IN THE

Supreme Court of Virginia

RECORD NO. 180758

MICHAEL PHILLIP GROSS, *et al.*,

Appellants,

v.

SUPEN PEZE STUART,

Appellee.

REPLY BRIEF OF APPELLANTS

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ARGUMENTS AND AUTHORITIES

I. The Court Erred in Permitting Ms. Stuart to Cross-Examine the Defense Expert About Collateral Matters.

Plaintiff's cause of action alleged Dr. Gross failed to meet the standard of care in performing a blepharoplasty procedure to remove fatty tissue from Ms. Stuart's eyelids. During the trial the defense expert explained that Dr. Gross properly performed the procedure (along with exploration around the eyelids). (JA 479-81, 503-10.) But on cross-examination Ms. Stuart questioned the defense expert about disciplinary allegations made against him by the Board of Medicine that did not relate to a blepharoplasty procedure or *any* facts at issue in the trial. The Circuit Court permitted this non-probative and wholly prejudicial line of questioning, in essence, without limitation.[1]

A. The Standard of Care Matters in the Medical Malpractice Expert Opinion Setting.

Ms. Stuart suggests that because Dr. Pitman relied on his "experience" in forming his opinion, any negative experience or history relating to Pitman or his career must be admissible. Again, in evidentiary

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[1] Ms. Stuart's claim that she did not mention the ultimate sanction is sleight-of-hand. She implied the sanction imposed on Dr. Pitman was severe – and preferred *not* to reveal that the proceedings resulted only in a reprimand and modest fine. (JA 42-43.)

rulings, *relevancy* generally should control. Va. R. Evid. 2:401. Just because Dr. Pitman relies on his professional experience performing blepharoplasties, this does not mean that experience with other unrelated matters, such as where botox is stored and whether instruments are sterilized (while he was serving in Afghanistan) is also relevant.

One thing is clear here – Ms. Stuart never brought forth any evidence that the Board of Medicine allegations bore any relationship to a blepharoplasty procedure. Ms. Stuart has relied on the suggestion that administrative charges *generally* relate to Dr. Pitman's knowledge of the standard of care. However, his knowledge of the standard of care with respect to the storage of botox, for example, is not relevant to his knowledge of the standard of care for performing a blepharoplasty.[2]

Although Ms. Stuart tries to expand the relevant standard of care here to all life experience, the definition of the standard of care in Va. Code § 8.01-581.20 limits the discussion to the procedure at issue. Va. Code § 8.01-581.20 defines the standard of care as the standard "by which the

[2] By analogy, a lawyer may lose a client's file, but that has zero bearing on that lawyer's knowledge of the standard of care in preparing a will. And under plaintiff's construct, an attorney expert's view on the law would necessarily open his driving record to scrutiny: to see if he actually followed or had respect for the law.

acts or omissions are to be judged . . ." The "standard of care" is linked in the Code section to the specific acts and omissions at issue -- here the performance of the blepharoplasty.[3]

Ms. Stuart tries to defend her exhaustive questioning on collateral (alleged) "bad acts" by asserting that the issues were relevant because the defense expert's "experience" was broadly placed at issue by reference to the expert's resume/CV. (Stuart's Br. at 16-17.) Adopting such a standard would openly encourage parties to focus on an expert's purported "bad acts" in order to impeach the witness's credibility and "experience." The very purpose of Rule 2:608(b) is to limit such peripheral expeditions. And, with respect to collateral matters, *Stottlemyer* counsels "[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 v. Ghramm*, 268 Va. 7, 12 (2004); *see also* Va. R. Evid. 2:607.

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[3] Indeed, Virginia decisions are legion that require a medical expert to "demonstrate expert knowledge of the standards of the defendant's specialty and what conduct confirms or fails to conform to those standards." *Holt v. Chalmeta*, 295 Va. 22, 32-33 (2018) (quoting *Wright v. Kaye*, 267 Va. 510, 518 (2004)).

When analyzing evidence of "bad acts," Rule 2:608 unequivocally denies introduction of specific instances of bad conduct to impeach *any* witness:

> Rule 2:608(b) *Specific instances of conduct; extrinsic proof*. Except as otherwise provided in this Rule, by other principles of evidence, or by statute, (1) specific instances of the conduct of a witness may not be used to attack or support credibility; and (2) specific instances of the conduct of a witness may not be provided by extrinsic evidence.

Notably, Ms. Stuart does not even attempt to distinguish or otherwise address Rule 2:608 in her briefing.[4]

B. Virginia Should not Adopt the Procedure Used at this Trial.

Holding collateral evidence of disciplinary issues inadmissible is consistent with *Stottlemyer*, Rule 2:608, the rules governing expert qualifications, and the holdings from numerous other courts facing the same issue. (Opening Br. at 17, note 4.)[5] Alternatively, admitting the mere

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[4] Additionally, Ms. Stuart's argument that any *allegation* of wrongdoing triggers admissibility defies logic. For example, Ms. Stuart posits that allegations of "bad acts" against an expert should be favored over a "bare finding" made by the Board of Medicine (Stuart Br. at 31.) But what if the expert was found innocent of any wrongdoing? In Ms. Stuart's regime, an expert could be still questioned about mere allegations without disclosing that the expert was ultimately found not culpable of any wrong.

[5] *See, e.g. Tormey v. Trout*, 748 So. 2d 303, 306 (Fla. Dist. Ct. App. 1999) ("Evidence of particular acts of misconduct may not be introduced to

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fact of a reprimand or censure without further inquiry could be reconciled with other evidentiary limitations like impeachment by prior convictions (Rule 2:609); *see 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.) Indeed, some Virginia Circuit Court decisions that pre-date *Stottlemyer* followed this approach. *See Ney v. Smith*, 52 Va. Cir. 105 (Alexandria Cir. Ct. 2000) ("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.")

Either of these approaches would avoid the inevitable trial within a trial spawned by plaintiff's theory. More importantly, either procedure avoids the avalanche of prejudicial evidence guaranteed to be introduced under Ms. Stuart's construct. Moreover, as a practical matter, imagine

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impeach the credibility of a witness"); *Morrow v. Stivers*, 836 S.W.2d 424, 429 (Ky. 1992) ("The matter of having hepatitis and thus not practicing for a time does not reflect on [the expert's] knowledge or ability to testify on the matters at hand, i.e., the causation of Stivers's condition and any deviation by Dr. Morrow from the standard of care."). By contrast, Appellee's brief presents no cases permitting the type of wholesale "bad acts" cross-examination permitted below.

future discovery if anything a witness has ever done wrong is relevant to probe his "experience."

1. Prejudice Outweighed Probity Here.

Ms. Stuart asserts that the Circuit Court did not abuse its discretion in determining that the probative value of the Consent Decree allegations outweighed any prejudicial effect. First, inadmissible "bad acts" evidence is barred under Va. R. Evid. 2:608(b) and Va. R. Evid. 2:607. This evidence had no probative value – or extraordinarily little value. Second, the prejudice here was overwhelming. (Opening Br. at 15-16.) Third, "[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). Finally, litigants need to know the rules. Leaving the admissibility of "bad acts" to discretion will lead to inconsistency – which is why such evidence is generally excluded under Rules 2:608 and 2:607.

2. Ms. Stuart Conducted a Trial Within a Trial Regarding the Defense Expert's Collateral Disciplinary Issues.

Ms. Stuart suggests that she did not conduct a trial within a trial. (Stuart Br. at 20.) But during cross examination of the defense expert, Ms. Stuart presented numerous *allegations* against him that had been issued in an investigation conducted by the Board of Medicine. (JA 535-51.) Even

after the defense expert denied the allegations, Ms. Stuart pressed on and alluded to findings from the administrative consent order. (JA 541-51.) On re-direct Dr. Pitman defended himself – and thus the jury was exposed to a lengthy back-and-forth about the details of allegations from a disciplinary action that had no relevance to the medical procedure at issue in this case. This is a trial within a trial.[6]

The attempt by Ms. Stuart to create a rule that experts in Virginia Courts may be subjected to cross-examination about any professional experience should be rejected. The evidence injected into this case was collateral to the applicable standard of care – and extremely prejudicial.[7]

II. Dr. Gross Did Not Waive His Objections to the Improper Cross-Examination of His Expert.

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[6] Ironically, Appellee also argues that since Dr. Gross made the "strategic decision" to rehabilitate Dr. Pitman and Ms. Stuart essentially "won" the trial within a trial, it is unfair to let Dr. Gross pursue an appeal of the cross-examination. (Stuart Br. at 11).

[7] Ms. Stuart challenges Dr. Gross' use of the word "collateral", but also (in attempting to distinguish *Stottlemyer*) argues that there is "overwhelming prejudice" to the defendant "if his or her career is put onto trial, rather than the specifics of the case." (Stuart Br. at 26-27) *Stottlemyer* involved a defendant/witness, rather than a non-party witness – but as noted in Appellants' Opening Brief, *Stottlemyer's* language applies to all witnesses. (Opening Br. at 15.) The reasoning in *Stottlemyer* was that prejudicial, wholly collateral evidence is not relevant – and this holding remains true in all cases.

Ms. Stuart spent the bulk of her cross-examination of Dr. Pitman raising collateral and prejudicial claims against the defense expert. (JA 535-51.) She now argues that by allowing Dr. Pitman to defend himself on re-direct, Dr. Gross waived his *Stottlemyer*-related objections, stating: "If Dr. Gross wanted to preserve his objection to Dr. Pittman's practice history, he could not address the matter on redirect examination." (Stuart Br. at 10.) The rule posited by plaintiff is as unfair as it is erroneous.

Ms. Stuart fundamentally misconstrues *Combs v. Norfolk & W. Ry*., 256 Va. 490 (1988). *Combs* involved exhibits – a table and commode – that plaintiff asserted were substantially different from the conditions of the accident site and plaintiff objected to their use at trial by the railroad. However, plaintiff subsequently used the same exhibits to try to "recreate" the scene and accident. 256 Va. at 499. This affirmative use of the exhibit "went beyond mere rebuttal" and waived the objection. *Id*. Dr. Gross did not affirmatively utilize demonstrative evidence here. His expert, Dr. Pitman, was the victim of character assassination – and, on re-direct, Dr. Pitman defended himself regarding the issues raised during cross-examination. As this Court has stated many times:

> We have never held that the mere cross-examination of a witness or the introduction of rebuttal evidence, either or both, will constitute a waiver of an exception to testimony which has been

> duly taken. To constitute such a waiver the party objecting to the evidence must have gone further and introduced on his own behalf testimony similar to that to which the objection applies.

Drinkard-Nuckols, Executor v. Andrews, 269 Va. 93, 102 (2005). No waiver occurred here.

III. The Circuit Court Erred in Allowing Stuart to Inject Consent Into the Case and in Failing to Give a Curative Instruction that Consent was Not at Issue.

Ms. Stuart's counsel's opening statement set the stage for a trial in which plaintiff's informed consent innuendo played a significant role. (JA 159-60, 289, 591-92). The cumulative effect of plaintiff's references to informed consent subjected the jury to evidence and argument on a claim that was never pled, was not proved, and should not have come up at trial. *Allison v Brown*, 293 Va. 617 (2017); *Mayr v. Osborne*, 293 Va. 74 (2017).

A. The Circuit Court Repeatedly Found the Issue of Consent was Improperly Placed Before the Jury.

Stuart's brief suggests the Circuit Court viewed the instances in which she brought up consent as isolated, insignificant, and innocent accidents. (Stuart Br. at 33.) This suggestion finds little support in the record. The Circuit Court expressed repeated frustration with counsel's references to consent. (JA 295, 602).

Prior to examining his expert witness, Stuart's counsel expressly committed to avoid consent issues (JA 170), telling the Circuit Court that plaintiff's expert would "answer my questions. He's not the kind of guy that's going to blurt something." (JA 171). But during his direct examination plaintiff's expert, Dr. Malone, blurted out that defendant "planned and got consent for a blepharoplasty" - suggesting that what Dr. Gross did went beyond this consent. Dr. Gross moved for a mistrial. The Circuit Court recognized that informed consent was "just hanging there, that somehow this defendant exceeded the scope of what was consented to." (JA 294).

In closing, counsel continued to cultivate the informed consent theory by arguing that when Ms. Stuart "went to see Dr. Gross, she went for **one reason**." Counsel continued, "the only reason she went there" was for the procedure to remove puffiness from the eyes and then noted that Dr. Gross injured plaintiff "after the blepharoplasty." (JA 591-592).[8] The Circuit Court again sustained defendants' objections and noted that counsel had yet again suggested that a second procedure beyond the scope of the

[8] In opening argument counsel had planted the same "one reason" seed: remarking 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.)

blepharoplasty caused Ms. Stuart's injury. (JA 601-602). The trial court stated that "the jury is now in position to infer that [Stuart] went in for one procedure and got two, and I just need to know how to fix that." (JA 601-602) (brackets added). The Court pushed back strongly against counsel's argument that he was merely suggesting that Dr. Gross went too far:

> [COUNSEL]: I said she went in for the blepharoplasty and he went too far is what I was –
>
> THE COURT: No, sir. 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) (brackets supplied.)

Informed consent did not give rise to Ms. Stuart's cause of action – accordingly, argument and evidence regarding consent was irrelevant. The Circuit Court thrice refused to grant defendants' mistrial motion and similarly failed to instruct the jury that consent was not at issue in this case.[9] Rather, the Circuit Court twice told the jury that defendants' objection was sustained and to disregard the prior statements. (JA 306, 607). This remedy did not address consent and fell short of fixing the consent problem (Opening Br. at 32-34), and the failure to give the requested curative instruction left the issue of consent "hanging there."

[9] In addition to the two mistrial motions made at trial, the Circuit Court refused defendants' post-trial motions as well.

This Court's precedents teach that repeated improper argument and testimony related to an inadmissible theory are grounds for a new trial. *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).

B. Ms. Stuart Conflates Exploration During the Blepharoplasty with Consent – and No Waiver Occurred with Respect to Consent.

Ms. Stuart suggests that by referencing exploration by Dr. Gross in performing the blepharoplasty, Dr. Gross opened the door for her to discuss whether she consented to a procedure separate and apart from blepharoplasty. Stuart conflates the difference between facts relating to the manner in which Dr. Gross performed a blepharoplasty and a legal claim for lack or consent. In other words, she fails to appreciate that: (1) whether exploration comported with the standard of care and (2) whether exploration amounted to a procedure to which Ms. Stuart had not consented are distinct questions. The former is appropriate in a negligence case - the latter is not, particularly if no consent claim has been pled.

This Court's precedent establishes that issues regarding a patient's consent and negligence during the performance of a medical procedure amount to different claims that must be pled and litigated independently. *Allison*, *supra*; *Mayr, supra*. Prior to trial, Ms. Stuart neither pled nor

identified or designated evidence that Dr. Gross lacked permission from Ms. Stuart to engage in exploration of the eyelid during the course of the blepharoplasty. Rather, she set in place a trial on the issue of whether the procedure performed by Dr. Gross aligned with the standard of care. But on three occasions in front of the jury it was suggested that Dr. Gross did not have permission from his patient to engage in certain exploratory actions related to the procedure. (JA 140-41, 289, 591-92.) And the Circuit Court specifically found the consent issue *was* raised by Ms. Stuart over her counsel's protests to the contrary. (JA 294, 601-02.)

By raising the propriety of "exploration" - which was a fact in this case - Dr. Gross did not somehow waive his objections or invite arguments regarding consent.

Finally, Ms. Stuart's expert never said that exploration was a deviation from the standard of care. In fact, the undisputed evidence is that exploration here met the standard of care. (JA 505.) This makes counsel's veiled suggestion that unconsented exploration was wrong and *caused* the injury all the more inappropriate. It would have been easy to simply instruct the jury that consent was not at issue – particularly since it was not pled – but Ms. Stuart fought this tooth and nail. (JA 293-96, 592-602.) Appellee

wanted the jury to believe exceeding consent was tantamount to negligence – and she likely succeeded.

This Court has frequently recognized that an insufficient curative instruction cannot cure significant ills. *Carter v. Shoemaker*, 214 Va. 16 (1973), *Kitze v. Comm.*, 246 Va. 283 (1993). Dr. Gross specifically sought the correct curative instruction repeatedly (JA 300, 604.) – but it was denied at Ms. Stuart's urging. This was reversible error.

IV. The Trial Court Erred in Accepting Ms. Stuart's Claim that the Circuit Court Could Not Sit as its Own Appellate Court and in Ruling it was Foreclosed from Reviewing Post-Trial Motions.

Virginia trial courts regularly assess evidence and statements by counsel in post-trial motions. See e.g., *Harris v. Shirmer*, 93 Va. Cir. 8, 31-40 (2016), *Meyer v. Schulman*, 66 Va. Cir. 254 (2004). Indeed, this Court has held that it is error for a trial court *not* to set aside a verdict post-trial where counsel makes inappropriate remarks during trial. *Forsberg v. Harris*, 238 Va. 442, 445 (1989); see also *Lowe v. Cunningham*, 268 Va. 268, 274 (2004) (holding that trial court erred in refusing to grant motions for mistrial made both during and after trial).

Jenkins v. Pyles, 269 Va. 383, 388 (2005), relied on by Stuart (See Stuart Brief at 45), comports with the above authorities and does not suggest that it is inappropriate for a trial court to review evidentiary rulings

or improper argument issues post-trial. *Jenkins* considered a trial court's ruling that a "plaintiff was guilty of contributory negligence as a matter of law." *Id.* at 385. The trial court granted defendant's motion to set aside a jury verdict for plaintiff and subsequently entered judgment for defendant. *Id.* at 387. Neither the trial court nor this Court, on appeal, considered or made any post-trial rulings regarding the admissibility of evidence. Rather, this Court held that the trial court's substitution of its factual conclusions for that of the jury was improper. *Id.* at 388. *Jenkins* teaches that trial courts should not disturb jury verdicts because the trial court views conflicting evidence differently than the jury. *Id.* at 388-90. But *Jenkins* in no way restricts a Circuit Court from considering post-trial motions and reconsidering and addressing rulings made during trial. *Forsberg*, 238 Va. at 445.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on January 11, 2019, the correct number of true and accurate copies of this Reply Brief were filed with the Supreme Court of Virginia, an electronic copy in PDF format was transmitted to court through VACES, and an electronic copy in PDF format was served upon counsel for the appellee via email as follows:

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