SCV: Submitted on 12-30-2016 15:42:53 EST for filing on 12-30-2016

IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 160377

ALEXIA SUMMERS

Petitioner-Appellant

v.

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

Respondents-Appellees

BRIEF OF APPELLEES

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INTRODUCTION

In this medical-malpractice action, Plaintiff alleges that the Defendant doctor, a family physician, breached the standard of care by joking about sex-related topics during casual conversation incident to seven office visits. The visits—which occurred over a two-month period—were for high-blood pressure, suspected liver problems, and other physical ailments. Plaintiff, an adult, does not allege any inappropriate touching, verbal abuse, or harassment. Rather, she claims that the doctor's joking comments about sex triggered strong memories and associations with past abuse at the hands of other persons.

Plaintiff has a history of mental illness, alleged sexual abuse, and alleged workplace sexual harassment. Plaintiff alleges that Dr. Syptak should have better familiarized himself with this "history and mental status" before treating her. Among other things, she notes that her medical records show that—some two-and-a-half years before—another physician at the practice had treated Plaintiff for emotional problems related to the alleged abuse and workplace harassment.

Plaintiff bases her malpractice action on two alleged breaches of the standard of care. First, she alleges that the Defendant doctor breached the standard of care by not reviewing her history more thoroughly. Second, plaintiff alleges that, given her "known" history, defendant breached the standard of care by making comments concerning sexual matters. These claims are interdependent; her theory of the case requires her to establish both.

Plaintiff did not identify any expert witness to establish either of these alleged breaches of the standard of care. In granting summary judgment, the Circuit Court held that Plaintiff needed expert testimony to establish both. Only a medical expert could explain the extent to which a family physician needed to review a patient's history before treating her. And only a medical expert could determine whether the alleged comments exceeded the bounds of appropriate doctor-patient communications.

On appeal, Plaintiff challenges only the second of these two independently sufficient rulings. For that reason alone, this Court should summarily dismiss her appeal. Where, as here, a court states

multiple bases for its ruling, an appellant must challenge all such bases or waive any objections.

Plaintiff's appeal also fails on the merits because—contrary to her arguments—she needed expert testimony to establish her medical-malpractice claim. Only a medical expert could explain the extent to which a family physician should review a patient's history before treating her. And only a medical expert could explain the parameters of appropriate doctor-patient communications incident to treatment.

Plaintiff's appeal fails for a final reason not addressed by the Circuit Court: Plaintiff could not establish causation of physical injury without a medical expert. Where, as here, a plaintiff bases an emotional distress claim on alleged negligence, the plaintiff must establish that physical injury resulted from the emotional distress. In the present case, Plaintiff claimed that her alleged emotional distress worsened her fibromyalgia symptoms and nerve pain. But to substantiate this causation theory at trial, Plaintiff needed a medical expert. Because she had none, her medical malpractice claim failed as a matter of law.

For all of these reasons, amplified below, this Court should affirm.

STATEMENT OF FACTS

Plaintiff's Office Visits With Dr. Syptak

Defendant J. Michael Syptak, M.D., is a physician at Harrisonburg Family Practice Associates ("HFPA"). (App. 1-2.) Plaintiff Alexia Summers saw Dr. Syptak for the first time on March 28, 2014, the day before a scheduled hernia removal operation. (App. 5, 184.) Plaintiff had significantly elevated blood pressure, which needed to be evaluated before surgery. (App. 184.)

Plaintiff was a longstanding patient of Dr. Syptak's wife, Deborah A. Nio, M.D., who also practiced at HFPA. (App. 2.) Dr. Nio, however, was unavailable that day. (App. 5.) Because Plaintiff needed to be seen immediately, she saw Dr. Syptak instead. (*Id.*) Plaintiff claims that, during this appointment, Dr. Syptak discussed his own interracial children: "That day he made comments about how he and his wife, who is my family doctor, have five Asian kids." (App. 164.) Plaintiff further claims that Dr. Syptak made an offensive remark regarding children of other races. (*Id.*) Plaintiff says that this comment bothered her because "[o]ne of my own children is half African American as a result of me being raped." (*Id.*) But Plaintiff does not claim that she told

Dr. Syptak about the rape or that she found his remarks to be offensive or injurious.

Over the next two months, Plaintiff saw Dr. Syptak six more times. (App. 115, 117.) Her husband went with her on May 7, the penultimate visit, to discuss a recently taken liver ultrasound. (App. 164.) Plaintiff and her husband surreptitiously recorded this session.[1] (App. 165.) The recording reveals that, after meeting Plaintiff's husband—and in the context of a discussion of weight loss and sleep apnea—Dr. Syptak joked about his own marriage and how finding his wife in their large king-sized bed was like playing a game of "Marco Polo":

> I mean, we already have a king-sized bed, but with people our size, it's like five beds. Okay? So—and a pillow that doesn't reach across the middle. What's that?
>
> I swear, having sex is like boarding a pirate ship. Like, I'll be like, roll over and climb the next wall. Like, I think I'm in the ocean here. I don't know what's going on. Like, where is you? I'm hiding. Marco!

(App. 196.) Dr. Syptak said that this arrangement was fine, though, because at his age he could not sleep while holding his wife without "my

[1] A transcript of the recording is in the Appendix at pages 193-212.

arms going dead." (App. 197.) Neither Plaintiff nor her husband objected to this mildly ribald humor. Indeed, her husband contributed to the conversation, opining that "you sleep better" in a king bed. (App. 197.)

After this initial joking, Dr. Syptak engaged Plaintiff and her husband in a detailed clinical discussion about Plaintiff's ultrasound, her blood-test results, and the possible need for a liver biopsy at UVA. (App. 197-201.) During this conversation, Dr. Syptak said that Plaintiff's cooking may have contributed to a fatty liver, at which point Plaintiff's husband jokingly asked her "Are you trying to kill me now?" Plaintiff responded "Uh-huh." (App. 199.) At the end of the visit, Dr. Syptak casually spoke with Plaintiff's husband about various subjects unrelated to Plaintiff's treatment, including marriage, politics, "Obamacare," parenting, etc. (App. 204-12.)

Plaintiff and her husband did not object to Dr. Syptak's comments. Pertinent here, they did *not* tell Dr. Syptak that Plaintiff had a history of sexual abuse; nor did they ask him to change the subject when Dr. Syptak discussed matters relating to sex. To the contrary, the

recording shows that Plaintiff and her husband were active participants in a meandering, casual conversation.

In her Complaint, Plaintiff alleges that Dr. Syptak made certain other statements relating to sex that were *not* captured on the May 7, 2014 recording. Although unsure of the date on which these alleged conversations occurred—Plaintiff says that all of the seven visits "kind of all run together in my mind"—she contends that Dr. Syptak told her a story about a boy who would not let his mom wash his socks because he was ashamed that "he had masturbated and ejaculated into them." (App. 6, 165, 187-88.) She alleges that Dr. Syptak commented that, notwithstanding his age, he still had sex with his wife and was "still like a 'jack rabbit.'" (App. 6.) She alleges that Dr. Syptak told her that her husband would find her sexier if she lost some weight. (*Id.*) She alleges that Dr. Syptak joked that, if his wife left him, he would call up his nanny to "have some fun." (*Id.*) And she alleges that Dr. Syptak gave her a nasal spray, commenting "this is for your nostrils—no other holes," which Plaintiff interpreted to be "sexual innuendo." (*Id.*) These comments were not, however, recorded.

Although Plaintiff now claims to have been "pierced as deeply as any sword" by what she now (mis)characterizes as Dr. Syptak's "sexual harassment," she made no complaints at the time. Indeed, she saw him a total of seven times throughout April and May 2014. That includes an office visit that occurred a week *after* the recorded conversation described above.

Plaintiff Asserts that Dr. Syptak's Statements Caused her Psychological and Physical Injury

Plaintiff has a history of mental illness—including bipolar disorder, depression, and PTSD—for which she has taken a number of psychotropic drugs. (App. 2, 8, 167.) She claims that she was sexually abused as a child and that, in 2010-11, was sexually harassed at the workplace.[2] (App. 2-3.) During this period of alleged workplace sexual harassment, Plaintiff saw Dr. Nio for psychological problems that Plaintiff claims resulted from that harassment. (App. 2-5.) Plaintiff ultimately settled a sexual harassment lawsuit against her former employer for an undisclosed sum. (App. 160.) She has fibromyalgia,

[2] Plaintiff refused to provide details about her workplace harassment, citing a confidentiality provision in the settlement agreement with her former employer. (App. 160, 168.)

nerve pain (radiculopathy), degenerative disc disease, lower back pain, and is now on full disability. (App. 133, 218, 161.)

Plaintiff alleges that Dr. Syptak's remarks to her triggered a severe emotional response and precipitated a suicide attempt. (App. 8-9.) She also contends that the experience exacerbated certain pre-existing physical conditions, including her fibromyalgia and nerve pain. (App. 10, 218.)

The Complaint

Plaintiff filed her Complaint on July 18, 2014, two months after her last visit to Dr. Syptak. The gist of the Complaint is that Dr. Syptak should not have made statements about sex to a patient with Plaintiff's history, sensitivity, and vulnerability. (App. 1-11.) Plaintiff does not, however, allege that Dr. Syptak knew or understood her history of sexual abuse and harassment. To the contrary, she claims that Dr. Syptak did *not* properly "examine, evaluate, and/or understand Plaintiff's history and mental status." (App. 10.)

In her malpractice claim,[3] Plaintiff alleges that "as her physician" Dr. Syptak had the duties: (1) "not to cause harm to her," (2) "to render care and treatment with that degree of skill, care and diligence as possessed by or expected of a reasonably competent physician under the same or similar circumstances," and (3) "to be reasonably familiar with Plaintiff's Medical Records." (App. 9.) She alleges that "Dr. Syptak breached those duties and was negligent in that he engaged in unsolicited, unwanted, inappropriate, and highly offensive sexual comments, 'jokes,' and sexual innuendo which he directed toward or in the presence of Plaintiff." (App. 10.) And she alleges that Dr. Syptak's negligence caused her severe emotional and physical injury. (*Id.*)

Plaintiff asserts that Dr. Syptak's employer, HFPA, is vicariously liable for these actions because, while treating Plaintiff, Dr. Syptak "was acting within the scope of his employment and agency with HFPA." (App. 10.) Plaintiff alleges no independent basis for HFPA's liability.

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[3] Plaintiff also brought a claim for intentional infliction of emotional distress, which she nonsuited after the Circuit Court dismissed her malpractice claim. (App. 301).

The Summary Judgment Motion

Plaintiff's expert designation identified only one expert witness, Mercy Souder. (App. 105-11.) Souder is a licensed professional counselor, not a medical doctor. (App. 110.) Attached to the designation is Souder's undated report detailing Plaintiff's psychological history. (App. 222-25.) Souder, who has counseled Plaintiff since October 12, 2010, reports that Plaintiff had been raped as a child, had attempted suicide multiple times before the events at issue in this case, and had been sexually harassed at her former job. (App. 223-24.) Souder also notes that Plaintiff had been diagnosed with bipolar disorder and PTSD. (App. 224.) Finally, Souder states that Plaintiff's symptoms worsened after her treatment by Dr. Syptak. (*Id.*)

Souder expresses no opinion about whether Dr. Syptak should have reviewed Plaintiff's entire chart or whether, had he done so, he would have known of her particular vulnerability to references to sex. She expresses no opinion about whether Dr. Syptak's comments to Plaintiff were within the standard of care. And she expresses no opinion about the extent—if any—to which Plaintiff's current

psychological and physical problems are attributable to Plaintiff's visits to Dr. Syptak.

Defendants moved for summary judgment, arguing that Plaintiff's failure to designate a medical doctor as a standard-of-care and causation expert meant that she could not establish her medical malpractice claim against Dr. Syptak. (App. 72-73; 74-87.) In response, Plaintiff contended that these issues did not require medical experts. (App. 143.) And she further argued that *Dr. Nio's* knowledge of Plaintiff's history could be combined with *Dr. Syptak's* statements to impute knowledge and liability to the corporation, HFPA. (App. 134-38.)

The Circuit Court granted Defendants' motion as to the negligence claim. To begin with, it rejected Plaintiff's attempt to weld Dr. Nio's knowledge to Dr. Syptak's statements in order to create liability for HFPA, noting that this theory was inconsistent with agency law. (App. 293) (rejecting concept of "downward imputation."). The Circuit Court next addressed Plaintiff's allegation that Dr. Syptak had a "duty to be reasonably familiar with Plaintiff's Medical Records." It held that only

a qualified medical expert could explain the extent to which a physician needed to review a patient's chart before an examination:

> The issue, as stated in Plaintiff's Complaint, is whether [Dr. Syptak] ***should have known*** [of Plaintiff's vulnerable condition] by more thoroughly reviewing her records. *See* Pl.'s Compl, ¶ 33 ("At all times relevant hereto, Dr. Syptak owed Plaintiff the duty to be reasonably familiar with Plaintiff's Medical Records.") **The question of whether the applicable standard of care required Dr. Syptak to do this, and to what extent, lies outside the realm of a lay person's common knowledge and experience**.

(App. 293) (italics in original; bold emphasis added).

As an additional basis for dismissing the malpractice claim, the Circuit Court held that—regardless of Dr. Syptak's knowledge of Plaintiff's prior history—Plaintiff still needed an expert witness to explain whether the standard of care forbade physicians from making comments like Dr. Syptak's. (*Id.*) The Circuit Court reasoned that the jury's general familiarity with standards for politeness and discretion did not equip it to evaluate whether the alleged statements violated the medical standard of care for doctor-patient interactions:

> Whether the standard of care for medical treatment of a patient disallows the types of comments at issue in this case—regardless of the defendant' 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.

(App. 293) (emphasis added).[4]

The Circuit Court, however, allowed Plaintiff's intentional infliction of emotional distress claim to proceed: "I believe under the law of Virginia, at this point I have to deny it as it relates to Count 1, a claim for intentional infliction of emotional distress." (App. 293.) Rather than go to trial on this remaining claim, Plaintiff nonsuited the action, thereby ripening the present case for appeal.[5] (App. 301.)

Plaintiff's Petition for Appeal included three assignments of error. In them, Plaintiff argued that: (1) the Circuit Court used the wrong standard for evaluating Defendants' summary judgment motion, (2) the Circuit Court wrongly rejected Plaintiff's theory that Dr. Nio's knowledge of Plaintiff's history of abuse could be combined with Dr. Syptak's comments to create liability for their mutual employer, HFPA, and (3) "'The circuit court erred in holding that a jury would

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[4] Because this disposed of the negligence claim, the Trial Court did not address—one way or another—Defendants' alternate argument that Plaintiff needed expert testimony to establish causation of physical injury.

[5] Summers filed a new Complaint based on this claim in the Circuit Court, which was served upon Defendants on April 1, 2016.

require expert medical testimony where the conduct at issue violated basic societal norms and involved no medical diagnosis or treatment." (Pet. at 1-2.)

This Court granted Plaintiff's Petition only as to the third assignment of error. Accordingly, the Circuit Court's rulings vis-à-vis the other two assignments are now law of the case.

ARGUMENT

I. Plaintiff's appeal fails because it addresses only one of the two alternative bases for the Circuit Court's ruling.

As a threshold matter, this Court should dismiss this appeal because it addresses only one of the two alternate bases for the Circuit Court's dismissal of Plaintiff's malpractice claim. The theory advanced in the Complaint rested on two distinct propositions: (1) that Dr. Syptak *should have known* about Plaintiff's history and (2) that Dr. Syptak *should have refrained* from making remarks relating to sex to someone with Plaintiff's "known" history.[6] (App. 9.) In its letter opinion, the

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[6] Plaintiff does not allege that Dr. Syptak himself knew about her history—indeed, she faults him for not discovering it—so this must mean constructive "knowledge." In her brief, however, Plaintiff continues to argue that Defendant *HFPA* had actual knowledge of Plaintiff's psychological vulnerability—and thus could be held liable for

(note continued on following page . . .)

Circuit Court ruled that Plaintiff needed expert testimony to establish *both* of these key propositions. (App. 293.) Yet Plaintiff did not have a qualified expert to support either. So the Circuit Court had two independently sufficient bases for dismissing her malpractice claim.

Plaintiff's appeal, however, addresses only one of these two bases—i.e., the absence of an expert to establish proposition (2). Plaintiff ignores the Circuit Court's additional holding that she needed an expert to establish proposition (1)—i.e., that Dr. Syptak "should have known [of Plaintiff's psychological history] by more thoroughly reviewing her records." (App. 293.) Her assignment of error does not mention this holding. Nor does her appellate brief discuss it. Instead, Plaintiff focuses on the Circuit Court's ruling that—regardless of Dr. Syptak's knowledge of Plaintiff's history—Plaintiff still needed

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(. . . note continued from previous page)
Dr. Syptak's actions—by virtue of *Dr. Nio's* prior treatment. As noted above, however, the Circuit Court rejected this argument, and this Court refused Plaintiff's appeal on that issue. *See supra* at 9, 12. This Court should not entertain Plaintiff's twice-rejected argument that HFPA, a corporate entity, knew of her vulnerability. Her case depends entirely on Dr. Syptak's alleged *constructive* knowledge of her history. And that, in turn, depends on whether Dr. Syptak had a duty to review Plaintiff's chart more thoroughly before examining her.

expert testimony to establish that the comments he made while treating her violated the standard of care.

This is fatal to Plaintiff's appeal. "It is well-settled that a party who challenges the ruling of a lower court must on appeal assign error to each articulated basis for that ruling." *Manchester Oaks Homeowners Ass'n, Inc. v. Batt*, 284 Va. 409, 421 (2012). In the present case, Plaintiff needed an expert to establish her key claim that "Dr. Syptak failed to appropriately examine, evaluate, and/or understand Plaintiff's history." (App. 10.) Because Plaintiff's appeal does not address the Circuit Court's holding that she needed expert testimony to establish that Dr. Syptak should have "more thoroughly review[ed] her records," and because that holding was sufficient to support the ruling below, Plaintiff's appeal fails as a matter of law. (App. 293.)

II. The Circuit Court properly held that Plaintiff needed a standard-of-care expert.[7]

Yet even if this Court addresses the merits of Plaintiff's appeal, it should affirm because—as the Circuit Court appropriately held—Plaintiff needed expert testimony to show (1) that Dr. Syptak should have known about Plaintiff's history and so (2) should not have made the statements in question.

A. Plaintiff needed expert testimony to establish that Dr. Syptak violated his duty to familiarize himself with Plaintiff's history.

Take, first, Plaintiff's allegation that Dr. Syptak breached his duty as a physician to review her medical records thoroughly before examining her. (App. 9.) In her Complaint, Plaintiff contends that a proper review of her medical history would have revealed that she had been treated two-and-a-half years before for psychiatric problems relating to sexual abuse and harassment. (App. 5.) She alleges that

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[7] Under Rule 3:20, a court "shall" enter summary judgment "[i]f it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment." This Court reviews summary judgment decisions de novo. *Virginia Fuel Corp. v. Lambert Coal Co., Inc.*, 291 Va. 89, 97 (2016).

this medical history should have alerted Dr. Syptak to Plaintiff's special sensitivity to remarks relating to sex. (App. 9-10.)

The Circuit Court properly granted summary judgment because Plaintiff failed to identify any standard-of-care expert to testify about Dr. Syptak's allegedly inadequate care. Under the Medical Malpractice Act,[8] "[t]he standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth." Code § 8.01-581.20.

In most medical malpractice cases, a deviation from the standard of care must be shown through expert testimony:

> Issues involving medical malpractice often fall beyond the realm of common knowledge and experience of a lay jury. Therefore, *in most instances, expert testimony is required to assist the jury*. Expert testimony is ordinarily necessary to establish the appropriate standard of care, a deviation from

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[8] Under Virginia's Medical Malpractice Act, "'malpractice' means any tort action or breach of contract action for personal injuries or wrongful death, based on health care or professional services rendered, or which should have been rendered, by health care provider, to a patient." Code § 8.01-581.1. Defendants in the present case are "health care providers." And the current action is a "tort action . . . for personal injuries based on professional services rendered" by Dr. Syptak to Summers. Accordingly, the Medical Malpractice Act applies.

> that standard, and that such deviation was the proximate cause of damages.

Beverly Enters.-Virginia, Inc. v. Nichols, 247 Va. 264, 267 (1994) (emphasis added). *See also Fruiterman v. Granata*, 276 Va. 629, 638 (2008) ("Expert testimony is generally required to establish . . . the appropriate standard of care and a deviation from the standard."); *Perdieu v. Blackstone Family Practice Ctr., Inc.*, 264 Va. 408 (2002) ("[E]xpert testimony is ordinarily necessary to establish the appropriate standard of care, to establish a deviation from the standard, and to establish that such a deviation was the proximate cause of the claimed damages.") (quoting *Raines v. Lutz*, 231 Va. 110, 113 (1986)); *Rogers v. Marrow by Marrow*, 243 Va. 162, 167, 413 S.E.2d 344, 346 (1992) ("In order to recover for medical negligence, the plaintiff ordinarily must prove through the use of expert testimony the applicable standard of care, a deviation from that standard, proximate causation, and damages.").

It is only in rare instances that a medical-malpractice plaintiff can establish a deviation from the standard of care without expert testimony. *See, e.g.*, *Coston v. Bio-Medical Applications of Virginia, Inc.*, 275 Va. 1, 5 (2008); *Beverly Enterprises-Virginia, Inc. v. Nichols*,

247 Va. 264, 268 (1994). Those cases, unlike the present case, all involve circumstances where the negligent act is something within the jury's common knowledge and experience.

In *Coston*, for example, dialysis-center employees placed the plaintiff in a chair that they knew was defective. The chair failed, causing the plaintiff to fall to the ground and suffer injuries. Although the case *was* a medical malpractice action—it was a tort action against a health care provider that arose out of the rendering of health-care services to a patient—this Court held that a standard-of-care expert was unnecessary because the alleged act of negligence fell within the ordinary experience of the jury. *Coston*, 275 Va. at 7.

Beverly-Enterprises-Virginia was much to the same effect. There, the decedent was a nursing-home Alzheimer's patient who had problems swallowing. Although this patient had choked on food in the past, needed to be spoon-fed, and was a known choke risk, an employee left food with the patient without providing any feeding assistance. The patient choked to death on this food. The Court held that it did not take an expert to know that leaving such a patient unattended and unassisted was a deviation from a nursing home's standard of care.

Beverly-Enterprises, 247 Va. at 268. *See also Webb v. Smith*, 276 Va. 305, 308 (2008) (no standard-of-care expert required where doctor was supposed to perform two different procedures while the patient was open, but forgot and only did one).

In the present case, Plaintiff alleges that Dr. Syptak violated his "duty to be reasonably familiar with Plaintiff's Medical Records." (App. 9.) But whether, and to what extent, the standard of care requires a family physician to review a patient's medical records before treating her is an issue that requires expert testimony to resolve. A lay juror is not equipped to judge whether, or to what extent, a family practice physician must review a patient's medical records before speaking to her.

This is not a case where "the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience." Unlike knowingly leading a patient to a broken chair, or knowingly leaving a demented choke-risk patient unattended during a meal, a physician's review of medical records is not a subject that the jury can evaluate without further assistance. Plaintiff needed expert testimony

from a practitioner in the same "specialty or related field of medicine." Code § 8.01-581.20. Plaintiff, however, identified no such expert.

The absence of such expert testimony was fatal to Plaintiff's negligence claim. As noted above, the gist of Plaintiff's negligence theory is that Dr. Syptak failed to adequately review her medical records and made the alleged statements because he was unaware of Plaintiff's history of sexual abuse and harassment. Because Plaintiff needed a standard-of-care expert to show that Dr. Syptak's review of her history was inadequate, and because Plaintiff identified no such expert in her designation, the Circuit Court properly granted Defendants' motion for summary judgment.

B. Plaintiff needed an expert to establish whether Dr. Syptak's comments violated the standard of care for family physicians conducting office visits.

The Circuit Court also was correct in holding that Plaintiff needed a medical expert to explain whether the standard of care forbade Dr. Syptak from making comments and jokes relating to sex. Dating back to Hippocrates, a key part of medical practice has been "bedside

manner"—making a personal connection with the patient.[9] A good bedside manner puts the patient at ease, makes the patient more receptive to medical advice, and increases the quality and amount of information that the patient provides to the physician. It also improves the patient's satisfaction with the interaction: "[P]hysicians may improve patients' sense that the doctor has given them adequate time by simply talking about the weather, telling a joke, or evoking conversation about something other than the health of the patient." Howard Bennett, "Humor in Medicine," SOUTHERN MEDICAL JOURNAL, Vol. 96, No. 12 (Dec. 2003) (collecting authority on the subject).

Thus, although a physician's casual remarks, often including humorous ones,[10] may not be about medicine, they are nevertheless an integral part of medical practice. Conversely, otherwise innocuous

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[9] Indeed, the modern version of the Hippocratic Oath includes the statement: "I will remember that there is art to medicine as well as science, and that warmth, sympathy, and understanding may outweigh the surgeon's knife or the chemist's drug." *See* http://guides.library.jhu.edu/c.php?g=202502&p=1335759 (accessed Dec. 20, 2016).

[10] Television and film reflect this, with comedian-doctors frequently appearing as characters in medical dramas, e.g., Dr. Hawkeye Pierce ("M*A*S*H"), Dr. Wayne Fiscus ("St. Elsewhere"), and the real-life Dr. Hunter "Patch" Adams ("Patch Adams").

words may have a harmful effect when uttered by a trusted physician to a patient. A bad bedside manner can, in some cases, harm a patient. Learning the boundaries of appropriate doctor-patient interaction is an essential part of medical training.

As this Court noted in *Harris v. Kreutzer*, 271 Va. 188, 203 (2006), it is also a subject requiring "appropriate expert testimony." In *Harris*, the plaintiff sued a clinical psychologist who had performed a Rule 4:10 independent medical examination on her during an earlier motor-vehicle-accident lawsuit. In that earlier suit, the plaintiff claimed that she had suffered traumatic brain injury. In her later medical-malpractice suit, she claimed that during the Rule 4:10 examination for the motor-vehicle-accident suit, the clinical psychologist "verbally abused [Harris], raised his voice to her, caused her to break down into tears in his office, stated that she was 'putting on a show,' and accused her of being a faker and a malingerer." *Id*. at 194. As in the present case, the plaintiff alleged that this conduct exacerbated pre-existing physical and emotional conditions.

On appeal, this Court held that the plaintiff's allegations of verbal abuse sufficed to state a medical-malpractice claim.[11] But it noted that, at trial, the plaintiff would need expert testimony to establish the clinical psychologist's alleged breach of his duty of care: "If such conduct was proven at trial, *and appropriate expert testimony showed such conduct breached the applicable standard of care for a reasonably prudent clinical psychologist* in Virginia, then a trier of fact could include that malpractice occurred." *Id.* at 203 (emphasis added).

In the present case, as in *Harris*, Plaintiff contends that Dr. Syptak violated the standard of care governing an appropriate doctor-patient interaction. Her Complaint repeatedly emphasizes the fact that Dr. Syptak made the statements in a clinical context. Thus, paragraph 14 asserts that "at the time Dr. Syptak engaged in the in the conduct described more fully above, he was Plaintiff's treating physician and as a result occupied a position of trust and confidence as regards Plaintiff." (App. 7.) Paragraph 15 asserts that "[a]s Plaintiff's physician, Plaintiff placed great reliance, faith and confidence in his

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[11] Though not an intentional-infliction-of-emotional-distress claim. *See Harris*, 271 Va. at 204.

professional word, advice, and conduct and Plaintiff was particularly vulnerable and sensitive to the words, advice and conduct of Dr. Syptak." (*Id.*) Paragraph 21 claims that Dr. Syptak's conduct "as Plaintiff's physician" was inappropriate. (App. 8.) Paragraph 31 states that "Dr. Syptak owed Plaintiff a duty as her physician not to cause harm to her." (App. 9.) And paragraph 32 states that "Dr. Syptak owed Plaintiff the duty to conduct himself in a professional and caring manner." (*Id.*)

Accordingly, as the Circuit Court rightly pointed out, the issue is not whether "[t]he language used by Dr. Syptak" violated ordinary standards of "politeness or discretion." The issue is whether "the standard of care for medical treatment of a patient disallows the types of comments at issue in this case." The Circuit Court correctly concluded that this "is a question requiring expert testimony." *See Harris*, 624 S.E.2d at 203.

On appeal, however, Plaintiff discounts the importance of the clinical context of Dr. Syptak's statements, saying that "[i]t is the nature and character of the conduct that determines whether or not it is medical, not the physical location where it occurred." (Br. at 18.) This

argument contradicts the allegations in her Complaint, which emphasize the importance of the statements' having been uttered in a clinical context. And the argument is also wrong. The fact that Dr. Syptak's statements were made by a doctor to a patient is vital to Plaintiff's malpractice claim. Whether or not doctors have a duty to refrain from making such comments when attempting to establish a rapport with their patients is *not* a question that a lay juror—who lacks training in appropriate doctor-patient interactions—can answer. Plaintiff needed a standard-of-care expert for this. *See Harris*, 624 S.E.2d at 203. Because she did not have one, the Circuit Court properly granted Defendants' summary-judgment motion.

III. This Court can affirm on the alternate ground that Plaintiff needed an expert to establish causation of physical injury.

Finally, this Court can affirm the Circuit Court's dismissal of Plaintiff's malpractice claim on the alternate ground that Plaintiff could not establish causation of physical injury without expert testimony.[12]

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[12] The Circuit Court did not base its summary judgment ruling on causation. But this Court can affirm on any alternate basis apparent from the record. *Perry v. Com.*, 280 Va. 572, 578 (2010) (describing the "right result for the wrong reason doctrine").

A plaintiff who asserts a negligent-infliction-of-emotional-distress[13] claim must demonstrate that the defendant's upsetting conduct caused physical injury:

> [W]here conduct is merely negligent, not willful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone. We hold, however, that where the claim is for emotional disturbance and physical injury resulting therefrom, *there may be recovery for negligent conduct*, notwithstanding the lack of physical impact, *provided the injured party properly pleads and proves by clear and convincing evidence that his physical injury was the natural result of fright or shock proximately caused by the defendant's negligence*. In other words, there may be recovery in such a case if, but only if, there is shown a *clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury*.

Hughes v. Moore, 214 Va. 27, 34 (1973) (emphasis added). *See also Contreras v. Thor Norfolk Hotel, LLC*, 292 F. Supp. 2d 798, 801 (E.D. Va. 2003) ("Virginia requires physical injury before a plaintiff may recover damages for emotional distress.") (quoting *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th Cir. 1991)). The injury must go

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[13] As noted above, Plaintiff's *intentional*-infliction-of-emotional-distress claim survived summary judgment, but Plaintiff nonsuited it. So the only count left is Plaintiff's *negligent*-infliction medical-malpractice action.

beyond the "'typical symptoms of an emotional disturbance,' for which there can be no recovery." *Myseros v. Sissler*, 239 Va. 8, 12 (1990).

Ascertaining the cause of a physical injury is a "diagnosis" that only a medical doctor can make. *See John v. Im*, 263 Va. 315, 321 (2002) (finding that psychologist was not qualified to testify about the cause of an injury); *Hollingsworth v. Norfolk S. Ry. Co.*, 279 Va. 360, 366-67 (2010) (finding that podiatrist was not qualified to testify about the cause of a foot injury). *Combs v. Norfolk and W. Ry. Co.*, 256 Va. 490 (1998), (holding that a biomechanical engineer could not testify about the cause of the plaintiff's ruptured disc). A licensed professional counselor, such as plaintiff's identified "expert," Ms. Souder, is not qualified to make such a determination.

In the present case, Plaintiff alleged that Dr. Syptak's conduct caused her "physical health" to "drastically deteriorate[]." In particular, she claims that it exacerbated the pain associated with her fibromyalgia and radiculopathy. (App. 89.) To succeed in her negligent-infliction claim at trial, however, Plaintiff needed to establish a "clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury." And as shown above,

the last link in this chain—causation of physical injury—is something that only a qualified medical doctor can establish.

Plaintiff, however, did not identify any medical expert who could testify that her change in physical condition, if any, was caused by Dr. Syptak's allegedly negligent remarks about sex. Plaintiff's only expert witness, Mercy Souder, is a licensed professional counselor, not a physician. Souder is not qualified to opine about causation of physical injury. Nor does her expert designation express any opinions on the subject. Because Plaintiff needed to establish causation of physical injury, because Virginia law allows only medical doctors to opine about the cause of physical injury, and because Plaintiff did not name any physician as an expert witness, her negligent-infliction-of-emotional-distress claim failed as a matter of law. For this additional reason, the Circuit Court did not err in dismissing Plaintiff's negligence claim.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that this Court affirm the decision below.

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

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CERTIFICATE

The undersigned hereby certifies that ten copies of this Brief of Appellee were hand-delivered to this Court on December 30, 2016. Rule 5:26(e) was also complied with. A copy was also emailed and mailed to counsel for Appellant stated below on that day.

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