IN THE

Supreme Court of Virginia

RECORD NO. 180736

OUR LADY OF PEACE, INC.,

Appellant,

v.

BARBARA MORGAN,
Administrator of the Estate of
Gertrude Austin, Deceased, et al.,

Appellees.

BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from a $1.75 million verdict against a nursing home and its former employee. The principal issue is whether the employee's rape of an incapacitated patient was within the scope of his employment.

Gertrude Austin, age 80, was a severely disabled resident of Our Lady of Peace ("Nursing Home"), a residential nursing home in Charlottesville. During the night shift, certified nursing assistant ("CNA") Matthew Martin turned off Austin's light, closed the privacy curtain, climbed up on her bed, positioned himself atop her in a "push up" position, and raped her. Another CNA caught him in the act. The police were called and Martin was apprehended later that day. Martin, who was 66 years old at the time of his attack, confessed to sexually assaulting Austin. He entered an Alford plea and was sentenced to decades in prison. He likely will spend the rest of his life there.

Before the commencement of this action, Austin died of unrelated causes. The administrator of Austin's estate, Barbara Morgan ("Plaintiff"), timely filed suit against the Nursing Home. She alleges, among other things, that Martin was acting within the scope of his

employment when he raped Austin. After entertaining the Nursing Home's Plea in Bar on this issue, the Circuit Court found that Martin was acting within the scope of his employment.

This was error. For an act to fall within the scope of employment, it must be done while the employee is engaged in the performance of the services for which he was retained. In sexually assaulting Austin, however, Martin was not performing any service for which the Nursing Home retained him. He was acting solely for his personal sexual gratification. Under this Court's well-established job-related service doctrine, Martin was not acting within the scope of his employment.

The Circuit Court also made erroneous evidentiary rulings. It barred the Nursing Home's standard-of-care expert—an administrator with 30 years experience in long-term-care facilities—from testifying about matters relating to Plaintiff's claims of negligent nursing-home management. The Circuit Court opined that, unless a nursing-home administrator had a medical or nursing degree, he could not have an "active clinical experience," as required by Code § 8.01-581.20. This ruling ignores the text of Code § 8.01-581.1, and undermines the purposes of Code § 8.01-581.20.

Finally, the Circuit Court erred in allowing Plaintiff to present expert testimony about such obvious things as that it was a violation of the standard of care for a nursing home employee to "be on top of a patient making thrusting motions," to "have his genitals in contact with a patient's genitals," to "penetrate a female [patient's][1] vagina," and to "rape a patient." The Circuit Court acknowledged that all of these matters were within the ordinary understanding of a juror. Yet it still allowed Plaintiff's expert to testify about them. This was error. Rather than eliciting testimony to educate the jury about an area of specialized knowledge, Plaintiff used her expert to paint a disturbing and sexually graphic picture for the jury. This was an abuse of expert testimony, which the Circuit Court should not have allowed.

For all these reasons, elaborated below, this Court should reverse the Circuit Court's judgment, dismiss the vicarious-liability claim against the Nursing Home, and remand for a new trial on Plaintiff's remaining negligence claim against the Nursing Home.

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[1] The trial transcript says "CNA's vagina," but counsel plainly meant to say "patient's vagina," which is how Plaintiff formulated the opinion in her expert designation. (JA 571.)

STATEMENT OF FACTS AND PROCEEDINGS BELOW[2]

Statement of Facts

Gertrude Austin was a resident at the long-term care facility operated by Defendant Our Lady of Peace, Inc. ("Nursing Home") in Albemarle County. At the time of the events in question, Austin was 80 years old. (JA 374.) She had suffered a stroke, could not speak, could not walk, was fed through a tube, and communicated mostly through grunts and moans. (JA 374-75, 489.) Because of her need for comprehensive care, Austin resided in the Nursing Home's Skilled Care Unit (the "Nursing Unit").

Defendant Martin Matthews Martin ("Martin") was a certified nursing assistant at the Nursing Home. (JA 621.) Employed there for 14 years, Martin was a valued employee; friendly with patients and staff alike. (JA 373, 593-608, 616-18, 622-23.) He was 66 years old at the time of the events in question. (JA 512.)

Martin worked nights, from 11pm to 7am. (JA 498, 518.) The Nursing Home usually staffed the Nursing Unit with one "charge

[2] Because Plaintiff was the prevailing party below, the facts are recited in the light most favorable to her.

nurse" and two CNAs during such shifts. (JA 623.) Martin worked the night shift on September 16-17, 2013. But the other CNA scheduled to work that night, Timothy Akanmu, was not able to work that night because his wife was in labor. (JA 522, 525, 615.) The Nursing Home was unable to find a replacement CNA for the shift. (JA 525.) So Martin and the charge nurse, Timothy Nyambok, staffed the Nursing Unit that night. (*Id.*)

At around 6:00 a.m. on September 17, 2013, Nyambok left the Nursing Unit to administer medicine to patients in the memory care center ("Memory Unit"), a task that usually took around 30 minutes. (JA 552-53.) This left Martin as the only staff member on the Nursing Unit floor for that time.

Vanessa Gunter, a CNA in the Memory Unit, arrived at work around 6:15 a.m. (JA 459.) To get to the Memory Unit, she had to walk through the Nursing Unit. (JA 459-60.) Gunter, who had worked with Austin in the past, heard loud moans coming from Austin's room. (JA 460-61.) Believing Austin to be in distress, Gunter entered her room. (JA 461.) There, she noticed that Austin's privacy curtain had been pulled closed. (*Id.*) This was unusual, Gunter said, because the curtain

usually was left open at night so that employees could monitor Austin.[3] (*Id.*) The lights had been turned off, too. (JA 462, 474.)

Gunter peeked around the curtain and saw Martin on top of Austin. (JA 462.) His feet were off the ground, his hands were on the handrails, he had positioned himself like he was doing a "push-up," and he was moving back and forth in a thrusting motion. (JA 462-65; 501-02.) Gunter concluded that Martin was having sex with Austin. (JA 464.)

Shocked, scared, and speechless, Gunter left the room. (JA 465-66.) She told another CNA, Shar'on McNab, about what she had seen. (JA 465.) Gunter then called Darlene Meade, the unit coordinator for the Memory Unit. (*Id.*) Management called the police shortly thereafter, but by the time they arrived, Martin had left. (JA 620.) Austin was taken to the emergency room, where she underwent a forensic examination for sexual assault. (JA 624-33; 637-38.)

The police called Martin later that day, asking him to come down to the station for a custodial interrogation. (JA 507, 513.) There,

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[3] Austin was fed through a PEG tube, which required regular visual monitoring. (JA 550, 588.)

Martin confessed to having sexually assaulted Austin. (JA 515; 704.) He ultimately entered an Alford plea and was sentenced to 50 years—22 years of which are to be spent in prison. (JA 587, 705-09.) As Martin already was in his late 60s, this was effectively a life sentence. As for Austin, she was moved to another nursing home. (JA 572-73.) She died on October 13, 2013 from unrelated causes. (JA 586.)

Procedural History

Plaintiff, acting as Austin's personal representative, sued Martin and the Nursing Home. In her Complaint, Plaintiff alleges that, during the night shift, Martin had pulled the privacy curtain closed and sexually battered, molested, and raped Austin against her will and without her consent. (JA 3-4.) Plaintiff asserts that Martin's contact with Austin amounted to assault and battery. (JA 4.) She further asserts that the Nursing Home was vicariously liable for Martin's actions. (JA 5.) To support this claim, Plaintiff states, in conclusory fashion, that Martin was acting within the scope of his employment when he sexually assaulted Austin. (*Id.*)

The Nursing Home filed a Plea in Bar, asserting that it could not be held liable for the sexual assault because it did not occur within the

scope of Martin's employment. (JA 17-20.) In particular, it argued that Martin's raping Austin "was a marked and unusual deviation from Our Lady's business for which Our Lady cannot be held responsible." (JA 20.)

The Circuit Court held an *ore tenus* hearing on November 13, 2015. (JA 362 *et seq.*) In a March 17, 2016 letter opinion, the Circuit Court found that Martin was acting within the scope of employment at the time of the alleged sexual assault because he "was performing duties at Our Lady of Peace and in execution of those services for which he was employed." (JA 107.) The Circuit Court does not identify what "duties" or "services" Martin was performing while he was lying atop Austin in her bed.

Plaintiff thereafter filed an Amended Complaint on February 23, 2017. (JA 214-21.) The factual allegations in the Amended Complaint track those in the original Complaint, adding a few more details. (JA 215-18.) Count I asserts a claim for assault and battery against Martin and the Nursing Home. (JA 218-19.) Count II asserts that the Nursing Home acted negligently by: (1) failing to provide an environment free from sexual and physical abuse, (2) failing to prevent the sexual

assault, (3) failing to stop sexual assault when it was in progress, (4) failing to provide adequate staffing, (5) failing to report prior inappropriate conduct by Martin, and (6) breaching its duty to protect Austin. (JA 219-20.)

The case was tried to a jury in August 2017. After the close of evidence, the Circuit Court instructed the jury that to hold the Nursing Home liable for Martin's conduct, it needed to find that: (1) the Nursing Home employed Martin, and (2) that Martin was acting within the scope of his employment. (JA 695.) It then informed the jury that "[t]he Court has determined that Martin Matthews Martin was an employee of Our Lady of Peace and was acting within the scope of his employment." (*Id.*) The matter was submitted to the jury on both the assault and battery and the negligence counts.

During deliberations, the jury asked, "Is an employer equally liable as the employee when the employee engages in a criminal act?" (JA 698.) The Circuit Court responded by referring the jurors back to what it had told them before: "The Court can only refer you to the jury instructions for the answer to this question." (JA 699.)

The jury returned a general verdict against both defendants in the amount of $1.75 million. (JA 700.) The Circuit Court entered judgment on this verdict on March 8, 2018. (JA 357-59.)

This appeal followed.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding that a nursing home employee's sexual assault of a patient fell within the scope of his employment. (Preserved at: JA 18-20, 45-48, 391-401.)

2. The Circuit Court erred in finding that the nursing home's standard-of-care expert lacked an "active clinical practice" and wrongly barred him from testifying about the standard of care for nursing home administrators. (Preserved at: JA 639-49, 655-58.)

3. The Circuit Court erred in permitting Plaintiff's standard-of-care expert to testify about matters that were within the common knowledge of the jurors. (Preserved at: JA 260-61, 378, 380-81.)

ARGUMENT

I. By alleging rape, Plaintiff pleaded herself out of the scope-of-employment presumption.

In light of this Court's recent decision in *Parker v. Carilion Clinic*, 819 S.E.2d 809, — Va. — (2018), it is necessary to address a threshold issue: whether, on a Plea in Bar, Plaintiff was entitled to the legal presumption that Martin's acts fell within the scope of his employment. She was not.

In general, a complaint asserting vicarious liability need only allege that the company employed the wrongdoer at the relevant time. *Parker*, 819 S.E.2d at 822. Given such an allegation, the law presumes that the employee's misconduct was within the scope of his employment. *Id.* But just as a plaintiff can plead herself out of a cause of action by alleging facts that vitiate it, a plaintiff can plead herself out of the scope-of-employment presumption by pleading facts that, if proven, would tend to show that the employee was not acting within the scope of employment. *Id.* (stating that a plaintiff can "plead herself out of court by affirmatively alleging facts that rebut the presumption implied in law"). For such self-refutation to occur, however, the facts must be plain from the face of the complaint—not inferred, conjectural, or debatable. *Id.*

By alleging forcible rape, Plaintiff explicitly and unambiguously pleaded herself out of the presumption that Martin's acts were within the scope of his employment as a CNA. To establish vicarious liability, a party must establish that the employee was engaged in job-related service while performing the wrongful act. *See infra*, Section II.

In her Complaint, Plaintiff asserts that Austin's duties included certain "Changing and Bathing Activities." (JA 2.) But Martin's alleged wrongdoing has nothing to do with the performance of such duties. Rather, it consists of his "raping Gertrude Austin." (JA 3.) The Complaint accuses Martin of "touching, sexually abusing, and molesting Gertrude Austin . . . against her will and without her consent." (JA 4.) There is no allegation that, by raping Austin, Martin was performing any job-related service. These alleged facts unambiguously establish that Martin was *not* performing a work-related service at the time of the alleged wrongdoing. Accordingly, they rebut the scope-of-employment presumption.

The scope-of-employment is a "bursting bubble" presumption. Once a party rebuts it, the presumption vanishes. *Parker*, 819 S.E.2d at 822 (noting that the "scope-of-employment 'presumption disappears in the face of positive facts to the contrary'") (quoting *McNeill v. Spindler*, 191 Va. 685, 694 (1950)). A plaintiff must then present sufficient evidence to establish by a preponderance of the evidence the scope-of-employment element. *Id.* In the present case, the allegations of rape in the Complaint are self-refuting—they rebut the presumption

that the alleged wrongdoing occurred within the scope of Martin's employment as a CNA. For purposes of the Plea in Bar, therefore, Plaintiff had the onus to prove, by a preponderance of evidence, that Martin's actions fell within the scope of his employment.

II. The Circuit Court erred in holding that the Nursing Home was vicariously liable for Martin's sexual assault of Austin.[4]

A. An employer is vicariously liable only if the employee was engaged in a job-related service at the time of the alleged wrongdoing.

When a company's employee injures a third party, two legal principles collide. On one hand, "common-sense is opposed to making one man pay for another man's wrong." *Parker*, 819 S.E.2d at 818 (quoting Oliver Wendell Holmes, Jr., AGENCY, 5 Harv. L. Rev. 1, 14

[4] At the Plea in Bar, the facts about the rape were drawn from the allegations in the Complaint. The respondeat superior issue presents a pure question of law, subject to de novo review. *Smith v. McLaughlin*, 289 Va. 241, 251 (2015) ("We apply a de novo standard of review when '[t]here are no disputed facts relevant to the plea in bar and it presents a pure question of law.'") (quoting *David White Crane Serv. v. Howell*, 282 Va. 323, 327 (2011)).

(1891)).[5] Under this reasoning, it is the employee, not his employer, who should be held liable.

On the other hand, common sense also says that a business should bear the costs of its operation—including the risks that its employees pose to third parties. *Ira S. Bushey & Sons, Inc. v. U. S.*, 398 F.2d 167, 171 (2d Cir. 1968) (Friendly, J.) (noting that respondeat superior arises from the "deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities."); s*ee also* Lewis A. Kornhauser, AN ECONOMIC ANALYSIS OF THE CHOICE BETWEEN ENTERPRISE AND PERSONAL LIABILITY FOR ACCIDENTS, 70 Calif. L. Rev. 1345 (1982). Under this reasoning, the employer should be held jointly liable with the employee.

The law of respondeat superior reconciles those two principles by drawing a dividing line between (1) employee acts that occur while the employee is carrying out the enterprise's business, and (2) employee acts that are unrelated to the enterprise's business. An act that occurs

[5] At the time of writing, pinpoint cites were unavailable in either S.E.2d or the Virginia reports. Thus, references to *Parker* will be to the slip opinion.

while the employee is doing his employer's business is said to be within the "scope of employment," and vice versa.

Under Virginia's respondeat superior law, employers are liable for torts that their employees commit while acting within the scope of employment. *Parker*, 819 S.E.2d at 819. This includes intentional torts. *Plummer v. Ctr. Psychiatrists, Ltd.*, 252 Va. 233, 237 (1996). And it even includes wrongdoing that violates the employer's policies and rules. *Commercial Bus. Sys., Inc. v. Bellsouth Services, Inc.*, 249 Va. 39, 46 (1995). It does not mean, however, that an employer is liable for every tort that an employee commits at the workplace. *Parker*, 819 S.E.2d at 821; *Giant of Maryland, Inc. v. Enger*, 257 Va. 513, 516-17 (1999).

To determine whether a particular act falls within the scope of employment, this Court applies the "job-related service" doctrine. Under that doctrine, an action falls within the scope of employment if, but *only* if, it occurs during the employee's performance of a job-related service. *Parker*, 819 S.E.2d at 819.

In *Parker v. Carilion*, decided last month, the Court observed that "the first principle of respondeat superior is that vicarious liability may

be imposed on an employer when '*the service itself,* in which the tortious act was done, was within the ordinary course of [the employer's business],' i.e., when the employee committed the tort while 'performing a normal function' of his assigned job." *Parker*, 819 S.E.2d at 819 (quoting *Gina Chin & Associates, Inc. v. First Union Bank*, 260 Va. 533, 543 (2000)) (emphasis added in *Parker*)).

Conversely, it held, "no such liability can be imposed if the tortious act did not arise out of the very transaction, or service or task, that the employee was being paid to perform." *Id.* (internal citation and quotation marks omitted). In other words, it is not enough "that the employee was 'using the master's property and the injury would not have been caused without the facilities afforded by reason of his relation to his employer.'" *Id.* (quoting *Bryant v. Bare*, 64 S.E.2d 741 (1951)).

In applying the job-related-service doctrine, motives matter. *Parker*, 819 Va. at 821-22. The same physical movements may comprise different actions, depending on the agent's intent. "[E]ven a dog distinguishes between being stumbled over and being kicked." Oliver Wendell Holmes, Jr., "Early Forms of Liability," Lecture I from THE

COMMON LAW (1909). Thus, in applying the job-related-service doctrine, a court should assess what the employee was trying to accomplish while he engaged in the tortious conduct. "The employee's motive in committing the tortious act plays a role in the job-related service doctrine." *Parker*, 819 Va. at 821-22 (citing cases).

Where an employee acts solely for his own purposes—and not in furtherance of any job-related duty—the tortious act does *not* fall within the scope of employment: "[R]espondeat superior liability cannot extend to an employer for an unauthorized tortious act by an employee arising 'wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account.'" *Id.* at 821 (quoting *Smith v. Landmark Communications, Inc.*, 246 Va. 149, 151-52 (1993)) (emphasis added in *Parker*). *See also Sayles v. Piccadilly Cafeterias, Inc.*, 242 Va. 328, 332 (1991) (holding that intoxicated driver returning from employer-sponsored Christmas party was not acting within scope of employment); *Cary v. Hotel Rueger*, 195 Va. 980, 986 (1954) (holding that hotel employee was not acting within the scope of employment where, while delivering ice to a hotel patron, the employee shot acquaintance over a private dispute). Vicarious liability attaches

if, but *only* if, the employee is doing the employer's business at the time of the wrongdoing.

The job-related-service doctrine can, in some instances, raise difficult factual questions about the agent's motives, the nature of the agent's work duties, and whether the wrongdoing occurred while he was performing one of those duties. Nevertheless, this Court has repeatedly rejected attempts to replace it with a simplistic bright-line rule.

Physical proximity to the workplace, for example, is not dispositive: "[r]espondeat superior liability cannot be established merely by showing that the employee was 'on the clock,' using the employer's property, or on the employer's premises at the time of the alleged tortious acts or omission." *Parker*, 819 S.E.2d at 821 (citing Charles E. Friend, PERSONAL INJURY LAW IN VIRGINIA § 9.2(A)(2)(a) at 205-07 (3d ed. 2003)).

Nor is temporal proximity. Even if the employee performs job-related services *immediately before and after* the tortious act, the tort does not fall within the scope of employment if—while in the process of *committing* the tort—the employee is not engaged in a work-related service:

> "If the employee *steps aside from the employer's business to do acts not connected with such business*, the relationship of master and servant is for the time suspended and the servant is not acting within the scope of his employment."

Parker, 819 S.E.2d at 821 n.10 (quoting *Cary*, 195 Va. at 984) (emphasis added in *Parker*)).

Instead of relying on bright-line shortcuts, this Court's opinions consistently focus on the critical question of whether, during the commission of the tortious act, (1) the employee was doing his employer's bidding, or (2) he was acting on his own account. In other words, the cases hinge on whether the employee was performing a job-related service at the time of the wrongful act. *Parker*, 819 S.E.2d at 820.

B. Martin was not performing a "job-related service" when he raped Austin.

1. Martin "stepped aside" from his work duties when he raped Austin.

In the present case, Plaintiff alleges that Martin shut Austin's privacy curtain, climbed on her bed, and then raped her. (JA 3-4, 215-17.) Applying the principles recited above, the scope-of-employment inquiry boils down to whether Martin was providing a work-related service while he raped Austin.

To ask that question is to answer it. Raping and sexually assaulting disabled patients is not part of the Nursing Home's business operations. Nor is it a service that the Nursing Home retained Martin to perform. Although Martin was responsible for general patient care—addressing needs caused by their infirmities—there is no allegation, nor was there any evidence, that he was providing any of those patient-care services while he was feloniously assaulting Austin.[6]

In her arguments below, however, Plaintiff attempts to blur the common-sense distinction between: (1) Martin providing personal care to Austin and (2) his subsequently raping her. Although these actions occurred consecutively, they are distinct events—motivated by different objectives and entailing different physical movements. As the first is

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[6] Indeed, Plaintiff presented evidence that Martin was *not* performing CNA services at the time of the rape. At trial, Plaintiff's counsel elicited the following testimony from the Nursing Home's executive director, Sara Ann Warden:

> Q: Is there any reason for a CNA to be on top of a patient making thrusting motions?
>
> A: Not that I'm aware of.

(JA 502.) But even without such testimony, it is obvious that raping a patient is not a service that a nursing home hires a CNA to perform.

antithetical to the second, they cannot be deemed to be a single act. They must be analyzed separately.

Plaintiff protests that the rape occurred between Martin's performance of work-related tasks. (Opp. Br. at 16.) Thus, in her Opposition Brief, she notes that after going to Austin's room to change her diaper, Martin "immediately transitioned to his sexual assault" and that "after he left Ms. Austin's room, Mr. Martin went right on with his normal routine." (*Id.*) But, as the cases make clear, the temporal proximity of work-related tasks to the wrongdoing does not matter. Under Virginia law, what matters is what the employee was doing *at the very time of the wrongful action*, not before or after it:

> "[R]espondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong *at the time and in respect to the very transaction out of which the injury arose*."

Parker, 819 S.E.2d at 819 (quoting *Manuel v. Cassada*, 190 Va. 906, 913 (1950)) (emphasis in original). Where, as here, an employee deviates

from his work-related tasks, that employee no longer acts within the scope of his employment.[7]

In the present case, when Martin climbed up on Austin's bed and raped her, he "step[ped] aside from the employer's business to do acts not connected with such business." *Parker*, 819 S.E.2d at 821 n.10. Raping Austin was, in fact, an extreme deviation from Martin's patient-care duties. The crime was anathema to the Nursing Home's business operations; it was not a misguided attempt to further them. Because Martin was not engaged in any service on behalf of the Nursing Home

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[7] *See Sayles*, 242 Va. at 332 (no vicarious liability where intoxicated employee got in traffic accident while returning from office party); *Cary*, 195 Va. at 986 (no vicarious liability where hotel employee shot acquaintance in workplace elevator over a private dispute); *Giant*, 257 Va. at 516-17 (no vicarious liability where supermarket employee injured a patron after angrily refusing manager's demand that employee pick up a piece of celery); *Kensington Assocs. v. West*, 234 Va. 430, 435 (1987) (no vicarious liability where security guard who had been warned to stay away from construction workers accidentally shot construction worker during gun-related horseplay); *McNeill v. Spindler*, 191 Va. 685, 695-96 (1950) (no vicarious liability where mill employee borrowed employer's truck to take home flour he had purchased from the mill for his own use); *Abernathy v. Romaczyk*, 202 Va. 328, 332 (1960) (no vicarious liability where employee driving employer's truck assaulted third party after exchanging words with motorist concerning minor fender-bender).

when he raped Austin, his abhorrent act did not fall within the scope of his employment.

2. The Circuit Court failed to identify what work-related duty Martin was performing when he raped Austin.

The Circuit Court, however, opined that Martin committed his "willful and malicious acts" while he was "in execution of those services for which he was employed." Yet the Circuit Court never identifies what "services" Martin was "executing" when he turned off the lights, shut the privacy curtain, climbed onto Austin's bed, positioned himself atop Austin, and raped her. And it does not cite any authority—in Virginia, or in any other jurisdiction—holding that a health care provider's sexual assault of a physically vulnerable patient falls within the scope of employment. Nor could it cite such authority. Cases from other jurisdictions unanimously hold that sexual assault by a health care worker on a patient falls outside the scope of employment. [8]

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[8] *See, e.g.*, *Regions Bank & Trust v. Stone County Skilled Nursing Facility Inc.*, 49 S.W. 3d 107 (Ark. 2001) ("McConnaughey was not, by any stretch of the imagination, acting within the scope of his duties as a CNA when he assaulted Elder. Rather, McConnaughey's actions were purely personal."); *Porter v. Harshfield*, 948 S.E.2d 83, 85-86 (Ark. 1997) (holding that radiology technician was not acting within scope of

(note continued on following page . . .)

It is unclear what the Circuit Court had in mind when it stated that Martin was "in execution of those services for which he was employed." What *is* clear is that Martin was not performing any work-related duties when he turned off the light, pulled the curtain shut, climbed atop Austin and raped her. These were gross deviations from

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(. . . note continued from previous page)
employment when, during an ultrasound for suspected gallbladder problems, he placed his mouth on the plaintiff's penis and began performing oral sex); *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, 12 Cal.4th 291, 300-04 (1995) (holding that ultrasound technician who sexually molested plaintiff during examination was not acting within the scope of his employment); *DiTeresi v. Stamford Health Systems, Inc.*, 2007 WL 901811 (Conn. Super. Ct. Mar. 6, 2007) (holding that hospital was not vicariously liable for employee's sexual assault on 96-year-old patient suffering from dementia); *Piedmont Hospital, Inc. v. Paladino*, 580 S. E. 2d 215, 218 (Ga. 2003) (holding that when "Patterson began manipulating Palladino's genitals, then he abandoned the hospital's interests and began pursuing his own personal, morally offensive, agenda."); *Zsigo v. Hurley Medical Center*, 716 N.W.2d 220 (Mich. 2006) (holding that medical center was not vicariously liable for employee's sexual assault of patient who was in restraints); *N.C. v. Cabrini Medical Center*, 765 N.E.2d 844, 847 (N.Y. 2002) ("A sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives."); *GL v. Kaiser Foundation Hospitals, Inc.*, 757 P.2d 1347 (Or. 1988) (holding that hospital was not vicariously liable for sexual assault by respiratory therapist on unconscious patient); *Buck v. Blum*, 130 S.W. 285, 289-90 (Tex. Ct. App. 2004) (holding that neurologist performing behind-the-back arm-strength test was not acting within scope of employment when he placed his penis in the patient's hand and told her to squeeze it).

Martin's job responsibilities. Accordingly, he was not acting within the scope of his employment.

C. *Plummer* is inapposite.

As further justification for its ruling, the Circuit Court opined that "The facts in this case are similar to the facts in *Plummer v. Center Psychiatrists* and rules based upon the rational [sic] provided in that opinion." (JA 107.) (citation omitted). Again, this is not so. *Plummer* was a very different case—both procedurally and substantively—from the one at bar.

To begin with, *Plummer* arose in a different procedural context. In the present case, the respondeat superior issue was decided on a Plea in Bar, with the scope-of-employment issue submitted to the judge on both the law and the facts. The Circuit Court resolved the issue by finding that Martin was acting within the scope of employment. *Plummer*, on the other hand was an appeal from a demurrer. So, unlike the present case, the holding in *Plummer* was *not* that the alleged conduct fell within the scope of employment. It was that, under the facts pleaded, a court could not rule out the possibility that the alleged wrongdoing fell within the scope of employment.

Substantively, the facts alleged in *Plummer* differ relevantly from those alleged here. The Plaintiff in that case was undergoing psychotherapy to treat her depression. She claimed that she and the defendant, a licensed clinical psychologist, had sex during a psychotherapy session. *Plummer*, 252 Va. at 234-35. But, unlike the present case, the plaintiff did not allege forcible rape. Instead, she alleged that—because she was depressed and suicidal—"she was unable to act with volition." *Id.* The plaintiff further alleged that the therapist's "education, experience, and knowledge of the plaintiff" enabled him to overcome her will and seduce her. Citing these reasons, this Court, in a 4-3 decision, found that the plaintiff had alleged enough facts to survive demurrer. *See Parker*, 819 S.E.2d at 820 (noting that, in *Plummer*, "the tortious act or transaction occurred *while* the employee was in fact performing a *specific job-related service* for the employer.") (emphasis in original).

Contrary to the Circuit Court's opinion, "the rational [sic] provided in that opinion" provides no guidance here. In the present case, unlike *Plummer*, Plaintiff alleges forcible rape. And in the present case, unlike *Plummer*, Martin did not rely on professional or clinical knowledge of

Austin to commit his crime. His vile acts could have been done just as well by a stranger breaking into the unit. *See, e.g.*, *Alcoy v. Valley Nursing Homes, Inc.*, 272 Va. 37 (2006). *See also Regions Bank & Tr. v. Stone County Skilled Nursing Facility, Inc.*, 49 S.W.3d 107, 112 (Ark. 2001) ("This criminal assault did not occur incident to McConnaughey's employment duties. His act of moving her and assaulting her might have been undertaken by anyone, even a visitor to the home, a delivery person, or a stranger off the street.").

Plummer also differs from the present case inasmuch as the alleged misconduct in that case was inextricably intertwined with the therapeutic process itself. Psychotherapy often results in "transference," a phenomenon in which the patient projects her emotional attachment with a third-party onto the psychologist. *See St. Paul Fire & Marine Ins. Co. v. Downs*, 617 N.E.2d 338, 391 (Ill. Ct. App. 1993) (discussing phenomenon). *See also* Timothy E. Allen, THE FORESEEABILITY OF TRANSFERENCE: EXTENDING EMPLOYER LIABILITY UNDER WASHINGTON LAW FOR THERAPIST SEXUAL EXPLOITATION OF PATIENTS," 78 WASH. L. REV. 525, 529 (2003).

Psychologists and psychiatrists are trained to recognize when this occurs, but—not infrequently, if the cases are any guide—a therapist may come to believe that sex with the patient would advance the patient's therapeutic goals. *Id.* Sex with patients is condemned by professional societies. *See, e.g.*, American Psychological Association, "Sexual Intimacies with Current Therapy Clients/Patients," ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, § 10.05 ("Psychologists do not engage in sexual intimacies with current therapy clients/patients."). Yet the very fact of this condemnation shows that it is a common problem.

Thus, decisions that address vicarious liability in this context go both ways.[9] Some courts find therapist-patient sexual relationships to fall within the scope of employment. *See Simmons v. United States*, 805 F.2d 1363, 1370 (9th Cir. 1986) ("[W]e believe the centrality of transference to therapy renders it impossible to separate an abuse of transference from the treatment itself.").[10] Others find such conduct to

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[9] The 4-3 decision in *Plummer* reflects this split.

[10] *See also Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306 (Minn. 1982); *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344 (Alaska 1990)

fall outside the scope of employment. *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 570 (6th Cir. 2008) (holding that therapist's "participation in an affair" with patient was "outside the scope of employment."). [11] The issue is controversial.

There is no similar controversy about whether raping or sexually assaulting an incapacitated patient falls within the scope of employment. The cases unanimously hold that such actions fall outside the scope of employment. *See supra*, note 8. Accordingly, *Plummer* provides little or no guidance for the present case.

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[11] *See also Giudicessi v.* State, 868 N.W.2d 418 (Iowa Ct. App. 2015); *Birkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989); *Cosgrove v. Lawrence*, 522 A.2d 483 (N.J. Super. Ct. App. Div. 1987).

III. The Circuit Court erred in excluding the Nursing Home's expert from testifying about standard of care.[12]

The Circuit Court also made erroneous, and consequential, evidentiary rulings. To begin with, it erred in barring the Nursing Home from presenting the expert testimony of Dana Moyers, a licensed nursing-home administrator. As noted above, Plaintiff sued the Nursing Home both for Martin's sexual assault of Austin, *and* for various standard-of-care breaches relating to the facility's alleged failure: (1) to provide an environment free of sexual abuse, (2) to staff the facility adequately, and (3) to protect Austin. (JA 219-20.) The allegations assert, in essence, that the facility was mismanaged and that its staff was inadequately trained to prevent sexual abuse.

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[12] A circuit court's decision whether to admit evidence is governed by an abuse-of-discretion standard. *Gelber v. Glock*, 293 Va. 497, 509 (2017) ("We review the circuit court's decision to admit or exclude evidence using an abuse of discretion standard."). As part of that determination, the court reviews the trial court's legal analysis. *Id.* ("This review necessarily includes a determination of whether the circuit court was guided by an erroneous legal conclusion or flawed interpretation of Code § 8.01–397."). A circuit court abuses its discretion when it acts under a misapprehension of the governing law. *Turner v. Commonwealth*, 284 Va. 198, 208 (2012).

The Nursing Home retained Moyers as an expert to rebut these allegations. Moyers has decades of clinical experience in the nursing-home industry. (JA 641-47.) At the time of Martin's attack, Moyers was working as an administrator at the Beaufont Health and Rehab Center in Richmond. (JA 645-46.) He is familiar with issues relating to:

- Staffing at nursing homes;
- Establishing nursing home policies and protocols;
- Training nursing home employees; and
- Maintaining a healthy and safe environment for residents at long-term care facilities.

(JA 239-40, 646-47.) At trial, the Nursing Home offered Moyers as "an expert in standard of care for skilled nursing facilities in relation to employment issues and dealing with staff care issues and training, and those matters." (JA 649.) Yet the Circuit Court barred his testimony on these matters.

This was error. Code § 8.01-581.20 governs the standards for allowing testimony of standard-of-care experts in medical-malpractice

actions.[13] Relevant here, it states that: "A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had *active clinical practice* in either the defendant's specialty or a 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) (emphasis added).

Plaintiff objected to Moyers' testifying as an expert because, she argued, "Mr. Moyers does not have an active clinical practice." (JA 659.) Plaintiff contended that supervising and administering a nursing home did not constitute a "clinical" practice. The Circuit Court agreed. It observed that this Court's cases addressing Code § 8.01-581.20 all involved doctors and nurses as experts, thereby implying that *only* a doctor or nurse could testify as an expert.[14] (JA 660) ("I did not see a case where there was not a medical professional designated; it was

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[13] The Circuit Court found that Plaintiff's claims fell under the Medical Malpractice Act.

[14] Although the Circuit Court does not say this expressly, it is the premise of the ruling.

either a doctor or a nurse.”). The Circuit Court then concluded that Moyers, who administers and oversees nursing homes, “does not have an active clinical practice.” (JA 662.)

This was error. The legal issue is one of statutory interpretation. It turns on whether—as the Circuit Court supposed—the term “clinical practice” is limited to front-line caregivers like doctors, nurses, or CNAs, or whether, instead, it encompasses those who train and supervise caregivers and who establish the policies and procedures that they must follow.

The Medical Malpractice Act does not define “clinical” or “clinical practice.” Thus, the Court looks to the plain meaning of the statutory language. Webster’s Third New International Dictionary defines “clinical” as “of, relating to, or conducted in or as if in a clinic (as a medical clinic).” *Id.* at 423. The General Assembly has made it clear that, for purposes of the Medical Malpractice Act, a nursing home is a form of medical clinic. *See* Code § 8.01-581.1 (defining “health care provider” to include “a nursing home as defined in § 54.1-3100”). Therefore, “clinical practice” includes individuals working at a nursing home.

Moyers, a nursing home administrator, had an "active clinical practice in . . . the defendant's specialty." It is undisputed that Moyers worked as an administrator at the Beaufont Health and Rehabilitation Center between 2012 and 2015 (i.e., "within one year of the date of the alleged act or omission forming the basis of the action"). This was "clinical" work—Moyers was not retired, was not a professional expert, and did not merely teach about nursing-home administration. He was a practitioner in the field. Thus, under the plain language of Code § 8.01-581.20, he was qualified to testify. The Circuit Court erred in barring him from doing so.

Instead of looking to the plain meaning of § 8.01-581.20, the Circuit Court looked at the types of cases that this Court has decided under the statute and the types of experts proposed in those cases. None of those cases, it observed, concerned whether a hospital administrator had a "clinical practice" for purposes of Code § 8.01-581.20. Thus, the Circuit Court concluded, a hospital administrator did not have a clinical practice.

This was error. That this Court's "active clinical practice" cases have, in the past, involved only doctors and nurses does not entail that

only a doctor or nurse can have an active clinical practice. The issue has never been before the Court. None of this Court's § 8.01-581.20 cases has addressed whether a hospital or nursing home administrator has a "clinical practice" for purpose of § 8.01-581.20's expert-witness requirements. Nor has this Court otherwise expressed any opinion on the matter. In the absence of such authority, the Circuit Court should have applied the plain language of the statute. Had it done so, it would not have excluded Moyers.

Excluding professionals like Moyers from testifying in cases alleging negligent nursing-home management frustrates the purposes of the Medical Malpractice Act. The Act plainly contemplates nursing-home-mismanagement cases. In addition to including nursing homes as health care providers, *see infra*, the definition of "health care provider" itself encompasses "a director, officer, employee, independent contractor, or agent of the persons or entities referenced herein, acting within the course and scope of his employment or engagement as related to health care or professional services." *See* Code § 8.01-581.1. So, for purposes of the Act, a licensed nursing-home administrator is a health care provider. It follows that an administrator's provision of

"health care" services in a nursing home environment is an "active clinical practice" for purposes of the Act. Whether or not the administrator also happens to be a doctor or nurse is beside the point.

The Circuit Court's view of the matter makes no sense. Managing a nursing home requires knowledge outside the ordinary understanding of the jury.[15] Excluding nursing-home administrators from testifying in nursing-home mismanagement cases—cases that directly implicate the standard of care for nursing-home administrators—deprives jurors of precisely the expertise they need to evaluate the defendant's conduct. That cannot have been the General Assembly's intent in insisting that experts have an active clinical practice.[16]

In the present case, barring Moyers from testifying was highly prejudicial. To rebut Plaintiff's allegations of mismanagement and inadequate training, Defendant needed to present evidence of someone

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[15] The General Assembly recognizes this, requiring nursing home administrators to be licensed by the Board of Health. *See* Code § 54.1-3102.

[16] The "active clinical practice" requirement serves other purposes, e.g., preventing retirees who are long out of practice from serving as experts, and preventing professional experts—i.e., health care professionals whose only work is in the courtroom—from serving as experts, etc.

with knowledge and experience in nursing-home management. By barring Moyers from presenting expert testimony relevant to the Nursing Home's standard of care, the Circuit Court committed reversible error.

IV. The Circuit Court erred in allowing Plaintiff's standard-of-care expert to testify about matters that were within the ordinary understanding of the jury.[17]

Finally, the Circuit Court erroneously permitted Plaintiff to elicit testimony from her expert, Theresa Cooper, on matters that were not the appropriate subjects of expert testimony. Plaintiff's expert designation stated that Cooper would opine that it is a violation of the standard of care "for a CNA to be on top of a patient," to cause unnecessary pain, to make "thrusting motions" atop a patient, to "have his genitals in contact with a patient's genitals," to "penetrate a female patient's vagina," and "to rape a patient." (JA 234-35.)

The Nursing Home moved *in limine* to exclude this testimony, arguing that "it is within the common knowledge of a jury that a CNA violated standards if that CNA raped, sexually assaulted or penetrated the vagina of a long term care resident." (JA 261.) It pointed out that

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[17] For standard of review, *see supra*, note 12.

these subjects "do not require an expert's input to guide a jury." (JA 258-59.) Thus, the Nursing Home argued, Cooper should be barred from testifying on those matters.

The Circuit Court overruled this motion. Even though it agreed that the matters lay within the ordinary understanding of a juror, it denied the Nursing Home's motion to bar Cooper from offering these opinions:

> So the Court is denying the motion in terms of the expert testifying, *but does find that it is within the common knowledge of jurors*, and therefore would not necessarily *require* expert testimony.

(JA 448-49) (emphasis added). Although the jury did not require expert assistance on this issue, the Circuit Court still allowed Plaintiff to present expert testimony.[18]

This was error. "Expert testimony is admissible only when specialized skill and knowledge are required to evaluate the merits of a claim." *Bd. of Sup'rs of Fairfax County v. Lake Services, Inc.*, 247 Va. 293, 297 (1994). Where, as here, the subject is within the ordinary understanding of the jury, expert testimony is inadmissible. *Id.*

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[18] Plaintiff elicited this testimony at trial. (JA 570-71.)

("Expert testimony is inadmissible regarding 'matters of common knowledge' or subjects 'such that [persons] of ordinary intelligence are capable of comprehending them, forming an intelligent opinion about them, and drawing their own conclusions therefrom.'") (quoting *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 296 (1987)). *See also Chapman v. City of Virginia Beach*, 252 Va. 186, 192 (1996) ("The admission of expert testimony is inappropriate for matters of common experience.").

As the Circuit Court recognized, Cooper's statements that a CNA should not rape a patient or cause the patient medically unnecessary pain were matters obvious to a layperson and therefore not appropriate subjects for expert testimony. The jury did not need to be told that a CNA should not be "on top of a patient," should not unnecessarily hurt a patient, should not "be on top of a patient making thrusting motions," should not "have his genitals in contact with a patient's genitals," should not "sexually assault a patient," should not "penetrate a female [patient's][19] vagina," and should not "rape a patient." (JA 570-71.) Nor

[19] *See supra*, note 1.

did the jury need to be told that nursing homes should do what they can to prevent such criminal misbehavior.

Because these were matters of common knowledge, the Circuit Court erred in allowing Plaintiff to elicit this testimony from Cooper. Cooper had no personal knowledge of the events in this case. But by allowing her to testify on these matters, the Court enabled Plaintiff to use Cooper's professional imprimatur to underscore Plaintiff's theory of the case. Worse, it allowed Plaintiff to go into graphic and disturbing detail about sexual assault—all in the guise of providing "expert" testimony on a CNA's standard of care. Allowing this testimony into evidence was prejudicial error: it was unnecessary, inflammatory, and inadmissible. This Court should reverse.

CONCLUSION

For all the foregoing reasons, Appellant Our Lady of Peace, Inc., respectfully requests that this Court reverse the judgment below, dismiss the vicarious-liability battery claim against it, and remand for a new trial on Plaintiff's negligence count.

OUR LADY OF PEACE, INC.,

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RULE 5:26(e) CERTIFICATE

The undersigned hereby certifies that, on December 5, 2018, a PDF copy of this brief and the Joint Appendix was sent to the following e-mail addresses:

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