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ORDER OF THE VIRGINIA 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

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

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Counsel for Defendants Virginia Hospital Center, VHC Physician Group, LLC, Aysha Farooqi, MD., Peter Ouellette, MD., and Thomas Strait, MD.

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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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PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO WITHDRAW AS COUNSEL AND IN OPPOSITION TO AWARD OF SANCTIONS (AUGUST 17, 2021)

IN THE CIRCUIT COURT
FOR ARLINGTON COUNTY

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

Plaintiff,

v.

VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM; ET AL.,

Defendants.

Case No. CL 19-375

I. The Motion to Withdraw as Counsel Is Authorized By the Rules of Professional Conduct and Should Be Granted

The Final Order in this case was suspended on August 3, 2021. The Motion of plaintiff's counsel to withdraw, pursuant to Rule 1:16 of the Rules of Professional Conduct was filed on July 19, 2021, prior to any of the other motions filed in this case.

Withdrawal of counsel is governed by Rule 1:16 of the Code of Professional Responsibility. In order to protect the confidences of the lawyer client relationship, counsel will be able to state their grounds only upon direction of the Court and in camera.

Rule 1:5(d) specifies that where counsel withdraws, that "the pro se party shall be deemed counsel of record" where no new counsel is substituted. The rule specially permits withdrawal where new counsel has not been retained. *Kone v. Wilson*, 272 Va. 59 (2006) prohibits a party from prosecuting a wrongful death action, in a representative capacity, on behalf of statutory beneficiaries; and *Hawthorne v. VanMarter*, 279 Va. 566 (2010) prohibits pro se party from filing an appeal, in a representative capacity, on behalf of wrongful death beneficiaries. Neither case prohibits a withdrawal of counsel pursuant to Rule 1:5(d) or pursuant to Rule 1.16 of the Rules of Professional Conduct, and each case applies only where the administrator attempts to pursue an appeal or prosecute a wrongful death case in representative capacity.

Kone and *Hawthorne* are not controlling. In those cases, the administrator was not the sole beneficiary of the estate and was acting in a representative capacity. Matarese is the sole beneficiary of her mother's estate and is not acting in representative capacity.

Withdrawal of counsel is permitted under Rule 1.16 of the Rules of Professional Conduct and under the specific language of Rule 1:5(d). There is no authority prohibiting withdrawal of counsel, and none is contained in Rule 1:5(d). Even if *Kone* and *Hawthorne* are held to apply to a *pro se* administrator who is not acting in a representative capacity, the

plain language of Rule 1:15(d), permits withdrawal of counsel, and allows the administrator to defend claims this claim for sanctions against her.

II. There Is No Basis for Imposition of Sanctions in This Case of First Impression

The Health Care Decisions Act "is a comprehensive statute regulating various aspects of healthcare decision-making", that includes authorization for "the delegation of medical decisions to agents lawfully appointed by the patient." § 54.1-2986(A) of the Act "provides a preordained list of persons and entities who can make healthcare decisions including the continuation, withholding, or withdrawal of healthcare, on behalf of an incapacitated patient who does not have an Advance Directive. Decision-makers are listed in descending order of authority, each possessing the ability to make decisions on behalf of a patent in the absence of a decision-maker of higher authority. § 54.1-2986(A)(1)-(7)." These quotes are taken from the legal memoranda submitted by the VHC Defendants and by Defendant Friedman to this Court on August 7, 2020.

One of the three Demurrers filed by the defendants asserted that the only remedy permitted under the Health Care Decisions Act was injunctive relief. After that Demurrer was overruled, the defendants changed their position, and asserted the Health Care Decision Act was irrelevant, and not even admissible in determining the applicable standards for patient consent.

The Health Care Decisions Act is the controlling standard for end-of-life decisions and for the withdrawal of life prolonging treatment. It mandates standards for DNR orders as well as Advance Directives. The

rights created by the Act are vested, and the statutes in effect when this cause of action arose are therefore controlling. *Potomac Hospital Corp. v. Dillon*, 229 Va. 355 (1985) (holding that version of statute in effect when cause of action arose creates vested right that cannot be adversely impacted by subsequent statutory amendment).

Va. Code § 54.1-2987.1 provides that a DNR may be issued only by a physician who has a bona fide physician patient relationship, and only with the consent of the patient or the patient representative. Va. Code § 54.1-2986 specifies authorized decision makers for advance directives. Those individuals, listed under subsections (A)(1) through (6), include guardian, spouse, adult child of the patient, parent of patient, adult brother or sister of the patient, or other relative of the patient. Under subsection (7) a disinterested committee has very limited decision-making power "except in cases in which the proposed treatment recommendation involves the withholding or withdrawing of a life-prolonging procedure." § 54.1-2982 states that a "life-prolonging procedure" includes artificially administered hydration and nutrition. Under the plain language of the Act, a committee can never implement an advance directive or render a decision involving the withdrawal of hydration or nutrition.

This case involves a clear violation of the Health Care Decisions Act. An undated DNR Order was signed by Dr. Farooqi without the consent of the patient. Dr. Farooqi was unable to explain why she did not date the order, that the patient or patient representative never signed. Dr. Farooqi withdrew IV hydration after the ethics committee met and rendered its decision, and in response to that decision. The contention of

defendants that the decision was "advisory" is not credible. The hospital minutes refer to the to the committee action as a "decision" and that decision was implemented, jointly and severally, by Dr. Farooqi and by each defendant. When Dr. Farooqi presented her unsigned DNR Order to the patient representative on February 2, 2014, the patient representative refused to sign it. Dr. Farooqi's testified that patient consent to an advance directive is an "ongoing process." Neither Dr. Farooqi or any of the other defendants had any knowledge of the Health Care Decisions Act, and none attempted to follow its clear statutory mandate.

The defendants' Motion for Sanctions fails to cite the only decision of the Virginia Supreme Court that interprets the Health Care Decisions Act and addresses the issue of sanctions. In *Gilmore v. Finn*, 259 Va. 448, the Court reversed an award of sanctions even though there was uncontroverted evidence that the lawful guardian (the patients' spouse) had authority to withdraw life-prolonging hydration and nutrition where the patient was in a persistent vegetative state.

In *Gilmore*, the spouse acted pursuant to statute, and there was no imposition of an advance directive by a committee that consisted entirely of interested healthcare providers. Unlike the patient in this case, the patient in *Gilmore* was in a persistent vegetative state. The guardian in *Gilmore* had made a good faith effort pursuant to Va. Code § 54.1-2986 "to ascertain the risks and benefits of an alternative to the treatment and the religious beliefs and basic values of the patient receiving treatment."

The Court found that there was uncontroverted evidence that the patient was in a persistent vegetative state and that the contrary allegation was not well grounded in fact at the time that the lawsuit was filed. Nevertheless, the Court found that the award of sanctions was an abuse of discretion because the controlling standard is whether there was "a reasonable belief the action was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." In making this determination, the Court stated that "the wisdom of hindsight should be avoided." 296 Va. at 467.

The plaintiff in this case presented credible testimony that a DNR and an Advance Directive was imposed without the consent of the patient or patient representative, and by a committee that had no authority to make such decisions. The record shows that the patient representative never consented to the DNR Order signed by Dr. Farooqi and ordered by the VHC Ethics Committee. The defendants implemented their plan for withdrawing IV hydration, while not providing any plan for nutrition, without consent, thereby mandating a death sentence for the patient. Any testimony of oral consent is lacking in credibility, unsupported by the Health Care Decisions Act, and for the jury to address. If in fact the patient representative had granted consent to a DNR or Advance Directive, then Dr. Farooqi's DNR Order would undoubtedly have been signed by the patient representative. Irrespective of the issue of oral consent, the Health Care Decision's Act does not permit oral consent for either a DNR or an Advance Directive, nor does it allow these decisions to be made by an attending physician or committee.

III. A Battery Includes Either Direct or Indirect Contact That Is Intentional and Unauthorized

A battery occurs where the terms of consent are ignored or where the conditions of a procedure are not followed. *Mayr v. Osborne*, 293 Va. 74, 80, 81 (2017); *Pugsley v. Privette*, 220 Va. 892, 899 (1980). Willful or authorized contact either by the assailant or by some other object set in motion by that person constitutes a battery. *Jones v. Commonwealth*, 184 Va. 679, 682 (1946); *Wood v. Commonwealth*, 149 Va. 401, 403 (1927). All those who aid, abet, counsel, or encourage the wrongdoer by words, gestures, looks or signs, are equally liable. *Pike v. Eubank*, 197 Va. 692, 699 (1956). A battery includes the unauthorized administration of drugs, *Mink v. University of Chicago*, 460 F. Supp. 713, 718 (D. C. N. D. ILL 1978); instruction another to clean urine, *Dupree v. J.C. Penny Co.*, 36 Va. Cir. 88 (Albemarle Cir. Ct.), (February 27, 1995) (J. Peatross); causing a patient to ingest a pill: or pulling a chair from under and individual who is about to sit. Restatement (Second) of Torts § 18, Subsection (c) *see also* Harper, James, and Gray on Torts, § 3.02.

Under the authorities cited, a battery occurs when medication is administered without consent, or where life prolonging treatment, such as oxygen, hydration, or nutrition is withdrawn without consent. Each example involves and intentional, harmful, and unconsented action, where there is either direct or indirect contact, either by the defendant or by an object set in motion by the defendant.

IV. The Defendants are Bound By the Battery Standard and Jury Instructions Introduced During Opening Statement

During opening statement, the VHC defendants submitted to the jury, without objection from Friedman, plaintiffs jury instruction No. 1 (Ex. No. 1). When counsel submits an instruction to the court and to the jury, it is making a representation of its accuracy and content. The instruction submitted to the jury imposes liability if (1) treatment was rendered without the consent of the patient; or (2) if unauthorized treatment was unwanted or without justification, excuse, or consent. Both conditions have been shown by the evidence presented.

This instruction is now the law of the case, and the defendants are barred from taking an inconsistent position. *Hale v. Maersk Line Ltd.*, 284 Va. 358, 371 (2012). By introducing a jury instruction, the VHC Defendants have represented its accuracy and are barred from now contending that there is a definition of battery different from that stated in its instruction. Friedman is similarly bound by his acceptance and failure to raise a timely objection.

V. The Dismissal of This Case Was Not Based Upon the Merits

This case was not dismissed due to any deficiency in the merits. It was dismissed solely because the grounds for the plaintiff's medical emergency were not documented to the satisfaction of the Court. The plaintiff had not rested her case. There was no evidentiary hearing where the plaintiff testified. The motion for a mistrial was summarily denied. Nor was there any attempt to determine whether the trial could proceed

with the plaintiff temporarily absent. The effect of the ruling was to impose a draconic and unprecedented sanction without affording the plaintiff fundamental due process rights.

The Motion to Strike the plaintiff's case was premature under the standards stated in *Durham v. National Pool Equipment Co.*, 205 Va. 441 (1964). The ruling is also contrary to *Brown v. Koulizakis*, 229 Va. 524 (1985) where the Court held that issues of negligence and proximate cause are ordinarily factual questions for a jury to decide, even in medical malpractice cases, and that where a motion to strike is granted, the trial court should allow a full record for appellate review. The fundamental requirement for due process of law is the opportunity to be heard. *Goldberg v. Kelly*, 397 U.S. 254 (1970). That has not occurred in this case.

Throughout this litigation, the plaintiff has been repeatedly subjected to disparaging attacks and insinuations. This tactic was most recently shown by the misreading of the decision by Judge Gerald Bruce Lee in *Matarese v. Archstone Pentagon City*, 795 F. Supp. 2d 402 (2011). Judge Lee found that the plaintiff qualified as an individual with a handicap under the Fair Housing Act (FHA), and awarded her compensatory damages in excess of $67,318.50, punitive damages of $100,000.00, attorney's fees, with prejudgment interest. The statements that the plaintiff does not suffer from a legitimate and adjudicated handicap, or that her case was lacking merit, are therefore untrue and shameful.

VI. The Sanctions Motion Is Without Precedent and Is Based Upon a False Narrative

Prior to trial, the Court had overruled three substantive Demurrers filed by the defendants: (1) a Demurrer asserting that the causes of action were barred by the statute of limitations; (2) a Demurrer asserting that a claim for battery had not been asserted; and (3) a Demurrer asserting that the Health Care Decisions Act was controlling, and that the exclusive remedy under the Act was injunctive relief, and not monetary damages. Each Demurrer was overruled.

At trial, the testimony of the plaintiff's expert witness, Gayle Galan, MD was admitted over persistent, strenuous, and duplicative objections. The testimony of record shows that: (1) no consent was ever obtained from either the patient or patient representative during the entirety of the hospital admission of the decedent (January 27, 2014 through February 9, 2014); (2) the defendants knew the patient representative would not sign or consent to a DNR Order; (3) a DNR Order was signed by Dr. Farooqi on an unspecified date; (4) the reason for Dr. Farooqi's failure to date her DNR Order has not yet been determined because the trial was not concluded; (5) the DNR Order authorized the withdrawal of life-prolonging therapy, including hydration; (6) the DNR Order was the equivalent of and Advance Directive; (7) the defendants jointly and severally implemented the DNR Order and Advance Directive after the ethics committee met and rendered its decision; (8) testimony that the committee decision was only "advisory" is contradicted by the VHC hospital record and by the testimony of Dr. Farooqi, who stated that she implemented the decision, and is further contradicted

by the testimony of Dr. Friedman and the other defendants, who also implemented the decision; (9) the contention that oral consent was given was is unsupported by the hospital records, that show no consent to an advance directive or DNR; and that (10) oral consent is further contradicted by the hospital records showing that the defendants knew until the date of death that the patient representative would not sign the DNR Order prepared by Dr. Farooqi.

The decedent was subjected to a DNR and Advance Directive without consent, written or otherwise. The standard for consent is defined in the Health Care Decisions Act. "Comfort care" or "palliative care" are not the equivalent of a DNR or Advance Directive. Because this case was prematurely concluded, the Court had not yet approved jury instructions. The evidence of record nevertheless fully supports a finding of battery as defined in the jury instruction introduced by VHC counsel during opening statement, without objection from Friedman (Ex. No. 1), and that is now binding.

The defendants have created a false narrative by ignoring of misstating evidence that was unfavorable to their defense, and by creating facts that were either never presented or that are contradicted by the testimony of their own witnesses. Because this case was prematurely concluded, it cannot be determined what additional evidence would have been presented. The dismissal of the case foreclosed the opportunity for the plaintiff to testify, and it is not known what other testimony would have been elicited before she rested her case. No authority has been cited that would permit an award of sanctions under the circumstances presented. The clear and unequivocal holding in *Gil-*

more v. Finn, shows that such an award would be improper here.

Another false narrative perpetuated by defendants involves their repeated, and false assertions that the plaintiff intended to use terms such as "death verdict", "death squad", "death panel", "death committee", and "execution." These terms do not appear in any pleading or transcript filed in this case. In one memorandum to the court, the plaintiff stated that the Health Care Decision Act does not permit "death committees or acts of euthanasia masquerading as health care." This was argument presented to the court, that is supported by the plain language of the Health Care Decisions Act. The suggestion that the plaintiff utilized the other terms in proceedings before this court is pure fiction and character assassination.

A party is entitled to argue their case based upon the evidence presented. It will never be known what evidence would have been presented in this case. Because this is a wrongful death case, involving a battery arising from an unauthorized and unconsented decision by an ethics committee, it would be entirely proper for the plaintiff to argue that the ethics committee was in effect a death committee that caused the plaintiff's death. However, that issue has not been addressed by the Court, and need not be addressed because the plaintiff's case was not permitted to conclude, the jury has not been instructed, and no closing argument has been made. The attempt to create inflammatory rhetoric and disparage plaintiff's counsel therefore rests exclusively with the defendants, who have created their own fictitious narrative.

VII. Due Process Requires that the Plaintiff Be Permitted to Present Her Arguments Pro Se

Linda Matarese is the administrator and "sole beneficiary" of her mother's estate. She is therefore not acting in a representative capacity, and she has a unified interest in the outcome of this case as administrator and sole beneficiary. She is not acting in a representative capacity on behalf of any beneficiary other than herself, and therefore neither *Krone* nor *Hawthorne* are controlling. Those case apply only where the pro se is party is acting in a representative capacity, and is either affirmatively pursuing a claim or appeal.

Due process requires a meaningful opportunity to be heard. *Goldberg v. Kelly*. *supra.* Matarese therefore has the right to defend herself against unsubstantiated, unprecedented, and unfounded claims for monetary sanctions.

The Rules of Procedure allow parties to file motions to reconsider in order to allow the court to correct errors. There is no doctrine of judicial infallibility. A court need not correct errors, but the rules permit counsel to nevertheless attempt to afford the court the opportunity to do so.

An unprecedented sanction has been granted without any evidentiary hearing or due process. The granting of the dismissal motion was premature because the plaintiff had not rested, and there was no hearing to address the medical emergency that confronted the plaintiff. *See Durham v. Natl. Pool Equipment Co.*, 205 Va. 441, 448 (1964) (holding that it was error to grant motion to strike before plaintiff rested her case). Plaintiffs Motion for a mistrial was

denied without any hearing or opportunity for the plaintiff to present the reasons why a mistrial was appropriate. *Harris v. Schirmer*, 93 Va. Cir. 8, 39 (2016) (Roanoke Cir. Ct.; Dorsey, J.) (motion for mistrial should be granted where there has been an impingement upon the right to a fair and just adjudication).

If counsel is granted leave to withdraw, pursuant to the Rules of Professional Conduct, then due process requires that the plaintiff be allowed to state her defenses to the sanctions motion. She will not be prosecuting the case or pursuing an appeal, but merely defending herself, in a wrongful death action where she is the administrator and sole beneficiary.

If counsel is not granted leave to withdraw, then it is equally important that Ms. Matarese be allowed to state the reasons for her opposition to the sanctions motion. Those reasons may or may not coincide with those asserted by her counsel, who have determined that it is necessary, pursuant to Rule 1.16, to withdraw from representation.

VIII. Conclusion

The granting of the motion to strike and dismissal of this action was not a ruling upon the merits of the case. The record shows that a prima facie case was presented that the defendants jointly and severally implemented a DNR and Advance Directive without the consent of the patient. The record further shows that under *Gilmore v. Finn*, there are no grounds to assess sanctions in this case of first impression involving the Health Care Decisions Act.

The Rules of Professional Conduct require the withdrawal of counsel, and Ms. Matarese is entitled

to state her reasons in support of her defenses to the motion for sanctions; and in support of her motion to reconsider the dismissal of her case.

Linda Matarese, Personal Representative of the Estate of Hilda Duld Bauman, Deceased
Plaintiff By Counsel

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JURY INSTRUCTION NO. 1

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Did any of the defendants intentionally touch Hilda Bauman or render treatment without her consent?

(2) If so, was the touching or unauthorized treatment unwanted and without justification, excuse or consent?

(3) Were any of the actions of the defendant or defendants a proximate cause either of injury or death to Bauman?

On these issues the plaintiff has burden of proof.

(4) If Bauman is entitled to recover, what is the amount of her damages for personal injuries, and the amount of damages to her estate? On these issues the plaintiff has burden of proof.

Your decision on these issues must be governed by the instructions that follow.

Va. Model Jury Instruction No. 36.070 and 36.080; *Mayr v. Osborn*; 293 Va. 74 (2017); *Washburn v. Klara*, 263 Va. 586 (2002); *Woodbury v. C.B. Courtney*, 239 Va. 651 (1990); *Puqsley v. Privette*, 220 Va. 892 (1980).

MATARESE AMENDED AND RESTATED PETITION FOR APPEAL IN THE VIRGINIA SUPREME COURT (MAY 12, 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

AMENDED AND RESTATED PETITION FOR APPEAL

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ASSIGNMENTS OF ERROR

I. 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.*).

II. The trial court erred and committed reversible error when it granted Defendants'-Appellees' Motion for Summary Judgment 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 because Material Facts Were in Dispute when the trial court erred and granted Defendants'-Appellees' Motion to Strike that precluded granting Summary Judgment to Defendants'-Appellees. In addition, the trial court erred when it granted a motion for summary judgment without adopting "those inferences from the facts that are most favorable to the nonmoving party, 'unless the inferences are strained, forced, or contrary to reason.'" 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.*).

III. In the instant case, over the repeated objections of Plaintiff's Attorney Trichilo, the trial court erred when it facilitated and approved the requests of Defendants' attorneys to introduce Defendants' evidence out of turn in Plaintiff's Case-In-Chief before Plaintiff was called to testify.

Contrary to the facts of *Gray v. Rhoads*, in the instant case, the trial court approved Defendants' attorneys introducing Defendants' evidence out of turn including deposition testimony, exhibits, and testimony and cross examination of Defendants'/Appellees' Farooqi, Friedman, Ouellette, and Strait in Plaintiff's Case-In-Chief before Plaintiff was called to testify. Thus, it appears that Defendants'/Appellees' Farooqi, Friedman, Ouellette, and Strait could be said to have testified as witnesses and/or would have previously testified before Matarese testified.

Therefore, it appears, Defendants'/Appellees' Farooqi, Friedman, Ouellette, and Strait had testified and/or previously testified. Thereafter, if Matarese had offered as substantive evidence the Inculpatory Admissions of Party Opponents, Defendants'-Appellees', Farooqi, Friedman, Ouellette, and Strait contained in Bauman's VHC Medical Records dated January 27, 2014 to February 9, 2014, admitting that neither Bauman nor Matarese consented to palliative, hospice or comfort care, do not resuscitate orders or palliative

sedation, they would have been refused. Notwithstanding that the statements constituted admissions by a party opponent under Va. Sup. Ct. R. 2:803(0), it appears that their effect, in this circumstance, would have been to contradict the witnesses and Va. Code § 8.01-404 would not have permitted their introduction. *See Gray v. Rhoads*, 268 Va. 81, 89, 597 S.E.2d 93, 98 (2004).

This would have prevented Plaintiff Matarese from introducing into evidence in Plaintiff Matarese's Case-In-Chief the Inculpatory Admissions of Party Opponents, Defendants'-Appellees', Farooqi, Friedman, Ouellette, and Strait Contained in Bauman's VHC Medical Records dated January 27, 2014 to February 9, 2014, admitting that neither Bauman nor Matarese consented to palliative, hospice or comfort care, do not resuscitate orders or palliative sedation, which Matarese intended to admit as substantive evidence in Plaintiff-Appellant Matarese's Case-In-Chief as Admissions by Party Opponents Under Va. Sup. Ct. R. 2:803(0) and Va. Code § 8.01-404. OBJECTIONS AND ERROR PRESERVED. Plaintiff's Attorney Trichilo:7/9/21 TR. 134: 7-11, "I object to the procedure unless Mr. Olszewski acknowledges on the record that he is introducing evidence in our case, and that's what he is — has been reluctant to do and that's what he needs to do." The Court: 7/14/21 TR. 591:7-10, "And the record will be clear that you [Trichilo] objected Friday, you objected on Monday, you're objecting again today, ... "

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The Appellant Linda Matarese, in her capacity as Administratrix of the Estate of Hilda Duld Bauman, Decedent ("Matarese") files this Petition for Appeal from the Final Order of Dismissal with Prejudice entered by the Arlington County Circuit Court on August 25, 2021. 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 HealthCare 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 and 9, 2021, the Circuit Court held pretrial hearings 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) and a timely Petition for Appeal on November 23, 2021.

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 to the trial court (Judge Wheat) on the record, "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").

"1. Ms. Matarese Qualifies as an Individual with a Handicap Under the FHA. The Court holds that Plaintiffs proved that Ms. Matarese qualifies as a person with a handicap under the FHA [Fair Housing Act] because they demonstrated that Defendants regarded Ms. Matarese as handicapped. The FHA

defines "handicap" as (1) a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 3602(h)." *Matarese v. Archstone Pentagon City*, 795 F. Supp. 2d 402, 432 (E.D. Va. 2011)(Lee, J.)

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.

AUTHORITIES AND ARGUMENT

I. 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.

A. 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).

B. Argument

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 Ito 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 prior to the conclusion of [Matarese's] evidence," before Matarese rested her case, and before Matarese, the sole plaintiff, and her husband, a material witness for Matarese, 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). Unlike Plaintiff Durham, 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.

After *Durham*, this Court held 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]" and reversed the judgment of the trial court and remanded the case for trial. *See Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. Partnership*, 253 Va. 93, 95, 97, 480 S.E.2d 471, 472, 473 (1997).

Likewise, in the instant case, the Trial Court erred when it granted a Motion to Strike before Matarese had an opportunity to present evidence in support of the allegations in Matarese's Verified Complaint (ToC 2-26), by introducing into evidence Defendants' admissions in Bauman's VHC medical

records dated January 27, 2014 to February 9, 2014, the date of Bauman's death, stating that Bauman and Matarese did not consent to Defendants' decisions about Bauman's medical treatment at VHC, which were essential evidence in Matarese's Case-in-Chief. Va. Sup. Ct. R. 2:803(0) (2022), Admission by party opponent.

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 because the three dispositive pretrial motions filed by Defendants were all decided in favor of Matarese by the trial court. *See* ToC at 478-481, Letter Opinion, Plea in Bar of the Statute of Limitations on April 6, 2020; ToC at 1130-1133, Letter Opinion, Demurrer alleging that the Health Care Decisions Act was the sole remedy on September 30, 2020; and ToC at 1459-1462, Letter Opinion, Demurrer based upon the failure to state a cause of action for battery on March 30, 2021.

In the trial court's Letter Ruling dated March 30, 2021 (ToC 1459-1462), at 1, ¶1, Defendants argued

that Plaintiff's Complaint "failed to state a cause of action for medical battery." To the contrary, Judge Wheat wrote, at 2, ¶2, "Consistent 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."

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 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. Plaintiff's Attorney Trichilo, not Attorney Volzer, "actually spoke with Mr. Domenic, Mr. Domenic Matarese." 7/15/21 TR. at 99:8-10 (emphasis added). "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." 7/15/21 TR. at 99:12-21.

In addition, Judge Wheat stated in her opening instruction to the Jury and the Court at the request of Def. Attorney Walkinshaw, "the parties in the 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 trial court (Judge Wheat) 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, the trial court erred when it did not apply the foregoing instruction to Matarese when Matarese became severely ill on July 15 and in intractable pain in the court room and was carried from the court room in a wheelchair by six deputies. 7/15/21 TR. at 69:21-70:6. Matarese needed to go home and take medication so she could return to her mother's trial as quickly as possible. The trial court erred when it did not apply the foregoing instruction to Matarese and instead dismissed Matarese's case with prejudice. In contrast to the trial court's treatment of Matarese, the trial court permitted Def. Strait to absent himself from trial for the entire day of Days 1 and 5 of the Trial without retribution because Def. Strait had "travel plans." 7/15/21 TR. 8:18-19; 66:10-12.

Without Matarese present, around noon July 15, 2021, the trial court initially planned to take Defendants' expert out of turn "so [Defendants'] expert can go on at one" today, 7/15/21 (7/15/21 TR. 95:10-11; 95:22 to 96:1-2) and the trial court planned to read more depositions on July 15 (7/15/21 TR. 71:18-22 to 72:1-5). When would Mr. and Mrs. Matarese have testified on July 15, 2021? The Deposition testimony of Ms. Matarese had lasted 8.8 hours and Mr. Matarese's deposition testimony had lasted 2.0 hours or a total of 10.8 hours.

Motion to Strike

Instead, on July 15, after Def.'s Attorney Walkinshaw admitted, the importance of Matarese's testimony, "They can't prove their case without [Matarese's] testimony." 7/15/21 TR. 61:4-5. And after Plaintiff's Attorney, Trichilo, "definitely said" to the trial court that "[Matarese] could be back by the end of the day on Friday [the next day]." 8/20/21 TR. at 42: 4-6. Suddenly, Walkinshaw stated, "—there's no evidence that she had a reaction to this allegedly—and I don't know—" Abruptly, the Trial Court (Judge Wheat) stated, "Motion to strike is granted." 7/15/21 TR. 103: 16-19. The Trial Court stated, "Case is dismissed against all defendants with prejudice." 7/15/21 TR. 103: 21-22. The Trial Court (Judge Wheat) stated, "I just think this case has to come to an end." 7/15/21 TR. 106:16.

II. Assignment of Error No. 2. The trial court erred and committed reversible error when it granted Defendants'-Appellees' Motion for Summary Judgment 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 because Material Facts Were in Dispute when the trial court erred and granted Defendants'-Appellees' Motion to Strike that precluded granting Summary Judgment to Defendants'-Appellees'. In addition, the trial court erred when it granted a motion for summary judgment without adopting "those inferences from the facts that are most favorable to the nonmoving party, 'unless the inferences are strained, forced, or contrary to reason'."

A. 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).

B. Argument

A "motion to strike is in effect a motion for summary judgment which is not to be granted if any material fact is genuinely in dispute." *Costner v. Lackey*, 223 Va. 377, 381, 290 S.E.2d 818, 820 (1982) (emphasis added) (citing *R.F. & P. Railroad v. Sutton*, 218 Va. 636, 643, 238 S.E.2d 826, 830 (1977)). The Supreme Court of Virginia has repeatedly cautioned that summary judgment is an "extreme remedy" and is available only when there are no material facts genuinely in dispute. *See*, *e.g.*, *Parson v. Carroll*, 272 Va. 560, 564, 636 S.E.2d 452 (2006). A summary judgment is appropriate in those cases where the dispute involves only pure questions of law. *See*, *e.g.*, *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 5, 82 S.E.2d

588 (1954) (noting that summary judgment "applies only to cases in which no trial is necessary because no evidence could affect the result").

Furthermore, in considering a motion for summary judgment, the court "must adopt those inferences from the facts that are most favorable to the nonmoving party, 'unless the inferences are strained, forced, or contrary to reason'." *Carson v. LeBlanc*, 245 Va. 135, 139-40, 427 S.E.2d 189, 9 Va. Law Rep. 908 (1993) (quoting *Bloodworth v. Ellis*, 221 Va. 18, 23, 267 S.E.2d 96 (1980)). In the instant case, the trial court erred when it granted a motion for summary judgment without adopting "those inferences from the facts that are most favorable to the nonmoving party, [Matarese], unless the inferences are strained, forced, or contrary to reason."

"On appeal," the Virginia Supreme Court has stated, "[1]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 present case, we conclude that the trial court erred in striking the Costner's evidence."

When used incorrectly, however, "summary judgment is a 'drastic remedy' that withdraws genuine issues of material fact from the fact finder, usually a jury — the ancient adjudicative body that our legal tradition views as 'the lower judicial bench in a bicameral judiciary' and 'the democratic branch of the judiciary power.'" *AlBritton v. Commonwealth*, 299 Va. 392, 404-405, 853 S.E.2d 512, 519 (2021).

In the instant case, "material facts [were] genuinely in dispute," concerning Defendants' written statements in Bauman's VHC Medical Records and set forth in Matarese's Verified Complaint admitting that Matarese and Bauman did not consent to Defendants' decisions about Bauman's medical treatment when the court granted Defendants' Motions to Strike 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 are to be determined by the jury, not the judge. *See Woodbury v. Courtney*, 239 Va. 651, 654, 391 S.E.2d 293, 295 (1990) ("A factual issue was created and the jury should have been allowed to determine the extent of the permission Woodbury granted to Dr. Courtney and whether he exceeded the scope of that permission").

Testimony of Petitioner-Appellant's Medical Expert, Dr. Gayle Galan; additional material facts concerning "consent." Petitioner-Appellant's expert medical witness, Dr. Gayle Galan, the only live witness called to testify on behalf of Plaintiff-Appellant Matarese, and who reviewed all of Bauman's VHC Medical Records, stated, "My Opinion that a battery . . . did occur to Ms. Bauman and the reason is there was improper withholding of IV fluids without . . . the consent of the daughter, who was the power of attorney" (7/14/21 TR. at 718:15-19); "So in this situation and the reason that this is authoritative and applicable to Ms. Bauman is that consent [for withdrawal of artificial nutrition and hydration] was never given" (7/14/21 TR. 892:10-12); "The Ativan contributed to her death" (7/14/21 TR. 776:17); "The

withdrawal of IV fluids contributed and caused her [Ms. Bauman's] death." (7/14/21 TR. 777:18-19). Plaintiff's Attorney Trichilo stated on 8/17/21 (ToC 3504-3517, page 8), "At trial, the testimony of plaintiff's expert witness, Gayle Galan, M.D., was admitted over persistent, strenuous, and duplicative objections. The testimony of record shows that: (1) no consent was ever obtained from either the patient or patient representative during the entirety of the hospital admission of the decedent (January 27, 2014 through February 9, 2014)."

At the Post Trial Hearing on August 20, 2021, material facts remained in dispute. However, the trial court acted improperly as the finder of fact and also introduced "evidence out of turn." Moreover, the conversation between Plaintiff's Attorney Trichilo and the Court (Judge Wheat) proves that material facts regarding "consent" in the evidence were in dispute and remain to this day in dispute. Bauman's VHC medical records will prove that neither Bauman nor Matarese "consented."

> ATTORNEY TRICHILO: The fact that-the contention that there was oral consent is nowhere shown in any of the medical records. In fact, those medical records repeatedly show that Ms. Matarese would not sign a DNR and—
>
> THE COURT (Judge Wheat): Well, there was testimony after all of that happened-and I think it was deposition testimony because I seem to recall 8/20/21 TR. at 74:13-20.
>
> THE COURT (Judge Wheat): So I understand

> your point about the initial document, but I do think that there was evidence submitted in the plaintiff's case suggesting that she had agreed to that course of—the treatment course, not necessarily the DNR, but the treatment course when she came back to the hospital, the palliative care and the comfort care.
>
> 8/20/21 TR. at 75:16-22.
>
> THE COURT (Judge Wheat): Am I missing something? Ms. Matarese, you need to sit down right now. You're not speaking.
>
> Go ahead, Mr. Trichilo.
>
> 8/20/21 TR. at 76:1-4 (emphasis added).
>
> MS. MATARESE: But could I possibly just briefly say what's in the records?
>
> THE COURT: No.
>
> 8/20/21 TR. at 79:20-22 (emphasis added).

An Appellate Court Will Not Consider Evidence Presented Out of Turn. At the Post Trial Hearing on August 20, 2021 (ToC 5264-5377), set forth above, the trial court (Judge Wheat) is referring to "evidence presented out of turn" or "deposition testimony" of Defendants' Farooqi, Ouellette, Strait and Friedman evidence submitted in the plaintiff's Case-in-Chief or evidence designated by Defendants but submitted, shown and read in Plaintiff Appellant Matarese's Case-In-Chief. "In reviewing a trial court's ruling striking the plaintiff's evidence and granting summary judgment for the defendant at the conclusion of the plaintiff's case-in-chief, an appellate court will not

consider evidence presented out of turn." Friend & Sinclair, Friend's Virginia Pleading and Practice, § 13.06 [2][d](3rd ed.)(2021) (citing *Gina Chin & Associates v. First Union Bank*, 260 Va. 533, 539, 537 S.E.2d 573, 576 (2000)).

In the instant case, over the repeated objections of Plaintiff's Attorney Trichilo, Defendants' attorneys introduced Defendants' evidence in Plaintiff's Case-In-Chief. In the instant case, before Plaintiff Appellant Matarese had rested her case and before Matarese was called to testify, Defendants' attorneys moved to strike. "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)). 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).

III. Assignment of Error No. 3. In the instant case, over the repeated objections of Plaintiff's Attorney Trichilo, the trial court erred when it facilitated and approved the requests of Defendants' attorneys to introduce Defendants' evidence out of turn in Plaintiff's Case-In-Chief before Plaintiff was called to testify.

Contrary to the facts of *Gray v. Rhoads*, in the instant case, the trial court approved Defendants' attorneys introducing Defendants' evidence including

deposition testimony, exhibits, and testimony and cross examination of Defendants'/Appellees' Farooqi, Friedman, Ouellette, and Strait in Plaintiff's Case-In-Chief before Plaintiff was called to testify. Thus, it appears that Defendants'/Appellees' Farooqi, Friedman, Ouellette, and Strait could be said to have testified as witnesses and/or would have previously testified before Petitioner Appellant Matarese.

Thereafter, if Matarese had offered as substantive evidence the Inculpatory Admissions of Party Opponents, Defendants'-Appellees', Farooqi, Friedman, Ouellette, and Strait contained in Bauman's VHC Medical Records dated January 27, 2014 to February 9, 2014, admitting that neither Bauman nor Matarese consented to palliative, hospice or comfort care, do not resuscitate orders or palliative sedation, they would have been refused. Notwithstanding that the statements constituted admissions by a party opponent under Va. Sup. Ct. R. 2:803(0), it appears that their effect, in this circumstance, would have been to contradict the witnesses and Va. Code § 8.01-404 would not have permitted their introduction. *See Gray v. Rhoads*, 268 Va. 81, 89, 597 S.E.2d 93, 98 (2004).

This would have prevented Plaintiff Matarese from introducing into evidence in Plaintiff Matarese's case-in-chief the Inculpatory Admissions of Party Opponents, Defendants'-Appellees', Farooqi, Friedman, Ouellette, and Strait Contained in Bauman's VHC Medical Records dated January 27, 2014 to February 9, 2014, admitting that neither Bauman nor Matarese consented to palliative, hospice or comfort care, do not resuscitate orders or palliative sedation, which

Matarese intended to admit as substantive evidence in Plaintiff-Appellant Matarese's Case-In-Chief

as Admissions by Party Opponents under Va. Sup. Ct. R. 2:803(0) and Va. Code § 8.01-404.

A. Standard of Review Is De Novo

A trial court's interpretation of a statute is a question of law subject to de novo review. *Simon v. Forer*, 265 Va. 483, 487, 578 S.E.2d 792, 794 (2003).

The terms of the statute at issue, Va. Code § 8.01-404, are clear and unambiguous as written. Thus, in construing the statute, this Court looks no further than the plain meaning of the statute's words. *Supinger v. Stakes*, 255 Va. 198, 205-06, 495 S.E.2d 813, 817 (1998); *City of Winchester v. American Woodmark Corp.*, 250 Va. 451, 457, 464 S.E.2d 148, 152 (1995). Under the plain meaning rule, "we must . . . assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute." *Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990). We cannot depart from the words used by the legislature when its intent is clear. *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944).

Plaintiff asks this court to reverse the judgment of the trial court and remand this case for a new trial, and review Virginia Code § 8.01-404 to evaluate the potential harm of keeping the prohibition at issue here, "in an action to recover for a personal injury or death by wrongful act . . . no extrajudicial recording of the voice of such witness, or reproduction or transcript thereof . . . shall be used to contradict him as a witness in the case." *Gray v. Rhoads*, 268 Va. at 89, 597 S.E.2d at 98 (quoting Virginia Code § 8.01-404 (emphasis added)).

B. Argument

Admission by Party Opponent, Va. Sup. Ct. R. 2:803(0) (A), is an out-of-court statement offered against a party that is (A) the party's own statement in either an individual or a representative capacity. Statements of an adverse party or its agent or employee during the term of agency or employment are not subject to the hearsay rule. Va. Sup. Ct. R. 2:803(0). An admission must be offered against a party, not for a party. A party's out-of-court self-serving, exculpatory statement may not be offered as substantive proof by that party as an admission.

Under Section 8.01-404 of the Virginia Code, although not admissible as impeachment to contradict a witness's statement in a personal injury or wrongful death action, admissions by a party opponent can be admitted as substantive evidence in the case in chief.

As this Court explained in *Gray v. Rhoads*, 268 Va. 81, 90, 597 S.E.2d 93, 98-99 (2004): "[E]xtrajudicial admissions made by a party to a civil action are admissible in evidence against" that party. *Prince v. Commonwealth*, 228 Va. 610, 613, 324 S.E.2d 660, 662 (1985). "An admission deliberately made, precisely identified and clearly proved affords evidence of a most satisfactory nature and may furnish the strongest and most convincing evidence of truth." *Tyree v. Lariew*, 208 Va. 382, 385, 158 S.E.2d 140, 143 (1967) (emphasis added). A party admission does not have to be inculpatory or incriminating when made. *Alatishe v. Commonwealth*, 12 Va. App. 376, 378, 404 S.E.2d 81, 82, (1991).

In *Gray v. Rhoads*, 268 Va. at 86, 597 S.E.2d at 96, the Supreme Court of Virginia examined the trial

court's interpretation of the statute at issue, Va. Code § 8.01-404, which was a question of law subject to de novo review, and held that the circuit court erred by refusing to allow the plaintiff to introduce into evidence the transcripts of the Officers' prior audio-recorded statements as party admissions in the plaintiff's case-in-chief. "We cannot say that the plaintiff was not prejudiced by this error since party admissions 'may furnish the strongest and most convincing evidence of truth.'" *Id.* (quoting *Tyree*, 208 Va. at 385, 158 S.E.2d at 143). For the reasons stated, we will reverse the judgment of the circuit court and remand this case for a new trial consistent with the views expressed in this opinion." *Id.*

"The use of prior written statements to contradict a witness is, however, made subject to the prohibition at issue here, 'in an action to recover for a personal injury or death by wrongful act . . . no extrajudicial recording of the voice of such witness, or reproduction or transcript thereof . . . shall be used to contradict him as a witness in the case.'" *Gray v. Rhoads*, 268 Va. at 89, 597 S.E.2d at 98 (quoting Virginia Code § 8.01-404 (emphasis added)).

"The plain terms of Code § 8.01-404 limit the application of the prohibition at issue to those situations where a prior written statement is used to "contradict" a witness. In the specific context of *Gray v. Rhoads*, that was not the result. The plaintiff in *Gray v. Rhoads* sought to introduce the transcripts of the Officers' prior audio-recorded statements as party admissions in the plaintiff's case-in-chief not to contradict the witness. At that point in the trial, the Officers would not have been testifying as witnesses nor would they have previously testified. Thus, the statements would

not have been used to "contradict" the Officers because they would not yet have been witnesses and might never have been. If the Officers had already testified and, thereafter, the prior audio-recorded statements had been offered as evidence, they would have been properly refused. Notwithstanding that the statements constituted party admissions, their effect, in that circumstance, would have been to contradict the witnesses and Code § 8.01-404 would not have permitted their introduction." *Id.* (emphasis added).

An Appellate Court Will Not Consider Evidence Presented Out of Turn. "In reviewing a trial court's ruling striking the plaintiff's evidence and granting summary judgment for the defendant at the conclusion of the plaintiff's case-in-chief, an appellate court will not consider evidence presented out of turn." Friend & Sinclair, Friend's Virginia Pleading and Practice, § 13.06 [2][d](3rd ed.)(2021) (citing *Gina Chin & Associates v. First Union Bank*, 260 Va. 533, 539, 537 S.E.2d 573, 576 (2000)).

Plaintiff Appellant Matarese requests that this Court not consider any of the evidence and testimony of Defendants' Farooqi, Ouellette, Strait and Friedman for the entire trial July 12 to July 15, 2021, all of which was presented out of turn.

In the instant case, the trial court erred by improperly requiring plaintiff to allow defendants' attorneys to present defendants' evidence in plaintiff's case in chief preventing Plaintiff Matarese from testifying and admitting as substantive evidence in Plaintiff's Case-In-Chief Defendants' inculpatory statements in Bauman's Medical Records as admissions by

party opponents under Va. Sup. Ct. R. 2:803(0) and Va. Code § 8.01-404.

As Def.'s Attorney Walkinshaw admitted on July 15, 2021, "They can't prove their case without [Matarese's] testimony." 7/15/21 TR. 61:4-5.

Plaintiff asks this court to reverse the judgment of the trial court and remand this case for a new trial, and review Virginia Code § 8.01-404 to evaluate the necessity of keeping the prohibition at issue here, "in an action to recover for a personal injury or death by wrongful act . . . no extrajudicial recording of the voice of such witness, or reproduction or transcript thereof . . . shall be used to contradict him as a witness in the case." *Gray v. Rhoads*, 268 Va. at 89, 597 S.E.2d at 98 (quoting Virginia Code § 8.01-404 (emphasis added)).

Matarese maintained a chain of custody between Matarese and VHC, Danita Richardson, VHC Custodian of Records, and Health Port. The Records were numbered (Mata VHC2-1-461) and transmitted to Defendants' attorneys on January 24, 2020, by Matarese's attorney and were relied upon by all parties and Matarese's Expert, Dr. Gayle Galan, since January 24, 2020.

IV. Set Forth Below are the Inculpatory Admissions of Party Opponents Farooqi, Friedman, Ouellette, and Strait, Quoted Directly from Bauman's Mata VHC2-1-461 Medical Records 1/27/14 to 2/9/14, Which Matarese Was Prevented from Introducing Into Evidence

No Consent to Hospital Treatment at VHC. Neither Bauman nor Matarese, her daughter, next of kin, agent under a durable power of attorney and agent under a durable health care power of attorney (cumulatively, "POA"), who was at Bauman's side, signed any consent for hospital treatment in connection with the emergency admission on January 27, 2014 or the subsequent VHC hospitalization from January 28, 2014 to February 9, 2014. (Compl. ¶¶10-12; Mata VHC2-26 & 1-461.)

Def. Farooqi's admission: Matarese was Bauman's "POA." Mata VHC2-411, 412, 417, 420, 426, 428, 429.

Def. Farooqi's admission: Bauman was to be treated as a "Full Code" with curative care and her stroke treated. Compl ¶15; Mata VHC2-355, 413, 417, 422, 289.

No Defendant ever recorded that the health care Matarese requested for Bauman was medically or ethically inappropriate or violated their individual consciences, that Bauman was in a "persistent vegetative state" or "terminal condition", or that Bauman was incompetent or incapable of making an informed decision or recorded that Bauman lacked capacity under Va. Code § 54.1-2983.2. (Compl. ¶¶ 16, 18; Mata VHC2-1-461).

Def. Farooqi's admission: On 1/28/14, without the knowledge or consent of Bauman or Matarese, Farooqi immediately recorded, "may prompt palliative care discussion w/pt's POA Linda (daughter)." (Compl ¶ 14; Mata VHC2-411).

Def. Farooqi's admission: Farooqi recorded that on Wednesday night, 1/29/14, "Pt's daughter refused [palliative care] last night [1/29/14], per nursing." (Compl. ¶¶ 27, 29, 30; Mata VHC2-420). [Admission by Party Opponent, Va. Sup. Ct. Rule 2:803 (0)].

Def. Farooqi's admission: Farooqi recorded, "Palliative care team aware of pt—case discussed with them—but consult deferred because pt's daughter refused [palliative care] last night [1/29/14], per nursing." (Compl. ¶¶ 27, 29, 30; Mata VHC2-420). [Admission by Party Opponent, Va. Sup. Ct. Rule 2:803 (0)].

On January 31, 2014 c. 3:00 pm, VHC Ethics Committee Meeting was convened, chaired by Def. Friedman, only 42 hours after Matarese rejected palliative care for Bauman on 1/29/14 c. 9:00 PM and had not changed her position. Friedman's admission: Speaking, "FOR ETHICS CMTE," Friedman issued a decision converting Bauman from Full Code to Do Not Resuscitate (DNR), and from curative care to comfort care, without the knowledge or consent of Bauman or Matarese. (Compl. ¶ 32; Mata VHC2-426).

Def. Friedman's admission: Def. Friedman, speaking, "FOR ETHICS CMTE," did not record any emergency need to convene a VHC Ethics Committee Meeting on 1/31/14. (Compl. 33; Mata VHC2-426).

Def. Farooqi's admission: On 1/31/14 @ 3:46 PM, Def. Farooqi "entered and signed" an order for "OS_

Com Care" and removed Bauman's IV without the knowledge or consent of Bauman or Matarese. Farooqi's order for "OS_ Com Care" SET IN MOTION Defs. Ouellette, Strait and VHC staff who would take care of Bauman after Farooqi left. (Compl. 38; Mata VHC2-342, 426, 325).

Def. Farooqi's admission: Sunday afternoon, 2/2/14, Farooqi admitted to Mr. and Mrs. Matarese, "After the Ethics Committee Meeting, I removed your Mother's IV." (Compl 38; Mata VHC2-342, 426, 325). (Domenic Matarese Dep., 9/18/20, at 17:8-14.)

Def. Farooqi's admission: On 2/2/14, Farooqi refused Matarese's repeated requests that Farooqi give Bauman an IV, feeding tube or TPN (Total Parenteral Nutrition) to sustain Bauman's life. Farooqi admitted to Mr. & Mrs. Matarese, "If I give your Mother an IV, feeding tube or TPN, it will make her stronger and make it harder for her to die." (Compl 39.) (Domenic Matarese Dep., 9/18/20, at 17:8-14.)

Def. Farooqi's admission: On 2/2/2014 c. 4:35 PM, at the end of the meeting between Mr. and Mrs. Matarese and Farooqi, Def. Farooqi records: "At this time, she [Matarese] has not . . . agreed to Capital Hospice . . . " (Compl. ¶ 41; Mata VHC2-278.)

Donna Hara, RN with Capital Hospice, Mata VHC2-433 (2/3/14) recorded she refused to admit Bauman to Capital Hospice because "[Bauman] does not have symptoms to manage that would qualify her for IP [Inpatient] level of [hospice] care at this time."

Def. Friedman's Admission: On 2/7/14 @ 5:00 PM, Friedman admits:

"The Patient's daughter ultimately avoided follow up with hospice." (Mata VHC2-263).

Def. Farooqi's Admission. On 2/2/2014 c. 4:35 PM, at the end of the meeting between Mr. and Mrs. Matarese and Farooqi, Def. Farooqi admits: "At this time, she [Matarese] has not signed a durable DNR, . . ." (Compl. ¶ 41; Mata VHC2-278.) Durable Do Not Resuscitate Order signed only by Farooqi, not dated, or signed by Bauman or Matarese at Mata VHC2-31.

Donna Hara, RN, Capital Hospice, recorded "Patient's daughter is resisting comfort care medications." Mata VHC2-433 (2/3/14). Comfort care medications include Morphine and Ativan.

On 2/3/14, Def. Ouellette replaced Def. Farooqi as Ms. Bauman's attending hospitalist. Def. Ouellette saw and physically examined Ms. Bauman daily from 2/3/14 to 2/7/14 (Mata VHC2-432, 435, 439) to prescribe, implement and control Ms. Bauman's treatment.

Def. Ouellette's Admissions. On 2/7/14, 10:00 AM, Ouellette recorded, "Daughter called me again agitated & upset." . . . "She now states in contrast to yesterday [thereby revoking comfort care] that we are somehow 'killing' her Mother." . . . "She has threatened . . . with a lawsuit multiple staff members here." (Mata VHC2-439). Def. Ouellette did not deny Matarese's accusations. (Compl. ¶ 52; Mata VHC2-439). [Va. Sup. Ct. R. 2:803 (0) (B), Ouellette's adoptive Admissions by failure to deny Matarese's accusations.]

Def. Friedman performed a physical examination and palliative care consult on Bauman's person, without Bauman's or Matarese's knowledge or consent, *TO SET IN MOTION* on 2/7/14 @ 6:50 pm, Defendant

VHC's nurses to begin injecting the 98-year-old Ms. Bauman with Ativan at least every 6 hours until Ms. Bauman died. (Mata VHC2-318, 348, 263-265, 263).

2/7/14 after 5:00 PM, *Def. Friedman admits that he touched Ms. Bauman*. "The patient is unresponsive to a gentle exam." (Mata VHC2-264).

On 2/8/14, Def. Strait replaced Def. Ouellette as Ms. Bauman's attending hospitalist. Def. Strait saw and physically examined Ms. Bauman from 2/8/14 to 2/9/14 to prescribe, implement and control Ms. Bauman's treatment (Compl. ¶¶ 68-70, 72-74; Mata VHC2-442-443).

Saturday, 2/8/14, Def. Strait's Admission to Matarese: "We are not providing life prolonging therapy" to Ms. Bauman. (Mata VHC2-442). Matarese's/Bauman's Consent was Irrelevant to Defendants.

Sunday, 2/9/14 @ Noon, Bauman died with Matarese beside her.

CONCLUSION

Petitioner/Appellant, LINDA MATARESE, respectfully requests this Honorable Court grant her Amended and Restated Petition for Appeal based on all Assignments of Error, reverse the trial court's August 25, 2021, "Final Order" (ToC at 3531-3534) dismissing her case with prejudice, as well as its July 15, 2021, "Final Order of Dismissal with Prejudice" (ToC at 2923-2925), and August 3, 2021 "Order" (ToC at 2983-2984) and remand the case for a new trial and for any and all further relief that this Court deems just and equitable in the interest of justice.

Respectfully submitted,

/s/ Linda Matarese
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lindamatarese@cs.com
(703) 415-7594
Linda Matarese, in her capacity as Administratrix of the Estate of Hilda Duld Bauman, Decedent, and Petitioner/ Appellant, Pro Se

Dated: May 12, 2022

MATARESE PETITION FOR REHEARING IN THE VIRGINIA SUPREME COURT (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

PETITION FOR REHEARING

Linda Matarese
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(703) 415-7594

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: May 12, 2022