

Circuit Court for Harford County
Case No. 120C-16-002630

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3287

September Term, 2018

ANNE KELLY BILLING

v.

JAMES E MOULSDALE

Meredith,
Arthur,
Gould,

JJ.

Opinion by Gould, J.

Filed: August 6, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

It's not often that a plaintiff loses a jury trial after winning on a summary judgment motion. But that's what happened to appellant Anne Kelly Billing in her action against appellee, Dr. James Mouldsdale, on her claims for informed consent and professional negligence.

Ms. Billing alleged that when she went to her appointment with Dr. Mouldsdale for an examination for kidney stones, Dr. Mouldsdale used the opportunity to conduct digital examinations of her vagina and rectum, examinations that had nothing to do with the treatment of her kidney stones. The court granted Ms. Billing's motion for summary judgment on the informed consent count. Days before the trial started, the parties reached an agreement under which Dr. Mouldsdale waived any defense to the informed consent claim as well as the right to challenge or dispute the court's summary judgment ruling. In return, Ms. Billing dropped her intentional tort claims and agreed to limit her recovery to \$1,000,000.

Ms. Billing went to trial believing that the jury's sole task regarding her informed consent claim was to determine the amount of damages due to her. The court, however, interpreted the summary judgment opinion in a more limited way, paving the way for the jury's defense verdicts on both the informed consent and negligence counts.

Ms. Billing timely appealed and now presents the following two questions for our review:

1. "Was the trial court legally correct in requiring a causation question on the verdict sheet when liability had already been conceded?"
2. "Was [the trial court] legally correct in his interpretation and application of [summary judgment] ruling?"

For the reasons explained below, we answer both questions in the negative, and therefore vacate the judgment and remand for a new trial consistent with this opinion.

FACTS AND LEGAL PROCEEDINGS

On April 13, 2013, Ms. Billing went to the emergency room at the Upper Chesapeake Medical Center for kidney and ureteral stones. Ms. Billing had a history of kidney stones and was instructed on her discharge to see Dr. Robert Hoofnagle, the urologist who had previously treated her. Dr. Hoofnagle was unavailable, so Ms. Billing scheduled an appointment with his partner, Dr. Mouldsdale.

During her appointment, Dr. Mouldsdale told her to disrobe and gave her two small paper wraps to cover herself. Dr. Mouldsdale touched Ms. Billing’s breasts, allegedly to listen to her heart and lungs. He instructed her to lie down and remove the paper wraps, leaving her completely exposed. Dr. Mouldsdale proceeded to perform digital pelvic and rectal examinations. Ms. Billing felt violated and was later diagnosed with anxiety and PTSD.

Ms. Billing filed suit against Dr. Mouldsdale, alleging counts of negligence (Count I), battery (Count II), intentional infliction of emotional distress (Count III), and failure to obtain informed consent (Count IV). Ms. Billing filed a motion for partial summary judgment solely on the informed consent count, which Dr. Mouldsdale opposed. The court heard oral arguments, and subsequently issued a Memorandum Opinion granting the motion (the “Memorandum Opinion”). The court stated, in part:

The parties have different versions of what Ms. Billing was told as to the physical examinations that Mr. Mouldsdale was to perform. However, the focus is misplaced as to whether Ms. Billing and Dr. Mouldsdale *generally*

agree that he informed her he would conduct a physical exam or whether Mr. Mouldsdale says he *specifically* indicated the exam would include both a vaginal and rectal exam because she was a new patient that he had never examined before. The problem in using this dichotomy to determine whether there is a genuine dispute as to a material fact is that it ignores a dispositive material fact—whether there was a medical need or necessity for these examinations at all.

Here, Sard is instructive. The Court held “the proper test for measuring the physician’s duty to disclose risk information is whether such data will be material to the patient’s decision. . . [and] [t]he scope of the physician’s duty to inform is to be measured by the materiality of the information to the decision of the patient.” *See Sard v. Hardy*, 281 Md. at 443-444.

It is clear that there was no medical value in performing these examinations. Both Dr. Hoofnagle and Dr. Fitzpatrick testified that the written report of the CAT scan provided sufficient information for the purpose of Dr. Mouldsdale’s assessment for treatment of Ms. Billing’s kidney stones. In fact, Dr. Mouldsdale conceded this point with his admission that he does not conduct a physical exam if a patient declines it. And, his reliance that consent by Ms. Billing was implied because she did not verbally object or verbally state that she was declining the physical examination before or during their occurrence is misplaced given the lack of their medical value or necessity.

Dr. Mouldsdale should not perform medically unnecessary and highly intrusive examinations under the guise of treating kidney stones without disclosing information material to Ms. Billing’s decision as to whether to have them. Telling her that he conducts them on all new patients omits pertinent and material information: that they were not medically necessary to either assess the treatment of her kidney stones or to actually treat them. Particularly given the highly intrusive nature of the examinations, Dr. Mouldsdale should have informed her about this material fact. The decision was Ms. Billing’s to make. *See Sard*, 281 Md. at 443-444 (“[t]he scope of the physician’s duty to inform is to be measured by the materiality of the information to the decision of the patient.”).

These exams were of no medical value to Ms. Billing’s treatment for kidney stones. Had she been told they were not medically necessary, she would have declined to have her bare breasts manually manipulated ostensibly to listen to her heart and lungs or to have the intrusive vaginal and rectal examinations.

Therefore, Dr. Mouldsdale fell short of the scope of his duty to inform Ms. Billing about the need for the examinations. In sum, the fact that the highly intrusive examinations were medically unnecessary is the significant material fact “necessary to resolve the controversy as a matter of law[.]” D’Aoust v. Diamond, 424 Md. 549, 575, 36 A.3d 941, 955-56 (2012). And, this court finds that Plaintiff has met her burden of proof that there is no genuine dispute as to a material fact relevant to informed consent. *See* Hendrix v. Burns, 205 Md. App. 1, 18, 43 A.3d 415, 425-26 (2012), *reconsideration denied* (June 7, 2012).

Having found that there is no genuine dispute of material fact, this court must now consider whether, on the undisputed material facts, Ms. Billing as the moving party is entitled to judgment on the claim as a matter of law. *See* 120 W. Fayette St., LLLP v. Mayor and City Council of Balt. City, 413 Md. 309, 328-29, 992 A.2d 459 (2010); Hill v. Knapp, 396 Md. 700, 711, 914 A.2d 1193 (2007); O’Connor, 382 Md. at 110-11, 854 A.2d 1191. This court finds that to be the case, and therefore, summary judgment will be granted as to Count IV, Informed Consent. *See* Piscatelli v. Smith, 424 Md. 294, 35 A.3d 1140 (2012); 120 W. Fayette St., 413 Md. at 329, 992 A.2d at 471; Maryland State Bd. of Elections v. Libertarian Party of Maryland, 426 Md. 488, 505, 44 A.3d 1002, 1012 (2012).

The court contemporaneously entered an Order (the “SJ Order,” and together with the Memorandum Opinion, the “Summary Judgment”), which stated as follows:

ORDERED that the Motion for Partial Summary Judgment as to Count IV, Informed Consent, of Complaint, is hereby **GRANTED**; and it is further

ORDERED that the Plaintiff is granted judgment as a matter of law as to Count IV, Informed Consent.

Dr. Mouldsdale promptly moved for reconsideration of the Summary Judgment, which the court denied.

Several days before trial, the parties entered into, and filed with the court, a written stipulation (the “Pretrial Stipulation”). The parties to the Pretrial Stipulation were Ms.

Billing, Dr. Mouldsdale, and Dr. Mouldsdale’s insurance carrier. The Pretrial Stipulation stated:

1. Plaintiff Dismisses the Intentional Torts, Counts II and III;
2. Plaintiff agrees to cap damages at one million dollars (policy limits) with the understanding that the Maryland cap on non-economic damages is still applicable to this case, and will not assert a claim for punitive damages;
3. Defendant will not question, appeal, request reconsideration of or dispute the correctness of the December 7, 2018 Memorandum Opinion and Order by the Honorable Angela M. Eaves Granting Summary Judgment as to Count IV, Informed Consent, in favor of the Plaintiff;
4. Defendant will not assert either in the underlying Circuit Court case or on appeal that the decision granting the Motion for Summary Judgment was in anyway error or inappropriate or assert any defense to liability on this count;
5. Defense Counsel represents to this Court that the Doctor[’]s Company, insuring the Defendant, has consented to this stipulation and has withdrawn any denial of coverage or reservation of rights to deny coverage up to its policy limits.

The trial was assigned to a different judge than the one who had granted the Summary Judgment.¹ On the first day of trial, the parties and the trial court discussed the ramifications of the Summary Judgment, including what to tell the jury about it. Ms. Billing wanted to read to the jury excerpts from the Memorandum Opinion describing what Dr. Mouldsdale did wrong; Dr. Mouldsdale argued that the jury should be told only that the SJ court determined that Dr. Mouldsdale did not obtain informed consent “for the treatment of kidney stones.”

¹ For the sake of clarity, we will refer to the judge who decided the motion for partial summary judgment and Dr. Mouldsdale’s motion for reconsideration as the “SJ court,” and the judge who presided over the trial as the “trial court.”

The trial court resolved the dispute in Dr. Mouldsdale’s favor, and a “stipulation” was read to the jury stating: “[r]egarding the claim for informed consent the court has ruled that Dr. Mouldsdale did not obtain informed consent (for the treatment of a kidney stone).” Ms. Billing objected to the inclusion of the phrase in the parenthesis—“for the treatment of a kidney stone”—arguing among other things that it was misleading and confusing.

Later in the trial, the parties debated what was left for the jury to decide in the informed consent count. Ms. Billing argued that the Summary Judgment resolved each element of the informed consent claim, including the fact that she suffered a compensable injury as a proximate result of Dr. Mouldsdale’s failure to obtain informed consent, and left only the amount of damages for the jury to decide. Dr. Mouldsdale disagreed, arguing that the Summary Judgment did not resolve, and therefore the jury would have to decide, whether his alleged misconduct proximately caused an injury to Ms. Billing. Again, the trial court agreed with Dr. Mouldsdale. Over Ms. Billing’s objections, these issues were included in the jury instructions² and the verdict sheet.³ As to the informed consent count, the jury found that the lack of informed consent did not damage Ms. Billing. The jury also found in Dr. Mouldsdale’s favor on the negligence count. A judgment in favor of Dr. Mouldsdale was entered on January 31, 2019.

This timely appeal followed.

² The jury instruction on informed consent included the following:

Regarding the claim for informed consent, the Court has ruled that Dr. Mouldsdale did not obtain informed consent for the treatment of kidney stone. You do not have to decide the question whether the defendant failed to obtain informed consent from the Plaintiff for the treatment of kidney stones. On

DISCUSSION

I.

Causation

Ms. Billing argues that the trial court erred in submitting the element of proximate causation to the jury. According to Ms. Billing, the SJ court resolved those issues in her favor, and moreover, in the Pretrial Stipulation, Dr. Mouldsdale waived any defense to liability as to the informed consent claim.

Dr. Mouldsdale responds that the Summary Judgment “resolved a single question as a matter of law: whether Dr. Mouldsdale failed to obtain informed consent from Ms. Billing before performing the pelvic and rectal examinations during her kidney stone evaluation on April 25, 2013.” He contends that the SJ court’s failure to “address or reach any conclusion as to causation” was entirely logical because “Ms. Billing did not raise the issue or make any argument about causation” in her summary judgment motion and the topic wasn’t discussed at the hearing. Thus, he argues, the Summary Judgment “did not resolve,

this question you will need to decide the issue of causation. And if so, then the amount of damages the Plaintiff should be awarded as a result of the Defendant’s failure to obtain informed consent.

For the Plaintiff to recover damages, the Plaintiff’s injuries must result from and be reasonably foreseeable consequences of the Defendant’s conduct. There may be more than one cause of an injury. Each person whose negligent act is a substantial factor in causing an injury is responsible. The Plaintiff has the burden to prove by a preponderance of the evidence each item of damage claimed to be caused.

³ The verdict sheet included this question: “Do you find the lack of informed consent caused damage to the Plaintiff?”

and could not have resolved, the causation element” of Ms. Billing’s informed consent claim, and the jury was, therefore, properly instructed on causation.

Dr. Mouldsdale also contends that the Pretrial Stipulation did not include a waiver of his defense to liability as to the informed consent count. He alternatively argues that even if he did waive his defenses to liability, Ms. Billing was not relieved of her burden of proving the element left open by the Summary Judgment—proximate causation—which he claims she failed to do.

The interpretation and application of the Summary Judgment and the Pretrial Stipulation are questions of law, and we therefore apply a non-deferential standard of review. Howell v. State, 465 Md. 548, 561 (2019). For the reasons explained below, we conclude that the Summary Judgment determined that Ms. Billing suffered an injury as a proximate cause of Dr. Mouldsdale’s failure to obtain informed consent, leaving only the amount of damages for the jury to decide. In addition, under the Pretrial Stipulation, Dr. Mouldsdale waived any right to challenge the Summary Judgment or assert a defense to liability on the informed consent claim.

A.
The Summary Judgment

The principles we apply to interpret a court order mirror those that apply to the interpretation of statutes. See Taylor v. Mandel, 402 Md. 109, 125-26 (2007). If an order is unambiguous, “the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used.” Id. at 125 (citation omitted). If ambiguous, we must discern its meaning by looking at the circumstances surrounding the order,

including the underlying motion that produced it. Id. at 126. Applying these principles here, we conclude that Dr. Mouldsdale’s narrow interpretation of the Summary Judgment cannot be reconciled with the express words of both the Memorandum Opinion and SJ Order.

The elements of an informed consent claim include:

the duty to disclose to the patient material information that “a physician knows or ought to know would be significant to a reasonable person in the patient’s position in deciding whether or not to submit to a particular medical treatment or procedure”; breach of that duty by failing to make an adequate disclosure; and that the breach was the proximate cause of the patient’s injuries.

Shannon v. Fusco, 438 Md. 24, 45-46 (2014) (quoting Sard v. Hardy, 281 Md. 432, 444 (1977)).⁴

With these elements in mind, we turn to the Memorandum Opinion, in which the SJ court stated:

Having found that there is no genuine dispute of material fact, this court must now consider whether, on the undisputed material facts, Ms. Billing as the moving party is entitled to judgment *on the claim* as a matter

⁴ The record in this case shows that, at times, the term “damages” was used when “injury” would have been more apt for the context. We therefore pause here to distinguish the two concepts. A claim for a violation of the duty to obtain informed consent is an action sounding in negligence. McQuitty v. Spangler, 410 Md. 1, 31 (2009). The basic elements of a negligence claim are a duty, breach of that duty, and a cognizable injury proximately caused by the breach. Faya v. Almaraz, 329 Md. 435, 448 (1993). The fact of an injury, therefore, must be alleged and proven in a negligence action, and proximate causation and cognizable injury must be proven to establish liability. Damages, on the other hand, are designed to compensate the plaintiff for the injury suffered. Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 451 (1992). Under Sard, the injury in an informed consent claim is being subjected to a procedure that the plaintiff would have refused had the duty of informed consent not been breached. 281 Md. at 448-49; see also McQuitty, 410 Md. at 20 (“personal autonomy and personal choice were the primary foundations of the informed consent doctrine”).

of law. *See* 120 W. Fayette St., LLLP v. Mayor and City Council of Balt. City, 413 Md. 209, 328-29, 992 A.2d 459 (2010); Hill v. Knapp, 396 Md. 700, 711, 914 A.2d 1193 (2007); O’Connor, 382 Md. at 110-11, 854 A.2d 1191. This court finds *that to be the case*, and therefore, summary judgment will be granted as to Count IV, Informed Consent.

(Emphasis added).

Under the plain language of the above paragraph, the SJ court’s ruling applied to the entire “claim” of informed consent. When the SJ court stated it found “*that to be the case*,” the “*that*” was the question posed in the prior sentence, namely “whether, on the undisputed material facts, Ms. Billing as the moving party is entitled to judgment *on the claim* as a matter of law.” And, when the SJ court used the phrase “*on the claim*,” the word “*claim*” referred to the claim of “Count IV, Informed Consent.” Each element of the claim—not just part of the claim.

Similarly, by stating that it was granting “summary judgment as to Count IV, Informed Consent,” the SJ court plainly meant that Ms. Billing prevailed on each element of “Count IV, Informed Consent,” not just the single element identified by Dr. Mouldsdale. The same holds true for the SJ court’s finding that “Plaintiff has met her burden of proof that there is no genuine dispute as to a material fact relevant to informed consent.” “[N]o genuine dispute as to a material fact relevant to informed consent” means what it says: there are no facts relevant to informed consent that are genuinely disputed. The plain meaning and all-encompassing nature of these words notwithstanding, Dr. Mouldsdale would have us re-write the Memorandum Opinion to drastically curtail its scope. This we will not do. Had the SJ court intended such a narrow ruling, we presume it would have expressly said so.

Further, contrary to Dr. Mouldsdale’s contention, the SJ court did address the causation element in its Memorandum Opinion. To establish the element of proximate causation, a plaintiff must “prove by a preponderance of the evidence that he would not have given his consent to the proposed procedure had full and adequate disclosure been made at the time consent was originally given.” Sard, 281 Md. at 448-49. Moreover, it’s not enough that the plaintiff would not have provided such consent—the plaintiff must prove that a reasonable person in the same shoes would not have provided such consent. Id. at 450.

Here, the SJ court made an express finding in conformance with this test:

These exams were of no medical value to Ms. Billing’s treatment for kidney stones. *Had she been told they were not medically necessary, she would have declined to have her bare breasts manually manipulated ostensibly to listen to her heart and lungs or to have the intrusive vaginal and rectal examinations.*

(Emphasis added).

Dr. Mouldsdale contends that this finding did not establish proximate causation. He argues that this finding addressed only what *Ms. Billing* would have done (i.e., the subjective test), but did not also apply the objective test, that is, what a reasonable person would have done in the same situation. Further, as noted above, Dr. Mouldsdale contends that it’s only “logical” that the SJ court did not address causation because Ms. Billing did not raise that issue in her summary judgment motion.

These arguments are unpersuasive. At best, whether the SJ court erred in neglecting to apply the objective test or in deciding an issue that Ms. Billing may not have raised goes

to the *correctness* or *propriety* of the SJ court’s causation finding, not *whether* it made a causation finding.⁵

In fact, Dr. Mouldsdale made precisely this argument in his motion for reconsideration of the Summary Judgment. There, he argued that the SJ court’s ruling on causation was erroneous because: (1) it did not apply the objective test in determining causation; and (2) Ms. Billing had not even raised causation in her motion.⁶ Thus, what

⁵ In any event, as discussed below, Dr. Mouldsdale waived his right to challenge the correctness of the SJ court’s finding when he agreed to the Pretrial Stipulation. Additionally, Dr. Mouldsdale’s contention that the SJ court did not make a finding under the objective test seems to us as elevating form over substance. The SJ court did not use the buzz words “reasonable person” in its causation finding, but it did find that “[the rectal and vaginal] exams were of no medical value to Ms. Billing’s treatment for kidney stones.” Reasonable people do not generally consent to medical procedures or intrusive examinations that have no medical value.

⁶ Among other things, Dr. Mouldsdale argued that the SJ court improperly “reviewed matters beyond the relief sought and beyond the evidence presented by the moving party.” In addition, he asserted:

By delineating a new bright line rule on requirements for informed consent to be applied to a physical examination this Court not only made findings of fact but also substituted the objective judgment of a reasonable patient with the subjective theoretical opinion of Ms. Billing. No evidence was presented in the Plaintiff’s Motion indicating Ms. Billing would have declined the examination in the event she received the information purportedly absent from the notice provided by Dr. Mouldsdale involving the purpose of the examine [sic]. (See Exhibit 1 to Pl’s Motion for Part. Sum. Jud.) “The rationale commonly offered in support of the objective test is that if a subjective standard were applied, the testimony of the plaintiff as to what he would have hypothetically done would be the controlling consideration. Thus, proof of causation under a subjective standard would ultimately turn on the credibility of the hindsight of a person seeking recovery after he had experienced a most undesirable result.” *Sard v. Hardy*, 281 Md. 432, 444 (1977).

Dr. Mouldsdale now cites as evidence that the SJ court *did not* rule on causation, he initially cited as evidence that the SJ court *did* rule on causation, albeit improperly and incorrectly.

To be sure, because the SJ court denied his motion for reconsideration, Dr. Mouldsdale was not judicially estopped from trying a new theory. See Nusbaum v. Nusbaum, 243 Md. App. 653, 666 (2019) (cleaned up) (judicial estoppel does not apply if the court does not accept the first of the inconsistent positions). Nevertheless, that Dr. Mouldsdale initially understood that the SJ court had made a finding on causation—so much so that his attorney signed a motion under Rule 1-311(b) advancing that position⁷—provides cause for us to view his current argument with a degree of skepticism.

More importantly, we find significant the fact that the SJ court denied Dr. Mouldsdale’s motion for reconsideration in a short order with no explanation or clarification of its initial ruling. If the SJ court had believed that Dr. Mouldsdale had incorrectly interpreted the Summary Judgment, the SJ court would have presumably clarified its ruling to prevent any further confusion by the parties or the trial court. That the SJ court denied the motion without such clarification signals to us that Dr. Mouldsdale’s initial interpretation, as expressed in his motion for reconsideration, was correct.

⁷ Maryland Rule 1-311(b) states:

The signature of an attorney on a pleading or paper constitutes a certification that the attorney has read the pleading or paper; that to the best of the attorney’s knowledge, information, and belief there is good ground to support it; and that it is not interposed for improper purpose or delay.

Accordingly, we hold that the SJ court decided each element of the informed consent claim, including that Ms. Billing was injured as a proximate result of Dr. Mouldsdale’s breach of his duty to obtain informed consent. The only issue left for the jury to decide on the informed consent claim was the amount of compensatory damages. The trial court erred in sending the issue of causation to the jury.⁸

**B.
The Pretrial Stipulation**

Because we hold that the Summary Judgment decided liability and left only the amount of damages for the jury to determine, the parties’ disagreement over the meaning of “liability” in the Pretrial Stipulation is largely moot.⁹ Dr. Mouldsdale agreed in paragraphs 3 and 4 of the Pretrial Stipulation not to “question, appeal, request

⁸ Dr. Mouldsdale states that his counsel told the trial court on numerous occasions throughout the trial that, as to the informed consent claim, the issues for the jury were proximate causation and damages, and that Ms. Billing’s counsel never contested that point. To the extent he is suggesting that Ms. Billing waived this issue, we disagree. As we stated earlier, Ms. Billing’s counsel timely objected to causation being included in the instructions and verdict form.

⁹ In reliance on Hurt v. Chavis, 128 Md. App. 626 (1999), Ms. Billing argues that once liability is established, the only task left for the jury to decide is the amount of damages. In Hurt, we reaffirmed that “[i]f negligence is established *and some injury conceded*, but the amount disputed, a verdict on liability may be directed, leaving for determination by the jury the amount to be awarded.” 128 Md. App. at 639 (quotation omitted). Dr. Mouldsdale counters that Hurt did not hold the defendant to the strict meaning of “liability,” but instead held that the trial court properly submitted causation and injury to the jury notwithstanding defense counsel’s purported concession on liability. The facts of Hurt are readily distinguishable from this case, not the least of which is that here, the Pretrial Stipulation expressly refers and relates to the Summary Judgment which, as discussed above, established liability. And, unlike in Hurt, the Pretrial Stipulation is akin to a contract, and is therefore enforceable against the parties in accordance with the plain meaning of its words. Wells v. Chevy Chase Bank, F.S.B., 363 Md. 232, 251 (2001).

reconsideration of or dispute the correctness” of the Summary Judgment, and further that he would “not assert” that the Summary Judgment “was in anyway error or inappropriate or assert any defense to liability on this count.”

The Pretrial Stipulation has the binding force of a contract. See Ragin v. Porter Hayden Co., 133 Md. App. 116, 134 (2000) (citing C & K Lord, Inc. v. Carter, 74 Md. App. 68, 94 (1988)); Bloom v. Graff, 191 Md. 733, 736 (1949). Dr. Mouldsdale, therefore, is bound by the SJ court’s finding of liability on the informed consent claim.

II. Informing the Jury about the Summary Judgment

We turn to Ms. Billing’s claim that the trial court improperly informed the jury about the Summary Judgment. As explained above, this issue was debated and decided on the first day of trial. To recap, Ms. Billing requested permission to read directly from the Memorandum Opinion. Dr. Mouldsdale argued that the jury should be told only that the court had previously found that he did not obtain informed consent for the treatment of kidney stones. The trial court sided with Dr. Mouldsdale. Accordingly, the following statement, which was inaptly referred to as a “stipulation,” was read to the jury:

Regarding the claim for informed consent the Court has ruled that Dr. Mouldsdale did not obtain informed consent for the treatment of a kidney stone.

According to Ms. Billing, this statement, and particularly the inclusion of the phrase “for the treatment of kidney stones,” was wrong and misleading and “the entire trial was mired” by it. Dr. Mouldsdale, on the other hand, contends that the inclusion of the phrase “for the treatment of kidney stones” conformed to the Memorandum Opinion and faithfully

reflected the manner in which Ms. Billing pleaded her claim of informed consent. He also argues that even if the jury was misinformed about the scope of the ruling, it was harmless because the jury was adequately informed that Dr. Mouldsdale was not “challenging the earlier finding of a lack of informed consent.”

We conclude that the statement given to the jury was a misinterpretation of the Memorandum Opinion. At Dr. Mouldsdale’s urging, the trial court placed great weight on what it perceived to be the SJ court’s emphasis that the intrusive examinations served no medical purpose “for the treatment of kidney stones.”¹⁰ The trial court saw that phrase as a limitation to the SJ court’s ruling, leaving open the possibility that the examinations could have been appropriate for a purpose other than the treatment of kidney stones. Dr. Mouldsdale argued that the other potential purpose was to assess Ms. Billing’s overall health, as he does with all new patients. The trial court, therefore, viewed the phrase “for the treatment of kidney stones” as a necessary limitation on the Summary Judgment that allowed for Dr. Mouldsdale to defend the negligence claim on that basis.

The problem, however, is that the SJ court considered and expressly rejected Dr. Mouldsdale’s attempt to defend the informed consent claim on this basis. In opposing Ms. Billing’s summary judgment motion, Dr. Mouldsdale argued that he “informs patients that he intends to perform pelvic and rectal examinations as part of his routine for new patients and provides an opportunity for the patient to ask questions and/or decline.” Dr. Mouldsdale argued that there was a genuine dispute “as to whether informed consent was given for the

¹⁰ The trial court incorrectly stated, “[e]very sentence ended with to treat a kidney stone.”

pelvic and rectal examinations performed by Dr. James E. Mouldsdale.” Dr. Mouldsdale clearly understood, therefore, that the issue raised in the summary judgment motion was whether he had obtained informed consent for the pelvic and vaginal examinations, not whether he had “obtained informed consent for the treatment of kidney stones,” as the jury was erroneously told.

The SJ court framed the parties’ disputing contentions this way:

Ms. Billing alleges that Dr. Mouldsdale did not inform her of his intent to perform vaginal and rectal examinations, that he failed to explain the purpose of these examinations, and that he failed to obtain her consent before performing them. Dr. Mouldsdale counters that the examinations were part of his routine exam for new patients, and that it was his custom and practice to do them unless a patient declined the examinations. He contends that he gave Ms. Billing sufficient notice of his intention to perform the exams and that she did not decline to have him do so.

The SJ court then rejected Dr. Mouldsdale’s position. The SJ court found that Dr. Mouldsdale’s practice of conducting pelvic and rectal examinations of all new patients, and his alleged disclosure to all new patients of this practice, were not the material issues. The SJ court explained:

. . . the focus is misplaced as to whether Ms. Billing and Dr. Mouldsdale *generally* agree that he informed her he would conduct a physical exam or whether Dr. Mouldsdale says he *specifically* indicated the exam would include both a vaginal and rectal exam because she was a new patient that he had never examined before. The problem in using this dichotomy to determine whether there is a genuine dispute as to a material fact is that it ignores the **dispositive material fact—whether there was a medical need or necessity for these examinations at all.**

(Italics in original, bold added). Two paragraphs later, the SJ court answered the question posed in the last sentence of the above paragraph, stating that “[i]t is clear that there was no medical value in performing these examinations.”

The SJ court explained why there was no medical value in performing these examinations: “[Ms. Billing’s experts] testified that the written report of the CAT scan provided sufficient information for the purpose of Dr. Mouldsdale’s assessment for treatment of Ms. Billing’s kidney stones.” Thus, the SJ found:

. . . Dr. Mouldsdale fell short of the scope of his duty to inform Ms. Billing about the need for the examinations. In sum, **the fact that the highly intrusive examinations were medically unnecessary** is the significant material fact “necessary to resolve the controversy as a matter of law[.]” D’Aoust v. Diamond, 424 Md. 549, 575, 36 A.3d 941, 955-56 (2012). And, this court finds that Plaintiff has met her burden of proof that there is no genuine dispute as to a material fact relevant to informed consent.

(Emphasis added.) In other words, the SJ court’s use of the phrase “for the treatment of kidney stones” merely explained *why* there was no medical necessity for the examinations and *why* it did not matter to Ms. Billing’s implied consent claim that Dr. Mouldsdale’s practice was to inform all new patients that he performed such examinations as part of an overall examination.

Another fundamental problem with telling the jury that “the Court has ruled that Dr. Mouldsdale did not obtain informed consent for the treatment of [a] kidney stone” was that it was plainly incorrect. If there was anything that Ms. Billing *did* consent to, it was an examination for kidney stones. That’s why she went to Dr. Mouldsdale’s office in the first place, and why the SJ court determined that there was no medical necessity for the pelvic and rectal examinations, which the SJ court concluded should have been disclosed to Ms. Billing.¹¹

¹¹ In addition, Dr. Mouldsdale’s argument unintentionally highlights the error in the statement. As noted above, Dr. Mouldsdale argues that the Summary Judgment “resolved a

The impact of this misleading statement was significant. The statement effectively nullified the Summary Judgment and opened a door for Dr. Mouldsdale to argue that his failure to obtain informed consent to treat kidney stones was irrelevant because he wasn't even treating Ms. Billing for kidney stones at that time. Dr. Mouldsdale's counsel took maximum advantage of the opportunity in his closing argument:

As you have had this read to you many times, this is the Court ruling that, as I told you in opening, we concede. It is not -- as I will get to in a minute, it is not a big deal.

Regarding the claim for informed consent, the Court has ruled that Dr. Mouldsdale did not obtain informed consent for the treatment of the kidney stone -- for the treatment of the kidney stones. This examination that is at issue was not done for the treatment of the kidney stone. That informed consent aspect is not relevant to this case in the context of he did not do this for the kidney stone at all. There was no treatment for the kidney stone that was provided. Let me say this again. There was no treatment for the kidney stone provided on April 25th. This is -- and you have a copy of his record. You will be able to review. This is his disposition. What he needed to do to determine the treatment was he was going to go over to Upper Chesapeake and actually review the film, the CAT scan, and continue to see how she was feeling. And I would plan on seeing her again in two weeks to do another x-ray to see if we can localize any stones and then follow her as appropriate.

So there was not any treatment on that date. He basically discharged her to come back in two weeks and he would come back to look at the record, request the imaging study. The physical exam, as I said to you, it was not treatment for the stone, which is why the informed consent question is simple to deal with. So when you get a question here, do you find the lack of informed consent? Did the fact that there was no informed consent for the treatment of the kidney stone cause any damage? The answer is simply, no,

single question as a matter of law: whether Dr. Mouldsdale failed to obtain informed consent from Ms. Billing before performing the pelvic and rectal examinations during her kidney stone evaluation on April 25, 2013.” The jury was told, however, that Dr. Mouldsdale did not obtain informed consent “for the treatment of kidney stones,” not that he didn't get informed consent to perform the pelvic and rectal examinations during her kidney stone evaluation. Thus, even under Dr. Mouldsdale's characterization, the statement read to the jury was incorrect.

because there was no treatment for the kidney stone. The physical exam wasn't for the kidney stone. And that is the end of the decision. You can knock on the door and tell the clerk that you have completed your deliberations.

It was a remarkable turnabout, and the prejudice to Ms. Billing was manifest. The Summary Judgment established that (i) Ms. Billing prevailed on the informed consent claim; (ii) Dr. Mouldale digitally penetrated Ms. Billing's rectum and vagina "under the guise" of treating kidney stones; (iii) given the purpose for Ms. Billing's visit to Dr. Mouldale, there was no medical necessity for such exams; and (iv) Dr. Mouldale was required, but failed, to disclose the lack of medical necessity for those examinations. Instead of disclosing these findings and conclusions to the jury, the incorrect statement enabled Dr. Mouldale to play the role of the magnanimous defendant by "conceding" that he didn't get informed consent for the treatment of kidney stones, and then shrug off that fact as "no big deal" because he wasn't even treating her for kidney stones that day.¹² Thus,

¹² Dr. Mouldale certainly thought the Summary Judgment was a "big deal" when he moved for reconsideration. In addition to arguing that the SJ court improperly decided the issue of causation, he argued:

The Court's Opinion also inappropriately reached the conclusion that "Dr. Mouldale should not perform medically unnecessary and highly intrusive examinations under the guise of treating kidney stones without disclosing information material to Ms. Billing's decision as to whether to have them." . . . There was no evidence presented that the examination by Dr. Mouldale was to treat kidney stones but was actually to determine treatment and ascertain the patient's overall medical condition as a new patient "because it's part of a routine, normal and complete physical examination." . . . The conclusion of this Court determined as a matter of law the scope of physical examinations that may be performed and substituted the Court's judgment for the medical judgment of a board certified urologist.

in addition to handing Dr. Mouldale a new defense to the informed consent claim (notwithstanding his waiver of any liability defenses), the anodyne description obscured the seriousness of the misconduct that had been established by the Summary Judgment.

The prejudice to Ms. Billing was not confined to her claim for informed consent. As indicated above, the trial court decided what the jury would be told about the Summary Judgment in the context of its effort to determine whether, and if so how, the Summary Judgment impacted Dr. Mouldale’s defenses to Ms. Billing’s negligence claim. The trial court’s decision was based on its view that the SJ court did not foreclose Dr. Mouldale’s defense to the negligence claim that the pelvic and rectal examinations met the standard of care for a general physical of a new patient presenting with Ms. Billing’s symptoms. The trial court was concerned that without a stipulation on what to tell the jury about the Summary Judgment, the trial would be interrupted frequently by objections and side bar discussions. The so-called stipulation, therefore, was intended to and in fact did affect both parties’ trial presentations. The resulting prejudice to Ms. Billing, therefore, extended to both the informed consent and negligence claims.

CONCLUSION

On remand, as to the informed consent count, the jury’s sole task will be to determine “what, if any, award will fairly compensate” Ms. Billing for Dr. Mouldale’s failure to obtain informed consent for his touching of Ms. Billing’s naked breasts and his digital examination of her vagina and rectum.¹³ See Maryland Civil Jury Instruction

¹³ To be clear, we are not holding that the jury is required to award damages on the informed consent claim.

(“MPJI-Cv”)10:1.¹⁴ Further, irrespective of the resulting impact on the negligence claim (as to which we express no opinion), the jury should be informed accurately about the findings in the Memorandum Opinion and SJ Order. The Pretrial Stipulation, including without limitation Dr. Mouldsdale’s agreement not to dispute the correctness of the Memorandum Opinion, remains fully binding on the parties.

**JUDGMENT IN FAVOR OF DEFENDANT
VACATED. CASE REMANDED TO THE
CIRCUIT COURT FOR HARFORD
COUNTY FOR A NEW TRIAL
CONSISTENT WITH THIS OPINION;
COSTS TO BE PAID BY APPELLEE.**

¹⁴ MPJI-Cv 10:1 (Introductory Statement) provides:

If you find for the plaintiff on the issue of liability, then you must consider the question of damages. It will be your duty to determine what, if any, award will fairly compensate the plaintiff.

The plaintiff has the burden to prove by a preponderance of the evidence each item of damage claimed to be caused by the defendant. In considering the items of damage, you must keep in mind that your award must adequately and fairly compensate the plaintiff. However, an award should not be based on guesswork.