES AND ARGUMENT

I. THE CONDUCT DID NOT INVOLVE THE EVALUATION OF ANY MEDICAL TREATMENT OR PROCEDURE, BUT RATHER WHETHER DR. SYPTAK SEXUALLY HARASSED MS. SUMMERS AND THE INJURIOUS EFFECT OF HIS HARASSMENT.

A. The damage that words cause is a subject about which persons of ordinary intelligence are capable of comprehending, forming an intelligent opinion, and able to draw their own conclusions. How to sexually harass a patient is not part of the medical school curriculum. Neither is how to tell vulgar sex "jokes" or how a male physician can describe his intimate sex life to his female patients. At the risk of stating the patently obvious, the conduct at issue in this case did not involve medical diagnosis, care or treatment in any way, shape, or form. Dr. Syptak's conduct involved words that had no medical application or connection whatsoever. Instead, they were words that, as the circuit court acknowledged, were "within the common knowledge and experience of the jury." The jury would be eminently qualified to judge the conduct at issue because it involved words and conduct within the common knowledge and experience of the average lay person.

B. The jury would not need the assistance of a medical expert in order to determine the harmful impact of words that have no relation to medical care or treatment. That words have the power to injure is not knowledge that medical doctors have a monopoly on. Rather, knowledge of

the reality that words have the power to injure is based on common, everyday human life experience. That is why adages such as "[d]eath and life are in the power of the tongue"[4] and "[r]eckless words pierce like a sword"[5] are found in texts with broad, if not universal, application, and not in some technical medical manual or text.

Even though the circuit court recognized that "[t]he language used by Dr. Syptak may be within the common knowledge and understanding of the jury" it limited that understanding to "judging politeness or discretion" outside of a doctor's office.[6] Implicit in the circuit court's ruling is the determination that because the conduct occurred in a doctor's office it became shrouded in mystery rendering it unintelligible to the jury. There is simply no logical or reasonable basis for this conclusion.

The physical location where conduct occurs does not act to transform what is non-medical into medical, or *vice versa*. It is the nature and character of the conduct that determines whether or not it is medical, not the physical location where it occurred. Using the metaphor found in "reckless words pierce like a sword," had Dr. Syptak been recklessly thrashing about with a

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[4] Proverbs 18:21.
[5] Proverbs 18:18.
[6] Politeness and discretion can only be judged based upon comparison of a spectrum of behaviors that includes rude, vulgar and offensive behaviors on one end, and polite, sensitive and respectful conduct on the other.

sword and had he cut or pierced Ms. Summers, it is difficult to imagine that a logical argument could be made that his conduct was medical, requiring an expert in the standard of care. His reckless words pierced as deeply as any sword. The location of that conduct did not act to transform what was reckless, non-medical conduct into medical diagnosis, care, or treatment.

1. Expert testimony would be inadmissible since the conduct at issue involves a subject which persons of ordinary intelligence are capable of comprehending and evaluating. Rule 2:702 of the Rules of the Supreme Court of Virginia, provides that expert testimony is admissible where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." This establishes a pre-requisite for the use of expert testimony - that it is admissible only where specialized skill or knowledge is required to evaluate the merits of a claim.

> Expert testimony is inadmissible regarding "matters of common knowledge" or subjects "such that [persons] of ordinary intelligence are capable of comprehending them, forming an intelligent opinion about them, and drawing their own conclusions therefrom."

Board of Supervisors v. Lake Servs., 247 Va. 293, 297 (1994), quoting *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 296, 362 S.E.2d 32, 42 (1987), *cert. denied*, 486 U.S. 1023, 100 L. Ed. 2d 228, 108 S. Ct. 1997 (1988).

The jury would be fully capable of comprehending the words used by Dr. Syptak, forming an intelligent opinion about them, and drawing their own conclusions. They would not need the assistance of any expert.

2. Dr. Syptak's conduct either did or did not breach the standard of care, and the notion that there could be competent expert testimony that conduct involving sexual harassment of a patient would <u>not</u> breach the standard of care is ludicrous. While the circuit court ruled that expert testimony was required to show that "the standard of care for medical treatment of a patient disallows the types of comments at issue in this case" it is almost impossible to imagine credible expert testimony to the contrary. One can't help but wonder how a foundation could be laid so that an expert would be allowed to render an opinion that sexual harassment of a patient does not violate the standard of care. It is even less likely that a jury would swallow such an opinion.

Dr. Syptak's "comments" either did or did not breach the standard of care. Given that it is inconceivable that expert testimony could be offered that he did not breach the standard of care; given the circuit court's prior ruling regarding the motion to dismiss pursuant to § 8.01-20.1 - that expert certification was not required; and, given the timing of the circuit court's ruling

changing its mind and requiring Ms. Summers to have expert testimony on this issue, the circuit court's ruling was especially flawed.

C. Had Ms. Summers been an employee of HFPA bringing a workplace sexual harassment claim for the same conduct, expert testimony would not have been required. Had Dr. Syptak commented to a female employee of HFPA that if she lost weight she would look and feel sexy; had he told her lewd masturbation "jokes"; had he told her that if his wife left him, he would have "fun" with the nanny; and, had he described how sex with his wife was "like boarding a pirate ship," and, had that employee brought a civil action pursuant to Title VII of the Civil Rights Act of 1964, and 42 U.S.C. § 2000e, *et seq.*, she would not have been required to present expert testimony in order to prove that she had been subjected to wrongful conduct. The jury in such an action would not require an expert to help them understand and evaluate the words used by Dr. Syptak.

The practical effect of the circuit court's ruling is that Ms. Summers' status as a patient makes it more difficult for her to seek redress than were she an employee. In essence, her status, as a patient, leaves her in a less protected, more vulnerable, position than were she an employee.

This result is difficult to reconcile with established Virginia law and the protection it affords Ms. Summers as a result of the confidential relationship

that exists by virtue of the doctor-patient relationship. "Without question, the patient and physician relationship . . . [is] a confidential relationship." *Diehl v. Butts*, 255 Va. 482, 489 (1998), citing *James v. Jane*, 221 Va. 43, 50 (1980). As this Court has noted, a confidential relationship is one characterized by a duty of protection and care being "one wherein a party is bound to act for the benefit of another, and can take no advantage for himself." *Estate of Parfiff v. Parfitt*, 277 Va. 333, 341 (2009), quoting, *Friendly Ice Cream Corp. v. Beckner*, 268 Va. 23, 33-34 (2004).

Virginia's protective classification of the doctor-patient relationship as a confidential relationship is in accord with the general authorities.

> The relation of physician and patient has its foundation on the theory that the former is learned, skilled, and experienced in those subjects about which the latter knows little or nothing, but which are of the most vital importance and interest to him, since upon them may depend the health, or even life, of himself or family; therefore the patient must necessarily place great reliance, faith, and confidence in the professional word, advice and acts of the physician . . .

61 Am. Jur. 2d Physicians, Surgeons, Etc., § 166.

The circuit court's ruling, requiring Ms. Summers to present expert testimony to establish that Dr. Syptak violated his duty of care toward her when he sexually harassed her, stands at odds with these principles. Although, as her physician, Dr. Syptak is deemed to hold a position of trust

and confidence and have a duty to act for her benefit, under the circuit court's ruling, he is afforded a layer of insulation protecting him from violation of that duty. Where a less-protected employee could seek to hold Dr. Syptak liable for the same conduct without an expert, his presumably protected patient must overcome an additional hurdle in the form of paying the cost of a medical expert.

Accordingly, not only was the conduct at issue - the impact of words having no relationship to medical diagnosis or treatment - a subject that the jury was manifestly capable of understanding and evaluating without expert assistance, but requiring expert testimony has the practical effect of undermining the protection the confidential physician-patient relationship is intended to afford patients.

II. THE CIRCUIT COURT WAS CORRECT IN ITS INITIAL DETERMINATION THAT THE ACTS OF NEGLIGENCE AT ISSUE "CLEALY [LAY] WITHIN THE RANGE OF THE JURY'S COMMON KNOWLEDGE AND EXPERIENCE."

Prior to its ruling on the MSJ, the circuit court had ruled that expert certification was not required under Va. Code § 8.01-20.1. JA, 68-69. Expert certification was not required because Ms. Summers had alleged a medical malpractice action that asserts a theory of liability where expert testimony is not necessary because the act of negligence "clearly lies within the range of the jury's common knowledge and experience." The circuit court was correct

in its initial ruling that the conduct at issue clearly lies within the jury's common knowledge and experience. There was nothing in the record to account for circuit court's dramatic about-face. Ms. Summers had not amended her complaint and neither Dr. Syptak nor HFPA had submitted any summary judgment materials disputing the allegations of sexual harassment by Dr. Syptak.

III. THIS COURT HAS NOT SUBSCRIBED TO THE NOTION THAT SIMPLY BECAUSE CONDUCT OCCURS IN A MEDICAL FACILITY JURORS ARE INCAPABLE OF EVALUATING THE CONDUCT WITHOUT EXPERT TESTIMONY.

In *Beverly Enterprises-Virginia v. Nichols*, 247 Va. 264 (1994), the plaintiff's decedent who suffered from Alzheimer's was placed in a nursing home. At the time of admission, employees of the corporate nursing home were advised that the patient had prior choking incidents and needed assistance when eating. *Id.*, at 266. Subsequent to her admission, a food tray was placed before the patient by a different employee. *Id.* The patient was not assisted with eating and died after choking to death. *Id.*, at 267. After a verdict in favor of the decedent's estate, the corporate nursing home appealed, contending that:

> [P]laintiff failed to show what the standard of care required Lynn Shores to do with the information the Nichols family claimed they gave about the prior choking incident, or with the information from the hospital record that said that the patient needed to be

> fed all of her meals. The plaintiff did not put on an expert witness and properly qualify that witness as an expert on nursing home intake assessments or as an expert witness on how a patient is to be fed. *Id.*, at 267.

Presumably the nursing home employee who placed the food tray before the decedent did not know that she required assistance eating and therefore the nursing home argued on appeal that the plaintiff should have been required to show by expert testimony that the failure to properly implement that information into the decedent's care breached the standard of care. This Court rejected that argument and held that the plaintiff was not required to present expert testimony to establish a *prima facie* case of medical negligence "because the question of whether a reasonably prudent nursing home would permit its employees to leave a tray of food with an unattended patient who had a history of choking and who was unable to eat without assistance is certainly within the common knowledge and experience of a jury." *Id.*, at 269.

> *The (corporate) defendant knew* that she was unable to feed herself and that she had two prior serious choking incidents. In spite of this knowledge, *the defendant's employee* left a tray of food with Mrs. Nichols and failed to provide assistance to her.[7]

[7] This holding, that the corporate defendant knew what its employees knew and was responsible for the acts and omissions of its other employee, is grounded in the same *respondeat superior* principles as Ms. Summers' claim against HFPA. JA, p. 10.

> Certainly a jury does not need expert testimony to ascertain whether the defendant was negligent because its employees failed to assist Mrs. Nichols under these circumstances. *Id.*, at 268 (emphasis added).

Likewise, in the present case, HFPA knew that Ms. Summers was particularly vulnerable to unwanted sexual conduct and comments. In spite of this, HFPA's employee, Dr. Syptak, made numerous unwanted sexual comments to her constituting sexual harassment. Practically speaking, from a liability standpoint, Dr. Syptak's conduct was no different than that of the employee who put the food tray in front of Mrs. Nichols. To paraphrase *Beverly Enterprises,* certainly a jury does not need expert testimony to ascertain whether HFPA was negligent because one of its employees made offensive and inappropriate sexual comments to Ms. Summers under the circumstances of this case.

In *Coston v. Bio-Medical Applications of Virginia, Inc.*, 275 Va. 1 (2008) the plaintiff alleged that while she was receiving dialysis treatment she was injured when a chair she was seated in failed causing her to fall and strike the ground. Despite this, the defendant's employees placed her back in the same chair which caused her to fall a second time. *Id.*

As in the present case, the defendant filed a pretrial motion for summary judgment contending that plaintiff had failed to identify any expert witness on the standard of care and that since the deadline had passed, plaintiff would not able to establish a *prima facie* case of medical negligence. *Id.*, at 2. There, as here, the circuit court granted defendant's motion for summary judgment and dismissed the action, holding that plaintiff was required to present expert testimony on the standard of care. *Id.*, at 3.

After noting that "issues involving medical negligence *often* fall beyond the realm of the common knowledge and experience of a lay jury, and, therefore, in *most* instances expert testimony is required to assist a jury" this Court reversed the summary judgment in favor of the defendant holding that whether placing a patient in a defective chair was medical negligence "is within the jury's common knowledge and experience and, therefore, expert testimony is not necessary." *Id.*, at 11 (emphasis added).

In *Coston*, evaluation of the conduct at issue - there placing someone in a defective chair - did not require medical training, knowledge or experience. The only thing "medical" about the conduct was its geographic location. Likewise, the conduct at issue in the present case, sexual harassment of someone known to be extremely sensitive and vulnerable to

such conduct, does not require medical expertise. The only thing medical about Dr. Syptak's conduct was its geographic location.

In *Dickerson v. Fatehi*, 253 Va. 324 (1997) the plaintiff alleged that during a surgery, a physician had used a hypodermic needle with a plastic attachment that the physician failed to remove at the completion of the surgery. The plaintiff brought suit after experiencing severe pain and having to undergo another surgery to remove the hypodermic needle and plastic attachment. *Id.*, 326.

There, as in the present case, the circuit court granted summary judgment in favor of the defendants on the grounds that expert testimony was necessary to establish the appropriate standards of care. *Id.*, at 325 This Court reversed, holding that the facts were such that "the jurors, absent expert testimony, reasonably could determine, by calling upon their common knowledge and experience, whether Fatehi was negligent and whether his negligence was a proximate cause of Dickerson's injuries." *Id.*, at 328.

In *Fatehi*, the conduct at issue involved actual medical treatment. Nevertheless, this Court ruled that the jury did not need a medical expert to determine that it is medical negligence to fail to do something so basic as removing a needle that was put in a patient during a surgery. In the present

case, the conduct at issue does not involve medical diagnosis or treatment of any kind. The arguable basis for requiring expert medical testimony is thus even less than that of *Fatehi*.

As this Court has repeatedly recognized, issues involving medical negligence *often*, but don't always fall beyond the realm of the common knowledge and experience of a lay jury, and thus there are instances, like the present case and those noted above, where the conduct involved is within the jury's common knowledge and experience.

One does not have to be a physician or have expertise in the practice of medicine to understand and evaluate the impact of sexual harassment on someone. One only need be a human being who has experienced life. By definition, a jury is perfectly suited to evaluate the conduct at issue without the assistance of any hired expert. To argue otherwise requires one to adopt a profoundly condescending view of the intelligence and collective wisdom of jurors and, by extension, the jury system itself, that is at odds with its exalted and protected status under our laws.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, Appellant Alexia Summers respectfully requests that this Honorable Court reverse and vacate the order of the

Circuit Court of Rockingham County granting summary judgment, and remand this case for further proceedings.

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CERTIFICATE

I hereby certify, pursuant to Rule 5:26(h), that on this 5th day of December, 2016, I electronically filed the foregoing Brief of Appellant with accompanying Appendix via VACES, with the required paper copies set to be delivered within the prescribed one business day. I further certify that on this 5th day of December, 2016, the Brief and Appendix were served, via e-mail, upon the following:

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Exclusive of the portions exempted by Rule 5:26(h), this brief does not exceed **50** pages.

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