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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Maite Murphy
Circuit Court Judge

Case No.: 2018-CP-10-02109
Appellate Case No. 2023-000029

Rebecca Turisk,

Appellant,

v.

Dennis K. Schimpf, M.D. and
Sweetgrass Plastic Surgery, LLC,

Respondents.

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STATEMENT OF ISSUES ON APPEAL

- I.** DID THE TRIAL COURT ERR IN CHARGING THE JURY AS TO ASSUMPTION OF THE RISK IN THE INSTANT MEDICAL MALPRACTICE ACTION?
- II.** DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR A DIRECTED VERDICT AS TO ASSUMPTION OF THE RISK, AND IN DENYING PLAINTIFF'S MOTION TO EXCLUDE THE PRINCIPLE AS A JURY CHARGE?
- III.** WAS THE TRIAL COURT'S JURY CHARGE ON ASSUMPTION OF THE RISK CONFUSING TO THE JURY, PREJUDICIAL TO PLAINTIFF, AND DID IT AFFECT THE OUTCOME OF THE TRIAL?
- IV.** DID THE TRIAL COURT ERR IN DENYING APPELLANT'S POST-TRIAL MOTION FOR A NEW TRIAL, OR IN THE ALTERNATIVE FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR ALTERNATIVELY FOR A NEW TRIAL ABSOLUTE?

STATEMENT OF THE CASE

This is a medical negligence action arising out of treatment of Appellant Rebecca Turisk (“Ms. Turisk”) by Dennis K. Schimpf, M.D. (“Dr. Schimpf”) and Sweetgrass Plastic Surgery, LLC (“Sweetgrass Plastic Surgery”) (collectively, “Defendants”).

This appeal centers on whether it was proper for the trial court to charge the jury as to Plaintiff’s alleged assumption of the risk. Appellant asserts that the trial court erred in charging the jury as to assumption of the risk; that assumption of the risk is irrelevant and inapplicable in the context of the instant medical malpractice action; that it was misleading, confusing, and prejudicial to charge the jury as to this principle; and that Appellant’s motion for a directed verdict on this issue should have been granted. Appellant also asserts that the trial court erred in denying her post-trial motion for a new trial or judgment notwithstanding the verdict where the jury verdict on proximate cause was both wholly unsupported by the evidence and controlled by an error of law.

PROCEDURAL HISTORY

On April 23, 2018, Ms. Turisk filed the present lawsuit in Charleston County, South Carolina. (Complaint, R. __). The Complaint alleged, *inter alia*, that Defendants were negligent in performing a reduction mammoplasty (i.e. breast reduction) and removing Ms. Turisk’s existing, twenty-five-year-old breast implants; that Defendants breached the standard of care by interrupting the vascularity (i.e. blood supply) to Ms. Turisk’s breasts, causing necrosis and infection of her breasts, leading to loss of one breast and disfigurement of the other; and that as a direct and proximate result of Defendants’ breach, Ms. Turisk has had to undergo multiple procedures to remove necrotic breast tissue, and has suffered *inter alia*, great pain, scarring, disfigurement, and hundreds of thousands of dollars in medical bills. (Complaint, R. __)

On May 23, 2018, Defendants filed their Answer to the Complaint, generally denying the substantive allegations contained therein and raising various affirmative defenses. (Answer, R.__). In raising their affirmative defenses to the Complaint, Defendants simultaneously alleged that the injuries complained of by Ms. Turisk were known risks and complications, which Ms. Turisk had accepted, while at the same time contending that they could not have “foreseen or anticipated in the exercise of ordinary care the circumstances that arose and/or became evident immediately prior to the incident.” (Answer at p. 4, para. 2 and 5; R.__). Defendants also alleged that Ms. Turisk’s injuries were caused in whole or in part by Plaintiff’s and/or her representatives’ own comparative/contributory negligence. (Answer at p. 4, para. 6; R.__).

Motion in Limine

On November, 11, 2022, Ms. Turisk’s trial counsel filed a Motion in Limine, wherein they sought to exclude, *inter alia*, testimony or evidence related to Plaintiff’s informed consent to surgery pursuant to Rules 401, 402, and 403, SCRE. (Motion in Limine, pp. 19-22; R.__). The Motion specifically noted that Ms. Turisk had not made a claim for lack of informed consent, but rather a claim that Defendants had breached the standard of care; that South Carolina and other courts expressly acknowledged the distinction between the two types of claims; and that evidence concerning informed consent is not relevant and does not make Defendants’ breach of the standard of care any more or less probable. (Id., pp. 19-22; R.__). Ms. Turisk’s trial counsel further argued that the evidence and/or testimony related to informed consent would only serve to confuse and mislead the jury to believe that by consenting to the procedure, Ms. Turisk had consented to injuries caused by Defendants’ negligence. (Id., pp. 19-22; R.__).

Trial

Thereafter, a four-day jury trial was held in Charleston, South Carolina, from November 14, 2022, to November 17, 2022. On the first day of trial, Ms. Turisk's Motion in Limine was heard by the Honorable Maite Murphy. (Trial Tr., p. 19, line 14 – p. 25, line 19; R. __). After hearing argument from both parties, the Court initially agreed with Ms. Turisk that the issue of informed consent was neither relevant nor material to her claim for breach of the standard of care, reasoning, "Basically her informed consent talks about risks of surgery, and it's not relevant, nor material, to the standard of care, which would be the causation of the breach of the standard of care and the proximate cause of her injuries. So your motion on that is granted." (Trial Tr., p. 21, lines 18-22, R. __).

Despite the ruling, Defendants' trial counsel continued to argue the issue, complaining that informed consent was "a central tenet of our defense in this case." (Trial Tr., p. 22, lines 1-6, R. __). In response, Ms. Turisk's trial counsel once again noted that the question in front of the jury is whether there was a breach of the standard of care; that informed consent does not go to that issue; that Ms. Turisk had not made a claim for lack of informed consent; and that the issue of informed consent is irrelevant and would be highly misleading and confusing to a jury, who was likely to interpret it to mean that Ms. Turisk had signed off on any and all possible complications, including any injuries caused by Defendants' negligent acts. (Trial Tr., p. 22, line 17 – p. 23, line 13; p. 24, lines 4-12; R. __).

In support of the Motion, Ms. Turisk's counsel cited to *Fletcher v. Medical University of South Carolina*, 390 S.C. 458, 462-70, 702 S.E.2d 372, 374-78 (Ct. App. 2010), recognizing the distinction between claims for lack of informed consent and claims for breach of the standard of care, and *Wright v. Kaye*, 592 S.E.2d 307, 27 (Va. 2004), a sister court case, wherein the

Supreme Court of Virginia held that “evidence of information conveyed to [the plaintiff] concerning the risks of surgery in obtaining her consent is neither relevant nor material to the issue of the standard of care,” and that “awareness of the general risks of surgery is not a defense available to [defendant] against the claim of deviation from the standard of care.” (Motion in Limine, pp. 19-22; Trial Tr., p. 19, line 14 – p. 25, line 19; R.__). Ms. Turisk’s counsel also cited *Hayes v. Camel*, 927 A.2d 880 (Conn. 2007), wherein the Supreme Court of Connecticut found that evidence of a plaintiff’s consent “could only serve to confuse the jury because the jury could conclude, contrary to the law and evidence, that consent to the surgery was tantamount to consent to the injury which resulted from that surgery;” and that a jury “could conclude that consent amounted to waiver, which is plainly wrong.” (Motion in Limine at p. 21; R.__).

In reply, Defendants’ trial counsel contended that the South Carolina Supreme Court’s decision in *Faile v. Bycura* stood for the proposition that evidence of informed consent is relevant any time assumption of the risk is pled as an affirmative defense. (Trial Tr., R. p. 21, lines 2-8; p. 22, lines 2-15; p. 23, lines 15-25; R.__). A review of *Faile*, however, reveals that the issue of informed consent was relevant in that case because Plaintiff had acknowledged in her consent form that surgery “**would probably result in** [certain side effects],” namely stiff toes. *Faile v. Bycura*, 289 S.C. 398, 399, 346 S.E.2d 528, 529 (1986). Although Ms. Turisk acknowledged the existence of certain risks and complications associated with surgery, she was never advised, nor did she acknowledge, that these general risks “would probably” occur in her case. The form did not even list mastectomy as a potential risk of surgery. (Consent Form, Def. Exh. 2, R.__) Indeed, it is difficult to fathom a situation where someone would voluntarily undergo (or even perform) an elective procedure with the understanding that it “would probably result in” necrosis, infection, debridement, and mastectomy.

The lower court reversed its initial decision and accepted Defense counsel's newly-raised interpretation of *Faile*, stating, "Well, it looks like the Supreme Court has told us differently, so I think since they pled it as an affirmative defense, ***the jury will be given a jury instruction regarding the two different standards. Obviously assumption of risk is not an assumption of consenting to deviation from the standard of care, so the jury will have the opportunity to make that distinction.*** But based upon the *Faile* case, I think it is appropriate." [Emphasis added] (Tr. Transcript, p. 24, lines 13-19). As a result of the Court's ruling, Defendants were permitted to advance their theory that informed consent and assumption of the risk were applicable to Ms. Turisk's claim for breach of the standard of care.

Breach of the Standard of Care

Ms. Turisk's medical expert, C. Scott Hultman, M.D., testified as to the standard of care. (Trial Tr., p. 190, line 15 – p. 244, line 20). Dr. Hultman, a member of the faculty at UNC-Chapel Hill and then Johns Hopkins, and a Board Examiner for The American Board of Plastic Surgery, testified that Dr. Schimpf breached the standard of care by selecting the wrong surgical approach for the breast reduction; that his selected approach was contraindicated and carried a high probability of failure for someone with existing implants like Ms. Turisk; and that Dr. Schimpf failed to take into account or even document in his chart the location of the surgical scars from Ms. Turisk's original implant procedure, a critical requirement for mapping out incisions for the surgery he was about to perform to ensure that the already-altered blood supply to the breasts was not disrupted during surgery. (Trial Tr., p. 199, lines 4-10; p. 208, line 16 – p. 210, line 1; R. __). Dr. Hultman also testified that safer, more appropriate approaches could and should have been employed, noting "[T]he key principle in this case is that the wrong operation was chosen to do the breast-reduction/implant removal [...] and that a different approach could

have been done to greatly improve the safety of the operation and ensure success.” (Trial Tr., p. 199, lines 4-10; R. __)

Undisputed Testimony

Disruption of Blood Supply as Proximate Cause of Injury

Plaintiff’s and Defendants’ experts offered competing opinions as to whether Dr. Schimpf breached the standard of care. However, the experts all agreed that Dr. Schimpf disrupted the blood supply to Ms. Turisk’s breasts during his performance of the surgery and that this disruption caused the severe complications Ms. Turisk suffered. Ms. Turisk’s medical expert, Dr. Hultman, testified:

Q. And can you explain to the jury the relationship of the technique employed by Dr. Schimpf to the necrosis infection and ultimately the loss of the breast tissue?

A. Yes. So the sequence of events would be that the incisions were made; breast tissue was removed; the nipple is in the process of basically dying over the course of the next one to two weeks. You might get a little bit of blood flow from across that scar, but not enough to support, what we call, the metabolic demand of the tissue. **This is more than just skin. I mean, it’s nipple, it’s ductwork, it’s glands that have to have a blood supply, and now it’s all gone.**

So this turns into basically a scab, or an eschar. And then when that -- as that is occurring, bacteria get in; the bacteria eat away at the tissues; and then the cycle continues because, as the bacteria eat at the tissues, any remaining blood supply is also gone. **And so when you remove blood supply to the breast, that’s when you get fat necrosis, or breast-tissue necrosis.**

So it’s setting up a cycle of events that we know what happened. I mean, she ended up with a mastectomy. [Emphasis added]

(Trial Tr. p. 226, lines 1-19; Pl.’s Exhibits 1-19, R. __).

Defendants’ medical expert, Dr. Todd Lefkowitz, initially tried to dispute that during and as a result of his surgery, Dr. Schimpf disrupted the blood supply to Ms. Turisk’s breasts.

However, upon having his memory refreshed with his own prior deposition testimony, he agreed, albeit begrudgingly, that Dr. Schimpf had indeed disrupted the blood supply to Ms. Turisk's breasts during and as a result of his surgery:

Q. But it [blood supply] was disrupted as a result of this surgery, correct?

A. It was resulted [sic] at some point during the surgery.

Q. Okay. And during this surgery, Dr. Schimpf's surgery?

A. That's correct.

Q. All right. Thank you. Does that refresh your memory now about you testifying that it was disrupted during the surgery?

A. It was disrupted during the surgery.

(Full exchange and impeachment at Trial Tr. p. 422, line 1 to p. 424, line 7, citing Lefkowitz Depo. Tr. p. 25, lines 18-24, and p. 26, lines 3-6, R. __)

Plaintiff's and Defendants' experts also agreed that Ms. Turisk's complications were a direct result of the surgical procedure that Dr. Schimpf performed. Defendants' own medical expert, Dr. Lefkowitz, expressly acknowledged that Ms. Turisk's medical complications were *the result* of Dr. Schimpf's performance of the procedure:

Q. You agree Ms. Turisk suffered an unfortunate complication *from this procedure*, correct?

A. **I do. Yes, sir.**

Q. Is that something that surgeons have to deal with throughout the course of their career?

A. It is. It's the worst part of our job, 100 percent.

[Emphasis added] (Trial Tr., p. 407, lines 7-12; R. __).

Defendants' infectious disease expert, Dr. Joseph, also acknowledged that Ms. Turisk's necrosis and infection resulted from the lack of blood flow caused by the surgery and explained

how the lack of blood flow caused the necrosis and infection can only be cured with surgery, stating, “You can’t cure something that doesn't have a blood flow, and the only way this was cured was by surgery, by removing it.” (Trial Tr., p. 368, lines 22-25; R. __). He also provided some insight on how Dr. Schimpf’s disruption of the blood supply caused that necrosis and infection:

A. [...] Fat necrosis is always a secondary infection, one that occurs after the surgical procedure.

Q. And do you believe that to be the case in Ms. Turisk's situation?

A. Absolutely.

Q. So if I’m understanding correctly, she would have had the fat necrosis first, and then the infection developed later?

A. Right. **The fat necrosis is invisible**, it’s under the skin, and all you can feel after surgery is a lump or something that's painful. **But when it causes skin damage, then it creates the secondary infection**, and that’s something visible by examination.

(Trial Tr., p. 370, lines 15-25) [Emphasis added]

Ms. Turisk’s medical expert, Dr. Hultman, provided further testimony that Ms. Turisk’s injuries were a direct and proximate result of Dr. Schimpf’s disruption of blood supply during surgery, stating, “when you remove blood supply to the breast, that’s when you get fat necrosis, or breast-tissue necrosis.” (Trial Tr., p. 226, lines 16-17; R. __). He further addressed how this necrosis led to infection and the loss of Ms. Turisk’s breasts:

Well, ultimately she required a complete mastectomy on the right side and a partial mastectomy on the left, but in the short run she ended up with a very severe infection on the right side, with complete loss of the nipple, severe fat necrosis which continued to progress with infection, and ultimately loss of those tissues.

And on the left side, it was a very, very close call. She ended up almost losing her nipple. Looks like she lost about a third of that,

but the rest of it did regenerate. But, as we know, she ended up having to have a partial mastectomy there for fat necrosis.

(Trial Tr., p. 212, lines 5-15; Pl.'s Exhibits 1-19, R. __).

Comparative Negligence

Despite the comparative/contributory negligence defense raised in Defendants' Answer, the experts also agreed that neither Ms. Turisk nor her caretakers did anything to cause or contribute to her injuries. Plaintiff's medical expert, Dr. Hultman, testified:

Q. Based on your review of this case, do you have an opinion as to whether Rebecca did anything to cause the fat necrosis and infection?

A. There is nothing in the record that indicates that she did anything to hasten this course or to cause this.

(Trial Tr., p. 212, lines 1-20; R. __)

Defendants' medical expert, Dr. Lefkowitz, agreed:

Q. All right. So you've also agreed that—I think you responded to this on direct—that Ms. Turisk, nor her caretakers, nor any of her subsequent physicians, did anything to cause the condition she finds herself in today?

A. No, sir. Nothing would suggest that.

Q. And the procedures she's had since then were done appropriately and were medically necessary?

A. I have no criticism with any of that.

(Trial Tr., p. 420, lines 17-19; R. __).

Defendants' infectious disease expert, Dr. Joseph, also agreed:

Q. Do you have any criticisms of anything that Ms. Turisk did in her postoperative care?

A. Oh, of course not.

Q. Do you have any criticisms of anything Ms. Turisk's caregivers, the laypeople in her life who took care of her, do you have any criticisms of them?

A. I do not.

(Trial Tr., p. 374, line 22 – p. 375, line 3; R. __).

Even the Defendant, Dr. Schimpf, agreed that Ms. Turisk did nothing to contribute to her injuries:

Q. So I want to get a few things out of the way just to sort of be certain that I hear you correctly. You agree that Rebecca did not do anything herself to cause this outcome; is that correct?

A. I'm unaware of anything. That's correct.

(Trial Tr., p. 325, line 25 – p. 326, line 2; R. __).

Plaintiff's Motions for Directed Verdict

At the conclusion of Defendants' case, Ms. Turisk's trial counsel moved for a directed verdict as to two affirmative defenses: comparative negligence and assumption of the risk. (Trial Tr., p. 427, line 2 – p. 428, line 4; R. __). As to comparative negligence, Ms. Turisk's trial counsel noted that no testimony had been elicited to support Defendants' contention that Ms. Turisk contributed to the outcome of the surgery nor had she been negligent in any way; and that—to the contrary—every doctor testified she did nothing wrong. Defendants' counsel conceded as much, and the motion was granted. (Trial Tr., p. 427, lines 4-17; R. __).

As to the assumption of risk defense, Ms. Turisk's trial counsel noted Ms. Turisk did not have any input on Dr. Schimpf's choice of surgical technique; that everyone agreed the blood supply to Ms. Turisk's breasts was disrupted as a result of the surgical technique Dr. Schimpf employed; and it was undisputed that Ms. Turisk did nothing to cause the outcome in this case. (Trial Tr., p. 427, line 19 – p. 428, line 4). Despite Plaintiff's arguments, the court again

summarily denied the Motion without so much as waiting for a response from the Defendants, stating, “There has been evidence presented creating a question of fact for the jury to determine on that issue.” (Trial Tr., p. 428, lines 2-4; R. __). In rendering its decision, however, the court failed to identify any evidence to support its ruling.

Plaintiff’s Objection to Jury Charge for Assumption of Risk

Ms. Turisk had previously moved to exclude evidence and testimony related to informed consent and assumption of the risk, emphasizing that mere awareness of the general risks of surgery is not a defense against a claim for deviation from the standard of care, and that providing evidence of Ms. Turisk’s informed consent was likely to mislead the jury to believe her consent to surgery was tantamount to consent to injuries resulting from that surgery. (Trial Tr., p. 19, line 14-p. 25, line 19; Motion in Limine, p. 19-22; R. __).

Ms. Turisk’s trial counsel also objected to the court’s inclusion of a jury charge for assumption of the risk. (Trial Tr., p. 432, line 13 – p. 433, line 5; R. __). Ms. Turisk’s counsel noted the jury charge was not appropriate because a) Dr. Schimpf testified he considered Ms. Turisk a high-risk patient (i.e., not a “straight-forward case” due to ptosis (the position of her nipples relative to her breasts), the size of her breasts, and her previous surgery), but then failed to offer *any* evidence that he actually informed her of this alleged high-risk status prior to surgery, and b) Dr. Schimpf’s records did not reflect that he considered Ms. Turisk a high-risk candidate for the surgery he performed or that he had any discussions with her about the same. Dr. Schimpf testified, “this is a complex breast case, very complex,” but the record is devoid of any evidence that he informed Ms. Turisk of this opinion. (Trial Tr., p. 267, lines 5-6; R. __). There was also zero evidence that Dr. Schimpf had any conversation with Ms. Turisk as to whether the station (i.e., position) of her nipple or prior surgery put her at a greater risk for

complications, and certainly zero evidence supporting the assertion that Ms. Turisk was informed of her alleged high-risk status and thereafter assumed the risk. (Trial Tr., p. 432, line 13 – p. 433, line 5; see also Dr. Schimpf’s testimony at Trial Tr., p. 276, line 21 to p. 277, line 1, p. 278, line 22 to p. 279, line 7, and p. 293, lines 3 to 9; R. __).

Additionally, Ms. Turisk’s counsel noted that Defendants’ assumption of the risk defense was directly undermined by Dr. Schimpf’s own prior deposition testimony, wherein he testified that nothing about Ms. Turisk’s case gave him any indication that she would have complications. (Trial Tr., p. 432, line 13- p.433, line 5; R. __). Even Defendants’ Answer asserts that Defendants could not have “foreseen or anticipated in the exercise of ordinary care the circumstances that arose and/or became evident immediately prior to the incident.” (Answer at p. 4, R. __).

Despite Ms. Turisk’s argument that Defendants had produced insufficient evidence to support a jury charge for assumption of the risk, the Court summarily denied the motion. Once again—without waiting to hear any argument from Defendants—the Court stated, “I respectfully disagree. He did go over the assumption of risk form with her, and the potential outcomes were listed in there as to what happens. So your motion is respectfully denied.” (Trial Tr., p. 433, lines 2-5; R. __). In denying the motion, the Court once again failed to acknowledge that Ms. Turisk had brought a claim for breach of the standard of care, and that a party’s awareness of general risks associated with surgery is not a defense against a claim for deviation from the standard of care, nor a waiver as to liability. The Court also failed to acknowledge there was zero evidence supporting Defendants’ claim that Ms. Turisk was high-risk and—more importantly—zero evidence that Defendants informed her of this status prior to surgery or informed her that mastectomies could result.

As a result of the Court's ruling, the jury was instructed on assumption of the risk and provided with the following charge:

Court: Defendants have asserted that the plaintiff assumed the risk of her alleged injuries. There are four elements to establish assumption of the risk: 1) The plaintiff must have knowledge of the facts constituting a dangerous condition; 2) The plaintiff must know the condition is dangerous; 3) The plaintiff must appreciate the nature and extent of the danger; and, 4) The plaintiff must voluntarily expose herself to the danger.

Assumption of the risk maybe implied from the plaintiff's conduct. Implied assumption of the risk arises when the plaintiff implicitly, rather than expressly, assumes known risks. In this case, the defendant contends that primarily implied assumption of the risk applies. Primary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are inherent in a particular activity.

Primary implied assumption of the risk is not a trial affirmative defense, but instead goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff. In other words, it is simply a part of the initial negligence analysis.

(Trial Tr., p. 479, line 17 – p. 480, line 7, Jury Instructions; R. __)

Thereafter, the jury retired to the jury room with a print-out of the court's charges. After one failed attempt at reaching a unanimous verdict, and a subsequent *Allen* charge by the judge, the jury presented the court with a question regarding the instructions they received:

The Court: [T]he note says: As, we, the jury move closer to unanimous decision, if we find the defendant deviated from the standard of care, no. 1, but not deviation causing plaintiff's injury, can we understand the ramifications to the defendant?

(Trial Tr., p. 487, line 24 – p. 488, line 5; R. __)

After reading the note, the Court informed the attorneys that despite the jury's request, it would not advise them of the ramifications of said judgment, but rather, simply instruct them to stop deliberating if they did not find that Defendants' deviation from the standard of care was a

proximate cause of Plaintiff's injuries. (Trial Tr., p. 488, lines 6 – 10; R. __) Understanding the jury's confusion and potential for an inconsistent verdict, Ms. Turisk's counsel objected to the court's proposed response, noting that it could lead to an award of zero money damages despite a finding that Defendants had violated the standard of care. (Trial Tr., p. 488, line 11 – p. 489, line 6). The Court acknowledged the objection but overruled it. (Id., R. __)

Troubled by this ruling, Ms. Turisk's trial counsel again voiced concern regarding the jury's confusion and the potential for an inconsistent verdict and moved that the jury be provided with additional instructions before the verdict was read. (Trial Tr., p. 490, line 22 – p. 491, line 11; R. __). In support of the Motion, Ms. Turisk's trial counsel noted that Plaintiff's and Defendants' respective experts all agreed that Dr. Schimpf's performance of the surgery disrupted the blood supply to Ms. Turisk's breasts, and that said disruption had caused the necrosis and infection:

ATTORNEY TANENBAUM: Your Honor, I've been thinking about this. It seems to me -- and this will be the subject of our post trial motions, if necessary -- **that all of the evidence in the case is -- all of it on both sides -- that the reason that this fatty necrotic tissue was created, so to speak, was a lack of blood flow, adequate blood flow,** whether it was, our position, as a result of the inflow being reduced, or the defendant's, the outflow being reduced. **Their infectious diseases expert said that; our expert said that; their expert said that; and the defendant said that.**

So I don't know how then that you'd find a breach of the standard of care, because the only care given was this operative procedure that did, in turn, cause the damages, and the plaintiff would be entitled to a verdict. And I would ask the Court to consider giving that instruction to the jury. [Emphasis added]

(Trial Tr., p. 490, line 22 – p. 491, line 11; R. __).

Again, the Court summarily denied the motion, simply stating, “No, sir, not at this juncture.”

(Trial Tr., p. 491, line 12, R. __).

Verdict

On November 17, 2022, the jury reached a verdict, unanimously finding that Defendants had deviated from the standard of care, but that said deviation was not the proximate cause of Plaintiff's injuries. (Trial Tr., p. 491, line 23 – p. 492, line, 9; Verdict Form and Form 4 Order, R. __). As a result, the jury did not reach the question of damages. Ms. Turisk received zero compensation for her injuries despite having incurred over \$500,000 in medical bills for the treatment of necrosis and infection—complications which Defendants' own experts attributed to the surgical procedure that Dr. Schimpf performed. (Pl's Exhibit 20, Summary of Bills, R. __).

Post-Trial Motions

On Monday, November 28, 2022, Ms. Turisk timely filed Plaintiff's Motion for a New Trial as to Proximate Cause and Damages Only, or in the Alternative for Judgment Notwithstanding the Verdict or Alternatively for a New Trial Absolute. (Post-trial Motion, R. __). Plaintiff sought relief on the grounds that the verdict was inconsistent in light of the evidence presented at trial and indicated the jury was confused, and because the verdict was contrary to the weight of the evidence. Plaintiff noted, *inter alia*, that every single expert, including Defendants' plastic surgery expert, Dr. Lefkowitz, and Defendants' infectious diseases expert, Dr. Joseph, testified that Dr. Schimpf disrupted the blood flow to Ms. Turisk's breasts during performance of the subject procedure, and that the disruption of blood flow caused the resulting necrosis and infection. (Post-trial Motion, R. __). As Dr. Joseph testified, "You can't cure something that doesn't have a blood flow, and the only way this was cured was by surgery, by removing it." (Trial Tr., p. 368, lines 22-25; R. __).

Ms. Turisk's Motion also requested a new trial pursuant to South Carolina's thirteenth juror doctrine. (Post-trial Motion, R. __). Plaintiff asserted that the verdict was contrary to the preponderance of the evidence—if not all of the evidence—and indicated that the jury was

confused as to the issue of proximate cause. In support of her motion, Plaintiff noted that all of the experts acknowledged Dr. Schimpf disrupted the blood supply to Ms. Turisk's breasts during the course of surgery and that it was the disruption of blood supply that caused the necrosis and infection. (Post-trial Motion, R. __).

On December 2, 2022, Defendants filed a Response in Opposition to Plaintiff's Post-Trial motion. (Memo in Opposition, R. __). Despite the uncontroverted testimony by Defendants' own experts that a) Plaintiff's complications were a result of the surgery; b) the disruption of blood supply during surgery caused the resulting necrosis and infection, necessitating even further surgery; and c) neither Plaintiff, nor her caretakers, nor her subsequent physicians did anything to cause her condition, Defendants contended that the record did not support Plaintiff's assertion that surgery was a proximate cause of Ms. Turisk's injuries. (Memo in Opposition, at p. 4; R. __).

Defendants further argued that the verdict was not inconsistent or at least not irreconcilably inconsistent with the weight of the evidence. (Memo in Opposition, at p. 4; R. __). Defendants then attempted to "harmonize" the inconsistent verdict by intimating that Plaintiff's criticism of Defendants' post-operative treatment somehow amounted to a second, distinct theory of liability, *completely removed from—and unaffected by—the surgery itself*. (Id., R. __). Finally, Defendants argued that despite the jury's *unanimous finding* that Defendants *deviated from the standard of care*, Defendants were still not liable under a theory of assumption of the risk. (Memo in Opposition, at pp. 6-7; R. __).

Thereafter, on December 12, 2022, the Court, without holding a hearing, entered an Order denying Plaintiff's post-trial motion, adopting each and every one of Defendants'

arguments, and *expressly finding that application of the assumption of the risk supports the jury's verdict of no liability*. (Order, R. __).¹

Notice of Appeal

On January 9, 2023, Plaintiff timely filed an initial Notice of Appeal, noting that the lower court had yet to file the Verdict Form in this case but that Plaintiff would supplement the Notice of Appeal upon entry of the same. The lower court then entered the Verdict Form and corresponding Form 4 Order on January 17, 2023. (R. __). Plaintiff filed her supplement to the Notice of Appeal on January 18, 2023. This appeal follows.

STANDARD OF REVIEW

Jury Instructions

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence. *Berberich v. Jack*, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011) (quoting *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008)).

It is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial. *Miller v. Schmid Labs., Inc.*, 307 S.C. 140, 142-43, 414 S.E.2d 126, 127 (1992). A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial. *Cole*, 378 S.C. at 404, 663 S.E.2d at 33. To warrant reversal, the appellant must show that the erroneous jury charge was prejudicial. *Id.* at 405, 663 S.E.2d at 33 (citing *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961)). No definite rule of law

¹ The order contains "proposed order" in the caption as it was prepared by Defendants' counsel. The trial court signed the order and filed it with the Court.

governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. *State v. Fripp*, 397 S.C. 455, 456, 725 S.E.2d 136, 139 (Ct. App. 2012).

Motions for Directed Verdict and JNOV

“When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court.” *Fettler v. Gentner*, 396 S.C. 461, 466, 722 S.E.2d 26, 29 (Ct. App. 2012) (quoting *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 405, 680 S.E.2d 778, 781 (Ct. App. 2009)). “The Court is required to view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the non-moving party.” *Id.* at 466, 722 S.E.2d at 29 (quoting *Gibson*, 383 S.C. at 405, 680 S.E.2d at 781). “The appellate court will reverse the trial court's ruling on a [directed verdict] motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law.” *Zinn v. CFI Sales & Mktg., Ltd.*, 415 S.C. 93, 108-09, 780 S.E.2d 611, 619 (Ct. App. 2015) (quoting *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006)).

Motions for New Trial

“A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State”. Rule 59(a)(1), SCRPC. “The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and the trial court’s decision will not be disturbed absent an abuse of discretion.” *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 569, 658 S.E.2d 80, 93 (2008).

“A trial judge’s order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was

controlled by an error of law.” *Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996) (citing *S.C. State Highway Dept. v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976)). “[W]hen a verdict is so confused that the jury's intent is unclear, the safest and best course is to order a new trial.” *Johnson v. Parker*, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983).

ARGUMENT

I. The trial court erred in charging the jury as to Assumption of the Risk.

A. The Doctrine of Assumption of the Risk is irrelevant and inapplicable in the context of the instant medical malpractice action.

In the present case, the trial court charged the jury on the elements for **Assumption of the Risk** and the principle of **Primary Implied Assumption of the Risk**. (R. __). However, Assumption of the Risk has little legitimate application in the medical malpractice context because a patient that undergoes surgery does not assume the risk that the physician will deviate from the standard of care. Said differently, a patient is entitled to expect that medical services will be rendered in accordance with the standard of care. The South Carolina Supreme Court’s decision in *Cole v. Raut* is instructive on this issue. *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30 (2008). In *Cole*, the South Carolina Supreme Court affirmed the Court of Appeals’ finding that the trial court erred in charging Assumption of the Risk. Although the plaintiff in that case had signed two consent forms acknowledging the risks associated with vaginal birth after caesarian section, the Supreme Court found that a jury charge on Assumption of the Risk was improper because the basis for plaintiff’s medical negligence claim was that the defendants had deviated from the standard of care by delaying plaintiff’s c-section. *Id.* at 405, 663 S.E.2d at 33. The Supreme Court found a jury charge on Assumption of the Risk was erroneous where there was no evidence the plaintiff “recognized any danger posed by a delay between the doctor’s observation of the warning signs indicating the need for a C-section delivery and actual

commencement of a C-section delivery,” so she “could not understand and appreciate the nature and extent of the danger of a delay.” *Id.* at 405, 663 S.E.2d at 33.

The conclusion that Assumption of the Risk is generally inapplicable in the context of a medical malpractice action is also well-established and supported by jurisprudence across the country. *See Spar v. Cha*, 907 N.E.2d 974, 982 (Ind. 2009) (recognizing that “assumption of risk—whether in the express, primary, or secondary sense—has little legitimate application in the medical malpractice context” because “a patient is entitled to expect that medical services be rendered in accordance with the standard of care, however risky the procedure may be.”); *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 884–85 (Del. Super. Ct. 2005) (noting that a primary implied assumption of the risk defense generally does not apply in the healthcare context as it would require a patient to consent to allow a healthcare provider to exercise less than ordinary care in the provision of services); *Morrison v. MacNamara*, 407 A.2d 555, 568 (D.C. 1979) (noting that “because of the doctor's ability to understand and interpret medical matters, the doctor generally owes a greater duty to his patient than the patient owes to himself”).

A review of the trial record further demonstrates that the doctrine of Assumption of the Risk is irrelevant and inapplicable to the facts in this case. “The doctrine [of Assumption of the Risk] is predicated on the factual situation of a defendant’s acts alone creating the danger and causing the accident, with the plaintiff’s act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted in the injury.” *Davenport v. Cotton Hope Plantation*, 333 S.C. 71, 79, 508 S.E.2d 565, 569 (1998) (citing *Senn v. Sun Printing Co.*, 295 S.C. 169, 173, 367 S.E.2d 456, 458 (Ct. App. 1988)). In *Davenport*, the South Carolina Supreme Court expressly abolished the doctrine of Assumption of the Risk as an absolute bar to recovery. Looking at the doctrine within the framework of South Carolina’s comparative

negligence system, the Court held “a plaintiff is not barred from recovery by the doctrine of assumption of risk unless the degree of [plaintiff’s] fault arising therefrom is greater than the negligence of the defendant.” *Id.* at 87, 508 S.E.2d at 573-74. [Emphasis added].

In the present case, it is undisputed by Defendants and Defendants’ own experts that Ms. Turisk did nothing to contribute to her injuries and that she was not negligent in any way. (Trial Tr., p. 212, lines 1-20; p. 420, lines 17-19; p. 374, line 22 – p. 375, line 3; p. 325, line 25 – p. 326, line 2; R.__). Indeed, Defendants’ own counsel conceded that no testimony had been elicited to support Defendants’ contention that Ms. Turisk contributed to the outcome of the surgery or had acted negligently. (Trial Tr., p. 427, lines 4-17; R.__). The trial court even entered a directed verdict in favor of Ms. Turisk as to the issue of comparative negligence.² (R. at *Id.*). Accordingly, even under the most liberal reading of *Davenport*, there is no scenario under which Ms. Turisk could be found to share any “degree of fault” in relation to her injuries. It was, therefore, error for the trial court to charge the jury as to Assumption of the Risk where it was already established—as a matter of law—that Ms. Turisk did not contribute to the outcome of her surgery or act negligently in any way.

Additionally, “Primary implied assumption of the risk arises when the plaintiff impliedly assumes those risks that are inherent in a particular activity.” *Davenport*, 333 S.C. at 81, 508 S.E.2d at 570. [Emphasis added]. “Primary implied assumption of the risk is not a true affirmative defense, but instead goes to the initial determination of whether *the defendant’s legal duty* encompass the risk encountered by the plaintiff.” *Id.* at 81, 508 S.E.2d at 570. “In its primary sense, implied assumption of risk focuses not on the plaintiff’s conduct in assuming the risk, but *on the defendant’s general duty of care*...Clearly, primary implied assumption of risk

² As expected, the directed verdict on comparative negligence was entered outside the presence of the jury and prior to the trial court’s reading of the jury charge.

is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case [of negligence] *by failing to establish that a duty exists.*” *Id.* at 81, 508 S.E.2d at 570 (quoting *Perez v. McConkey*, 872 S.W.2d 897, 902 (Tenn. 1994)). [Emphasis added]

Primary Implied Assumption of the Risk is most commonly at issue in cases involving spectator sports. *See Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 637 S.E.2d 560 (2006) (finding that hockey arena owners and operators do not owe a duty to protect spectators from flying pucks). Surgery is not a spectator sport. It is incontrovertible that surgeons owe their patients a duty to render medical services in accordance with the standard of care. Although Plaintiff’s and Defendants’ experts offered competing opinions as to whether Dr. Schimpf *deviated* from the standard of care, there was never any question as to whether a duty existed in the first place. It was error for the trial court to charge the jury as to Primary Implied Assumption of the Risk because the existence of a duty was never in doubt. *See Davenport*, cited *supra*, noting that the general question is whether “a duty exists.”

Finally, the trial court erred in relying on Defendants’ interpretation of *Faile v. Bycura* as justification for charging the jury on Assumption of the Risk. (Tr. Transcript, p. 24, lines 13-19). As noted in Appellant’s Statement of the Case, there is a significant difference between the present case and *Faile*. Specifically, the plaintiff in *Faile* signed a consent form acknowledging “that the surgery would probably result in [certain side effects],” namely stiff toes. *Faile v. Bycura*, 289 S.C. 398, 399, 346 S.E.2d 528, 529 (1986) [Emphasis added]. Although Ms. Turisk acknowledged the existence of certain general risks and complications associated with surgery, she was never advised, nor did she acknowledge, that these risks “would probably” occur in her case. In this case, the form did not even list mastectomy as a potential risk of surgery. (Consent Form, Def. Exh. 2, R.__). As such, Ms. Turisk could not “have freely and voluntarily exposed

[her]self to a known danger which [s]he understood and appreciated,” which the *Faile* court notes is **required** for the doctrine of assumption of the risk to apply. *Faile*, 289 S.C. at 399, 346 S.E.2d at 529.

“It is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial.” *Miller v. Schmid Labs., Inc.*, 307 S.C. 140, 142-43, 414 S.E.2d 126, 127 (1992) (quoting *Dunsil v. E.M. Jones Chevrolet Co.*, 268 S.C. 291, 295, 233 S.E.2d 101, 103 (1977)). Appellant respectfully submits that Assumption of the Risk, both as a general doctrine and in its primary implied sense, is inapplicable to the facts in the present case. It was reversible error for the trial court to charge the jury as to this principle. Accordingly, Plaintiff respectfully requests that this Court reverse the verdict and remand this case for a new trial on the merits.

B. The Trial Court abused its discretion in failing to grant Plaintiff’s motion for a directed verdict as to Assumption of the Risk, and in denying Plaintiff’s motion to exclude the principle as a jury charge.

Defendants’ own medical experts attributed the complications which Ms. Turisk suffered (i.e., necrosis and infection) to Dr. Schimpf’s performance of the surgical procedure. Specifically, all of the experts acknowledged that Dr. Schimpf had disrupted the blood supply to Ms. Turisk’s breasts during the course of surgery and that it was the disruption of blood supply which caused the necrosis and infection. (Trial Tr., p. 226, lines 1-19; p. 422, line 1-p. 424, line 7, citing Lefkowitz Depo. Tr., p. 25, lines 18-24 and p. 26, lines 3-6; Trial Tr., p. 407, lines 7-12; p. 361, lines 9-16; p. 370, lines 15-25; p. 212, lines 5-15; and p. 368, lines 22-25; R. __).

Given the foregoing, Ms. Turisk’s trial counsel moved for a directed verdict as to Defendants’ Assumption of the Risk defense. In support of the motion, Ms. Turisk’s trial counsel noted that Ms. Turisk did not have any input on Dr. Schimpf’s choice of surgical

technique; that everyone agreed the blood supply to Ms. Turisk's breasts was disrupted as a result of the surgical technique Dr. Schimpf employed; and that it was undisputed that Ms. Turisk did nothing to cause the outcome in this case. (Trial Tr., p. 427, line 19 – p. 428, line 4). Despite Plaintiff's arguments, the court summarily denied the Motion without so much as waiting for a response from the Defendants, stating, "There has been evidence presented creating a question of fact for the jury to determine on that issue." (Trial Tr., p. 428, lines 2-4; R.__). In rendering its decision, however, the court notably failed to identify *any* evidence to support its ruling.

"The exercise of a trial court's discretion implies conscientious judgment, not arbitrary action, and takes account of the law and particular circumstances of the case, being directed by the reason and conscience of the judge to a just result." *Horn v. Davis Elec. Constructors*. 312 S.C. 363, 366, 440 S.E.2d 398, 400 (Ct. App. 1994) (citing *Nienow v. Nienow*. 268 S.C. 161, 232 S.E.2d 504 (1977); *State v. Hill*. 266 S.C. 49, 221 S.E.2d 398 (1976)). The trial court abused its discretion by summarily denying Appellant's Motion for a Directed Verdict. As noted above, the trial court did not even consider a response from the Defendants before denying the motion, broadly and nonspecifically stating "There has been evidence presented creating a question of fact for the jury to determine on that issue." (Trial Tr., p. 428, lines 2-4; R.__). At the same time, the trial court failed to identify any evidence to support its ruling. Appellant respectfully submits that the swift and unspecific nature of this ruling demonstrates a lack of conscientious judgment as to this issue.

In addition to moving for a directed verdict on Assumption of the Risk, Appellant's trial counsel also moved to exclude a jury charge as to this principle. (Trial Tr., p. 432, line 13 – p. 433, line 5; R.__). Ms. Turisk's counsel noted that the jury charge for Assumption of the Risk

was not appropriate because a) Dr. Schimpf testified he considered Ms. Turisk a high-risk patient, but then failed to offer *any* evidence that he actually informed her of this alleged high-risk status prior to surgery, and b) Dr. Schimpf's records did not reflect that he considered Ms. Turisk was a high-risk candidate for the surgery he performed or that he had any discussions with her about the same. Specifically, there was zero evidence that Dr. Schimpf had any conversation with Ms. Turisk as to whether the station (i.e., position) of her nipple or her prior surgery put her at a greater risk for complications, and certainly zero evidence supporting the assertion that Ms. Turisk was informed of this "high-risk status" and thereafter assumed the risk. (Trial Tr., p. 432, line 13 – p. 433, line 5; R. __)

Additionally, Ms. Turisk's counsel noted that Defendants' assumption of the risk defense was directly undermined by Dr. Schimpf's own prior deposition testimony, wherein he testified that nothing about Ms. Turisk's case gave him any indication that she would have complications. (*Id.* at R. __). Even Defendants' Answer asserts that Defendants could not have "foreseen or anticipated in the exercise of ordinary care the circumstances that arose and/or became evident immediately prior to the incident." (Answer at p. 4, R. __).

Despite Ms. Turisk's argument that Defendants had produced insufficient evidence to support a jury charge on Assumption of the Risk, the Court summarily denied the motion. Once again—without waiting to hear any argument from Defendants—the Court stated, "I respectfully disagree. He did go over the assumption of risk form with her, and the potential outcomes were listed in there as to what happens. So your motion is respectfully denied." (Trial Tr., p. 433, lines 2-5; R. __). In denying the motion, the Court once again failed to acknowledge that Ms. Turisk had brought a claim for breach of the standard of care, and that a party's awareness of general risks associated with surgery is not a defense against a claim for deviation from the

standard of care, nor a waiver as to liability. The court also failed to acknowledge there was zero evidence supporting Dr. Schimpf's claim that he considered Ms. Turisk a high-risk candidate prior to surgery and—more importantly—zero evidence that he informed Ms. Turisk that her anatomy and previous surgery put her at a higher risk for complications. Additionally, while the consent form acknowledged “the possibility of additional procedures” following surgery, there was absolutely no reference to the mastectomies that Ms. Turisk was forced to undergo.

As a result of the trial court's ruling, the jury was instructed on Assumption of the Risk. Appellant respectfully submits the court's reflexive ruling demonstrates a lack of conscientious judgment as to this issue and amounts to an abuse of discretion meriting reversal.

C. The Trial Court's jury charge on Assumption of the Risk was prejudicial to Plaintiff; the charge was confusing to the jury and affected the outcome of the trial.

“A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial.” *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). As noted above, in *Cole v. Raut*, the South Carolina Supreme Court affirmed the Court of Appeals' finding that the trial court erred in charging Assumption of the Risk. *Id.* at 405, 663 S.E.2d at 33. However, the Supreme Court found that *under the specific facts of that case*, the erroneous jury charge did not amount to prejudicial error, noting “without a more specific argument showing how the Coles were prejudiced, we hold that the erroneous charge on assumption of the risk does not amount to reversible error.” *Id.* at 406, 663 S.E.2d at 34.

The present case is distinguishable from *Cole* on various fronts. First, the jury in *Cole* rendered a general verdict in favor of the defendant physician, unlike the present case where the jury found the Defendants deviated from the standard of care. As a result, the Supreme Court would not speculate as to whether the defense verdict was a result of a) the improper charge or,

b) a finding that defendant had acted without negligence, stating, “It would be far too speculative on the part of this Court to find prejudicial error given the evidence presented at trial [...] that Dr. Raut was not negligent in ordering Cole’s C-section when she did.” *Id.* 663 S.E.2d at 34. The Court reasoned, “there was ample evidence at trial from which a jury **could have** concluded that Dr. Raut was not negligent in rendering medical assistance during Cole’s labor and delivery.” *Id.* at 407, 663 S.E.2d at 34. [Emphasis added]. In the present case, however, there is zero doubt that Dr. Schimpf was negligent in rendering medical care to Ms. Turisk **because** the jury unanimously found that Defendants deviated from the standard of care. (Verdict Form, R. __). Accordingly, unlike in *Cole*, we need not speculate as to the jury’s reasoning.

In addition, it is undisputed that Dr. Schimpf **caused** Ms. Turisk’s injuries. Every single expert in this case, **including** Defendants’ plastic surgery expert, Dr. Lefkowitz, and Defendants’ infectious disease expert, Dr. Joseph, testified that Dr. Schimpf disrupted the blood supply to Ms. Turisk’s breasts during surgery and that the disruption of blood supply caused the necrosis and infection. (Trial Tr. p. 226, lines 1-19; p. 422, line 1-p. 424, line 7, citing Lefkowitz Depo. Tr., p. 25, lines 18-24 and p. 26, lines 3-6; Trial Tr., p. 407, lines 7-12; p. 361, lines 9-16; p. 368, lines 22-25; p. 370, lines 15-25; and p. 212, lines 5-15). The jury’s finding as to proximate cause is contrary to the preponderance of the evidence, if not all the evidence, and clearly indicates the jury was confused. “A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial.” *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011). That is exactly what happened in the present case.

This case is also distinguishable from *Cole* because the jury instructions here lack the type of redemptive language the Supreme Court found in that case. In *Cole*, the Supreme Court

considered the entire jury charge in light of the evidence and issues presented at trial. *Id.* at 406, 663 S.E.2d at 34. Having reviewed the case-specific evidence, the Court found that the court's jury charge on assumption of the risk was not prejudicial to plaintiffs because it contained clarifying language within the erroneous charge itself:

I charge you, if you find that the plaintiff freely and voluntarily exposed herself to a known danger and understood and appreciated the danger, then in such circumstance your verdict would be for the defendant. ***However, I charge you, on the other hand,*** if you find that the plaintiff's injuries and negligence were the result of the defendant's negligence, then in such circumstance, your verdict would be for the plaintiff.

Cole, 378 S.C. at 406, 663 S.E.2d at 34. [Emphasis added].

In stark contrast, the diffuse nature of the trial court's jury instruction in the present case cannot compensate for the confusion and ambiguity it creates. Here, the trial court instructed the jury on Assumption of the Risk as follows:

Defendants have asserted that the plaintiff assumed the risk of her alleged injuries. There are four elements to establish assumption of the risk: 1) The plaintiff must have knowledge of the facts constituting a dangerous condition; 2) The plaintiff must know the condition is dangerous; 3) The plaintiff must appreciate the nature and extent of the danger; and, 4) The plaintiff must voluntarily expose herself to the danger.

Assumption of the risk maybe implied from the plaintiff's conduct. Implied assumption of the risk arises when the plaintiff implicitly, rather than expressly, assumes known risks.

In this case, the defendant contends that primarily implied assumption of the risk applies. Primary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are inherent in a particular activity.

Primary implied assumption of the risk is not a trial affirmative defense, but instead goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff. In other words, it is simply a part of the initial negligence analysis.

(Trial Tr., p. 479, line 14 -p. 480, line 7, R. __)

Unlike in *Cole*, the jury instruction on Assumption of the Risk in this case was diffuse and did not contain clarifying language within and/or immediately following the charge itself. As a result, the charge was confusing to the jury and prejudicial to Ms. Turisk. “Conflicting and irrelevant instructions constitute reversible error [;] and a trial Judge ought to take care not to confuse the jury by charging them on legal principles which are inapplicable to the case on trial.” *Wright v. Harris*, 228 S.C. 144, 148, 89 S.E.2d 97, 98 (1955) (citations omitted). It is clear that the jury instruction had the potential to confuse the jury. Accordingly, this court should reverse and remand this case for a new trial. *See Berberich v. Jack*, 392 S.C. 278, 295, 709 S.E.2d 607, 616 (2011) (“Because the jury instructions in this case had the potential to confuse the jury, we reverse and remand for a new trial in accordance with this decision.”).

II. The trial court erred in denying Appellant’s Post-Trial Motion for a New Trial, or in the Alternative for Judgment Notwithstanding the Verdict, or Alternatively for a New Trial Absolute.

A. The verdict as to proximate cause is contrary to the weight of the evidence.

There was never any doubt at trial that Defendants caused Plaintiffs’ injuries. As noted above, Plaintiff’s and Defendants’ experts agreed that it was Dr. Schimpf who disrupted the blood supply to Plaintiff’s breasts and that the disruption in blood supply caused necrosis and infection. It is also undisputed that neither Plaintiff, nor her caretakers, nor her subsequent physicians did anything to cause and/or contribute to Ms. Turisk’s injuries, and that the multiple post-operative procedures she has been forced to undergo as a result of these injuries, including debridements and mastectomies, were all medically necessary. (Trial Tr., p. 212, lines 1-20; p. 420, lines 17-19; p. 374, line 22 – p. 375, line 3; Trial Tr., p. 325, line 25 – p. 326, line 2.; p. 427, lines 4-17; R. __).

“Proximate cause is the efficient or direct cause; **the thing that brings about the complained of injuries.**” *McKnight v. S.C. Dept. of Corrections*, 385 S.C. 380, 386, 684 S.E.2d 566, 569 (Ct. App. 2009). [Emphasis added]. In the present case, there was no controversy as to whether Defendants caused Plaintiff’s injuries, but, rather, as to whether they deviated from the standard of care in doing so. The jury unanimously found that they did. It was error for the Court to find that Plaintiff “did not prove her damages were proximately caused by Defendants’ breach,” when all of the evidence, including all the expert testimony in this case, establishes otherwise. (Order, p. 5; R.__). “Ordinarily proximate cause is a question for the jury, but when the evidence is susceptible to only one inference, it becomes a matter of law for the court.” *McKnight*, 385 S.C. at 387, 684 S.E.2d at 569; *Oliver v. S.C. Dept. of Highways & Public Transp.*, 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992); *see also Tuten v. Joel*, 410 S.C. 104, 116, 763 S.E.2d 54, 61 (Ct. App. 2014). Here, there could only be one inference from the evidence: Dr. Schimpf’s disruption of blood supply to Ms. Turisk’s breast caused the necrosis and infection. That is what the experts for both Plaintiff and Defendants testified to at trial.

Additionally, each of the elements for proximate cause were met in this case. Proximate cause requires proof of (1) causation in fact and (2) legal cause. *Oliver*, 309 S.C. at 316, 422 S.E.2d at 130. Causation in fact is proven by establishing the injury would not have occurred ‘but for’ the defendant’s negligence. *Id.* at 316, 422 S.E.2d at 130. Here, Plaintiff’s and Defendants’ experts testified that the disruption of blood supply during surgery caused the necrosis and infection. (Trial Tr., p. 212, lines 1-20; p. 420, lines 17-19; p. 374, line 22 – p. 375, line 3; Trial Tr., p. 325, line 25 – p. 326, line 2.; p. 427, lines 4-17; R.__). But for this disruption, Ms. Turisk would not have suffered her injuries.

Legal cause is proven by establishing foreseeability. *Oliver*, 309 S.C. at 316, 422 S.E.2d at 131. Foreseeability is determined by looking to the natural and probable consequences of the act complained of. *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996) (citing *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994)). The plaintiff need not prove that the person charged with negligence should have contemplated the particular event that occurred. *Id.* at 401, 477 S.E.2d at 721 (citing *Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990)). Here, both Plaintiff's and Defendants' experts testified that necrosis and infection are the natural and probable consequence of the disruption of blood supply. Plaintiff's medical expert Dr. Hultman specifically testified, "And so when you remove blood supply to the breast, that's when you get fat necrosis, or breast-tissue necrosis." (Trial Tr., p. 226, lines 16-7m R.__). Defendants' own infectious disease expert likewise testified, "You can't cure something that doesn't have blood flow, and the only way this was cured was by surgery, by removing it." (Trial Tr., p. 368, lines 22-25; R.__). It was error for the trial court to find that Ms. Turisk did not meet her burden of proof as to proximate cause. Each of the elements were met. Moreover, the evidence in this case is only susceptible to one inference: Dr. Schimpf's disruption of the blood supply during surgery caused the necrosis and infection.

B. Plaintiff's criticism of Defendants' post-operative care does not amount to a second distinct theory of liability.

The Court erred in finding that Plaintiff's criticism of Defendants' post-operative treatment somehow amounted to a second, distinct theory of liability, completely removed from—and unaffected by—the surgery itself. (Order, p. 5). It did not. While Plaintiff's medical expert, Dr. Hultman, testified that Defendants could have started administering antibiotics earlier than they did, he also specifically acknowledged, "there's nothing to indicate she had a systemic

infection at this time, so I wouldn't feel compelled to start a whirl of antibiotics." (Trial Tr., p. 211, lines 16-18). Dr. Hultman also noted he would have applied a topical antibiotic to the suture, but then later clarified that as far as antibiotics and postoperative care are concerned, Dr. Schimpf had followed the standard of care:

Q. You talked a little bit about a possible infection. You agree that Dr. Schimpf and the operating team took appropriate steps to minimize the risk of an infection during the surgery?

A. Yes.

Q. You saw that Ms. Turisk was given antibiotics interoperatively?

A. Correct.

Q. She was given Ancef, and that meets the standard of care, doesn't it?

A. Yes, it does.

Q. She was also prepped with a chlorhexidine solution?

A. Yes.

Q. And that's an appropriate intervention to try to help prevent the spread of infection on operative sites?

A. Correct.

Q. And you agree that both of those things are appropriate and meet the standard of care?

A. Yes.

Q. You suggested that perhaps a topical antibiotic would be used, but you would agree that the photos that you were shown in the immediate postoperative period only showed bruising?

A. Correct.

Q. And you don't put a topical antibiotic on bruising?

A. No.

Q. And I think you recommended that you would want to see the patient within a week or so, very quickly, for follow-up, correct?

A. Yes.

Q. And you're aware that Dr. Schimpf did see the patient multiple times in the postoperative period?

A. Yes.

Q. And you agree that there was nothing in the record to indicate that Ms. Turisk had an infection during her initial postoperative visit on November the 7th?

A. That's correct.

Q. And the same is true on November the 15th when the wounds were noted to be clean, there was no redness, no warmth, no discharge? That's all a description of a wound that's not infected, correct?

A. Yes.

Q. And then Ms. Turisk went about two weeks before she returned to see Dr. Schimpf again, and that's when she developed the infection, correct?

A. I think she had an infection at that point. Yes.

Q. And that's when the culture showed that she did have an infection?

A. Yes.

Q. And that's where I think we got into a discussion earlier on direct exam about the bacteria. Is it safe to say that she had multiple bacteria in that wound?

A. Yes.

Q. And when that was identified, were those bacteria addressed appropriately with antibiotics?

A. Yes, they were.

Q. And that meets the standard of care?

A. Yes.

Q. You find out what the bacteria is, and you treat it with one what works for it?

A. Correct.

Q. And that was done for Ms. Turisk?

A. Yes.

Q. You also talked a little bit about wound care treatment. You agree that the prescription of antibiotics empirically is appropriate when an infection might be suspected?

A. Yes.

Q. And Ms. Turisk received those from Dr. Schimpf's office in this case?

A. Yes.

Q. She was also receiving wet-to-dry dressings and debridements. You agree those are appropriate interventions for an open wound?

A. Yes.

Q. And that meets the standard of care?

A. It does.

(Trial Tr. p., 238, line 2 to p. 240, line 25).

As the above testimony demonstrates, Dr. Hultman's thoughts on Ms. Turisk's post-operative care did not amount to a second distinct theory of liability. The central focus in this case has always been on the surgical approach that disrupted the blood supply. (Complaint, R.__). The experts all agreed that Dr. Schimpf disrupted the blood supply to Ms. Turisk's breasts during his performance of the surgery and that this disruption caused the necrosis and infection. (Trial Tr. p. 226, lines 1-19; p. 422, line 1-p. 424, line 7, citing Lefkowitz Depo. Tr., p. 25, lines 18-24 and p. 26, lines 3-6; Trial Tr., p. 407, lines 7-12; p. 361, lines 9-16; p. 370, lines 15-25; and p. 212, lines 5-15).

Additionally, Ms. Turisk's surgery and post-operative care are intermeshed with one another. It is undisputed that the surgery performed by Dr. Schimpf caused the post-operative complications. (Trial Tr., p. 226, lines 16-17; p. 370, lines 22-25). It was error for the Court to

construe Plaintiff's criticism of Defendants' post-operative treatment as a second, distinct theory of liability, completely removed from and unaffected by the surgery itself.

C. The jury's verdict was inconsistent and demonstrates the jury was confused. It was error for the Court to deny Plaintiff's post-trial motions.

“[W]hen a verdict is so confused that the jury's intent is unclear, the safest and best course is to order a new trial.” *Johnson v. Parker*, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983). This court may reverse a trial judge's order denying a new trial if the decision is wholly unsupported by the evidence, **or** the conclusion reached was controlled by an error of law. *See Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996), (“A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.”). Appellant respectfully submits that reversal in this case is warranted under either of these grounds.

First, the trial court's decision is wholly unsupported by the evidence. As set forth above, every single expert, including Defendants' plastic surgery expert, Dr. Lefkowitz, and Defendants' infectious disease expert, Dr. Joseph, testified that Dr. Schimpf disrupted the blood flow to Ms. Turisk's breasts during performance of the subject procedure, and that the disruption of blood flow caused the resulting necrosis and infection. It was, therefore, error for the trial court to find that Plaintiff did not prove her damages were proximately caused by Defendants' breach when all of the evidence, including all the expert testimony in this case, establishes otherwise.

Second, the trial court's decision should be reversed because it is controlled by an error of law. As set forth under Section II(A) of this brief, it is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial.

Miller v. Schmid Labs., Inc., 307 S.C. 140, 142-43, 414 S.E.2d 126, 127 (1992). “Conflicting and irrelevant instructions constitute reversible error [;] and a trial Judge ought to take care not to confuse the jury by charging them on legal principles which are inapplicable to the case on trial.” *Wright v. Harris*, 228 S.C. 144, 148, 89 S.E.2d 97, 98 (1955). Here, the trial court erred in charging the jury as to assumption of the risk, as it was inapplicable under the facts of this case. Accordingly, it was error for the Court to find assumption of the risk supports the jury’s verdict of no liability. (Order, p. 7). Appellant respectfully submits that her post-trial motion for a new trial should have been granted because the verdict was contrary to the weight of the evidence, indicating that the jury was confused. Finally, it was error for the trial court to deny Appellant’s motion for a new trial where the court’s findings were unsupported by the evidence and controlled by an error of law.

Conclusion

For the foregoing reasons, Appellant respectfully requests that this Honorable Court grant her appeal, reverse the trial court, and remand this case for a new trial on the merits. It was error for the trial court to charge the jury as to assumption of the risk. The charge was prejudicial to Appellant, confusing to the jury, and affected the outcome of the trial. It was also error for the trial court to deny Appellant’s post-trial motion for a new trial, or in the alternative for judgment notwithstanding the verdict, where the verdict as to proximate cause was contrary to the weight of the evidence at trial, indicating that the jury was confused.

[Signature on following page]

Respectfully submitted,

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Maite Murphy
Circuit Court Judge

Case No.: 2018-CP-10-02109
Appellate Case No. 2023-000029

Rebecca Turisk,

Appellant,

v.

Dennis K. Schimpf, M.D. and
Sweetgrass Plastic Surgery, LLC,

Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Brief of Appellant complies with Rule 211(b),
SCACR.

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