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.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The Nursing Home is not vicariously liable for Martin's misconduct because Martin was not performing any job-related service when he raped Austin.

A. Plaintiff cites no facts or law to support her assertion that Martin was acting within the scope of his employment.

In its opening brief, the Nursing Home noted that, under Virginia law, an employer is vicariously liable for its employee's wrongdoing only if the employee was performing a "job-related service" at the time of the alleged wrongdoing. In the present case, Plaintiff alleges that Martin raped Austin. Because rape was not among the services that the Nursing Home hired Martin to perform, the Nursing Home is not vicariously liable for Martin's misconduct.

Plaintiff's response to this straightforward argument is noteworthy for what it does *not* contain. First, *Plaintiff does not cite anything in the record establishing what job-related service Martin was performing* <u>*while*</u> *he was raping Austin*. Nor can she. Raping a disabled, paralyzed patient is a marked and extreme deviation from a CNA's work-related duties. One cannot imagine a more extreme "stepping aside" from one's job duties. *Parker v. Carilion Clinic*, — Va.

—, 819 S.E.2d 809, 821 n.10 (2018). So rather than identify any particular job-related service being performed at the time, Plaintiff quotes a paragraph in the Complaint that parrots the vicarious-liability standard, stating—without explanation or elaboration—that Martin committed his wrongful acts during the "execution of the services for which he was employed." (Br. at 19) (citing JA 4, ¶ 21). This conclusory assertion is, however, belied by Plaintiff's rape allegations.

Second, *Plaintiff cites no case, in Virginia or elsewhere, holding that sexual assault on an incapacitated patient falls within the scope of a health care provider's employment.* Again, Plaintiff does not do so because she cannot do so. The cases on point—several of which the Nursing Home cites in footnote 8 of its opening brief—unanimously hold that conduct of this sort falls outside the scope of employment. Plaintiff fails to distinguish these cases. Nor does she explain why Virginia should be the lone jurisdiction holding that raping an incapacitated patient falls within a health care provider's scope of employment.

B. The Nursing Home based its arguments on the Complaint's allegations of rape.

Rather than address these core factual and legal issues, Plaintiff tries to change the subject: presenting an array of arguments—mostly procedural but some substantive. None of them has merit.

Plaintiff's procedural points focus on whether the Nursing Home preserved its argument that Plaintiff pleaded herself out of a respondeat superior claim. Thus, on page 18 of her brief, Plaintiff argues that "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 assertion is false. From the outset of this case, the Nursing Home took the position that the factual allegations in the Complaint were sufficient to defeat Plaintiff's respondeat superior claim. In its brief in support of its Plea, for example, the Nursing Home relied exclusively on facts alleged in the Complaint. (JA 44) (citing ¶¶ 15-16 of the Complaint). After reciting this Court's cases on vicarious liability and the regulations imposed on nursing homes to prevent sexual abuse of patients, it argued that "as a matter of law, Mr. Martin's conduct was a marked and unusual deviation from the services he was tasked to

perform and Our Lady cannot be held responsible for Martin's criminal actions." (JA 48.) Accordingly, it asked the Circuit Court to "dismiss Count One as to Our Lady." (*Id.*) The brief cannot be read in any way other than as an argument that the facts alleged in the Complaint show that Martin was not acting within the scope of his employment.

Indeed, that was how Plaintiff herself viewed the matter. When opposing the Nursing Home's vicarious-liability arguments, Plaintiff characterized the proceeding as "OLOP's Demurrer regarding OLOP's liability." (JA 97.) And when responding to the Nursing Home's arguments, she claimed that the Complaint had "properly pleaded" facts establishing vicarious liability. (*Id.*) At the hearing, Plaintiff's counsel began by stating, "I realized this has been filed as a plea in bar, but essentially it is a demurrer." (JA 402.)

Although the Circuit Court heard testimony from the Nursing Home's executive director, Sara Ann Warden, this related to other legal issues pending before the court.[1] Relevant here, none of it pertained to

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[1] For example, much of Warden's testimony concerned whether a separate entity, Coordinated Services Management, Inc., was Martin's employer, the subject of different plea in bar. (JA 50-58, 367-68, 384, 390.) Other portions of Warden's testimony described Austin's mental

(note continued on following page . . .)

the circumstances surrounding Martin's rape of Austin. The Circuit Court instead drew those facts from the Complaint. (JA 107) (citing "Mr. Martin's alleged conduct"). As it should have. *David White Crane Service v. Howell*, 282 Va. 323, 326 (2011) (holding that where, as here, a party does not introduce evidence on a plea, the court draws facts from the complaint's allegations). So, contrary to Plaintiff's argument, the Nursing Home did not need to present evidence to support its Plea. It just needed to establish that the alleged facts showed—as a matter of law—that Martin did not act within the scope of employment.

Contrary to Plaintiff's argument, the Nursing Home does *not* contend that the Circuit Court "erroneously resolved the facts." (Br. at 14.) For purposes of the vicarious-liability plea, there were no facts in dispute. The question presented was whether, by alleging rape, Plaintiff had alleged conduct by Martin that was—as a matter of law—a marked and unusual deviation from a CNA's work duties.[2] Based on

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(. . . note continued from previous page)
condition at the time of the rape, which was the subject of yet another plea in bar. (JA 83-86, 374-83.)

[2] The importance of the presumption discussion in *Parker* is that it confirms the Nursing Home's position that Plaintiff could plead herself out of court on the issue.

those allegations, the Circuit Court could have held, and *should* have held, that raping Austin fell outside the scope of Martin's employment.

C. Plaintiff's conclusory allegations do not save her vicarious-liability claim.

Substantively, Plaintiff's principal argument is that the Circuit Court could find vicarious liability because the Complaint alleges that "Martin's actions set forth in paragraph 16 [i.e., his rape of Austin] were committed while Martin was performing his duties as a nurse aide and in the execution of the services for which he was employed." (Br. at 19) (citing JA 4, ¶ 21). The paragraph Plaintiff relies on, however, is a conclusory allegation unsupported by any alleged facts. The Complaint does not state what job-related services Martin was performing while he was raping Austin.[3] Nor has Plaintiff *ever* identified the purported job-related service Martin was performing at the time. That Martin was performing any such services while committing his vile act is—to understate the matter—not plausible. So Plaintiff's boilerplate

[3] The Complaint alleges that bathing, changing clothes, and changing diapers were part of a CNA's duties but—contrary to Plaintiff's assertion on page 20 of her brief—*it fails to allege that Martin was doing any of these things while raping Austin.* (JA 2-3.) Paragraph 21 just asserts, in conclusory fashion, that the rape occurred while Martin was performing unspecified work duties.

allegation is not, without more, sufficient to overcome the allegation of rape and to establish respondeat-superior liability. *See Terry v. Irish Fleet, Inc.*, 296 Va. 129, 133 (2018) ("We are not bound . . . by the 'conclusory allegations' set forth in the amended complaint.").

Plaintiff also relies heavily on this Court's decision in *Plummer v. Ctr. Psychiatrists, Ltd.*, 252 Va. 233 (1996), arguing that the case stands for the general proposition that "sexual assault of a patient" can fall within the scope of employment. (Br. at 20.) This is an incorrect reading of the case. First, unlike the Circuit Court in the present case, the *Plummer* Court did *not* affirmatively find that the alleged wrongful act fell within the scope of the therapist's employment. It merely held that the complaint had alleged insufficient facts to resolve the issue one way or the other. Second, the plaintiff in *Plummer* did not allege criminal sexual battery.[4] She alleged that her therapist seduced her by using intimate knowledge that he had acquired during their therapy sessions—a far cry from the horrific allegations in the present case. Third, the *Plummer* Court did not generalize its holding to all

[4] Under Code § 18.2-67.4, "sexual battery" entails the use of "force, threat, intimidation, or ruse," none of which was alleged in *Plummer*.

forms of sexual assault; its ruling was limited to the facts before it. Fourth, as the Nursing Home noted in its opening brief, cases alleging therapist-patient sex are *sui generis*, implicating complex emotions arising out of the therapeutic relationship.

Plaintiff's final argument on the vicarious-liability issue is that the Nursing Home's scope-of-employment arguments are inconsistent with its argument that the present action falls within the ambit of the Medical Malpractice Act, Code § 8.01-581.1 *et seq*.[5] Not so. These are distinct legal issues governed by different laws, using different legal standards, and underlain by different public policies.[6]

The General Assembly enacted the Medical Malpractice Act to address rising medical-malpractice insurance costs resulting from litigation against health care providers. *Simpson v. Roberts*, 287 Va. 34, 40 (2014). This Court construes the Act broadly to effectuate that

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[5] Plaintiff has not cross-appealed the Circuit Court's ruling that the Medical Malpractice Act applies to the present action. Accordingly, that ruling is now law of the case.

[6] In its Demurrer, the Nursing Home did not claim that Counts I or II fell under the Act. (JA 21; 89-93.)

purpose. And most provisions of the Act apply to lawsuits as a whole, not to individual claims.[7]

The present action falls under the Act. Plaintiff seeks relief for, among other things, the Nursing Home's alleged negligent staffing, training, and supervision of the nursing unit. (See JA 5-15, 219-20.) Nursing homes and their officers and employees are "health care providers" under the Act. Code § 8.01-581.1. "Staffing" is a nursing home "professional service" under the Act. *Id.* And "malpractice" includes negligent provision of professional services by a nursing home. *Id.* Therefore, this is a medical-malpractice action.

As the Nursing Home noted in its opening brief, vicarious-liability law is grounded on very different public policies and is governed by common law, not statute. This Court does not borrow its vicarious-liability standard from the Medical-Malpractice Act, or vice-versa. And

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[7] *See, e.g.*, Code § 8.01-581.1 (defining "malpractice" as "any tort action or breach of contract action for personal injuries or wrongful death, based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient."); Code § 8.01-581.20 (applying expert-witness rules for "any action against a physician, clinical psychologist, podiatrist, dentist, nurse, hospital or other health care provider"; Code § 8.01-581.15 (applying damages cap to "any verdict returned against a health care provider in an action for malpractice").

vicarious liability is count-specific, not action-wide. So there is no inconsistency in the Nursing Home's arguing both that the Medical Malpractice Act applies to this action and that Martin's criminal misconduct fell outside the scope of his employment. Because Plaintiff has not identified any "affirmative, inconsistent representation" made by the Nursing Home, her judicial-estoppel arguments fail as a matter of law. *Wooten v. Bank of Am., N.A.*, 290 Va. 306, 310 (2015).

II. Moyers had the required experience to testify about the Nursing Home's standard of care.

Plaintiff begins her response to the Nursing Home's second assignment of error by arguing that the Nursing Home failed to preserve the issue. She concedes that the Nursing Home summarized Moyers's proposed testimony in its expert-witness disclosure, but claims that the Nursing Home "never referred the trial court to its Expert Disclosure during the trial." (Br. at 13 n.2, 33.)

This is false. At trial—during the colloquy about whether Moyers could testify—Defense counsel specifically asked the Circuit Court if it wished to review Moyers's expert designation. (JA 659.) Counsel then gave the Circuit Court a copy of it. (JA 659-60.) The expert

designation's detailed description of Moyers's proposed testimony more than adequately preserved Defendant's objection.[8] (JA 245-50.)

On the merits, Plaintiff starts off by quoting Code § 8.01-581.20(A). (Br. at 31.) Plaintiff, however, omits the last sentence of this subsection, which covers nursing-home malpractice claims. The omitted phrase states that "[t]he provisions of this section shall apply to expert witnesses testifying on the standard of care as it relates to *professional services in nursing homes*." *Id.* (emphasis added) "Professional services in nursing homes" include several services that need not be performed by doctors or nurses (e.g., "staffing to provide patient care, psycho-social services, personal hygiene, hydration, nutrition," and "patient monitoring."). Code § 8.01-581.1. Thus, standard-of-care testimony about such services is subject to § 8.01-581.20(A). But because these services often are not performed by a

[8] A proffer enables the reviewing court to determine whether or not the trial court's evidentiary ruling was prejudicial. *Gardner v. Com.*, 288 Va. 44, 53 (2014). In the event this Court reverses on other grounds, that question becomes moot. Nevertheless, the Court should still rule on the question, as the same expert-witness issue likely would arise again on remand. *See Harman v. Honeywell Int'l, Inc.*, 288 Va. 84, 95–96 (2014) (addressing evidentiary issues likely to arise on remand where the judgment was reversed on other grounds).

doctor or nurse, it makes zero sense for the General Assembly to restrict standard-of-care testimony about them to doctors or nurses. If the General Assembly wanted to impose such an unusual restriction, it would have said so.

Plaintiff also argues that only "health care providers" can offer standard-of-care testimony in a medical malpractice case. (Br. at 26, 31, 32, 36.) Even if true, this argument fails because nursing-home administrators like Moyers *are* "health care providers" under the Act. Code § 8.01-581.1 (defining "health care provider" to include nursing homes and their directors, officers, and employees).

Lastly, Plaintiff contends that standard-of-care witnesses must, under 8.01-581.20(A), be licensed practitioners. (Br. at 31-32, 36.) Therefore, she concludes, only doctors or nurses can testify as standard-of-care experts. (*Id.* at 31, 36.) This is a non-sequitur. Plaintiff assumes, without any support, that only doctors or nurses can be licensed practitioners for purposes of the Act. The reality is that nursing-home administration is a recognized profession, requiring licensure in Virginia. *See* Code § 54.1-3102. Moyers is a licensed practitioner in this profession, who had active clinical practice during

the relevant period. (JA 239-40, 639, 645-47.) As such, he should have been allowed to testify about standard of care.[9]

III. Plaintiff's expert should not have been allowed to testify about matters within the ordinary understanding of jury members.

In its opening brief, the Nursing Home argued that the Circuit Court should not have allowed Plaintiff's expert, Theresa Cooper, to testify about matters that were within the ordinary understanding of jurors. In response, Plaintiff argues that neither Rule 2:702(a)(i) nor Va. Code § 8.01-401.3(A) forbids such testimony. (Br. at 41-42).

Plaintiff is mistaken. Code § 8.01-401.3(A) and Rule 2:702 allow qualified expert witnesses to present "scientific, technical, or other specialized knowledge" where this "will assist the trier of fact to understand the evidence or to determine a fact in issue." Plaintiff fails to explain how the opinions in question—i.e., that a CNA acts wrongfully when he rapes a disabled resident—concern matters of "scientific, technical, or other specialized knowledge." Cooper's opinions, which merely state the obvious, did not help the jury.

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[9] Plaintiff cites *John v. Im*, 263 Va. 315 (2002), which holds that only a medical doctor can "diagnose" a physical injury. The case is inapposite as there is no causation or diagnosis issue in this appeal.

Plaintiff does not deny, and cannot deny, that the testimony concerned matters that were obvious to the ordinary juror. Instead, she argues that it rebutted certain eyewitness testimony. But the admissibility of Cooper's opinions did not depend on its relevance. It depended on whether those opinions were the proper subject of expert testimony. They were not; the testimony was inadmissible; and the Circuit Court erred in not excluding it.

IV. The Nursing Home did not waive its arguments by asking for a general verdict.

Finally, Plaintiff argues that the Nursing Homes "waived" assignments of error two and three by not requesting a verdict form that distinguished between the Nursing Home's direct liability for negligence and its vicarious liability for Martin's conduct. (Br. at 34-35, 40-41.) Because the jury returned only a general verdict against the Nursing Home, it is not clear whether it found that the Nursing Home was negligent. Assignments of error two and three relate to the negligence count. Therefore, Plaintiff reasons, the Nursing Home has waived assignments of error two and three.

This argument is a nonstarter. To begin with, Plaintiff does not support her waiver argument with any authority. So the Court should

not consider it. Rule 5:28(d). On the merits, the argument fails because general verdicts are the rule, not the exception, in Virginia practice. *See* VA. PRAC. TRIAL HANDBOOK § 39:5 (noting that special verdicts and special interrogatories are rarely used in Virginia). There is no requirement that a verdict form separately address all the counts, or elements thereof. Where, as here, a verdict is ambiguous about the reasons for the jury's action, the remedy is not to bar the appellant's otherwise properly preserved argument. *Allison v. Brown*, 293 Va. 617, 627 n.4 (2017) (rejecting similar waiver argument). It is to remand the case for a new trial. *Id.* at 631; *Tashman v. Gibbs*, 263 Va. 65, 76 (2002).

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.

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RULE 5:26(e) CERTIFICATE

The undersigned hereby certifies that, on January 10, 2019, a PDF copy of this brief was sent to the following e-mail addresses:

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