IN THE

Supreme Court of Virginia

RECORD NO. 180758

MICHAEL PHILLIP GROSS, *et al.*,

Appellants,

v.

SUPEN PEZE STUART,

Appellee.

OPENING BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

I. The Circuit Court Erred in Denying Defendants' Motion in Limine and in Permitting Plaintiff to Cross-Examine the Defense Medical Expert About Collateral Matters (Including a Disciplinary Proceeding Arising From his Deployment to Afghanistan) that were Wholly Unrelated to the Medical Procedures and Alleged Injuries at Issue in this Case. (Preserved at JA 31-35, 61-65, 98-99, 111-15, 526-35.)

   A. The Circuit Court Erred in Permitting Plaintiff to Introduce Evidence About Collateral Matters in Contravention of *Stottlemyer v. Ghramm*, 268 Va. 7 (2004) – Particularly Where Plaintiff Would Not Be Entitled to Prove the Disputed Collateral Evidence in Her Own Case. (Preserved at JA 31-35, 61-65, 111-15, 98-99, 50-51.)

   B. The Circuit Court Erred in Ruling that Dr. Pitman's Disciplinary History and Related Allegations Constituted Relevant and Admissible Evidence. The Collateral Matters Should Not have Been Deemed Admissible for Impeachment or "Credibility" Purposes or for Any Other Reason. (Preserved at *Id*.).

   C. Even if the Evidence of Dr. Pitman's Disciplinary History and Related Allegations is Deemed Relevant, the Circuit Court Erred in Admitting the Evidence Where its Unfair Prejudice Substantially Outweighed Any Probative Value. (Preserved at JA 34, 63-65, 527-35.)

II. The Circuit Court Erred in Allowing Plaintiff to Inject the Consent Issue into the Case, Particularly Where No Such Claim was Pled and There was No Evidence that Exploring the Eyelid was a Deviation From the Standard of Care. (Preserved at JA 291, 594-603, 55-59.)

   A. The Circuit Court Erred in Denying Defendants' Motions for Mistrial and Post-Trial Motions to Strike the Evidence and For a New Trial Relating to Dr. Malone's Improper Mention of Consent. (Preserved at JA 291, 55-56.)

B. The Circuit Court Erred in Denying Defendants' Motions for Mistrial and Post-Trial Motions to Strike the Evidence and For a New Trial Relating to Counsel's Improper Argument Regarding Consent. (Preserved at JA 594-606, 56-59.)

C. The Circuit Court Erred in Refusing to Provide An Instruction that Consent and/or Exceeding Consent was Not at Issue in this Case – Particularly Where the Court Acknowledged that the Concept of Exceeding Consent had Been Placed Before the Jury by Plaintiff, Plaintiff did Not Plead any Consent Claim, and Plaintiff had No Evidence that Exploring the Eyelid (the suggested "violation of consent") was a Deviation From the Standard of Care. (Preserved at JA 60-61, 300-01, 604-06.)

III. The Circuit Court Erred in Ruling that it "Lacked Authority" to Address Defendants' Post-Trial Motions. (Preserved at JA 677-79, 683-88, 86-87.)

STATEMENT OF THE CASE

Plaintiff Supen Peze Stuart (Ms. Stuart) claimed that Defendants, Michael P. Gross, M.D. and Prince William Plastic Surgery and Spa Services Company, LLC, injured her when Dr. Gross negligently performed a cosmetic procedure on her upper eyelids known as a blepharoplasty. Plaintiff never pleaded that Dr. Gross failed to obtain informed consent or exceeded the scope of the consent given. (JA 1-3.) Yet Plaintiff injected concepts of consent and exceeding consent into the trial. (JA 289, 591-92.) The Circuit Court of Fairfax County, however, refused to instruct the jury that consent was not at issue despite several requests by Dr. Gross that the Court do so. (JA 302-06, 606-07.) The court also allowed Plaintiff

to cross-examine and discredit the defense expert in minute detail about a collateral disciplinary proceeding (JA 527-51) that was totally unrelated to any medical procedures at issue here.

The "*Stottlemyer*" Issue

In *Stottlemyer v. Ghramm*, 268 Va. 7 (2004), this Court ruled that allegations of collateral wrongdoing cannot be introduced to smear a medical malpractice defendant – nor to suggest that past errors support the conclusion that errors were made in the current action. 268 Va. at 12. This case raises the question of whether this same rule also extends to expert witnesses. While Dr. Gross contended that *Stottlemyer's* prohibition on collateral evidence applies to all witnesses, Plaintiff argued that unrelated prior professional infractions by an *expert* constitute "impeachment" and "credibility" issues that illustrate a lack of knowledge of the standard of care. (JA 526, 27, 649, 11319.)

Defendants' expert Dr. John Mathews Pitman, II, a Board certified plastic surgeon, is licensed to practice medicine in the Commonwealth of Virginia and, therefore, is presumed to know the standard of care applicable to plastic surgeons in Virginia. Va. Code § 8.01-581.20. Dr. Pitman testified that Dr. Gross complied with the standard of care and that

his efforts were not a negligent proximate cause of Plaintiff's injury and damages. (JA 470-71, 499, 507.)

In 2015, however, Dr. Pitman – as a member of the United States Army Reserve – deployed to Afghanistan. (JA 536.) This deployment resulted in problems for his medical practice. The problems spawned a review by the Board of Medicine that resulted in a reprimand and fine under a consent order. (JA 36-44.) None of the alleged wrongdoing involved a blepharoplasty, a ptosis or any medical issue related to this case.[1] Under the Consent Order, Dr. Pitman did not admit or deny any of the allegations. (JA 42.) His license was never suspended. (JA 42-43.)

Defendant moved *in limine* to exclude evidence of the disciplinary proceedings and the allegations. (JA 31-34.) The Court denied the motion pre-trial – finding the evidence relevant. (JA 113-19.) At trial, over objection, the court allowed Plaintiff to delve into numerous individual charges raised against Dr. Pitman. (JA 528-51; *see* fn. 3, *infra*.) These allegations were wholly unrelated to the medical procedures at issue in this case, but became the focal point of Plaintiff's cross-examination. (JA 536-51.) The allegations were further discussed at length in Rebuttal Argument (JA 648-52) where Plaintiff's counsel essentially told the jurors that Dr.

[1] "Ptosis" is the drooping of an upper eyelid.

Pitman's disciplinary record established that Dr. Pitman's view of the standard of care could not be trusted. (*Id*.)

Plaintiff's Efforts to Inject Informed Consent Issues Into the Case Although Such Claims Were Never Pleaded

Notwithstanding that Plaintiff did not bring a claim for lack of consent, lack of informed consent, or a claim that Dr. Gross exceeded her consent during surgery, Plaintiff's counsel stated in his opening remarks to the jury that Dr. Gross "was only going in to do this blepharoplasty. That's all he was supposed to do, just simply remove the fat, incision, take the fat out, sew it up, and not deal with the muscles at all." (JA 144.)

Before any witnesses were called to testify, Defendants addressed the Court with their concerns that (1) the above comment "smacks of exceeding the scope of a patient's consent" and (2) Plaintiff may attempt to elicit testimony on this issue from Dr. Timothy Malone, Plaintiff's only expert witness. (JA 159-60.) The court and counsel engaged in extensive discussion and Plaintiff's counsel stated, "I'm not going to bring up informed consent." (JA 170.) Defendants asked that Dr. Malone be "instructed properly to choose his words," to which Plaintiff's counsel replied, "I don't – he'll answer my questions. He's not the kind of guy that's going to blurt something." (JA 170-71.) This assurance turned out to be unfounded.

Plaintiff's Expert Raises Consent

Later that same day, during re-direct examination, Plaintiff asked Dr. Malone, "Was there anything in Dr. Gross' office notes to indicate that he thought he was treating ptosis [of the eyelids]?" Dr. Malone replied, "He – he planned and got consent for a blepharoplasty." (JA 289.)

Defendants moved for a mistrial. (JA 291.) Plaintiff argued that it was an "innocent" comment. (JA 291-93.) The court, however, recognized the dilemma: "[Defense Counsel] is right. It's like a – it's just hanging there, that somehow this defendant exceeded the scope of what was consented to." (JA 294, brackets supplied.) The court then contemplated, "Is there something I can do to cure it?" (JA 295.) The court denied the motion for mistrial and invited Defendants to suggest alternative relief. (JA 300.) Consequently, Defendants asked the court to instruct the jury that there is no issue or claim in the case regarding informed consent or lack of consent for the procedure Dr. Gross performed. (JA 300-01.)

The court denied Defendants' request to so instruct the jury and, instead, simply told the jury the following: "Ladies and gentlemen, I sustained an objection to the last question put to Dr. Malone. And the Court is instructing you that you should not consider any answer that Dr. Malone may have made to that last question." (JA 306.)

Closing Argument Alluding to Consent

On day three of trial, counsel for Plaintiff told the jury, early in his argument:

> The evidence in this case, when you look at the record of Dr. Gross, is that when Ms. Stuart went to see Dr. Gross, **she went for one reason**. She went to have the puffiness removed from her eyes. **That's the only reason she went there. We're here today because Dr. Gross performed the blepharoplasty**, the procedure to remove the fat from the eyes, **and then after he completed the blepharoplasty**, he damaged the levator muscle in the right eye and the levator tendon in the left eye **after he completed the blepharoplasty**.

(JA 591-92) (emphasis added). Upon hearing this, Defendants, again, moved for a mistrial because of the interjection of the issue of exceeding consent into the case. (JA 592, 603.)

The court stated: "The clear implication was that she went in for one procedure and got two, and it's the second one that causes us to be here." (JA 602.) Despite its cognizance of the problem, the court denied Defendants' motion for mistrial and also denied Defendants' renewed request that the jury be instructed that Plaintiff is not claiming Dr. Gross performed a procedure without her consent. (JA 604-06.) The court instead, simply told the jury:

> Ladies and gentlemen, the objection that was just made by the defendant is sustained. You are to

> disregard the last statement, and then I'll ask [plaintiff's counsel] to please rephrase at this time.

(JA 607, brackets supplied.)

The Verdict and Post-Trial Motions

The jury returned a plaintiff's verdict for $800,000.

In post-trial motions, Defendants renewed their Motions for Mistrial and moved to Set Aside the Verdict, and asked the court to grant Defendants a new trial based on the errors that tainted the trial. (JA 55-65.) Plaintiff argued that the court could not sit as its own appellate court and that it lacked the authority to grant the Defendants relief under Va. Code § 8.01-430. (JA 86-88, 679-82.)

The court ruled that it lacked authority to grant relief (JA 692-93, 98-99), but that even if it had authority, the rulings would stand. (*Id.*) This appeal followed.[2]

STATEMENT OF FACTS

Plaintiff sought a blepharoplasty to remove puffiness in her eyelids. In the course of the blepharoplasty, Dr. Gross explored conditions in the region. (JA 380, 393-95.) Plaintiff's expert did not state – and Plaintiff's

[2] The trial court suspended its initial order to permit time for post-trial motions. (JA 53.) The suspension occurred within 21 days of the initial Final Order which was dated February 14, 2018. (JA 52.)

pleading never asserted – that exploration in the eyelid was a deviation from the standard of care. In fact, it is not a deviation, but an acceptable practice. (JA 505.) Plaintiff's expert did not contradict this. Nonetheless, following the surgery, Plaintiff asserts that the levator tendon in her left eye and the levator muscle in her right eye were damaged. The left eyelid was repaired, but Plaintiff cannot raise her right eyelid, with the result that she cannot see out of that eye. (JA 2, ¶¶ 9-11.)

Defendant's expert, Dr. Pitman, testified that the injury did not occur through negligence (JA 470-71, 499, 507) and that Dr. Gross' conduct met the standard of care. (*Id*.) Dr. Pitman's testimony, however, was tremendously undercut by Plaintiff's overwhelming emphasis on the allegations raised in the Board of Medicine's disciplinary action against him arising from his deployment to Afghanistan. (JA 36-44.) The bulk of Plaintiff's cross-examination of the expert was comprised of Dr. Pitman's disciplinary issues. (JA 536-51.)

Here is a sample:

> A I had been in Afghanistan for almost a month at that point, so I had no idea what the condition of the OR was. The OR wasn't open and functioning.
> Q You maintained biohazard bins that didn't have proper bags in them?
> A Again, I wasn't there.

Q And during this period of time, you had expired medications in the operating room?
A I'm sure there were. The OR was closed --
Q You had surgical --
A -- I wasn't --
Q -- instruments – you had surgical instruments that weren't sterile in the sink?
A Most likely.
Q How many other surgeons who operate in that room?
A None.
Q So you left, and you left it unsanitary?
A We just left.
Q You stored Botox in your refrigerator where your staff kept their food?
A No. That was the – that was to be disposed.
Q It was kept in the refrigerator where you staff kept their food to be disposed--
A I didn't do – store it; I was gone.
Q Well, this was your office.

(JA 548-49.) Ultimately, Plaintiff's counsel bluntly told the jury in Rebuttal Argument that all those allegations go to "his knowledge of the standard of care." (JA 648-53.) A list of the issues raised against Dr. Pitman is set out at footnote 3, *infra*.

Plaintiff also suggested that Dr. Gross exceeded or failed to obtain consent to "explore" the eyelid, and that this "additional" procedure caused the injury. (JA 159-60, 289, 591-92.) Again, Ms. Stuart's pleading had no "consent" component – nor any claim that exploration associated with a blepharoplasty was improper. When Plaintiff's counsel raised such

arguments, the trial court expressed consternation (JA 294-95, 602), and asked what could be done to cure the problem. (JA 295, 604.) Defendants repeatedly sought a cautionary instruction that lack of consent was not an issue in this case. (JA 300-01, 604-06.)

While acknowledging that the consent problem was "hanging there" due to Plaintiff's tactics (JA 294-95, *see* JA 289), the court declined to instruct the jurors that exceeding consent was not an issue in the case. (JA 306, 607.) This allowed Plaintiff to argue that she could recover based upon Dr. Gross' decision to explore the eyelid – beyond the plain blepharoplasty (JA 591-92) – even though: (1) she pleaded no consent claim and (2) lacked *any* evidence that exploring the region was a deviation from the standard of care. In short, because of these errors – and Plaintiff's exploitation of them – there is a very real chance that the jury's award is based on wholly non-negligent conduct.

STANDARD OF REVIEW

Evidence is collateral if the party cross-examining the witness would not be entitled to prove the matter in support of that party's own case. *Stottlemyer*, 268 Va. at 12. Generally, a trial court's decision to admit or exclude evidence will not be disturbed absent a finding of abuse of discretion. *John Crane, Inc. v. Jones*, 274 Va. 581, 590 (2007), *cert*

denied, 552 U.S. 1184 (2008). However, "[a] trial court has no discretion to admit clearly inadmissible evidence because admissibility of evidence depends not upon the discretion of the court but upon sound legal principles." *Norfolk & Western Ry. Co. v. Puryear*, 250 Va. 559, 563 (1995).

A denial of a motion for mistrial or request for a new trial is viewed for abuse of discretion. *Lawlor v. Comm.*, 285 Va. 187, 220 (2013), *cert. denied*, 571 U.S. 953 (2013). However, when the admission of improper evidence is so prejudicial that it "probably remained on the minds of the jury and influenced their verdict," the judgment will be reversed on appeal. *Asbury v. Comm.*, 211 Va. 101, 104 (1970). Similarly, "if the prejudicial effect of the impropriety cannot be removed by the instructions of the trial court, the adverse party is entitled to a new trial." *Lowe v. Cunningham*, 268 Va. 268, 272 (2004).

The denial of a cautionary instruction is generally reviewed for abuse of discretion. *Lewis v. Comm.*, 269 Va. 209 (2005). However, a litigant is entitled to an instruction supported by the record. *Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 78 (2004). Questions of law such as statutory construction are reviewed *de novo*. *Addison v. Jurgelsky*, 281 Va. 205, 208 (2011).

ARGUMENTS AND AUTHORITIES

I. The Circuit Court Erred in Permitting Plaintiff to Cross-Examine the Defense Expert about Wholly Unrelated and Collateral Matters in Contravention of *Stottlemyer* and Governing Rules of Evidence. (Relating to AOE I, IA, IB, IC.)

A. Dr. Pitman's Disciplinary History is Collateral and Inadmissible and its Admission Spawned a Distracting and Prejudicial Trial Within a Trial. (Relating to AOE I, IA.)

Defendants retained Dr. Pitman as an expert to testify about the standard of care and the cause of Plaintiff's alleged injuries. Plaintiff sought to discredit Dr. Pitman with questions about prior "allegations" and incidents which arose from an inquiry by the Board of Medicine. (JA 536-51.) The incidents were wholly unrelated to a blepharoplasty or Dr. Pitman's knowledge of this procedure – they were related to problems that developed in his practice arising from his deployment to Afghanistan as a member of the United States Army Reserve. (JA 36-44.) The defense argued that evidence of Dr. Pitman's disciplinary history was collateral and not probative of the standard of care or Plaintiff's injuries. The trial court, however, allowed Plaintiff to hold a "trial within a trial" on Dr. Pitman's disciplinary proceedings.

1. Under *Stottlemyer* and Virginia Law the Disputed Evidence was Collateral and Inadmissible.

This Court has articulated the principle of "collateral" evidence as follows:

> It is an elementary rule that the evidence must be confined to the point in issue, and hence evidence of collateral facts, from which no fair inferences can be drawn tending to throw light upon the fact under investigation, is excluded, the reason being . . . that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them . . .

Stottlemyer v. Ghramm, 268 Va. 7, 12 (2004) (citing *Jackson v. The Chesapeake & Ohio Ry. Co.*, 179 Va. 642, 648 (1942)).

In *Stottlemyer*, this Court upheld the Circuit Court's refusal to permit a plaintiff from cross-examining the defendant, Dr. Ghramm, to show that he had committed prior bad acts of misconduct and negligence. This Court stated that such subjects were "collateral" and "would certainly have injected non-probative prejudicial evidence before the jury." *Stottlemyer*, 268 Va. at 12. The Court stated that evidence of prior unrelated conduct has no relevance as to whether the defendant was negligent during the occasion at issue.

The issue in *Stottlemyer* was the prior bad acts of the defendant himself, but the principle is applicable in the instant case because the crux

of the analysis remains the same with respect to *any* witness. Certainly, the language utilized in *Stottlemyer* indicates that the rule applies to *all witnesses*:

> the rule is well established that a litigant may not cross-examine *a witness* about collateral independent facts irrelevant to the issues before the trier of fact.

268 Va. at 11-12 (emphasis added), and "plaintiff did not have a right to cross-examine *a witness* on collateral matters." *Id*. at 13 (emphasis added).

One purpose behind the rule is to avoid exactly what transpired here – an inappropriate and prejudicial focus on wholly collateral matters. The "trial within a trial" regarding Dr. Pitman's discipline was highly prejudicial, and not probative of relevant issues. As this Court has observed, "[s]uch evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them . . ." *Stottlemyer*, 268 Va. at 12.

2. The "Trial Within a Trial" on Dr. Pitman's Discipline was Error Regardless of Whether Collateral Disciplinary Issues are Flatly Inadmissible or Can be Mentioned in <u>Passing Without Detail.</u>

Defense counsel moved pre-trial to exclude this evidence on the grounds that it was irrelevant, collateral and unduly prejudicial. (JA 31-35, 111-15.) The court denied the Motion. (JA 113-19.) At trial, over

objection, the court not only admitted evidence of the Board's proceedings, but permitted Plaintiff to ask Dr. Pitman in detail about accusations levied against him by the Virginia Board of Medicine – and also permitted Plaintiff to delve into the minutia of the allegations. (JA 529-51.) Thus, the jury heard the details of copious charges that were levied.[3] The majority of cross-examination focused on these collateral matters rather than the standard of care for the blepharoplasty at issue in this trial or Dr. Pitman's views on the case. (*Id.*) The collateral evidence was highly prejudicial and distracting.

* * *

[3] The charges put before the jury included: leaving his operating room in an unsafe and unsanitary condition; maintaining biohazard materials in bins without proper bags; storing Botox and food in the same office refrigerator; leaving unsterile surgical instruments in the operating room sink; having unlicensed personnel provide medical treatment in his absence; instructing two unlicensed medical assistants to remove sutures and staples from post-operative patients, to clean wounds, and to change dressings; failing to place eight to ten patients with other authorized treatment providers for opioid dependency; failing to ensure proper continuity of care for patients receiving Suboxone treatment; leaving pre-signed prescription pads with his staff; failing to advise patients that he was being deployed for military duty; failing to provide a patient with a referral to another plastic surgeon; allowing a medical assistant to provide Percocet to a patient; prescribing Percocet to a patient being treated as an opioid addict; failing to obtain and document comprehensive medical and psychiatric, family, and substance abuse histories, and physical examinations for patients being treated for opioid addiction. (JA 36-44.)

This case squarely presents the question of whether the logic of *Stottlemyer* applies to expert witnesses. Under *Stottlemyer*, all the disputed evidence here was collateral and *Stottlemyer's* language extends to protect all witnesses from this type of collateral attack. 268 Va. at 11-13.

Various jurisdictions share the view that collateral disciplinary information is inadmissible.[4] Even where bare evidence of a Board inquiry

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[4] Courts across the country split as to whether litigants may yield collateral licensure issues or unrelated lawsuits to challenge medical experts on cross-examination. Some jurisdictions bar such evidence. *Manhardt v. Tamton*, 832 So. 2d 129, 131 (Fl. Dist. Ct. App. 2002) (reversing and remanding a medical malpractice case after concluding that a line of questioning on cross-examination of a medical expert regarding an unrelated case filed against the expert was irrelevant to the doctor's expertise . . .) *Reece v. Nationwide Mut. Ins. Co.*, 217 S.W.3d 226, 231 (Ky. 2007) (holding revocation of expert's medical license was a collateral matter that "had no relation to the case" to which the doctor was testifying "and was likely to be highly inflammatory"); *Tormey v. Trout*, 748 So. 2d 303, 305-06 (Fl. Dist. Ct. App. 1999) (finding that questions to medical expert regarding discipline from Florida's Department of Medicine were improper); *Nowastke v. Osterloh*, 549 N.W. 2d 256, 259 (Wis. Ct. App. 1996) ("we conclude that the trial court erred when it admitted evidence of the prior unrelated medical malpractice actions"); *Morrow v. Stivers*, 836 S.W.2d 424 (Ky. 1992) (expert's previous license suspension is inadmissible, collateral and highly inflammatory). Other courts have allowed evidence of collateral lawsuits or discipline to come into evidence. *Cetera v. DiFilippo*, 934 N.E. 2d 506, 520 (Ill. App. Ct. 2010) (explaining that jury properly heard evidence that expert physician received a letter of reprimand from licensing board); *Richmond v. Longo*, 604 A.2d 374, 378 (Conn. App. Ct. 1992) (finding that trial court wrongly excluded evidence of expert physician's medical license being restricted). There is, of course, a wide gulf between admitting the fact that a Reprimand has been received
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or reprimand is deemed admissible, parties generally are not free to dredge up extensive details of collateral allegations. In any event, wholesale character assassination on the scale that occurred here is not generally tolerated. *See e.g., Ney v. Smith*, 52 Va. Cir. 105 (Alexandria Cir. Ct. 2000) (Pre-*Stottlemyer*) ("Plaintiff's counsel will be permitted to elicit that the suspension is not related to the witness's medical expertise. No further questioning on that issue by either side will be permitted.") The improper evidence admitted against Dr. Pitman irreparably tainted this trial.

B. The Circuit Court Erred in Finding Dr. Pitman's Disciplinary History Relevant and Admissible. (Relating to AOE I, IA, IB.)

1. Plaintiff Could Not Have Proven This Collateral Matter in Support of Her Own Case. (Relating to AOE I, IA.)

Matters that are "collateral" to the issues of the case or matters that merely tend to degrade a witness are not admissible as character evidence, even though they may bear on veracity. *See Harold v. Comm.*, 147 Va. 617, 622 (1927). The test to determine whether evidence is material or collateral is whether the party cross-examining the witness would be entitled to prove the matter in support of that party's own case, or

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and dragging an expert through copious unrelated "allegations" from an inquiry.

whether the only purpose of the evidence is for contradiction. *Stottlemyer*, 268 Va. at 12; *Seilheimer v. Melville*, 224 Va. 323, 327 (1982).

Here, the Board of Medicine matters into which Plaintiff made extensive inquiry were irrelevant and collateral to whether Dr. Gross complied with the applicable standard of care in the performance of a blepharoplasty, and whether Dr. Pitman was knowledgeable about that standard of care. Plaintiff could not have introduced the disciplinary evidence in her case in chief, and its only purpose was to degrade Dr. Pitman as a witness. *Stottlemyer*, 268 Va. at 12. Under *Stottlemyer*, it was error to allow the cross examination and a new trial is required.

2. The Disputed Evidence was Not Relevant: the Evidence was Improper for any Reason, Including Attempted Impeachment or a Challenge to Credibility. (AOE I, IA, IB.)

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Rule 2:401 of the Virginia Rules of Evidence. (Va. R. Evid.) Evidence that is not relevant is not admissible. Va. R. Evid. 2:402. Even if evidence is relevant, the court may exclude it if its probative value is substantially outweighed by the danger of unfair prejudice. Va. R. Evid. 2:403.

In this case, Dr. Pitman's disciplinary history is not relevant because it does not have any tendency to make the existence of any fact in issue more or less probable. To justify the subject matter of cross examination, Plaintiff offered "credibility" as the basis for asking Dr. Pitman about his disciplinary history. (JA 527.) Yet the evidence relating to the discipline was improper for the purpose of impeachment or attacking Dr. Pitman's credibility or veracity:

> When a litigant impeaches a witness' reputation for truth and veracity, such evidence must be confined to the general reputation of the impeached witness for truth and veracity and **may not include the commission of specific acts of untruthfulness or other bad conduct, even though these have bearing on veracity**.

Gamache v. Allen, 268 Va. 222, 229 (2004) (emphasis added).

Dr. Pitman was not convicted of any crime, and therefore impeachment by evidence of a criminal conviction per Va. Code § 19.2-269 and Va. R. Evid. 2:609 is not applicable. The evidence is not relevant as to credibility because Va. R. Evid. 2:608(b) states that "specific instances of the conduct of a witness may not be used to attack or support credibility"; and "specific instances of the conduct of a witness may not be proved by

extrinsic evidence."[5] There is no provision of Va. R. Evid. 2:607 (relating to impeaching a witness' credibility) under which Dr. Pitman's disciplinary history would be probative evidence of his credibility. Dr. Pitman's disciplinary history also is not relevant to prove any bias or prejudice, and thus Va. R. Evid. 2:610 permitting extrinsic evidence to prove bias or prejudice is not applicable.

The Board of Medicine allegations were used as suggested instances of alleged prior "bad conduct," which is not admissible for the purpose of attacking a witness' credibility. Plaintiff's rebuttal argument relying on Dr. Pitman's discipline and the details of alleged infractions shows that the error is harmful and reversible as it cannot be concluded that the testimony was immaterial to the jury's verdict. *See Barkley v. Wallace*, 267 Va. 369, 374 (2004). Indeed, Plaintiff bluntly told the jurors that Dr. Pitman's disciplinary history showed he lacked knowledge of the standard of care in this case. (JA 649; *see also* JA 648-51.)

The relevant issues at trial were whether Dr. Gross deviated from the standard of care for a blepharoplasty, proximately causing injury to Plaintiff. Nothing in Dr. Pitman's disciplinary history is probative of those issues.

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[5] *See e.g., Payne v. Carroll*, 250 Va. 336, 340 (1995) (prior felony conviction admissible, but details are inadmissible for purposes of impeachment except in the case of perjury.)

C. Even if the Disciplinary Evidence Were Deemed Relevant, the Prejudicial Effect Substantially Outweighed Any Probative Value. (Relating to AOE I, IC.)

Even if the trial court were deemed to be correct in finding some relevance in Dr. Pitman's disciplinary proceeding, that does not mean that an avalanche of disparaging disciplinary evidence is admissible or that the minutia relating to the specific allegations of the consent decree should be placed before the jury.

Generally, in Virginia, if relevant evidence is offered which may be inflammatory and which may have a tendency to prejudice jurors, its relevancy must be weighed against the tendency of the offered evidence to produce passion and prejudice out of proportion to its probative value. *Coe v. Comm.*, 231 Va. 83, 87 (1986). "Relevant evidence may be excluded if: (a) the probative value of the evidence is substantially outweighed by (i) the damage of unfair prejudice[.]" Va. R. Evid. 2:403.

When, as here, the prejudice is out of proportion to the probative value of the evidence, exclusion is necessary. *See, e.g., Seilheimer*, 224 Va. at 327; *Edwards v. Syrkes*, 211 Va. 600, 601 (1971) (prejudicial effect exceeds any probative value).[6]

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[6] *See Spurlin v. Richardson*, 203 Va. 984, 990 (1962) ("Evidence of collateral facts, from which no fair inferences can be drawn tending to throw

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Dr. Pitman was the only medical expert witness offered by the Defendants. He was extensively cross examined regarding over a dozen alleged instances of improper medical conduct that had nothing to do with the topics at issue in this case. (JA 536-51.) He was asked, "Doctor, isn't it a fact that you had an opportunity to either admit or deny these allegations in an administrative hearing and you chose to not deny these allegations?" (JA 550-51.) Because this was allowed, a trial within a trial was conducted that was essentially a mud-slinging campaign. It cannot be said that the error in admitting this highly prejudicial evidence did not influence the jury's decision. The verdict should be set aside.[7]

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light upon the particular fact under investigation, is properly excluded for the reason that such evidence tends to draw the minds of the jury away from the point in issue, to excite prejudice, and mislead them"); *Green v. Ford Motor Co.*, 3:00-cv-00049, 2001 U.S. Dist. LEXIS 19883, *22 (W.D.Va. Nov. 26, 2001) (holding that in regards to specific instances of misconduct by an expert medical physician, that the "probative value . . . is outweighed by the prejudicial effect such information would likely have if revealed to the jury").

[7] Generally, "error will be presumed prejudicial unless it plainly appears that it could not have affected the result." *Breeding v. Johnson*, 208 Va. 652, 659 (1968) (citations omitted). Where it appears on appeal that "illegal evidence has been admitted, the judgment must be reversed, as it cannot be said what effect it may have had on the minds of the jury." *Norfolk & W. Ry. Co. v. Briggs*, 103 Va. 105, 113 (1904) (citations omitted).

Even if this Court finds that the existence of an expert's "reprimand" or suspension or loss of license is relevant in the abstract, delving into the individual claims that were wholly unrelated to the medical procedures at issue here was extraordinarily prejudicial. Plaintiff's Rebuttal Argument confirms this – counsel told the jury that Dr. Pitman was essentially unqualified to render an opinion based on collateral, external evidence. (JA 648-50.)

By corollary, is any lawyer who has ever received a traffic ticket unfit to opine on what the law is – having flaunted the law behind the wheel? This is the exact logic Plaintiff used below.

The Circuit Court erred in permitting the collateral attack on Dr. Pitman. Under *Stottlemyer*, none of this evidence was admissible. Even if this Court finds some muted or summary reference to the Board hearing is admissible,[8] the overwhelming prejudice spawned by the improper cross-examination in this case necessitates a new trial.

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[8] *See, Ney v. Smith*, 52 Va. Cir. 105 (Alexandria Cir. Ct. 2000) (pre-*Stottlemyer* case allowing potential mention of license suspension, but nothing more.)

II. The Circuit Court Erred in Allowing Plaintiff to Inject the Consent Issue into the Case, Particularly Where No Such Claim was Pleaded and There was No Evidence that Exploring the Eyelid was a Deviation from the Standard of Care. (Relating to AOE II, IIA, IIB, IIC.)

No consent issues were pleaded by Plaintiff. And Plaintiff's expert did not opine that exploration of the eyelid was a deviation from the standard of care. Yet Plaintiff asserted that Ms. Stuart's injury occurred because Dr. Gross' exploration exceeded the parameters of the blepharoplasty surgery. (JA 159-60, 289, 591-92.)

A. The Circuit Court Erred in Denying Defendants' Motions for Mistrial and Post-Trial Motions For a New Trial. (Relating to AOE II, IIA, IIB.)

1. The Court Acknowledged Consent was Improperly Injected into the Proceedings.

The court voiced concern in each instance that Plaintiff injected consent into the trial. First, Dr. Malone, Plaintiff's expert, gratuitously mentioned that Dr. Gross only received consent to perform the blepharoplasty – suggesting that doing any additional treatment was unauthorized. (JA 289.)[9] The court complained, "it's just hanging there,

[9] Again, this occurred after Plaintiff's counsel assured the court it would not happen. (JA 170-71.) And after Counsel's Opening Statement raised similar concerns (JA 144), resulting in a promise Plaintiff would not raise informed consent as an issue. (JA 170.)

that somehow this defendant exceeded the scope of what was consented to." (JA 294.) Counsel's Closing Argument went even further.

In spite of the prior admonitions of the Court and the concerns expressed regarding interjection of matters related to informed consent, Plaintiff's counsel began his closing remarks with the following:

> The evidence in this case, when you look at the record of Dr. Gross, is that when Ms. Stuart went to see Dr. Gross, *she went for one reason*. She went to have the puffiness removed from her eyes. *That's the only reason she went there. We're here today because Dr. Gross performed the blepharoplasty*, the procedure to remove the fat from the eyes, *and then after he completed the blepharoplasty*, he damaged the levator muscle in the right eye and the levator tendon in the left eye *after he completed the blepharoplasty*.

(JA 591-92, emphasis added.)

In response to these comments, the court sustained Defendants' objection to counsel's improper Closing Argument and wrestled with "how to fix" the fact that the jury was "now in a position to infer that [Plaintiff] went in for one procedure and got two[.]" (JA 601-02.) And the second, "unconsented" one caused the injury. (*Id*.)

2. The Trial Court Should Have Granted a Mistrial and/or <u>Defendants' Motions to Strike and for a New Trial.</u>

Defendants raised motions for mistrial to both Dr. Malone's comment and the Closing Argument (JA 291, 603, 593-604) – and then raised post-

trial motions to set aside the verdict and for a new trial based on these rulings. The trial court rejected all of them (JA 300, 302-06, 604-06, 86) – simply leaving the consent issue "hanging there." (JA 294.)

An alleged lack of informed consent was never part of Plaintiff's cause of action; argument and evidence regarding consent simply was not relevant. "'Relevant evidence' means evidence having any tendency to make the existence of any *fact in issue* more probable or less probable than it would be without the evidence." Va. R. Evid. 2:401 (emphasis added). "When counsel deliberately places irrelevant issues before a jury for an improper purpose, the likely necessity of granting a mistrial increases." *Lowe v. Cunningham*, 268 Va. 268, 274 (2004); *Davis v. Maynard*, 215 Va. 407, 408 (1975).

Dr. Malone's gratuitous mention of consent (JA 289) provided fuel for the consent fire. While the court originally told the jury to disregard Malone's comment (JA 302, 306), this assumed Plaintiff would not rekindle the flames. Plaintiff's Closing Argument, instead, ignited the problem.

> Although counsel for a party generally has wide latitude in making closing arguments, counsel may not argue as evidence in the case matters that do not appear in the record. *See Velocity Express Mid-Atlantic, Inc. v. Hugen*, 266 Va. 188, 198-99 (2003); *Atlantic Coast Realty Co. v. Robertson*, 135 Va. 247, 263 (1923). Counsel has no right to testify in the guise of making argument, nor to assume the

> existence of evidence that has not been presented. *Velocity Express*, 266 Va. at 199; *Atlantic Coast*, 135 Va. at 263.

Graham v. Cook, 278 Va. 233, 249-50 (2008).

The court erred by not granting the motions for mistrial and post-trial motions because simply instructing the jury to disregard counsel's "last statement" (JA 606) did not cure the harm imposed by those comments. As this Court recognized in *VEPCO v. Jayne*, 151 Va. 694 (1928), where counsel's improper closing remarks are not supported by the law or evidence, instructing the jury to disregard those remarks serves only to "theoretically cure the wrong, leaving the defendant to writhe under the unjustified imputations before the jury . . ." 151 Va. at 703.[10] Here, the trial court erred in allowing Plaintiff to inject the unpled consent issue into the case, *Allison v. Brown*, 293 Va. 617 (2017); *Mayr v. Osborne*, 293 Va. 74 (2017); and by denying Defendant's motions for mistrial and to set aside the verdict and for a new trial.

[10] *See also Maxey v. Hubble*, 238 Va. 607 (1989) (reversing a trial court's denial of a motion for mistrial following plaintiff's counsel's improper argument.)

B. The Circuit Court Erred in Refusing to Provide An Instruction that Exceeding Consent was Not at Issue. (Relating to AOE II, IIA, IIB, IIC.)

1. The Concept of Exceeding Consent was Repeatedly Injected into the Case and the Court Failed to Inform the Jury that "Consent" was Not a Proper Basis for Recovery.

The trial court twice ruled that Plaintiff had improperly injected consent issues into the case – and twice asked Defendants how the court could best fix the problem. (JA 295, 604.) In both instances, Defendants plainly requested an instruction that told the jury that lack of consent, or exceeding consent, was not at issue in the case. (JA 300-01, 604-06.) In both instances, the court, at Plaintiff's request, refused to do so. (JA 300, 604-06.) In response to post-trial motions, the court upheld the decision. (JA 98-99.)

Plaintiff did not plead a "consent" claim. As this Court has made clear on various occasions, a litigant cannot recover for a claim that has not been pleaded. *Allison*, 293 Va. at 625-26; *Wetlands Am. Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 291 Va. 153, 174-75 (2016); *Jenkins v. Bay House Assocs.*, 266 Va. 39 (2003); *Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.*, 221 Va. 1139 (1981).

The court acknowledged consent was raised when Plaintiff argued that Ms. Stuart had come in for one treatment and received a second, "and

it's the second one that causes us to be here." (JA 601-02.) Earlier in the proceeding the Circuit Court recognized that through Dr. Malone's testimony on "consent" Plaintiff had left the issue of consent "hanging there." (JA 294, 289.) The court was aware the consent problem had been placed before the jury. When Plaintiff suggested her Closing Argument did not raise consent issues, the court adamantly disagreed. (JA 596, 602.) Yet, when asked to fix the consent problem, the court declined to do so.

Defendants first requested an instruction to the effect that: "There is no issue in this case with regard to informed consent." (JA 300.) Then, after the improper Closing Argument, Defendants requested an instruction that Plaintiff "is not claiming that Dr. Gross performed any procedure on her without her consent." (JA 604.) Both statements were undeniably accurate. *Schlimmer*, 268 Va. at 78 (litigant entitled to an instruction supported by the record.)

The Court's rejection of these requests allowed Plaintiff to cultivate the idea that Dr. Gross' exploration of the eyelid exceeded consent. That is certainly what was argued:

> ***[S]he went for one reason***. She went to have the puffiness removed from her eyes. ***That's the only reason she went there. We're here today because Dr. Gross performed the blepharoplasty***, the procedure to remove the fat from the eyes, ***and then after he completed the***

> ***blepharoplasty***, he damaged the levator muscle in the right eye and the levator tendon in the left eye ***after he completed the blepharoplasty***.

(JA 591-92) (emphasis added).

There was absolutely no evidence exploration was a deviation from any standard of care. Indeed, the uncontested evidence was to the contrary. (JA 505, 393-95.) The requested instructions were required to protect the Defendants from Plaintiff's unsupported innuendos regarding surgery "beyond" consent. Without the requested instructions, jurors were left with the impression that Plaintiff's unpleaded theory was legitimate. *Maxey*, 238 Va. at 616. The trial court's admonition to ignore Counsel's "last statement" (JA 607) certainly did *not* tell jurors that exceeding consent was not a proper basis for recovery.

A trial court's failure to give a required curative instruction "is presumed to be prejudicial 'unless it plainly appears that it could not have affected the result.'" *Lavinder v. Comm.*, 12 Va. App. 1003, 1008 (1991) *(en banc)* (quoting *Caldwell v. Comm.*, 221 Va. 291, 296 (1980)). Here, the verdict returned was a general verdict; the trial court acknowledged several times that consent had been put before the jury (JA 294, 289, 601-02, 596), and this Court cannot know whether the jury's verdict was based, in whole or in part, upon the unpleaded theory advanced by Plaintiff. There is a

significant likelihood the verdict is based on Plaintiff's "exploration beyond consent" argument – a theory which was neither proven, nor pleaded.[11]

Under these circumstances, the proper remedy is to set aside the verdict. *E.g., Tashman v. Gibbs*, 263 Va. 65, 76 (2002) (when it cannot be determined from the verdict upon what theory of recovery the jury relied, the court must presume that the jury relied on the allegedly erroneous evidence and instructions in reaching its verdict); *Ponirakis v. Choi*, 262 Va. 119, 126 (2001); *Bostic v. About Women OB/GYN, P.C.*, 275 Va. 567, 578 (2008). A new trial is required.

2. The Failure to Instruct the Jury that Informed Consent is Not an Issue in the Case is Not Harmless.

Plaintiff suggests it was harmless for the Court to fail to instruct the jury that "exceeding consent" is not a basis for recovery in this case. She contends that the Court's instruction to disregard counsel's "last statement" and suggestion that Plaintiff's counsel "rephrase" his argument (JA 607) eradicated any mischief caused by counsel's comments:

> The evidence in this case, when you look at the record of Dr. Gross, is that when Ms. Stuart went to see Dr. Gross, **she went for one reason**. She went to have the puffiness removed from her eyes.

[11] Again, notably, there is no evidence in this record that exploration was a deviation from any standard of care. In fact, the evidence is to the contrary. (JA 505, 393-95.)

> **That's the only reason she went there. We're here today because Dr. Gross performed the blepharoplasty**, the procedure to remove the fat from the eyes, **and then after he completed the blepharoplasty**, he damaged the levator muscle in the right eye and the levator tendon in the left eye **after he completed the blepharoplasty**.

(JA 591-92) (emphasis added).

First, the Court's admonition to "disregard the last statement" did not tell the jury that exceeding consent was not an issue in the case.[12] Second, counsel's *last* statement dealt with "when" the damage allegedly occurred (*i.e.*: he damaged the eyelids "after he completed the blepharoplasty.") The Court's comment failed to offer any insights into whether exceeding consent was a viable theory of recovery. Moreover, telling counsel to "rephrase" his comments (JA 607) suggests the choice of words was improper – but not the theory. Third, error is presumed when improper comments and evidence are placed before the jury. *See Tashman*, 263 Va. at 76 (Court must presume jury relied on error in

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[12] The Court told the jury:

> Ladies and gentlemen, the objection that was just made by the defendant is sustained. You are to disregard the last statement, and then I'll ask [plaintiff's counsel] to please rephrase at this time.

(JA 607, brackets supplied.)

reaching its verdict); *Lavinder*, 12 Va. App. at 1008 (failure to give curative instruction is presumed prejudicial unless it plainly appears it could not have affected the result.) And the risk of repeatedly injecting an improper issue into a case should be borne by the proponent of the improper theory not the target of the innuendo. *See Jayne*, 151 Va. at 703 (theoretical cure leaves defendant to writhe under the unjustified imputations.)

As this Court has observed: "Juries are sufficiently prone to indulge in conjectures, without having possible facts not in evidence suggested for their consideration." *Norfolk R&L Co. v. Corletta*, 100 Va. 355, 360 (1902). Here, the consent claim was not even pleaded; but plaintiff improperly sowed the consent theory repeatedly before the jury. (JA 289-90, 144, 591-92.) Where counsel repeatedly injects improper argument or testimony into a trial, it is grounds for a new trial, even when the trial court has instructed the jury to disregard the improper comments. *See Velocity Express Mid-Atlantic v. Hugen*, 266 Va. 188, 198-203 (2003); *Maxey v. Hubble*, 238 Va. 607, 615-16 (1989); *Rinehart & Dennis Co. v. Brown*, 137 Va. 670, 678-80 (1923). In *Maxey*, a medical malpractice case, plaintiff's counsel repeatedly attempted to "portray the defense as a part of a conspiracy among members of the medical profession." 238 Va. at 613.

Though the trial court instructed the jury to disregard the remarks of counsel, this Court reversed and remanded the plaintiff's verdict:

> The injured party's right to a new trial is especially strong where his opponent has persisted in an objectionable course of conduct after the trial judge has expressed disapproval of it, sustained an objection to it, or instructed the jury to disregard it.

Maxey, 283 Va. at 615-16; *see also Rinehart*, 137 Va. at 678-80. The Court's failures to grant the requested curative instructions were not harmless error and the decision below should be reversed.

III. The Trial Court's Ruling That it Lacked Authority to Rule on Post-Trial Motions was Erroneous. (Relating to AOE III.)

Plaintiff convinced the trial court that it could not sit as an "appellate court" to review its own decisions on post-trial motions. (JA 86-88.) Further, by relying on cases involving mistrial motions that were never requested until ***after*** the jury retired, Plaintiff sought to convince the court that it could not re-visit or consider its flawed rulings here regarding mistrial motions that *were brought* ***before*** the jury retired. (*Id*.) Plaintiff also, under Va. Code § 8.01-430, argued that if evidence supported the verdict, the verdict could not be overturned. (*Id*.) Of course, this argument ignored that if the jury is improperly instructed and overwhelmed with inadmissible evidence, its verdict is insupportable.

Here, Plaintiff: (1) never pleaded consent, (2) argued that Dr. Gross exceeded consent (JA 591-92), and then (3) blocked instructions that consent was not at issue. (JA 301-02, 605-06.) This was most certainly reviewable in post-trial motions. *Gazette, Inc. v. Harris*, 229 Va. 1, 48 (1985) (holding trial court erred in refusing defendant's post-trial motion to reconsider evidence.) The evidentiary rulings as to Dr. Pitman's character assassination were also reviewable. Often, when the totality of such errors is revisited post-verdict, the impact is more visible. That is one reason post-trial motions exist. *See* Rule 4:15. Plaintiff's unprecedented theory on Va. Code § 8.01-430 – that trial courts cannot sit as their own appellate court – would cripple motions for reconsideration and common post-trial motions practice.

Plaintiff's misdirected attempt to apply "waiver" analysis to claims that were repeatedly preserved during trial, similarly, must fail. The key waiver inquiry is always whether the court has been made aware of the argument being raised and has an opportunity to rule on it. *Scialdone v. Comm.*, 279 Va. 422 (2010); Va. Code § 8.01-384. The trial court here was plainly aware of – and had authority to rule on – Defendants' Post-Trial motions seeking a new trial (or renewed mistrial motion) based on errors that were previously raised during the proceedings. *See*, Rule 1:1. The Court erred

in ruling it lacked authority to address these issues (JA 692-93, 98-99) and in failing to grant Dr. Gross' Post-Trial motions for a new trial.

CONCLUSION

For the foregoing reasons, Defendants request that the judgment be reversed and the case be remanded for a new trial.

Respectfully submitted,

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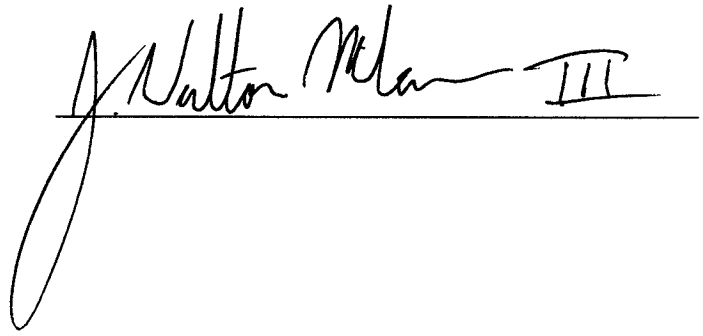
CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, that on this 5th day of December, 2018, electronic copies of this Opening Brief of Appellee were e-filed, via VACES, and the correct number of paper copies were hand-filed with the Supreme Court of Virginia. In addition, an electronic copy of this Opening Brief of Appellee was served via e-mail, and paper copies by first class mail, to counsel for Appellant at the following address:

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