COURT OF APPEALS OF VIRGINIA

Record No. 0147-25-4

ABOUT WOMEN OB/GYN, P.C., ET AL.
v.
SONJA JOYNER

Present: Judges AtLee, Friedman and Senior Judge Annunziata
Argued at Alexandria, Virginia

Opinion Issued September 15, 2026[*]

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Manuel A. Capsalis, Judge

Kristina L. Fattoum (Byron J. Mitchell; Paul T. Walkinshaw; M. Logan Blake; Mitchell & Simopoulos, PLLC; Wharton Levin, on briefs), for appellants.

Lawson D. Spivey (Edward L. Weiner; Annette S. Yospe; Weiner Spivey & Miller, PLC, on brief), for appellee.

MEMORANDUM OPINION BY
JUDGE ROSEMARIE ANNUNZIATA

About Women OB/GYN, P.C. and Dr. Richard Neil Jenet (the providers) appeal the circuit court's judgment entering the jury's award of $2,350,700, along with costs and interest, to Sonja Joyner on her medical malpractice case. The providers argue that the circuit court improperly instructed the jury on vicarious liability for the actions of a nurse and erred by allowing Joyner to present expert testimony from witnesses who did not meet the statutory requirements for expert qualification. We affirm the judgment against About Women, but reverse the judgment against Dr. Jenet.

[*] This opinion is not designated for publication. *See* Code § 17.1-413(A).

BACKGROUND[1]

In 2018, Joyner reported painful menstrual cycles to her family doctor. A sonogram revealed her enlarged uterus contained uterine fibroids—benign tumors of the uterine muscle. Her family doctor referred Joyner to Dr. Jenet, an obstetrician gynecologist employed by About Women. Dr. Jenet recommended a total hysterectomy (removal of her uterus, ovaries, and fallopian tubes) and scheduled surgery for February 13, 2019, at Sentara Northern Virginia Medical Center.

Dr. Jenet planned a robotic assisted laparoscopic surgery, which involved using instruments connected to robotic arms and a camera that were inserted into small punctures in Joyner's abdomen. Dr. Jenet would manipulate the robotic arms from a console 10 feet away from Joyner. Nurse Xing Yuan, a registered nurse and licensed surgical assistant employed by Sentara, would assist Dr. Jenet and act under his supervision at the patient's bedside. The pair had worked together for over 30 years.

During Joyner's operation, Dr. Jenet performed a myomectomy to remove fibroids. He used a monopolar electrocautery surgical device called a LiNA Loop to remove the fibroids. Electrocautery devices electrically seal blood vessels; monopolar ones also cut tissue. The LiNA Loop functioned like an electrified lasso, encircling and tightening around tissue. An electric generator controlled by a foot pedal activated the electric current that cut and cauterized the tissue.

Nurse Yuan and Dr. Jenet maneuvered the LiNA Loop around the fibroid tissue; Dr. Jenet manipulated the device using other instruments as it was not connected to the robot. Dr. Jenet directed Nurse Yuan to cinch the LiNA Loop. He confirmed that the device was cinched tightly and that he could see the LiNA Loop's tip. After Dr. Jenet determined the device's appropriate

[1] On appeal from a judgment of a jury verdict, "[w]e view the evidence and all reasonable inferences fairly deducible from it in the light most favorable to the prevailing party at trial." *Colas v. Tyree*, 302 Va. 17, 26 (2023) (alteration in original) (quoting *Xspedius Mgmt. Co. of Va., L.L.C. v. Stephan*, 269 Va. 421, 425 (2005)).

placement, he told Nurse Yuan to "fire when ready" and Nurse Yuan stepped on the foot pedal, activating the device. They successfully removed a fibroid.

As the pair repositioned the device to remove another fibroid, Dr. Jenet noticed the LiNA Loop was loose, and he could not see the device's tip. Before Dr. Jenet could adjust, one of two possible events occurred: Nurse Yuan either heard Dr. Jenet instruct him to fire, or he inadvertently stepped on the LiNA Loop pedal. Either way, Nurse Yuan prematurely activated the LiNA Loop, which cut into the main blood vessel of Joyner's left leg (the left external iliac artery) and left ureter; an area superior to the operative area.

Joyner began to bleed profusely, her blood pressure dropped, and she went into extreme shock. Dr. Jenet removed the robotic arms and made an abdominal incision; he applied pressure to the bleeding, and called for assistance.[2] He then completed the hysterectomy, making space for the medical team to further address the bleeding. Due to the amount of blood lost, Joyner went into cardiac arrest and the medical team had to resuscitate her. The responding surgeons tied off the damaged blood vessel, which they misidentified as one supplying the bladder; then Dr. Jenet closed the puncture wounds, and a urologist repaired the ureter. Testing revealed that the surgeons had tied off the left external iliac artery to Joyner's left leg, cutting off circulation. So, Joyner underwent emergency surgery to relieve swelling, reconstruct the artery, and return blood flow.

Joyner suffered permanent nerve and tissue damage in her left leg. She requires a cane for walking and cannot participate in her pre-surgery activities, like hiking and horseback riding. In addition, Joyner developed bladder incontinence and cognitive difficulties. The event exacerbated her post-traumatic stress disorder. Follow-up treatment cost $352,897.32 in medical bills.

[2] Dr. Jenet summoned a general surgeon, a urologist, and a vascular surgeon for assistance.

Joyner sued About Women and Dr. Jenet for negligence.[3] She alleged About Women's "employees and agents" provided her with medical care. Those "employees/agents" breached the standard of care when they failed to perform the myomectomy properly, failed to operate the LiNA Loop properly, cut and damaged her external iliac artery, and "failed to exercise the degree of skill and diligence practiced by a reasonably prudent practitioner in the field of medicine in this Commonwealth." Joyner also claimed Dr. Jenet breached the standard of care, but made no assertion that he did so through his employees or agents. The providers admitted Dr. Jenet acted within the scope of his employment with About Women during Joyner's operation, but denied they violated the standard of care.

Pretrial, the providers moved to exclude evidence and argument of their vicarious liability for Nurse Yuan, arguing that Joyner's complaint failed to plead that theory of recovery and failed to designate an expert on Nurse Yuan's negligence. The circuit court denied the motion *in limine*, finding that the complaint alleged "a claim individually against [Dr.] Jenet and one for vicarious liability against . . . About Women's employees and agents." The circuit court found "whether Nurse Yuan is an agent of About Women acting at the direction of its employee Dr. Jenet" was a question to be addressed at trial based on the evidence. Therefore, it permitted Joyner's "claim for vicarious liability of employees and agents of Defendant About Women."

At trial, Dr. Jenet testified that Nurse Yuan prematurely activated the LiNA Loop a second time: the device was loose, he lacked full visualization, and he had not given the order to fire. Nurse Yuan testified that while he has sole control over activation of the LiNA Loop, he only activates it with Dr. Jenet's permission, and he confirmed that the LiNA Loop had not malfunctioned.

[3] Joyner sued two other doctors and their employers, but only the counts against Dr. Jenet and About Women, as his employer, are before the Court in this appeal. The jury found against the vascular surgeon and his practice group jointly and severally with the providers.

Dr. Edward Koch, a retired board-certified general obstetrics and gynecology physician licensed in Virginia, testified for Joyner as an expert in gynecological surgery. From 2018 to 2020 he maintained an active clinic practice in gynecological procedures. Dr. Koch had performed hysterectomies, operated electrocautery devices, used a LiNA Loop to remove fibroids laparoscopically, led gynecological operations, and served four years as chief of gynecological surgery. He had last used a LiNA Loop in 2005. He testified that he had performed the same procedure as Dr. Jenet. He had also performed robotic surgery in a pig lab to remove a kidney and watched a couple of robotic-assisted hysterectomies. He stated the issue here was not the robot. The LiNA Loop is unconnected to, and operates independently from, the robot, and functioned the same whether surgery is laparoscopic or open. The providers objected to his expert testimony because he had not operated a LiNA Loop robotically. The circuit court overruled the objection, qualifying Dr. Koch as an expert in gynecological surgery, not to include robotic surgeries.

Dr. Koch testified that gynecologic surgeries use monopolar electrocautery devices, like the LiNA Loop, that cut tissue and cauterize blood vessels. The surgeon must cinch the monopolar device down tight before it is activated, or the electrical charge may travel to unintended areas. Additionally, when activating any electrocautery device, the operator must always keep it in his sight. If the operator loses sight of the LiNA Loop's tip and it is activated, it may thermally damage adjacent tissue. Dr. Koch confirmed that the LiNA Loop instruction manual contained those directions. He opined that Dr. Jenet met the standard of care until the removal of the second fibroid, and he violated the standard of care when the LiNA Loop was activated a second time before he had confirmed that it was secure and in full view. Dr. Koch found the miscommunication between Dr. Jenet and Nurse Yuan immaterial because Nurse Yuan operated under Dr. Jenet's instruction and control. Dr. Koch also opined that Dr. Jenet violated the standard of care by failing to identify the cut artery.

Joyner also offered Dr. David A. Mayer, a double board-certified general surgeon and a vascular surgeon practicing for over 40 years in New York, as an expert in general and vascular surgery. Dr. Mayer maintained an active clinical practice in general and vascular surgery from 2018 to 2020 and met the qualifications for licensure in Virginia. He had led 25,000 major surgeries, including 50 hysterectomies (the last one in 2010) as a part of his training, and assisted several hundred gynecologists with hysterectomies, including 10 robotic hysterectomies. He testified that he had used electrocautery devices more than 30,000 times in his practice, including ones that cut tissue and sealed blood vessels; he explained almost all surgeries use cautery. Dr. Mayer had never performed a myomectomy or used a LiNA Loop as a lead surgeon but had cinched tight and activated a LiNA Loop as a surgical assistant. Dr. Mayer's active clinical practice did not perform hysterectomies or use LiNA Loops. The providers objected to Dr. Mayer qualifying as an expert because he had not operated a LiNA Loop during a robotic hysterectomy or myomectomy. Overruling the objection, the circuit court qualified Dr. Mayer as an expert in the field of general and vascular surgery and allowed him to testify about operating the LiNA Loop without visualization based on his experience with electrocautery devices.

Dr. Mayer opined that Dr. Jenet violated the standard of care because he could not see the tip of the LiNA Loop when the device was activated, injuring Joyner. Dr. Mayer testified that the lead surgeon oversaw the operating team, so even if Nurse Yuan inadvertently activated the LiNA Loop, Dr. Jenet was responsible. Additionally, Dr. Jenet violated the standard of care when he failed to identify the cut artery.

At the conclusion of Joyner's evidence, the circuit court overruled the providers' motion to strike the standard-of-care testimony, renewing their previous expert objections. The providers' gynecological experts then testified; they agreed that the premature activation of the LiNA Loop violated the standard of care, but disputed Dr. Jenet's responsibility. They opined that Dr. Jenet did

not order Nurse Yuan to fire the LiNA Loop a second time. Dr. Jenet reiterated that before he had the LiNA Loop fully visualized and cinched and without his cue to fire, Nurse Yuan activated the LiNA Loop. At the close of the providers' case, the circuit court denied the parties' motions, including the providers' motion to strike the vicarious liability claim for lack of expert testimony of Nurse Yuan's negligence.

The parties debated Joyner's proposed jury instructions that covered the agent-principal relationship and vicarious liability, Instructions 25 through 29. The instructions specifically described what Joyner had to establish to recover against Dr. Jenet "for the actions of Xing Yuan, RN," including that Nurse Yuan was Dr. Jenet's agent. The providers objected, arguing that the pretrial ruling (to which they had noted an objection) recognized the complaint alleged a vicarious claim only against About Women. The circuit court overruled the objection, interpreting it as challenging the pretrial ruling. The circuit court noted that it agreed with the pretrial ruling and found it to be the law of the case. The jury found for Joyner and awarded her $2,500,000 in damages.

The providers moved to set aside the verdict and for a new trial, arguing the court should not have allowed the vicarious liability jury instructions because Joyner did not allege or prove that Dr. Jenet was vicariously liable for Nurse Yuan. The providers also renewed their argument that Dr. Mayer did not meet the qualification requirements of Code § 8.01-581.20(A). The circuit court denied the providers' motions and entered judgment for $2,350,000—the medical malpractice cap—along with costs and interest.

The providers appeal. They challenge the circuit court's jury instructions on vicarious liability, claiming Joyner never alleged or proved that theory with the requisite expert testimony. The providers also argue that the circuit court should not have allowed Joyner's experts to testify because they were not qualified to speak to Dr. Jenet's standard of care.

ANALYSIS

I. Jury Instructions

"One of a trial court's most important responsibilities is to ensure that a jury is properly instructed." *Emergency Physicians of Tidewater, PLC v. Hanger*, 303 Va. 77, 88 (2024). Instructions are provided "to fully and fairly inform the jury as to the law of the case applicable to the particular facts, and not to confuse them." *Commonwealth v. Kartozia*, 304 Va. 321, 332 (2025) (quoting *Honsinger v. Egan*, 266 Va. 269, 274 (2003)). "A trial court's decision whether to grant or refuse a proposed jury instruction is generally subject to appellate review for abuse of discretion." *Rodrigue v. Butts-Franklin*, 79 Va. App. 645, 653 (2024) (quoting *Howsare v. Commonwealth*, 293 Va. 439, 443 (2017)). "We apply the deferential abuse of discretion standard alongside our recognition that '[a] litigant is entitled to jury instructions supporting his or her theory of the case if sufficient evidence is introduced to support that theory and if the instructions correctly state the law.'" *Kartozia*, 304 Va. at 332 (alteration in original) (quoting *Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 78 (2004)). "[B]y definition," a circuit court "abuses its discretion when it makes an error of law." *Coffman v. Commonwealth*, 67 Va. App. 163, 166 (2017) (quoting *Commonwealth v. Greer*, 63 Va. App. 561, 568 (2014)).

The providers claim the circuit court erred when it instructed the jury on vicarious liability because Joyner failed to plead and prove it with expert testimony of Nurse Yuan's negligence. We agree that Joyner's complaint failed to plead a theory of vicarious liability against Dr. Jenet, so the circuit court erred by instructing the jury in a manner that permitted the jury to find Dr. Jenet vicariously liable. We reverse the verdict against him. But we affirm the verdict against About Women, because About Women waived its pleading argument and we disagree that Joyner needed expert testimony of Nurse Yuan's negligence.

A. Vicarious Liability Against Dr. Jenet

"Our jurisprudence prohibits the entry of judgment on a right not pleaded and claimed." *Sloan v. Thornton*, 249 Va. 492, 500 (1995). The right of recovery is based on "a pleading setting forth facts warranting the granting of the relief sought." *Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.*, 221 Va. 1139, 1141 (1981) (quoting *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207 (1935)). "The issues in a case are made by the pleadings, and not by the testimony of witnesses or other evidence." *Dabney v. Augusta Mut. Ins. Co.*, 282 Va. 78, 86 (2011) (quoting *Jenkins v. Bay House Assocs., L.P.*, 266 Va. 39, 44 (2003)). Thus, "[a] litigant's pleadings are as essential as his proof, and a court may not award particular relief unless it is substantially in accord with the case asserted in those pleadings." *Id.* (quoting *Jenkins*, 266 Va. at 43). This rule protects the litigant who "is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense." *Id.* (quoting *Jenkins*, 266 Va. at 43).

Virginia's "notice pleading regime" embodies these principles. "[E]very pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense." *Allison v. Brown*, 293 Va. 617, 624 (2017) (quoting Rule 1:4(d)). A pleading meets this standard when it is "drafted so that [the] defendant cannot mistake the true nature of the claim." *Id.* (alteration in original) (quoting *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24 (1993)). Regardless of how "informal," a pleading is sufficient "where [it is] sufficient in substance to fairly apprise the defendant of the nature of the demand made upon him, and states sufficient facts to enable the court to say that if the facts stated are proved, the plaintiff is entitled to recover." *Id.* at 627 (alteration in original) (quoting *Mankin v. Aldridge*, 127 Va. 761, 765 (1920)). Actual notice of a claim is insufficient; the notice must be in the complaint. *Id.* at 626. Applying these principles, our Supreme Court has held that a

party was not entitled to jury instructions based on a theory of liability not previously identified in the pleadings. *Sloan*, 249 Va. at 500-01; *Allison*, 293 Va. at 626-27.

A careful review of the complaint reveals a single theory of recovery against Dr. Jenet, negligence. The count against him did not include allegations of agency or a right of control over anyone. *Whitfield v. Whittaker Mem'l Hosp.*, 210 Va. 176, 181 (1969) (determining agency requires that the agent is "subject to the [principal's] control, or right of control, with regard to the work to be done and the manner of performing it"). So, nothing in the complaint informed Dr. Jenet in "plain and explicit" language that Joyner sought to hold him vicariously liable for Nurse Yuan's alleged negligence. *Dabney*, 282 Va. at 86. Under binding precedent, Joyner was not entitled to jury instructions based on a theory of liability not previously identified in the pleadings. *Sloan*, 249 Va. at 500-501; *Allison*, 293 Va. at 627. Thus, the circuit court erred in granting them. *Coffman*, 67 Va. App. at 166.

The circuit court found that the challenged jury instructions reflected the pretrial ruling, which it considered the law of the case. That was error. "The law-of-the-case doctrine has no binding effect on a trial court prior to an appeal." *In re Brown*, 295 Va. 202, 224 (2018) (quoting *Robbins v. Robbins*, 48 Va. App. 466, 474 (2006)). And the pretrial ruling identified "a claim individually against [Dr.] Jenet and one for vicarious liability against . . . About Women's employees and agents." It also ruled "whether Nurse Yuan is an agent of About Women acting at the direction of its employee" was a jury question.

Having determined that the circuit court erred, we must consider whether this error was harmless. Code § 8.01-678. Here we conclude that it was not. "In Virginia, non-constitutional error is harmless 'when it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached.'" *Campos v. Commonwealth*, 67 Va. App. 690, 717 (2017) (quoting *Lavinder v. Commonwealth*, 12 Va. App.

1003, 1005 (1991) (en banc)). "An error does not affect a verdict if a reviewing court can conclude, without usurping the jury's fact finding function, that, had the error not occurred, the verdict would have been the same." *Id.* (quoting *Lavinder*, 12 Va. App. at 1005). "If an issue is erroneously submitted to a jury, [we] presume that the jury decided the case upon that issue." *Hale v. Maersk Line Ltd.*, 284 Va. 358, 377 (2012) (quoting *Herr v. Wheeler*, 272 Va. 310, 318 (2006)).

Absent error, the jury would not have received the instructions on vicarious liability against Dr. Jenet. The jury verdict form does not specify the theory of recovery, so we do not know if the jury relied on the erroneous instruction. Not knowing the jury's basis, we presume the jury decided the case upon the erroneous issue. *Id.* Therefore, we cannot say the verdict would have remained the same without the instruction, so the error is not harmless. *Campos*, 67 Va. App. at 717. Accordingly, we reverse the judgment against Dr. Jenet and remand for further proceedings without a vicarious liability theory against Dr. Jenet.

B. Vicarious Liability Against About Women

An opening brief must contain "the argument (including principles of law and authorities) relating to each assignment of error." Rule 5A:20(e). Under Rule 5A:20(e), About Women must present the circuit court's alleged error "to us with legal authority to support [its] contention." *Coward v. Wellmont Health Sys.*, 295 Va. 351, 367 (2018) (quoting *Bartley v. Commonwealth*, 67 Va. App. 740, 746 (2017)). As we have explained, "unsupported assertions of error do not merit appellate consideration." *Winters v. Winters*, 73 Va. App. 581, 597 (2021). An appellant's failure to provide authority "leaves us without a legal prism" to consider the alleged error and it is not our role to "research or construct a litigant's case or arguments for" it. *Coward*, 295 Va. at 367 (quoting *Bartley*, 67 Va. App. at 746). An appellant who "fails to develop an argument in support of his or her contention or merely constructs a skeletal argument" waives the issue. *Id.* (quoting *Bartley*, 67 Va. App. at 746).

Although appellants' assignment of error alleges that Joyner's complaint failed to plead vicarious liability against Dr. Jenet *and* About Women, the brief presented no argument supporting its contention for About Women; the brief addresses only Dr. Jenet. But the argument addressing Dr. Jenet does not explain why About Women cannot be held vicariously liable, and we cannot construct About Women's argument for it. *Id.* Thus, About Women waived its claim regarding Joyner's complaint. *Id.*

About Women also argued that the evidence below was insufficient to instruct the jury on vicarious liability because Joyner failed to present expert opinion on Nurse Yuan's negligence. We disagree that expert testimony was necessary here.

As a preliminary matter, Joyner contends that About Women waived this argument by failing to raise it when the parties litigated jury instructions. "Generally, the reasons for objecting to the grant or refusal of a jury instruction must be presented to the trial court before such objection will be considered on appeal." *Nolte v. MT Tech. Enters., LLC*, 284 Va. 80, 97 (2012) (quoting *Morgen Indus. v. Vaughan*, 252 Va. 60, 67-68 (1996)). Before discussing jury instructions, About Women had argued in the motion to strike that Joyner could not prove a vicarious liability claim for Nurse Yuan's actions without expert testimony on the standard of care. "No party, after having made an objection or motion known to the court, shall be required to (i) make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration" of such a ruling. Code § 8.01-384(A). "The undeniable purpose of Code § 8.01-384(A) is to relieve counsel of the burden of making repeated further objections to each subsequent action of the trial court that applies or implements a prior ruling to which an objection has already been noted." *King v. Commonwealth*, 264 Va. 576, 582 (2002). About Women's motion to strike informed the circuit court that it objected to jury instructions on vicarious liability of Nurse Yuan for insufficient evidence. By instructing the jury on that issue,

the circuit court implemented its denial of the motion to strike. Thus, the objection was preserved. *King*, 264 Va. at 582.

Turning to the merits of About Women's contention, a principal is only "liable for the tortious acts" of its employees. *Plummer v. Center Psychiatrists*, 252 Va. 233, 235 (1996); *see also Whitfield*, 210 Va. at 183 (applying the principle to a doctor's "lent servant" from a hospital). Accordingly, the evidence must be sufficient for a reasonable factfinder to conclude that Nurse Yuan was negligent to establish About Women's vicarious liability. *Plummer*, 252 Va. at 235.

"[I]ssues involving medical malpractice often fall beyond the realm of common knowledge and experience of a lay jury." *Summers v. Syptak*, 293 Va. 606, 613 (2017) (quoting *Beverly Enters.-Va., Inc. v. Nichols*, 247 Va. 264, 267 (1994)); *Perdieu v. Blackstone Fam. Prac. Ctr.*, 264 Va. 408, 421-22 (2002) (noting that the relevant standards of care were "not within the common knowledge of a jury"). "The general rule in medical malpractice cases is that an expert is required to establish that the defendant 'deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed.'" *Summers*, 293 Va. at 613 (quoting Code § 8.01-20.1); *Coston v. Bio-Med. Applications of Va., Inc.*, 275 Va. 1, 5 (2008) (collecting cases).

But "[t]here is an exception to this rule, although its application is 'rare.'" *Summers*, 293 Va. at 613 (quoting *Beverly Enters.-Va.*, 247 Va. at 267; *Raines v. Lutz*, 231 Va. 110, 113 n.2 (1986)). "Under this exception, 'expert testimony is unnecessary [when] the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience.'" *Id.* (alteration in original) (quoting *Beverly Enters.-Va.*, 247 Va. at 267). Examples of this exception include an employee who left a tray of food alone with a nursing home patient known to choke on food, *Beverly Enters.-Va.*, 247 Va. at 269; a doctor who forgot to perform one of two

surgeries, *Webb v. Smith*, 276 Va. 305, 308 (2008); a surgeon who left a hypodermic needle in a patient after a surgery, *Dickerson v. Fatehi*, 253 Va. 324, 326 (1997); and an employee who knowingly placed a dialysis patient in a defective chair, *Coston*, 275 Va. at 7.

We hold narrowly, under the unique facts presented, that this case falls within the rare exception to the general rule. The negligence theory against Nurse Yuan was that he activated an electrical cutting and burning device before it was properly positioned and without instruction, injuring Joyner outside the operative area. *Plummer*, 252 Va. at 235. No one disputed that Nurse Yuan activated the LiNA Loop a second time. Nurse Yuan testified that he had sole control over the LiNA Loop's foot pedal and that the device did not misfire or malfunction. Dr. Jenet and his gynecological experts agreed with Dr. Koch and Dr. Mayer that Nurse Yuan activated the LiNA Loop prematurely. Dr. Jenet and his gynecological experts also testified that Nurse Yuan activated the LiNA Loop a second time without instruction. Dr. Jenet acknowledged that activation would violate the standard of care for activation of the device if he gave the order; his defense was that he did not. Disputing Dr. Jenet's account of events, Nurse Yuan defended himself by insisting he would have fired the device only upon Dr. Jenet's order. This factual dispute and negligence theory did not require the jury to assess nuanced decision-making based on specialized medical knowledge. A jury needed no medical expertise to evaluate Nurse Yuan's conduct. The evidence showed one of two possible events occurred: Nurse Yuan either heard Dr. Jenet instruct him to fire, or he inadvertently stepped on the LiNA Loop foot pedal. Considering these specific facts, the jury, relying on common knowledge and experience, could conclude that activating the surgical device, designed to cut into and burn the human body, before instruction to do so and confirmation of proper placement, breached the

standard of care for use of that device. Expert testimony therefore was unnecessary.[4] *Summers*, 293 Va. at 613. Because the common-knowledge exception applied and the evidence supported a negligence finding against Nurse Yuan without expert testimony, the circuit court's decision to give the vicarious-liability instruction was within its discretion and cannot be disturbed on appeal. *Kartozia*, 304 Va. at 332.

II. Medical Expert Testimony

Admitting "expert testimony is a matter within the sound discretion of the trial court, and we will reverse the trial court's judgment only when the [trial] court has abused this discretion." *Toraish v. Lee*, 293 Va. 262, 268 (2017) (quoting *Keesee v. Donigan*, 259 Va. 157, 161 (2000)). "The abuse of discretion standard draws a line—or rather, demarcates a region—between the unsupportable and the merely mistaken, between the legal error . . . that a reviewing court may always correct, and the simple disagreement that, on this standard, it may not." *Jefferson v. Commonwealth*, 298 Va. 1, 10-11 (2019) (alteration in original) (quoting *Reyes v. Commonwealth*, 297 Va. 133, 139 (2019)).

Code § 8.01-581.20 governs the admissibility and qualification of expert witnesses in medical negligence cases. "Under this statute, a physician is presumed to know the statewide standard of care in the physician's specialty or field of medicine either if the physician is licensed to practice in Virginia or '[i]f the physician is licensed out-of-state, but meets the educational and examination requirements of the statute.'" *Jackson v. Qureshi*, 277 Va. 114, 122 (2009) (alteration in original) (quoting *Lloyd v. Kime*, 275 Va. 98, 109 (2008)). The statutory presumption applied to both Dr. Koch and Dr. Mayer. Dr. Koch, as a certified OB/GYN licensed

[4] Even though the circuit court did not address this exception in its ruling, we are "not limited to the grounds offered by the trial court in support of its decision, and [we are] 'entitled to affirm the court's judgment on alternate grounds, if such grounds are apparent from the record.'" *Summers*, 293 Va. at 612 (alteration in original) (quoting *Perry v. Commonwealth*, 280 Va. 572, 582 (2010)).

in Virginia was entitled to the presumption that he knew the relevant standard of care in his field. *Id.* And Dr. Mayer, as a New York general and vascular surgeon who met the qualifications for licensure in Virginia, was entitled to the presumption that he knew the standard of care in his field. *Id.*

"Under Code § 8.01-581.20(A), a witness to whom the presumption applies may nonetheless be disqualified as an expert witness if he does not meet either of two statutory requisites:" knowledge and an active clinical practice. *Holt v. Chalmeta*, 295 Va. 22, 32-33 (2018) (quoting *Wright v. Kaye*, 267 Va. 510, 518 (2004)). "Conversely, '[a] witness *shall* be qualified to testify as an expert' if both statutory requisites are met." *Wright*, 267 Va. at 518 (alteration in original) (quoting Code § 8.01-581.20(A)). We consider both statutory prongs in terms of the "relevant medical procedure," which is viewed in the context of the alleged deviation from the standard of care. *Id.* at 521-23; *Holt*, 295 Va. at 36 ("[It] is the act upon which the claim of malpractice is based.").

To fulfill the "knowledge requirement," an expert witness must demonstrate "expert knowledge on the standard of care in the defendant's specialty." *Lloyd*, 275 Va. at 109. To determine whether the knowledge prong is met, we do not apply a "rigid formula," but consider that "knowledge may derive from study, experience, or both." *Black v. Bladergroen*, 258 Va. 438, 444 (1999). An expert may be qualified to testify on a standard of care irrespective of the setting when the standard of care remains the same. *See Holt*, 295 Va. at 32-35 (uncontradicted expert qualified to opine on acts performed in a different setting because the standard of care did not differ); *Sami v. Varn*, 260 Va. 280, 284 (2000) (expert not precluded from opining on emergency care without practicing in that setting because of experience with the procedure and the same standard of care).

The active clinical practice prong requires the expert witness to show that he had an "active clinical practice in either the defendant's specialty or related field of medicine within one year of the date of the alleged act or omission forming the basis of the action." Code § 8.01-581.20(A). The "related field of medicine" is established "if in the expert witness' clinical practice the expert performs the procedure at issue and the standard of care for performing the procedure is the same." *Holt*, 295 Va. at 35 (quoting *Sami*, 260 Va. at 285). "The phrase 'actual performance of the procedures at issue in this case' is 'not to be given a narrow construction inconsistent with the plain terms of the statute.'" *Id.* at 36 (quoting *Wright*, 267 Va. at 524). The expert witness "need not have performed the actual procedure within one year of the alleged negligence," as the statute requires only that he "performed that procedure, at some point." *Id.* at 37-38.

The providers claim Joyner's experts failed to satisfy both prongs of the statute because they had not performed a robotic hysterectomy and had limited experience with a LiNA Loop. The premise of the providers' argument is that the relevant medical procedure was a myomectomy with a LiNA Loop during a robotic hysterectomy. But we find the providers' framing of the testimony is stated at too granular a level. *Id.* at 35.

Wright v. Kaye is instructive on this issue. In that case, a doctor left staples in a bladder after removing a cyst on a urachus (urachal cystectomy) during laparoscopic surgery. *Wright*, 267 Va. at 515-16. The circuit court excluded experts for insufficient knowledge because they had never performed, witnessed, or studied a urachal cystectomy. *Id.* at 519. Yet the plaintiff did not claim that the decision to remove the urachal cyst deviated from the standard of care nor did she claim an injury to the urachus. *Id.* at 520. Nor did plaintiff criticize that decision or the use of a stapler. *Id.* Rather, the alleged deviation was neglecting the bladder when performing nearby surgery, causing a bladder injury. *Id.* at 520-21. And in that context, nothing in the record suggested a urachal cystectomy had a unique standard of care compared to other surgeries near the

bladder. *Id.* at 521. "Actual performance of the procedures at issue in this case" is not a narrow test and it does not require "the same medical procedure with the same pathology in all respects as gave rise to the alleged act of malpractice at issue." *Id.* at 523. Thus, the relevant procedure was laparoscopic surgery with a stapler near the bladder, not a urachal cystectomy. *Id.* at 519, 522-23.

Similarly, here Joyner never claimed that the decisions to use the robotic console or to perform a myomectomy with a LiNA Loop or a hysterectomy deviated from the standard of care, and she did not claim a uterine injury. In fact, Dr. Koch testified that Dr. Jenet met the standard of care until the removal of the second fibroid. Dr. Koch—who had performed robotic surgery on a pig and observed robotic-assisted hysterectomies—also testified that the LiNA Loop "has nothing to do with the robot at all" and functions the same whether surgery is robotic, traditional laparoscopic, or open. He explained that what matters is how you use the LiNA Loop. "The trial court was not entitled to ignore [Dr. Koch's] uncontradicted testimony that the standard of care for the performance of [the LiNA Loop] was common" for robotic and nonrobotic surgery settings, when visualizing and cinching the device. *Holt*, 295 Va. at 35.

Rather, Joyner based her claim on the improper operation of a LiNA Loop and an external-iliac-arterial injury, superior to the operative area and apart from the hysterectomy. The parties agreed that the deviation from the standard of care was Nurse Yuan activating the LiNA Loop prematurely, before Dr. Jenet had the device secured and fully visualized. And in that context, nothing in the record suggested the LiNA Loop had a unique standard of care compared to other monopolar electrocautery devices used to cut tissue and seal blood vessels; indeed, it showed that when activating a monopolar electrocautery device, the device must be secure and fully visualized. Similarly, nothing in the record suggested that activation of the monopolar electrocautery device during a gynecological procedure differed from other procedures. *Wright*,

267 Va. at 521. Accordingly, the premature activation of a monopolar electrocautery device formed the basis of Joyner's claim and is the procedure at issue. *Id.* at 522.

A. Dr. Koch

The evidence established that Dr. Koch had knowledge of the standard of care for operating a monopolar electrocautery device in Dr. Jenet's specialty, gynecological surgery. *Lloyd*, 275 Va. at 109. Dr. Koch derived his opinion from his experience operating electrocautery devices during gynecological surgeries, including removing fibroids with a LiNA Loop, and his study of the LiNA Loop manual. *Black*, 258 Va. at 444. And Dr. Jenet's experts concurred with Dr. Koch's opinion: when activating a LiNA Loop it must be secure and fully visualized. Dr. Koch's limited experience in a robotic setting did not preclude his testimony because the standard of care remained the same irrespective of the robot. *Holt*, 295 Va. at 32-35; *Sami*, 260 Va. at 284.

The evidence also established that Dr. Koch had an active clinical practice in Dr. Jenet's specialty within one year of Joyner's February 2019 surgery. Code § 8.01-581.20(A). Dr. Jenet was an obstetrician-gynecologist and then a gynecologist; from 2018 to 2020 Dr. Koch practiced gynecological procedures in Virginia. Dr. Koch need not satisfy the "performance of the procedure at issue" criteria because that standard applies only when the expert has a related field of medicine.[5] *Holt*, 295 Va. at 35. Having satisfied both statutory prongs of Code § 8.01-581.20(A), the circuit court did not err in qualifying Dr. Koch as an expert in gynecological surgery, not to include robotic surgeries. *Wright*, 267 Va. at 518.

[5] The circuit court's determination on this issue is unclear, so we note that Dr. Koch had performed the procedure at issue. He had operated monopolar electrocautery devices, including a LiNA Loop 12 times (twice laparoscopically to remove fibroids) between 2000 and 2005. *See Holt*, 295 Va. at 35-36 (applying the "actual performance of procedure test" when it could not discern whether the circuit court determined that the witness's clinical practice was the same as the defendant's specialty).

B. Dr. Mayer

The record similarly supports the circuit court's certifying Dr. Mayer as an expert on the standard of care for operating a monopolar electrocautery device. Dr. Mayer derived his opinion from his experience as a general and vascular surgeon using electrocautery devices, including monopolar ones, more than 30,000 times and as a surgical assistant to a gynecological surgeon operating a LiNA Loop. *Black*, 258 Va. at 444. As discussed above, Dr. Koch confirmed that gynecologic surgeries also use monopolar electrocautery devices, and the LiNA Loop had the same standard of care for activation as other monopolar electrocautery devices. Dr. Mayer's standard-of-care opinion also aligned with the three gynecologist experts and the LiNA Loop instruction manual: when activating a LiNA Loop it must be secure and fully visualized. Thus, the record showed that Dr. Mayer had knowledge of the standard of care for operating a monopolar electrocautery device in Dr. Jenet's specialty. *Lloyd*, 275 Va. at 109.

The evidence also established that Dr. Mayer had an active clinical practice in a related field of medicine to Dr. Jenet's specialty within a year of Joyner's surgery. Code § 8.01-581.20(A). From 2018 to 2020 Dr. Mayer saw patients weekly and led general and vascular surgeries in his practice, he met the qualifications for licensure in Virginia, and he assisted gynecologists hundreds of times with hysterectomies. As established above, Dr. Mayer had extensive experience operating monopolar electrocautery devices under the same standard of care as a gynecological surgeon. And Dr. Mayer had operated a LiNA Loop, cinching it tight and activating it, when assisting a gynecological surgeon. Therefore, the record established that in his clinical practice Dr. Mayer performed the procedure at issue with the same standard of care as gynecological surgeons, so Dr. Mayer's practice was a "related field of medicine." *Holt*, 295 Va. at 35. Having satisfied both statutory prongs of Code § 8.01-581.20(A), the circuit court did not err in allowing Dr. Mayer to testify based on his experience with electrocautery devices. *Wright*, 267 Va. at 518.

The record here supported the circuit court's ruling that Joyner's expert witnesses were qualified, so we cannot say the circuit court abused its discretion. *Jefferson*, 298 Va. at 10-11. When applying the abuse of discretion standard, "we do not substitute our judgment for that of the trial court. Rather, we consider only whether the record fairly supports the trial court's action." *Harris v. Joplin*, 304 Va. 338, 347 (2025). It is of no consequence that reasonable jurists could differ on the underlying issue as "[o]nly when reasonable jurists could *not* differ can we say an abuse of discretion has occurred." *Id.* (emphasis added). The abuse of discretion standard means a "circuit court 'has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.'" *Lucas v. Riverhill Poultry, Inc.*, 300 Va. 78, 93 (2021) (quoting *Landrum v. Chippenham and Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011)).

CONCLUSION

For these reasons, the circuit court's judgment is affirmed as to About Women and reversed as to Dr. Jenet. We remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.