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V I R G I N I A

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND  
DIVISION I

JAYNE W. ELLETT  
Route 1, Box 279  
Crewe, Virginia 23930

Plaintiff

vs.

CASE NO. LH - 1344

GEORGE JOHNSON, M.D.  
7109 Jahnke Road  
Richmond, Virginia 23225

Defendant

MOTION FOR JUDGMENT

The plaintiff, by counsel, move this Honorable Court for judgment against the defendant on the grounds and in the amount as hereinafter set forth:

1. On March 26, 1980, plaintiff, Jayne Ellett, was an in-patient in Chippenham Hospital under the care of hospital staff and defendant George Johnson, M.D.

2. On March 26, 1980, a certain surgical procedure was performed on plaintiff, Jayne Ellett, by defendant, George Johnson, M.D., and his agents, servants or employees.

3. The defendant was negligent in his diagnosis, care, treatment and follow-up care and treatment of plaintiff, Jayne Ellett.

RECEIVED & FILED  
in the Clerk's Office

- / -


4. As a direct and proximate result of the aforesaid negligence, the plaintiff, Jayne Ellett, was caused to sustain serious and permanent injuries, has been prevented from transacting her business, has suffered and will continue to suffer loss of earnings, has suffered and will continue to suffer great pain of body and mind; has sustained permanent disability, deformity and loss of earning capacity; has incurred and will incur in the future hospital, doctors and related bills in an effort to be cured of said injuries.

5. As a direct and proximate result of the negligence of the defendants, plaintiff, James Ellett, has incurred economic responsibility for medical treatment of Jayne Ellett, both in the past and in the future, and has lost the services of his wife in their businesses.

6. The statute of limitations applicable to this matter was tolled by prior notice sent to defendant pursuant to Rule 2(a) of the Medical Malpractice Rules of Procedure as established by the Virginia Supreme Court.

7. This action is brought pursuant to Virginia Code §8.01-229(E) (3) in that this action was the subject of a prior action which was styled in the same manner, which was Case No. LF-802 in the Circuit Court of the City of Richmond, Division I, and which was voluntarily nonsuited by plaintiff by Order of this Court entered approximately March 21, 1983.

WHEREFORE, the plaintiffs demand judgment against the defendant, in the sum of five hundred thousand dollars (\$500,000.00) and their costs in their behalf expended.



---

GERALD F. RAGLAND, JR.  
Counsel for Plaintiffs  
Suite 400, 3251 Old Lee Hwy.  
Fairfax, Virginia 22030  
(703) 691-0900

C. Medical report of Dr. John A. Jane addressed to Ralph E. Godsey and dated October 6, 1982.

D. Medical report of Dr. Justiniano F. Campa, addressed to John Jane, M.D. and dated October 6, 1982.

E. Report of electromyography dated October 21, 1982, and signed by Lawrence H. Phillips, M.D.

ANSWER: Admit

2. If the preceding Request is not admitted, explain in detail why the statement is not admitted and state with specificity those facts which would make the statement true, identifying the individuals and/or documents which corroborate such facts.

ANSWER: Not applicable.

3. Defendant is requested to admit that the trauma or damage found on the median nerve of plaintiff's right arm during the surgery performed by the defendant on March 28, 1980, was proximately caused by the defendant, Dr. Johnson, or those acting under his direction and control, during the previous right arm surgery of March 26, 1980.

ANSWER: Admit.

4. If the preceding Request is not admitted, explain in detail why the statement is not admitted and state with specificity

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

the 27th day of August 19 85

nunc pro tunc 8/15/85

JAYNE W. ELLETT

PLAINTIFF

v.

GEORGE JOHNSON, M.D.

DEFENDANT

O R D E R

THIS CAUSE came on August 15, 1985, and came the parties, in person and by their respective counsel and came again the jury sworn in this case, to-wit: Cecil W. Absher, Thomas W. Lee, Marian D. Mangrum, Tara J. McLean, David L. Miller, Jr., Cathy Talbert and Cary N. Watt, pursuant to their adjournment on August 14, 1985.

The remainder of the plaintiff's evidence was presented and the defendant's evidence was presented. At the close of all evidence, plaintiff moved to strike the defendant's evidence for the reasons stated in the record and was argued by counsel. The motion was denied. Plaintiff's exception to the ruling is hereby noted.

And after hearing arguments of counsel and receiving instructions from the Court, the jury retired to their room to consult of their verdict and after some time returned into Court with the following verdict:

- 5 -

85-2128

"We, the jury, on the issues joined,  
find for the defendant, George Johnson, M.D."

/s/ Catherine C. Talbert  
Date: August 15, 1985

It is therefore ORDERED that the plaintiff recover nothing of the defendant, but that the defendant recover of the plaintiff his costs expended in defense of this suit.

To all of which action of the Court, the plaintiff, by counsel, duly objected.

It is ORDERED that the transcript of these proceedings when properly prepared and filed with the Clerk's Office of this Court, shall without more become a part of the record made in this case.

It is further ORDERED that a copy of this Order be mailed to counsel of record for all parties and the date of mailing noted on the margin hereon.

And nothing further remaining to be done herein, it is ORDERED that this cause be stricken from the docket and the papers placed among the ended causes.

A Copy Teste:

IVA R. PURDY, CLERK

By

Linda H. Brown

Deputy Clerk



VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

JAYNE W. ELLETT

vs.

DR. GEORGE W. JOHNSON

August 14 & 15, 1985

Richmond, Virginia

Partial transcript of proceedings in the  
above when heard before The Honorable Melvin Hughes,  
Judge, and a jury.

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-7-

## 1 APPEARANCES:

2 Gerald F. Ragland, Jr., Esquire  
3 Arlene Starace, Esquire  
4 Suite 305  
5 10521 Judicial Drive  
6 Fairfax, Virginia 22030  
7 Counsel for the plaintiff

8 R. Carter Scott, III, Esquire  
9 Browder, Russell, Morris & Butcher  
10 One James Center, Suite 1100  
11 Richmond, Virginia 23219  
12 Counsel for the defendant

1  
2 MR. RAGLAND: Before I do this, Your  
3 Honor, as a foundation for this testimony, I  
4 would like to read into the record one request  
5 for admissions, and the defendant's response  
6 thereto, if I may.

7 THE COURT: All right. Have you made  
8 Mr. Carter aware of what it is?

9 MR. RAGLAND: This is just the  
10 proximate cause question.

11 THE COURT: Mr. Scott?

12 MR. SCOTT: Your Honor, I think we  
13 have already admitted this, but we will admit  
14 that the injury to the nerve occurred during  
15 the surgery on March 26, 1980. We will be  
16 willing to stipulate that.

17 THE COURT: All right. Is that what  
18 you are trying to do, Mr. Ragland?

19 MR. RAGLAND: The only thing missing  
20 from the stipulation is that the cause is  
21 related to the defendant's actions.

22 THE COURT: Well, I thought that was  
23 more or less implicit with what Mr. Scott just  
24 said.

25 MR. RAGLAND: So long as we have that

1 stipulation.

2 THE COURT: Do either one of you  
3 gentlemen want to tell the jury this, or I  
4 will.

5 MR. RAGLAND: Well, Your Honor, I  
6 want to call Dr. Bruce Butler. His  
7 deposition was taken de bene esse, and we  
8 recorded it, and I would ask you to instruct  
9 the jury about the use of a deposition.

10 THE COURT: What about the  
11 stipulation? That is what I am asking  
12 specifically.

13 MR. RAGLAND: Yes, I'm sorry, what a  
14 stipulation is, and that that in fact is not in  
15 dispute.

16 THE COURT: All right. Ladies and  
17 gentlemen, as you have been told, and I think  
18 some of the testimony has already revealed,  
19 there were two operations that the plaintiff  
20 had here, one on the 26th of March, I believe,  
21 and one on the 28th of March. It has been  
22 stipulated -- now that means that it has been  
23 agreed between the parties that this is a fact  
24 not in controversy, that the injury to the  
25 median nerve occurred during the first



1 operation. All right, we had two nerves, the  
2 ulnar and median, and that an injury occurred  
3 during that first operation.

4 And secondly, we are about to view  
5 a deposition, a video-taped deposition of a  
6 Dr. Bruce Butler who is one of the plaintiff's  
7 witnesses. A deposition is simply a question  
8 and answer session that is held outside of  
9 court and prior to trial. And you are to  
10 consider this video tape replay of that  
11 deposition as if the doctor were actually  
12 here, and take it as evidence in this case to  
13 the point that you would find it as evidence.  
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1                   NOTE: The following colloquy took  
2 place following the discussion on instructions,  
3 out of the presence of the jury:

4  
5                   MR. RAGLAND: My only concern right  
6 now is that in light of giving of this  
7 proximate cause charge -- I'm inclined to ask  
8 to reopen to read this admission into evidence.  
9 I thought it was covered by the stipulation,  
10 but in light of the fact that that charge is  
11 being given --

12                  THE COURT: The stipulation, as I  
13 understand it, as it was given, didn't include  
14 the magic words "proximate cause." I  
15 don't believe the stipulation included that  
16 language. The stipulation, as I recall it, was  
17 that it was agreed between the parties that the  
18 injury occurred during the first operation.

19                  MR. SCOTT: Yes, sir.

20                  THE COURT: Basically.

21                  MR. SCOTT: I'm not following the  
22 distinction between being caused by the first  
23 operation and occurring at the time of the  
24 first operation. I don't know what the  
25 difference is there. We are not going to argue

1 at any time that it didn't happen during the  
2 first operation, but we are certainly not  
3 conceding, and didn't in the request for  
4 admissions say that any negligence on his part  
5 caused it. And that is the distinction, as I  
6 see it. I think we can resolve it in argument,  
7 Judge. Mr. Ragland can simply say that we have  
8 agreed that the injury occurred, was caused.  
9 If he wants to say was caused at the time of  
10 the first surgery, I'm not going to disagree  
11 with that. But the proof of the negligence  
12 causing it is the thing. I mean it can occur  
13 at a time, but not --

14 THE COURT: To be actionable, it has  
15 to be negligence where there is a proximate  
16 cause. That is actionable negligence. You can  
17 have negligence over here, but it may not be  
18 actionable because for legal reasons there is  
19 no proximate cause, or there may be other  
20 instances where there is not damage.

21 MR. RAGLAND: In this case, the  
22 action that caused the injury is the same  
23 action, whether or not it was negligence.  
24 The issue is whether or not it was negligence  
25 when that nerve was injured during the first

1 surgery. The facts don't question -- It is a  
2 question of whether those facts equal  
3 negligence. If they equal negligence, the  
4 proximate cause is there. It is not an  
5 additional thing that has to be proved. If it  
6 was negligent to injure that nerve, I don't have  
7 to then go on and prove that the injury to that  
8 nerve was the proximate cause of the injury to  
9 that nerve.

10 THE COURT: Well, that is the  
11 question, though. That is a factual, legal  
12 mixed question here that I think they have to  
13 decide. They have to decide, one, was it  
14 negligent, and was her injury, the injury, was  
15 it proximately caused by the negligence of the  
16 doctor. That is the question, and it's a  
17 factual question. Now, when they say there is  
18 some dispute between you as to whether it  
19 occurred or was caused, I forgot what the  
20 language says, but the stipulation at least was --  
21 I don't know what words I used, I can't recall.  
22 But I think I used the word "occurred," that  
23 there is no dispute that the damage or the  
24 injury to the median nerve occurred during the  
25 first operation. Now, it may have been



1 different. I don't know if I said "caused". I  
2 probably said "occurred." But the question of  
3 proximate cause is one for the jury, in my  
4 mind.

5 MR. RAGLAND: May I reopen the case  
6 to read this admission?

7 THE COURT: What is your position on  
8 that, Mr. Scott?

9 MR. SCOTT: I would object to it. We  
10 have got, when you use proximate cause in  
11 connection with a request for admissions, where  
12 there is no statement of negligence associated  
13 with it, I think it would be, if anything, I  
14 think it would -- I can't think of the word. I  
15 don't think the jury should be told that. I  
16 mean I don't think those words should be used  
17 because then the issue still remains that the  
18 negligence must cause it. And I think telling  
19 the jury may presuppose that the negligence  
20 caused it.

21 THE COURT: Well, I will deny, your  
22 request is denied, Mr. Ragland, and your  
23 exception is noted.

24 MR. RAGLAND: May I read this into  
25 the record?

-15-

1 THE COURT: Go right ahead.

2 MR. RAGLAND: What you are denying is  
3 that I be allowed to read this request?

4 THE COURT: I'm denying your request  
5 to reopen the case for the purpose of this.

6 MR. RAGLAND: And if you were to allow  
7 me to do so, I would read this admission, the  
8 following statement: "The defendant is  
9 requested to admit that the trauma or damage  
10 found on the median nerve of plaintiff's right  
11 arm during the surgery performed by the  
12 defendant on March 28, 1980 was proximately  
13 caused by the defendant, Dr. Johnson, or those  
14 acting under his direction and control, during  
15 the previous right arm surgery of March 26,  
16 1980." The answer to that is: "Admit."

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2 CERTIFICATE OF COURT REPORTER  
3

4 I, Nancy Douglas Cook, hereby certify that I,  
5 having been duly sworn, was the Court Reporter in the  
6 Circuit Court of the City of Richmond, Virginia,  
7 on August 14 & 15, 1985, at the time of the hearing herein.

8 I further certify that the foregoing transcript  
9 is a true and accurate record of the excerpts from the  
10 proceedings during the hearing herein.

11 Given under my hand this 26<sup>th</sup> day of September,  
12 1985.

13  
14  
15 Nancy Douglas Cook  
16 Nancy Douglas Cook, CSR-RPR  
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## II. STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the lower Court erred, and in effect, directed a verdict for defendant, in instructing the jury using a standard instruction containing the issue of proximate cause, when the element of proximate cause had been admitted prior to trial and stipulated to in open court and there was no evidence from either party as to proximate cause upon which jury could base it's deliberations?

2. Whether the lower Court erred, upon disregarding the stipulation admitting proximate cause, in refusing to allow plaintiff to reopen her case for the purpose of introducing evidence as to that issue in the form of defendant's pre-trial admission?



COUNTER STATEMENTS  
OF  
QUESTIONS PRESENTED

- I. Whether the Trial Court properly instructed the jury on the issue of proximate cause of plaintiff's damages?
- II. Whether the Trial Court properly refused to allow the plaintiff to reopen her case at the close of defendant's evidence and after argument on jury instructions?