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

REPLY BRIEF OF APPELLANT

John B. Simpson, VSB No. 38759
MARTINWREN, P.C.
400 Locust Ave., Suite 1
Charlottesville, VA 22902
(434) 817-3100 – Telephone
(434) 817-3110 – Facsimile
simpson@martinwrenlaw.com

Counsel for Appellant

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INTRODUCTION

In their opposing brief, Appellees J. Michael Syptak ("Dr. Syptak") and Harrisonburg Family Practice Associates ("HFPA") (collectively "Appellees") ignore the applicable standard of review; misstate facts or, contrary to the requisite standard, state facts in the light most favorable to themselves; and, unilaterally add a requirement that in order for sexual harassment to violate the standard of care a doctor owes his patient, the patient must prove that the doctor should have known that she was particularly vulnerable to such conduct.

But perhaps most striking is Appellees' argument that sexual harassment of a patient by a doctor can be a valid component of a doctor's "bedside manner" through which he makes "a personal connection with the patient" and therefore only another doctor is capable of determining whether sexual harassment violates the standard of care. Brief of Appellee, pp. 23-24.

AUTHORITIES AND ARGUMENT

I. Appellees' arguments are based on misstatements of the facts.

In an effort to bolster their argument that Appellant Alexia Summers ("Ms. Summers") was required to present expert medical testimony in order to show that sexual harassment of her violated the standard of care, Appellees ignore certain allegations and manipulate others in order to recast the complaint into something that suits their needs.

They do this primarily in two different ways. First, they inaccurately state that Ms. Summers did not allege that Dr. Syptak knew that she was vulnerable to his sexual harassment conduct when he saw her and that she needed expert testimony to show that he should have reviewed her records prior to seeing her.

Second, they incorrectly state that Ms. Summers alleged a negligence claim that had two elements; the first element being that Dr. Syptak should have known that she was particularly vulnerable to sexual harassment (notwithstanding that Ms. Summers had alleged that he actually knew of her vulnerability); the second element being that Dr. Syptak's conduct in sexually harassing her violated the standard of care. By this manipulation Appellees provide themselves with the basis to argue that there were two interdependent issues upon which Ms. Summers was required to present expert testimony and further, that there was an independent non-appealable basis to affirm the circuit court's ruling - that being the circuit court's ruling that Ms. Summers needed expert testimony to show that Dr. Syptak should have reviewed her records showing her treatment for sexual harassment at HFPA.

A. Appellees falsely state that Ms. Summers did not allege that Dr. Syptak knew that she was particularly sensitive to his sexually charged conduct. Appellees repeatedly and unequivocally state in their brief that Ms. Summers did <u>not</u> allege that Dr. Syptak knew that she was vulnerable

to his sexual harassment. See, *e.g.,* "Plaintiff does not allege that Dr. Syptak himself knew about her history . . ." (Brief of Appellees, p. 15, note 6); and, "Plaintiff does not, however, allege that Dr. Syptak knew or understood her history of sexual abuse and harassment." Brief of Appellees, p. 9.

Those statements, upon which much of Appellees' argument is based, are demonstrably and patently false. It is a plain and obvious fact that Ms. Summers alleged more than once in her complaint that Dr. Syptak *knew* that she was vulnerable to his offensive conduct.

In paragraph 17 of her complaint, Ms. Summers alleged:

> At the time Dr. Syptak engaged in the conduct described more fully above, *he* *knew* or should have known that Plaintiff was particularly sensitive and psychologically vulnerable to his sexual comments, "jokes, and sexual innuendo.

JA, p. 7, ¶ 17 (emphasis added).

Pararaph 34 of Ms. Summers' complaint contained the following allegation:

> At all times relevant hereto, Dr. Syptak engaged in the conduct described more fully above, *he* *knew* or should have known - because he was acting as Plaintiff's physician and from the information contained in Plaintiff's Medical Records - that Plaintiff was particularly sensitive and psychologically vulnerable to his sexual comments, "jokes," and sexual innuendo.

JA, p. 9, ¶ 34 (emphasis added).[1]

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[1] As noted previously, there was no summary judgment evidence submitted by Appellees that disputed the allegation that Dr. Syptak knew of Ms. Summers' vulnerability.

Appellees' statement that Ms. Summers did not allege that Dr. Syptak knew of her vulnerability is thus categorically false. Ms. Summers properly alleged alternative facts that Dr. Syptak knew or should have known of her vulnerability when he engaged in his reprehensible conduct. See Rule 1:4(k) of the Rules of the Supreme Court of Virginia, "A party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense may plead alternative facts . . ."

B. Appellees incorrectly state that Ms. Summers alleged a negligence claim that involved two interdependent elements. In order to bolster their argument that Ms. Summers needed expert testimony to establish that Dr. Syptak's sexual harassment violated the standard of care he owed her as her doctor, Appellees seek to revise and alter the allegations of her complaint by transforming her claim that Dr. Syptak violated his duty to her when he sexually harassed her into a claim involving two interdependent components where Ms. Summers must prove not only that Dr. Syptak sexually harassed her, but also that he should have known that she was particularly vulnerable to such conduct.

Appellees thus manipulate the allegations in Ms. Summers' complaint in order to convert a straightforward negligence claim into a two-part claim where the parts are "interdependent." Appellees do this by taking her

allegations of knowledge, that were relevant to her intentional infliction of emotional distress claim, and artificially appending them to her negligence claim. This manipulation occurs as follows:

> Plaintiff bases her malpractice action on two alleged breaches of the standard of care. First, she alleges that 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.[2]

Brief of Appellees, p. 2.

However, consideration of the allegations actually made by Ms. Summers directly contradicts this manipulation by Appellees. First, as noted above, Ms. Summers did not simply allege that Dr. Syptak should have known of her vulnerability, she also alleged, alternatively, *that he did know*.

Second, although Ms. Summers also alleged a claim in Count I for intentional infliction of emotional distress wherein what Dr. Syptak or HFPA knew, or should have known, (insofar as Ms. Summers' vulnerability was concerned) was an important element since such knowledge would be

[2] This mischaracterization of the allegations actually made by Ms. Summers in her complaint also supports Appellees' correspondingly flawed argument that since the assignment of error granted by this Court did not address the first "component" there is an independent basis for the circuit court's ruling and therefore the appeal should be dismissed.

relevant as to the required element of recklessness, in her Count II claim for negligence (which is the subject of this appeal) at paragraph 35, she alleged that Dr. Syptak "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." JA, p. 10 (emphasis added).[3]

Simply stated, Ms. Summers alleged that Dr. Syptak's conduct of sexually harassing her - regardless of his knowledge of her vulnerability - constituted negligence. While proof that he knew or should have known of her vulnerability may render his conduct even more egregious, it is not necessary for a plaintiff to establish that a sexual harasser actually knew his victim was particularly vulnerable to his conduct before there can be liability.

The two-part construction offered by Appellees - which requires that Ms. Summers must prove that Dr. Syptak should have been aware that she was particularly vulnerable should he sexually harass her in order for there to be liability - is absurd. Dr. Syptak's conduct in sexually harassing Ms.

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[3] See also, Brief of Appellees, p. 10, "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 direct toward or in the presence of Plaintiff.'"

Summers was, in and of itself, negligent. Dr. Syptak's conduct would violate the standard of care owed to any woman patient regardless of her history and whether she had ever been sexually abused or harassed in the past. Ms. Summers was not required to prove that Dr. Syptak should have known that she was particularly vulnerable to sexual harassment in order for his conduct to constitute negligence.

II. Appellees' argument that sexual harassment of a patient can be an integral part of the practice of medicine and establishing a personal connection with a patient is preposterous.

Appellees argue that Dr. Syptak's conduct was "an integral part of medical practice," "making a personal connection with the patient," part of establishing "[a] good bedside manner," and therefore, only a doctor or medical professional can tell whether his conduct violated the standard of care. Brief of Appellees, pp. 24, 28.

This conduct, which Appellees contend was an integral part of the practice of medicine through which Dr. Syptak was making a personal connection and establishing a good bedside manner with Ms. Summers, included the following:

a) telling a female patient that she would look and feel sexy if she lost weight;[4]

b) using the terms "Love," "Sweetpea," and "Sweets" in conversation with that patient;[5]

c) telling this patient about a boy who had masturbated and ejaculated into his socks and as a result he didn't want his mother doing his laundry;[6]

d) describing to this same patient his own sex life, telling her that he had slowed down, but he's still like a "jack rabbit" and that perhaps that is why he has five kids;[7]

e) telling that patient that if his wife left him, he would ask "where's the nanny's old number" and that he would "have some fun now";[8]

f) telling this same patient an "off-color" joke that the nasal spray he gave her should be used only in her nostrils, and not any other holes;[9] and,

g) telling this same patient that he and his wife have a king size bed and that "having sex is like boarding a pirate ship".[10]

These are the comments and thus the context for Appellees' argument that "[w]hether or not doctors have a duty to refrain from making such comments is *not* a question that a lay juror - who lacks training in appropriate doctor-patient interactions - can answer." Brief of Appellees, p. 28 (emphasis original).

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[4] JA, pp. 6, 164-165.
[5] JA, p. 6.
[6] JA, pp. 6, 187.
[7] JA, pp. 6, 165.
[8] JA, pp. 6, 191-192, 195.
[9] JA, pp. 6, 188-189.
[10] JA, pp. 7, 196.

This is a bizarre argument - that sexual harassment of patients can be “an integral part of medical practice,” “making a personal connection with the patient,” part of establishing “[a] good bedside manner,” and therefore, only a doctor or medical expert can tell whether sexual harassment violates the standard of care. It is difficult to ascertain whether this argument is more insulting to the practice of medicine or to the common intelligence and ordinary experience of the jury.

III. Appellees cannot deny the sexual harassment conduct of Dr. Syptak, so, contrary to the applicable standard of review, they state the facts in the light favorable to themselves and they blame their victim.

The standard of review on appeals from summary judgments is well-established. As this Court has noted, “In reviewing a circuit court’s grant or denial of summary judgment, we ‘apply the same standard 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.’” *Va. Fuel Corp. v. Lambert Coal Co.,* 291 Va. 89, 98 (2016), quoting, *Fultz v. Delhaize America, Inc.*, 278 Va. 84, 88 (2009).

Perhaps because no part of Dr. Syptak’s reprehensible conduct was disputed in the summary judgment motion, Appellees seek to gloss over and minimize the conduct at issue and engage in blame-shifting.

Throughout their brief, Appellees continually describe Dr. Syptak's disgraceful conduct in the most innocuous terms. To that end they describe his reprehensible conduct as involving nothing more than "mildly ribald humor," "casual" (discussion) "about various subjects unrelated to Plaintiff's treatment," and "joking comments about sex." Brief of Appellees, pp. 1, 6.

While Appellees' efforts to transform sexual harassment into "an integral part of medical practice" and characterization which minimizes such offensive conduct as nothing more than "mildly ribald humor" and "joking comments about sex" are troubling, their attempt to blame-shift, in this case, blaming the victim, is shameful. To this end, Appellees complain that Ms. Summers should have told Dr. Syptak that she had a history of abuse, or asked him to change the subject, and that she made no complaints about his conduct at the time. Brief of Appellees, pp. 6, 8. The obvious implication is that Ms. Summers should be held responsible because she did not do anything to stop the harassment.

This attempt to blame the victim is particularly distasteful given what Appellees know about Ms. Summers. Appellees are well aware that Ms. Summers has been profoundly damaged psychologically as a result of the chronic and horrific sexual abuse she has suffered in her life and that, as a result she is unable to cope as the average "normal" person would. Appellees

know this because HFPA, through Dr. Nio, provided extensive treatment to Ms. Summers when she was sexually harassed in 2010 and 2011. Appellees themselves note in their brief that Ms. Summers' psychological problems include "bipolar disorder, depression and PTSD - for which she has taken a number of psychotropic drugs." Brief of Appellees, p. 8.

Appellees are also aware that Ms. Summers' counselor describes these impairments in her report which Appellees referenced in their brief. See Brief of Appellees, p. 11. As Ms. Summers' counselor stated in that report:

> She (*i.e.,* Ms. Summers) has low self esteem, has difficulty trusting herself and identifying her own needs as well as validating her own experiences (i.e., she doubts them). As a victim of sexual abuse, she lacks self confidence and doubts her instincts. She did not, as is common with victims of sexual assault, realize the full impact of his behaviors and how it would affect her. She is vulnerable, often blames herself and struggles with chronic feelings of worthlessness.
>
> . . .
>
> These earlier experiences diminish her ability to cope with later traumatic events and leave her more vulnerable to the negative effects of traumatic experiences.

JA, pp. 224-225.

IV. Ms. Summers did not need expert testimony to show that she suffered physical harms as a result of Dr. Syptak's conduct.

In *Pespi-Cola Bottling Co. v. McCullers*, 189 Va. 89 (1949) this Court explained why expert medical testimony is not required in all cases to establish causation of physical injury or harm. As the Court explained:

> While on matters strictly involving medical science, as such, some special skill is needed, yet there are numerous related matters, involving health and bodily soundness, upon which the ordinary experience of everyday life is entirely sufficient. The line may sometimes be difficult to draw; but there can be no difficulty in determining that a layman may be received to state (for example) that a person was or was not apparently ill. Great liberality should be shown by the courts in applying this principle, so that the cause of justice may not be obstructed by narrow and finical rulings.
>
> . . .
>
> "The opinions of lay or nonexpert witnesses who are familiar with a person whose physical condition is in question and have had opportunity for observing him are competent evidence on issues concerning the general health, strength, and the bodily vigor of such person, his feebleness or apparent illness, or changes in his apparent state of health or physical condition from one time to another."

Id., at 97, quoting 20 Am. Jur., Evidence, sec. 859, p. 719.

In *Todt v. Shaw,* 223 Va. 123, 126 (1982), the defendant contended that lay testimony was insufficient to establish causation between the accident and the plaintiff's physical disabilities and inability to work and that expert medical testimony was required. This Court rejected that argument as being contrary to the holdings in "a consistent line of cases." See also: *Sumner v. Smith*, 220 Va. 222 (1979), lay testimony of causal connection between an automobile accident and injury is admissible for whatever weight the fact finder might give it, even where medical testimony fails to establish a causal connection; and, *Bussey v. E.S.C. Rests. Inc.,* 270 Va. 531, 538 (2005), "we begin with the proposition that generally, lay testimony is admissible to prove causation."

In *Nichols v. Kaiser Found. Health Plan*, 257 Va. 491, 498 (1999) this Court noted the distinction between "matters strictly involving medical science as opposed to accepting testimony of lay or nonexpert witnesses who are familiar with a person whose physical condition is in question."

The physical harms and injuries claimed by Ms. Summers were not "matters strictly involving medical science," but rather, harms and injuries to her physical condition that were observable by herself and other lay witnesses. Those harms included not only attempted suicide, but also 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, 213, 217-218. Here, lay testimony by persons familiar with Ms. Summers would be admissible to prove causation as to her attempted suicide, 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 and expert testimony would not be required. *Nichols, supra* at 499.

V. Because Dr. Syptak was acting within the scope of his employment at HFPA when he sexually harassed Ms. Summers, summary judgment should not have been granted to HFPA.

While Appellees make only cursory references to Ms. Summers' *respondeat superior* liability claim against HFPA, there is no factual dispute that Dr. Syptak was acting within the scope of his employment when he sexually harassed Ms. Summers since Appellees admitted this in their answer to the complaint. JA, pp. 10, 43. Accordingly, not only was it error to grant summary judgment in favor of Dr. Syptak, but it was error to grant it in favor of HFPA.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

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.

/s/ John B. Simpson
John B. Simpson, VSB No. 38759
MARTINWREN, P.C.
400 Locust Ave., Suite 1
Charlottesville, VA 22902
(434) 817-3100 – Telephone
(434) 817-3110 – Facsimile
simpson@martinwrenlaw.com

Counsel for Appellant

CERTIFICATE

I hereby certify, pursuant to Rule 5:26(h), that on this 10th day of January, 2017, I electronically filed the foregoing Reply Brief of Appellant via VACES, with the required paper copies set to be delivered within the prescribed one business day. I further certify that on the same date, the Brief was served, via e-mail, upon the following:

Powell M. Leitch, III, VSB No. 27420
LeClairRyan
1800 Wells Fargo Tower
Roanoke, VA 24006
(540) 510-3013 – Telephone
(540) 510-3050 – Facsimile
Powell.Leitch@leclairryan.com

Counsel for Appellee

Exclusive of the portions exempted by Rule 5:26(h), this brief does not exceed **15** pages.

/s/ John B. Simpson
John B. Simpson, VSB No. 38759

Counsel for Appellant