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2026 VT 44

No. 25-AP-345

John Ford

Supreme Court

v.

On Appeal from
Superior Court, Lamoille Unit,
Civil Division

Marek Polomsky, MD and
University of Vermont Medical Center

April Term, 2026

Benjamin Battles, J.

Matthew A. Zidovsky of Langrock Sperry & Wool, LLP, Burlington, and John Ford, Pro Se,
Wolcott, for Plaintiff-Appellant.

David Pocius and Tyler Gorbett of Paul Frank + Collins P.C., Burlington, for Defendants-
Appellees.

PRESENT: Reiber, C.J., Eaton, Waples, Drescher, JJ., and Arms, Supr. J.,
Specially Assigned

¶ 1. **WAPLES, J.** Plaintiff appeals a civil division order dismissing his claim for medical battery against defendants Dr. Marek Polomsky and University of Vermont Medical Center (UVMCC). On appeal, plaintiff argues that he did not expressly consent to a procedure Dr. Polomsky performed and therefore that he presented a prima facie case of medical battery. We conclude that plaintiff has not sufficiently pled a claim for medical battery. We affirm.

¶ 2. Plaintiff's complaint and the documents relied on in the complaint reflect the following. See Sutton v. Purzycki, 2022 VT 56, ¶ 20, 217 Vt. 326, 295 A.3d 377 (explaining "documents relied on in a complaint merge into the pleadings" and may be considered when

evaluating motion to dismiss); Kaplan v. Morgan Stanley & Co., 2009 VT 78, ¶ 10 n.4, 186 Vt. 605, 987 A.2d 258 (mem.) (concluding trial court properly relied on entire town plan where plaintiff specifically referred to plan in complaint, even though plaintiff did not attach full text of plan to complaint). In October 2022, plaintiff was admitted to UVMMC due to acute coronary syndrome. After initially declining surgery, plaintiff met with Dr. Polomsky and agreed to undergo bypass surgery. Plaintiff signed a UVMMC form presented by defendants entitled “Consent for Procedure.” The form indicated that plaintiff “authorize[d]” Dr. Polomsky “to perform the following,” and listed “coronary bypass graft surgery, endoscopic vein harvest, left atrial appendage clip.” This list was handwritten on the form; the rest of the form was boilerplate. The boilerplate form also indicated that Dr. Polomsky explained “the procedure” to plaintiff as well as attendant benefits and risks. Plaintiff received surgery during which a left atrial appendage clip was placed in plaintiff’s heart.

¶ 3. In April 2025, plaintiff brought a claim for medical battery,¹ asserting that Dr. Polomsky “committed battery by intentionally placing an unauthorized medical device on plaintiff’s left atrial appendage while plaintiff was unconscious.” Plaintiff alleged that the form’s use of the singular “procedure” in the title and throughout the form “directly impl[ied] that the form be utilized for single and not multiple procedures.” He further asserted that Dr. Polomsky failed to discuss the atrial clip or conduct post-procedural imaging during follow-up appointments to confirm the device’s proper functioning.

¶ 4. Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted under Vermont Rule of Civil Procedure 12(b)(6). Defendants stated that medical battery requires an absence of consent for the procedure and emphasized that plaintiff conceded he signed the consent form specifically listing “left atrial appendage clip.” Defendants

¹ Plaintiff also brought a claim for breach of fiduciary duty against defendants but later voluntarily dismissed this count.

argued that plaintiff consented to the performed procedure and therefore failed to plead a viable medical-battery claim. In response, plaintiff contended that he provided consent for the bypass procedure but nothing more.

¶ 5. The trial court granted defendants' motion to dismiss. The court concluded that the complaint and the consent form "make clear that [plaintiff] expressly provided consent for placement of the left atrial appendage clip." The court explained that it was not reasonable to conclude that the singular "procedure" in the boilerplate form negated plaintiff's consent to all three procedures handwritten on the form. "Because [plaintiff] expressly provided consent" for the atrial clip, the court held that he failed to state a claim for medical battery against Dr. Polomsky. Plaintiff appealed.

¶ 6. "We review decisions on a motion to dismiss de novo under the same standard as the trial court and will uphold a motion to dismiss for failure to state a claim only if it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." Birchwood Land Co. v. Krizan, 2015 VT 37, ¶ 6, 198 Vt. 420, 115 A.3d 1009 (quotation omitted). In doing so, "[w]e assume that the facts pleaded in the complaint are true and make all reasonable inferences in the plaintiff's favor." Sutton, 2022 VT 56, ¶ 20 (quotation omitted). "Our role in reviewing the trial court's decision on such a motion is limited to determining whether the bare allegations of the complaint" and incorporated documents "are sufficient to state a claim." Birchwood Land Co., 2015 VT 37, ¶ 6 (quotation omitted); see Sutton, 2022 VT 56, ¶ 20 (recognizing that "documents relied on in a complaint merge into the pleadings").

¶ 7. Notwithstanding our liberal pleading standard, "where the plaintiff does not allege a legally cognizable claim, dismissal is appropriate." Montague v. Hundred Acre Homestead, LLC, 2019 VT 16, ¶ 11, 209 Vt. 514, 208 A.3d 609. Civil Rule 8 protects not only plaintiffs seeking access to the courts but also defendants and the courts from "legally insufficient" suits. Colby v. Umbrella, Inc., 2008 VT 20, ¶ 13, 184 Vt. 1, 955 A.2d 1082 ("[T]he beauty of our rules

of civil procedure is that they strike a fair balance, at the early stages of litigation, between encouraging valid, but as yet underdeveloped, causes of action and discouraging baseless or legally insufficient ones.”). Accordingly, a plaintiff’s complaint must include “a short and plain statement of the claim showing that the pleader is entitled to relief.” V.R.C.P. 8(a) (emphasis added). A conclusory allegation, absent factual and legal basis, does not meet this threshold. See Colby, 2008 VT 20, ¶ 10; Aranoff v. Bryan, 153 Vt. 59, 62-64, 569 A.2d 466, 468-69 (1989) (declining to accept as true unsupported conclusory statements in complaint).

¶ 8. Plaintiff here pled medical battery,² which occurs when a healthcare provider “performs a procedure for which the patient has not given consent”³ or which is “substantially different” from the procedure the patient authorized. Christman v. Davis, 2005 VT 119, ¶¶ 6, 16, 179 Vt. 99, 889 A.2d 746 (quotation omitted); see Restatement (Third) of Torts: Intentional Torts to Persons § 15 cmt. b (2026) [hereinafter Restatement] (stating “actual consent extends to conduct by an actor that is substantially the same in nature as the conduct that the person was willing to permit” but “does not extend to conduct that substantially differs from the conduct that a person was willing to permit”). Accordingly, the “central issue” in medical battery cases is whether the

² Battery is “an intentional act that results in harmful contact with another.” Christman, 2005 VT 119, ¶ 6. In Christman, we looked to the California Supreme Court’s distinction between battery and lack of informed consent, which described intent as “deliberate intent to deviate from the consent given.” Id. ¶ 7 (quoting Cobbs v. Grant, 502 P.2d 1, 8 (Cal. 1972)). We clarify that the intent element of battery pertains to the actor’s intent to perform certain conduct, not to contravene another’s authorization. See Wilson v. Smith, 144 Vt. 358, 360, 477 A.2d 964, 964 (1984) (holding evidence did not support finding of intent for battery because defendant testified he struck plaintiff’s ward while turning to face her and “any contact with [her] was unintentional”). Here, intent is established because it is undisputed that Dr. Polonsky intended to perform the challenged procedure.

³ There are multiple kinds of consent. See Restatement § 13 (describing actual, apparent, and presumed consent and emergency exception). The trial court’s order and plaintiff’s arguments discuss only whether he provided express consent and do not mention any other kind of consent. See id. § 14 (defining express consent as type of actual consent, where “plaintiff explicitly communicates willingness in writing or orally” and describing signature on consent form as “express”). Accordingly, we address express consent only.

patient consented “to the [provider’s] particular conduct, or to substantially the same conduct.” Christman, 2005 VT 119, ¶ 16 (quotation omitted).

¶ 9. If a patient did consent, the patient cannot prevail on a medical battery claim “even if [the consent] was induced by a lack of necessary disclosure of information.” Id. If a patient “consents after inadequate necessary disclosures, the claim should be one of medical malpractice under the lack-of-informed-consent line of cases.” Id. ¶ 16.

¶ 10. In Christman, we identified “inadequate disclosures of the alternatives and foreseeable risks and benefits of the alternatives” as an example of lack of informed consent.⁴ Id. ¶ 7. The disclosure required for informed consent, however, is not limited to risks and alternatives; it also broadly includes “adequate information about the general nature of the proposed treatment.” Restatement § 16 cmt. f. Indeed, we have explained that “it is the duty of the physician, in terms of informed consent, to give to a patient whose situation otherwise permits it all information material to the decision to undergo the proposed treatment.” Small v. Gifford Mem’l Hosp., 133 Vt. 552, 557, 349 A.2d 703, 706 (1975) (emphasis added); see id. at 554, 349 A.2d at 705 (describing informed consent as “what a patient needs to know and ought to be told in order to intelligently consent to the proposed treatment”). In a medical-malpractice action based on lack of informed consent, “[t]he burden would be on the patient to show . . . that such material information was not furnished.” Id. at 557, 349 A.2d at 706. To reiterate, if the allegations sound in lack of informed consent, the proper claim is for medical malpractice and not medical battery.

¶ 11. Two of our prior decisions elucidate these concepts. In O’Brien v. Synnott, we allowed the plaintiff to pursue a battery claim where the plaintiff gave consent to “medical treatment generally” but received substantially different treatment. 2013 VT 33, ¶ 16, 193 Vt. 546,

⁴ Vermont’s informed consent statute defines lack of informed consent as the “failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.” 12 V.S.A. § 1909(a)(1).

72 A.3d 331. Namely, a nurse “presented herself in her capacity as [the] plaintiff’s medical provider” but “actually drew blood for the nonmedical purpose of providing a sample of [the] plaintiff’s blood to the police.” *Id.* ¶ 5. We reasoned that the “[p]laintiff’s broad consent to medical treatment is different in kind from any purported consent to a blood draw for nonmedical, law-enforcement purposes.” *Id.* ¶ 16. Because these purposes were fundamentally different, the plaintiff’s consent for medical treatment did not extend to the “blood draw for nonmedical, law-enforcement purposes.” *Id.*; see, e.g., Rousseau v. Coates, 488 F. Supp. 3d 163, 166 (D. Vt. 2020) (finding plaintiff could pursue battery action against defendant doctor, where plaintiff consented to artificial insemination from medical student who resembled plaintiff’s husband but defendant inseminated her using his own genetic material, because jury could conclude that there was substantial difference between consented-to procedure and procedure actually performed).

¶ 12. In Christman, by contrast, we held that the plaintiff did not have a battery claim because the plaintiff’s consent to a procedure extended to the “different but substantially the same (or less invasive) procedure[]” that the defendant performed. O’Brien, 2013 VT 33, ¶ 16 (summarizing holding in Christman, 2005 VT 119, ¶ 17). There, the plaintiff consented to a tissue graft procedure on his gums, and the defendant periodontist performed a less invasive flap procedure. *Id.* ¶¶ 13-14. The plaintiff argued that he consented only to the tissue graft procedure and alleged that the defendant had not discussed the flap procedure, or any other procedure, with him. *Id.* ¶ 13. We reasoned that the conduct the plaintiff consented to in the more extensive operation encompassed the conduct the defendant performed in the less extensive operation such that the “plaintiff’s consent covered the flap procedure.” *Id.* ¶¶ 17, 19. We explained that although the plaintiff had no battery claim, his allegation that the defendant had not discussed the flap procedure with him could have been an actionable claim for lack of informed consent. *Id.* ¶ 18.

¶ 13. Here, plaintiff concedes that he signed the consent form. Plaintiff does not contest that he consented to “left atrial appendage clip” as written on the form and to infer that he did not

consent would be unsupportable. Plaintiff's complaint stated the form listed " 'coronary artery bypass graft surgery,' 'endoscopic vein harvest,' and 'left atrial appendage clip.' " Although plaintiff claimed that use of the singular "procedure" implied the form would "be utilized for single and not multiple procedures," plaintiff's own formulation separates the listed items into three procedures. Plaintiff does not challenge his consent to the graft surgery and the vein harvest. Given his consent to multiple procedures, no reasonable factfinder could conclude that the consent form authorized only one procedure. The complaint's assertion that "the vein harvest . . . is integral to bypass surgery" while "the atriClip represents an entirely different procedure" does not change the fact that the form authorized three distinct procedures. We decline to disregard the third item listed on the form; at the very least, plaintiff consented to "left atrial appendage clip" as written on the form. See Off. of Auditor of Accts. v. Off. of Att'y Gen., 2025 VT 36, ¶ 8, 221 Vt. 266, 342 A.3d 948 ("If a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations." (quotation omitted)).

¶ 14. Accordingly, plaintiff's battery claim may proceed only if the procedure plaintiff authorized—"left atrial appendage clip"—and the procedure Dr. Polomsky performed are substantially different. See Christman, 2005 VT 119, ¶ 16 (explaining battery occurs where doctor obtains consent but "subsequently performs a substantially different treatment" (quotation omitted)). "If the language of the consent form that a plaintiff signed encompasses the defendant's conduct, the plaintiff's claim of 'substantial variance' will ordinarily be rejected." Restatement § 15, Reporters' Notes cmt. b (emphasis added). At no point has plaintiff argued that there was a substantial variance between the consented-to procedure and the performed procedure. In fact, in his reply brief on appeal, plaintiff agreed with defendants' statement that he "made no allegations that Dr. Polomsky performed a substantially dissimilar procedure th[a]n the one to which

[plaintiff] expressly consented,” describing that as “a correct statement given that Dr. Polomsky did perform the same procedure—as was consented to.”⁵

¶ 15. Plaintiff argues instead that his subjective understanding of the procedure differed from the procedure Dr. Polomsky performed. That is, plaintiff alleges that he did not understand that “left atrial appendage clip” entailed placement of a medical device on his heart, due to ambiguity of the consent form and lack of discussion from Dr. Polomsky.

¶ 16. Plaintiff’s alleged lack of understanding, however, is really an argument that Dr. Polomsky did not furnish sufficient information for plaintiff to comprehend the nature of the procedure and intelligently consent to it. See Small, 133 Vt. at 557, 349 A.2d at 706. This might support a claim for lack of informed consent, but it does not constitute battery. As explained above, a patient can consent to a procedure even if they were not subjectively aware of it so long as the conduct taken was “substantially the same” as the consented-to conduct. O’Brien, 2013 VT 33, ¶ 16; see Christman, 2005 VT 119, ¶ 18 (finding consent present for less invasive operation despite plaintiff’s lack of knowledge and explaining plaintiff’s allegation that defendant had not discussed flap procedure with him was informed-consent argument).⁶ Plaintiff’s alleged subjective lack of understanding does not establish that the listed procedure—from an objective perspective—substantially differed from the performed procedure. See Christman, 2005 VT 119,

⁵ Consent may be vitiated if the provider “operat[ed] with knowledge that the plaintiff was mistaken (not merely ignorant) about the nature of the operation.” D. Dobbs, *The Law of Torts* § 114 (2d ed. 2026); see Restatement § 16 (explaining person does not give actual consent where they consent due to “substantial mistake” and “actor knows of the mistake or causes the mistake by affirmative misrepresentation or fraud”). Here, plaintiff has not alleged that Dr. Polomsky knew of plaintiff’s misunderstanding or that he caused it through affirmative representation or fraud. See V.R.C.P. 9(b) (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”). Accordingly, we do not address this theory.

⁶ Although plaintiff attempts to distinguish Christman on the ground that Christman involved a less invasive operation, this difference is immaterial. The relevant question is whether the conduct performed was “substantially the same” as the conduct plaintiff consented to. Christman, 2005 VT 119, ¶ 16 (quotation omitted). In Christman, we held that less invasive operations fall within this ambit, but this conclusion does not preclude other instances where procedures may be “substantially the same.” Id. (quotation omitted).

¶ 16 (explaining that “[i]n determining whether plaintiff gave adequate consent, we must focus on the conduct or procedure to be performed” (quotation omitted)). Concluding otherwise would mean that no matter what the form contained—even if the form listed the official name of the procedure, “ligation of the left atrial appendage by use of an AtriClip”—plaintiff could claim that he did not consent simply because he did not understand the meaning of those terms or what the procedure entailed. This would turn every medical-malpractice claim based on lack of informed consent into a battery claim.

¶ 17. We reject plaintiff’s argument that informed consent is “a prerequisite for all consent” and thus he “can pursue a medical battery claim when alleging that no informed consent was given for a procedure.” Consent and informed consent correspond to the distinct legal claims of medical battery and medical malpractice, respectively. See *id.* ¶ 11. Medical battery is a common law intentional tort while medical malpractice is a statutory action concerning “professional medical negligence.” See *id.* ¶ 8 (explaining that medical-malpractice claim requires “plaintiff to prove that the defendant failed to exercise the degree of care of a reasonably skilled professional under the same circumstances and that this failure caused injury that would not have otherwise occurred” (citing 12 V.S.A. § 1908(1)-(3))). The Legislature has imposed strict limitations on medical-malpractice claims, including requiring a patient to file a certificate of merit with their complaint and imposing an affirmative burden on the patient to provide expert testimony. See 12 V.S.A. § 1042(a), (e); *id.* § 1909; see also McClellan v. Haddock, 2017 VT 13, ¶¶ 17-18, 204 Vt. 252, 166 A.3d 579 (explaining “certificate-of-merit statute was part of a broader legislative reform effort” to address healthcare providers’ “principal concern” of being burdened by “meritless lawsuit[s]”). Plaintiff’s assertion that his lack of informed consent amounts to lack of any consent collapses the distinction between these two causes of action. See Christman, 2005 VT 119, ¶ 11 (recognizing that informed-consent statute did not eliminate or preempt battery claims); Kohoutek v. Hafner, 383 N.W.2d 295, 299 (Minn. 1986) (“To argue that consent that is

inadequately informed is no consent at all, and hence a battery, is to ignore the practical differences underlying the distinction between battery and negligent nondisclosure.”). Allowing patients to assert a medical-malpractice claim under the guise of medical battery would permit patients to circumvent the statutory requirements they must meet to bring a medical-malpractice claim. Although our rules establish a liberal pleading standard, and we give pro se litigants some leeway, In re Hopkins Certificate of Compliance, 2020 VT 47, ¶ 17, 212 Vt. 368, 237 A.3d 661, we must not interpret our rules in a way that would undermine the clear legislative intent expressed in 12 V.S.A. §§ 1042 and 1909. Cf. McClellan, 2017 VT 13, ¶ 20 (“While it is thus tempting for this or any court to apply its own rules allowing the liberal amendment of complaints, it is essential to resist that approach where, as here, it would undermine a clear and specific legislative mandate.”).

¶ 18. Because plaintiff did not allege, either below or on appeal, that the procedure listed on the signed consent form was substantially different from the procedure Dr. Polomsky performed, we do not sua sponte consider the issue.⁷ See Progressive Ins. Co. v. Brown ex rel. Brown, 2008 VT 103, ¶ 8, 184 Vt. 388, 966 A.2d 666 (“We have consistently held that we will not consider arguments on appeal that were not preserved in the trial court.”); In re Entergy Nuclear Vt. Yankee, LLC, 2007 VT 103, ¶ 10, 182 Vt. 340, 939 A.2d 504 (requiring party to “present the issue with specificity and clarity to give the original forum a fair opportunity to rule on it” (quotations omitted)). While we draw all reasonable inferences in plaintiff’s favor, it would be entirely speculative to infer that “left atrial appendage clip” described a procedure substantially dissimilar to the performed procedure, or even that plaintiff intended to make such a claim. See

⁷ Plaintiff was self-represented until oral argument, at which time he retained counsel. Plaintiff’s counsel did not argue that there was a substantial variance between the two procedures either. At most, plaintiff’s counsel stated, “reasonable minds can differ about whether the procedure that he’s taking issue with is accurately defined on the form.” However, this does not amount to an argument that the form’s language substantially differed from the procedure conducted. To the extent that plaintiff disagrees, we reiterate that “[w]e will not address arguments raised for the first time at oral argument.” TD Banknorth, N.A. v. Dep’t of Taxes, 2008 VT 120, ¶ 33, 185 Vt. 45, 967 A.2d 1148.

Sutton, 2022 VT 56, ¶ 20 (requiring resolving “reasonable inferences in the plaintiff’s favor” when considering motion to dismiss (quotation omitted) (emphasis added)). The distinction between consent and informed consent is already “slippery” and allowing this case to proceed on an improper legal basis would confuse them further. Christman, 2005 VT 119, ¶ 7 (quotation omitted).

¶ 19. Plaintiff has not stated a legally cognizable battery claim showing that Dr. Polomsky’s conduct was “unauthorized.” We therefore affirm the trial court’s dismissal of plaintiff’s complaint.

Affirmed.

FOR THE COURT:

Associate Justice

¶ 20. **REIBER, C.J., dissenting.** Under Vermont’s liberal notice pleading standard and construing the facts alleged in the complaint in the light most favorable to plaintiff, plaintiff has sufficiently pled a claim for medical battery. I would therefore reverse the court’s order dismissing his claim and respectfully dissent.

¶ 21. My disagreement with the majority stems more from a concern about due process than disagreement about our law on medical battery. Because this case is at the motion-to-dismiss stage, the threshold for plaintiff “is exceedingly low.” Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575, 959 A.2d 990 (mem.) (quotation omitted); see V.R.C.P. 8(a) (requiring “short and plain statement of the claim showing that the pleader is entitled to relief”). Dismissal is appropriate “only when it is beyond doubt that there exist no facts or circumstances consistent with the complaint that would entitle the plaintiff to relief.” Bock, 2008 VT 81, ¶ 4 (emphasis added); see Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5, 184 Vt. 1, 955 A.2d 1082 (“Motions to dismiss for failure to state a claim are disfavored and are rarely granted.”). In assessing the claims in the

complaint, “we take all facts alleged in the complaint as true.” Bock, 2008 Vt. 81, ¶ 4; see V.R.C.P. 8(f) (requiring pleadings to be “construed as to do substantial justice”).

¶ 22. Plaintiff here pled medical battery, which occurs when “a health care provider . . . performs a procedure for which the patient has not given consent.” Christman v. Davis, 2005 VT 119, ¶ 6, 179 Vt. 99, 889 A.2d 746. Plaintiff’s complaint alleged that he met with Dr. Marek Polomsky at University of Vermont Medical Center (UVMHC) and agreed to bypass surgery. He signed what UVMHC provided—a form entitled “Consent for Procedure.” The form indicated that plaintiff gave consent for Dr. Polomsky to perform “the following,” and listed “coronary bypass graft surgery, endoscopic vein harvest, left atrial appendage clip.” Plaintiff received surgery during which a left atrial appendage clip was placed in plaintiff’s heart.

¶ 23. Plaintiff filed suit and his complaint alleged the consent form was “in the singular and not plural, directly implying that the form be utilized for single not multiple procedures.” Plaintiff asserted that Dr. Polomsky “committed battery by intentionally placing an unauthorized medical device on plaintiff’s left atrial appendage while plaintiff was unconscious.” Plaintiff alleged that the form he signed did not provide consent for this procedure because the form used procedure in the singular on several occasions, leading him to understand that he consented to only one of the procedures listed, not multiple procedures. Plaintiff alleged that installing the clip caused him “permanent harm by potentially reducing the already compromised cardiac output, increasing cardiac failure risk due to increases in left atrium size and left ventricle filling pressure.” He also claimed that the procedure caused him to suffer emotional distress, diminished his quality of life, and made him more susceptible to future cardiac events.

¶ 24. This Court adopted a “no set of facts” standard as reflected in Colby and Bock where we noted motions to dismiss are disfavored and should be rarely granted. See Bock, 2008 VT 81, ¶ 4 (providing that dismissal “is proper only when it is beyond doubt that there exist no facts or circumstances” that would entitle plaintiff to relief (emphasis added)); Colby, 2008 VT

20, ¶ 5 (similarly describing standard for motion to dismiss). We departed from and expressly rejected a heightened pleading standard adopted by the federal courts. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007) (explaining that “no set of facts” standard was “best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint”); Island Indus., LLC v. Town of Grand Isle, 2021 VT 49, ¶ 24, 215 Vt. 162, 260 A.3d 372 (explaining that Vermont had “rejected the heightened pleading standards the United States Supreme Court has adopted under the Federal Rules of Civil Procedure”).

¶ 25. In Colby and Bock we directly addressed the federal shift to a higher standard but held Vermont had relied on a liberal standard for twenty years and was not bound by federal jurisprudence when interpreting Vermont rules. Colby, 2008 VT 20, ¶ 5 n.1 (rejecting dissent’s suggestion of adopting heightened standard). In doing so we reaffirmed our minimal notice pleading standard. The “no set of facts” test requires only fair notice. More recently, we rejected dismissal of Covid exposure claims, holding that “[w]hen a complaint contains a bare-bones claim for relief, ‘[t]he legal theory of a case should be explored in the light of facts as developed by the evidence.’ ” Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co., 2022 VT 45, ¶ 45, 217 Vt. 195, 287 A.3d 515 (quoting Ass’n of Haystack Prop. Owners, Inc. v. Sprague, 145 Vt. 443, 447, 494 A.2d 122, 125 (1985)).

¶ 26. Under our liberal pleading standard, reasonable inferences from facts pled are taken as true. That is not the federal plausibility standard we deliberately rejected; it is a far more permissive and plaintiff-friendly standard. As applied, if a fact is susceptible to competing inferences, we must draw all inferences in plaintiff’s favor so long as they are reasonable. Here, the trial court held that inferences that might support plaintiff’s claims were not reasonable. But clearly it is reasonable from plaintiff’s allegations that he construed the form he signed differently from defendants. This point of view is not a speculative or attenuated logical leap, nor conjecture

or supposition. The inference flows naturally from the claims. Plaintiff is entitled to the most favorable inferences under our standard.

¶ 27. The majority relies heavily on the fact that plaintiff signed the consent form, but construing the form in the light most favorable to plaintiff demonstrates that it does not unambiguously show that plaintiff consented to the clip procedure. The form lists three procedures, including the clip, but the form throughout refers to singular “procedure.” It is titled “Consent for Procedure” in the singular, and the word “procedure” is used thirteen other times on the document.⁸ The form uses the plural on one occasion where it authorizes “other procedures” if an unsuspected condition is discovered at the time of the “surgery or procedure,” in the singular. Plaintiff’s complaint asserted that because the form used the singular “procedure,” he reasonably understood the form to authorize a single, and not multiple, procedures. Plaintiff’s construction of the form is not wholly unreasonable and therefore, we must accept it for purposes of resolving the motion to dismiss.⁹ See Birchwood Land Co. v. Krizan, 2015 VT 37, ¶ 6, 198 Vt. 420, 115 A.3d 1009 (explaining that when reviewing motion to dismiss we “accept as true all reasonable inferences derived” from facts pleaded in complaint).

¶ 28. Moreover, the issue of medical battery is not fully developed in our law, and this should weigh against dismissal at this early stage. This Court has recognized in the past that we should be “particularly wary of dismissing novel claims because the legal theory of a case should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations.” Montague v. Hundred Acre Homestead, LLC,

⁸ The form also indicates that “Abbreviations Are Not Permitted,” demonstrating that the drafters understood that the exact language used on the form was of consequence.

⁹ The civil division concluded that it was “not reasonable” for plaintiff to interpret the form to authorize only one procedure. However, any ambiguity in the meaning of the form is drawn against defendants, as drafters of the form. See Toys, Inc. v. F.M. Burlington Co., 155 Vt. 44, 49, 582 A.2d 123, 126 (1990) (“[A] doubtful provision in a written instrument is construed against the party responsible for drafting it.”). Moreover, at the motion to dismiss stage, reasonable inferences must be drawn in favor of plaintiff.

2019 VT 16, ¶ 11, 209 Vt. 514, 208 A.3d 609 (quotation and alteration omitted). This Court has very few cases on medical battery. As the majority recounts, Christman discussed medical battery at length, relying on treatises and out-of-state cases. See 2005 VT 119, ¶ 6 (citing Restatement, and out-of-state cases to define medical battery). Although the case provided some legal contours of medical battery, it also recognized that the difference between lack of consent and lack of informed consent was “slippery.” Id. ¶ 7 (quotation omitted). Plaintiff’s theory here is distinct from that alleged in Christman in that it involves a totally different procedure, not a less-invasive procedure.

¶ 29. Vermont’s liberal pleading standard reflects the principles of the Vermont Constitution, which enshrines a “Remedy at law secured to all,” and provides that every person has a right to seek a remedy through “recourse to the laws, for all injuries or wrongs . . . conformably to the laws.” Vt. Const. ch. I, art. 4. Justice is a function of procedural due process, and at the initial stage of litigation our focus is properly on the minimum requirements of notice and hearing. Although a defendant at the initial stage needs to understand what wrongful conduct is alleged and the legal basis for it, and certainly vague allegations are not enough, we are careful to restrain our standard from imposing technical requirements on litigants. This is necessary because the doors of justice are too often out of reach for all people.

¶ 30. Because plaintiff’s complaint states a claim for which relief may be granted under the standards of notice pleading in Vermont, I would reverse the trial court’s dismissal of his claim. I therefore respectfully dissent.

Chief Justice

¶ 31. **DRESCHER, J., dissenting.** Like the Chief Justice, I dissent from the majority because I conclude that under our notice-pleading standard, plaintiff adequately stated a claim for medical battery. I write separately because my conclusion is based not on the ambiguity of the

informed-consent form but on its failure to describe the procedure in a manner adequate to establish consent as a matter of law.

¶ 32. At the outset I want to emphasize the many areas where I agree with the majority. We agree that in Vermont a motion to dismiss for failure to state a claim may only be granted “if it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.” Birchwood Land Co. v. Krizan, 2015 VT 37, ¶ 6, 198 Vt. 420, 115 A.3d 1009 (quotation omitted). “We assume that the facts pleaded in the complaint are true and make all reasonable inferences in the plaintiff’s favor.” Sutton v. Purzycki, 2022 VT 56, ¶ 20, 217 Vt. 326, 295 A.3d 377 (quotation omitted). We look to whether the “bare allegations of the complaint,” along with any incorporated documents, “are sufficient to state a claim.” Birchwood Land Co., 2015 VT 37, ¶ 6; see Sutton, 2022 VT 56, ¶ 20 (explaining that documents relied on in complaint merge into pleadings).

¶ 33. We also agree that medical battery and medical malpractice are distinct legal claims, and that to state a claim for medical battery, a patient must allege that the health-care provider “perform[ed] a procedure for which the patient has not given consent” or which is substantially different from the procedure authorized by the patient. Christman v. Davis, 2005 VT 119, ¶ 6, 179 Vt. 99, 889 A.2d 746; see O’Brien v. Synnott, 2013 VT 33, ¶ 12, 193 Vt. 546, 72 A.3d 331 (“In the medical context, a provider commits battery if the provider performs a procedure without the patient’s consent, and a plaintiff who has consented to a procedure cannot recover for an invasion.”).

¶ 34. As I read the majority, I assess we also agree that in the absence of the consent form plaintiff’s “bare allegation” that defendant Polomsky “committed battery by intentionally placing an unauthorized medical device on plaintiff’s left atrial appendage” would be sufficient to state a claim for medical battery under Vermont’s liberal notice-pleading standard. Birchwood Land Co., 2015 VT 37, ¶ 6; see Christman, 2005 VT 119, ¶ 6 (stating elements of medical-battery claim).

¶ 35. But I respectfully disagree with the majority’s view that the consent form in this case defeats plaintiff’s claim as a matter of law. My conclusion is not based on the ambiguity of the form. Cf. ante, ¶ 27 (Reiber, C.J., dissenting) (concluding that informed-consent form did not unambiguously demonstrate consent due to use of singular noun “procedure”). Rather, in my opinion the form is insufficient to demonstrate consent because it does not describe, at all, what is involved in the atrial clip procedure. The form uses terminology that plaintiff claims was not discussed with him and that he did not understand. It states simply: “left atrial appendage clip.” The description lacks verbs. It does not, for example, state that an atriClip would be installed on plaintiff’s heart. Indeed, the form itself instructs that “abbreviations are not permitted”; to the lay patient, “left atrial appendage clip” is just as opaque as an unknown acronym.

¶ 36. By treating the form as dispositive evidence of plaintiff’s consent to the clip procedure, the majority draws inferences against plaintiff that are contrary to our 12(b)(6) standard and our reasoning in both O’Brien and Christman. In O’Brien, we reversed summary judgment for the defendant nurse who drew an evidentiary blood sample for police when the plaintiff was already a hospital patient. We explained that “[i]f words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact,” 2013 VT 33, ¶ 13 (quoting Restatement (Second) of Torts § 892(2) (1979)), but remanded for a trial because the summary-judgment ruling “relie[d] on inferences in defendants’ favor that we cannot draw at the summary judgment stage.” Id. ¶ 14. Similarly, in Christman, we affirmed summary judgment for the defendant periodontist because the plaintiff conceded the procedure performed was subsumed within the consented-to procedure. 2005 VT 119, ¶¶ 14, 19. We noted, however, that summary judgment would have been inappropriate if the performed procedure had been an alternative to the consented-to procedure.¹⁰ Id. ¶ 19. These cases establish that the scope

¹⁰ The majority is also inconsistent with Christman insofar as it depends on characterizing the clip procedure as “substantially the same as the consented-to conduct.” Ante, ¶ 16 (quotation omitted). That determination is contradicted by the complaint’s allegation that “the atriClip

and nature of a medical-battery plaintiff's consent is a factual issue, and that courts should not draw inferences against a nonmoving medical-battery plaintiff as to that issue before trial.

¶ 37. I share the majority's perspective that the consent form is potentially compelling evidence that plaintiff reasonably appeared to consent to placing the atriClip device on his heart. I also agree that plaintiff's allegation that he did not consent to the placement of the clip on his heart seems implausible since he concedes he consented to bypass surgery. Plaintiff's claim could be defeated at summary judgment by undisputed evidence that the clip procedure was a necessary predicate, or substantially similar, to the bypass, or that plaintiff was advised that "left atrial appendage clip" on the form meant installation of the atriClip on his heart, or that the form was reasonably understood by defendants to be intended as consent. If we were a federal court, the implausibility of the claim might require dismissal under the heightened pleading standard set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). See Iqbal, 556 U.S. at 678 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" (quoting Twombly, 550 U.S. at 555)).

¶ 38. But we have never imposed a plausibility requirement for a complaint to survive a motion under Rule 12(b)(6). See Island Indus., LLC v. Town of Grand Isle, 2021 VT 49, ¶ 24, 215 Vt. 162, 260 A.3d 372 (explaining that this Court has "rejected the heightened pleading standards the United States Supreme Court has adopted under the Federal Rules of Civil Procedure"). "All that is required under Vermont's extremely liberal notice-pleading standard is a complaint with a bare bones statement that merely provides the defendant with notice of the claims against it." Id. (citation and quotations omitted). The complaint alleges defendants performed a medical procedure and plaintiff did not consent to the procedure. Because the consent

represents an entirely different procedure," and cannot be reconciled with Christman's reliance on the factual record developed during summary-judgment litigation.

form did not clearly explain what that procedure was, it should not defeat plaintiff's claim at this stage of the litigation. Accordingly, I respectfully dissent.

Associate Justice