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March 3, 2011

Via E-Mail: drobelen@courts.state.va.us

Doug Robelen, Chief Deputy Clerk
P. O. Box 1315
100 North Ninth Street, 5th Floor
Richmond, VA 23219-1315

Re: Alyssa Chalifoux, Appellant v. Radiology Associates of Richmond, Inc., Appellee
Record No. 100052

Dear Mr. Robelen:

I would greatly appreciate if you would forward the letter below to the Justices sitting for Tuesdays's oral argument at the earliest opportunity.

As this Court is aware, I argued Tuesday on behalf of the plaintiff/ appellant, Alyssa Chalifoux, in the Alyssa Chalifoux v. Radiology Associates of Richmond matter – Record no. 100052. After the close of argument, counsel for the defendant/ appellee, Brewster Rawls, urged that I write a letter to the Court to clear up a misstatement he believes I made during my rebuttal argument. I am therefore sending this letter at his request.

During my rebuttal, I was posed a question from Justice Goodwyn to which I was reasonably confident but not entirely sure of the answer. The query involved whether the defendant had access to plaintiff's medical records. I assumed that defendant Radiology Associates had access to the plaintiff's medical records, based, in part, on the uncontested expert testimony in this matter. For example, plaintiff's expert, Dr. Lipper, testified that when symptoms reported to the radiologist are vague or inadequate, radiologists have a duty to dig a little deeper to access a referring doctor's medical records to more precisely determine the nature of the patient's symptoms. *See* Joint App. 298. Furthermore, the defendant's expert, Dr. Konerding, acknowledged that it is "quite appropriate" for a radiologist to contact a referring physician to request his treatment notes and get a patient history, especially when a patient's symptoms may appear to be somewhat vague or inadequate. *See* Joint App., 249. I believed that Radiology Associates' President, Dr. Faunce, had also admitted in his deposition that his group practice had access to Ms. Chalifoux' medical records in this case. Thus, when pressed to give a definitive answer, I answered that, "yes," Dr. Faunce admitted that Ms. Chalifoux' medical records were accessible to Radiology Associates for review.

After Tuesday's hearing, Mr. Rawls and his co-counsel, Sandra Holleran, insisted that I was mistaken and expressed significant concern about the veracity of my comments. I have since methodically and exhaustively reviewed Dr. Faunce's deposition testimony. After review, I realized that I may have left the Court with a mistaken impression that the defendant actually had the patient's records in its possession. To whatever extent my citation of the record may have caused a factual misunderstanding with the Court, I am writing to apologize to both the Court and defense counsel for any error.

In retrospect, what I should have stated, as supported by the record, is that Dr. Faunce admitted that radiologists with Radiology Associates of Richmond routinely speak with treating doctors as part of their consulting relationship ("There are numerous times when an attending doctor will call us and ask questions." – Joint App. 416). Dr. Faunce also stated that, while there were no written policies at his practice, there may be instances on an informal, case-by-case basis where radiologists with his group practice will go and talk with the referring doctor to get more information about the patient's symptoms when a radiologist receives information which may be a little more generic or less detailed than the radiologist would like. *See* Joint App. 406-407.

Moreover, Dr. Faunce stated that his practice from time to time refers to the American College of Radiology (ACR) standards of care as a reasonable and professional internal guideline. *See* Joint App. 400-401. Those ACR guidelines indicate that "radiologists should have the authority to modify an order/ referral for a radiological procedure, provided that the study's report or the patient's medical records contain the rationale for the change. Educating your referring physicians on this matter is critical in minimizing these problems while maximizing the efficiency of patient care delivery." *See* Joint App. 388.

Dr. Faunce stated that there is no policy or internal guideline prohibiting speaking with the patient directly about her symptoms or combing through information provided from previous studies. *See* Joint App. 404-405. Dr. Faunce also established that when defendant Radiology Associates receives a requisition for interpreting an imaging study, it's customary to receive a "history" of the patient's symptoms along with the requisition. *See* Joint App. 396. Dr. Faunce went on to explain later in his deposition that, along with the patient requisition and history, documentation such as a patient questionnaire and intake form as well as information the clinician ordering the study provided, is typically included. These items are stored in digital format and are available to radiologists for review. *See* Joint App. 404-405. It is also undisputed that Ms. Chalifoux' imaging studies and reports are all warehoused in one file, which the defendant's radiologists have access to review. Joint App. 403.

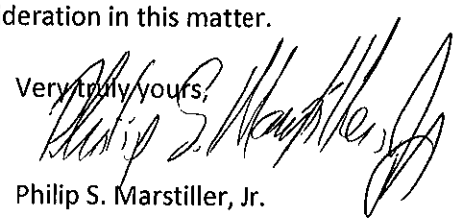
Notwithstanding the foregoing excerpts from the Joint Appendix, Dr. Faunce never expressly, specifically stated verbatim whether Radiology Associates had "access" to Ms. Chalifoux' medical records. Also, to the extent that Justice Goodwyn was trying to determine whether the defendant had actually obtained copies of Ms. Chalifoux' medical records (e.g. the records of referring physician, neurologist, Dr. Blevins), the record is silent on this topic. However, it's true and supported by the record that the defendant and its radiologists would likely have easy access to delve into Ms. Chalifoux' medical condition and symptoms (as reflected in the referring doctor's records) by simply speaking with the referring doctor or Ms. Chalifoux or by reviewing information contained in her file (as both

consultant and as part of their duty of care to the patient). Dr. Faunce never explicitly admitted this fact, but the defendant's access to Ms. Chalifoux' records is well established and may be reasonably inferred from the testimony of the experts in this case, the ACR guidelines which the defendant uses as a reference guide, as well as Dr. Faunce in his deposition, when he stated that radiologists in the defendant's group practice typically receive, in conjunction with the requisition order, a history of the patient's symptoms, patient intake data and other information provided by the referring doctor and may have occasion on a case-by-case basis, in the exercise of professional judgment, to get more information from the referring doctor about the nature of the patient's symptoms. *See* Joint App. 404-407.

In closing, I want to emphasize that I am not attempting to re-argue my client's case but rather simply to address defense counsel's concerns about a perceived misstatement in my answer to Justice Goodwyn. As such, I thought it appropriate to cite portions of the record which form the basis for my answer.

Once again, I apologize for any misunderstanding which may have been caused by my answer during oral argument. Thank you for your consideration in this matter.

Very truly yours,



Philip S. Marstiller, Jr.

PSM/jhc
cc: Brewster Rawls, Esquire (By Fax 782-0133)
Sandra M. Holleran, Esquire (By Fax 782-0133)