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IN THE

Supreme Court of Virginia

RECORD NO. 180758

MICHAEL PHILLIP GROSS, *et al*.,

Appellants,

v.

SUPEN PEZE STUART,

Appellee.

BRIEF OF APPELLEE

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Supen Peze Stuart submits the following Brief of Appellee in this appeal filed by Michael Phillip Gross and Prince William Plastic Surgery and Spa Services Company, LLC, appealed from the Fairfax County Circuit Court:

STATEMENT OF THE CASE

This is a medical malpractice case. Ms. Stuart went to Dr. Gross to have the puffiness in her eyelids surgically removed before her wedding. Before the surgery, she had no problem opening her eyelids or seeing. After the surgery, she could not raise or lower either eyelid. She saw a second surgeon, Dr. Malone, who discovered that a muscle in the right eyelid and a tendon in the left eyelid were cut. It is undisputed that Dr. Gross injured this muscle and tendon during his surgery. Dr. Malone was able to surgically repair the left eyelid, but unfortunately, the right muscle was inoperable and Ms. Stuart is functionally blind in that eye.

Ms. Stuart filed this lawsuit against Dr. Gross and his employer. Dr. Malone testified as a fact witness and as an expert, explaining to the jury that Dr. Gross was negligent in his performance of the surgery. He also testified to Ms. Stuart's permanent injury caused by the negligence. Dr. Gross relied upon an expert, Dr. Pitman, to present a highly technical defense about how the injuries occurred during the surgery yet absent negligence. The jury

rejected Dr. Gross's theory and returned its verdict against Dr. Gross in the amount of $800,000.00.

Dr. Gross's appeal is a textbook example of Monday-morning quarterbacking. The issues Dr. Gross appeals all relate to the trial court's discretion exercised in real time, when it had the opportunity to not only hear argument and engage in colloquy with counsel, but also to observe the witnesses and the jury's reaction to testimony and instruction. Dr. Gross does not focus on whether the trial court abused that discretion; instead, he wants this Court, based upon a sterile record, to reverse the trial court because it may have exercised its discretion differently. This is not an appropriate function of this appellate court.

The first assignment of error relates to the trial court's decision to allow Ms. Stuart to cross-examine Dr. Pitman about allegations over the way he practiced medicine in Virginia. The trial court considered briefs and heard considerable argument about the probative value and prejudicial effect of the evidence, and it allowed the evidence.[1] The allegations were probative of Dr. Pitman's credibility as an expert, including his knowledge of the standard of care in Virginia.

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[1] Judge Azcarate considered the issue *in limine*, and Judge Mann considered the issue during trial.

The second assignment of error relates to the trial court's refusal to grant two motions for a mistrial based upon Dr. Gross's argument that issues of consent were interjected into the trial. The trial court exercised its discretion by denying the motions and giving cautionary instructions.

The third assignment of error relates to Dr. Gross's post-trial motion. Dr. Gross asked the trial court to sit as its own appellate court, reviewing alleged error that occurred during trial and granting a mistrial on these bases. The trial court declined Dr. Gross's invitation, but it nonetheless found that its rulings during trial were appropriate.

As explained more fully below, Dr. Gross waived the objections he argues on appeal because he introduced evidence of the same character during trial. Even if he did not waive, the trial court properly exercised its discretion when ruling on the substantive issues. Thus, this Court should affirm the trial court.

STATEMENT OF FACTS

Ms. Stuart went to Dr. Gross for cosmetic surgery to remove the puffiness from her eyes for her upcoming wedding. J.A. at 320. Ms. Stuart testified that she wanted the puffiness from her eyes removed, and that she had no difficulty seeing or moving her eyelids. *Id.* at 320-21. On May 26, 2016, Dr. Gross attempted to remove the puffiness through a procedure

known as a blepharoplasty. *Id.* at 366. A blepharoplasty is performed by removing excess skin and fat in the eyelids. *Id.* at 197-98.

Following the surgery, Ms. Stuart could not open either of her eyes, so she went to another surgeon, Dr. Timothy Malone, to determine the cause of the problem. *Id.* at 176. Dr. Malone testified at trial, both as a fact witness about his diagnoses and treatment and as an expert witness on the issues of standard of care and causation. *Id.* at 191, 196, 198.

Dr. Malone testified that the muscle in Ms. Stuart's right eyelid was cut. *Id.* at 198. He testified that Dr. Gross negligently cut the muscle. *Id.* at 199-201, 221-22. The cut muscle was not repairable, so Ms. Stuart remains unable to operate her right eyelid. *Id.* at 203-04. This condition is permanent. *Id.* at 220.

Dr. Malone also testified that the tendon in Ms. Stuart's left eyelid was negligently cut by Dr. Gross. *Id.* at 209, 221-22. Dr. Malone was able to surgically repair the tendon, and Ms. Stuart is able to open and close her left eyelid again. *Id.* at 210, 212.

Dr. Gross offered Dr. John Pitman as an expert witness at trial. *Id.* at 469. Dr. Pitman testified that Dr. Gross was not negligent in performing his May 26, 2016, surgery and did not negligently cause injury to Ms. Stuart. *Id.* at 470-71, 479-80.

The first issue raised on appeal concerns Dr. Pitman's practice history. The Virginia Board of Medicine investigated Dr. Pitman about a number of transgressions involving multiple patients. *Id.* at 529-30. The Board made findings of fact against Dr. Pitman, and Dr. Pitman voluntarily waived his right to contest those findings. *Id.*; *see also id.* at 36-44, the Consent Order containing the allegations.

Dr. Gross filed a motion *in limine* and asked the trial court to exclude this evidence. *See id.* at 31-35. During oral argument of the motion, Dr. Gross conceded that Dr. Pitman's education, training, and experience were all relevant. *Id.* at 112. Indeed, Dr. Gross noted that "experience" was among the "kinds of things . . . to help the jury understand things." *Id.* at 113. Ms. Stuart argued that Dr. Pitman's history of failing to comply with state law and with Board of Medicine regulations was relevant to his knowledge of the standard of care. *Id.* at 115-16. The trial court ruled the evidence was relevant and therefore admissible. *Id.* at 117.

On direct examination at trial, Dr. Pitman was asked to offer opinions about negligence based upon his experience. *Id.* at 507. Dr. Pitman's *curriculum vitae*, which contained a detailed accounting of his experience

and accomplishments, was offered into evidence. *Id.* at 464-65. He also testified about his ongoing affiliation with the Army reserves.[2] *Id.* at 455-56.

During cross-examination, Dr. Pitman admitted that "practicing within the standard of care would include complying with state laws concerning the practice of medicine and regulations of the [B]oard of [M]edicine." *Id.* at 535. Ms. Stuart was permitted to question Dr. Pitman about the allegations of his practice history to explore his experience that helped form the basis for his opinions. *Id.* at 535-50. After he first denied the allegations, Dr. Pitman admitted that he previously declined the opportunity to challenge the allegations during an "administrative hearing." *Id.* at 550-51. Ms. Stuart did not reference the Board of Medicine, nor did she ask about the sanction imposed by it. *Id.* at 533, 550-51.

On redirect examination, Dr. Gross asked a number of additional questions about the transgressions, including whether the allegations occurred while Dr. Pitman was deployed. *Id.* at 568-69. Many of the allegations were repeated by Dr. Gross through questions, and Dr. Pitman was asked to explain them to minimize them. *Id.* at 568-73.

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[2] His affiliation is relevant here because Dr. Pitman blamed the transgressions on a deployment. Dr. Gross argued in closing that Dr. Pitman was in Afghanistan for 179 days. J.A. at 634.

The second issue raised through this appeal relates to consent. During direct examination, Dr. Malone gave an unsolicited answer to a question that referenced "consent." *Id.* at 289. Dr. Gross moved for a mistrial, arguing that consent was interjected into the case. *Id.* at 291. The trial court denied the motion for mistrial. *Id.* at 300. The trial court instructed the jury that it "should not consider any answer that Dr. Malone may have made to that last question." *Id.* at 306.

During closing argument, Ms. Stuart began by attempting to discuss why the defense theory of the case was inconsistent with the evidence. *Id.* at 591-92. Dr. Gross objected, arguing that the closing argument interjected consent into the case. *Id.* at 592-93. Dr. Gross moved for a mistrial, which was denied. *Id.* at 603, 606. The trial court then instructed the jury to disregard the argument made by Ms. Stuart, and it instructed Ms. Stuart to rephrase her argument. *Id.* at 607.

The final issue raised in this appeal is whether the trial court had authority to grant a mistrial after the jury's verdict was returned. After the verdict was returned, Dr. Gross moved for a mistrial, which was denied. *Id.* at 668. Dr. Gross then filed a post-trial motion for a mistrial, and the trial court found it did not have authority to grant a mistrial at that time, and even if it did, "and assuming without deciding that the jury was exposed to

improper argument or evidence, the Court finds that the jury was properly instructed." *Id.* at 693.

For the reasons stated below, the Court should affirm the trial court on all three assignments.

ARGUMENT

I. Dr. Gross waived his objections when he offered evidence of the same character at trial (Assignments of Error I and II).

This Court has repeatedly reaffirmed that when a party objects to evidence but introduces his own evidence of the "same character," that party waives his objection. *Pettus v. Gottfried*, 269 Va. 69, 79 (2005). When waiver occurs, the objection is not a ground for reversing a judgment. *Drinkard-Nuckols v. Andrews*, 269 Va. 93, 101 (2005).

This rule has an exception: "when the objecting party elicits evidence of the same character either during cross-examination of a witness or in rebuttal testimony, a duly made objection is not waived." *Id.* at 102. This exception is strictly limited; indeed, if evidence of the same character is introduced on redirect examination, the exception does not apply and waiver occurs. *Combs v. Norfolk & W. Ry.*, 256 Va. 490, 499 (1988).

A. Dr. Gross waived his objections to evidence of Dr. Pitman's practice history when he introduced the same evidence on redirect examination (Assignment of Error I).

Dr. Gross objected to Ms. Stuart cross-examining Dr. Pitman about uncontested factual findings made by the Board of Medicine regarding the way he practiced medicine. Ms. Stuart was permitted to cross-examine Dr. Pitman about the underlying allegations that led to the Board finding.[3] J.A. at 535-51. She did not reference the Board of Medicine or the fact that the findings were made by the Board.

Despite objecting to cross-examination about the allegations, Dr. Gross asked a remarkable number of questions about the same allegations on redirect examination. Dr. Pitman was asked: whether he denied the allegations, *id.* at 568; when the allegations about his dirty operating room arose, *id.* at 568-69; whether patients were receiving Botox injections from unlicensed staff while he was deployed, *id.* at 569; whether he was writing prescriptions for patients while deployed, *id.*; and whether he found appropriate accommodations for opioid-addicted patients, *id.* at 569-71. Dr. Gross repeated the allegations during one of his concluding redirect examination questions:

[3] From the outset of the cross-examination, Ms. Stuart was clear that she did not intend to ask about any sanction imposed by the Board. J.A. at 533.

> Does any of what you've just shared with us about the circumstances surrounding your deployment, the placement of your patients, whether your OR was dirty when you bugged out in 13 days -- does any of that come to bear in your mind when you sit down and sat down in this case to evaluate whether a surgeon you'd never heard of and didn't know met the standard of care for a patient you don't know?

Id. at 573.

The present case is directly controlled by *Combs*. In that case, the plaintiff objected to a table and a toilet used as demonstrative exhibits, arguing that they failed to accurately replicate those involved in the incident. 256 Va. at 498. The plaintiff asked a witness during redirect examination to interact with the demonstratives. *Id.* at 499. This Court found that although the table was inaccurate, the Court could not reverse on that basis because the plaintiff waived his objection by "presenting demonstrative evidence on his own behalf." *Id.* The Court explained: "While the presentation of rebuttal evidence does not give rise to such a waiver, [the plaintiff's] use of the exhibits ***during re-direct examination*** of [the witness] went beyond mere rebuttal." *Id.* (emphasis added).

The same rationale applies here. If Dr. Gross wanted to preserve his objection to Dr. Pitman's practice history, he could not address the matter on redirect examination. But he chose to ask many questions about the allegations. By engaging the evidence, attempting to explain it away, and

suggesting to the jury the weight that should be given to it, Dr. Gross waived his objection.

This is a just result. Dr. Gross was faced with a strategic choice: preserve his objection or engage the evidence and attempt to use it to his own advantage. Dr. Gross chose to engage it. During redirect examination, Dr. Gross asked six questions that either referenced Afghanistan or Dr. Pitman's deployment. J.A. at 568-73. Dr. Pitman's answers referenced those matters even more times. The goal of the redirect examination was clear: try to use Dr. Pitman's reserve status to his advantage and ask the jury to punish Ms. Stuart for questioning the credibility of a member of the armed services. Dr. Gross made that calculated choice, and unfortunately for him, it did not work.

It is fundamentally unfair for Dr. Gross to attempt this strategy, have it fail, and then come to this Court complaining of error in the underlying evidence. This is why the waiver rule exists. A litigant cannot object to evidence, then ask for a free pass to try to use the evidence to its advantage. Here, Dr. Gross should not get a free pass to attempt to use Dr. Pitman's practice history to his advantage, then complain when it does not work. In using this evidence, he made a strategic choice that came with consequences, including waiving his objection to the evidence.

For these reasons, the Court should rule that Dr. Gross waived his objection to Dr. Pitman's practice history and Assignment of Error I.

B. Dr. Gross waived his objection to consent by introducing evidence of the same character in his case-in-chief (Assignment of Error II).

According to Dr. Gross, Ms. Stuart interjected consent into the case. It is important to look at the specific objection given at trial. During his testimony, Dr. Malone stated, "He -- he planned and got consent for a blepharoplasty." J.A. at 289. Dr. Gross objected to the implication that he "***should not have been in there***, or should not have been that deep and then ***exploring those structures***," contending this specifically was injecting consent issues into the case. *Id.* at 159 (emphasis added).

Dr. Gross's objection is remarkable because his entire defense was predicated on the concession that he did in fact injure the eyelids, but only when he went "exploring" after he successfully completed the blepharoplasty. The defense was set up in opening statement, where Dr. Gross described how he "completed the blepharoplasty portion of the procedure" and then "explored." *Id.* at 150. Indeed, exploration was the major theme of the opening statement. Dr. Gross testified on direct about how he explored the structures after removing the fat from the eyes. *Id.* at

380. Dr. Gross also used his operative note to explain his exploration. *Id.* at 386-87.

On cross-examination, Dr. Gross succinctly described how "[he] completed the blepharoplasty and then explored to see how the levator aponeurosis[4] was." *Id.* at 403. And that "when [he] completed the blepharoplasty, that was without incident . . . [and] it wasn't until [he] went to explore the tarsus that a problem occurred." *Id.* at 408.

During redirect examination, Dr. Gross returned to the matter of exploration after completion of the blepharoplasty. He answered multiple questions on the topic of "if [he] would have encountered or not encountered the levator had [he] stopped after [the] blepharoplasty." *Id.* at 442. He then confirmed that "her difficulty opening her eyelids was a result of [his] surgery." *Id.* at 446.

The present case is similar to *Drinkard-Nuckols*. In that case, the plaintiff objected to "'expectation evidence' tending to show that health care providers other than the defendants were negligent." 269 Va. at 103. But the plaintiff then asked one defendant "about his expectations concerning who would read his report of [the plaintiff's] chest x-ray," so this Court held

[4] The levator "elevates the upper eyelid." J.A. at 357. Dr. Malone testified that the right levator muscle had been cut, which was what prevented Ms. Stuart from opening her eye. *Id.* at 198.

that the plaintiff waived his objection by offering evidence of the same character. *Id.* at 103-04.

In the present case, Dr. Gross objected to evidence about exploring eyelid structures because it "smacks" of informed consent. J.A. at 159. He then offered testimony in his case-in-chief—indeed, during his own direct examination testimony—about exploration he conducted after completing the blepharoplasty. In fact, Dr. Gross's direct examination contained eleven references to post-blepharoplasty exploration. *See id.* at 343, 345, 360, 365, 380 (two references), 381, 386 (two references) 391, and 393.

Ms. Stuart's theory was that Dr. Gross negligently performed the blepharoplasty procedure. Dr. Gross's defense was that he performed that procedure correctly, but injured Ms. Stuart during the post-blepharoplasty exploration. By offering this evidence, Dr. Gross waived his objection to Plaintiff's evidence and argument about post-blepharoplasty exploration—the basis of Dr. Gross's consent objection.

For these reasons, the Court should rule that Dr. Gross waived his objection to consent and Assignment of Error II.[5]

[5] If the objections underlying Assignments of Error I and II were waived, then Assignment of Error III was necessarily waived.

II. The trial court properly allowed Ms. Stuart to cross-examine Dr. Pitman about his practice history because it was relevant to the basis for his opinions, was not overwhelmingly prejudicial, and was not prohibited by *Stottlemyer* (Assignment of Error I).

The trial court's evidentiary rulings are reversible only upon a finding that it abused its discretion. *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 529 (2006). "While a trial court has no discretion to admit clearly inadmissible evidence, a great deal must necessarily be left to the discretion of the court of trial, in determining whether evidence is relevant to the issue or not." *Id.* (internal citations and quotations omitted).

A. Dr. Pitman's practice history was relevant because it challenged the basis for his opinions.

All relevant evidence is admissible unless excluded by other law, and all irrelevant evidence is inadmissible. Rule 2:402(a). Relevant evidence is that "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. In the present case, Dr. Pitman's practice history is relevant for two reasons: (1) it calls into question his experience, upon which he based his opinions; and (2) it calls into question whether he knows the standard of care. Both of these bases were articulated to the trial court. J.A. at 529.

In this case, the jury was instructed by agreement that a doctor is negligent if he fails to comply with the standard of care. *Id.* at 586. It was

instructed that it must rely upon expert testimony to determine the standard of care. *Id.* And it was instructed that "[i]n considering the weight to be given to the testimony of an expert witness, you should consider ***the basis for his opinion*** and the manner by which he arrived at it and the underlying facts and data upon which [he] relied." *Id.* at 585 (emphasis added).

On direct examination, Dr. Pitman was asked to offer opinions "[b]ased upon [his] knowledge, training, and ***experience***, [his] years in practice as a board certified plastic surgeon." *Id.* at 507 (emphasis added). Dr. Gross offered Dr. Pitman's *curriculum vitae* into evidence, which contained his "education, training background, and experience." *Id.* at 464-65. And, Dr. Pitman discussed his ongoing affiliation with the Army reserves, as well as teaching positions he holds as a result of the reserves. *Id.* at 455-56, 461.

There is no question that Dr. Pitman's experience is relevant to this case. He testified he based his opinions upon it. The jury was instructed that it should therefore consider his experience when weighing the credibility of his opinions. Just as favorable aspects of Dr. Pitman's experience may be probative of why the jury should find him knowledgeable and credible, so too are unfavorable aspects probative of why the jury should question his

knowledge and credibility.[6] If Dr. Pitman's teaching positions held as a result of his reserve status are probative, then so too are allegations that arose as a result of that reserve status.

Dr. Gross put Dr. Pitman's experience at issue. He cannot do so and then ask the trial court to allow only favorable evidence of his experience. The practice history was therefore relevant to the basis for his opinions.

The practice history is relevant for an independent reason: to call into question whether Dr. Pitman knows the standard of care. Dr. Pitman testified that the standard of care is "how you would expect a reasonably prudent surgeon to practice in Virginia." J.A. at 535. He testified that all doctors in Virginia should practice within the standard of care. *Id.* And he testified that complying with the standard of care requires compliance with Board of Medicine regulations. *Id.* at 535-36. Dr. Pitman was then asked about the allegations regarding his practice. *Id.* at 536-51.

Dr. Pitman conceded the relevance of the allegations. If the standard of care requires compliance with Board regulations, and if Dr. Pitman does not comply with those regulations, it calls into question whether Dr. Pitman practices within the standard of care. If Dr. Pitman does not practice within

[6] At the motion *in limine*, the trial court acknowledged this when it said, "I mean, I'm sure you're going to have him testify to everything wonderful he's done in his whole life." J.A. at 112.

the standard of care, it calls into question whether he knows the standard of care.

On the threshold issue of relevance—the low bar of whether there is ***any*** tendency to prove or disprove a material fact—there is no question that the practice history has probative value. It tends to disprove his knowledge of the standard of care and questions the weight the jury should give his opinions.

For these reasons, the trial court properly ruled that Dr. Pitman's practice history was relevant.

B. The trial court properly exercised its discretion when determining that the prejudicial effect of Dr. Pitman's practice history failed to substantially outweigh its probative value.

It is within the trial court's discretion to weigh whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. *Coe v. Commonwealth*, 231 Va. 83, 87 (1986); *see also* Rule 2:403. The question is not whether the evidence was prejudicial (all evidence offered by Ms. Stuart was prejudicial to Dr. Gross); the question is whether the prejudicial effect was so high that it substantially outweighed the probative value.

As noted above, Dr. Pitman's history is probative of the basis for his opinions, including whether he knows the standard of care. The basis of his

opinions is particularly important because the jury was instructed it should consider it when weighing Dr. Pitman's opinions. As a practical matter, the jury was required to consider it when determining whether Dr. Pitman's or Dr. Malone's opinions were more persuasive.

The trial court had two opportunities to weigh this probative value against the danger of unfair prejudice. The trial court heard Dr. Gross's motion *in limine*. J.A. at 110-19. The trial court denied the motion. *Id.* at 117, 119. At trial, the trial court then heard considerable argument specifically on the prejudicial effect of the evidence. *Id.* at 527-34. Although Dr. Gross suggested the evidence was prejudicial, the only prejudice articulated to the Court was the following: "We are going to get into a trial within a trial here. There was an adjudication by consent order, without admitting or denying the allegations by the board. Different burden of proof --." *Id.* at 529. Thus, Dr. Gross's concern was limited to a trial within a trial that would result if the Board finding was introduced.[7]

The trial court heard this concern, and it eliminated it. Ms. Stuart agreed that she would ask Dr. Pitman about the underlying allegations, but she would not bring up the Board sanction. *Id.* at 533-34. The trial court,

[7] Dr. Gross specifically raised the prejudice issue at trial, and it was limited to the "trial within a trial" argument if the Board finding was introduced. No other basis should be considered on appeal. Rule 5:25.

commenting on this compromise, stated, "So then no trial within a trial." *Id.* at 534. The trial court then asked Dr. Gross if it had any comment on this compromise, and Dr. Gross did not offer any criticism. *Id.*

The present case is a textbook example of a trial court hearing the argument of counsel, considering the probative value and prejudicial effect of evidence, weighing those factors, and reaching a compromise mindful of both factors. The trial court understood the substantial probative value of the evidence—the basis for an expert's opinion is always of vital importance—and it eliminated the concern of a trial within a trial. It did not permit Ms. Stuart to go into the Board of Medicine finding, nor did it allow Ms. Stuart to introduce evidence of the sanction. Instead, the trial court allowed Ms. Stuart to question Dr. Pitman about the allegations, which go to the basis for his opinions. When Dr. Pitman denied the allegations, Ms. Stuart was only allowed to ask Dr. Pitman only about the fact that he had a prior opportunity to deny the allegations but did not. J.A. at 550-51. Ms. Stuart was "stuck" with Dr. Pitman's answers to the questions, and if he denied them all, she was not permitted to introduce other evidence (i.e., the Board finding, another witness, etc.) to challenge him. Thus, the trial court avoided a trial within a trial.

The trial court was in the best position to hear the evidence and argument and reach the compromise that weighed the Rule 2:403 factors. If this Court reverses that decision, Ms. Stuart asks: where will the Court draw the line? How will the Court differentiate this reasoned decision against others? And how will this Court establish a clear rule that other trial courts can follow? The question is not whether this Court would have ruled differently than the trial court; rather, the question is whether the trial court abused its discretion.

Finally, reversing the trial court and excluding Dr. Pitman's practice history would result in unfairness to Ms. Stuart. Dr. Gross chose to retain Dr. Pitman as an expert witness, knowing full well the baggage he carried. Dr. Gross tried to bolster Dr. Pitman's experience to lend credibility to his opinions, and Dr. Pitman volunteered much testimony about his military service. Dr. Gross clearly wanted the jury to accept Dr. Pitman's opinions because of his service. It is fundamentally unfair if Dr. Gross is permitted to emphasize this part of his background, while then immediately asking the Court to exclude negative parts of the same background. Instead, the trial court did what is fair: allow the jury to hear all of the evidence, and allow it—as ultimate decider of facts—to weigh it and assign it appropriate weight.

For these reasons, the trial court properly exercised its discretion when weighing the probative value against the prejudicial effect. This Court should affirm the trial court's decision to admit the practice history.

C. *Stottlemyer* does not apply to experts, and this Court should not extend its holding to experts through this case.

Dr. Gross argues that *Stottlemyer* applies to this case and holds that Dr. Pitman's practice history is inadmissible. He engages in a discussion of "collateral" facts. And finally, he suggests that *Stottlemyer* should be extended to experts. For the reasons explained below, all of these arguments fail and do not serve as a basis to reverse the trial court.

1. *Stottlemyer* does not presently apply to non-party experts.

Dr. Gross argues that *Stottlemyer v. Ghramm*, 268 Va. 7 (2004) applies to this case. *See* Opening Br. of Appellant 14-15. Indeed, Dr. Gross argues that the *Stottlemyer* "principle is applicable in the instant case because the crux of the analysis remains the same with respect to *any* witness." *Id.*

In *Stottlemyer*, the first sentence establishes the issue before the Court: "whether the circuit court erred by refusing to permit the plaintiff to cross-examine the defendant physician regarding his alleged prior acts of negligence and misconduct." 268 Va. at 9. The holding was likewise limited to whether the plaintiff could cross-examine the defendant-physician about

alleged bad acts. *Id.* at 13. To the extent this Court used the word "witness" instead of "defendant" while quoting other cases or discussing its reasoning, that word choice is not central to the holding. It is therefore dicta.

As *Stottlemyer* stands, it applies only to defendant-physicians. Thus, it does not presently serve as a basis for excluding Dr. Pitman's practice history.

2. Dr. Gross has misapplied the meaning of "collateral" as used in *Stottlemyer*; it is merely another way of saying irrelevant.

Dr. Gross devotes much of his argument to *Stottlemyer's* use of the word "collateral." He suggests that *Stottlemyer* somehow establishes a standard (whether Ms. Stuart could prove the matter in her case) that controls whether the cross-examination was appropriate. The plain goal is to substitute "collateral" for relevance to severely limit what Ms. Stuart is permitted to ask on cross-examination.

To be sure, *Stottlemyer* states 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. The Court clarified the definition of collateral: "The test as to whether a matter is material or collateral, in the matter of impeachment of a witness, is whether . . . the cross-examining party would be entitled to prove it in support of his case." *Id.* at 12 (quoting *Allen v.*

Commonwealth, 122 Va. 834, 842 (1918)). Conversely, "[a] fact is wholly collateral to the main issue if the fact cannot be used in evidence for any purpose other than for contradiction." *Id.* (quoting *Seilheimer v. Melville*, 224 Va. 323, 327 (1982)).

Professor Friend has addressed the concept of collateral facts raised in the cases cited by *Stottlemyer*: "Some cases suggest that this is a separate 'rule' or 'doctrine' in the law of evidence. However, it is in reality just another way of stating the relevancy requirement, with the term 'collateral' being substituted for the word 'irrelevant.'" Charles E. Friend & Kent Sinclair, The Law of Evidence in Virginia § 6-5[a] p. 359 (7th ed. 2012). He further explains that the word "contradiction" as used in *Seilheimer* "refers to impeachment of a witness by *prior inconsistent statements*." *Id.* at p. 360 (emphasis in original). Finally, Professor Friend explains the real meaning of collateral:

> It is noted elsewhere in this work that as to reputation evidence and certain other matters, a cross-examiner who asks a witness a question as to a "collateral" matter must "take his answer"—*i.e.,* ***is precluded from producing extrinsic evidence*** to prove the collateral matter, regardless of whether the witness admits or denies the collateral matter.

Id. at § 12-3[f] p. 660 (emphasis added).

The cases cited by *Stottlemyer* support Professor Friend's interpretation. In *Allen*, the issue was whether a party could attack a

witness's reputation for truth and veracity. 122 Va. at 842. The Court quoted Greenleaf on Evidence for the proposition that "upon examination to try the credit of the witness only general questions can be put; and he cannot be asked as to any collateral independent fact merely with a view to contradict him afterwards by calling another witness." *Id.*

In *Seilheimer*, this Court reviewed whether a rebuttal witness was properly called to contest the defendant's testimony. 224 Va. at 325. The defendant denied on cross-examination that he made a payment to a third-party, and the plaintiff called a witness to testify that the defendant stated he intended to make the payment. *Id.* at 326. The defendant appealed, relying upon the above language from *Allen* to argue that the plaintiff could not ask the question on cross-examination solely for the purpose of contradicting the defendant later. *Id.* at 326-27. This Court held the rebuttal witness was appropriate because the matter was not collateral; it was probative of the main issue in dispute, namely the commissions due to the plaintiff. *Id.* at 327.

Stottlemyer, the cases it cites, and Professor Friend are consistent and reconcilable. *Stottlemyer* excluded the physician-defendant's prior bad acts on relevance grounds. It refers to the acts as "non-probative prejudicial evidence" and then says it is collateral because it is not a "relevant subject[]

of inquiry." 268 Va. at 12. Professor Friend explains that collateral, as used here, really means irrelevant.

Neither *Allen* nor *Seilheimer* establish "collateral facts" as some sort of test competing with the relevance standard. Instead, they establish that ***when impeaching a witness***, a party may not introduce extrinsic evidence if the matter on which impeachment occurred was collateral to the case. Neither case suggests that you cannot cross-examine a witness about an otherwise relevant matter. Again, Professor Friend supports this and explains when a party may be "stuck" with a cross-examination answer.

Simply put, Dr. Gross's lengthy discussion of "collateral" is misplaced. The underlying issue in this case is whether his expert's practice history is relevant and, if so, whether it should have been excluded under Rule 2:403. *Stottlemyer's* collateral facts discussion does not change the analysis.

3. The Court does not need to extend *Stottlemyer* to experts.

At its core, Dr. Gross's position on appeal is that this Court should extend *Stottlemyer* to experts. For the three reasons below, the Court should not.

First and foremost, there is a fundamental difference between expert witnesses and defendants. A defendant is entitled to be judged on what he or she did in the case giving rise to this case. And there is overwhelming

prejudice to that defendant if his or her entire career is put onto trial, rather than the specifics of the case. Rule 2:404(b) recognizes this inherent prejudice by specifically excluding prior bad acts of a party to prove action in conformity therewith in the case in question. Although this rule was not adopted when *Stottlemyer* was decided, the Court did discuss how "[e]vidence that a defendant was negligent on a prior occasion simply has no relevance or bearing upon whether the defendant was negligent during the occasion that is the subject of the litigation." 268 Va. at 13.

Conversely, an expert witness is different by its very nature. Unlike a party or a fact witness, an expert chooses (typically for compensation) to participate in litigation and in doing so chooses to expose himself or herself to broad cross-examination. For that matter, an expert agrees to put his or her reputation and credibility at issue. When a party chooses its expert, it does so knowing the baggage the expert will bring to trial. The expert's experience—both good and bad—is not only probative of the basis for his or her opinions, but for an understanding of whether he or she actually knows and follows the applicable standard of care. If an expert testifies that he knows the standard of care, the issue of whether he or she follows it is relevant to actual knowledge, credibility, and the basis of the opinions.

Second, the Rules currently provide adequate parameters for trial courts to evaluate bad acts of an expert witness. Rules 2:401 and 2:402 provide the relevancy limits, and Rule 2:403 vests the Court with broad discretion to ensure that the jury hears only probative evidence that is not substantially outweighed by unfair prejudice. In the present case, the trial court excluded the Board of Medicine finding, but it allowed questions about the underlying allegations. Perhaps the trial court allowed the questions because Dr. Pitman repeatedly referenced his reserve duty to support his testimony. A different trial court will have different facts and allegations, and that court will have Rule 2:403 to guide it in deciding whether to admit the testimony.

Moreover, trial courts have Rule 2:607. That rule provides that "[s]ubject to the provisions of Rule 2:403, the credibility of a witness may be impeached . . . with any proof that is relevant to the witness's credibility." Rule 2:607(a). A number of forms of impeachment are listed, including evidence of prior convictions, evidence of bias, prior inconsistent statements, etc. *Id.* But also, a witness may be impeached by "any other evidence which is probative of the issue of credibility because of a logical tendency to convince the trier of fact . . . that the sincerity or veracity of the witness is questionable." Rule 2:607(a)(viii).

This rule has inherent protections: credibility may be attacked only with relevant or probative matters. Under the facts of the present case, the trial court determined that Dr. Pitman's practice history was relevant and probative. Specifically, it was probative of the basis for his opinions, including whether he knows the standard of care. Whether an expert knows the standard of care is ***the*** central issue when weighing whether to believe an expert.

Third, Virginia courts have long-recognized and long-emphasized that the jury is the ultimate decider of fact. Indeed, over one century ago, this Court recognized the "exclusive province of the jury":

> There are so many considerations affecting the credibility of a witness that it is far better and more promotive of the ends of justice, to leave the jury free in each case to determine, in view of all the circumstances, the witnesses whom they will credit, or the parts of the evidence of any witness which they will credit and which they will discredit, than to fetter their judgment by inflexible rules which may compel them to conclusions which they would not otherwise reach.

Norfolk & W. R. Co. v. Poole's Adm'r, 100 Va. 148, 155-56 (1902) (internal quotations omitted). "The jury has a right to weigh the testimony of all witnesses, expert and otherwise." *Walrod v. Matthews*, 210 Va. 382, 390 (1969) (quoting *Pepsi-Cola Bottling Co. of Norfolk v. McCullers*, 189 Va. 89, 99 (1949)). This strong, almost absolute preference for juries deciding

cases, not judges, is one characteristic that sets Virginia courts apart from many of its sister jurisdictions.

If the Court accepts Dr. Gross's invitation to fashion a *Stottlemyer*-like rule for experts, the result would necessarily infringe upon this strong history of the jury deciding which witnesses to believe. Any rule will result in a blanket prohibition on at least some categories of evidence; a statement to trial courts that under no circumstances—regardless of the underlying facts—can a jury hear certain evidence. Should the Court now decide that the underlying allegations against an expert, or Board of Medicine findings, or reprimands are never admissible? Should the Court now rule that even though an expert will testify on direct "to everything wonderful that he's done in his whole life," there are no circumstances under which unlawful medical decisions made by the expert are admissible? J.A. at 112.

The better course of action is to reject adoption of a blanket, *Stottlemyer*-like rule for experts. This Court should trust trial courts to appropriately apply the relevance rules, including Rule 2:403; it should, above all else, trust juries to hear all bases of an expert's opinions and faithfully execute its exclusive province: to weigh the credibility of the witnesses and decide the case.

For these reasons, the Court should not extend *Stottlemyer* to experts.

4. If the Court is inclined to adopt a rule for expert witnesses, it should follow what the trial court did here.

As Dr. Gross correctly points out, other jurisdictions vary greatly in what disciplinary history is admissible. Some allow the fact of a reprimand, and some allow the fact of a prior lawsuit against the expert. In all of the cases, the specific underlying facts unquestionably affected the result.

If this Court is inclined, contrary to Ms. Stuart's argument above, to adopt a rule for expert witnesses, it should follow what the trial court did here. The trial court's standard was sound for three reasons.

First, the underlying allegations against an expert are more probative of whether he knows the standard of care than a bare finding made by the Board of Medicine. If the jury is told that the Board reprimanded an expert without any explanation of why, how can the jury properly assess how this affects the credibility of the expert's opinion? Conversely, when it hears the allegations, the jury can decide what weight, if any, to give the evidence.

Second, the expert here was given the opportunity to deny the allegations. And, Ms. Stuart was stuck with the answers given by the expert. She was not permitted to introduce extrinsic evidence to contradict the expert.

Finally, Ms. Stuart was permitted to reference an "administrative hearing" only after Dr. Pitman denied the allegations at trial when he had previously not contested them. To avoid the possibility that undue weight would be given to a Board of Medicine finding, Ms. Stuart was only permitted to reference an "administrative hearing." And, she was only permitted to reference the hearing to impeach the witness, who denied the allegations in front of the jury when he had not done so before.

For these reasons, if the Court adopts a *Stottlemyer*-like rule, it should follow what the trial court did in this case.

III. The trial court properly ruled upon the alleged interjection of consent into the case by denying the motions for a mistrial and giving cautionary instructions (Assignment of Error II).

A trial court's decision whether to grant a motion for a mistrial is reviewed for abuse of discretion. *Lowe v. Cunningham*, 268 Va. 268, 272 (2004). "This broad discretionary power reflects in part the principle that a jury is presumed to have followed a timely and explicit cautionary instruction directing it to disregard an improper remark or question by counsel." *Id.*

Generally, "absent a manifest probability of prejudice to an adverse party, a new trial is not required when a court sustains an objection to an improper remark or question by counsel and thereafter instructs the jury to disregard the remark or question." *Id.* Conversely, a mistrial should be

granted only when "the prejudicial effect of an improper remark or question is overwhelming, such that it cannot be cured by a cautionary instruction." *Id.* at 273 (internal quotations, citations, and punctuation omitted).

In determining whether the prejudicial effect of a statement is so overwhelming that it cannot be cured by a cautionary instruction, the trial court should consider the relevance and content of the statement, whether the statement was deliberate, and the probable effect of the statement. *Id.* at 273. "To justify a new trial, the nature of counsel's improper reference must be 'likely to inflame the passion or instill a prejudice in the minds of the jury.'" *Id.* (quoting *Virginia-Lincoln Furniture Corp. v. S. Factories & Stores, Corp.*, 162 Va. 767, 781 (1934)).

A. The trial court properly exercised its discretion when it denied the first motion for a mistrial because Dr. Malone's statement was innocently made and was not prejudicial.

The trial court denied Dr. Gross's first motion for a mistrial made during Dr. Malone's testimony. J.A. at 300. It instructed the jury that it "sustained an objection to the last question" and that it was "instructing you that you should not consider any answer that Dr. Malone may have made to that last question." *Id.* at 306.

The trial court properly exercised its discretion because Dr. Malone's statement was innocent and not prejudicial. Dr. Malone was asked, "Was

there anything in Dr. Gross's office notes to indicate that he thought he was treating ptosis?"[8] *Id.* at 289. Dr. Malone responded with the allegedly inappropriate statement: "He -- he planned and got consent for a blepharoplasty."[9] *Id.* The Court made a finding that Ms. Stuart's question was appropriate, but the witness went beyond the question. *Id.* at 299. Thus, the trial court found that the statement was not deliberate; it was innocently made by the witness.

Moreover, the content of the statement was correct—Dr. Gross did in fact plan for and receive consent for a blepharoplasty. But more importantly, Dr. Malone's statement probably had little effect, if any, on the jury because Dr. Gross and the Court stopped the testimony before Dr. Malone continued further. Dr. Malone did not use the phrase "informed consent," he did not state that Dr. Gross failed to obtain consent, and significantly, he did not state that Dr. Gross did not have consent to treat ptosis.

As stated in *Lowe*, the trial court could have granted the motion for a mistrial only if it found that Dr. Malone's statement inflamed the passion of

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[8] As explained in more detail below, Ms. Stuart asked this question because of the absurdity of the post-blepharoplasty-exploration defense.

[9] Blepharoplasty is the procedure to remove fat from the eyelids, thus removing the "puffiness," and ptosis is the procedure to tighten the muscles and tendons in the eyelid to enhance the ability to open the eyelids. J.A. at 197.

the jury or installed prejudice in its mind. This would have required the jury to take a large intellectual leap, infer that Dr. Gross operated without consent, and then conclude that the lack of consent was negligent.

The trial court weighed these factors. It stated that it was considering whether the statement was "enough for a mistrial, or if there's something else that can be done about it." *Id.* The trial court then determined that it could cure the problem with an instruction. *Id.* at 299-300. The trial court exercised its discretion under *Lowe* and made a sound decision. The question for this Court is not whether it may have decided differently; rather, the question is whether the decision was so manifestly wrong that it can be characterized as an abuse of discretion.

If the Court rules that the trial court abused its discretion, it will set a precedent that will open the floodgates of mistrial-motion appeals. The objectionable statement from Dr. Malone was one word: consent. As noted above, Dr. Gross and the trial court stopped Dr. Malone before he went any further. If this Court reverses the trial court, then it is saying that the utterance of that single word automatically constitutes grounds for a mistrial. Such a ruling would have two implications: (1) trial courts would no longer have discretion under *Lowe* in cases like this; and (2) this Court would be

stating that it no longer believes that juries can follow cautionary instructions to ignore a single word.

Moreover, what other single words will constitute grounds for an automatic mistrial? Evidence of insurance is generally not admissible. Rule 2:411. As a practical matter, the word insurance is frequently inadvertently mentioned during personal injury cases. Jurors ask about insurance in *voir dire*, witnesses unknowingly mention it during testimony, and juries submit jury questions about it. Will the utterance of the word insurance—a clearly inadmissible matter—be automatic grounds for a mistrial?

The Court in *Lowe* established a clear set of guidelines for trial courts to follow. And the trial court here followed them appropriately when ruling on Dr. Malone's statement. The Court should affirm the denial of the first motion for a mistrial.

B. The trial court properly exercised its discretion and denied the second motion for a mistrial because Ms. Stuart was permitted to address the defense theory of the case.

During closing argument, Ms. Stuart argued 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.

J.A. at 591-92. Dr. Gross objected, the trial court denied the motion for mistrial, and then the trial court instructed the jury to disregard Ms. Stuart's statement. *Id.* at 596, 603, 606-07.

At trial and on appeal, Dr. Gross has argued that this closing argument somehow interjected consent into the case. Dr. Gross's argument is remarkable because he introduced the exact evidence and argument to which he objects.

During opening statement, Dr. Gross first raised the matter of how he "explored" the structures of the eyes ***after he completed the blepharoplasty***. *Id.* at 150. Dr. Gross confirmed his theory during his testimony, when he stated that he completed the blepharoplasty "without incident" and then proceeded to explore. *Id.* at 403, 408. And he testified that if he had stopped the surgery after the blepharoplasty, he would not have encountered the eye structures that were ultimately injured. *Id.* at 421. Ms. Stuart did not introduce the concepts of exploration or two surgeries into the case; Dr. Gross did.

The Court should pay particular attention to how this theory fits into the strategy Dr. Gross employed at trial and now on appeal to curtail Ms. Stuart's ability to counter or question his theory.

Ms. Stuart's theory was that Dr. Gross negligently performed the blepharoplasty. Her expert, Dr. Malone, testified that Dr. Gross cut a muscle in the right eye and tendon in the left eye. *Id.* at 221. He then testified that these cuts were below the standard of care. *Id.* at 221-22. Dr. Malone's explanation—and Ms. Stuart's theory—was that Dr. Gross made these cuts because he went too deep during the blepharoplasty. *Id.* at 143 (opening statement discussing going too deep); 261 (Dr. Malone offering the "too deep" explanation).

Dr. Gross clearly understood Ms. Stuart's theory of the case. During opening statement, Dr. Gross stated: "From our point of view, this is a case of an unusual surgical finding. It's not a case of Dr. Gross doing something he wasn't supposed to do, going too deep, messing with muscles, nothing like that." *Id.* at 145. Indeed, Dr. Gross conceded that Ms. Stuart could critique the blepharoplasty technique by saying "[y]ou went too deep." *Id.* at 169.

In light of Ms. Stuart's theory, Dr. Gross developed his defense. In simple terms, Dr. Gross argued that the jury should assume that he completed the blepharoplasty successfully and that the injury occurred while he was exploring. He wanted the jury to believe that he always intended to explore. He then argued to the trial court that Ms. Stuart was not permitted

to even argue about exploration because she did not have an expert to say that exploration was negligent. In other words, he argued that Ms. Stuart could not contest his theory.

Ms. Stuart had the right to challenge Dr. Gross's theory. Indeed, when Dr. Gross raised the theory early in the case, Ms. Stuart told the Court that she did not "think the evidence supports this argument." J.A. at 162-63. She then introduced evidence to question Dr. Gross's explanation for the injury. Dr. Malone was asked to explain a blepharoplasty, and he confirmed that muscles and tendons should not have been involved in the procedure. *Id.* at 197-98. Dr. Gross was asked on cross-examination to confirm that he would not have encountered the muscle or tendon had he stopped after the blepharoplasty. *Id.* at 421.

Ms. Stuart also challenged Dr. Gross's theory by questioning his explanation for why he performed the failed exploration. Dr. Gross testified that he observed ptosis—or drooping of the upper eyelid—during his first visit with Ms. Stuart. *Id.* at 350. He believed that Ms. Stuart had problems with the structures of her eyes, including the levator complex that lifts the eyelid. *Id.* at 356-57. He characterized the ptosis as "moderate to severe and more significant on the right side." *Id.* at 360. He then tried to claim that the

purpose of his exploration was to look at the structures of the eyelid "to try and look for the source of the ptosis." *Id.* at 380.

On cross-examination, Dr. Gross was asked about a number of facts that call into question this justification for exploration. First, Ms. Stuart did not have a problem opening her eyes, and she never complained to Dr. Gross that she had a problem opening her eyes. *Id.* at 320-21, 402. She went to Dr. Gross only to have the puffiness removed. *Id.* at 320. Second, Ms. Stuart did not complain to Dr. Gross about problems with her ability to see. *Id.* at 320, 402, 428. Third, Dr. Gross did not document "moderate to severe" ptosis; instead, his medical record merely reflected that she had ptosis. *Id.* at 421-22. Fourth, Dr. Gross used general anesthesia, which would have prevented him from adequately assessing whether the eyes were symmetrical following the ptosis repair.[10] *Id.* at 434, 437-39.

The purpose of addressing Dr. Gross's contention that the injury happened after the blepharoplasty was to illustrate the absurdity of that explanation. If Ms. Stuart had no complaints about her ability to see and only

[10] Ms. Stuart has not assigned cross-error. But Dr. Gross's testimony very well may have opened the door to explicit consent evidence. Although consent evidence was not initially relevant because the claim was not pleaded, the consent form and other issues of informed consent may have become relevant to prove that Dr. Gross did not always intend to explore after the blepharoplasty. Such evidence could have been admitted with a limiting instruction. *See* Rule 2:105.

went to Dr. Gross for the puffiness, then why would he explore the muscles and tendons? To Ms. Stuart, this made no sense. Instead, he injured the muscles and tendons when he went too deep in performing the blepharoplasty.

This Court has explained that "the purpose of closing argument is to draw the jury's attention to the body of evidence that has been admitted into the record and to argue reasonable inferences that may be drawn from that evidence." *Graham v. Cook*, 278 Va. 233, 250 (2009). When Ms. Stuart began closing argument, she was attempting to do just that—discuss Dr. Gross's theory of why he explored, and then point to all of the evidence that proved why the theory was simply not believable.

Ms. Stuart had merely stated during closing argument Dr. Gross's theory when he objected. The rationale for the objection was telling. Dr. Gross claimed Ms. Stuart could not discuss exploration because her expert "never, ever testified that exploration was beneath the standard of care." J.A. at 593. But earlier in the trial, Dr. Gross conceded that Ms. Stuart could "bring the claim of poor blepharoplasty technique, you went in too deep, you shouldn't have been exploring where you were exploring, without giving a scent of informed consent." *Id.* at 170. It is clear that Dr. Gross understood

that his theory was contradicted by the facts, so he asked the trial court to prevent Ms. Stuart from even discussing exploration during closing.

Ms. Stuart was, of course, permitted to address the defense's theory. And later in the closing, she was permitted by the trial court to address the theory. If there was any problem with the objected-to closing, then, it must have been concern that the "scent" of the argument suggested or implied issues of consent.

The trial court was in the best position to exercise its discretion, weigh the considerations stated in *Lowe*, and determine that a cautionary instruction was appropriate. Ms. Stuart's comment was not an intentional attempt to interject an inappropriate matter before the jury; instead, Ms. Stuart thought—and still believes—that she was appropriately arguing the defense theory of the case. It probably had little effect on the jury because, just as with Dr. Malone's statement, the jury would have needed to infer that Ms. Stuart was discussing consent and find negligence because there may have been lack of consent.

Putting all of this aside, Dr. Gross conceded that Ms. Stuart could discuss exploration, as long as the tone did not imply issues of consent. The trial court heard Ms. Stuart's argument. It heard the tone of the argument. It observed the jury. This Court should not substitute its discretion for that of

the trial court when assessing tone of an argument. As with Dr. Malone's statement, Ms. Stuart asks rhetorically, if this Court finds an abuse of discretion when the issue was the "scent" of Ms. Stuart's statements, what precedent will be set for other trial courts?

For these reasons, the Court should affirm the trial court's denial of the second motion for a mistrial.

C. The trial court properly exercised its discretion and gave appropriate cautionary instructions.

"[J]uries are presumed to follow prompt, explicit, and curative instructions" given by the trial court. *Beavers v. Commonwealth*, 245 Va. 268, 280 (1993). Unless the record shows the contrary, the assumption stands. *See LeVasseur v. Commonwealth*, 225 Va. 564, 589 (1983).

Dr. Gross takes issue with the format of the cautionary instructions given by the trial court. Dr. Gross asked for cautionary instructions that would have referenced consent. J.A. at 300, 604. The trial court, exercising its discretion, declined. Instead, it instructed the jury after the first motion for a mistrial: "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." *Id.* at 306. After the second motion for a mistrial was denied, the trial court instructed the jury: "Ladies and gentlemen, the objection that was

just made by the defendant is sustained. You are to disregard the last statement, and I'll ask Mr. Mims to please rephrase at this time." *Id.* at 607.

The trial court decided against referencing consent in its instructions. Referencing the objected-to matter in an instruction is, of course, a double-edged sword. Referencing the matter again may amplify it. *See LeVasseur*, 225 Va. at 588. And as explained in detail above, objections to Dr. Malone's statement and the closing argument were made long before damaging, overly-prejudicial statements were made in front of the jury. For this reason alone, the trial court may have thought it was unnecessary to emphasize consent in its instruction.

But importantly, the trial court explicitly instructed the jury to disregard the objected-to matter, which is routinely done by trial courts when resolving these matters. *See, e.g., Westlake Props. v. Westlake Pointe Prop. Owners Ass'n*, 273 Va. 107, 123 (2007) (where the trial court instructed the jury "to just disregard the fact that the question was asked and do not consider it in any way"); *LeVasseur*, 225 Va. at 588 (instructing, "Please disregard the last remarks that the Commonwealth Attorney made it its entirety").

If this Court reverses the trial court on this issue, it will set a difficult precedent for trial courts to follow. What happened in this case was not unique. Witnesses frequently mention inappropriate matters, and trial courts

routinely tell the jury to disregard what was said. Indeed, this jury, like most, was given an additional instruction that it could not consider any matter rejected or stricken by the court because "[i]t is not evidence and should be disregarded." J.A. at 588. If trial courts can no longer simply tell the jury to disregard a matter, what level of detail will be required every time something like this happens, and how can trial courts give a more detailed instruction without commenting on the evidence? *See Norfolk & W. R. Co. v. Sonney*, 236 Va. 482, 486 (1988) (stating that trial courts should not comment on the character of the evidence).

The trial court exercised its discretion and explicitly told the jury to disregard the two objected-to statements. The instructions were proper, and the Court should affirm on this ground.

IV. The trial court correctly ruled that the issues Dr. Gross raised in his post-trial motion were not appropriate for such a motion (Assignment of Error III).

After a verdict is reached, the trial court's authority to set aside a verdict "is explicit and narrowly defined." *Jenkins v. Pyles*, 269 Va. 383, 388 (2005). A verdict may be set aside only if it "is plainly wrong or without credible evidence to support it." *Id.*; *see also* Code § 8.01-430 (confirming that a verdict may be set aside if it "is contrary to the evidence, or without credible evidence to support it").

Dr. Gross's post-trial motion included: the trial court should have granted Dr. Gross's mistrial motions; the trial court should have given Dr. Gross's proposed cautionary instructions; and the trial court should have excluded Dr. Pitman's practice history. *See* J.A. at 55-66.

Dr. Gross argues that the trial court had authority to rule upon his post-trial motion. Dr. Gross's brief does not, however, address *Jenkins*, nor does it explain how a trial court is authorized to review its own evidentiary and motions rulings after the jury has returned its verdict. Indeed, he argues that these issues were "most certainly reviewable," yet cites only one case, *Gazette, Inc. v. Harris*, 229 Va. 1 (1985). *Harris* does not stand for the proposition that a trial court errs when it fails to consider post-trial motions. *Id.* at 48. The actual holding was that "the amount of the verdict bears no reasonable relation to the damages sustained and, therefore, ***is not supported by the evidence***." *Id.* (emphasis added). As Ms. Stuart has repeatedly argued, verdicts can be set aside only if they are not supported by the evidence. *Harris* merely restates that legal principle.

Dr. Gross never argued to the trial court that the verdict was unsupported by the evidence. Additionally, he did not file a motion to reconsider, likely because he was not entitled to oral argument on such a motion. Rule 4:15(d). Instead, his memorandum repeatedly referenced so-

called error committed by the trial court. And, it asked the trial court to "grant their renewed motion for mistrial, set aside the verdict, and award Defendants a new trial." J.A. at 65. Ms. Stuart is not seeking to "cripple" post-trial practice; instead, she is simply pointing out that the specific relief sought by Dr. Gross was not permitted under the law.

This Court has unequivocally held that a trial cannot grant a post-trial motion for mistrial. "A motion for a mistrial is untimely and properly refused when it is made after the jury has retired." *Cheng v. Commonwealth*, 240 Va. 26, 39 (1990). Dr. Gross made two motions for a mistrial; neither was taken under advisement, and the trial court expressly denied both. J.A. at 300, 606. The motion made immediately after the verdict was returned and the one made in the post-trial motion were both made "after the jury has retired," so they were untimely and properly refused by the trial court.

For these reasons, the Court should affirm the trial court on Assignment of Error III.

CONCLUSION

The Court should affirm the trial court on all three assignments of error.

SUPEN PEZE STUART
By Counsel

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CERTIFICATE

I certify that I have complied with Rule 5:26, and that on December 28, 2018, I filed an electronic version and three printed copies of the foregoing Brief of Appellee with the Court and emailed a copy to the following:

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