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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Maite Murphy
Circuit Court Judge

Appellate Case No. 2026-000340

Rebecca Turisk,

Petitioner,

v.

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

Respondents.

APPENDIX

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SC Court of Appeals

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Appellate Case No. 2023-000029

Rebecca Turisk,

Appellant,

v.

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

Respondents.

FINAL BRIEF OF APPELLANT

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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. p. 20). 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. pp. 20-25).

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. p. 26). 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, R. at p. 29, paras. 2 and 5). 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, R. at p. 29, para. 6).

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, R. pp. 52-55.) 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., R. pp. 52-55). 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., R., pp. 52-55).

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., R. pp. 163:14 – 169:19). 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., R. p. 165:18-22).

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., R. p. 166:1-6). 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., R. p. 166:17 – p. 167:13; p. 168:4-12; 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, R. pp. 52-55; Trial Tr., R. pp. 163:14 – 169:19). 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, R. at p. 54).

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. 165:2-8; p. 166:2-15; p. 167:15-25). 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. p. 908) 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, R. p. 168:13-19). 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., R. pp. 335:15 – 389:20). 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., R. p. 344:4-10; pp. 353:16 –355:1). 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., R. p. 344:4-10).

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., R. p. 371:1-19; Pl.’s Exhibits 1-19, R. pp. 880-898).

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., R. pp. 568:1-570:7, citing Lefkowitz Depo. Tr., R. p. 854:18-24, and p. 855:3-6).

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., R. p. 553:7-12).

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., R. p. 514:22-25). 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., R. p. 516:15-25) [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., R. p. 371:16-17). 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., R. p. 357:5-15; Pl.'s Exhibits 1-19, R. pp. 880-898).

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. 357:1-20)

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., R. p. 566:12-19).

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., R. pp. 520:22 – 521:3).

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., R. pp. 471:25 – 472:2).

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., R. pp. 573:2 – 574:4). 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., R. p. 573:4-17).

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., R. pp. 573:19 – p. 574:4). 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., R. p. 574:2-4). 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., R. pp. 163:14 –169:19; Motion in Limine, R. pp. 52-55).

Ms. Turisk’s trial counsel also objected to the court’s inclusion of a jury charge for assumption of the risk. (Trial Tr., R. pp. 579:13 – 580:5). 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., R. p. 413:5-6). 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., R. pp. 574:13 – 580:5; see also Dr. Schimpf’s testimony at Trial Tr., R. pp. 422:21 – 423:1; pp. 424:22 – 425:7; and p. 439:3 –9).

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., R. pp. 579:13 – 580:5). 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, R. at p. 29, para. 5).

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., R. p. 580:2-5). 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.

(Jury Instructions at Trial Tr., R. pp. 626:4 – 627:7).

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., R. pp. 634:24 – 635:5)

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., R. p. 635:6 – 10). 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., R. pp. 635:11 – 636:6). The Court acknowledged the objection but overruled it. (R. at Id.)

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., R. pp. 637:22 – 638:11). 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., R. pp. 637:22 – 638:11).

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

(Trial Tr., R. p. 638:12).

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., R. pp. 638:23 – 639:9; Verdict Form and Form 4 Order, R. pp. 10-

17). 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. p. 899).

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. pp. 130-137). 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. at Id.). 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., R. p. 514:22-25).

Ms. Turisk’s Motion also requested a new trial pursuant to South Carolina’s thirteenth juror doctrine. (Post-trial Motion, R. pp. 134-136). 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. pp. 130-137).

On December 2, 2022, Defendants filed a Response in Opposition to Plaintiff's Post-Trial motion. (Memo in Opposition, R. p. 138). 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, R. at p. 141).

Defendants further argued that the verdict was not inconsistent or at least not irreconcilably inconsistent with the weight of the evidence. (Memo in Opposition, R. at p. 141). 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*. (R. at Id.) 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 R. pp. 143-144).

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. pp. 1-9).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. pp. 10-17). 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. pp. 626:14—627:7). 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., R. p. 357:2-20; p. 566:17-19; pp. 520:22 – 521:3; pp. 471:25 – 472:2). 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., R. p. 573:4-17). 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 is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie

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.

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. 168, 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. p. 908). 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., R. p. 371:1-19; pp. 568:1—570:7, citing Lefkowitz Depo. Tr., R. p. 854:18-24 and p. 855:3-6; Trial Tr., R. p. 553:7-12; p. 507:9-16; p. 516:15-25; p. 357:5-15; and p. 574:22-25).

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., R. pp. 573:19 – 574:4). 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., R. p. 574:2-4). 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., R. p. 574:2-4). 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., R. pp. 579:13 – 580:5). 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., R. p. 579:13 – 580:5).

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. (R. at Id.) 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 R. p. 29, para. 5)

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., R. p. 580: 2-5). 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. p. 16). 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. R. 371:1-19; pp. 568:1— 570:7, citing Lefkowitz Depo. Tr., R. p. 854:18-24 and p. 855:3-6; Trial Tr., R. p. 553:7-12; p. 507:9-16; p. 514: 22-25; p. 516:15-25; and p. 357:5-15). 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., R. pp. 626:14 – 627:7)

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., R. p. 357:2-20; p. 566:17-19; pp. 520:22 – 521:3; pp. 471:25 – 472:2.; p. 573:4-17).

“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, at R. p. 5). "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., R. p. 357:2-20; p. 566:17-19; pp. 520:22 – 521:3; pp. 471:25 – 472:2; p. 573:4-17). 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., R. p. 371:16-17). 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., R. p. 514:22-25). 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, R. 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., R. p. 356:16-18). 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., R. p. 383:2 – 385:25).

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. pp. 20-25). 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. R. p. 371:1-19; pp. 568:1—570:7, citing Lefkowitz Depo. Tr., R. p. 854:18-24 and p. 855:3-6; Trial Tr., R. p. 553:7-12; p. 507:9-16; p. 516:15-25; and p. 357:5-15).

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., R. p. 371:16-17; p. 516:22-25). 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, R. 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.

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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.

CERTIFICATE OF COMPLIANCE

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

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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Respondents.

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COUNTER STATEMENT OF ISSUES ON APPEAL¹

- I. DID THE CIRCUIT COURT PROPERLY SUBMIT TO AND CHARGE THE JURY ON ASSUMPTION OF THE RISK WHERE (A) THE SUPREME COURT PREVIOUSLY HELD THAT IT WAS APPLICABLE TO MEDICAL MALPRACTICE CASES NEARLY IDENTICAL TO THIS ONE; AND (B) THERE WAS EVIDENCE THAT APPELLANT KNEW OF AND APPRECIATED THE KNOWN RISKS OF HER SURGICAL PROCEDURE AND THAT SHE NONETHELESS VOLUNTARILY EXPOSED HERSELF TO THEM BY CHOOSING TO UNDERGO THE ELECTIVE, COSMETIC PROCEDURE?
- II. DID THE CIRCUIT COURT PROPERLY DENY APPELLANT’S POST TRIAL MOTIONS BECAUSE THE JURY’S VERDICT IN FAVOR OF RESPONDENTS WAS SUPPORTED BY THE GREATER WEIGHT OF THE EVIDENCE AND NOT INCONSISTENT?

STATEMENT OF THE CASE

This is a medical malpractice appeal arising from the unanimous defense verdict rendered at the conclusion of a four (4)-day jury trial held from November 14, 2022 to November 17, 2022. With this appeal, Appellant, who is simply dissatisfied with the jury’s finding that she failed to meet her burden of proof with respect to proximate cause and their award of no damages, asks this Court to substitute its judgment for that of the jury by reversing South Carolina Supreme Court precedent on the application of informed consent to medical malpractice cases like this one and by generally relieving her of her burden to prove each and every element of her medical negligence cause of action. Appellant’s arguments are without merit. As detailed further below, this Court should affirm the circuit court jury’s verdict.

A. Factual Background

Respondent Dennis K. Schimpf (“Dr. Schimpf”) is the owner of Respondent Sweetgrass Plastic Surgery, LLC (the “Practice”) (collectively, “Respondents”). He is a board-certified plastic

¹ Respondents expressly do not consent to be bound by Appellant’s Statement of the Issues, of the Case, and of the Standard of Review. Consequently, pursuant to Rule 208(b)(2), SCACR, Respondents submit their own Counter Statements and respectfully request that this Court adopt them.

surgeon with over fifteen (15) years of experience. (R. pp. 411-12). Appellant is a fifty-seven-year-old (57) woman with a significant medical history of chronic pain, adrenal fatigue, fibromyalgia, and multiple back surgeries. (R. pp. 253, 302-03, 316-17). Since 2012, she has been deemed disabled due to a back injury and the resulting treatment for it, including multiple fusion surgeries, a surgically implanted spinal cord stimulator, and chronic reliance on opioid pain prescriptions. (R. pp 302-03, 316).

On July 18, 2016, Appellant first presented to Respondents complaining of long-standing neck and upper back pain and that her breasts impeded her ability to perform physical activity. (R. p. 911). Accordingly, Dr. Schimpf assessed Appellant's medical history, discussed her surgical goals, and performed a physical examination, which Appellant acknowledges. (*Id.*, R. p. 303). Specifically, Dr. Schimpf examined Appellant's breasts, measured her nipple to clavicle length, and graded her ptosis (i.e., drooping), which revealed that Appellant's neck and back pain were directly related to her documented large, pendulous breasts. (R. p. 911). Consequently, Dr. Schimpf recommended that Appellant undergo a bilateral breast reduction, which included removing her prior breast implants, and discussed her surgical options with her. (*Id.*, R. p. 303). In doing so, Dr. Schimpf also *first* explained the risks associated with breast reduction to Appellant, to include wound healing, wound opening, draining, and infection, the need for revision surgery, and even death. (*Id.*, R pp. 303-04). As early as her first appointment, Appellant knew the risks described to her were real risks and she did not have any questions about them. (*Id.*). She confirmed that she was comfortable with proceeding with surgery knowing those risks were very real. (R. pp. 304, 911-12).

On October 27, 2016, Appellant returned to Respondents for a pre-operative appointment. (R. pp. 908-09). During this appointment, Respondents discussed the surgical risks with Appellant for

a second time as well as the alternatives to surgery. (*Id.*, R. p. 305). Their conversation was memorialized in writing and signed by Appellant. (*Id.*). More precisely, Respondents informed Appellant that the “**most likely material risks and complications**” associated with breast reduction included **asymmetry, bleeding, delayed healing, discoloration/swelling, discomfort, failure to improve symptoms, infection, skin, nipple and flag loss, wound separation, and unsatisfactory results**. (*Id.*). For a second time, Appellant represented to Respondents that she understood and accepted these risks and consented to the surgery. (*Id.*, R. p. 308). In fact, Appellant stated she was “over-the-moon excited to have the surgery despite **knowing that these were real risks**.” (R. p. 310).

On November 1, 2016, Appellant presented to Respondents for her breast reduction surgery. (R. pp. 913-14)². Prior to operating, Dr. Schimpf designed and physically pre-marked onto Appellate an inferior pedicle for use with the standard Wise pattern technique for this type of surgery, which consisted of creating a ten (10)-centimeter-wide inferior pedicle (i.e., wide segment of tissue under the nipple) to preserve blood flow to Appellant’s nipple/areola complex. (*Id.*). Notably, it is undisputed that the inferior pedicle wise technique selected by Dr. Schimpf is considered the “gold-standard” technique for breast reduction. (R. pp. 354, 378-79, 407). Additionally, it is undisputed that Dr. Schimpf created a pedicle two (2) to four (4) centimeters wider than that required by the standard of care, which offered Appellant’s nipple/areola complex greater and better blood supply. (R. pp. 425-26).

In addition to the above, prior to operating on November 1, 2016, Dr. Schimpf also discussed the details of the procedure with Appellant; discussed that he would be removing Appellant’s

² Respondents’ reference to Plaintiff’s Exhibit 25, titled simply as “Operative Note” in the trial transcript and admitted at the end of the Defendants’ case-in-chief, in their Initial Brief was a scrivener’s error. Respondents intended to cite to the Defendants’ Operative Note, which was designated in their matter to be included in the record on appeal.

implants and tissue and that he would be moving up the nipple/areola complex. (R. pp. 426, 913-14). Furthermore, he again reiterated the risks associated with breast reduction to Appellant – namely, that complications with **wound healing, need for revision surgery specific to breast and nipple loss, and painful scarring could result.** (R. pp. 913-14). In other words, contrary to Appellant’s assertion, Dr. Schimpf informed Appellant on multiple occasions that there was a real risk that she would need a mastectomy or similar breast loss surgery if complications arose. (*Id.*). In response, Appellant again voiced her understanding and consented to the surgery. (*Id.*). Tellingly, Appellant did not have any criticisms of Respondents’ informed consent process. (R. pp. 377-78, 533-34). Indeed, Appellant’s own expert testified that a reasonable and prudent physician would discuss the risks that Respondents discussed with Appellant and that the informed consent form used by Respondents complied with the standard of care. (R. pp. 377-78).

After providing the appropriate informed consent for a third time, Dr. Schimpf subsequently performed Appellant’s breast reduction surgery and with special attention to the blood flow to Appellant’s nipple/areola complex, as acknowledged by Appellant’s expert, as well as his own: Dr. Todd Lefkowitz, a board-certified plastic surgeon that, unlike Appellant’s expert, performs approximately 100 to 150 breast surgeries a year. (R. pp. 380-383, 525-26, 543-44). Specifically, Dr. Schimpf checked her nipple/areola complex’s capillary refill to confirm that blood would fill the area when pressed and confirmed the continued viability of both nipples throughout the procedure and at the conclusion of surgery. (R. pp. 913-14)³. He also checked for congestion and ischemia and saw none. (*Id.*). Stated another way, during surgery and in the immediate post-operative period, Dr. Schimpf did not see any indication that the blood flow to Appellant’s nipple/areola complex had been disrupted in any way despite properly looking for evidence of the

³ Dr. Schimpf demonstrated for the jury how he checks for capillary refill using a video demonstrative during trial. (R. pp. 439-40).

same on multiple occasions throughout the procedure as well as post-operatively. Ultimately, Respondents discharged Appellant to the care of her friend, Ms. Mary Ackerman, on the same day and with aftercare instructions. (R. p. 907).

The day after her surgery, Appellant's caregivers contacted Respondents several times and informed Dr. Schimpf that Appellant was light-headed and dizzy but otherwise okay. (R. p. 941). They reported no problems with her surgical incisions or the appearance of her breasts. (*Id.*). The same day, Dr. Schimpf recommended that she continue to follow her post-operative instructions, encouraged increased fluid intake and invited her to come into his office so she could be evaluated, but she declined to do so. (*Id.*, R. p. 311). Alternatively, he also told her that she could go to the emergency room, but she declined that option as well. (*Id.*). The next day, November 3, 2016, Dr. Schimpf learned from Appellant's caregivers that she had improved with additional fluids, was stable and ambulatory, and that she had taken her wound dressings down, which were clean, dry, and intact, and that she was sponge-bathing. (R. p. 942).

On November 7, 2016, one of Appellant's caregivers called Dr. Schimpf and reported that Appellant had dark red serosanguinous drainage and a reported fever. (R. p. 943). Accordingly, Respondents scheduled an appointment for Appellant the next day. (*Id.*). On November 8, 2016, Appellant presented to Respondents again. (R. p. 943). On this day, her incisions were documented as healing and draining appropriately and that there were no signs of erythema, warmth, redness, or seroma, indicating no infection was present. (*Id.*). It was also documented that her right nipple/areola complex was bruised. (*Id.*). Appellant returned to Respondents on November 15, 2016, where it was documented that she was "doing better daily" and that her right nipple/areola complex was very bruised and forming eschar. (R. p. 945). Subsequently, Appellant was scheduled for a two (2) week follow-up visit. (*Id.*).

However, prior to her follow up visit, on November 27, 2016, Appellant presented to an emergency room for breast-related complaints. (R. p. 946). There, it was discovered that, although Appellant had a normal white blood cell count and negative blood cultures, her wound swab from the breast incision grew out bacteria consistent with those found naturally on the skin and in the GI tract. (*Id.*). Dr. Schimpf consulted with the emergency room physician that evening and scheduled to see Appellant in-office the next day. (*Id.*). On November 28, 2016, Dr. Schimpf met with Appellant to discuss his concerns regarding the viability of her right nipple tissue and what could be done to address it later, and he sharply debrided some necrotic tissue around the area. (R. pp. 946-47). Her wound was open and draining appropriately. (*Id.*). Dr. Schimpf prescribed antibiotics prophylactically and asked her to return in forty-eight (48) hours. (R. pp. 947-50). Appellant never returned to Dr. Schimpf or Respondents after this appointment.

In the weeks that followed, Appellant was admitted to multiple hospitals, and she underwent a lengthy course of treatment with another plastic surgeon, Dr. Fernando Herrera. However, she ultimately developed fat necrosis (i.e., dead tissue), an infection, and lost her right nipple and volume in her right breast. Importantly, even at trial, Dr. Herrera did not attribute Appellant's nipple or volume loss to any action or negligence of Respondents.

Q: [] [I]t's my understanding you are not here to tell this jury that Dr. Schimpf did anything that was below the standard of care or was medically negligent in any way, are you?

A: I would agree with that statement.

(R. p. 726).

B. Procedural History

On April 23, 2018, Appellant initiated this lawsuit by filing a Complaint in the Court of Common Pleas for Charleston County (R. pp. 18-25). Contrary to Appellant's contention on

appeal, in her Complaint, Appellant not only alleged that Respondents were negligent in selecting the wrong approach to her breast implant removal and breast reduction, which allegedly disrupted the blood flow to her breasts, but also by “failing to timely diagnose and recognize” an infection in her breast and “failing to appropriately treat her” breast infection. (*Id.* at p. 24). On May 23, 2018, Respondents timely filed their Answer. In their Answer, Respondents properly asserted, among other defenses, that their conduct was in full compliance with the standard of care and that Appellant’s claimed injuries were known complications of her surgical procedure for which she was properly informed yet voluntarily accepted (i.e., assumption of the risk). (R. p. 29, ¶¶ 2-4). Furthermore, they properly asserted that, in the exercise of ordinary care, Defendants could not have foreseen or anticipated that Appellant would, indeed, incur a known complication because, as detailed above, Respondents took more than one (1) reasonable measure to preserve blood flow to Appellant’s nipple/areola complex and ensure that she healed properly in the post-operative period. (*Id.* at p. 29, ¶ 5).⁴

Between November 14, 2022 and November 17, 2022, the parties tried the case to a jury. Just as she did in her Complaint, starting with pre-trial motions and continuing through closing arguments, Appellant alleged that Respondents selected the wrong surgical technique **and** that Respondents’ post-operative care violated the standard of care. (R. pp. 161-63, 188-89, 591-92). In fact, Appellant repeatedly showed the jury over a dozen photos of her breasts during the post operative period and testified about the “foul odor” allegedly emanating from her breasts during post-operative appointments with Respondents to suggest that Respondents must have somehow

⁴ Appellant asks this Court to infer that Respondents were conceding assumption of the risk by pleading this defense, or at least contradicting it. (Appellant’s Initial Brief, pp. 12, 25). As an initial matter, Respondents were permitted to plead defenses in the alternative without conceding any position. Second, Appellant plainly misconstrues this defense. (*Id.*). It does not undermine the assumption of the risk doctrine. Instead, it is complementary. It acknowledges that, while known surgical risks exist (and Appellant appreciated), there was no indication that Appellant would have developed one (1) or more of them due to Respondents’ exercise of reasonable care.

missed an infection. (R. pp. 271-72, 880-98).

Moreover, Appellant's expert separated his opinions about Dr. Schimpf⁵ in two (2) parts and testified that his second opinion was that Dr. Schimpf should have applied a topical antibiotic to Appellant's incision after November 6, 2016. (R. pp. 343, 356, 388-89). He did not, however, testify that Dr. Schimpf's alleged failure to timely administer antibiotics caused any of Appellant's claimed injuries or damages. As a result, **Appellant did not present any evidence of causation for her second distinct theory of liability**. Additionally, Respondents' infectious disease expert, Dr. Patrick Joseph, testified that an administration of a topical antibiotic would not have changed Appellant's outcome, which undermined it completely. (R. p. 517).

Regarding Appellant's other theory of liability, that Respondents allegedly selected the wrong surgical technique, Appellant merely offered the testimony of her expert, who does not routinely perform this procedure and who instead focuses his practice on the treatment of burns, to opine that Dr. Schimpf's choice of technique was contraindicated by the scars on Appellant's areolas from her prior implant surgery and that *the technique caused* the disruption in Appellant's blood flow and, in turn, her injuries and damages. (R. pp. 337-38, 353-55, 371, 376-77). However, this unsupported theory was thoroughly rebutted by the testimony of Dr. Lefkowitz, who actually and regularly performs breast reduction surgery, and who testified that Dr. Schimpf selected the proper technique for Appellant's surgery, that "[the] scar [was] not, in any way, an issue for Dr. Schimpf to choose an inferior pedicle technique[,]" and that blood can and does flow through scars in a variety of plastic surgeries, such as facial reconstruction after skin cancer, which has less

⁵ Appellant did not present any expert testimony that the practice or any of its employees violated the standard of care at any time. Therefore, Respondents argued that the practice was entitled to a direct verdict and maintain that position. (R. p. 386 (During the cross examination of Appellant's expert: "Q: And you're not offering any opinions that any of the employees of the practice, any of the nurses, physician assistants, anyone else that worked for the practice, did anything that was negligent or below the standard of care in this case? A: No."))).

vascularity than a breast. (R. pp. 540-43). He also testified that disruptions in blood flow are a known surgical complication that can and do occur in the absence of negligence and that Appellant unfortunately developed known complications after surgery through no fault of Dr. Schimpf. (R. pp. 534-35, 546). Most importantly, he testified that Respondents met the standard of care in every aspect of their care of Appellant, including their obligations to obtain Appellant's informed consent prior to operating. (R. pp. 530, 533-34, 545-46, 548, 572).

Dr. Schimpf likewise testified that he met the standard of care, that the inferior pedicle technique was appropriate for Appellant and was not at all contraindicated by the scars from her prior breast surgery, and that her known complications were not the result of the technique that he chose. (R. pp. 421-23, 428, 438-39, 467-69). Contrary to Appellant's repeated assertion, Dr. Schimpf did not testify that Appellant was "high risk." Instead, he explained to the jury why the technique suggested by Appellant's expert (i.e., the superior pedicle technique) would not have been appropriate and would have, in fact, been riskier for Appellant given the size, weight, and drooping of her breasts. (R. pp. 438-39).

Dr. Schimpf also offered an explanation for the **cause of Appellant's post-operative issues** that was **unrelated to his surgical technique**: venous congestion, which is when blood that enters tissue cannot leave or becomes clogged in the vein and causes tissue death. (R. p. 451). Without casting blame on Appellant, Dr. Schimpf explained that venous congestion can occur when there is too much external compression on vulnerable tissue and that it can happen when a patient goes home and sleeps in a way that causes a bra or bandage to twist and tighten across vulnerable tissue. (R. pp. 447-48). He further explained that there is a limited window to act to relieve the congestion and if he is not made aware of symptoms consistent with the condition and able to see the patient, such as the case with Appellant who did not report massive swelling or

other issues and refused to be seen in the forty-eight (48)-hour post-operative period, the tissue death is inevitable. (R. pp. 448-49, 451). He clarified that there was no evidence that Appellant was likely to develop venous congestion when she was discharged after surgery, but he could not rule out that she could have developed the condition at her home before he saw her again post-operatively given the lack of evidence of blood flow disruption during surgery. (R. p. 447). Thus, not everyone agreed that the blood supply to Appellant's breasts was disrupted as a result of Dr. Schimpf's surgical technique as Appellant now posits.

Dr. Joseph provided an explanation for how infection can develop and spread once tissue dies (e.g., fat necrosis). However, importantly, he did not attribute Appellant's development of fat necrosis or infection to the conduct of Respondents. (R. p. 520). In sum, before resting, Respondents presented ample evidence at trial of informed consent, that Respondents met the standard of care with respect to Appellant's surgery and post-operative care, and that neither Appellant's claimed damages nor outcome were caused by medical negligence. Consequently, the circuit court properly submitted the issue of assumption of the risk to the jury and denied Appellant's motions for directed verdict on it.

Contrary to Appellant's suggestion, the circuit court did not submit assumption of the risk as a total bar to recovery. Instead, consistent with South Carolina law, it instructed the jury that assumption of the risk goes to the jury's initial determination of negligence. (R. pp. 626-27). The jury had a copy of the instructions and did not submit any questions related to assumption of the risk. The lone question posed by the jury concerned causation. (R. pp. 634-35).

Moreover, assumption of the risk was not included on the verdict form. Instead, in typical fashion, the form asked, (1) "Did the plaintiff prove by the greater weight, or preponderance of the evidence, that the defendant deviated from the standard of care[;]" and (2) "Did the plaintiff prove

by a greater weight, or preponderance of the evidence, that the defendant deviating (sic) from the standard of care was the proximate cause of the plaintiff's injuries?" (R. pp. 638-39). In other words, the verdict form asked whether Appellant proved both negligence and causation. If the jury answered yes to the first two (2) questions, then and only then, the form asked the jury to consider damages. After deliberating for only a few hours, the jury returned a unanimous decision in Respondents' favor. (*Id.*). As is their right, they determined that Appellant proved that there was deviation in the standard of care (i.e., negligence), but that she did not likewise prove causation by a preponderance of the evidence. (*Id.*, R. p. 10-17). The circuit court's poll of the jurors confirmed the unanimous verdict, foreclosing any concern that the jurors were unsure of their decision or had been misrepresented on the verdict form. (R. pp. 639-641).

On November 28, 2022, Appellant sought 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. (R. pp. 130-37). The crux of Appellant's post-trial motion was that the jury was somehow confused because they did not award Appellant any damages despite evidence of her poor surgical outcome and that the verdict was inconsistent and against the greater weight of the evidence. Appellant did not make any arguments about assumption of the risk.

Similar to her Initial Brief, in her post-trial motion, Appellant disregarded that she pursued a distinct theory of liability based on Respondent's post-operative care that could have resulted in the jury's finding that Respondents breached the standard of care with respect to Appellant's after care (versus the choice in surgical technique) but that the asserted breach did not cause Appellant's injuries and damages. Appellant's position also ignores the well-establish law of South Carolina that liability may not be inferred from a bad result alone. *See Dumont v. United States*, 80 F. Supp. 2d 576, 581 (D.S.C. 2000) (holding that a bad result is not by itself sufficient to raise an inference

or presumption of negligence); *Ward v. Epting*, 290 S.C. 547, 561, 351 S.E.2d 867, 875 (S.C. App. 1986) (same). Accordingly, the circuit court's order denying Appellant's post-trial motion was proper, was consistent with the evidence, and should not be reversed. (R. pp. 1-9).

STANDARD OF REVIEW

A. Jury Instructions

An appellate court will not reverse the circuit court's decision regarding jury instructions unless the circuit court abused its discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (internal citations omitted). There is no abuse of discretion where the circuit court's ruling is based on South Carolina law, or, where grounded in factual conclusions, there is evidentiary support. *See id.* (internal citations omitted). Even if the charge is confusing, which it was not in this case, that alone is insufficient to warrant reversal. *Keaton v. Greenville Hosp. Sys.*, 334 S.C. 488, 498, 514 S.E.2d 570, 575 (1999). Moreover, even if the circuit court erred in giving a particular instruction, the requesting party must also show that the error was prejudicial to warrant reversal on appeal. *Id.* at 390, at 539.

In reviewing jury charges for error, the appellate court must consider the circuit court's jury instruction as a whole in light of the evidence and issues presented at trial. *Hennes v. Shaw*, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012) (internal citation omitted). If the instructions are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. *Id.* (citing *Keaton*, 334 S.C. at 497, 514 S.E.2d at 575).

B. New Trial

Whether to grant a new trial is a matter within the discretion of the circuit court, and the decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law. *Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003) (citing *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999)). Stated another way,

a jury's verdict is entitled to "substantial deference." *Mills v. S.C. State Ports Auth.*, 435 S.C. 213, 227, 865 S.E.2d 910, 917 (Ct. App. 2021). "A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive." *Id.* at 226 (internal citation omitted). A so-called inconsistent verdict is not an automatic ground for a new trial. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 49-50, 691 S.E.2d 135, 149 (2010) (internal citation omitted). To the contrary, where there is a logical reason for reconciling an inconsistent verdict, it is the duty of the court to sustain it. *Id.*; *see also Longshore v. Saber Sec. Servs.*, 365 S.C. 554, 561, 619 S.E.2d 5, 9 (Ct. App. 2005) (affirming the trial court's decision to not overturn a jury verdict in favor of the defendants on an assault and battery claim where the jury found liability for negligent hiring because the verdict could be "harmonized."); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 422, 453 S.E.2d 908, 912 (Ct. App. 1995) (affirming denial of plaintiffs' motion for new trial where the jury returned a verdict for two other plaintiffs because the moving plaintiffs did not prove each element of their causes of action).

Equally important to medical malpractice cases like this one, the plaintiff must show, through expert testimony that, "in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence . . . [and] when it is the only evidence of proximate cause relied upon, it must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." *Daves*, 355 S.C. at 230, 584 S.E.2d at 430 (*quoting James v. Lister*, 331 S.C. 277, 286, 500 S.E.2d 198, 203 (Ct. App. 1998)). In other words, the plaintiff has the burden of proving both a deviation from the standard of care **and** proximate cause through expert testimony. *Id.*; *see also Richardson's*

Rests. v. Nat'l Bank of S.C., 304 S.C. 289, 295, 403 S.E.2d 669, 672 (Ct. App. 1991) (internal citation omitted) (“In order to prevail on a claim of negligence, the plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. If he fails to establish any one of these elements, his cause of action fails.”). Where a jury finds that she did not do so and it is supported by the evidence, the decision of the jury should not be disturbed through a new trial. *See Stevens*, 342 S.C. at 53, 536 S.E.2d at 666 (“[I]f a jury finds the plaintiff has failed to prove damages proximately caused by the defendant’s negligence, then its verdict should be for the defendant.”); *Dropkin v. Beachwalk Villas Condo. Ass’n*, 373 S.C. 360, 365, 644 S.E.2d 808, 810 (Ct. App. 2007) (affirming denial of the plaintiff’s motion for a new trial in a traditional negligence case where plaintiff did not prove proximate cause).

C. Judgment Notwithstanding the Verdict (JNOV)

In reviewing the denial of motions for directed verdict and JNOV, the evidence and the reasonable inferences that can be drawn therefrom must be viewed in the light most favorable to the non-moving party, which, at this juncture, is Respondents. *Daves*, 355 S.C. at 229, 584 S.E.2d at 429 (citing *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 78, 439 S.E.2d 266, 269 (1993)). The motion should not be granted where the “evidence yields more than one inference[,] or its inference is in doubt.” *Id.* (internal citation omitted). As with considering a motion for a new trial, a jury’s verdict should be given substantial deference when contemplating a JNOV. *See Mills*, 435 S.C. at 227, 865 S.E.2d at 917.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT’S MOTIONS AND INSTRUCTING THE JURY AS TO ASSUMPTION OF THE RISK.

A. The South Carolina Supreme Court Held That Assumption Of The Risk Applies In Medical Malpractice Cases Like This One.

The circuit court did not err in denying Appellant’s motions and instructing the jury as to assumption of the risk because the South Carolina Supreme Court previously held in *Faile v. Bycura* that assumption of the risk can apply in medical malpractice cases like this one; where the plaintiff is not seeking damages for lack of informed consent. 289 S.C. 398, 346 S.E.2d 528 (1986). Importantly, in the same case, it held that assumption of the risk *should* be submitted to the jury under facts nearly identical to this one.

In *Faile*, the plaintiff alleged that her surgeon selected the wrong procedure for relief of her heel pain. *Id.* at 399, at 529. She did not allege that the surgery was performed incorrectly – just that it was the wrong choice. *Id.* She also did not allege that there was a lack of informed consent. *Id.* The defendant-surgeon defended that the procedure was appropriate and raised the defense of assumption of the risk because, prior to both surgeries, the plaintiff signed a consent form in which she acknowledged that the surgery would probably result in a complication (i.e., stiff toes), that it may not work, and that she may need additional procedures in the future. *Id.* Additionally, the plaintiff signed a form acknowledging that other treatment options existed but that she was nonetheless electing the surgery. *Id.* Despite this, at trial, the circuit court struck assumption of the risk from the defendant-surgeon’s answer. *Id.* The Supreme Court reversed the decision of the circuit court and held that assumption of the risk should have been submitted to the jury. *Id.* at 399-400, at 530.

The present case is strikingly similar to *Faile*. Appellant alleges that Respondents chose the incorrect technique for her breast reduction surgery: the inferior pedicle/Wise pattern

technique. Like the plaintiff in *Faile*, she does not allege that Respondents performed her surgery incorrectly or that they lacked consent – just that the surgery was the wrong choice for her. Appellant’s informed consent to the surgery also mirrors that of the plaintiff’s in *Faile*. Specifically, Appellant signed a consent form stating that the “most likely material risks and complications” associated with her surgery included asymmetry, bleeding, delayed healing, discoloration/swelling, discomfort, failure to improve symptoms, infection, skin, nipple and flag loss, wound separation, and unsatisfactory results.” (R. p. 908-09). She signed a consent form acknowledging the likelihood of the same injuries that she would later claim in her lawsuit. (R. p. 328). In the same form, she also acknowledged that other treatment options existed and that future surgeries may be required, but that she nonetheless elected to undergo the procedure. (*Id.*). Moreover, Dr. Schimpf personally discussed the risk of Appellant’s surgery with her during multiple pre-operative appointments. (R. p. 911-12). Therefore, it follows that, under South Carolina law, assumption of the risk is applicable to the present case and the circuit court properly denied Appellant’s motions to exclude and motions for directed verdict related to the same.

Appellant tries to distance herself from *Faile* by misconstruing its holding and the evidence on the record. Contrary to Appellant’s assertion, under *Faile* and other South Carolina law, Respondents were not required to use any magic words or phrases in obtaining Appellant’s informed consent, such as “high-risk,” “most probably,” or “mastectomies,” to submit the doctrine to the jury. *See Faile*, 289 S.C. at 399, 346 S.E.2d at 529 (submitting assumption of the risk to the jury without noting that the plaintiff was specifically informed that her heel pain, in addition to stiff toes, would most probably persist); *see also Baxley v. Rosenblum*, 303 S.C. 340, 347, 400 S.E.2d 502, 507 (Ct. App. 1991) (“The defense of assumption of the risk ordinarily presents a question of fact for the jury.”). Instead, Respondents were only required to produce evidence of

assumption of the risk that was “susceptible of more than one reasonable inference.” *Carter v. A. C. Tuxbury Lumber*, 173 S.C. 58, 60, 174 S.E. 754 (1934) (holding that assumption of the risk should have been submitted to the jury where the testimony adduced at trial was susceptible to “more than one reasonable inference” as to whether the plaintiff assumed the risk of his work injury). As explained in greater detail below, Respondents produced more than enough evidence that (i) Appellant was informed of the “most likely” risks of her surgery, which included those that she later experienced, on at least three (3) occasions, (ii) that she understood those risks and appreciated that they were real, and (iii) that she ultimately elected to pursue her surgery with full knowledge of and in spite of those risks. **The best evidence of this is the fact that Appellant did not bring a cause of action in her Complaint against Respondents for want of informed consent despite trying to intimate the same in her Initial Brief.** (*See generally*, R. pp. 18-25).

Furthermore, Dr. Schimpf never testified that Appellant was a “high-risk” patient. Thus, it makes sense that there were no references to the alleged “high-risk” status of Appellant in Respondents’ medical records. Appellant cannot convert Dr. Schimpf’s statement that Appellant had “large, pendulous breasts, and it was definitely not just a straightforward garden variety” to create an issue where one does not exist. (*Compare* Appellant’s Initial Brief, pp. 11-12 *with* R. pp. 422-23). Accordingly, any argument premised on Respondents’ alleged obligations to so-called high-risk patients is misdirected and should be disregarded.

Appellant also tries to circumvent *Faile* by making a blanket assertion that the doctrine has no “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.” However, this assertion is both nonsensical and ignores the plain text of *Faile*, which addresses the relevance of assumption of the risk to medical malpractice cases like this one. First, the

assertion is nonsensical because no one ever asked Plaintiff to assume a risk of potential medical negligence in this case, nor would they. Appellant would seek to conflate the very real medical risks of the procedure that are being assumed with a completely hypothetical legal one that could never be assumed. As the Supreme Court explained: “[w]hen a patient seeks treatment by a particular type of practitioner, he may be held to have assumed the risk of the method of treatment of the particular school of thought chosen.” *Faile*, 289 S.C. at 399, 346 S.E.2d at 529-300. Appellant’s position also ignores the well-established purpose of assumption of the risk in South Carolina tort law. *See Baxley*, 303 S.C. at 347, 400 S.E.2d at 507 (“The doctrine of assumption of the risk embodies the principle that one should not be permitted knowingly and voluntarily to incur an obvious risk of harm and then hold another person responsible for his injury.”). Thus, there is both a legitimate and purposeful application of assumption of the risk to medical malpractice cases, including this one.

Appellant’s assertion that there is no “legitimate application” of the doctrine is without any other support under South Carolina law. Appellant claims that *Cole v. Raut* is “instructive on this issue.” (Appellant’s Initial Brief, p. 19). However, *Cole* does not stand for Appellant’s proposition at all and is inapplicable to the present case. In *Cole*, the plaintiff plainly did not sign a consent form for a C-section delivery, which was the basis of the plaintiffs’ medical malpractice claim. 378 S.C. 398, 411, 663 S.E.2d 30, 36 (2008). Instead, she signed a consent form for an entirely separate procedure (i.e., a VBAC). *Id.* As a result, the South Carolina Supreme Court held that the plaintiffs could not be held to assume the risk of a C-section. *Id.* Here, Appellant admittedly signed a consent form for the surgery at issue, which explained the known complications of the surgery. Furthermore, she was also instructed on these potential risks during multiple other encounters with Respondents, so assumption of the risk is directly relevant to this case and applicable. Neither *Cole*

nor the out-of-jurisdiction case law cited by Appellant changes this.

Moreover, Appellant's assertion is, at best, a red herring. Respondents never argued that Appellant consented to negligence. Indeed, the record is replete with testimony that a patient cannot consent to negligence, so this is a non-issue. (R. pp. 329, 565, 595). The same is true with Appellant's references to comparative negligence, which Appellant conflates with assumption of the risk. (Appellant's Initial Brief, pp. 20-21). Respondents never pursued, and the circuit court did not submit assumption of the risk as a complete bar to Appellant's recovery. Instead, the circuit court correctly instructed the jury that assumption of the risk goes to the initial determination of negligence. *See Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 81, 508 S.E.2d 565, 570 (1998) (holding that "primary implied assumption of risk is simply a part of the initial negligence analysis[.]"); *see also Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 38, 637 S.E.2d 560, 562 (2006) (noting that South Carolina's adoption of comparative negligence does not affect the doctrine of assumption of the risk). In short, none of Appellant's arguments alter the fact that *Faile* controls and unequivocally supports the circuit court's decisions as to assumption of the risk.

B. Respondents Presented More Than Sufficient Evidence That Appellant Assumed The Risks Of Her Surgical Procedure To Create A Question For The Jury.

The circuit court did not err in denying Appellant's motions and instructing the jury on assumption of the risk because, as detailed above, the doctrine is available in all medical malpractice cases under South Carolina law, and Respondents presented more than sufficient evidence of it to create a question for the jury of its application to the present case. Assumption of the risk is the deliberate and voluntary choice to assume a known risk. *Baxley*, 303 S.C. at 347, 400 S.E.2d at 507. It may be implied by a plaintiff's conduct. *Davenport*, 333 S.C. at 78-79, 508 S.E.2d at 569 (internal citations omitted) (providing the elements). It is ordinarily a question for

the jury. *Id.* Assumption of the risk presents a question of fact for the jury where the defendant produces evidence that is susceptible of more than one reasonable inference that the plaintiff (i) had knowledge of a dangerous condition, (ii) appreciated the dangerous condition, and (iii) voluntarily exposed herself to it. *Baxley*, 303 S.C. at 347, 400 S.E.2d at 507; *see also Carter*, 173 S.C. at 60, 174 S.E. at 754 (cited *supra*).

Respondents produced evidence that Appellant knew of and appreciated the dangers associated with her surgery beginning with her very first encounter with Respondents. During her cross examination, Appellant testified that, at her first preoperative appointment with Respondents, Dr. Schimpf explained the surgical options available to her and the risks that were associated with those surgical options. (R. p. 303). Specifically, she testified that he discussed that she may not be satisfied with the outcome, that she could develop an infection, that there might be a problem with asymmetry, and that there was a risk of death, in addition to a general list of things that could happen with any surgery. (R. pp. 303-04). She also testified that she did not have any questions related to these risks and that she knew that they were “very real.” (R. p. 304). In fact, she told the jury that she had even been researching the risks on her own and that she was comfortable proceeding with the surgery knowing that the dangerous risks were real. (*Id.*).

She further testified that the risks were reiterated to her during a second encounter with Respondents – just days before her surgery – and that her understanding of the risks was memorialized yet again in a signed consent form. (R. 304-05). Consequently, Respondents entered Appellant’s signed consent form into the record without objection by Appellant and confirmed that she initialed that the most likely risks of surgery were explained to her in terms that she understood and that those included, among others, asymmetry, bleeding, delayed healing, different size than expected, discoloration and swelling, discomfort, pain, sensitivity, failure to improve

symptoms, infection, nipple loss, wound separation, and unsatisfactory terms. (R. pp. 305-98, 908-09). Appellant agreed that Respondents covered with her all of the complications that she later developed before she chose to move forward with the surgery. (R. p. 328). Appellant further agreed that she was “over-the-moon excited” to have the surgery despite knowing that above-referenced risks were real risks. (R. p. 310).

Through Dr. Schimpf’s testimony, Respondents elicited uncontradicted testimony that he explained the surgical risks, such as delayed wound healing, need for revision surgery specific to breast and nipple loss, and painful scarring, to Appellant for a third time immediately prior to operating. (R. p. 443, 911-12). Additionally, with full knowledge of the potential risks, she voluntarily chose to undergo the procedure anyway. The surgical experts, including Appellant’s, were unified that Respondents’ explanation of the risks to Appellant met the standard of care. (R. pp. 377-78, 533-34). Appellant’s subsequent treating physician also agreed that the risks that Respondents informed Appellant of for the surgery in question were the same as those that he tells his patients. (R. pp. 728-29).

The foregoing demonstrates that, before resting, Respondents produced more than enough evidence that would enable a reasonable juror to conclude that Appellant was properly informed of the complications for which she later sought damages (e.g., nipple and volume loss, asymmetry, infection, pain, need for revisional surgery, and an unsatisfactory outcome) and that she fully appreciated the potential for these complications yet still voluntarily chose to subject herself to them by electing the surgery. The fact that Dr. Schimpf did not have any indication that Appellant would ultimately develop one (1) or more complication after his exercise of reasonable care does not negate that he provided Appellant with the information that she needed to make an informed decision about surgery and that she did, in fact, make an informed decision of her own free will.

Furthermore, as mentioned above, Respondents did not have to use specific language, such as “mastectomies,” to trigger the doctrine as Appellant argues – though the evidence on the record supports that Respondents properly informed Appellant that there was risk that she would have to undergo subsequent surgeries for nipple and volume loss. (R. pp. 913-14). This evidence, along with the Supreme Court’s opinion in *Faile*, was available to and considered by the circuit court in ruling on Appellant’s motions. (R. pp. 165-68). Therefore, the circuit court’s submission of assumption of the risk to the jury was appropriate and not arbitrary.

C. The Circuit Court’s Instruction On Assumption Of Risk Was Not Confusing And Did Not Affect The Outcome Of The Trial.

The circuit court correctly instructed the jury on assumption of the risk under South Carolina law. In fact, the circuit court’s instruction contained the very same language used by the Supreme Court in *Davenport* in articulating assumption of the risk, including implied assumption of the risk, which was proper for the circuit court to include. *See* 333 S.C. at 79-81, 508 S.E.2d at 569-70. Despite Appellant’s contention, primary implied assumption of the risk’s application is not limited to spectator sports, and it does capture Appellant’s conduct in this case. *See e.g., Conrad-Hutsell v. Colturi*, 2002-Ohio-2632, ¶ 29 (Ct. App.) (holding that implied assumption of the risk may be submitted to a jury in a medical malpractice case); *Gray v. Gonzalez*, 290 A.D.2d 292, 293, 735 N.Y.S.2d 776 (App. Div. 2002) (same).

In South Carolina, there are only three (3) variations of assumption of the risk: (1) express, (2) primary implied and (3) secondary implied. *See Davenport*, 333 S.C. at 78-82, 508 S.E.2d at 570-71. “Express assumption of risk applies when the parties expressly agree in advance, either in writing or orally, that the plaintiff will relieve the defendant of his or her legal duty toward the plaintiff.” *Id.* at 79, at 569. Primary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are inherent in a particular activity. *Id.* at 81, at 570. Primary implied

assumption of risk is not a true affirmative defense, but instead “is simply a part of the initial **negligence analysis.**” *Id.* Stated another way, it is a part of determining whether there was an exercise of reasonable care. *See Cole v. S.C. Elec. & Gas, Inc.*, 362 S.C. 445, 453, 608 S.E.2d 859, 863 (2005) (holding that primary implied assumption of the risk was submitted to the jury despite finding a duty existed because there was still of question of fact as to whether the defendant met the standard of care). “Secondary implied assumption of risk, on the other hand, arises when the plaintiff knowingly encounters a risk created by the defendant’s negligence. It is a true defense because it is asserted only after the plaintiff establishes a prima facie case of negligence against the defendant.” *Id.* at 71, at 571.

The evidence presented at trial supports that Appellant impliedly assumed the risks of her surgical procedure by executing her consent form wherein she acknowledged and accepted the risks inherent to her surgery and by choosing to undergo it. Thus, it was appropriate for the jury to be instructed on primary implied assumption of the risk versus the other variations. The fact that Respondents have a statutory duty of care does not render primary implied assumption of the risk inapposite because the jury was still tasked with assessing whether Respondents exercised reasonable care; breached their statutory duty. *See Cole*, 362 S.C. at 453, 608 S.E.2d at 863 (cited *supra*). This was explained to the jury in the circuit court’s instruction. (R. pp. 626-27) (“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 part of the initial negligence analysis.**”))⁶ (emphasis added). So, Appellant’s claim that the circuit court’s instruction was confusing is wholly without merit and

⁶ Although not required under South Carolina law, this is arguably the “redemptive” or “clarifying” language that Appellant claims the circuit court’s instruction lacked as it specifies that assumption of the risk is not a complete bar to Appellant’s recovery.

unsupported by the record. Even so, the limited portion of the circuit court’s instruction on primary implied assumption of the risk is not sufficient on its own to overturn the jury’s verdict. *See Hennes*, 397 S.C. at 402, 725 S.E.2d at 507 (holding that, even assuming isolated portions of an instruction are “misleading,” the instruction does not constitute reversible error if the remainder of the instruction is reasonably free from error).

Markedly, there is no evidence that the jury was at all confused by the court’s instruction on this issue. The jury did not submit any questions related to assumption of the risk or otherwise intimate confusion during the circuit court’s polling. The mere fact that it was offered as part of the larger instruction is not sufficient to overturn the circuit court because, as discussed in detail above, assumption of the risk was both relevant and applicable. Additionally, Appellant’s incorrect perception that causation was undisputed likewise does not justify a new trial because assumption of the risk does not bear on causation; it is only relevant for assessing negligence.

Furthermore, as Appellant recognizes in her own Initial Brief, the instruction must affect the outcome of trial. *See Cole*, 378 S.C. at 404, 663 S.E.2d at 33. There is simply no evidence that the instruction affected the outcome of the trial. **In fact, the jury found for Appellant on the issue of negligence – which is the only element of the verdict that could possibly be affected by assumption of the risk.** Therefore, even assuming *arguendo* that the instruction had the potential to confuse jurors, Appellant cannot prove that she was prejudiced by it and, therefore, the jury’s unanimous verdict should not be disturbed.

D. Assuming The Circuit Court Erred In Denying Appellant’s Motions And Instructing The Jury As To Assumption Of The Risk, Such Error Was Harmless And There Are Other Reasons For Sustaining The Verdict.

The circuit court’s denial of Appellant’s motions and instructions as to assumption of the risk are consistent with South Carolina law. However, assuming *arguendo* that the circuit court erred in submitting assumption of the risk to the jury, any error that resulted was harmless and

would not support reversal. In South Carolina, harmless error is not a proper ground for reversal of a circuit court. *Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009). Whether an error is harmless depends on the circumstances of the particular case. *In re Harvey*, 355 S.C. 53, 63, 584 S.E.2d 893, 897 (2003). “No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). Error is harmless where it could not reasonably have affected the result of the trial. *Harvey*, 355 S.C. at 63, 584 S.E.2d at 897. Similarly, “[u]nder the present rules, a respondent - the ‘winner’ in the lower court - may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

First, Appellant can point to no improper prejudice that the submission of assumption of the risk or the circuit court’s instruction on it had on her case, especially when, as observed in the prior section, the jury found for Appellant on the issue of negligence. Second, the record is clear that Appellate had a full and fair opportunity to rebut testimony about her informed consent. However, she admitted under oath that she knew and understood the very real risks of her procedure, but that she was nonetheless “over the moon” to proceed. Moreover, she did not object to the admission of her consent form.

Third, while there was a wealth of evidence that Respondents properly obtained Appellant’s informed consent prior to operating, assumption of the risk was not a central tenant of Respondents’ case. Instead, Respondents principally defended the case based on the evidence that Respondents chose the correct and “gold standard” surgical technique and provided Appellant with proper post-operative care and that Appellant’s injuries were known complications that can occur

in the absence of negligence. In other words, Respondents defended that negligence did not cause Appellant's injuries and damages. The jury's verdict is entirely consistent with this and should not be disturbed.

Contrary to Appellant's contention, it was not conclusively established that Dr. Schimpf disrupted the blood flow to Appellant's breasts during surgery. In fact, the evidence shows that this issue did not develop in the immediate post-operative period, but later on during the healing process. Moreover, Dr. Schimpf offered venous congestion as an alternative explanation for the Appellant's issues with blood flow. Furthermore, Dr. Lefkowitz did not testify that any alleged disruption in blood flow during surgery *was the result of negligence; the choice in surgical technique*. (R. pp. 554, 568-69). In fact, he testified that a disruption in blood flow and Appellant's resulting complications is known to occur in the absence of negligence and did so in this case. In sum, he did not testify that Respondents caused Appellant's injuries or damages. Additionally, Appellant's treating physician plainly refused to be critical of Respondents' conduct and, as a result, did not lend support to Appellant's theory of causation. (R. pp. 725-26).

It is well settled law in medical malpractice cases that neither the court nor jury may infer liability based on evidence of a bad result alone. *See Dumont*, 80 F. Supp. 2d at 581 (requiring evidence of a deviation of the standard of care and not merely a bad result); *Ward*, 290 S.C. at 561 S.E.2d at 875 (same). Additionally, neither the judge or jury were required to accept the testimony of Appellant's expert that the choice in surgical technique caused Appellant's disruption in blood flow and resulting injuries because, under South Carolina law, there can be more than one (1) acceptable surgical approach. *McCourt v. Abernathy*, 318 S.C. 301, 307, 457 S.E.2d 603, 607 (1995) ("The mere fact that the plaintiff's expert may use a different approach is not considered a deviation from the recognized standard of medical care. Nor is the standard violated because the

expert disagrees with a defendant as to what is the best or better approach in treating a patient. Medicine is an inexact science, and generally qualified physicians may differ as to what constitutes a preferable course of treatment.”). Also, the jury was permitted to be critical of and not accept all or part of Appellant’s expert’s opinions due to his admitted lack of experience with breast reduction surgeries relative to Dr. Schimpf and Dr. Lefkowitz. (R. p. 339) (Appellant’s expert testifying that he does not “frequent[ly] perform Appellant’s operations”); *Bonaparte v. Floyd*, 291 S.C. 427, 439, 354 S.E.2d 40, 48 (S.C. App. 1987) (holding that the fact that a witness is not a specialist in the particular branch involved affects the weight of the witness’s testimony and may afford a basis for completely rejecting it). Thus, Appellant did not automatically meet her burden of proof as to the required element of causation simply because she offered the opinion of an expert and that she experienced post-operative complications.

Also, regardless of her attempts to now distance herself from her claims related to her post-operative care, the fact remains that she made those allegations a part of her Complaint, elicited an opinion from her expert on antibiotics, suggested through her own testimony that she had developed an infection prior to receiving antibiotics from Respondents by repeatedly showing graphic images of her breasts and discussing its foul odor, and otherwise made her post-operative care an issue for the jury. However, she did not present **any evidence** that Respondents’ alleged post-operative care proximately caused her injuries and damages. In fact, Respondents confirmed that these same complaints are more consistent with the fat necrosis process that can occur following this surgery, than with an alleged infection. (R. p. 516). Therefore, it is quite possible that the jury could have taken issue with Respondents’ aftercare but concluded that it did not cause her injuries and damages, which is an acceptable ground for sustaining their verdict.

II. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT’S POST-TRIAL MOTIONS FOR A NEW TRIAL, OR, IN THE ALTERNATIVE, FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, ALTERNATIVELY, FOR A NEW TRIAL ABSOLUTE.

A. The Jury’s Unanimous Verdict As To Proximate Cause Was Supported By The Greater Weight Of The Evidence.

The circuit court did not err in denying Appellant’s post-trial motions because the jury received overwhelming evidence that neither Respondents’ choice in surgical technique nor their post-operative care proximately caused Appellant’s injuries and damages. Appellant misstates the record to try to overcome the jury’s unanimous verdict. As a threshold matter, Respondents never conceded causation in any manner as Appellant repeatedly suggests. In fact, as previously discussed, they offered the testimony of Dr. Schimpf and Dr. Lefkowitz to fully rebut the testimony of Appellant’s expert on both negligence and causation. Both surgeons testified that Dr. Schimpf complied with the applicable standard of care and that Appellant’s injuries were known complications that can be caused by physicians exercising reasonable care; in the absence of negligence. This was supported by the testimony of Appellant’s own expert who testified that the complications that Appellant developed can arise even when the right surgical approach is taken, and, in fact, has occurred to his own patients. (R. pp. 377-79). Appellant’s treating physician testified similarly. (R. pp. 729, 737). Thus, Appellant’s claims that “[t]here was never any doubt at trial that Defendants caused Plaintiffs’ injuries” and “there was no controversy as to whether Defendants caused Plaintiff’s injuries” are gravely inaccurate and Appellant was not relieved of her burden to prove each and every element of her cause of action. Appellant’s claims as to the lack of controversy about causation are also contradicted by the verdict form, which required the jury to assess both negligence and causation.

Appellant’s claims that the experts agreed that it was Dr. Schimpf that disrupted the blood supply to Appellant’s breasts are equally unfounded. First, Appellant’s treating physician did not

offer any testimony as to causation. (R. pp. 725-26). Second, Dr. Lefkowitz did not testify that Dr. Schimpf's **surgical technique** caused the disruption in Appellant's blood flow. The fact that he opined that her blood flow had been disrupted at some point during the surgery is not dispositive on causation or liability because he did not link it to any particular decision of Respondents, including Dr. Schimpf's decision to use the "gold standard" surgical technique and to go above and beyond in order to preserve blood flow by utilizing a larger pedicle. This was fatal to Appellant's first theory of liability because she did not contend that the surgery was performed incorrectly.

More generally, Dr. Lewkowicz's testimony on the disruption is not dispositive because Dr. Schimpf testified within a reasonable degree of medical certainty that, in retrospect, Appellant likely developed venous congestion post-operatively in her home which would explain Appellant's complications as opposed to any surgical cause. (R. pp. 447-51). He also explained that he saw no indication that there was any disruption in Appellant's blood flow during surgery despite extensively looking for evidence of it by checking her capillary refill. (*Id.*). Moreover, both he and Dr. Lefkowitz testified that Dr. Schimpf created a pedicle for Appellant that was several inches larger than what is standard, which promoted greater blood flow to Appellant's nipple/areola complex and made it less likely that the surgical technique would cause a disruption. (R. pp. 430-31, 571-72).

Dr. Joseph likewise did not testify that any action of Dr. Schimpf caused Appellant's fat necrosis and subsequent infection. (R. pp. 509, 520). Consequently, the only evidence before the jury in support of Appellant's theory that Dr. Schimpf's choice in surgical technique caused her injuries and damages was the limited testimony of Appellant's expert, Dr. Hultman, which, again, neither the jury nor circuit court was required to accept above all else, particularly in light of his

admitted relative inexperience with this surgery. Appellant presented no evidence supporting that Respondents' post-operative care caused her any injury despite affirmatively pursuing it as a separate theory of liability. Accordingly, the greater weight of the evidence supports that Respondents did not proximately cause Appellant's injuries and damages and, in turn, the jury's verdict and the circuit court's decision to deny Appellant's post-trial motions. *See McKnight v. S.C. Dept. of Corrections*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009) (holding that proximate cause is only a matter for the court where the evidence does not support more than one inference).

B. The Jury's Verdict Was Not Inconsistent And In No Way Demonstrated That The Jury Was Confused.

The circuit court also did not err in denying Appellant's post-trial motions because the jury's verdict was not inconsistent. *See e.g., Stevens*, 342 S.C. at 51, 53, 536 S.E.2d at 661, 666 (holding a verdict that found the defendant liable for *proximately causing* the plaintiff's injuries yet awarding zero dollars in damages was facially inconsistent); *Herring v. Home Depot, Inc.*, 350 S.C. 373, 381, n.16, 565 S.E.2d 773, 777, n.16 (Ct. App. 2002) (internal citation omitted) (illustrating that a verdict in favor of a plaintiff for both revocation of acceptance and breach of warranty would be inconsistent due to their contradictory elements). Instead, it was a verdict indicative that Appellant failed to prove at least one (1) element of her medical malpractice cause of action: proximate cause. This kind of verdict is entirely permissible and appropriate under South Carolina law. *See Dropkin*, 373 S.C. at 365, 644 S.E.2d at 810 (cited above); *see also Vinson v. Hartley*, 324 S.C. 389, 411-12, 477 S.E.2d 715, 727 (Ct. App. 1996) (denying the plaintiff's motion for a new trial where the jury found for the defendant on proximate cause although the defendant admitted negligence). Otherwise, a plaintiff would be relieved of its burden to prove each and every element of its cause of action which is most certainly not the law.

Regardless, even assuming *arguendo* the verdict was inconsistent, it was not irreconcilably inconsistent because in her Complaint and at trial, Appellant argued that Respondents' surgical technique and aftercare violated the standard of care. *Austin*, 387 S.C. at 49, 691 S.E.2d at 149 (internal citation omitted) (holding that verdicts must be irreconcilably inconsistent to warrant a new trial). Appellant's expert never retracted his opinion that Respondents were negligent in not applying topical ointment to Appellant's breast wounds. Moreover, her attorneys included Appellant's criticisms of Respondents' aftercare in their statements to the jury. (R. pp. 590-92). Therefore, it stands to reason that the jury could have found that Respondents' aftercare breached the standard of care, but that their surgical technique did not. Moreover, unlike the verdict in *Stevens*, the verdict reflects that Appellant **did not prove** that her damages were proximately caused by Respondents' alleged deviations. Thus, an award of zero damages is entirely consistent with South Carolina law and does merit reversing the circuit court.

Further, the mere fact that the jury did not find proximate cause does not mean that the jury was confused on the issue. Indeed, the record supports that the opposite was true. The jury was verbally instructed on Appellant's burden of proof as to proximate cause and was also provided with a copy of the instructions. Additionally, the jury was polled after the verdict was read and each juror affirmed that the verdict was, in fact, the one that they had reached. Accordingly, any concerns that the jury was confused as to proximate cause (in addition to assumption of the risk) is entirely speculative, is wholly without support in the record and likewise does not justify Appellant's post-trial motions.

CONCLUSION

At base, this Court is left with a straightforward decision. None of the issues presented by Appellant warrant the reversal of the circuit court, which exercised its discretion and made proper, well-considered decisions to submit assumption of the risk to the jury and deny Appellant's

motions related to the same, as well as to deny Appellant's post-trial motions. The rulings of the circuit court challenged here did not prejudice Appellant, who was able to present her entire case. The jury spent nearly a week hearing the evidence and promptly returned a verdict for Respondents, which is supported by the factual record detailed above. Because there is no indication in this record that the circuit court abused its discretion in any way, this Court should affirm the jury's unanimous verdict in favor of Respondents.

Respectfully submitted,

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August 21, 2023

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Aug 21 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Appellate Case No. 2023-000029
Circuit Court Case No. 2018-CP-10-02109

Rebecca Turisk,

Appellant,

v.

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

Respondents.

CERTIFICATE OF COMPLIANCE

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

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Aug 07 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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The Honorable Maite Murphy
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Rebecca Turisk,

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v.

Dennis K. Schimpf, M.D. and
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Respondents.

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REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents' Statement of the Case misconstrues the facts and takes liberties with the record. Contrary to Respondents' claim, it is not "undisputed that the inferior pedicle wise technique selected by Dr. Schimpf is considered the 'gold-standard' technique for breast reduction." (Resp. Initial Brief, p. 3). Appellant's expert, Dr. Hultman—a board examiner for plastic surgeons—specifically testified, "I would not call this the gold standard for this patient whatsoever. I would call this a wrong operation and a contraindicated operation." (Trial Tr., R. p. 354:17-19). Dr. Hultman explained, "[I]t would not be used at all for this particular situation. This would be extremely rare to use this particular operation with the knowledge ahead of time that there were serious risks to the nipple and to the breast tissues." (Trial Tr., R. 354:13-16). Indeed, even the jury in this case unanimously found that Defendants had deviated from the standard of care. (Verdict Form, R. p. 16).

Respondents' brief also falsely states that, "Dr. Schimpf informed Appellant on multiple occasions that there was a real risk that she would need a mastectomy or similar breast loss surgery if complications arose." (Resp. Return, p. 4, incorrectly referring to Plaintiff's Exh. 25, which refers to Dr. Herrera's notes, which have nothing to do with Dr. Schimpf's examinations or the pre-operative record). In fact, there are no references to the terms "mastectomy" or "breast loss" in Dr. Schimpf's pre-operative chart or in the consent form, which was *drafted by Dr. Schimpf's office*, and which Respondents now asks this Court to misconstrue in their favor. (Consent Form, Def. Exh. 2, R. p. 908).

Respondents' brief also incorrectly argues that Appellant did not present evidence that the practice or any of its employees violated the standard of care at any time. (Resp. Initial

Brief, p. 8, FN). Respondents ignore the undisputed evidence that Dr. Schimpf is an owner and agent of Sweetgrass Plastic Surgery, LLC. As the Circuit Court correctly determined, “[I]n looking at evidence, there has been evidence presented that the care provided by Dr. Schimpf in his capacity as an agent of Sweetgrass Plastic Surgery, with two of the documents which are in evidence, the informed consent form, and along with the discharge instruction, this creates a question of fact that is proper for the jury to consider as to whether or not an agency-physician relationship has been established.” (Trial Tr., R. p. 404:18-24; Def. Exhs. 1 and 2, pp. 907-909). Additionally, Sweetgrass employee and Nurse Practitioner, Jordan Harper, made no distinction between being an employee of Sweetgrass Plastic Surgery and working for Dr. Schimpf, the owner of the practice, testifying that Sweetgrass Plastic Surgery, LLC is Dr. Schimpf. (Harper Tr., R. p. 795:11-21).

Respondents’ brief also erroneously contends that “not everyone agreed that the blood supply to Appellant’s breasts was disrupted as a result of Dr. Schimpf’s surgical technique as Appellant now posits.” (Resp. Return, p. 10). This is incorrect. Even Respondents’ own medical expert, Dr. Lefkowitz, upon being reminded of his earlier deposition testimony, begrudgingly conceded that the disruption of blood supply occurred *during* Dr. Schimpf’s performance of the surgery, not afterwards, stating “it [the blood supply] was disrupted during the surgery.” (Trial Tr., R. pp. 568:1—570:7, citing Lefkowitz Depo. Tr., p. 854:18-24, 855:3-6). This is undisputed. Dr. Schimpf’s self-serving and speculative references to venous congestion have no basis in fact, and are wholly unsupported by the medical record.

Respondents also incorrectly contend that Appellant presented two separate and distinct theories of liability. (Resp. Return, p. 8). She did not. As Appellant’s expert, Dr. Hultman, testified, application of an antibiotic could have potentially prevented “*further*” necrosis and loss

of tissues” *resulting from* the disruption of blood supply, stating, “if there's no blood supply to help fight this bacteria, then they will eventually result in a mastitis or some type of severe breast infection, so this is a situation where I would put topical antibiotics on this area.” [Emphasis added] (Trial Tr., R. p. 389:8-13). Respondent’s failure to properly administer an antibiotic is not a separate and distinct theory of liability, it is an aggravating factor. The damage was already done when Dr. Schimpf disrupted the blood supply *during* surgery—an undisputed fact, which Respondent’s own medical experts could not escape during trial. (Trial Tr., R. pp. 568:1 - 570:7; 553:7-12; 516:15-25). Even Dr. Schimpf acknowledged that it was the lack of blood flow to the nipple, which resulted in the infection, stating, “And the tissues been damaged. There’s no blood flow going into that nipple at that moment, so all of the IV antibiotics in the world are not going to get into that because antibiotics are carried through blood.” (Trial Tr., R. p. 457:20-23).

Respondent’s brief also attempts to walk back Dr. Schimpf’s testimony demonstrating that he considered Ms. Turisk a high-risk candidate given the complex nature of the case, which required specialized skill and experience. Dr. Schimpf specifically testified, “And so I agree with him [Dr. Hultman], I don't -- this is a complex breast case, very complex. In fact, you know, my junior surgeons, their first year in practice, we keep complex cases away from them because you don't want those in your collection period.” [Emphasis added] (Trial Tr., R. p. 413:5-8). It is undisputed that Dr. Schimpf never advised Ms. Turisk that her condition was any more complex than the standard case. Certainly, there is no indication in the medical record that he advised Ms. Turisk that her case was “complex” or “very complex” or that she had an increased risk of “mastectomy” or “necrosis.”

Additionally, Respondents’ intimation that Appellant sought to establish liability “from a bad result alone” runs in direct contravention to the jury’s finding that Respondents deviated

from the standard of care. 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., R. p. 371:1-19; p. 568:1-570:7, citing Lefkowitz Depo. Tr., R. p. 854:18-24 and 855:3-6; Trial Tr., R. 553:7-12; 507:9-16; 514:22-25; 516:15-25; and 357:5-15). As stated in Appellant's brief, the jury's finding as to proximate cause in this case is contrary to the preponderance of the evidence, if not all the evidence, and clearly indicates the jury was confused with regard to the Assumption of Risk charge it received. "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).

Respondents' Brief also appears to misrepresent case law to this Court. For example, Respondent states, "In *Cole [v. Raut]*, the plaintiff plainly did not sign a consent form for a C-section delivery, which was the basis of the plaintiffs' medical malpractice claim. [...]. Instead, she signed a consent form for an entirely separate procedure (i.e., a VBAC). (Resp. Brief, p. 18). Even an ancillary review of *Cole* reveals Respondents' representations are not true. To the contrary, the decision in *Cole* specifically states that Plaintiff did sign a consent form for a C-section delivery, stating, "The consent form documented Cole's consent to a VBAC delivery, induction of labor through medication, and augmentation of labor with medication, and also indicated Cole's authorization to delivery by C-section if necessary." *Cole v. Raut*, 378 S.C. 398, 402, 663 S.E.2d 30, 32 (2008). Respondent should be precluded from misconstruing the record and applicable case law.

Finally, in an effort to draw attention away from the Circuit Court’s misapplication of Assumption of the Risk defense to the present medical malpractice case—ignoring that a patient cannot voluntarily assume the risk of medical malpractice—Respondents now falsely state, “assumption of the risk was not a central tenant [sic] of Respondents’ case.” (Respondents’ Return, p. 26). This is the exact opposite of what counsel for Respondents argued at trial, when he stated that Assumption of the Risk “is the central tenet of our defense in this case.” [Emphasis added] (Trial Tr., R. p. 166:2-3). Again, Respondents cannot and should not be allowed to misconstrue the record and take contrary positions than the ones they took at trial.

ARGUMENT

I. Assumption of the Risk is inapplicable in the context of nearly all Medical Negligence actions, including the present case. Respondents’ Return misconstrues the law and conflates the defenses available in Medical Negligence actions with those available in actions for Lack of Informed Consent.

The facts and legal questions presented in the instant Medical Negligence action mirror those encountered by the Maryland Court of Special Appeals in *Schwartz v. Johnson*, 206 Md. App. 458, 49 A.3d 359 (Md. App. 2012), a seminal case, wherein the Court examined how jurisdictions across this country, including South Carolina, have overwhelmingly addressed the use of assumption of the risk defense in medical malpractice cases.

A review of the Court’s analysis is instructive. In *Schwartz*, the Court noted that assumption of the risk was a recognized affirmative defense, but that it is “a rare situation” where it is relevant or applicable to a medical malpractice case. *Id.*, 206 Md. App at 474, 49 A.3d at 368. Looking outside of its own jurisdiction, the Court provided examples of rare, isolated situations where assumption of the risk might be an applicable defense in a medical malpractice case, such as when a patient refuses the treatment suggested by a physician or elects to follow an

unconventional medical treatment. *Id.*, 206 Md. App at 475-479, 49 A.3d at 369-371. Neither of those factors are present in the instant case.

Another such rare circumstance involved a South Carolina case, which Respondent cites in his Return, and which is clearly distinguishable from the present action. The *Schwartz* Court noted, “In *Baxley v. Rosenblum*, 303 S.C. 340, 400 S.E.2d 502 (Ct. App. 1991), the Court of Appeals of South Carolina held that, based on the particular facts of the case, the trial judge had a duty to submit the defense of assumption of risk to the jury in a medical malpractice action. *Id.* at 507. [In that case,] [t]he appellant was the appellee's patient *and* was a doctor himself.” *Id.* The Court reasoned that the patient, as a physician, was in a better position to understand the risk associated with his actions, including his willful disregard of the doctor’s recommendations. *Id.* Ms. Turisk, by contrast, is not a physician, and had no way of knowing that the technical approach Dr. Schimpf employed was contraindicated for someone in her condition. As a non-physician, she had no appreciation for the heightened risks associated with this particular approach. Accordingly, she could not have assumed the risk the way the patient-physician did in *Baxley*.

The *Schwartz* Court found that outside of the aforementioned rare circumstances, including the one found in *Baxley*, the Assumption of the Risk defense is not an appropriate defense to present to a jury. The Court reasoned, “The rationale for the limited viability of the assumption of risk defense in a medical malpractice action may be explained by the elements of the defense itself; for a person to ‘assume the risk,’ he or she must have had knowledge of the risk of the danger, appreciated that risk, and voluntarily accepted that the risk could occur. [internal citations omitted]. Therefore, in the healthcare context, for a patient to have ‘assumed the risk’ of a negligent medical procedure, he or she must have voluntarily accepted the risk that

the doctor would negligently complete the procedure. Such a factual scenario, however, will almost never occur.” *Schwartz v. Johnson*, 206 Md. App. 458, 49 A.3d 359, 371 (Md. App. 2012).

The Court further reasoned, “for a court to hold that a patient assumed the risk of a physician acting negligently in a medical procedure is ‘tantamount to a finding that the [physician] owed no duty’ to the patient.” *Id.* citing, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. Ct. 2005). “[T]here is virtually no scenario in which a patient can consent to allow a healthcare provider to exercise less than ‘ordinary care’ in the provision of services. Even if given, a patient’s consent to allow a healthcare provider to exercise less than ordinary care would be specious when considered against the strict legal, ethical and professional standards that regulate the healthcare profession. **Regardless of whether the patient elects to have healthcare or requires it, the patient appropriately expects that the treatment will be rendered in accordance with the applicable standard of care. This is so regardless of how risky or dangerous the procedure or treatment modality might be.**” *Id.*, [Emphasis in original]

Here, the arguments presented by the parties in *Schwartz* are identical to the arguments in the instant case. In *Schwartz*, the defendant doctor argued that the patient had “voluntarily assumed the risk of bowel perforation” during performance of a colonoscopy, and that a bowel perforation “is a normal and usual complication associated with the performance of a colonoscopy, and thus can occur without any negligence on the part of the physician.” *Id.* 206 Md. App. at 483, 49 A.3d at 373. Similarly, Dr. Schimpf claims that the necrosis and subsequent mastectomies suffered by Ms. Turisk are normal and usual complications associated with a

breast reduction, which occurred without any negligence on his part. He further claims that Ms. Turisk voluntarily assumed the risk of said so-called non-negligent complications.

The Court in *Schwartz*, however, quickly dispensed with this faulty line of reasoning, noting, “The defense of assumption of risk, however assumes that the defendants, i.e., a doctor in a malpractice case was negligent. [...] Dr. Schwartz did not concede in the trial court, nor does he in this appeal, that he was negligent in the performance of the colonoscopy on Johnson. What Dr. Schwartz is arguing, in essence, is that Johnson voluntarily assumed the risk of a non-negligent complication of a colonoscopy. That can be raised only as a defense to a claim of a breach of informed consent, which claim was not brought by Johnson in the instant case. In other words, a patient's voluntary assumption of a risk normally associated with a particular medical treatment or procedure, after having been properly informed of the same, occurs in virtually every case and does not relieve the physician of compliance with the applicable standard of care. To hold otherwise would mean that Johnson consented to allow Dr. Schwartz to exercise less than ordinary care when Dr. Schwartz conducted the colonoscopy. Accordingly, we hold that the trial court did not err in ruling that the defense of assumption of risk was not available to Dr. Schwartz.” [Emphasis added] *Id.* 206 Md. App. at 483, 49 A.3d at 373.

This well-reasoned analysis is equally applicable to the current case. Like the Plaintiff in *Schwartz*, Ms. Turisk filed an action against Respondents for Medical Negligence. She did not file an action for Lack of Informed Consent. Dr. Schimpf should not have been allowed to mislead the jury by invoking Assumption of the Risk as a defense to an action for Medical Negligence. “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." *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011).

Here, the Court's erroneous jury charge clearly affected the outcome of the trial, particularly when one considers that (a) the jury found that Respondents deviated from the standard of care, and (b) it was uncontroverted by every expert in this case that Dr. Schimpf disrupted the blood supply to Ms. Turisk's breasts during the course of surgery and that this disruption caused the necrosis and infection. (Trial Tr., R. p. 371, lines 1-19; pp. 568:1—570:7, citing Lefkowitz Depo. Tr., R. p. 854:18-24 and p. 855:3-6; Trial Tr., R. p. 553:7-12; p. 507:9-16; p. 516:15-25; p. 357:5-15; and p. 514:22-25). Contrary to Respondents' contention, the Court's erroneous jury instruction was not harmless error and clearly affected the outcome of the trial. Accordingly, this Honorable Court should reverse the Circuit's orders and remand this case for a new trial on the merits.

II. Respondents misconstrue *Faile v. Bycura*, which is clearly distinguishable from the present case.

Contrary to Respondents' contention, *Faile v. Bycura* is clearly distinguishable from the present case. The issue of informed consent was relevant in that case simply 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. That is materially different from what the Plaintiff in *Faile* acknowledged. There is a clear distinction to be made between acknowledging that a certain subset of outcomes – in the event that complications were to arise – tend to be the "*most likely material risks and complications*" associated with a procedure as Appellant acknowledged when

signing Respondents' consent form, as opposed to acknowledging that said outcomes were most likely and probable to occur, as was the case in *Faile*. (Consent Form, Def. Exh. 2, R. p. 908). In the present case, the form did not even list mastectomy as a potential risk of surgery. (R. at Id.) As noted in Appellant's brief, 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. Certainly, Ms. Turisk did not consent to Respondents' deviation from the standard of care.

CONCLUSION

For the foregoing reasons, and those set forth in Appellant's [Initial] Brief, 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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Mount Pleasant, South Carolina
August 7, 2023

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Aug 07 2023

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.

CERTIFICATE OF COMPLIANCE

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

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(D)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Rebecca Turisk, Appellant,

v.

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

Appellate Case No. 2023-000029

Appeal from Charleston County
Maite Murphy, Circuit Court Judge

Unpublished Opinion No. 2025-UP-349
Heard April 10, 2025 – Filed October 15, 2025

AFFIRMED

Mark C. Tanenbaum and Whitney Allison Smith Rogers,
both of Mark C. Tanenbaum, PA, of Mt. Pleasant;
Elizabeth Middleton Burke, Misty Black O'Neal, and
Theodore Augustus Constantine Hargrove, II, all of
Rogers, Patrick, Westbrook & Brickman, LLC, of Mount
Pleasant; Jesse Sanchez, of The Law Office of Jesse
Sanchez, LLC, of Mount Pleasant; and William Tyler
Robinson, of Ty Robinson Law Firm, LLC, of Charleston,
all for Appellant.

Todd W. Smyth and Allie Aleece Maples, both of Smyth Whitley, LLC, of Charleston, for Respondents.

PER CURIAM: In this medical malpractice action, Appellant Rebecca Turisk assigns error to the trial court charging the jury on assumption of risk. Turisk also appeals the trial court's denial of her motion for a new trial or in the alternative, a judgment notwithstanding the verdict (JNOV) because (1) the verdict as to proximate cause was contrary to the weight of the evidence, (2) Turisk's criticism of Respondent Dr. Dennis K. Schimpf's postoperative care did not amount to a second distinct theory of liability, and (3) the jury's verdict was inconsistent and demonstrates the jury was confused. We affirm.

FACTS/PROCEDURAL HISTORY

Turisk commenced the underlying medical malpractice action against Respondents,¹ alleging Dr. Schimpf selected a contraindicated surgical technique for her breast reduction and implant removal surgery, which resulted in necrosis, infection, and ultimately a double mastectomy and reconstructive surgeries. Specifically, Turisk alleged the technique Dr. Schimpf used was contraindicated for her surgery because it failed to account for existing scar tissue below each nipple, which limited blood flow to the nipple-areolar complex (NAC).

On November 1, 2016, Dr. Schimpf performed an implant removal, breast reduction, and breast lift on Turisk using the "inferior pedicle" technique.² In the first three weeks following surgery, Turisk testified she experienced fevers, noticed drainage and odor from her breasts, and that her incision opened. The patient notes from those weeks provided that Turisk's right NAC was very bruised and that an eschar (hardened dead tissue over a deep wound) had formed, but there was no discharge, warmth, or redness. Eventually, Turisk went to the emergency room when the incision opened on her right breast. Turisk received IV antibiotics and was sent home to follow-up at Sweetgrass. The patient note from the following day

¹ Sweetgrass Plastic Surgery, LLC, and Dennis K. Schimpf, MD are Respondents. Dr. Schimpf owns Sweetgrass Plastic Surgery, and Turisk was seen and treated by Dr. Schimpf and other Sweetgrass Plastic Surgery employees.

² During the breast reduction surgery, most of the tissue surrounding the NAC is removed. The surgeon leaves a strip of tissue, the "pedicle", to maintain blood supply to the NAC. An inferior pedicle goes downward from the NAC to the bottom of the breast.

indicated that the right incision had closed, and Dr. Schimpf "prophylactically" prescribed a round of antibiotics. Dr. Schimpf debrided³ the tissue on the right NAC and noted an odor coming from the surrounding underlying tissue, "which was open and draining," but he did not notice any internal spread of infection. Dr. Schimpf prescribed a solution to control odor and "clean up" the region.

On December 3, Turisk entered inpatient care at the Medical University of South Carolina (MUSC) and remained there for five days. Turisk had developed an infection, fat necrosis,⁴ and an open wound on her right NAC. Unfortunately, the breast tissue could not be saved, resulting in Turisk having to undergo a double mastectomy and five reconstructive surgeries.

Turisk brought the underlying action against Respondents. Turisk's expert witness, Dr. Charles Hultman, testified he believed Dr. Schimpf breached the standard of care by using a contraindicated surgical technique. In his opinion, the inferior pedicle technique compromised blood supply to the NAC and part of the breast because the tissue preserved to maintain blood flow—the pedicle—directed blood through Turisk's existing scars and blood could not pass through scar tissue. Dr. Hultman opined the inferior pedicle technique would be "extremely rare" in cases involving scar tissue like Turisk's because it would be "a dangerous operation . . . that would have a high chance of failure." Dr. Hultman described other techniques that could have "greatly improve[d] the safety of the operation and [ensured] success." However, Dr. Hultman acknowledged on cross-examination that "a patient can experience fat necrosis and nipple loss even when the surgeon has done everything according to the standard of care" and that necrosis can occur regardless of where the incisions were made. Finally, Dr. Hultman testified that he did not believe any of Turisk's actions caused or accelerated the infection.

Dr. Schimpf then offered Dr. Todd Lefkowitz as an expert in plastic surgery. Dr. Lefkowitz testified that, in his opinion, Turisk's scars did not render the inferior pedicle technique a contraindicated choice because blood could flow through the scars. Dr. Lefkowitz further testified that Dr. Schimpf cut a larger pedicle than is standard to accommodate for the scar tissue and to ensure sufficient blood flow to the NAC. Dr. Lefkowitz conceded there was some disruption to the blood flow during surgery because fat necrosis would not have occurred absent some disruption;

³ Debridement cleans the area of nonviable tissue to allow a wound to heal.

⁴ Fat necrosis occurs when inadequate blood flow into or return from fatty tissue causes the tissue to die and release oil that metabolizes into a caustic alcohol, which can damage surrounding tissue.

however, he did not believe the use of the inferior pedicle technique as opposed to another technique caused the disruption. Dr. Lefkowitz further testified that known risks and complications of this surgery include loss of the NAC, infection, and the need for further, more complex surgery. Lastly, Dr. Lefkowitz agreed with other witnesses that Turisk did nothing to cause the infection or necrosis. All the experts testified to a reasonable degree of medical certainty.

The jury returned a verdict in favor of Respondents, finding that Turisk proved by the preponderance of the evidence that Respondents deviated from the standard of care but failed to prove this deviation from the standard of care proximately caused Turisk's injuries. Turisk filed a post-trial motion for a new trial as to proximate cause and damages, or in the alternative, either a JNOV or a new trial absolute. The trial court denied the motion. This appeal followed.

LAW/ANALYSIS

I. Assumption of Risk Jury Instructions

Turisk argues the trial court erred in charging the jury on assumption of risk because a patient cannot assume the risk that a physician will deviate from the standard of care, and because assumption of risk goes to duty and there was no question a duty existed as a matter of law. Turisk further argues the charge was prejudicial because it confused the jury. We hold the charge was erroneous but not prejudicial.

"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). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. 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." *Id.* (citation omitted). "An erroneous jury instruction . . . is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction." *Id.* at 405, 663 S.E.2d at 33.

"Primary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are *inherent* in a particular activity." *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 81, 508 S.E.2d 565, 570 (1998). "Primary implied assumption of risk is not a true affirmative defense[] but instead goes to the initial determination of whether the defendant's legal duty

encompasses the risk encountered by the plaintiff." *Id.*; see also Restatement (Second) of Torts § 496A cmt. (c)(2) (1965) (stating that under implied assumption of risk, "the legal result is that the defendant is relieved of his duty to the plaintiff").

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 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.

Davenport, 333 S.C. at 81, 508 S.E.2d at 570 (emphasis added) (quoting *Perez v. McConkey*, 872 S.W.2d 897, 902 (Tenn. 1994)). Primary assumption of risk is "really a principle of no duty, or no negligence, and so denies the existence of any underlying cause of action." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 68, at 496–97 (5th ed. 1984). In essence, defendants do not owe plaintiffs a duty of due care regarding common and known inherent risks—the classic example being that a baseball stadium owes no duty to plaintiffs injured by flying baseballs. *Cf. Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 38, 637 S.E.2d 560, 562–63 (2006) ("Under the doctrine of implied primary assumption of risk, Respondents' duty of care did not encompass the risk involved. The risk of a hockey spectator being struck by a flying puck is inherent to the game of hockey and is also a common, expected, and frequent risk of hockey."); *Cole v. Boy Scouts of Am.*, 397 S.C. 247, 253, 725 S.E.2d 476, 479 (2011) ("Where a person chooses to participate in a contact sport, whatever the level of play, he assumes the risks inherent in that sport.").

Before surgery, Turisk signed a consent form acknowledging that "[a]lternative methods and therapies, their benefits, material risks and disadvantages" had been explained to her; she understood and accepted that the most likely risks and complications included infection and nipple/skin loss, among others; and she had been informed of the possible need for additional procedures postoperatively.

The trial court instructed the jury on the elements of assumption of risk and explained that:

In this case, [Respondents] contend[] that [primary] 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.

In addition to its assumption of risk instruction, the trial court instructed the jury that: "despite [informed consent to a medical procedure], the defendant remains under a duty to comply with and meet the standard of care in choosing a surgical technique and performing that technique."

We hold the trial court erred in charging the jury as to assumption of risk because it was inapplicable to the facts of this case and risked confusing the jury. *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) ("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."). Surgery is an inherently risky endeavor, and we recognize that patients may assume some risk when they agree to undergo surgery. In fact, our precedent does evidence that patients assume the risk of their chosen method of treatment—i.e., by electing to undergo surgery as opposed to another form of treatment. *See Faile v. Bycura*, 289 S.C. 398, 399, 346 S.E.2d 528, 529–30 (1986) ("When a patient seeks treatment by a particular type of practitioner, he may be held to have assumed the risk of the *method* of treatment of the particular school of thought chosen." (emphasis added)). However, the existence of a surgery's known inherent risks does not alter the physician's duty to exercise reasonable care, and the exercise of reasonable care includes selecting an appropriate surgical technique. *See Hoeffner v. The Citadel*, 311 S.C. 361, 368, 429 S.E.2d 190, 194 (1993) ("Reasonable care, in the context of professional negligence, requires the exercise of that degree of skill and care which is ordinarily employed by members of the profession under similar conditions and in like surrounding circumstances."); *Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) (holding that though a patient consented to a vaginal birth after caesarian section procedure, the patient "did not simultaneously assume the risk of any danger specifically associated with a delayed C-section delivery").

Turisk claimed Dr. Schimpf violated the standard of care by selecting a contraindicated technique, a risk she neither consented to nor understood and appreciated. Turisk at no point consented to the risks associated with negligent

surgery. Keeton et al., *supra* § 68, at 485 ("It is not true that in any case where the plaintiff voluntarily encounters a known danger he necessarily consents to any future negligence of the defendant."). There is no testimony or indication that Turisk was aware of the different techniques Dr. Schimpf could have used to perform her surgery, nor is there any evidence that she consented to a particular technique. Moreover, even if she had consented to Dr. Schimpf's use of the inferior pedicle technique, there is no evidence that she fully understood and appreciated the risks of this technique compared to any other. See *Faile*, 289 S.C. at 399, 346 S.E.2d at 529 ("In order for the doctrine of assumption of the risk to apply, the injured party must have freely and voluntarily exposed himself to a known danger which he *understood and appreciated*." (emphasis added))⁵; Keeton et al., *supra* § 68, at 487 ("[The plaintiff] must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger he confronts."). Turisk's decision to undergo surgery and consent to the inherent risks did not relieve Dr. Schimpf of his duty to select an appropriate technique and perform the surgery with due care. Thus, primary implied assumption of risk did not apply in this case and the trial court erred in charging the jury as to assumption of risk.

However, though the trial court erred in charging the jury on assumption of risk, we hold the erroneous instruction was not prejudicial because it did not affect

⁵ *Faile* and *Cole v. Raut* were decided under a prior framework when assumption of risk was an affirmative defense. Following the adoption of comparative negligence, see generally, *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991); our supreme court had to reconcile the assumption of risk doctrine with comparative negligence. *Davenport*, 333 S.C. at 77, 508 S.E.2d at 568. ("*Nelson* made clear that a plaintiff's contributory negligence would no longer bar recovery unless such negligence exceeded that of the defendant. Not so clear was what would become of the defense of assumption of risk."). The court held express assumption of risk and primary implied assumption of risk are compatible with comparative negligence because they go to whether the defendant has a legal duty to the plaintiff. *Id.* at 79–82, 508 S.E.2d at 569–71. However, the court held secondary implied assumption of risk—which "arises when the plaintiff knowingly encounter[ed] a risk created by the defendant's negligence"—is *not* compatible with comparative negligence because it is "an absolute bar to recovery" and "may involve either reasonable or unreasonable conduct on the part of the plaintiff." *Id.* at 82, 87, 508 S.E.2d at 571, 573. Thus, because secondary assumption of risk may "require a plaintiff, who is fifty-percent or less at fault, to bear all of the costs of the injury," the court held it was "contrary to the premise of our comparative fault system." *Id.* at 86, 508 S.E.2d at 573.

the outcome of the trial. *See Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) ("An erroneous jury instruction, however, is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction."). The jury ultimately found that Dr. Schimpf's actions, although a deviation from the standard of care, did not proximately cause Turisk's injuries. Even without the assumption of risk instruction, the outcome would not change because, as the circuit court instructed the jury, assumption of risk contemplates whether a defendant's duty encompasses a particular risk. Inherent to the jury's finding that Dr. Schimpf breached the standard of care is a finding that Dr. Schimpf was *not* relieved of his duty of care to Turisk with regard to selecting a surgical technique and providing adequate postoperative care. *See Cole v. S.C. Elec. & Gas, Inc.*, 362 S.C. 445, 453, 608 S.E.2d 859, 863 (2005) ("Primary implied assumption of the risk arises when the plaintiff impliedly assumes risks inherent in a particular activity. It is not a true affirmative defense but is another way of stating there is no duty to the plaintiff." (citation omitted)). The jury may only reach proximate cause once the existence of a duty, the standard of care, and a breach of that standard have already been established. By reaching proximate cause, the jury rejected the theory that Turisk assumed the risk of her injuries. As discussed herein, the jury—within its purview and consistent with the evidence presented—did not find that the breach of the standard of care proximately caused the unfortunate injury in this case.

Accordingly, we hold that the trial court erred in charging the jury on assumption of risk but the error did not prejudice Turisk.

II. Post-trial Motion

Turisk asserts the trial court erred in denying her post-trial motion for a new trial or JNOV because all experts agreed that but for a disruption of blood supply to the NAC, Turisk would not have suffered her injuries, and all experts agreed that necrosis and infection were the natural and probable consequences of a disruption of blood supply. Turisk contends the evidence was susceptible to only one inference—a disruption to the NAC's blood supply resulted from the inferior pedicle technique that caused infection and necrosis. Turisk also argues that the jury's findings were inconsistent and demonstrated that the jury was confused because (1) the verdict was wholly unsupported by the evidence and (2) the assumption of risk charge was improper. Turisk notes the trial court compounded the error by relying on the assumption of risk doctrine in its order. We disagree.

"When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this [c]ourt must apply the same standard as the trial court by viewing the

evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012). "The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt." *Id.* at 332, 732 S.E.2d at 171. "Moreover, '[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.'" *Id.* (alteration in original) (quoting *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)). "An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below." *Id.* "In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Id.*

"Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 49, 691 S.E.2d 135, 149 (2010). "Verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge 'should not be required to guess as to what a jury sought to render.'" *Id.* (quoting *Prego v. Hobart*, 287 S.C. 116, 118, 336 S.E.2d 725, 726 (Ct. App. 1985)). "However, '[i]t is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found.'" *Id.* at 49–50, 691 S.E.2d at 149 (alteration in original) (quoting *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967)).

To succeed in a medical malpractice action, the plaintiff must establish (1) there was a doctor-patient relationship between the parties; (2) the health professional deviated from "generally accepted standards, practices, and procedures;" and (3) the deviation was the proximate cause of the plaintiff's injury. *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014).

"Proximate cause requires proof of both causation in fact and legal cause." *Hurd v. Williamsburg County*, 353 S.C. 596, 611, 579 S.E.2d 136, 144 (Ct. App. 2003), *aff'd*, 363 S.C. 421, 611 S.E.2d 488 (2005). "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence." *Id.* "Legal cause, in contrast to the 'but for' nature of causation in fact, is proved by establishing foreseeability. *Id.* "The standard by which foreseeability is determined is that of looking to the natural and probable consequences of the complained of act." *Id.* at 612, 579 S.E.2d at 144. "[I]f the accident would have happened as a natural and probable consequence, even in the absence of the alleged

breach, then a plaintiff has failed to demonstrate proximate cause." *Id.* "When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 586–87, 846 S.E.2d 1, 10 (Ct. App. 2020) (quoting *McKaughan v. Upstate Lung & Critical Care Specialists, P.C.*, 421 S.C. 185, 190, 805 S.E.2d 212, 214 (Ct. App. 2017)).

Here, the trial court did not err in denying the post-trial motion because the evidence presented to the jury was susceptible to more than one inference. *See RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171 ("An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." (citation omitted)). All the experts agreed that fat necrosis was caused by inadequate blood flow into the NAC, which can occur as a natural consequence of this surgery regardless of the technique used. But to satisfy the element of causation, Turisk was required to prove that Dr. Schimpf's *breach* caused the blood flow disruption that resulted in fat necrosis. Because the alleged breach was the selection of a contraindicated technique, Turisk had to prove that using an inferior pedicle elevated the risk of blood flow disruption so much that this outcome was foreseeable. *Hurd*, 353 S.C. at 611, 579 S.E.2d at 144 ("Proximate cause requires proof of both causation in fact and legal cause.").

The jury was presented with conflicting evidence as to causation. Dr. Hultman testified it would be "extremely rare" to use the inferior pedicle technique on a patient like Turisk because of "the knowledge ahead of time that there were serious risks to the nipple and to the breast tissues." On the other hand, Dr. Lefkowitz testified that even if "not a drop of blood got through the scar," Dr. Schimpf mitigated any increased risk of blood flow disruption by cutting a larger-than-standard pedicle. Thus, there was credible evidence to support the jury's conclusion that the blood flow disruption was not caused by Dr. Schimpf's use of an inferior pedicle. Therefore, the trial court did not err in denying Turisk's post-trial motion because evidence supports the jury's finding that, to the extent Dr. Schimpf breached the standard of care in his treatment of Turisk, the breach did not cause Turisk's injuries. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) ("In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight. When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in

the testimony or the evidence.'" (alteration in original) (quoting *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998))); *Geiger v. Checker Cab Co.*, 229 S.C. 39, 43, 91 S.E.2d 552, 554 (1956) ("The credibility of witnesses is peculiarly within the province of the jury.").

Further, the trial court did not err in finding that the jury's verdict was consistent because the intention of the jury's verdict was clear—Dr. Schimpf breached a duty of care he owed Turisk by selecting a contraindicated technique, but this breach did not cause the damages she suffered. *Daves v. Cleary*, 355 S.C. 216, 234, 584 S.E.2d 423, 432 (Ct. App. 2003) ("A jury's verdict should be affirmed if it is possible to do so and carry into effect the jury's clear intention."); *Austin*, 387 S.C. at 49, 691 S.E.2d at 149 ("Verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge 'should not be required to guess as to what a jury sought to render.'" (quoting *Prego*, 287 S.C. at 118, 336 S.E.2d at 726)); *id.* at 49–50, 691 S.E.2d at 149 ("However, '[i]t is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found.'" (alteration in original) (quoting *Rhodes*, 249 S.C. at 530, 155 S.E.2d at 310)); *see Vinson v. Hartley*, 324 S.C. 389, 411–12, 477 S.E.2d 715, 726–27 (Ct. App. 1996) (upholding a jury verdict finding the defendant did not proximately cause the plaintiff's injuries despite the defendant conceding she had breached her duty of care to the plaintiff).

Accordingly, we affirm the trial court's denial of Turisk's post-trial motion.

CONCLUSION

For the foregoing reasons, we hold the trial court erred in charging the jury on assumption of risk but the error did not prejudice Turisk, and we affirm the trial court's denial of Turisk's post-trial motion.

WILLIAMS, C.J., and GEATHERS and TURNER, JJ., concur.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Maite Murphy
Circuit Court Judge

Appellate Case No. 2023-000029

Rebecca Turisk,

Appellant,

v.

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

Respondents.

APPELLANT’S PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant Rebecca Turisk, through her undersigned counsel, hereby petitions this Honorable Court for a rehearing in connection with the unpublished opinion issued in this case (Opinion No. 2025-UP-349), filed October 15, 2025, attached hereto. Appellant respectfully submits that the following points have been overlooked or misapprehended by the Court:

I. The lower court’s Assumption of the Risk Jury Instruction was confusing to the jury, prejudicial to Appellant, and affected the outcome of the trial.

In the present case, this Court correctly held that “the trial court erred in charging the jury as to assumption of risk because it was inapplicable to the facts of this case *and risked confusing the jury.*” (Emphasis added). However, Appellant respectfully submits that this Court erred in holding that “the erroneous instruction was not prejudicial because it did not affect the outcome of

the trial.” A closer review of the record and related case law establishes that the assumption of the risk instruction, particularly when viewed “as a whole in light of the issues and evidence presented at trial,” was indeed confusing and affected the outcome in this 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.” *Berberich v. Jack*, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011). “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). “In reviewing jury charges for error, we must consider the court’s jury charge as a whole *in light of the evidence and issues presented at trial.*” *State v. Perry*, 440 S.C. 396, 403, 892 S.E.2d 273 (2023) (Emphasis in original).

Here, the jury charge, *when viewed as a whole in light of the evidence and issues presented at trial*, was clearly prejudicial to Appellant. From the outset of trial, Appellant warned that allowing Defendants to center their case on assumption of the risk would mislead the jury. (R. pp. 164:14-169:19). Defendants sought to introduce evidence of Ms. Turisk’s informed consent to support their assumption of the risk theory. (R. pp. 166:1-6). In response, Appellant filed a Motion in Limine arguing that such evidence was irrelevant to a breach of standard of care claim and would mislead the jury to believe that by consenting to the procedure, Ms. Turisk had consented to injuries caused by Defendants’ negligence. (R. pp. 52-55; 164:14-169:19; *see also* Appellant’s Final Brief, pp. 2-5).

In support of her Motion in Limine, Appellant’s counsel cited extensive authority from South Carolina and other states, demonstrating the distinction between informed consent and medical malpractice claims. (R. pp. 52-55; 164:14-169:19; Appellant’s Final Brief, pp. 2-5).

Among these authorities, Ms. Turisk's trial counsel cited the highly instructive case of *Hayes v. Camel*, wherein the Supreme Court of Connecticut held 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." *Hayes v. Camel*, 283 Conn. 475, 486, 927 A.2d 880, 889 (Conn. 2007).

The trial court initially agreed with Appellant, correctly ruling that assumption of risk was not relevant, nor material, and verbally granted Appellant's motion to exclude such evidence, which, if permitted, would have allowed Defendants to develop their assumption of the risk theory. (Trial Tr. 165:16-22). Despite this ruling, however, Defendants' counsel continued to argue the issue, complaining that assumption of risk was "*a central tenet of our defense in this case.*" (Trial Tr. 166:2-3). Defendants' counsel incorrectly insisted that evidence of informed consent was relevant whenever assumption of risk was pled as an affirmative defense, citing *Faile v. Bycura*, 289 S.C. 398, 346 S.E.2d 528 (1986). (Trial Tr. 165:2-8; 166:2-15).

In response, Ms. Turisk's trial counsel once again noted 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. (R. p. 166:17 – p. 167:13; p. 168:4-12).

Based on Defendants' misreading of *Faile*, however, the trial court reversed itself, 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." (Trial Tr. 168:13-19). The court added that the jury would "have the opportunity to make that distinction," abdicating its duty to instruct the jury only on applicable law and requiring the jury

to sort applicable from inapplicable law, which is the trial court's exclusive province and not that of a lay jury. (Id.)

As this Court's opinion acknowledges, "the trial court erred in charging the jury as to assumption of risk because it was inapplicable to the facts of this case and risked confusing the jury." The prejudicial impact of allowing Defendants to introduce informed consent evidence throughout trial to support their inapplicable assumption of risk theory coupled with instructing the jury on that inapplicable doctrine cannot be overstated. "[T]he purpose of jury instructions is to enlighten the jury as to what law is applicable to a certain state of facts in order that a just, fair and proper verdict can be reached." *State v. Peer*, 320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1995). When a trial court instructs a jury on a defendant's "central defense" that has no application in a medical malpractice action, allowing the Defendant to develop that theory throughout trial, the instruction does the opposite. It confuses rather than enlightens. Here, prejudice is not speculative; it is certain and was foreseeable. Indeed, Plaintiff's counsel warned of this very outcome if Defendants were permitted to develop their assumption of the risk theory and the jury was instructed on assumption of the risk.

The assumption of risk instruction did not merely risk confusing the jury about whether Dr. Schimpf breached the standard of care; it infected their analysis of causation itself. By presenting informed consent evidence alongside an assumption of risk instruction, and by developing this theory throughout trial, Defendants led the jury to believe that Ms. Turisk's acknowledgment of generalized surgical risks severed the causal link between Dr. Schimpf's breach and her injuries.

This erroneous instruction was confusing to the jury, prejudicial to Appellant, and affected the outcome in this case. As this Court acknowledged in its Opinion, "Dr. Schimpf breached a duty

of care he owed Turisk by selecting a contraindicated technique.” Yet despite every expert testifying that Dr. Schimpf disrupted the blood flow *during surgery* using this contraindicated technique—and that this disruption caused Ms. Turisk’s necrosis and infection—the jury found no causation.¹ (See Appellant’s Final Brief, at pp. 6-9, 23).

This inconsistent verdict demonstrates precisely the type of confusion that *Hayes v. Camel* predicted, and counsel for Ms. Turisk warned against from the outset of trial, allowing the jury to conclude that “consent to the surgery was tantamount to consent to the injury which resulted from that surgery,” that “consent amounted to waiver.” 927 A.2d 880 (Conn. 2007). Viewed “as a whole *in light of the evidence and issues presented at trial*,” the instruction that this Court recognized “risk[ed] confusing the jury” did exactly that—with prejudicial effect that confused the jury and affected the outcome of the trial. Accordingly, Appellant respectfully requests that this Court grant rehearing, find the assumption of risk instruction was prejudicial error, and remand this case for a new trial on the merits.

II. The Court of Appeals erred in holding that “By reaching proximate cause, the jury rejected the theory that Turisk assumed the risk of her injuries.”

Respectfully, this reasoning is circular. Here, the Court points to the verdict itself to conclude that the verdict was not affected by the trial court’s erroneous instruction. But a jury can find breach while still believing the plaintiff “assumed” the risk of complications, with that belief

¹ 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 using what the jury deemed a contraindicated technique, which deviated from the standard of care, and that it was the disruption of blood supply during surgery which caused the necrosis and infection. (Trial Tr., R. p. 371:1-19; pp. 568:1—570:7, citing Lefkowitz Depo. Tr., R. p. 854:18-24 and p. 855:3-6; Trial Tr., R. p. 553:7-12; p. 507:9-16; p. 516:15-25; p. 357:5-15; and p. 574:22-25).

improperly severing the causal analysis. As our Supreme Court noted in *Berberich v. Jack*, “A jury charge consisting of irrelevant and inapplicable principles may confuse the jury.” 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011). That’s precisely what happened here, and what Appellants trial counsel foresaw happening before the trial even started, and is further reinforced by courts across this country, which acknowledge that, within the context of medical malpractice actions like the present case, issues of informed consent “could only serve to confuse the jury because the jury could conclude, contrary to the law and the evidence, that consent to the surgery was tantamount to consent to the injury which resulted from that surgery.” *Hayes v. Camel*, 927 A.2d 880, 283 Conn. 475 (Conn. 2007).

As described above, the trial court’s erroneous and inapplicable assumption of risk instruction infected the jury’s analysis as to assumption of the risk. This is particularly evident where every expert, including Defendants’ plastic surgery expert, Dr. Lefkowitz, and Defendants’ infectious disease expert, Dr. Joseph, testified that Dr. Schimpf disrupted blood flow *during* surgery using what the jury found to be a contraindicated technique that deviated from the standard of care, and that this disruption caused the necrosis and infection.

Dr. Hultman testified “when you remove blood supply to the breast, that’s when you get fat necrosis.” (Trial Tr. 371:16-17). Dr. Lefkowitz acknowledged blood flow “was disrupted *during the surgery*.” (Trial Tr. 570:7). Indeed, as this Court’s Opinion acknowledges, “Dr Lefkowitz [Defendants’ Expert] conceded there was some disruption to the blood flow *during surgery* because fat necrosis *would not have occurred* absent some disruption.” (Emphasis added). Dr. Joseph admitted, “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. 514:22-25). Even Dr. Schimpf

acknowledged that without blood flow to the nipple, infection was inevitable. (Trial Tr. 457:20-23). (See Appellant’s Final Brief, pp. 6 -10 and15).

III. The Court of Appeals erred in affirming the Trial Court’s denial of Appellant’s Post-Trial Motions Based on its finding that “the evidence presented to the jury was susceptible to more than one inference.”

A. The Court’s Opinion Misstates the Record.

This Court’s Opinion states there was “conflicting evidence as to causation.” Respectfully, this misstates the record. The experts disagreed about whether the inferior pedicle technique was appropriate (breach), not about what caused the injuries (causation).

There was never any doubt at trial that Defendants caused Plaintiffs’ injuries. As noted in herein and in Appellant’s Final Briefs, Plaintiff’s and Defendants’ experts agreed that it was Dr. Schimpf who disrupted the blood supply to Plaintiff’s breasts *during surgery* and that it was this disruption in blood supply that *caused* the necrosis and infection. As this Court’s Opinion acknowledges, “Dr. Lefkowitz [Defendants’ Expert] conceded there was some disruption to the blood flow *during surgery* because fat necrosis *would not have occurred* absent some disruption.” (Emphasis added). 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., R. p. 357:2-20; p. 566:17-19; pp. 520:22 – 521:3; pp. 471:25 – 472:2.; p. 573:4-17).

“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). In the present case, there was no controversy as to whether Dr. Schimpf caused Plaintiff’s injuries, but, rather, as to whether he deviated from the standard of care in doing so.

The jury unanimously found that he did. This Court’s very Opinion holds, that insofar as the breach of the standard of care is concerned, “the intention of the jury’s verdict was clear,” stating, “Dr. Schimpf breached a duty of care he owed Turisk by selecting a contraindicated technique.” It was error for the lower 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, at R. p. 5).

“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 disrupted blood flow *during* surgery using what the jury found to be a contraindicated technique that deviated from the standard of care, and that this disruption caused the necrosis and infection. That is what the experts for both Plaintiff and Defendants testified to at trial.

It was error for the lower 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, at R. p. 5).

B. The Court of Appeals’ Opinion improperly heightened Appellant’s burden of proof.

This Court stated that “because the alleged breach was the selection of a contraindicated technique, Turisk had to prove that using an inferior pedicle elevated the risk of blood flow disruption so much that this outcome was foreseeable.” This misstates the applicable standard.

Proximate cause requires proof of: (1) causation in fact—the injury would not have occurred “but for” the defendant’s negligence; and (2) legal cause—foreseeability. *Oliver v. S.C.*

Dept. of Highways, 309 S.C. 313, 316, 422 S.E.2d 128, 130-31 (1992). Causation in fact is proven by establishing the injury would not have occurred “but for” the defendant’s negligence. *Id.* Legal cause is proven by establishing foreseeability, which is determined by looking to the natural and probable consequences of the complained-of act. *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996).

The law does not require proving the risk was “elevated [...] so much” compared to other techniques. It requires only that the harm be a natural and probable consequence of the breach itself. Here, both elements were established: (1) But for Dr. Schimpf’s disruption of blood supply during surgery, Ms. Turisk would not have suffered necrosis and infection; and (2) necrosis and infection were the natural and probable consequences of blood flow disruption, as every expert testified. Dr. Hultman testified, “when you remove blood supply to the breast, that’s when you get fat necrosis, or breast-tissue necrosis.” (Trial Tr. 371:16-17). Dr. Joseph confirmed, “You can’t cure something that doesn’t have a blood flow.” (Trial Tr. 514:22-25).

When a technique is contraindicated specifically because it risks blood flow disruption through scar tissue, and that exact risk materializes during employment of that contraindicated technique, which the jury deemed was a deviation of the standard of care, both causation and foreseeability are established as a matter of law.

C. The Court of Appeals’ Opinion mischaracterizes mitigation testimony as alternative causation.

This Court’s opinion points to Dr. Lefkowitz’s testimony about cutting a larger pedicle as creating a factual dispute. But this testimony addressed mitigation attempts, not alternative causation. As set forth above, Dr. Lefkowitz still admitted blood flow was disrupted *during the surgery* and that fat necrosis would not have occurred absent some disruption. He further conceded this was an “unfortunate complication *from this procedure.*” (Trial Tr. 553:7-12).

Attempted mitigation that fails is not an alternative inference. It is confirmation of causation. The Court cannot transform testimony defending the theoretical adequacy of a technique into evidence disputing actual causation. No expert—including Dr. Lefkowitz when confronted with his prior testimony—disputed that the surgery disrupted blood flow and caused the necrosis.

It was error for this Court to hold that “the evidence presented to the jury was susceptible to more than one inference.” When every expert—including Defendants’ own—testified that blood flow was disrupted during surgery using what the jury found to be a contraindicated technique, and that this disruption caused the necrosis, the evidence is susceptible to only one inference. As this Court’s Opinion acknowledges, “Dr. Lefkowitz [Defendants’ expert] conceded there was some disruption to the blood flow during surgery because fat necrosis would not have occurred absent some disruption.” (Emphasis added).

Because the evidence was susceptible to only one inference, it was error for the lower court to deny Appellant’s post-trial motions and error for this Court to affirm that denial. The verdict as to proximate cause is contrary to the weight of the evidence. Accordingly, Appellant respectfully request that this Court grant her petition for rehearing, reverse its decision, and remand this case for a new trial on the merits.

IV. The Court of Appeals’ Opinion incorrectly makes a credibility determination stating, “There was credible evidence to support the jury’s conclusion that the blood flow disruption was not caused by Dr. Schimpf’s use of an inferior pedicle.”

This violates the very standard the Court itself articulated in its Opinion. The Court correctly cited *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, stating: “In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.” 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) Yet immediately after citing this prohibition, the Court proceeded to find there was “credible”

evidence to support a conclusion that the blood flow disruption was not caused by Dr. Schimpf's use of an inferior pedicle. This is the exact credibility determination *RFT Mgmt. Co.* forbids.

Moreover, the Court mischaracterizes Dr. Lefkowitz's testimony by conflating two distinct subjects. The Court states: "On the other hand, Dr. Lefkowitz testified that even if 'not a drop of blood got through the scar,' Dr. Schimpf mitigated any increased risk of blood flow disruption by cutting a larger-than-standard pedicle. Thus, there was credible evidence to support the jury's conclusion that the blood flow disruption was not caused by Dr. Schimpf's use of an inferior pedicle."

The Court treats this testimony as addressing causation, but Dr. Lefkowitz was testifying about something entirely different: whether the inferior pedicle technique was **theoretically contraindicated** (a breach question). He testified that "even if you took that worst-case assumption" that "not a drop of blood got through the scar," the pedicle design was theoretically adequate. (R. 394:25-395:12). This was his defense of why selecting the technique met the standard of care—not testimony about what actually caused Ms. Turisk's injuries. The jury disagreed with him.

When Dr. Lefkowitz was forced to address what **actually happened** (causation), and confronted with his earlier deposition testimony, he was forced to concede that blood flow **was** "disrupted during the surgery" and that fat necrosis would not have occurred absent some disruption. (Full exchange and impeachment at Trial Tr., R. pp. 568:1-570:7, citing Lefkowitz Depo. Tr., R. p. 854:18-24, and p. 855:3-6; Appellants Final Brief, pp. 6-10). He further acknowledged this was an "unfortunate complication *from this procedure*." (Trial Tr. 553:7-12). As noted in this Court's Opinion, "Dr. Lefkowitz [Defendants' expert] conceded there was some

disruption to the blood flow *during surgery* because fat necrosis *would not have occurred* absent some disruption.” (Emphasis added).

These are not conflicting statements requiring reconciliation. They address different questions:

1. **Breach question:** Was selecting the inferior pedicle technique theoretically defensible? (Dr. Lefkowitz testified, yes, because, in his opinion, the pedicle was designed to be large enough.)
2. **Causation question:** Did the surgery disrupt blood flow causing necrosis? (Dr. Lefkowitz testified blood flow was disrupted during surgery and necrosis wouldn’t have occurred without it.)

As noted above, the Court cannot transform testimony defending the theoretical adequacy of a technique into evidence disputing actual causation. No expert—including Dr. Lefkowitz when confronted with his prior testimony—disputed that the surgery disrupted blood flow and caused the necrosis. Respectfully, the Court’s characterization of this selected testimony as creating a causation dispute constitutes both an improper credibility determination and a misstatement of the record. Because the Court made an improper credibility determination and treated theoretical breach testimony as creating a causation dispute, it should reverse and remand for a new trial.

V. The Court of Appeals erred in holding that “the trial court did not err in denying Turisk’s post-trial motion because evidence supports the jury’s finding that to the extent Dr. Schimpf breached the standard of care in his treatment of Turisk, the breach did not cause Turisk’s injuries.”

For the reasons set forth in Sections III and IV above, this holding is wholly unsupported by the evidence and controlled by an error of law. When every expert—including Defendants’ own—testified that blood flow was disrupted *during surgery* using what the jury found to be a contraindicated technique, and that this disruption *caused the necrosis*, the evidence establishes

causation as a matter of law. *McKnight v. S.C. Dept. of Corrections*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009).

VI. The Court of Appeals erred in holding “the trial court did not err in finding that the jury’s verdict was consistent because the intention of the jury’s verdict was clear—Dr. Schimpf breached the duty of care he owed Turisk by selecting a contraindicated technique, but the breach did not cause the damages suffered.”

This holding overlooks the internal contradiction in the verdict. As this Court recognized, the inferior pedicle technique was contraindicated because it “failed to account for existing scar tissue below each nipple, which limited blood flow to the nipple-areolar complex.” The technique was contraindicated precisely because it posed unacceptable risks of blood flow disruption.

The verdict requires accepting two irreconcilable propositions: (1) Dr. Schimpf was wrong to select a technique because it risked blood flow disruption through scar tissue, and (2) when blood flow disruption occurred through scar tissue during use of that technique, it was unrelated to his selection. If the technique selection didn’t matter—if any technique would have caused the same problem—then selecting the inferior pedicle would not constitute a breach. Conversely, if selecting it was a breach because of its specific risks, then those risks materializing establishes causation.

“[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). Here, the verdict’s internal contradiction—finding breach for selecting a risky technique while finding that risk’s materialization unrelated—demonstrates the confusion created by the erroneous assumption of risk instruction.

CONCLUSION

For the foregoing reasons, as well as those reasons stated in Appellant’s Final Brief and at oral argument, Appellant respectfully requests that this Honorable Court grant her petition, 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.

[Signatures on following page]

Respectfully submitted,

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Mount Pleasant, South Carolina

The South Carolina Court of Appeals

Rebecca Turisk, Appellant,

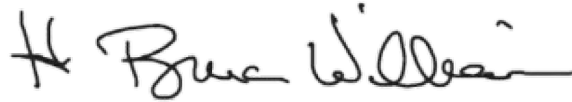
v.

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

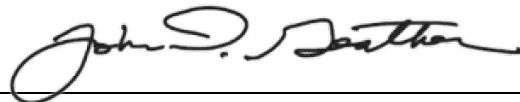
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ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

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