In the

Supreme Court of Virginia

At Richmond

Record No. 180736

OUR LADY OF PEACE, INC.,

Appellant,

– v. –

BARBARA MORGAN, Administrator of the Estate of
GERTRUDE AUSTIN, Deceased, and
MARTIN MATTHEWS MARTIN,

Appellees.

BRIEF OF APPELLEE

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INTRODUCTION

"And for the plea in bar, how do I know that?" (JA396.) The circuit court asked this question in response to Our Lady of Peace's ("OLP") argument on its plea in bar—brought at the outset of this case and submitted to the trial court as factfinder—that Mr. Martin's conduct was not within the scope of his employment with OLP. The circuit court had this question because OLP had chosen to put on absolutely no evidence of what happened early in the morning of September 17, 2013, that led up to another OLP employee walking into Ms. Austin's room to find Mr. Martin on top of Ms. Austin, thrusting at her with his pelvis.

Virginia law has always recognized the respondeat superior inquiry as being reliant upon the "facts of a particular case" rather than being amenable to categorical, as-a-matter-of-law assertions. *Gina Chin & Assocs. v. First Union Bank*, 260 Va. 533, 541 (2000). This Court's recent decision in *Parker v. Carilion Clinic*, __ Va. __, 819 S.E.2d 809 (2018), reaffirmed the fact-specific nature of the inquiry when it once again reversed a trial court's decision sustaining a demurrer to a vicarious liability claim because of the lack of specific facts upon which to base such a decision. It should have come as no surprise to OLP, then, that the circuit court in this case declined to grant OLP's plea in bar to Plaintiff's vicarious liability claim for Mr. Martin's conduct when OLP consciously declined the opportunity to provide the circuit court with any evidence upon which it could base such a ruling. Simply

stated, OLP failed to carry its burden to rebut the presumption created by its admission that Mr. Martin was OLP's employee at the time of his tortious conduct because OLP did not adduce any evidence of what actually happened.

On appeal, OLP engages in spectacular contortionism to try to backfill the record that it did not create below. Many of OLP's arguments are waived because they were not made below, and those that remain fly directly in the face of this Court's prior cases, all of which were reaffirmed as good law in *Parker*. So, OLP's scope of employment argument fails.

Its other arguments do too. A standard of care expert in a medical malpractice trial must have an "active clinical practice." OLP's expert did not have, and could never have, an active clinical practice for purposes of the Medical Malpractice Act because he is not a clinician under any stretch of the imagination. He is basically a business manager. So while he may know plenty about the business of running a nursing home, he was not qualified to testify to the standard of care for purposes of the Medical Malpractice Act. On the other hand, Plaintiff's expert did have an active clinical practice as a nurse working in nursing homes. She was thus qualified to testify to the standard of care. As OLP itself asserts, running a nursing home "requires knowledge outside the ordinary understanding of the jury." (OLP Opening Brief at 36.) The circuit court was thus well within its discretion in permitting Plaintiff's qualified expert to testify in this matter.

STATEMENT OF THE CASE

Plaintiff filed her Complaint on January 21, 2015, naming OLP and its employee, Mr. Martin, as defendants. (JA1.) The theories of recovery against OLP sounded in both vicarious liability for the conduct of its employees, and direct liability for its own negligence. OLP responded with, in relevant part, a plea in bar attacking the vicarious liability allegation as it related to Mr. Martin's conduct, and a demurrer claiming that Plaintiff was required to plead all of her claims under the Virginia Medical Malpractice Act.[1] (JA18 *et seq.*) The circuit court received evidence *ore tenus* and heard argument on OLP's plea in bar November 13, 2015. (JA362-424.) The court sustained OLP's demurrer regarding whether the claims against OLP must be pled under the Medical Malpractice Act from the bench, (JA424), and later issued a letter opinion overruling OLP's plea in bar on the scope of employment issue, (JA106-07.) The court later memorialized those rulings in an Order entered March 18, 2016, which gave the Plaintiff the opportunity to amend her Complaint to plead her claims under the Medical Malpractice Act. (JA108 *et seq.*)

[1] OLP's pleading only contended that Counts Three through Six must be pled under the Act. However, at oral argument OLP clarified that it had intended to include all claims against OLP – including Count One, the claim against Martin and OLP for assault and battery – in its argument that these claims had to be pled under the Medical Malpractice Act. (JA411, 423.)

Plaintiff filed her Amended Complaint on February 23, 2017. (JA213 *et seq.*) The case went to trial on August 22, 2017. (JA457 *et seq.*) The jury was charged on August 29, 2017, and the jury was provided with an agreed verdict form that did not differentiate between defendants, or between the various bases for recovery (JA350). While the jury was deliberating, the trial court came back on the record to ask both parties about the verdict form. Noting that the agreed verdict form did not differentiate between the various theories of liability, the court suggested "for purposes of appeal that it might be wise to have an instruction so we know on what basis the jury made their decision." (JA696-97.) Counsel for OLP declined the court's invitation to clarify the verdict form, noting that "it would be difficult for me to respond . . . without injecting insurance into this." (JA697.) In other words, OLP declined the opportunity to create a clear appellate record regarding whom the jury found liable and upon which theory of recovery because ambiguity was better for insurance coverage.

The jury deliberated for approximately three hours before returning a verdict in favor of the Plaintiff. (JA700; 350.) The court denied OLP's post-trial motions and entered judgment on the jury's verdict by final order dated March 8, 2018. (JA357-58.)

STATEMENT OF FACTS

A. Facts pertinent to Assignment of Error 1

OLP assigns error to the circuit court's plea in bar ruling that Mr. Martin's conduct occurred within the scope of employment. Thus, the facts relevant to this assignment of error are those facts that were made part of the record in conjunction with the plea in bar.

The plea in bar came in response to Plaintiff's original Complaint. That Complaint alleged that OLP employed Mr. Martin as a nurse aide, and that the duties of a nurse aid included undressing patients, including Gertrude Austin, changing their undergarments, and coming into contact with their private and genital areas. (JA2, ¶¶10-12.) The Complaint further alleged that the duties of a nurse aide included having private access to patients, entering their rooms, and pulling privacy curtains. (JA3, ¶13.) On the evening in question in this case, Mr. Martin, in the course and scope of his employment with OLP, entered Ms. Austin's room and "undertook to provide care to her with the door closed and the privacy curtains drawn," and that "while Martin was performing his duties in caring for Gertrude Austin and related services in the course and scope of his employment with OLP, . . . Martin engaged in wrongful conduct which included, but was not limited to, raping Gertrude Austin." (JA3, ¶¶15-16.) The Complaint specifically alleged that "Martin's actions set forth in Paragraph 16 were committed while Martin was

performing his duties as a nurse aide and in the execution of the services for which he was employed." (JA4, ¶21.) Finally, the Complaint alleged that Martin's conduct "involved acts of touching, sexually abusing, and molesting Gertrude Austin in a rude, degrading, highly offensive, insulting, and wrongful way, against her will and without her consent," and that his conduct was "performed in the course and scope of his employment with OLP." (JA4-5, ¶¶25, 27.)

OLP's Plea in Bar filing did not include any evidence of the specific facts and timeline of what happened on the night in question, nor did the testimony that OLP presented at the *ore tenus* hearing held on November 13, 2015. Its only evidence was the testimony of Sara Warden, the executive director of OLP. As relevant to the scope of employment inquiry, Ms. Warden generally established that OLP is answerable to several different regulatory agencies, and that OLP had policies against abuse of residents. (*E.g.* JA368-70.) Ms. Warden also confirmed that Mr. Martin was an employee of OLP. (JA371.) Ms. Warden confirmed that Mr. Martin's duties included bathing and dressing patients, and providing incontinence care. (JA372.) Finally, Ms. Warden indicated that Mr. Martin had received training on OLP's policies and had generally been a well-regarded employee. (JA373-74.)

And that is about it for purposes of the scope of employment question. OLP put on absolutely no evidence about what actually happened on the night in question. OLP did not present the testimony of another employee, Ms. Gunter, who walked

into the room while Mr. Martin was engaged in his tortious conduct, and OLP did not present the video of the police interview where Mr. Martin described his conduct. Indeed, OLP's evidence conspicuously skipped from the general evidence about OLP's policies and regulatory status prior to the incident to evidence about what OLP did following the incident. (JA382-83.) OLP now concedes that the only facts about what actually happened on the night in question that were in the record for purposes of the plea in bar were those alleged in the Complaint. (OLP Opening Br. at 13 n.4.)

The remainder of the plea in bar hearing was devoid of evidence, and was instead devoted to OLP's argument that by virtue of its regulatory status, sexual assault of a patient could not be in the scope of Mr. Martin's employment. Tellingly, when OLP's counsel argued that "at the time that this incident took place, [Mr. Martin] had completed the care that he was responsible for . . . and so the line would have been drawn when the services were complete," the circuit court pointedly asked "[a]nd for the plea in bar, how do I know that?". (JA396.) OLP's deliberate silence with regard to what actually happened on the night in question was deafening.

Based on the record created by OLP, the circuit court made the factual finding that Mr. Martin was OLP's employee and that his job required him to address the physical needs of patients, like Ms. Austin, who needed significant care. (JA107.) The court thus found that, based on the facts then before the court, the situation was

similar to those in *Plummer v. Center Psychiatrists*, 252 Va. 233 (1996), and that Mr. Martin's conduct, while outrageous and violative of OLP's rules, nevertheless occurred "while he was performing duties at Our Lady of Peace and in execution of those services for which he was employed." (JA107.) On that basis the court overruled OLP's plea in bar. (JA107.) OLP never asked the circuit court to revisit that ruling based on additional facts, and certainly does not assign error to anything other than the circuit court's March 2016 ruling on the plea in bar.

Finally, contemporaneous with filing the plea in bar, OLP filed a demurrer to all claims asserted against it in Plaintiff's original Complaint on the grounds that all of the claims fell within the Virginia Medical Malpractice Act, and thus must be pled in accordance with that Act. At the November 13, 2015 hearing OLP made clear that its position was that all counts in the Complaint, including the claim for vicarious liability for Mr. Martin's conduct alleged in Count 1, fell within the Act. (JA411.) This was so, according to OLP, because the allegations in the Complaint all qualified as "healthcare," which OLP defined as "any act including professional services in nursing homes during the patient's care or treatment on confinement. Any act during the patient's care. That's the definition of healthcare." (JA416.) OLP went on to state, specifically with regard to the battery claim in Count 1, that the battery claim arose from healthcare, and thus was a malpractice claim within the meaning of the Act. (JA423.) Thus, OLP explicitly told the circuit court that the

conduct alleged in Count 1 qualified as healthcare because it occurred "during the patient's care."

B. Facts pertinent to Assignments of Error 2 and 3.

Assignments of Error 2 and 3 take aim at evidentiary rulings that the court made about the admissibility of expert testimony, one during trial and one before trial on a motion in limine. Ms. Morgan thus sets forth below only those facts relevant to these two rulings.

1. Plaintiff's Expert

As stated above, OLP responded to Plaintiff's original Complaint with a demurrer contending that all of the claims against OLP fell within the Virginia Medical Malpractice Act, and thus must be pled in accordance with that Act. This meant, according to OLP, that the claims "can only be proven by expert testimony" and were subject to the cap on damages set forth in the Act. (JA412.) The court accepted OLP's position, and thus required Plaintiff to re-plead all of her claims under the Act. (JA424.)

Ms. Morgan did re-plead all of her claims under the Act. In addition to the vicarious liability claim against OLP for Mr. Martin's conduct, the Amended Complaint included vicarious liability theories against OLP for its employee's failure to intervene when she walked in on Mr. Martin's tortious conduct against Ms. Austin, and direct claims against OLP for its negligent training, staffing and

supervision. (JA214-20.) Ms. Morgan also took OLP's assertion that all of the claims against OLP could "only be proven by expert testimony" under the Medical Malpractice Act seriously, and thus disclosed a qualified expert, Theresa Cooper, to support all of her claims. Nurse Cooper's testimony touched on and responded to various evidence.

This included Vanessa Gunter. Ms. Gunter was an OLP employee who was going to work the morning shift on September 17, 2013. She showed up and was walking down a hallway when she heard Ms. Austin moaning loudly in a way that caused Ms. Gunter concern. (JA460.) She went into Ms. Austin's room and found the privacy curtain closed. (JA461.) She looked around the privacy curtain and saw Mr. Martin on top of Ms. Austin, with her severely contracted legs spread in a way she had never seen before, and thrusting back and forth in a manner that caused Ms. Gunter to conclude that he was having sex with Ms. Austin. (JA462-65.) She stood there and watched for about ten seconds and then, instead of yelling or doing anything to intervene, she turned around and left Ms. Austin's room with Mr. Martin still atop of her. (JA465.) She went to find another staff member, and the two of them then waited between ten and thirty minutes before calling anyone to report what Ms. Gunter had seen. (JA465-66.)

Plaintiff's Amended Complaint included allegations of negligence against OLP for Ms. Gunter's failure to intervene or take reasonable steps to mitigate the

harm that Ms. Austin was suffering. (JA219-29, ¶41(c), (f).) OLP contested this theory of liability, and sought to explain Ms. Gunter's conduct in a way that was not a breach of the standard of care. OLP elicited testimony from Ms. Gunter to suggest that it was not clear what was going on when she walked in on Mr. Martin in Ms. Austin's room, and so that is one reason why she did not immediately intervene. (*See, e.g.*, JA475-76.) Plaintiff thus disclosed Nurse Cooper to testify, among many subjects, that there would be no good reason, and it would be a violation of the standard of care, for a CNA like Mr. Martin to be on top of a patient, to be having sex with a patient, etc., and so it was no excuse to say that Ms. Gunter was not exactly sure what was going on. Whatever Ms. Gunter might have thought could be going on, Nurse Cooper was there to establish that none of it could be legitimate conduct within the standard of care.

OLP did not object to Nurse Cooper testifying regarding Ms. Gunter's breaches of the standard of care owed to Ms. Austin. Rather, OLP simply objected pre-trial to certain snippets of Nurse Cooper's anticipated testimony where Nurse Cooper responded to what Ms. Gunter claimed she had seen and whether that would be a violation of the standard of care. The court exercised its discretion to allow Nurse Cooper's testimony.

2. OLP's standard of care expert.

OLP also disclosed an expert that it purported to offer for standard of care testimony in this case that, according to OLP, fell entirely within the definition of malpractice under the Act. At trial OLP called Mr. Moyers and sought to qualify him 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." (JA648-49.) On voir dire of Mr. Moyers it was established that Mr. Moyers is not a clinician in any way. He is not a doctor, a nurse, a CNA, or any other kind of healthcare provider. He is, instead, something akin to a business manager, responsible for the administrative side of running a nursing home and maximizing profits. (JA649-52.) He explicitly conceded that he did not "have a clinical medical practice." (JA652.)

On that basis Ms. Morgan moved to exclude Mr. Moyers from testifying to standard of care in a medical malpractice case because he did not satisfy the qualification requirements set forth at Virginia Code § 8.01-581.20. Neither in the discussion that immediately ensued, nor at any other point during the trial, did OLP ever proffer what exactly Mr. Moyers would testify about and what he would say. OLP never referred the circuit court to OLP's expert disclosure and never made it

part of the trial record,[2] and never otherwise made a record about what specifically Mr. Moyers would testify to or comment upon. After hearing the arguments of counsel and doing own research, the court ruled that because "this is a medical management practice case and it is not an employment case," Mr. Moyers did not satisfy the requirements of § 8.01-581.20, and thus could not testify as a standard of care expert. (JA662.)

ARGUMENT

A. The Circuit Court correctly denied OLP's plea in bar – Assignment of Error 1.

1. Standard of review.

OLP raised the scope of employment issue via a plea in bar, and submitted it to the trial court for decision rather than to the jury. Contrary to OLP's contention that the plea in bar ruling presents a pure question of law, there were no stipulated or undisputed facts. Rather, this was a standard *ore tenus* plea in bar hearing where OLP presented testimony and Ms. Morgan's counsel cross-examined the witness.

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[2] The Joint Appendix indicates that OLP filed its Expert Designation with the Clerk of the Circuit Court in May of 2017. (JA238, *et seq.*) That Designation includes a summary of Mr. Moyers's expected testimony, including matters that are clearly medical in nature, such as the standard of care for the technique a CNA like Mr. Martin should use to reposition a patient, (JA246), the medical staffing requirements for the overnight shift, (JA248), etc. However, OLP never referred the trial court to its Expert Disclosure during the trial, nor did OLP make a proffer of which of these manifold opinions OLP actually intended to elicit from Mr. Moyers had he been permitted to testify.

Also contrary to OLP's contention that Plaintiff bore the burden of proof, OLP assumed the burden of proof to negate the scope of employment contention by raising the scope of employment issue via plea in bar rather than having it be part of the Plaintiff's case to the jury.

OLP's evidence established that Mr. Martin was OLP's employee at the time of the assault. (JA371.) It was thus OLP's burden to rebut the presumption that Mr. Martin "was *not* acting within the scope of his employment when he committed the act complained of, and if the evidence leaves the question in doubt it becomes an issue to be determined by the" trier of fact. *Gina Chin*, 260 Va. at 542 (alterations omitted, emphasis in original). There is no contention by OLP that the circuit court failed to identify the relevant cases or misstated this Court's legal standards for scope of employment. Rather, the contention is that the circuit court erroneously resolved the facts. As this Court recently observed regarding the standard of review for a trial court's resolution of evidence presented *ore tenus*,

> Because the circuit court heard the evidence *ore tenus*, its factual findings are entitled to the same weight as a jury verdict, and we are bound by its findings of fact unless they are plainly wrong or without evidence to support them. Under this standard of review applicable to judges sitting as factfinders no less than jurors, we review factfinding with the highest degree of appellate deference. In addition, we view the evidence and all reasonable inferences drawn from it in the light most favorable to Yancey, as the prevailing party at trial.

Palmer v. R.A. Yancey Lumber Corp, 294 Va. 140, 158-59 (2017) (alterations, quotations, and citations omitted).

2. Virginia's standard for determining scope of employment is well-settled and longstanding.

The vicarious liability claim against OLP for Mr. Martin's conduct presents the situation where an employee commits an intentional tort in the workplace, while on the clock, while doing his job. Though unfortunate, this is not a new situation. And this Commonwealth's law regarding the employer's vicarious liability when the employee's intentional tort injures a third party is well-established. The reasoning was stated with clarity as far back as 1922:

> If a person, acting for himself, willfully and maliciously inflict an injury upon another, he is liable in damages for such injury. And there is no reason why a master should be permitted to turn his business over to servants who have no regard for the public welfare and thereby escape the responsibility which he would otherwise have to bear. It is manifestly right and just that both corporations and individuals be required to answer in damages for wanton and malicious assaults inflicted upon others by their servants, while acting within the scope of the servant's employment and duty, and it matters not whether the act of the servant is due to lack of judgment, the infirmity of temper, or the influence of passion, or that the servant goes beyond his strict line of duty and authority in inflicting such injury . . . .

Davis v. Merrill, 133 Va. 69, 74 (1922).

Since *Davis*, this Court has reaffirmed and added to Virginia's law on respondeat superior liability for the intentional torts of an employee. In *Plummer v. Center Psychiatrists*, 252 Va. 233 (1996), a case, exactly like this one, involving sexual conduct by a healthcare provider that "constituted an assault and battery" upon a patient, this Court confirmed that "the willfulness or wrongful motive which

moves an employee to commit an act which causes injury to a third person does not of itself excuse the employer's liability therefor." *Id.* at 236 (quoting *Commercial Bus. Sys. v. BellSouth*, 249 Va. 39, 45 (1995)). The dispositive question is "not the motive of the employee in committing the act complained of, but whether that act was within the scope of the duties of employment and in the execution of the service for which he was engaged." *Id.* at 236-37. Thus, even if the employee's conduct is "outrageous and violative of his employer's rules," and even if his "motive was personal" to advance his own desires "rather than the interest of" his employer, the conduct will still be within the scope of employment when the "willful and malicious acts were committed while [the employee] was performing his duties . . . and in the execution of the services for which he was engaged." *Id.* at 237.

Five years later this Court confronted a fact pattern where a bank teller was using his position to deposit forged checks drawn on a customer's business account into a friend's personal account, with the teller getting a cut of the action. *Gina Chin*, 260 Va. at 536-37. This was, of course, contrary to the bank's rules, as well as countless applicable regulations and laws. When the scheme was discovered, the aggrieved business from which the money had been drawn sued the bank for vicarious liability for the criminal conduct of its employee.

The bank contended that the teller's conduct could not possibly have been within the scope of employment because it was not done "with an intent to benefit

the employer." *Id.* at 541. Conceding that certain language from its prior decisions, if taken in isolation, could support this position, this Court nevertheless concluded that "our prior decisions do not support that interpretation" when viewed as a whole. *Id.* The sexual conduct in *Plummer* certainly was not intended to benefit the psychologist's employer, and the "self-dealing and accepting illegal bribes" in another case certainly was not intended to benefit the wrongdoer's employer, but the Court had nevertheless found that this conduct could occur in the scope of employment. *Id.* (citing *Plummer* and *Commercial Business Systems*). Harkening back to *Davis*'s explication of Virginia's policy behind vicarious liability, the Court "expressly reject[ed]" any suggestion that only acts done in furtherance of the employer's interests could fall within the scope of employment. *Id.* Thus, the Court found that a reasonable trier of fact could find that the bank teller's criminal conduct was within the scope of his employment. *Id.* at 545.

And just recently in *Parker v. Carilion Clinic*, __ Va. __, 819 S.E.2d 809 (2018), this Court synthesized and reaffirmed all of this prior case law dealing with intentional torts committed within the scope of employment. The Court made clear that the rebuttable presumption that an employee's conduct was committed within the scope of employment arises at the pleading stage and persists until positive evidence is shown regarding the incident in question that would rebut that presumption. *Id.* at 818. The Court went on to acknowledge that the "job-related-

service-principle" that lies at the heart of the scope of employment inquiry "has arisen in many intentional tort contexts," including *Plummer* where a healthcare provider engaged in nonconsensual sexual intercourse with a patient while acting within the scope of his employment. *Id.* at 820.

3. OLP failed to preserve any argument that Plaintiff pleaded herself out of the scope of employment presumption.

OLP's first argument proclaims that "in light of this Court's recent decision in *Parker v. Carilion Clinic*," it is necessary to address the "threshold issue" whether Plaintiff's Complaint pleaded itself out of scope of employment. (OLP Opening Br. at 10.) By presenting the issue in this manner—that it is an argument prompted by an opinion issued by this Court in the last month—OLP is conceding that it was not an argument that the court below considered or was even asked to consider. The record bears this out.

This, of course, is a problem for OLP. Under Rule 5:25, "because [OLP] raises this argument for the first time on appeal, [this Court] will not consider it." *Raley v. Haider*, 286 Va. 164, 169 (2013). Simply stated, OLP never contended to the circuit court that Plaintiff's Complaint, standing alone, defeated any claim that OLP would be vicariously liable for Mr. Martin's conduct. That kind of argument would be made via demurrer, arguing that as a matter of law the allegations in the Complaint, taken as true, establish that Mr. Martin's conduct was not in the scope of his employment. *See, e.g.*, *Parker*, 819 S.E.2d at 822 (describing the argument that

"a plaintiff can plead herself out of court by affirmatively alleging facts that rebut the presumption implied in law" as one that is raised "at the demurrer stage of a case"). But OLP did not demurrer to the scope of employment allegations in Count 1 of Plaintiff's Complaint. OLP only attacked the vicarious liability claim via its plea in bar, and even then never argued to the trial court that the allegations in Plaintiff's Complaint, standing alone, pleaded her out of the vicarious liability claim. Because OLP never raised this argument below, it cannot be considered now.

4. Plaintiff's Complaint does not plead itself out of the presumption of scope of employment.

Even if the Court were to address the substance of OLP's unpreserved pleading argument, the argument fails. Plaintiff alleged that Mr. Martin was OLP's employee and that "while Martin was performing his duties in caring for Gertrude Austin and related services in the course and scope of his employment with OLP, . . . Martin engaged in wrongful conduct which included, but was not limited to, raping Gertrude Austin." (JA3, ¶¶15-16.) The Complaint specifically alleged that "Martin's actions set forth in Paragraph 16 were committed while Martin was performing his duties as a nurse aide and in the execution of the services for which he was employed." (JA4, ¶21.) "These allegations created a rebuttable presumption that facts exist . . . that would satisfy the 'established test' for vicarious liability." *Parker*, 819 S.E.2d at 822. For the factual allegations in the Complaint to defeat that presumption, "the self-refutation must be clear, not conjectural, and irrefutable rather than debatable." *Id.*

Here, the allegations in the Complaint are a far cry from "irrefutably" defeating the scope of employment presumption. The Complaint alleges that while Mr. Martin was engaged in cleaning and changing Ms. Austin—services that were explicitly part of his job and that required him to be in close proximity to and make contact with her private regions—he inappropriately touched, molested, and raped her. The Complaint explicitly alleges that this tortious conduct occurred during and in the execution of the services for which Mr. Martin was employed. (JA4 ¶21. Thus the allegations in the Complaint, taken as true, establish that the tortious conduct occurred while Mr. Martin was performing a job-related service, not after he had concluded those services and not separate from those services.

This Court has explicitly held that a healthcare provider, like Mr. Martin, can engage in sexual assault of a patient in the course and scope of his employment. *Plummer v. Center Psychiatrists*, 252 Va. 233 (1996), is analytically identical to this case, and especially to OLP's argument about the effect of the allegations in Plaintiff's Complaint. The employee was a psychologist, a healthcare provider just like Mr. Martin. The plaintiff was a vulnerable patient, just like Ms. Austin. *Id.* at 234-35. The psychologist used his position and the plaintiff's condition to commit "an act of sexual intercourse upon plaintiff which constituted an assault and battery upon her since, Dr. Roque Gerald, through his education, experience and knowledge of plaintiff overcame her will so that she was unable to act with volition." *Id.* at 235. There was no suggestion

that the sexual conduct was part of or in furtherance of the therapy, or in any way in furtherance of the employer's interests. *See, e.g.*, *Gina Chin*, 260 Va. at 541 (pointing to *Plummer* as an example of a case where the employee's conduct was not in furtherance of his job responsibilities but was still within the scope of employment). And despite all of this, this Court held that a reasonable trier of fact, like the trial court here on OLP's plea in bar, could conclude that sexual assault by a healthcare provider was within the scope of employment. *Plummer*, 252 Va. at 237.

OLP's attempt to distinguish *Plummer* falls short. Its procedural distinction is defeated by OLP's own briefing. OLP tries to differentiate *Plummer* from the present case on the grounds that *Plummer* was an appeal from a demurrer ruling, whereas the present case involves a plea in bar ruling where the respondeat superior issue was submitted to the court "on both the law and the facts." (OLP Opening Br. at 25.) Yet, pages earlier, OLP concedes that "the facts about the rape were drawn from the allegations in the Complaint." (*Id.* at 13 n.4.) So, the facts of the incident in question in both *Plummer* and the present case were based solely on the allegations in the respective complaints. OLP's purported procedural distinction is one without a difference.

OLP's attempts at substantive distinction are equally unavailing. OLP first tries to distinguish this case from *Plummer* on the grounds that this case alleges that Mr. Martin's conduct included "rape," whereas the Complaint in *Plummer* did not use the

word "rape." (*Id.* at 26.) It is true that this Court's opinion in *Plummer* has no indication that the complaint in that case used the word "rape." Instead, the complaint alleged that Dr. Gerald used his position and the plaintiff's mental condition to commit "an act of sexual intercourse upon plaintiff which constituted an assault and battery upon her since, Dr. Roque Gerald, through his education, experience and knowledge of plaintiff overcame her will so that she was unable to act with volition." 252 Va. at 234-35. The problem for OLP is that this allegation is materially identical to the definition of "rape" under Virginia law. *See* Va. Code § 18.2-61(A) (defining "rape" as "sexual intercourse with a complaining witness . . . accomplished (i) against the complaining witness's will . . .; or (ii) through the use of the complaining witness's mental incapacity or physical helplessness"). In other words, the plaintiff in *Plummer* effectively alleged rape even if she did not use that word. So any difference between what occurred in *Plummer* and what occurred here—and it is not all clear that there was any analytically meaningful distinction at all—is merely a difference in degree rather than a difference in kind for purposes of the respondeat superior analysis.

OLP further attempts to distinguish *Plummer* on the grounds that the psychologist there was alleged to use his education and experience to overcome the plaintiff's will. (OLP Opening Br. at 26-27.) OLP even goes so far as to discourse upon the concept of "transference" in the psychotherapy context. A few responses. First, the Complaint in this case explicitly alleged, among other things, that, while

engaging in his job-related service of cleaning and changing Ms. Austin, Mr. Martin relied upon his "authority dominion and control over Gertrude Austin and the access to Gertrude Austin which OLP . . . granted to him" to engage in his tortious conduct. He is thus analytically identical to Dr. Gerald in *Plummer* who used his position and training to sexually assault his patient. Second, in its argument to the circuit court OLP never tried to distinguish *Plummer* from the present case on the basis that the potential for "transference" in the psychotherapy relationship somehow makes sexual assault by a psychologist different than sexual assault by a CNA, (JA398-400), and OLP certainly never made any kind of factual record about the difference between the CNA-patient relationship and the psychologist-patient relationship. OLP should not be permitted to argue distinctions or assert factual differences here that were not argued or established below. And third, the supposedly unique nature of the therapist-patient relationship was pointed out and discussed by the dissent in *Plummer*. 252 Va. at 239-40. If that context had been seen by the *Plummer* majority as being in any way a limiting principle on the ability of sexual assault by a healthcare provider to fall within the scope of employment, the majority surely would have responded to the dissent by saying so. The majority did no such thing, so the settled law of this Court is that sexual assault by a healthcare provider within the scope of employment is not limited to the therapist-patient context.

In short, OLP's attempt to distinguish this case from *Plummer* boils down to the proposition that some of the facts are different. That of course is true between any two cases. What matters is whether any of those differences are analytically meaningful, and here they are not. As long as *Plummer* remains good law—and given that this Court explicitly cited and incorporated *Plummer* into its analysis in *Parker*, it does remain good law—OLP's position that the circuit court was plainly wrong or without evidence to support it when it found that Mr. Martin's conduct occurred within the scope of his employment cannot be sustained. OLP did not contend that *Plummer* was not good law in the lower court, and does not ask this Court to overturn *Plummer*. So, the circuit court's decision must stand.

5. OLP took inconsistent positions in the circuit court about how to characterize Mr. Martin's conduct.

As described above, OLP asserted in its plea in bar that Mr. Martin's conduct occurred outside the performance of his duties as a CNA. But at the exact same time—indeed, during the exact same hearing—OLP argued that Mr. Martin's conduct qualified as "healthcare" and thus fell within the Medical Malpractice Act. (JA416, 423.) "Healthcare" is defined in the Act as "any act, professional services in nursing homes, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical diagnosis, care, treatment or confinement." Va. Code § 8.01-581.1. OLP summarized this definition as being "[a]ny act during the

patient's care." (JA614.) Thus, by OLP's own assertion, Mr. Martin's conduct was properly described as being an act during—not after, not separate from, but during—the patient's care.

It would take some impressive contortion to square OLP's contention that the assault and battery complained of in Count 1 was "healthcare" but yet, at the same time, did not occur as part of Mr. Martin's job-related services as a healthcare provider. OLP was in essence engaging in the kind of approbation and reprobation that gave rise to the doctrine of judicial estoppel. *See, e.g.*, *Matthews v. Matthews*, 277 Va. 522, 529 (2009) ("The modern-day doctrine of judicial estoppel is derived from the Scottish law prohibiting approbation and reprobation. Judicial estoppel forbids a party from assuming successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory.") (citations and quotations omitted). Where the court has accepted one position advanced by a party, that party cannot ask that an inconsistent or mutually contradictory position also be accepted. *Id.* Here, the court accepted OLP's contention about Count 1 falling under the definition of healthcare. It thus logically and justifiably rejected the opposite contention that Mr. Martin's conduct was somehow not within the scope of his employment as a healthcare provider. OLP got exactly what it requested in its demurrer about the Medical Malpractice Act, so this Court should reject OLP's attempt to assert the

inconsistent and contradictory position that Mr. Martin's conduct fell outside the scope of his services as a healthcare provider.

6. The circuit court's ruling is entirely consistent with this Court's analysis in *Parker*.

OLP seeks to recast its arguments and the record below into the mold of this Court's recent discussion of scope of employment principles in *Parker v. Carilion Clinic*. However, in light of the record created by OLP for purposes of the plea in bar, the circuit court's decision is perfectly in line with the analysis in *Parker*.

Beginning at the end, the circuit court relied upon and applied all of the same cases and concepts highlighted by this Court in *Parker*. This Court declared in *Parker* that, "[i]n Virginia, 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." 819 S.E.2d at 819 (citations and quotations omitted, emphasis in original). The court's letter opinion overruling the plea in bar similarly observed that the relevant inquiry was "whether the *service itself* was within the ordinary course of the employer's business." (JA106-07 (emphasis added).) This Court observed that the "job-related-service" principle may arise in the intentional tort context when the tort occurred "in the execution of the services for which" the employee was employed. *Parker*, 819 S.E.2d at 820. Similarly, the circuit court found that Mr.

Martin's intentional tort was committed "in execution of those services for which he was employed." (JA107.) Despite occurring more than two years before this Court issued the decision in *Parker*, the circuit court engaged in precisely the analysis and looked for precisely the circumstances identified by this Court in *Parker*. Having identified the correct analytical framework, the court made a factual determination—in its role as finder of fact, on the record created by OLP—that Mr. Martin's conduct fell inside the scope of employment line. Where the circuit court's analysis was sound, its resolution of the facts must be accorded deference.

Second, this case and *Parker* are materially identical in terms of procedural posture. *Parker* was an appeal from a demurrer ruling, so the facts were limited to those alleged in the complaint. Despite expounding at length about the limiting principles on vicarious liability under Virginia law, at the end of the day this Court found that, at the pleading stage, it was error for the circuit court to have dismissed the vicarious liability claim as a matter of law. 819 S.E.2d at 822-23. This was so because the plaintiff had alleged that the employees had committed their tortious conduct "in the context of their employment with Carilion," thus triggering the rebuttable presumption that the conduct was within the scope of employment. *Id.* at 822. In the absence of positive evidence or allegations taking the conduct outside the scope of employment, it was error for the lower court to have ignored the presumption and dismissed the vicarious liability claim. *Id.* at 823.

It is materially identical here. OLP concedes that the only facts in the record for purposes of the plea in bar were those alleged in the Complaint. The Complaint explicitly alleged that Mr. Martin was OLP's employee and that "while Martin was performing his duties in caring for Gertrude Austin and related services in the course and scope of his employment with OLP, . . . Martin engaged in wrongful conduct which included, but was not limited to, raping Gertrude Austin." (JA3, ¶¶15-16.) The Complaint specifically alleged that "Martin's actions set forth in Paragraph 16 were committed while Martin was performing his duties as a nurse aide and in the execution of the services for which he was employed." (JA4, ¶21.) Under the rubric of *Parker*, these allegations triggered the rebuttable presumption that Mr. Martin was acting within the scope of his employment. OLP did not adduce any evidence about what actually happened on the night in question, so OLP could not possibly have rebutted the presumption. Thus, just as it was error for the circuit court in *Parker* to have ignored the presumption established by the allegations in that plaintiff's complaint, it would have been error for the circuit court here to have ignored the unrebutted presumption by finding that Martin's conduct was not within the scope of his employment.

In short, the analysis in both this case and *Parker* is limited to what the plaintiffs alleged in their respective complaints. Both complaints alleged facts sufficient to trigger the scope of employment presumption. And in neither case was

there any record evidence of what actually happened between the employee and the plaintiff that could rebut that presumption. Thus, the ultimate conclusion is the same in both cases—the scope of employment presumption is unrebutted.

Finally, *Parker*'s analytical framework supports the circuit court's decision. This Court cast the scope of employment inquiry in a transactional light. An act will be within the scope of employment if it arose "out of the very transaction, or service or task, that the employee was being paid to perform." 819 S.E.2d at 819 (citations and quotations omitted). The Court explained that the tie that binds all of the prior intentional tort scope of employment cases—*Plummer*, *Majorana*, and *Gina Chin*—was that "the tortious act or transaction occurred while the employee was in fact performing a specific job-related service for the employer, and, but for the employee's wrongdoing, the service would otherwise have been within the authorized scope of his employment." *Id.* at 820. The allegations in Plaintiff's Complaint fit perfectly within this framework.[3] Mr. Martin's sexual assault arose

[3] So too do the facts of the incident adduced at trial fall squarely within the *Parker* analytical framework. In his videotaped confession, Mr. Martin described what happened early on the morning in question. (JA704.) Approximately 6:15 in the morning of the 17th, Mr. Martin went into Ms. Austin's room to "change her" because she was "a heavy wetter." (*Id*. at 29:30.) While changing her, he climbed up on Ms. Martin's bed, spread her contracted legs, and, according to him, "tried to but [] couldn't enter her" because she was dry. (*Id.* at 31:00.) Nevertheless, Mr. Martin was able to at least thrust his penis "between the labia." (*Id.* at 31:45.) Thus, even if OLP had submitted the scope of employment issue to a factfinder—be it the trial court or a jury—on the basis of a more complete evidentiary record, the factfinder still easily and reasonably could have concluded that Mr. Martin's conduct

out of, and occurred during, his job-related-service of cleaning and changing Ms. Austin and having private access to her private region. He was being paid to perform those services. But for his wrongdoing, that service would otherwise have been within the authorized scope of his employment. There simply is no basis to find, based on the factual record on the plea in bar, that there was any meaningful break or separation between Mr. Martin's authorized job-related-service and his tortious wrongdoing. Rather, the one flowed directly from the other, and so it was within the scope of his employment.

B. The trial court properly excluded OLP's medical malpractice standard of care expert because he was not qualified to testify in a medical malpractice case – Assignment of Error 2.

OLP's second assignment of error contends that the trial court erred when it found that OLP's standard of care expert was not qualified to testify in this case. Ms. Morgan agrees with OLP that this assignment of error is subject to abuse of discretion review. (OLP Opening Br. at 30 n.12.)

OLP insisted that everything about Plaintiff's Complaint was governed by the Medical Malpractice Act, so Virginia Code § 8.01-581.20 was the first place to look to see who could testify as an expert on standard of care. As relevant here, that statute provides:

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arose "out of the very transaction, or service or task, that the employee was being paid to perform" when his assault began in continuous sequence from his having accessed her genital area to change and clean her. *Parker*, 819 S.E.2d at 819.

> Any health care provider who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of practice in which he is qualified and certified. This presumption shall also apply to any person who, but for the lack of a Virginia license, would be defined as a health care provider under this chapter, provided that such person is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia. An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this Commonwealth. 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.

Va. Code § 8.01-581.20(A).

This description of who qualifies to testify as a standard of care expert in a medical malpractice case clearly refers to someone who is "licensed to practice in Virginia" or "licensed in some other state" and who had an "active clinical practice in either the defendant's specialty or a related field of medicine within one year" of the act complained of. In other words, it has to be a doctor, nurse, CNA, nurse practitioner, or the like—someone licensed in some field of medicine—with an active clinical practice in the same or similar field as the defendant. Every single case in which this Court has examined the qualifications to testify under section 8.01-581.20 has involved experts that fit this description—someone who is actually a healthcare provider him or herself. *See, e.g.*, *Lloyd v. Kime*, 275 Va. 98, 109 (2008) ("In order to qualify a witness as an expert on the standard of care, the proponent of

the expert must show, among other things, that the 'specialty or field of medicine in which the expert is qualified and certified' is the same as the defendant's specialty or a related field of medicine."). Not a single case involves an expert who works in some capacity in the healthcare field but is not him or herself a healthcare provider.

OLP thus placed itself way out on a limb when it offered Dana Moyers, a nursing home administrator with absolutely no clinical training or experience, as a medical malpractice standard of care expert. After OLP established his qualifications, such as they were, and offered him as an expert, Ms. Morgan's counsel voir dired Mr. Moyers. That voir dire established that Mr. Moyers's primary experience was in "business development and revenue generation," "budgetary performance," and profit growth. (JA649-51.) It further established that Mr. Moyers is not a CNA, not a nurse, and does not "have a clinical medical practice." (JA651-52.) Ms. Morgan thus moved to exclude the expert testimony of Mr. Moyers because he failed to satisfy the requirements of section 8.01-581.20 and was not competent to testify to standard of care in a medical malpractice case. After deliberation and review of the relevant cases, the court granted Ms. Morgan's motion. (JA660-62.)

1. OLP failed to preserve this error.

As an initial matter, this Court should not even get to the merits of this argument because OLP failed adequately to preserve the alleged error. To obtain reversal on a claim that a trial court improperly excluded evidence, the party must show both that the exclusion was improper and that its exclusion was likely prejudicial. OLP failed to make a record sufficient to find prejudicial error in two key respects.

a. OLP failed to make a proffer of Mr. Moyers's expected testimony.

To permit the appellate court to assess whether the exclusion of witness testimony is prejudicial, "counsel is required to proffer the substance of the anticipated testimony." *Gardner v. Commonwealth*, 288 Va. 44, 53 (2014); *see also* Va. Sup. Ct. R. 2:103 (Error may not be predicated upon admission or exclusion of evidence, unless . . . as to evidence excluded, the substance of the evidence was made known to the court by proffer.") Here, OLP never made a proffer of the substance of Mr. Moyers's testimony. OLP did not give a summary of what aspects of Plaintiff's claim Mr. Moyers would be speaking to, what he would be saying about those subjects, or what his opinions would be about OLP's provision of healthcare to Ms. Austin. Indeed, OLP never even referred the court to its expert disclosure or made that disclosure part of the trial record as a place to look for a summary of Mr. Moyers's expected testimony and opinions. OLP's failure to make the required

proffer prevents any determination of whether the alleged error was prejudicial, and is thus fatal to this assignment of error.

b. OLP failed to create the record necessary to determine the basis for the jury's verdict.

As stated above, Plaintiff's Amended Complaint asserted three distinct theories of recovery against OLP. One was vicarious liability for Mr. Martin's assault and battery of Ms. Austin. (JA218-19, ¶¶30-38.) The second was vicarious liability for OLP's other employees', namely Ms. Gunter's, failure to intervene, stop, and mitigate the damage of Mr. Martin's assault and battery upon Ms. Austin. (JA219-20, ¶¶41(c), (f).) The third was OLP's own direct negligence in the care provided to Ms. Austin, staffing of the facility, and retention of Mr. Martin. (JA219-20, ¶¶41(a), (b), (d), (e), (f).) Nevertheless, the case went to the jury with an agreed general verdict form. (JA350.) The verdict form did not differentiate between defendants Martin and OLP, and also did not differentiate between the different bases for liability against OLP.

It is thus impossible to determine from the verdict form the basis for the jury's verdict against OLP. Was it just one of the vicarious liability theories? Both? Neither? Did the jury find that OLP was itself negligent? There is simply no way to tell. Astoundingly, when this issue was explicitly called to OLP's attention and the court suggested substituting a new verdict form that would allow everyone to

"know on what basis the jury made their decision," OLP rejected the offer because of something having to do with insurance coverage. (JA696-97.)

OLP's strategic choice on this issue is fatal to its assignment of error about Mr. Moyer's testimony. Mr. Moyers was offered as an expert solely on "employment issues and dealing with staff care issues and training, and those matters" in the context of nursing homes. (JA648-49.) His testimony would thus only have been pertinent to the third theory of recovery against OLP, *i.e.* its own direct negligence. It would have had no bearing upon the two vicarious liability theories. But neither the parties, nor the circuit court, nor this Court know which of those three theories was the basis for the jury's verdict. Thus, it is impossible to conclude that any alleged error in precluding Mr. Moyers's testimony was prejudicial in terms of actually affecting the verdict.

2. OLP's argument is also substantively incorrect.

Even if the Court finds that OLP has adequately preserved its alleged error, the substance of OLP's argument fails. According to OLP, anyone who has experience and training in working at a nursing home can testify as a standard of care expert in a nursing home medical malpractice case. OLP interprets "clinical" to mean anything in the realm of a medical clinic, such that anyone with experience in a medical clinic can testify as a standard of care expert. By those lights, nearly

anyone who has experience working in a hospital would be qualified to testify to standard of care in a medical malpractice case against a hospital.

For example, consider a medical malpractice case against a hospital, where the plaintiff's allegation is that the hospital provided improper, unindicated treatment. Hospitals have entire departments staffed with people whose job is to interact with insurance companies about whether specific treatment is proper and indicated under the circumstances. Under OLP's theory, a plaintiff could call someone from this department to testify as a standard of care expert against a hospital. It is hard to imagine that any other potential medical malpractice defendant would want the Court to adopt OLP's position, which would greatly expand the class of people who could serve as experts for medical malpractice plaintiffs.

OLP gets to this conclusion by ignoring much of section 8.01-581.20. OLP completely elides the prominence of the concept of a "practice" in subsection (A). The first (very long) sentence of subsection (A) establishes the standard of care in a medical malpractice case against a physician, clinical psychologist, hospital, other health care provider, etc. to be "that degree of skill and diligence *practiced* by a reasonably prudent *practitioner* in the field of *practice* or specialty in this Commonwealth." This sentence alone indicates a need for symmetry between the defendant and the expert. It is a like-for-like, fight-fire-with-fire requirement. The defendant is a health care provider, so the experts too must be heath care providers.

This "practice" concept arises again later in subsection (A), where the qualifications for experts are spelled out to include a requirement that the expert have an "active clinical practice." The term "practice" implies the learned professions. One practices law. One practices medicine. *See, e.g.*, BLACK'S LAW DICTIONARY 1192 (7th ed. 1999) (defining "practitioner" as "a person engaged in the practice of a profession, esp. law or medicine"). One does not practice nursing home administration or revenue enhancement or budgetary performance.

Indeed, this was the entire basis for this Court's decision that arose in a different, but still similar context. In *John v. Im*, 263 Va. 315 (2002), this Court addressed whether a licensed psychologist with experience in testing for and diagnosing brain injuries was qualified to give a causation opinion about what caused a particular injury. This Court observed that "the causation of a particular physical human injury is a component of a diagnosis, which is part of *the practice of medicine*." *Id.* at 321 (emphasis added). Because the psychologist was not a medical doctor, he could not provide an expert opinion on the causation of an injury. Once again, this "practice" concept was a principle of limitation that restricted who could testify about medical issues. The upshot is that under *John v. Im*, a psychologist with a Ph.D. cannot testify about the diagnosis and causation of a brain injury because he does not practice medicine, but yet under OLP's position here that same psychologist could testify as a standard of care expert in a medical malpractice

case against the neurologist who treated the brain-injured patient. That cannot possibly be what the drafters of the Medical Malpractice Act had in mind when they conspicuously inserted the "active clinical practice" limiting principle into the definition of who can testify as a standard of care expert in a medical malpractice case.

Taken as a whole, section 8.01-581.20 clearly envisions experts who themselves practice medicine of some degree. It does not envision generally anyone who works in any capacity in the medical field. Mr. Moyers simply does not fall into the prescribed class of people.

OLP is also incorrect when it contends that the trial court's decision rested solely on its interpretation of section 8.01-581.20. In announcing its ruling, the trial court first observed that it had not found a single medical malpractice case where someone who was not a medical professional had been designated or permitted to testify. (JA660.) The court then reviewed how section 8.01-581.20 had been applied in this Court's past cases, all of which focused on the requirement that the expert have pertinent experience in the actual medical practice of the defendant. And then the court announced its finding:

> So, I find *where this is a medical management practice case and it is not an employment case*, that the requirements of 8.01-581.20 require an active clinical practice, where this expert does not have an active clinical practice, the Court finds that he cannot testify . . . .

(JA662 (emphasis added).) The emphasized portion indicates that the court's ruling relied upon its view of the nature of this specific case and not just the statute. The court viewed this case as a medical management case, not an employment case. So a qualified expert would have to be someone who could speak to the medical management issues, not just employment issues.

Mr. Moyers could not even arguably speak to medical management issues. At most he could speak to employment issues, which was not what the case was about. Where the proposed expert could not speak to the issues in the case as seen by the trial court, and where there had literally never been an instance in Virginia where someone like Mr. Moyers had been permitted to testify in a medical malpractice case, it cannot be said that the circuit court's decision was an abuse of discretion.

C. The trial court did not abuse its discretion in permitting Ms. Morgan's standard of care expert to testify – Assignment of Error 3.

OLP's final argument is that the trial court erred in permitting Ms. Morgan's standard of care expert, Theresa Cooper—an actual licensed, practicing nurse with relevant clinical experience—to provide certain snippets of testimony. Ms. Morgan agrees that this argument is subject to the abuse of discretion standard of review.

As the Court will recall, OLP began this case by insisting that the Medical Malpractice Act, and specifically its attendant requirements for standard of care expert testimony, governed every aspect of Ms. Morgan's claim:

> [M]alpractice means any tort based upon healthcare, therefore, *a battery arising from healthcare is malpractice*, within the meaning of the statute. And so our position is that *these claims* fall under the Medical Malpractice Act . . . And with that, they would be subject to the other provisions of the act, which are *expert testimony*, caps on damages, all the other items in which a medical malpractice claim must contain."

(JA423 (emphasis added).) So Ms. Morgan took OLP's cue and disclosed a qualified standard of care expert as to all three aspects of her claim against OLP. OLP then turned around and contended that Ms. Morgan's expert should be prohibited from testifying about many of the standard of care issues that form two of those three theories of recovery—the two vicarious liability theories.

The trial court agreed that though expert testimony may not be necessary on certain aspects of Ms. Morgan's claims, it was nevertheless permissible to assist the jury's resolution of this case. The circuit court's decision should be affirmed for two reasons. First, much like its second assignment of error, OLP has failed to preserve this alleged error. And second, the circuit court was well within its discretion to permit the testimony in question.

1. OLP failed to preserve this alleged error.

OLP's strategic decision to consent to and proceed with a general verdict form is just as problematic for this assignment of error as it is for the second assignment of error. OLP's contention does not go to the entirety of Nurse Cooper's testimony. Instead, it takes issue with only certain aspects of her testimony that OLP contends

are self-evident, such as that it is a breach of the standard of care for a CNA to be on top of a patient, to make thrusting motions atop a patient, to penetrate a female patient's vagina, etc. These portions of Nurse Cooper's testimony were only pertinent to the two vicarious liability theories of recovery against OLP. In short, they go to the point that there was no medically viable reason for Mr. Martin to have been doing what he was doing, and that there was no justifiable reason for Ms. Gunter to have been in doubt about what she was seeing or what the required response was. The aspects of Nurse Cooper's testimony with which OLP takes issue would have no bearing on the direct negligence theory against OLP based on its staffing, supervision of employees, retention of Mr. Martin, etc. Thus, for the same reasons as discussed above, it is impossible to conclude that this alleged error was prejudicial because it is impossible to tell—due to OLP's express tactical decision—which theory or theories formed the basis for the jury's verdict. Thus, OLP has not adequately preserved this error.

2. The trial court's decision was appropriate in light of the positions taken by OLP.

The circuit court's decision to permit Nurse Cooper to testify about the standard of care issues in question falls squarely within the governing law on admission of expert testimony. Rule 2:702(a)(i) and Virginia Code§ 8.01-401.3(A) do not provide that expert testimony is admissible only if necessary to permit the

trier of fact to understand the evidence; rather, expert testimony is admissible if it will assist the trier of fact.

That is exactly what occurred here in two respects. First, at trial, OLP never stipulated or conceded that Mr. Martin actually did what he was accused of and admitted to doing. Indeed, OLP consistently sought to cast doubt upon Ms. Gunter's eyewitness testimony about what she saw when she walked into Ms. Austin's room. Despite Ms. Gunter testifying on direct that she believed that Mr. Martin was having sex with Ms. Austin when she walked in, (JA464), OLP cross-examined Ms. Gunter extensively to establish that it was dark in Ms. Austin's room, that she did not see any of Mr. Martin's clothes pulled down, that she did not see Mr. Martin's buttocks or any genitals, that she did not see the front of Mr. Martin's body, etc. (JA474-76.) So, when OLP was trying to create doubt about what even happened, it was absolutely helpful for the jury to understand that there would be no reason within the standard of care for a CNA to be doing what Ms. Gunter described seeing.

Second, a large issue at trial—and the second theory of liability against OLP—was whether Ms. Gunter reacted appropriately when she saw Mr. Martin on top of and thrusting at Ms. Austin such that she believed he was having sex with her, but did not intercede or do anything to assist Ms. Austin. OLP suggested that her response was acceptable and within the standard of care because she was not sure what she was seeing. Thus, again, it was perfectly appropriate for Plaintiff to

establish through expert testimony that everything that Ms. Gunter admitted that she saw and believed was happening would have been outside the standard of care, and that action was required by the standard of care. The trial court was well within its discretion to admit Ms. Morgan's standard of care expert testimony.

CONCLUSION

The vast majority of the issues about which OLP complains are the product of OLP's own tactical choices. OLP chose to submit the scope of employment question to the court as factfinder rather than to a jury. OLP further chose to make that submission based on a factual record completely devoid of any evidence of what actually happened on the night in question aside from what was alleged in Plaintiff's Complaint. OLP thus chose not to even meaningfully try to rebut the presumption that Mr. Martin was acting within the scope of his employment. OLP chose to seek—and received—the benefits and protections of the Medical Malpractice Act for all aspects of this case. OLP then chose to place itself way out on an untested, unsupported limb by putting forward a medical malpractice expert whose qualifications were unlike literally every other known medical malpractice expert ever to have testified in Virginia since the adoption of the Act. Finally, OLP chose to reject a verdict form that would have permitted this Court to know which theory or theories of liability were the basis for the jury's verdict.

OLP, like any other litigant, must live with all of those choices. And the result of those choices for purposes of this appeal is that the trial court's decision should be affirmed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 27, 2018, the Brief of Appellee was filed electronically via the VACES system with the Supreme Court of Virginia and that three copies of the same were hand delivered to the clerk's office. This same date, a copy of the Brief of Appellee was sent via email to all counsel of record, at the email addresses below:

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