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OPINIONS AND ORDERS

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REHEARING ORDER

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ORDER OF THE VIRIGINA SUPREME COURT (JUNE 29, 2022)

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING
IN THE CITY OF RICHMOND

LINDA MATARESE, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF HILDA DULD BAUMAN, DECEASED, ET AL.,

Appellants,

v.

VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM, D/B/A VIRGINIA HOSPITAL CENTER, ET AL.,

Appellees.

Record No. 211110

Circuit Court No. CL19000375-00

From the Circuit Court of Arlington County

On May 12, 2022, came the appellant, who is self-represented, and filed a motion to amend the petition for appeal and an amended petition for appeal.

Upon consideration whereof, the Court grants the motion to amend and the amended petition for appeal is considered filed.

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the amended petition for appeal.

Upon further consideration whereof, the appellant's June 7, 2022, supplemental motion for leave to amend the petition for appeal is denied as moot, and the appellant's June 24, 2022, motion for leave to supplement the record is denied.

A Copy,

Teste:

Muriel-Theresa Pitney
Clerk

By:

/s/ William Basil Tsimpris
Deputy Clerk

ORDER OF THE VIRIGINA SUPREME COURT DEFERRING ISSUANCE OF MANDATE (NOVEMBER 7, 2022)

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING
IN THE CITY OF RICHMOND

LINDA MATARESE, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF HILDA DULD BAUMAN, DECEASED, ET AL.,

Appellants,

v.

VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM, D/B/A VIRGINIA HOSPITAL CENTER, ET AL.,

Appellees.

Record No. 211110

Circuit Court No. CL19000375-00

ORDER DEFERRING ISSUANCE OF THE MANDATE

Upon consideration of the motion of the appellants, who are self-represented, it is ordered that issuance of the mandate in this case be and the same hereby is deferred, to and including the 2nd day of January, 2023, on the expiration of which time the same may

be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance of the mandate shall be deferred until the final determination of the case by that Court. Upon further consideration, the terms and conditions of the trial court's August 25, 2021 Final Order are extended until proceedings in the Supreme Court of the United States are terminated. If appellants determine that no writ of certiorari will be filed, appellants shall immediately notify the clerk of this Court and the mandate shall issue forthwith.

A Copy,

Teste:

Muriel-Theresa Pitney
Clerk

By:

/s/ Lesley Smith
Deputy Clerk

ORDER OF THE VIRIGINA SUPREME COURT (JANUARY 5, 2022)

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING
IN THE CITY OF RICHMOND

LINDA MATARESE, ADMINISTRATRIX,

Appellant,

v.

VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM, ETC., ET AL.,

Appellees.

Record No. 211110

Circuit Court No. CL19000375-00

From the Circuit Court of Arlington County

On December 14, 2021 came the appellant, in proper person, and filed a motion to amend the petition for appeal in this case. Thereafter, came appellee Loren Friedman, by counsel, and filed a response in opposition thereto, to which opposition appellant filed a reply.

On January 27, 2021 came counsel for the appellant and filed a motion to withdraw as counsel.

Upon consideration whereof, the Court denies the appellant s pro se motion to amend her petition

for appeal and grants Phillip B. Leiser, Esquire s motion to withdraw as counsel and appellant is permitted to appear pro se in this matter.

A Copy,

Teste:

Muriel-Theresa Pitney
Clerk

By:

/s/ Lesley Smith
Deputy Clerk

FINAL ORDER OF DISMISSAL OF PREJUDICE OF THE ARLINGTON COUNTY CIRCUIT COURT (JULY 15, 2021)

VIRGINIA: IN THE ARLINGTON COUNTY CIRCUIT COURT

LINDA MATARESE, PERSONAL REPRESENTATIVE (ADMINISTRATOR) OF THE ESTATE OF HILDA DULD BAUMAN, DECEASED,

Plaintiff,

v.

VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM, D/B/A VIRGINIA HOSPITAL CENTER, ET AL.,

Defendants.

Case No. CL-19000375-00

Before: Judith L. WHEAT, Arlington County Circuit Judge.

FINAL ORDER OF DISMISSAL WITH PREJUDICE

THIS MATTER came before the Court on July 15, 2021 on Virginia Hospital Center Physician Group, L.L.C., Aysha Farooqi, M.D., Peter Ouellette, M.D., Thomas Strait, M.D., and Loren Friedman, M.D.'s

Motions to Strike Linda Matarese's Evidence and for Summary Judgment; and it is hereby ADJUDGED and ORDERED that Defendant's Motions to Strike and for Summary Judgment are hereby GRANTED;

that Linda Matarese's evidence is hereby struck;

that summary judgment is granted in favor of Virginia Hospital Center Physician Group, L.L.C., Aysha Farooqi, M.D., Peter Ouellette, M.D., Thomas Strait, M.D., and Loren Friedman, M.D.;

this matter is DISMISSED WITH PREJUDICE;

that the cause is concluded; and

that the transcript of the Court's ruling as well as the transcript of those proceedings are hereby incorporated.

ENTERED this 15th day of July, 2021.

/s/ Judith L. Wheat
Judge, Arlington County Circuit

Seen and Agreed to by:

By: /s/ Michael E. Olszewski
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Counsel for Defendants Virginia Hospital Center, VHC Physician Group, LLC, Aysha Farooqi, MD., Peter Ouellette, MD., and Thomas Strait, MD.

SEEN AND OBJECTION:

The plaintiff age 76, Linda Matarese, was confronted with an unexpected health care emergency during the 4th day of this jury trial. She has sensitivity to certain chemicals, such as paint thinners & cleaners, when outside her normal environment for an extended period. The emergency was unexpected & unpredicted and was the subject of an adjudication by the U.S.D.C. for the E.D. of Va. in a civil action filed by the plaintiff against Archstone properties. The plaintiff's husband, who was attending to his wife at home when this case was dismissed, stated that she was in pain & discomfort but would be able to appear tomorrow afternoon. The husband was available to testify. No attempt has been made for accommodation of a legitimate handicap.

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Counsel for Defendant Loren Friedman, MD.

TRIAL JUDGE INSTRUCTIONS ON COMING AND GOING FROM COURTROOM, TRANSCRIPT (JULY 12, 2021)

VIRGINIA: IN THE CIRCUIT COURT
FOR ARLINGTON COUNTY

LINDA MATARESE,
PERSONAL REPRESENTATIVE OF THE
ESTATE OF HILDA DULD BAUMAN,

Plaintiff,

v.

VIRGINIA HOSPITAL CENTER
ARLINGTON HEALTH SYSTEM, ET AL.,

Defendants.

Civil Action No. CL19-375

Before: Hon. Judith L. WHEAT, Judge.

[July 12, 2021, Transcript, p. 194]

> . . . openings first thing tomorrow morning. And then if there's other things we have to take up this afternoon, we can take that up.

MR. TRICHILO: 9:30 will be l0A?

THE COURT: 9:30 will be in courtroom 10A, yes.

MR. WALKINSHAW: I have one issue, Judge, and I'm not sure when it will be appropriate to mention this—maybe not until tomorrow, but Dr. Strait, one of my clients, is not present today, but he will be tomorrow. And I just—if the jury is impaneled today and they see that he's not there, I would just like it not to be—like the jury to be told not to read anything into it that he's not here.

THE COURT: One of the things I'll just put into my opening instructions is that the parties in this case may come in and out during the trial and you're to put no significance on that.

MR. WALKINSHAW: Thank you.

THE COURT: That way it doesn't single anybody out and gives everybody the ability if things come up.

MR. WALKINSHAW: Okay. Thank you.

MR. TRICHILO: What's the best way to alert the Court if we have a client who needs to leave the courtroom? In other words, ask for her to be excused momentarily?

THE COURT: If Mrs. Matarese needs to leave, she should just get up and leave.

MR. TRICHILO: Okay.

THE COURT: Just make sure she doesn't do it through the well of the court and stuff, but I just don't—we should draw as little attention to any of it as possible, understanding it's a long trial and people will be coming in and out. So if she needs to go out, she should just go out.

MR. TRICHILO: Thank you.

THE COURT: All right. Anything else? You know, I've done this all day without coffee.

(The proceedings resumed in open court as follows:)

THE COURT: Ladies and gentlemen, I have . . . .

[. . .]

BENCH RULING TRANSCRIPT, DISMISSING CASE AGAINST ALL DEFENDANTS WITH PREJUDICE (JULY 15, 2021)

VIRGINIA: IN THE CIRCUIT COURT
ARLINGTON COUNTY

LINDA MATARESE,
PERSONAL REPRESENTATIVE OF THE
ESTATE OF HILDA DULD BAUMAN,

Plaintiff,

v.

VIRGINIA HOSPITAL CENTER
ARLINGTON HEALTH SYSTEM, ET AL.,

Defendants.

Civil Action No. CL19-375

Before: Hon. Judith L. WHEAT, Judge.

[July 15, 2021, Transcript, p. 98]

MR. VOLZER: Good morning, Your Honor—or good afternoon.

We've spoken to Mrs. Matarese's husband. She—as an officer of the court, I'll give you all the facts that I know, even though most of them aren't helpful to us.

She went home. She's in bed. She does not have a regular doctor to call, so the alternative would have been to go to the hospital, which she did not. Her husband says she's in the same level of pain as when she left here today. He thinks she could be here tomorrow, but there's no guarantees. Originally when we spoke to him, he said probably based on history, meaning her medical history, it wouldn't be before Monday. I have to tell you that.

I know you have to make a decision, and I want you to have all the facts. Although they don't particularly play well for us, you know, those are the facts that we have right now. If I had any guarantees that she would be here tomorrow or even Monday, I would state that. I don't have those facts.

I think that a motion to dismiss is a harsh remedy. As I said earlier, I think the more appropriate would be to declare a mistrial, but its your decision.

MR. TRICHILO: Since I actually spoke with Mr. Domenic, Mr. Domenic Matarese, let me just clarify a few things.

THE COURT: Sure.

MR. TRICHILO: He said his wife was in discomfort and making her food, and she was wanting to rest, and that his best assessment was some sort of chemical sensitivity that she has had rarely in the past. When I told him the case may be thrown out, he said both of us will be there tomorrow afternoon. He spoke with his wife, so her preference was to rest, that she could recover most

quickly at home. If she went to a hospital, she believes it would be GW or Inova.

MR. WALKINSHAW: Your Honor, I don't know that Mr. Matarese's comments about what's going on classify as a medical diagnosis. Still don't have any information as to the medical reasons as to why she left and if she's not going to seek medical treatment—

THE COURT: Well, that's my concern. She's not going to seek medical treatment, I have nothing to evaluate.

MR. WALKINSHAW: Correct. And what we have is just her absenting herself from the courtroom because she doesn't feel well, and I don't think that that's sufficient grounds to grant a mistrial special—

THE COURT: I already denied that. I'm not granting a mistrial.

MR. WALKINSHAW: Okay. Well, I appreciate that. But it does—and we have no guarantee that she's coming tomorrow. It totally gums up the works.

You know, Dr. Strait now lives in California. He's flown in all the way from California for this. We have experts coming. I do not want to put on evidence out of turn before they rest. I don't think that's appropriate. You know, we'll be here to the end of next week. And based on things, how things have gone thus far, there's no guarantee that it would end by next week either based on how things have gone and what we have seen today, so I think that a motion to strike is appropri-

ate at this time and for judgment in the defendants' favor.

THE COURT: Mr. Olszewski gets to speak and you'll get a response.

MR. OLSZEWSKI: Your Honor, I'm not going to take much more of the Court's time. I'll just adopt what Mr. Walkinshaw just said. I adopt it on behalf of Dr. Friedman.

MR. TRICHILO: Your Honor, one fact I don't think is important, but Mrs. Matarese's sensitivity has been adjudicated by a federal court as a legitimate handicap, so it's not something that is made up. In fact, it's referenced in a published case—

THE COURT: But how am I going to get any information, Mr. Trichilo? She's not going to a doctor. You're asking me to accept the word of her husband that what she has experienced in the past is what he thinks is happening now. I'll have nothing to make a determination. And if she comes back tomorrow afternoon, I can't get—your case in chief finished tomorrow afternoon, so then it's continued into next week. I've told this jury Tuesday or Wednesday of next week. And she's not taking any action seriously to show to this court that there is an actual medical emergency that precludes her from being here.

MR. TRICHILO: Judge, I just want to make my record, okay, and then you can do what you will.

THE COURT: Sure.

MR. TRICHILO: I was starting to say the Archstone case decided by Judge Lee adjudicated a legitimate handicap—

THE COURT: Which is what? Tell me what it is.

MR. TRICHILO: It's some sort of sensitivity, chemical sensitivity to cleaning or paint fumes—of course unknown, but it's referenced in the case. It's a published case, so it's readily accessible online where they were awarded compensatory and punitive damages.

But when she's in a different environment for an extended period, it can be triggered. And the husband said it's very rare. He would come here and leave her unattended if that would make a difference. He said they would definitely be here by Monday, but he said they could come tomorrow afternoon when he heard the case may be thrown out, but he said Monday for certain.

MR. WALKINSHAW: Your Honor—

THE COURT: Yes.

MR. WALKINSHAW:—there's no evidence that she had a reaction to this allegedly—and I don't know—

THE COURT: Motion to strike is granted.

MR. WALKINSHAW: Thank you, Judge.

THE COURT: Case is dismissed against all defendants with prejudice.

Can we bring the jury, please.

So I want to formally tell the jury that the case has concluded and their service is done. So I'm sure you-all want to be here for that, so well resume at 1 o'clock when they come back.

MR. VOLZER: Thank you, Judge.

(A recess was taken.)

THE COURT: Bring the jury in. Thank you.

(The jury entered the courtroom: 1:05 p.m.)

THE COURT: You-all may be seated.

All right. Ladies and gentlemen, as you have probably noted—in fact, you've spent more time in courtroom 10B than you have spent in courtroom 10C because there have been a number of legal issues that have been raised throughout the course of this trial that I have had to decide and rule on.

There were a number of motions that were made today. I have granted those motions, and the case is over, so your service is now concluded. I very much appreciate all of your time. I apologize because it's a frustrating experience for you, but I do appreciate your service and will tell you that your service is what got us to this point.

And so with the Court's extreme thanks, your service is now concluded and you-all are free to go. Thank you very much. You're welcome to talk about the case now with anyone, including counsel. You don't have to though. So if you have no interest in talking to them, you can just tell them you don't want to talk to them; and that's your call as well.

Thank you very much. If you'll just leave all your notepads and everything here and—actually, why don't you just take them back into courtroom 10B, leave them there, and well have somebody collect them. Thank you very much. Just stick them right on the bench in the back there and

we will collect all of them, and that way you're all just free to go.

Thank you very much. Enjoy the rest of your summer.

(The jury left the courtroom: 1:08 p.m.)

Counsel, will you prepare an order, please, get it to Mr. Volzer and Mr. Trichilo, and I'll go ahead and get it entered?

MR. HEALY: Your Honor, I think we can dispose of that issue right now. Our trial tech is printing off an order we already drafted and ran by Mr. Trichilo. I don't believe Mr. Volzer has looked at it.

THE COURT: Is there anything else that anybody wanted to put on the record so your record is complete?

MR. VOLZER: I don't think we want to add to your discomfort, Judge.

THE COURT: You know, it's unfortunate, but I just think this case has to come to an end.

MR. WALKINSHAW: Your Honor, there is the matter of summary judgment being granted in favor of the hospital on Thursday. I don't believe we have an order entered on that yet, but I just want to make it clear on the record I'll prepare one, and it will simply say you're granting summary judgment.

THE COURT: Very good.

Counsel, I'll let you-all sort out the order. I'm going to go upstairs. Just when it is completed, please give it to the clerk. It's been—I won't say it's been

a pleasure, but you-all have given me a lot to think about the last two weeks, and so I appreciate the experience.

Best of luck to everyone.

MR. WALKINSHAW: Thank you, Judge.

MR. OLSZEWSKT: Thank you, Your Honor.

(The proceedings adjourned at 1:15 p.m.)

FINAL ORDER OF THE ARLINGTON COUNTY CIRCUIT COURT (AUGUST 25, 2021)

VIRGINIA: IN THE ARLINGTON COUNTY CIRCUIT COURT

LINDA MATARESE, PERSONAL REPRESENTATIVE (ADMINISTRATOR) OF THE ESTATE OF HILDA DULD BAUMAN, DECEASED,

Plaintiff,

v.

VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM, D/B/A VIRGINIA HOSPITAL CENTER, ET AL.,

Defendants.

Case No. CL-19000375-00

Before: Judith L. WHEAT, Arlington County Circuit Judge.

FINAL ORDER

THIS MATTER came before the Court on August 20, 2021, on Benjamin Trichilo, Esq. & Harvey Volzer, Esq.'s Motions to Withdraw as Counsel for Linda Matarese, Linda Matarese's Motion for Reconsideration, Virginia Hospital Center Physician Group, L.L.C., Aysha Farooqi, M.D., Peter Ouellette, M.D., Thomas Strait, M.D.'s Motion for Sanctions, and Loren

Friedman M.D.'s Motion for Sanctions; and it is hereby ADJUDGED and ORDERED;

that Benjamin Trichilo, Esq. & Harvey Volzer, Esq.'s Motions to Withdraw is GRANTED;

that future pleadings can be submitted to Linda Matarese at 801 15th Street South, #1405, Arlington, VA 22202;

that Virginia Hospital Center Physician Group, L.L.C., Aysha Farooqi, M.D., Peter Ouellette, M.D., Thomas Strait, M.D.'s Motion for Sanctions is DENIED;

that Loren Friedman, M.D.'s request for monetary sanctions against Linda Matarese is DENIED'

that Loren Friedman, M.D.'s motion to strike the pro se pleadings of Linda Matarese filed prior to the entrance of this order is GRANTED, with the exception of Linda Matarese's opposition to Benjamin Trichilo, Esq. & Harvey Volzer, Esq's Motion to withdraw, and those pleadings are hereby struck from the record as legal nullities;

that Linda Matarese's Motion for Reconsideration was denied by the Court in its August 3, 2021 order and the information presented at this hearing did not cause the Court to change that decision;

that the Court's August 3, 2021, suspending order is hereby LIFTED;

that this matter is DISMISSED WITH PREJUDICE with respect to all Defendants;

that the cause is concluded; and

that the transcript of the Court's rulings is hereby incorporated.

/s/ Judith L. Wheat
Judge
08/25/2021

SEEN AND OBJECTED to for the reason stated in Dr. Friedman's Pleadings & on the Record

By: /s/ Bryan J. Healy
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Counsel for Defendant Loren Friedman, MD.

SEEN AND OBJECTED to for the reason stated in Dr. Friedman's Pleadings & on the Record with written permission

By: /s/ Christine A. Bondi
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Counsel for Defendants Virginia Hospital Center, VHC Physician Group, LLC, Aysha Farooqi, MD., Peter Ouellette, MD., and Thomas Strait, MD.

SEEN AND OBJECTION to granting of motion to strike:

With written permission

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Prior Counsel for Plaintiff Linda Matarese

SEEN AND OBJECTION, to striking Matarese's pleadings filed after Atty's Trichilo and Volzer filed motion to withdraw as counsel; Motion to strike plaintiff's case was premature as plaintiff had not been called to testify and had not tested her case number under *Durham*, 205 Va. 441 (1964); Dismissal of Plaintiff's case was not based upon the merits and violated Plaintiff's due process rights; Plaintiff suffers from

legitimate handicaps/disabilities under Fair Housing Act 42 U.S.C. 3602(h) and ADA 42 U.S.C. 12102(1) Repeated denials of Matarese's Motions for Mistrial without citing case law or law to support denial; Court refused to grant Atty Trichilo's Request to Reasonable Accommodations/Modifications to allow Matarese to testify in her Mother's Case; Trial Court abused its discretion when it permitted "lawyers and parties to come and goes they need to during the trial without asking the court for permission," but did not permit Matarese to leave during a handicap emergency. Transcript Jury Trial Day 1, July 12, 2021, 197-198.

By: /s/ Linda Matarese

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Counsel for Defendant Loren Friedman, MD.

ORDER OF THE ARLINGTON COUNTY CIRCUIT COURT (AUGUST 3, 2021)

VIRGINIA: IN THE CIRCUIT COURT
ARLINGTON COUNTY

LINDA MATARESE, PERSONAL REPRESENTATIVE OF THE ESTATE OF HILDA DULD BAUMAN, DECEASED,

Plaintiff,

v.

VIRGINIA HOSPITAL CENTER PHYSICIAN GROUP, ET AL.,

Defendants.

Case No. CL-19-375

Before: Judith L. WHEAT,
Arlington County Circuit Judge.

ORDER

THIS MATTER came before the Court upon Defendants Virginia Hospital Center Physician Group LLC, Aysha Farooqi, M.D., Peter Ouellette, M.D., and Thomas Strait, M.D.'s Motion to Suspend Final Judgment until their Motion for Sanctions has been heard and decided by this Court, and

IT APPEARING TO THE COURT that said Motion is proper and that this Court should retain jurisdiction over this matter until post-trial motions are heard and ruled upon, it is hereby

ORDERED that the orders entered on July 15, 2021 granting judgment in favor of these Defendants are SUSPENDED until further order of the court after issuing its decision on post-trial motions.

Entered this 3rd day of August, 2021.

Hearing on plaintiff's Counsels' Motion to withdraw and Defendant's Motion to Sanctions will be rescheduled to August 20, 2021 or such at the date and time as agreed upon by the Court. The court will not entertain Plaintiff's renewed request for a mistrial, having denied said motion prior to releasing the jury.

WE ASK FOR THIS:

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Counsel for Virginia Hospital Center Physician Group, LLC, Dr. Farooqi, Dr. Strait, and Dr. Ouellette

SEEN AND _____

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Counsel for Loren Friedman, M.D

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Counsel for Plaintiff

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BENCH RULING DENYING MOTION FOR MISTRIAL FOLLOWING NOTIFICATION TO TRIAL COURT OF MEDICAL EMERGENCY (JULY 15, 2021)

VIRGINIA: IN THE CIRCUIT COURT
ARLINGTON COUNTY

LINDA MATARESE,
PERSONAL REPRESENTATIVE OF THE
ESTATE OF HILDA DULD BAUMAN,

Plaintiff,

v.

VIRGINIA HOSPITAL CENTER
ARLINGTON HEALTH SYSTEM, ET AL.,

Defendants.

Civil Action No. CL19-375

Before: Hon. Judith L. WHEAT, Judge.

[July 15, 2021, Transcript, p. 60]

MR. OLSZEWSKI: I have them, yeah.

THE COURT: We're all getting them right now.

MR. TRICHILO: What happened last night, there were—

THE COURT: Mr. Trichilo, at this point I'm just going to deal with it, okay. Whatever happened, happened. We're just going to deal with it. This case needs to keep moving. So if you can hand those designations up.

You-all can take a look at them. Let's see if we can figure this out.

(A recess was taken.)

THE COURT: All right. Where do we go from here, Counsel?

MR. WALKINSHAW: You're aware of the—

THE COURT: I'm aware.

MR. WALKINSHAW: You're aware she denied medical treatment?

THE COURT: I'm aware. She and her husband both left.

MR. WALKINSHAW: Correct.

THE COURT: And they are the next two witnesses in the case after these depositions.

MR. WALKINSHAW: Correct. And unless they—they can't prove their case without her testimony. She's absent. Were in the middle of trial. I think that the answer is a motion to strike, a directed verdict that the case be over.

MR. TRICHILO: Your Honor, let me correct a statement. Mrs. Matarese asked to—said she had to go home. Her husband is taking her to a doctor. She did not refuse medical care. He's taking her directly to the doctor. She was taken by the bailiffs by wheelchair down to the first level. Her

husband is getting the car and bringing her straight to the family doctor. All she could tell me was she felt very badly. She's always been very strong. And I don't know what it is, but it's a serious problem and she is not here.

So we either need to adjourn the case for a day until she can get back. She would not want this case to proceed without her. It's too important. And there is no fault on her part, I can assure the Court. She said she had low blood sugar. I asked her if she did anything unusual today, and she said, I never do anything unusual.

MR. WALKINSHAW: The information that she refused medical—

THE COURT: I was told that by the deputies that they offered to have the medics come and to take her to the hospital, and she refused and said she wanted to go to her doctor. If it was an emergency, it would seem to me she would need to go to the emergency room.

MR. TRICHILO: She may end up at the emergency room, Your Honor. Family doctors or whoever her doctor is may say it's too much for him, but we don't know at this point. And certainly not wanting to be put in an ambulance and being separated from her husband for a 76-year-old lady who has been married 50 years is not, I think, an unusual request.

THE COURT: Mr. Trichilo, we are in the middle of a trial that has been delayed and delayed and delayed, and now we just came up with a whole new schedule. She and her husband were the last two witnesses who were supposed to testify

and all of a sudden ten minutes, 15 minutes before that's supposed to happen, she has an unspecified medical emergency that requires her not to be here, for me to adjourn the trial, which now means they have a witness who has to leave today who cannot testify, that I now have jurors I was going to have come in tomorrow. I'm finding it very difficult to believe. I'm not challenging your representations, I am not challenging counsel's veracity at all, but I am finding it very difficult to believe at this point. And if it was that kind of a serious nature, why should we not get in an ambulance and go to the hospital?

MR. TRICHILO: Would it make a difference if I said take her to the emergency room instead of to her family doctor? If she knew her case was going be to be dismissed with prejudice as these defendants are now asking the Court to do, that would be done in a minute. This lady wants to go forward. This is not—

THE COURT: So how do you propose we deal with this? We now have an expert who cannot come. Here's here today and ask the jury to come back tomorrow. How are you—I mean, I don't know, you know, at this—she comes back and they tell me everything is fine and then what, we've turned everything on its head, or she comes back and they told her to drink some sugar?

MR. WALKINSHAW: It also sounds like Mr. Trichilo is proposing that she go to the emergency room, not for medical care but for legal benefit, legal strategic benefit.

MR. VOLZER: This has got to stop, Your Honor. We will defer to you and your decision, okay?

THE COURT: At this point, just state the facts on the record. I'm going to—I am not happy and I'm not going to make a decision that impacts people while I am having steam coming out of my ears. I don't think that's fair to anyone, so put your facts on the record. Everyone put the position on the record that you want me to consider.

I'm going to take a break. I'm going to take a walk around the block, and then I will come back and I will decide how I'm going to handle this.

Anything else you want to put on the record?

MR. VOLZER: No, Your Honor, not at this time.

MR. WALKINSHAW: Would you like me to make a record before—while you're on the bench?

THE COURT: Yes.

MR. WALKINSHAW: Okay.

THE COURT: I want to hear everything that people want to say so I can come back and make a decision and tell this jury and tell these defendants, tell everyone what is going on.

MR. WALKINSHAW: Yes, Your Honor. So here we are on the Thursday of trial. We have had only one live witness testify so far. I believe that I was going to begin my case today. I had two experts scheduled for today. One is sitting outside currently. We planned to take him out of turn. Dr. Dzeng, who is the other expert I was going to have testify today that flew in last night, graciously agreed to change all of her plans and come

Monday. And we had already agreed to have trial on Friday so that we could accommodate getting the trial done in a timely fashion as scheduled. Dr. Strait has travel plans scheduled for tomorrow. It's going to upset the apple cart.

And we know that Mrs. Matarese was about to testify. She had a medical emergency, but she refused medical treatment by EMS personnel as confirmed by the bailiff to you. There are—and without her testimony, which should have happened today, they can't prove their case. And I submit to you they are not going to be able to prove their case anyway. There are ample legal grounds that we submitted to you pretrial for you to find that this case is not legally cognizable, and for those reasons, in addition to the reasons, they will not be able to prove their case, we ask for a motion to strike their case and then for a judgment in our favor.

MR. OLSZEWSKI: Your Honor—

THE COURT: Let Mr. Olszewski and then I'll let you make your record, Mr. Trichilo.

MR. OLSZEWSKI: Your Honor, just simply on behalf of Dr. Friedman, we adopt what was just stated on behalf of the other defendants.

MR. VOLZER: Your Honor, I think I'm the only person that's ever had this happen before, and in that case, which was in federal court, they declared a mistrial, and I think that would be the appropriate way of handling this.

We cannot, including Your Honor, determine the extent of the medical emergency. And all we can

say is, you know, the facts that you have that she initially did not want to go to the hospital, she may end up there, but that's speculation, too.

And it's a horrible problem. I'm sitting here with what would have been my playing the role of Dr. Casey. I mean, it's right here. I was ready to go. I mean, no one anticipated this. No one could possibly anticipate this.

I think the correct way to handle this is to declare a mistrial.

MR. WALKINSHAW: Judge, the facts as I know them is that she was about to testify, she started having what appeared to be some sort of attack, she was having difficulty breathing. The deputies came and started tending to her. She was asked whether she wanted to go to the hospital, and we heard her say, I want to go home. I want to go home.

So it's my understanding right now that she left to go home. I don't mean to cast aspersions on Mr. Trichilo. And if I'm misstating what I heard, then fine, but—

THE COURT: You're making your record, go ahead.

MR. WALKINSHAW: It sounded like Mr. Trichilo said if she needed to go to the emergency room, to confirm it, then we'll send her to the emergency room. But I don't—I don't think that's—she's in charge of her medical care. While she was here, she was offered EMS, she declined. What she said instead was, I want to go home. So I don't

know that—with those facts, I don't think you can include it's a medical emergency.

If Mr. Trichilo advises her to go to the emergency room, her legal benefit, I don't—for legal strategic reasons, that doesn't—again, nothing on Mr. Trichilo, but it doesn't strike me as a genuine request for treatment on her part.

What we heard was, I want to go home and I decline medical treatment. That's what we heard. That's what happened.

MR. VOLZER: Your Honor—

THE COURT: I'll let you just respond factually. Everybody is just making a record at this point because whatever decision I make is a significant decision, so you can make your record.

MR. VOLZER: Just one final thing, Your Honor. We have at least six deputies here that can get on the stand and confirm that she was in obvious physical distress, and we can call any one of them and they would all say the same thing. The one deputy could barely get her into the wheelchair. I mean, that's a problem. And they are readily available. They can all say that. And what happens after she left here, we can only speculate.

MR. WALKINSHAW: Just one more thing, Your Honor—

MR. VOLZER: Wait. The other thing, Mr. Walkinshaw has no factual basis, and, in fact, misrepresented what Mr. Trichilo said earlier, and it's getting very tiring—

THE COURT: Mr. Volzer, I heard what everybody has said. You're making your record. I have ears, I have sat through this whole trial, I am able to understand what each of the counsel are saying, and I really—I am getting fed up to here with all the grandstanding back and forth. I understand people need to make their record, but I'm pretty fed up.

Mr. Walkinshaw, is there anything else that you want to factually put on the record?

MR. WALKINSHAW: Just something you're already aware of is this case involves events seven years ago; it's been a long, hard fought battle up until now. My clients have taken the week off. I have experts coming in at great expense. It's tremendous prejudice to my clients and to witnesses I have scheduled.

THE COURT: Would you let the jury know that we're going to need another half an hour. Counsel, I'll be back in about 20 minutes.

(A recess was taken.)

THE COURT: Counsel, here is how I've decided. I'm denying at this point the motion for a mistrial, okay. I am not deciding on your motion to dismiss at this point.

What I'm going to do is we're going to do the deposition testimony without Mrs. Matarese here because she has those transcripts and there is nothing that she would need to be here for.

We are going to take a break for lunch and we are going to do Mr. Walkinshaw's expert who is here and that will testify. And Mrs. Matarese

will miss that testimony, but I'm not going to make that expert come back. We'll have that expert testify.

I imagine that that would get us upwards to around 2 o'clock or 2:30 thereabouts. And at that point perhaps we will have some information about what is going on with Mrs. Matarese, and at that point having more information can make a determination how to proceed. But at least we keep the trial going, and we do what we intended to do, and we will go from there.

Are we ready for the jury with the deposition transcripts?

MR. WALKINSHAW: What are we going to tell the jury? Anything?

THE COURT: No. I think I told the jury the parties can come and go as they please, so I don't think—they knew there were depositions. I'm sure they saw me roll my eyes, and I'm sure they think it is me just taking a long time again to decide this. I won't tell them she had a medical emergency. I don't think that that is appropriate, so she's not here. I told them the parties could come and go, and I think we just proceed with the trial.

MR. VOLZER: We agree with your approach.

THE COURT: All right.

MR. WALKINSHAW: For the record, we object.

THE COURT: Your objection is noted for the record.

MR. OLSZEWSKI: Same for Dr. Friedman.

THE COURT: All right. Have we sorted out the depositions so that we can at least get this happening?

MR. TRICHILO: I think Casey and Lewis are ready to go.

MS. BONDI: Your Honor, we only have one objection to one line of Dr. Casey's testimony. Would you like to rule on that objection now?

THE COURT: Let's just do it right now and then that's resolved. I told the jury half an . . . .

[. . .]

ORDER OF THE VIRIGINA SUPREME COURT DENYING PETITION FOR REHEARING (OCTOBER 4, 2022)

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING
IN THE CITY OF RICHMOND

LINDA MATARESE, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF HILDA DULD BAUMAN, DECEASED, ET AL.,

Appellants,

v.

VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM, D/B/A VIRGINIA HOSPITAL CENTER, ET AL.,

Appellees.

Record No. 211110

Circuit Court No. CL19000375-00

On consideration of the petition of the appellant to set aside the judgment rendered herein on June 29, 2022 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Muriel-Theresa Pitney
Clerk

By:

/s/ Melissa B. Layman
Deputy Clerk

PETITION FOR REHEARING
(JULY 13, 2022)

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

LINDA B. MATARESE,

Petitioner,

v.

LOREN FRIEDMAN, M.D., VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM, d.b.a. Virginia Hospital Center, VIRGINIA HOSPITAL CENTER PHYSICIAN GROUP L.L.C., d.b.a. VHC Physician Group, DR. AYSHA FAROOQI, M.D., DR. PETER OUELLETTE, M.D. and DR. THOMAS STRAIT, M.D.,

Respondents.

Record No. 211110

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PETITION FOR REHEARING

INTRODUCTION

Petitioner/Appellant, Linda Matarese ("Matarese"), respectfully requests rehearing in this case as stated herein. On May 12, 2022, Matarese, appearing *pro se* in this matter pursuant to the Order of the Supreme Court of Virginia (the "Court") dated January 5, 2022, permitting Matarese to appear *pro se* in the above-captioned matter, and in her capacity as Administratrix of the Estate of her Mother, Hilda Duld Bauman, Decedent ("Bauman"), filed a Motion for Leave to Amend and Restate Her Petition for Appeal and filed an Amended and Restated Petition for Appeal.

On May 13, 2022, Matarese appeared before a Writ Panel of the Court. Matarese explained to the Panel that the Petition for Appeal must be amended because it did not assign error to the trial court when it struck Matarese's case before Matarese rested her case, before Matarese was called to testify, and when material facts were in dispute concerning "consent" for Bauman's treatment at Virginia Hospital Center ("VHC") in a medical battery, treatment without consent, case. The Panel did not question Matarese's statements. Matarese concluded, "This is a very serious matter." Matarese received an Order of this Court dated June 29, 2022, stating, "Upon consideration whereof, the *Court grants the motion to amend and the amended petition for appeal is considered filed.*"

This Court's 6/29/22 Order, approved Matarese's May 12, 2022, Amended and Restated Petition for Appeal without comment or correction.

However, thereafter, the Court stated: "Upon review of the record in this case and consideration of

the argument submitted in support of and in opposition to the granting of an appeal, *the Court is of the opinion there is no reversible error in the judgment complained of*. Accordingly, the Court refuses the amended petition for appeal."

The June 29, 2022 Order of the Court is a short form order, brief and summary in nature that does not give reasonable knowledge to the Petitioner, Matarese, of the rationale for the Court's opinion that there is no reversible error in the judgment complained of, which is a violation of procedural due process.

STATEMENT OF FACTS

On July 12, 2021, Day 1 of the Jury Trial at the request of Defendants' Attorney Walkinshaw, the trial court wrote a Jury Instruction stating, "the parties in this case may come in and out during the trial and you're to put no significance on that." 7/12/21 TR. at 194:7-22, 195:1-2. Defendant Strait "absented himself" without court permission on Day 1 of the Trial.

Plaintiff's Attorney Trichilo asked the trial court how that Instruction applied to his client. The court replied: "If Mrs. Matarese needs to leave, she should just get up and leave. So if she needs to go out, she should just go out." 7/12/21 TR. at 195:4-16.

On July 15, 2021, Day 4 of the Jury Trial, Matarese experienced severe, intractable pain in court and was removed from the court room by,

> at least six deputies here that can get on the stand and confirm that she was in obvious physical distress, and we can call any one of

> them and they would all say the same thing. The one deputy could barely get her into the wheelchair. 7/15/21 TR. at 69:21-70:6.

The deputies carried Matarese, still in intractable pain, to her husband's car to go home and take pain medication so she could return to the trial as soon as possible. By Day 4 of a six-day Jury Trial, Matarese had not rested her case. Neither, Ms. Matarese, the sole plaintiff, nor Mr. Matarese, a material witness, was ever called to testify in Bauman's case. Defendants' attorneys quickly took the opportunity of Matarese's absence to begin discussing "a motion to strike [Matarese's] case and then for a judgment in [Defendants'] favor," 7/15/21 TR. at 61:6-7, 67:2-4, Attorney Walkinshaw admitted, "They can't prove their case without [Matarese's] testimony." *Id.* at 61:4-5. Admission by agent of party opponent, Va. S.Ct. R. 2:803(0)(D).

It appeared the trial court did not know about Matarese's handicap until Plaintiff's attorney Trichilo told the court on July 15, 2021 after Matarese was carried out of the courtroom by the six deputies, "the Archstone case decided by Judge Lee adjudicated a legitimate handicap." *Id.* at 102:17-19. In *Matarese v. Archstone Pentagon City*, 795 F.Supp.2d 402, 432 (E.D. Va. 2011), the Honorable Judge Gerald Bruce Lee stated, "1. Ms. Matarese Qualifies as an Individual with a Handicap Under the FHA [Fair Housing Act]." In addition, Matarese is certified federally and by Arlington County as handicapped under Title II of the Americans with Disabilities Act ("ADA"), which governs the courts in Virginia.

Motion to Strike. On July 15, 2021, Plaintiff's Attorney, Trichilo, told the court, "When I told him

[Mr. Matarese] the case may be thrown out, he [Mr. Matarese] said both of us will be there tomorrow afternoon. He [Mr. Matarese] spoke with his wife, so her preference was to rest, that she could recover most quickly at home." *Id.* at 99: 16-20. At the Post Trial Hearing on August 20, 2021, Judge Wheat admitted, "I believe Mr. Trichilo definitely said [Matarese] could be back by the end of the day on Friday [July 16, 2021]." 8/20/21 TR. at 42: 4-6.

When Defendants' Attorney, Walkinshaw, heard Ms. Matarese was returning to court, he immediately stated: "-there's no evidence that she had a reaction to this allegedly-and I don't know"-In response, the trial court (Judge Wheat) without comment abruptly stated: "Motion to strike is granted." "Case is dismissed against all defendants with prejudice." *Id.* at 103:14-22. The trial court's only reasoning for striking was, "I just think this case has to come to an end." *Id.* at 106:16.

AUTHORITIES AND ARGUMENT

For Almost 60 Years, the Law of Our Commonwealth has been Durham v. National Pool Equipment Co. Under *Durham*, this Court has said, a Trial Judge Sustaining a Motion to Strike a Plaintiff's Case Before Plaintiff Rests Was Premature and Constituted Reversible Error.

It is a matter of law that a motion to strike cannot be granted where the Plaintiff has not rested its case. Only the Plaintiff can decide when it has rested its case. If this Court allows its 6/29/22 Order in Matarese's case to stand that there is no reversible error in Judge Wheat's premature striking of Matarese's case, which is directly counter to *Durham,*

and that a judge can use a motion to strike to strike a party, not the party's evidence, the almost 60 years precedent and control of *Durham* over the judiciary, lawyers and litigants will be destroyed. In the instant case, it took Judge Wheat 36 days to admit she struck Matarese because "[Matarese] had voluntarily absented herself from the courtroom" and not on the basis of striking the evidence. 8/20/21 TR. at 99:13. Six deputies removing Matarese from the court room and carrying Matarese to her husband's car was not voluntary. Moreover, when Matarese tried to return to court, Judge Wheat struck Matarese and her case and locked the court house door.

In *Durham v. National Pool Equipment Co.*, 205 Va. 441, 448, 138 S.E.2d 55, 60 (1964), this Court held, "He [Plaintiff Durham] had not rested his case. Under the facts and circumstances here presented we cannot say, as a matter of law, that Durham's testimony showed that he had no case. The sustaining of the motion to strike was premature and constituted reversible error." "The motion [to strike] should never be made prior to the conclusion of a party's evidence." Sinclair & Middleditch, Jr., 1 Virginia Civil Procedure § 13.8 (7th Ed. LexisNexis Matthew Bender (2021)) (emphasis added) (citing *Durham v. National Pool Equipment Co.*, 205 Va. 441, 138 S.E.2d 55 (1964)).

In the instant case, Defendants' Motion to Strike was made before Matarese rested her case, and before Matarese, the sole plaintiff, and her husband, a material witness, were called to testify. Like Plaintiff Durham, "[Plaintiff Matarese] had not rested [her] case. . . . The sustaining of the motion to strike was premature and constituted reversible error." *Durham*

v. National Pool Equipment Co., 205 Va. 441, 448, 138 S.E.2d 55, 60 (1964).

The standard by which a motion to strike should be judged is well settled. "In ruling on a motion to strike a plaintiff's evidence, a trial court must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the plaintiff. Any reasonable doubt as to the sufficiency of the evidence must be resolved in the plaintiff's favor." *Artrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 357, 397 S.E.2d 821, 823 (1990). The Trial Court erred when it failed to resolve any reasonable doubt as to the sufficiency of the evidence in Plaintiff's favor.

Three Dispositive Pretrial Motions Filed By Defendants Were All Decided In Favor of Matarese by the trial court (Judge Wheat). Thus, it was improper to decide, as a matter of law, that Matarese had no case such that her claims should be dismissed with prejudice.

Moreover, the trial court (Judge Wheat) erred when it "granted the motion to strike and ruled in favor of the Defendants" because "[Matarese] had voluntarily absented herself from the trial," *and not on the basis of striking Matarese's evidence.* 8/20/21 TR. at 42:8-11 (emphasis added). Matarese did not "'voluntarily' absent herself from the trial." Matarese was in intractable pain and was carried from the court room by six deputies and had to go home to take pain medication so she could return to her Mother's trial as quickly as possible. 7/15/21 TR. 69:21-22; 70:1-6. Judge Wheat admitted, "I believe Mr. Trichilo [Plaintiff's Attorney] definitely said [Matarese] could be back by the end of the day on Friday [the next day]." 8/20/21 TR. at 42: 4-6.

Assignment of Error No. 1. The Trial Court erred and committed reversible error when it granted Defendants'-Appellees' Motion to Strike prior to Plaintiff-Appellant Matarese resting her case-in-chief, prior to having all witnesses for Plaintiff testify, including Plaintiff-Appellant Matarese, and Mr. Matarese, and prior to having all evidence introduced in Plaintiff-Appellant Matarese's case-in-chief. Plaintiff-Appellant Matarese and Mr. Matarese, a material witness, were never called to testify. The sustaining of the Motion to Strike was premature and constituted reversible error. In addition, the trial court erred when in ruling on a motion to strike a plaintiff's evidence, the trial court failed to view the evidence and all reasonable inferences deducible therefrom in the light most favorable to Plaintiff-Appellant Matarese. The trial court erred when it failed to resolve any reasonable doubt as to the sufficiency of the evidence in Plaintiff-Appellant Matarese's favor.

Objections and error preserved. By Objection stated by Plaintiff's Attorney Trichilo 7/15/21 TR. 83: 4-7 ("For the record–I apologize–I object to substantive rulings being made in this case without my client being made here."); by Objection stated by Plaintiff, Pro Se Matarese at Post Trial Hearing 8/20/21 TR. 100: 1-4, in conjunction with 8/25/21 "Final Order," (ToC at 3531-3534) entirety of "SEEN AND OBJECTIONS," page 3 under Linda Matarese, Plaintiff, Pro Se, and specifically "Motion to Strike Plaintiff's case was premature as Plaintiff had not been called to testify and had not rested her case under *Durham*, 205 Va. 441 (1964)"; by 8/25/21 "Final Order," page 3 (ToC at 3531-3534), Attorneys Volzer & Trichilo, "SEEN AND OBJECTION TO GRANTING

OF MOTION TO STRIKE," and by Attorney Trichilo's Objection in 7/15/21 "Final Order of Dismissal With Prejudice," page 2 (ToC at 2923-2925). Attorney Trichilo (ToC 3504-3517, 08/17/2021, pages 7, 11) (citing *Durham v. National Pool Equipment Co.*).

STANDARD OF REVIEW IS DE NOVO

Where a defendant moves to strike a plaintiff's evidence after all evidence has been presented, this Court applies a de novo review of the Circuit Court's decision in which it "views the evidence and the inferences reasonably raised thereby in the light most favorable to the plaintiff, whose evidence was stricken." *Austin v. Shoney's, Inc.*, 254 Va. 134, 135, 486 S.E.2d 285, 285 (1997) (citing *Meador v. Lawson*, 214 Va. 759, 761, 204 S.E.2d 285, 287 (1974)).

When no evidence has yet been taken and a defendant moves to dismiss the plaintiff's claims, this Court applies a de novo review in the same manner as that applied to a decision on a demurrer, in which the truth of all material facts is accepted as alleged. *New Age Care LLC v. Juran*, 71 Va. App. 407, 414, 837 S.E.2d 64, 68 (2020) (citing *Bragg v. Bd. of Supervisors*, 295 Va. 416, 423, 813 S.E.2d 331, 334 (2018)).

The facts of the instant case fall in between the two extremes: Defendants moved to strike Ms. Matarese's evidence and dismiss her claims after some evidence was taken but before Matarese, the sole plaintiff, and her husband, a material witness, were called to provide their own testimony. Thus, this Court should apply a de novo review of the Circuit Court's decision, and it should both view the evidence presented in the first four days of the trial

in the light most favorable to Ms. Matarese and assume the truth of her allegations in her Verified Complaint (ToC at 2-26).

CONCLUSION

The trial judge's ruling constituted a clear and unequivocal reversible error and needs to be rectified in the interest of justice. Appellant/Petitioner Matarese respectfully asks this Court to grant Appellant/ Petitioner's Appeal to allow this crucial issue to be presented to this Court.

Respectfully submitted,

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Linda Matarese, in her capacity as Administratrix of the Estate of Hilda Duld Bauman, Decedent, and Petitioner / Appellant, Pro Se

Dated: July 13, 2022

AMENDED PETITION FOR APPEAL
(DECEMBER 14, 2021)

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

LINDA B. MATARESE,

Petitioner,

v.

LOREN FRIEDMAN, M.D., VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM, d.b.a. Virginia Hospital Center, VIRGINIA HOSPITAL CENTER PHYSICIAN GROUP L.L.C., d.b.a. VHC Physician Group, DR. AYSHA FAROOQI, M.D., DR. PETER OUELLETTE, M.D. and DR. THOMAS STRAIT, M.D.,

Respondents.

Record No. 211110

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AMENDED PETITION FOR APPEAL

[TOC & TOA Omitted]

I. First Assignment of Error

The trial court erred and committed reversible error when it (i) granted Defendants' Oral Motions to Strike Plaintiff Matarese's Evidence and her Complaint, and (ii) granted Summary Judgment to Defendants before Matarese, the sole plaintiff, and her husband, a material witness for plaintiff, were called to testify and before Plaintiff Matarese rested her case. *Moreover, material facts were in dispute when the trial court erred and granted defendants' motions to strike* Matarese's evidence and Complaint that precluded granting Summary Judgment to Defendants. 7/15/21 "Final Order of Dismissal With Prejudice" (ToC at 2923-2925); 8/25/21 "Final Order" (ToC at 3531-3534).

The trial court erred when it granted "a motion to strike the Plaintiff's evidence before the Plaintiff has had an opportunity to present evidence in support of the allegations in the motion for judgment [Complaint]," which was based on Ms. Bauman's Virginia Hospital Center's medical records dated 1/27/14 to 2/9/14. *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. Partnership,* 253 Va. 93, 95, 480 S.E.2d 471, 472 (1997).

The trial court committed reversible error when it granted the motion to strike Plaintiff Matarese's evidence and her Complaint because "[Plaintiff] had not rested [her] case." *Durham v. National Pool Equipment Co.,* 205 Va. 441, 448, 138 S.E.2d 55, 60 (1964). The motion to strike the evidence "should never be made prior to the conclusion of a party's evidence." Sinclair

& Middleditch, Jr., 1 Virginia Civil Procedure § 13.8 (7th Ed. LexisNexis Matthew Bender (2021)) (citing *Durham v. National Pool Equipment Co.,* 205 Va. 441, 138 S.E.2d 55 (1964)). In the instant case, Defendants' Oral Motion to Strike Plaintiff Matarese's evidence and Complaint was made on day four of a six-day trial before Matarese, the sole plaintiff, and her husband, a material witness for plaintiff, were called to testify and before Plaintiff Matarese rested her case.

Moreover, the trial court erred when it granted a motion to strike the plaintiff's evidence without resolving "any reasonable doubt as to the sufficiency of the evidence in favor of the plaintiff." *Costner v. Lackey,* 223 Va. 377, 381, 290 S.E.2d 818, 820 (1982) (citing *Jones v. Downs,* 222 Va. 25, 28, 278 S.E.2d 799, 800 (1981)).

In addition, it was improper to decide that Ms. Matarese had no case such that her claims should be dismissed with prejudice especially after the three dispositive pretrial motions (Plea in Bar and two Demurrers) filed by Defendants were all decided by Judge Wheat in favor of Plaintiff Matarese (ToC at 478-481, 1130-1133, 1459-1462.)

Moreover, in Judge Wheat's most recent pretrial motion dated March 30, 2021 (ToC 1459-1462), at 1, ¶ 1, defendants argued that "Plaintiff's Complaint fails to state a cause of action for medical battery." To the contrary, Judge Wheat wrote, at 2, ¶ 2, *"[C]onsistent with the Court's prior rulings in this case*, the Court finds that Plaintiff's Complaint makes factual assertions which, when accepted as true, as they must be at this [demurrer] stage of the proceedings, set forth a legal basis for judgment against each of the defend-

ants. Accordingly, *Defendants' demurrers are overruled* (emphasis added)."

A. Error Preserved.

By Objection stated by Plaintiff's Attorney Trichilo 7/15/21 TR. 83: 4-7 ("For the record-I apologize-I object to substantive rulings being made in this case without my client being made here."); by Objection stated by Plaintiff, Pro Se Matarese 8/20/21 TR. 100: 1-2, in conjunction with 8/25/21 "Final Order," (ToC at 3531-3534) entirety of "SEEN AND OBJECTIONS," page 3 under Linda Matarese, Plaintiff, Pro Se, and specifically "Motion to Strike Plaintiff's case was premature as Plaintiff had not been called to testify and had not rested her case under *Durham,* 205 Va. 441 (1964)"; by 8/25/21 "Final Order," page 3 (ToC at 3531-3534), Attorneys Volzer & Trichilo, "SEEN AND OBJECTION TO GRANTING OF MOTION TO STRIKE," and by Attorney Trichilo's Objection in 7/15/21 "Final Order of Dismissal With Prejudice," page 2 (ToC at 2923-2925).

II. Statement of the Case and Material Proceedings Below

The Appellant Linda Matarese, in her capacity as Administratrix of the Estate of Hilda Duld Bauman, Decedent (referred to here as "Ms. Matarese") files this Petition for Appeal from the Final Order of Dismissal with Prejudice entered by the Arlington County Circuit Court. Through the Final Order, the Circuit Court granted the oral motion by Appellees Virginia Hospital Center Physician Group LLC, Aysha Farooqi, M.D., Loren Friedman, M.D., Peter Ouellette, M.D., and Thomas Strait, M.D. (the "Defendants") to strike Ms. Matarese's evidence and enter summary

judgment dismissing all of Ms. Matarese's claims and Complaint.

The basis for the Defendants' motion and the Circuit Court's decision was unusual. Ms. Matarese, who is 74 years old, had a medical emergency on the fourth day of trial that forced her to return to her home to take medication so she could quickly return to Ms. Bauman's case. When Ms. Matarese left the courtroom in a wheelchair, Defendants' attorneys began discussing with the trial court a motion to strike Ms. Matarese's evidence and dismiss her claims and Complaint entirely before Ms. Matarese ever had an opportunity to present her own testimony or complete the presentation of her case in chief. Apart from the fact that a motion to strike Ms. Matarese's evidence was premature, the Circuit Court's decision was unduly harsh given the circumstances and the meritorious nature of her claims in support of her Mother, Ms. Bauman.

Ms. Matarese, the duly qualified Administratrix of the Estate of Hilda Duld Bauman, filed a Verified Complaint (ToC 2-26) on February 5, 2019 in the Arlington County Circuit Court seeking damages for treatment without consent (medical battery) committed by Defendants upon the decedent, Hilda Duld Bauman ("Ms. Bauman") during her hospitalization at Virginia Hospital Center Arlington Health System ("VHC") between January 27, 2014 and the day she died on February 9, 2014. The Defendants were served with the Verified Complaint in January 2020.

The Defendants filed a pretrial plea concerning the statute of limitations, which the Circuit Court resolved in Ms. Matarese's favor on April 6, 2020 (ToC 478-481). A pretrial demurrer concerning the

Health Care Decisions Act as the sole remedy was also resolved in Ms. Matarese's favor on September 30, 2020 (ToC 1130-1133). A pretrial demurrer concerning Ms. Matarese's cause of action for battery was resolved in her favor on March 30, 2021 (1459-1462).

Moreover, in Judge Wheat's most recent pretrial motion dated March 30, 2021 (ToC 1459-1462), at 1, ¶ 1, defendants argued that "Plaintiff's Complaint fails to state a cause of action for medical battery." To the contrary, Judge Wheat wrote, at 2, ¶ 2, "[C]onsistent with the Court's prior rulings in this case, the Court finds that Plaintiff's Complaint makes factual assertions which, when accepted as true, as they must be at this [demurrer] stage of the proceedings, set forth a legal basis for judgment against each of the defendants. Accordingly, Defendants' demurrers are overruled (emphasis added)."

On July 8, 2021, the Circuit Court held a pretrial hearing to hear motions in limine and for summary judgment. (Final Transcript, 7/8/21 Pretrial Hearing, Motions in Limine; Summary Judgment Motions (ToC 3732-3946)). The case proceeded to trial for four days. (Final Transcript, Jury Trial-Day 1, 7/12/21 (ToC 4064-4335); Final Transcript, Jury Trial-Day 2, 7/13/21 (ToC 4336-4644); Final Transcript, Jury Trial-Day 3, 7/14/21 (ToC 4645-4978); Final Transcript, Jury Trial-Day 4, 7/15/21 (ToC 5087-5225)). On the fourth day of the trial, after Ms. Matarese experienced a medical emergency, the Circuit Court granted Defendants' oral motion to strike Ms. Matarese's evidence and for summary judgment dismissing her claims and Complaint with prejudice. 7/15/21 "Final Order of Dismissal with Prejudice" (ToC at 2923-2925).

Ms. Matarese was never called to testify and never rested her evidence.

On August 3, 2021, the Circuit Court entered an Order granting Defendants' motion to suspend the Final Judgment to allow them to move for sanctions against Ms. Matarese and her attorney, Mr. Trichilo. (8/3/21 Order (ToC 2983-2984)) granting Defendants Motion to Suspend 7/15/21 Final Order of Dismissal with Prejudice allowing Defendants to Bring Motions for Sanctions Against Matarese and Trichilo. On August 20, 2021, the Circuit Court denied Defendants' motion for sanctions (and granted Ms. Matarese's attorneys' motion to withdraw) (8/20/21 TR. 1-102 at Post Trial Hearing, Defendants' Motions for Sanctions, Plaintiff's Counsels' Motion to Withdraw, Grounds for Mistrial at 40-42, Jury Instruction at 71; Final Order, 8/25/21 (ToC 3531-3534), removing Defendants' Motion to Suspend 7/15/21 Final Order & Denying Defendants Motions for Sanctions and Granting Plaintiff's Counsels' Motion to Withdraw).

Ms. Matarese filed a timely Notice of Appeal to the Supreme Court of Virginia on September 24, 2021 (ToC 3537-3539). She filed a timely Notice of Filing of Multiple Transcripts on October 22, 2021 (3540-3541).

III. Standard of Review is De Novo

Where a defendant moves to strike a plaintiff's evidence after all evidence has been presented, this Court applies a de novo review of the Circuit Court's decision in which it "views the evidence and the inferences reasonably raised thereby in the light most favorable to the plaintiff, whose evidence was stricken." *Austin v. Shoney's, Inc.,* 254 Va. 134, 135, 486 S.E.2d

285, 285 (1997) (citing *Meador v. Lawson,* 214 Va. 759, 761, 204 S.E.2d 285, 287 (1974)).

When no evidence has yet been taken and a defendant moves to dismiss the plaintiff's claims, this Court applies a de novo review in the same manner as that applied to a decision on a demurrer, in which the truth of all material facts is accepted as alleged. *New Age Care LLC v. Juran,* 71 Va. App. 407, 414, 837 S.E.2d 64, 68 (2020) (citing *Bragg v. Bd. of Supervisors,* 295 Va. 416, 423, 813 S.E.2d 331, 334 (2018)).

The facts of the instant case fall in between the two extremes: Defendants moved to strike Ms. Matarese's evidence and dismiss her claims after some evidence was taken but before Matarese, the sole plaintiff, and her husband, a material witness for plaintiff, were called to provide their own testimony. Thus, this Court should apply a de novo review of the Circuit Court's decision, and it should both view the evidence presented in the first four days of the trial in the light most favorable to Ms. Matarese and assume the truth of her allegations in her Verified Complaint (ToC at 2-26).

IV. Statement of Facts

On July 12, 2021, Day 1 of the Jury Trial in *Matarese, Administrator of the Estate of Hilda Bauman v. Virginia Hospital Center, et al.*, Attorney Walkinshaw told the Court that his client and party Defendant in the case, *Dr. Strait, "is not present today,"* and asked the Court for an Instruction for the "jury to be told not to read anything into it that he's not here." The Court stated, "I'll just put into my opening instructions . . . that the parties in this case may come in and

out during the trial and you're to put no significance on that." 7/12/21 TR. at 194:7-22, 195:1-2.

Plaintiff's Attorney Trichilo asked the Court how that Instruction applied to his client. The Court replied: "If Mrs. Matarese needs to leave, she should just get up and leave . . . . So if she needs to go out, she should just go out." 7/12/21 TR. at 195:4-16. However, when Ms. Matarese became severely ill on July 15 and needed to leave to go out, go home and take medication, the court did not apply the foregoing instruction to Matarese.

On July 15, 2021, Day 4 of the Jury Trial in *Matarese, Administrator of the Estate of Hilda Bauman v. Virginia Hospital Center, et al.*, Ms. Matarese became severely ill in the court room and in constant pain and was removed from the court room in a wheel chair by six deputies.

Plaintiff's Attorney Volzer stated, "We have at least six deputies here that can get on the stand and confirm that she was in obvious physical distress, and we can call any one of them and they would all say the same thing. The one deputy could barely get her into the wheelchair." 7/15/21 TR. at 69:21-70:6.

By Day 4 of a six-day Jury Trial, neither Ms. Matarese, the sole plaintiff, nor Mr. Matarese, a material witness, had been called to testify in Ms. Bauman's case. A courtroom bailiff asked Matarese if she wanted to go to a hospital and stated they could take Matarese to Virginia Hospital Center. Matarese told the bailiff Virginia Hospital Center was a Defendant in Matarese's case.

Defendants' attorneys took the opportunity of Matarese's absence to begin discussing "a motion to

strike [Matarese's] case and then for a judgment in [Defendants'] favor," 7/15/21 TR. at 61:6-7, 67:2-4, admitting, "they can't prove their case without [Matarese's] testimony." *Id.* at 61:4-5.

Plaintiff's attorney Trichilo told the Court, "the Archstone case decided by Judge Lee adjudicated a legitimate handicap." *Id.* at 102:17-19. In addition, Matarese is certified federally and by Arlington County as handicapped under Title II of the Americans with Disabilities Act ("ADA"). Mr. Trichilo told the Court Mr. Matarese would immediately return to Court and testify and leave his wife unattended. Mr. Trichilo told the Court, Mr. Matarese said "they would definitely be here by Monday, but he said they could come tomorrow afternoon when he heard the case may be thrown out, but he said Monday for certain." *Id.* at 103: 1-13.

Immediately, Defendants' Attorney, Walkinshaw, stated: "-there's no evidence that she had a reaction to this allegedly-and I don't know"-In response, the trial court (Judge Wheat) without comment stated: "Motion to strike is granted." "Case is dismissed against all defendants with prejudice." *Id.* at 103:14-22. No hearing was held and there was no adjudication on the merits.

The trial court stated, "I just think this case has to come to an end." Id. at 106:16.

V. Argument and Authorities

In *Durham v. National Pool Equipment Co.,* 205 Va. 441, 138 S.E.2d 55 (1964), the Virginia Supreme Court reversed and remanded the case to the trial court. The Court held that it was reversible error for

the trial court to grant the motion to strike Plaintiff Durham's evidence because the *"motion was premature." Id.* (emphasis added). Plaintiff Durham had testified but *"Plaintiff Durham had not rested his case." Id.* 205 Va. at 448, 138 S.E.2d at 60 (emphasis added). "Under the facts and circumstances here presented we cannot say, as a matter of law, that Durham's testimony showed that he had no case." *"The sustaining of the motion to strike was premature and constituted reversible error." Id.* 205 Va. at 448, 138 S.E. 2d at 60 (emphasis added).

Unlike Plaintiff Durham who had testified, Ms. Matarese, the sole Plaintiff, had not even been called to testify in Ms. Bauman's case by Day 4 of a 6-day Jury Trial. In the instant case, Ms. Matarese, like Plaintiff Durham, did not rest her case.

In *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. Partnership,* the Supreme Court of Virginia held that the trial court erred by granting defendants' motion to strike the law firm's evidence at the conclusion of opening statements. 253 Va. 93, 95, 480 S.E.2d 471, 472 (1997). The Court stated: "We are of opinion that a trial court should not grant a motion to strike the plaintiff's evidence before the plaintiff has had an opportunity to present evidence in support of the allegations in the motion for judgment [Complaint]. Indeed, we have stated on several occasions that we disapprove the grant of motions which 'short circuit' the legal process thereby depriving a litigant of his day in court and depriving this Court of an opportunity to review a thoroughly developed record on appeal." *Id.* (citing *Carson v. LeBlanc,* 245 Va. 135, 139-40, 427 S.E.2d 189, 192 (1993); *CaterCorp, Inc. v. Catering Concepts, Inc.,* 246

Va. 22, 24, 431 S.E.2d 277, 279 (1993); *Renner v. Stafford,* 245 Va. 351, 353, 429 S.E.2d 218, 220 (1993)).

Like *Seyfarth supra,* the trial court struck Matarese's evidence and Complaint before plaintiff had an opportunity to present evidence in support of the allegations in her Complaint from Ms. Bauman's Virginia Hospital Center medical records and Defendants' notes therein that will prove that neither Ms. Bauman nor Ms. Matarese "consented" to Defendants' decisions about Ms. Bauman's medical treatment at Virginia Hospital Center.

Moreover, a "motion to strike is in effect a motion for summary judgment which is not to be granted if <u>*any*</u> *material fact is genuinely in dispute*." *Costner v. Lackey,* 223 Va. 377, 381, 290 S.E.2d 818, 820 (1982) *(citing R.F. & P. Railroad v. Sutton,* 218 Va. 636, 643, 238 S.E.2d 826, 830 (1977); Rule 3:18 (emphasis added). In the instant case, there were material facts in dispute concerning "consent" when the court granted Defendants' Motions to Strike Matarese's Evidence and Complaint and for Summary Judgment that should have precluded granting Summary Judgment to Defendants. *Costner v. Lackey,* 223 Va. 377, 381, 290 S.E.2d 818, 820 (1982). Questions relating to "consent" are questions of fact, which were to be determined by the jury, not the judge. *See Woodbury v. Courtney,* 239 Va. 651, 654, 391 S.E.2d 293, 295 (1990). By Day 4 of a six-day jury trial, neither Ms. Matarese, the sole plaintiff, nor Mr. Matarese, a material witness, had been called to testify. Ms. Matarese's testimony would have included Ms. Bauman's Virginia Hospital Center medical records and Defendants' notes therein that will prove that neither Ms. Bauman nor Ms. Matarese "consented"

to Defendants' decisions about Ms. Bauman's medical treatment at Virginia Hospital Center.

"In considering a motion to strike the plaintiff's evidence, a trial court is required to resolve any reasonable doubt as to the sufficiency of the evidence in favor of the plaintiff." *Costner v. Lackey,* 223 Va. 377, 381, 290 S.E.2d 818, 820 (1982) (citing *Jones v. Downs,* 222 Va. 25, 28, 278 S.E.2d 799, 800 (1981)).

On appeal, the Virginia Supreme Court stated, "[I]t is also our duty to view the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff whose evidence was struck." *Costner v. Lackey,* 223 Va. 377, 381, 290 S.E.2d 818, 820 (1982) (citing *Warehouse v. Prudential Storage,* 208 Va. 784, 790, 161 S.E.2d 86, 90 (1968)). "Applying these principles in the [instant] case, [the Virginia Supreme Court could] conclude that the trial court erred in striking [Plaintiff Matarese's] evidence and Complaint.

The standard by which a motion to strike should be judged is well settled. "When the sufficiency of a plaintiff's evidence is challenged by a motion to strike, the trial court should resolve any reasonable doubt as to the sufficiency of the evidence in plaintiff's favor. . . . " *Butler v. Yates,* 222 Va. 550, 553-554, 281 S.E.2d 905, 906 (1981) (citing *Trail v. White,* 221 Va. 932, 935, 275 S.E.2d 617, 620 (1981)), quoting *Williams v. Vaughan,* 214 Va. 307, 309, 199 S.E.2d 515, 517 (1973).

Judge Wheat erred by failing to resolve any reasonable doubt as to the sufficiency of the evidence in plaintiff's favor. Moreover, in ruling on a motion to strike, the trial judge is obliged to "adopt those inferences most favorable to the party whose evidence

is challenged, even though he may believe different inferences are more probable." *Butler v. Yates,* 222 Va. 550, 553-554, 281 S.E.2d 905 (1981) (quoting *Lane v. Scott,* 220 Va. 578, 582, 260 S.E.2d 238, 240 (1979)). In ruling on the motion to strike, Judge Wheat erred because she never "adopted those inferences most favorable to [Matarese,] the party whose evidence is challenged, even though [Judge Wheat] may believe different inferences are more probable."

> *Instead, Judge Wheat stated she granted the motion to strike [Matarese's case] and ruled in favor of the Defendants because Plaintiff Matarese "had voluntarily absented herself from the trial" when Plaintiff had an emergency and had to go home to take medication so she could return to her Mother's trial as quickly as possible. 8/20/21 TR. at 42:8-11.*

In addition, the trial court committed reversible error when it granted the motion to strike Plaintiff Matarese's evidence and her Complaint because the "motion was premature." *Durham v. National Pool Equipment Co.,* 205 Va. 441, 138 S.E.2d 55 (1964). "Plaintiff [Matarese] had not rested [her] case." *Id.* 205 Va. at 448, 138 S.E. 2d at 60. The motion to strike the evidence "should never be made prior to the conclusion of a party's evidence." Sinclair & Middleditch, Jr., 1 Virginia Civil Procedure § 13.8 (7th Ed. LexisNexis Matthew Bender (2021)) (citing *Durham v. National Pool Equipment Co.,* 205 Va. 441, 138 S.E.2d 55 (1964)). In the instant case, Defendants' Motion to Strike Plaintiff Matarese's evidence and Complaint was made before Matarese was called to testify and "prior to the conclusion of [Matarese's] evidence."

In the instant case, the trial court erred when the trial court granted Defendants' motions to strike Plaintiff Matarese's evidence and Complaint before Matarese testified and before Plaintiff Matarese rested her case. *"The sustaining of the motion to strike was premature and constituted reversible error." Durham v. National Pool Equipment Co.,* 205 Va. 441, 448, 138 S.E.2d 55, 60 (1964) (emphasis added).

VI. Second Assignment of Error

During a recess in Plaintiff Matarese's case-in-chief, she unexpectedly left the courthouse due to an emergency. The trial court abused its discretion, as a matter of law, when it denied her counsels' oral motion to declare a mistrial, without ever conducting a hearing at which testimony and evidence could be adduced concerning her medical emergency and handicaps.

Instead, the trial court imposed the harshest possible penalty on a plaintiff in a civil case-by granting Defendants' oral motions "to strike [Matarese's] case and then for a judgment in [Defendants'] favor," 7/15/21 TR. at 61:6-7, 67:2-4, admitting, "they can't prove their case without [Matarese's] testimony." *Id.* at 61:4-5. The Arlington County Circuit Court ("the trial court") entered orders dated 7/15/21, 8/3/21, and 8/25/21, which, respectively, (i) denied her oral motion for mistrial and instead granted Respondents' (Defendants below) oral motions to strike her case and enter summary judgment in their favor even though material facts were in dispute that precluded summary judgment; (ii) denied her motion to reconsider ("MTR") its denial of her 7/15/21 oral motion to declare a mistrial; and (iii) dismissed, with prejudice, Matarese's complaint.

A. Error Preserved.

Plaintiff's written objections to trial court's 7/15/21 "Final Order of Dismissal With Prejudice" (ToC at 2923-2925 and 2926-2928); 8/25/21 "Final Order" (ToC at 3531-3534); as well as 7/15/21 TR. at 61:8-62:4; 67:11-68:5; 69:21-70:8; 98:3-99:7; 99:12-21; 101:16-103:13.

VII. Argument

A. Standard of Review

"A mistrial should be declared when necessary to avoid the effects of error in law, juror prejudice or of misconduct by a party, attorney, juror, witness or judge which impinges upon the parties' right to a fair and just adjudication of their rights." *Harris v. Schirmer,* 93 Va. Cir. 8, 30 (2016) (quoting Virginia Civil Benchbook for Judges and Lawyers § 3.02[12][b][ii] (citing *Robert M. Seh Co. v. O'Donnell,* 277 Va. 599, 675 S.E.2d 202 (2009); *Westlake Properties v. Westlake Pointe Ass'n,* 273 Va. 107, 639 S.E.2d 257 (2007); *Lowe v. Cunningham,* 268 Va. 268, 601 S.E.2d 628 (2004)).

In *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 717 S.E.2d 134, 137 (2011), this Court explained its review of a trial court's decision under an abuse of discretion standard, citing the following principles.

> . . . [W]hen a decision is discretionary, we do not mean that the [trial] court may do whatever pleases it. The phrase means instead that *the court has a range of choice, and that its decision will not be disturbed as*

> *long as it stays within that range and is not influenced by any mistake of law. . . .*
>
> An abuse of discretion . . . can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment . . . . The Fourth Circuit has recognized this definition . . . [a]nd we now embrace it. *Id.* at 282 Va. at 352-53, 717 S.E.2d at 137.

B. It was a Mistake of Law for the Trial Court to Grant Defendants' Oral Motions to Strike Plaintiff Matarese's Evidence and Complaint and Grant Summary Judgment to Defendants Before Matarese, the Sole Plaintiff, Had Rested Her Case, and When Material Facts Were in Dispute

The motion to strike the evidence "should never be made prior to the conclusion of a party's evidence." Sinclair & Middleditch, Jr., 1 Virginia Civil Procedure § 13.8 (7th Ed. LexisNexis Matthew Bender (2021)) (citing *Durham v. National Pool Equipment Co.,* 205 Va. 441, 138 S.E.2d 55 (1964)). In the instant case, Defendants' Motion to Strike Plaintiff Matarese's evidence and Complaint was made before Matarese was called to testify and "prior to the conclusion of [Matarese's] evidence."

Plaintiff asks that this honorable Court to "disturb" and reverse the trial court's decision and remand for a new trial because the trial court has been influenced by mistake of law as set forth *supra*

and for the reasons set forth under First Assignment of Error, set forth *supra.*

C. In addition, the trial court abused its discretion, as a matter of law, by failing to conduct an evidentiary hearing at which it could adduce testimony from both Matarese and her husband, in order to assess her medical emergency and accommodations required under Title II of the Americans with Disabilities Act ("ADA"), and by failing to accord proper weight to the other factors it considered

In exercising its discretion, the trial court failed to conduct an evidentiary hearing at which testimony and evidence could be adduced that would enable it to assess Matarese's medical emergency and handicap accommodations required under Title II of the ADA; and, whether the imposition of sanctions was warranted; and if so, the appropriate sanction to impose. The court heard no testimony, took no evidence, and simply relied on the speculation and musings of counsel, as well as its own speculation as to the Matarese's emergency. Although, as Mr. Volzer had pointed out to the trial court, there were six deputies who could have shed light on Matarese's condition, the court did not request to hear their testimony. 7/15/21 TR. at 69:21-70:6. The trial court's failure to conduct such an *evidentiary* hearing constitutes an abuse of its discretion, *per se.*

Moreover, the trial court accorded the relevant factors improper weight. Finally, to the extent it was appropriate to impose some type of sanction against Matarese for her medical emergency and handicap,

the trial court abused its discretion by considering only the most severe penalty possible-dismissal of her case, with prejudice, rather than some lesser sanction-such as an imposition of an award of attorney's fees and costs or, *e.g.,* any additional expert witness fees, attorney's fees, and court reporter fees incurred by Defendants as a consequence of any delay caused by Matarese's medical emergency and handicap.

1. The court placed far too much weight on inconveniencing Defendants and their experts

Several things stand out from the trial court's musings. Notably, it placed paramount importance on not inconveniencing Defendants' expert witnesses and consequently, bent over backwards to accommodate their schedules. Accommodating the schedules of busy professionals is an important consideration. But to place that consideration above all others accords improper weight to it. While physicians' time is valuable, it should not have been lost on the court that Defendants' experts were likely highly compensated for their appearance in court as well as their travel time, and reimbursed for their travel expenses, too. None of them had been subpoenaed against his will; and all of them had plenty of advance notice to enable them to have adequately cleared their calendars, operating under the assumption that court proceedings are often fraught with inevitable delays such that a trial scheduled to end on a particular day might, for various reasons, run several days beyond its anticipated end-date. As for Defendants, themselves, Dr. Strait had "absented himself" from the trial on Day 1 and was planning to "absent himself" from trial on Day 5. The trial court stated no com-

plaints against Dr. Strait for "absenting himself" for two entire days out of five days. Dr. Strait reported no medical emergency or handicap that required him to miss two days out of five days of the trial. The trial court fashioned its instruction for Dr. Strait.

On Day 1 of the trial, Defendants' Attorney Walkinshaw told the Court that his client and party Defendant in the case, *Dr. Strait, "is not present today,"* and asked the Court for an Instruction for the "jury to be told not to read anything into it that he's not here." The Court stated, "I'll just put into my opening instructions . . . that the parties in this case may come in and out during the trial and you're to put no significance on that." 7/12/21 TR. at 194:7-22, 195:1-2.

Plaintiff's Attorney Trichilo asked the Court how that Instruction applied to his client. The Court replied: *"If Mrs. Matarese needs to leave, she should just get up and leave. . . . So if she needs to go out, she should just go out."* 7/12/21 TR. at 195:4-16. However, when Ms. Matarese became severely ill on July 15 and needed to leave to go out, go home and take medication, the court abused its discretion. The court did not apply the foregoing instruction to Matarese even though the court's commitment to Matarese is in the transcript.

2. The court failed to properly ascertain whether any such inconvenience would accrue as a consequence of Matarese's absence

The trial court took no evidence or testimony from any of the Defendants or from either of their experts, as to whether they would be substantially

inconvenienced by a delay in the proceedings, to the extent that it would impede their care for their patients. Without such testimony, the court could not possibly make an informed decision as to the burden Matarese's absence might place on those parties/expert witnesses. In the absence of any such testimony concerning the prejudice that would arise from any delay in the proceedings, it was wrong for the court to assume such prejudice would occur as a consequence of Matarese's brief absence.

3. The Record reflects that no such inconvenience would have accrued

Any anticipated hardship or inconvenience to Defendants or their experts was purely speculative. Indeed, the colloquies between the court and counsel directly refute the notion that any prejudice would have inured to Defendants or their experts as a result of the potential delay in the proceedings caused by Matarese's absence from court. Her absence did not in any way, shape, or form impede Defendants from putting on their expert testimony-out of order, as the parties and the court had previously agreed. In fact, Defendant's expert who had flown in from Tennessee that morning was present in court and ready to testify at 1:00 p.m. There was nothing that precluded the court from putting him on the stand.

Their second expert had agreed to testify on Monday, 7/19/21. Her anticipated testimony was not impeded by Matarese's absence on Thursday; nor would it have been, even had Matarese's absence continued through Friday and Monday-an assumption apparently adopted by the court, based purely on speculation that Matarese would not return to court

the following day, contrary to her husband's representations to her counsel, which were, in turn, conveyed to the court. In short, inconvenience to the experts, while a relevant consideration, should not have been a factor in the court's exercise of its discretion because no inconvenience to Defendants' experts would have occurred, despite Matarese's absence from court for a portion of the fourth day of trial.

4. The court's apparent conclusion that Matarese's absence would inevitably lead to an unreasonable and protracted delay in the conclusion of the proceedings was not warranted by the facts

The court expressed its exasperation that the case had been "delayed and delayed and delayed." But none of those delays was attributable to Matarese. Irrespective of the proper weight to be accorded this factor, it, too, was a mirage. There is no indication that Matarese's absence for the remainder of the afternoon on Thursday, 7/15/21, would have materially altered the ability of the court to resume the proceedings, with or without Matarese present, and adhere to its planned agenda. Indeed, the court had indicated that, notwithstanding Matarese's absence, it would permit her counsel to read to the jury excerpts of deposition testimony from two unavailable witnesses, adjourn the proceedings for a break for lunch, and then resume the proceedings with the (out-of-turn) testimony of Defendants' expert witness who had flown in that morning from Tennessee. 7/15/21 TR. at 71:18-72:5. The court estimated that all of that would be complete by about 2:00 or 2:30 that afternoon on Day 4. *Id.* at 72:6-7.

Subsequently, the court modified that schedule, explaining that it would permit Matarese's counsel to read to the jury the excerpts of testimony for one of her witnesses, Dr. Casey, and then send the jury to lunch. After the jury returned from lunch, Defendants' expert from Tennessee would testify, following which, presumably, the court would permit Plaintiff's counsel to read the admissible excerpts of the deposition testimony of the other unavailable witness. *Id.* at 94:4-17. Having already set forth its agenda for the rest of that day (as well as the next), and assuming the accuracy of the court's estimate that the anticipated proceedings that day would conclude by about 2:30, it could have allowed the jury to recess for the evening at that time; dealt with whatever motions *in limine* were still at issue; and then reconvened the following morning (Friday, 7/16/21) to hear testimony from the two Defendants who had been scheduled to testify that day. Presumably, their testimony, followed by a break for lunch, would have provided sufficient time for Matarese and her husband to make good on their commitment to return to court Friday afternoon. Of course, had Matarese's absence continued through Friday, 7/16/21, the court could then have evaluated whether her absence justified the court's imposition of sanctions. But the court was simply in no position to determine, on that Thursday afternoon, 7/15/21, whether Matarese's absence would have any adverse impact, whatsoever, on either (1) the travel plans of Defendants' expert witnesses or on (2) the expected duration of the trial. Nevertheless, despite the paucity of *facts* to consider, the court, echoing Defendants' counsel's concerns, and pondering the issue against the backdrop of its perception that the trial had been "delayed and delayed and delayed"-albeit, for reasons

not attributable to anything Matarese or her counsel did or did not do-simply speculated, erroneously, that her absence would adversely affect those two considerations. *The Circuit Court not Matarese changed the trial dates from 2020 to 2021 because of the COVID-19 Pandemic.* And rather than proceed in accordance with the schedule it had indicated to counsel and the jury, the trial court elected to take up the matter of Matarese's absence from court.

While that would have been appropriate had she been present in court, she was not, and therefore, both the court's conclusions, and its rulings based thereon, were premature. The court should have afforded Matarese a reasonable opportunity to explain her absence from the court, in-person and under oath. Had it waited until the following day, it undoubtedly would have been in a better-informed position as to whether sanctions should be imposed, and if so, an appropriate sanction.

5. The trial court's litmus test, to determine whether a true medical emergency existed, consisting solely in Matarese's response declining the deputies' offer to have her transported to Defendant Virginia Hospital Center by ambulance, was overly simplistic and therefore, accorded too much weight.

The trial court placed far too much weight on Matarese's refusal to be transported to Defendant Virginia Hospital Center on July 15, 2021, by ambulance, reasoning that her refusal, *ipso facto*, defeated her claim that she had suffered a medical emergency. As discussed, *supra*., there are a variety of factors that might influence someone *not* to go by

ambulance to Defendant Virginia Hospital Center. Moreover, underlying the court's reasoning is its apparent belief that the only medical "emergency" that would justify a party leaving the courthouse during a proceeding is one that involves life or death. Such an extreme view is unwarranted. The court simply had insufficient information with which to determine whether Matarese's absence was necessitated by a *bona fide* medical emergency.

6. In light of its previously-announced policy that the parties could come and go as they wished, and in light of Matarese's subjective belief that whatever health concerns she experienced justified her leaving the courthouse, the court placed too much weight on the mere fact of Matarese's absence.

The trial court placed too much weight on what it characterized as Matarese's voluntary absence from the courthouse, in light of its earlier statements granting blanket permission to the parties to come and go as they pleased. The court cannot have it both ways-on the one hand, permitting the parties to come and go as they please, but on the other hand, imposing upon one party, Matarese, the harshest possible sanction for taking the court at its word. Matarese was not in court pursuant to a subpoena. She had not taken the stand prior to her departing the courthouse and so was not in the middle of testifying. She had not been called to testify. She did what the court said parties could do, including leave the courthouse, and did not understand that she could not leave the courthouse, or that if she did, her case would likely be dismissed-and *with prejudice*. The trial court created the confusion and Matarese should

not be punished for simply doing what the court had expressly told her she could do.

7. The trial court's judgment was informed by few facts, much conjecture and speculation, and was clouded by emotion.

Despite its best intentions, the trial court allowed its emotion to cloud its judgment, resulting in its inability to fairly adjudicate the motion to declare a mistrial in a neutral, unbiased, and dispassionate manner. It is clear from the court's somewhat testy exchanges with Matarese's counsel early in the day that it was focused on moving the trial along. In and of itself, that is not unreasonable. But Matarese's absence triggered an exaggerated negative response from the court, presumably, because of its perception that her absence would significantly impede the court's ability to "move things along."

The court candidly admitted that as a result of Matarese's unexpected absence, it was "not happy," "fed up," and had "steam coming out of [its] ears." 7/15/21 TR. 64:19-20; *Id.* at 70:11-22, 19-22; *Id.* at 64:21-22.

In summary, Matarese's absence that afternoon on Day 4 of the trial had no appreciable impact in delaying the proceedings, other than counsel and the court spending significant time musing and speculating about the *bona fides* of her decision to leave the courthouse; its likely duration; and its likely impact on anticipated proceedings over the course of the following few days. The court's decision, that afternoon, to impose the most severe penalty on her, by dismissing her case, with prejudice, was premature, ill-considered, and clouded by the court's own emotions. That this is true is self-evident from *the trial court's stated rationale*

for its decision—"I just think this case needs to end." 7/15/21 TR. at 106:16.

D. The trial court's imposition against Matarese of the most severe penalty possible—the dismissal of her case, with prejudice, without an evidentiary hearing, was, itself, an abuse of discretion.

It is troubling that the court prematurely imposed the harshest penalty on Matarese before it was even clear that her absence from court that afternoon would prejudice Defendants, or would substantially delay the trial. Even if, hypothetically, her absence resulted in either of those consequences, the court could likely have adequately addressed it with an appropriate award of attorney's fees, costs, and expenses, during an evidentiary hearing, which was never held.

VIII. Conclusion

Petitioner/Appellant, LINDA MATARESE, respectfully requests this Honorable Court grant her Amended Petition for Appeal, reverse the trial court's 8/25/21 "Final Order" (ToC at 3531-3534) dismissing her case with prejudice, as well as its 7/15/21 "Final Order of Dismissal with Prejudice" (ToC at 2923-2925), and 8/3/21 "Order" (ToC at 2983-2984) and remand the case for a new trial.

[Certificates Excluded]

PLAINTIFF'S NOTICE OF APPEAL (SEPTEMBER 24, 2021)

VIRGINIA: IN THE CIRCUIT COURT
ARLINGTON COUNTY

LINDA MATARESE, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF HILDA DULD BAUMAN, DECEASED, ET AL.,

Plaintiff,

v.

VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM, D/B/A VIRGINIA HOSPITAL CENTER, ET AL.,

Defendants.

Case No. CL-2019-000375-00

COMES NOW Plaintiff, LINDA MATARESE, in her capacity as Administratrix of the Estate of Hilda Duld Bauman, Decedent, ("Matarese"), by Counsel, pursuant to VA. R. S. Ct. 5:9(a) and (b), and hereby files this Notice of Appeal to the Supreme Court of Virginia, from this Court's:

(1) "Final Order" entered on 8/25/21, which dismissed, with prejudice, Matarese's complaint;[1]

(2) denial of her oral motion for mistrial made on 7/15/21;

(3) "Final Order of Dismissal With Prejudice," entered on 7/15/21,[2] and which granted Defendants' motions to strike Matarese's evidence and for summary judgment;

(4) 8/3/21 order entitled, "Order," which purported to deny her "Motion for Reconsideration" of the Court's denial of her 7/15/21 oral motion for mistrial.[3]

Undersigned counsel certifies that the following transcripts are in possession of Plaintiff, and, to the

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[1] Matarese also notes her appeal of that portion of the 8/25/21 "Final Order," to the extent that it struck from the Record as legal nullities the pro se pleadings filed by Matarese prior to that date. Although the Court declined to strike her opposition to her former counsel's motion to withdraw, it should also have specified that it was not striking her prose Notice of Appeal filed on 8/16/21. To the extent the Supreme Court of Virginia agrees with that additional limitation on the extent of the Court's order striking her prose pleadings, this Notice of Appeal should be considered an Amended Notice of Appeal. Finally, Matarese paid the $20.00 filing fee when she filed her 8/16/21 Notice of Appeal.

[2] The 7/15/21 order was suspended pursuant to the Court's 8/3/21 "Order." The suspension was subsequently lifted pursuant to the Court's 8/25/21 "Final Order."

[3] This, according to the Court's 8/25/21 "Final Order" which references the earlier (8/3/21) order.

extent not already made a part of the Record, will be filed with the Court, pursuant to VA. R. S. Ct. 5:11(b).

(i) 7 /15/21 Jury Trial (Day 4), which contains the colloquy between the Court and Matarese's trial counsel, concerning Defendants' oral motion to strike Plaintiff's evidence and for entry of summary judgment on behalf of Defendants;

(ii) 8/20/21 transcript of the post-trial motions hearing.

Respectfully submitted,

Linda Matarese

by Counsel

/s/ Phillip B. Leiser

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Counsel for Plaintiff, Linda Matarese

NOTICE OF APPEAL
(AUGUST 16, 2021)

VIRGINIA: IN THE CIRCUIT COURT
ARLINGTON COUNTY

LINDA MATARESE, PERSONAL REPRESENTATIVE (ADMINISTRATOR) OF THE ESTATE OF HILDA DULD BAUMAN, DECEASED,

Plaintiff,

v.

VIRGINIA HOSPITAL CENTER PHYSICIAN GROUP LLC, AYSHA FAROOQI, M.D., LOREN FRIEDMAN M.D., PETER OUELLETTE, M.D., AND THOMAS STRAIT, M.D.,

Defendants.

Case No. CL-19000375-00

COMES NOW Plaintiff Linda Matarese ("Matarese"), Administrator of the Estate of Hilda Duld Bauman, Deceased, and hereby gives notice of appeal to the Supreme Court of Virginia from the final judgment of this Court entered on the 15th day of July, 2022, and further gives notice that a transcript or statement of facts, testimony, and other incidents of the case will be filed.

Respectfully submitted,

/s/ Linda B. Matarese
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Plaintiff, Pro Se

Dated: August 16, 2021