IN THE

Supreme Court of Virginia

RECORD NO. 060392

RIVERSIDE HOSPITAL, INC. t/a
RIVERSIDE REGIONAL MEDICAL CENTER
and NURSE GREEN,

Appellants,

v.

TERRY ALLEN JOHNSON, EXECUTOR OF THE ESTATE OF ELAINE DUDLEY JOHNSON, DECEASED,

Appellee.

BRIEF AMICUS CURIAE

in Support of Appellee
By The Virginia Trial Lawyers Association

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STATEMENT OF THE CASE

On March 26, 2001, Appellee Terry Allan Johnson, Executor of the Estate of Elaine Dudley Johnson, Deceased ("Johnson"), filed a Motion for Judgment in the Circuit Court of the City of Newport News against Nurse Green and Riverside Hospital, Inc. t/a Riverside Regional Medical Center (collectively, "Riverside"), alleging medical negligence and seeking compensatory and punitive damages. App. 106–13. The parties disputed the discoverability of various items, causing Johnson to file a Motion to Compel, which the trial court heard on January 26, 2005. The court ordered Riverside to produce, *inter alia*, certain nurse training materials and an incident report pertaining to Ms. Johnson. App. 596–600. Riverside then challenged the admissibility of this evidence in Motions in Limine, which in pertinent part were overruled or taken under advisement. App. 968–74.

Trial began October 31, 2005, with the Honorable D.F. Pugh presiding. Johnson non-suited his claim for punitive damages and the case was submitted to the jury, which on November 9, 2005 returned a verdict against both defendants in the amount of $1,000,000.00 with prejudgment interest. App. 3012, 3313–14. The trial court entered final judgment on the jury's verdict the following day but later retracted the award of prejudgment interest in an Amended Judgment on November 30, 2005. App. 3315–16, 3326–27. Riverside filed its Notice of Appeal on December 8, 2005, assigning error to several evidentiary rulings, among other issues. App. 3328–30.

ASSIGNMENTS OF ERROR

1. The trial court erred in admitting statistical evidence concerning patient falls at other, non-party institutions and previous patient falls at Riverside Hospital.

2. The trial court erred in admitting evidence of Riverside Hospital's staff-orientation instructions and in admitting nurse training materials from non-party Riverside School of Professional Nursing.

3. The trial court erred in admitting privileged communications and reports, including the Quality Care Control Report (incident report) and printed reports from Riverside Hospital Quality Management Services' fall database, which is derived from Quality Care Control Reports.

4. The trial court erred in prohibiting defendants' standard of care expert, Nurse Francis Vickers, from testifying that Ms. Johnson did not require fall-prevention measures because she was not a high-fall-risk patient.

5. The trial court erred in submitting Instruction 14, which instruction wrongly informed the jury that Riverside Hospital was under "a duty to exercise reasonable care" towards Ms. Johnson.

QUESTIONS PRESENTED

1. Whether the trial court properly admitted evidence of defendant Riverside Hospital, Inc.'s staff orientation instructions and nurse training material. (Assignment of Error No. 2).

2. Whether the trial court properly admitted incident report evidence generated by defendants (Assignment of Error No. 3).

STATEMENT OF MATERIAL FACTS

On October 29, 1997, seventy-nine year-old Elaine D. Johnson ("Ms. Johnson") was admitted to Riverside Regional Medical Center, operated by Riverside Hospital, Inc., for treatment of chemotherapy-related dehydration. App. 2717–21. Despite Ms. Johnson's ailing condition, Riverside's staff never assessed her fall risk potential or instituted fall prevention techniques prior to October 31, 1997 at about 10:40 p.m., after Ms. Johnson was found by her nurse, Defendant Green, lying in the hallway, disoriented. App. 1896. She had fallen and fractured her hip, an injury that limited her mobility for the remainder of her life. App. 2745–47; 2763–74.

On the night of Ms. Johnson's fall, Nurse Green inconsistently documented the events at least four different times between 10:40 p.m. and midnight, including three conflicting entries in Ms. Johnson's patient chart at 10:40, 10:45, and 11:00 p.m., and an "incident report" sometime before midnight. App. 39–40, 1896. Nurse Green recorded at 10:40 p.m. that Ms. Johnson fell and was confused as to time and place, noting that she assisted her back to bed without complaint. App. 39. At 10:45 p.m., she recorded that Ms. Johnson was in fact complaining of hip pain. App. 40. Yet, at 11:00 p.m., she documented transferring Ms. Johnson back to bed with **five** persons assisting, despite recording 15 minutes earlier that Ms. Johnson already was assisted back to bed without complaint. App. 40.

Nurse Green also filled out an incident report that night. App. 1896. The report contains no subjective comments regarding the quality of care

provided to Ms. Johnson, no recommendations for improving patient care, and not even any comments on liability exposure. Instead, the incident report contains medical information conveniently omitted from Ms. Johnson's medical records. Id. Specifically, the report contained the only evidence that Ms. Johnson previously was "non-compliant" with instructions and "out of bed without assistance." Id. This information was probative of whether Ms. Johnson was a fall risk, as it documented risk factors that were omitted from Ms. Johnson's patient chart.

In support of his claims that Riverside negligently failed to assess Ms. Johnson as a high-risk-fall patient and failed to institute proper fall precautions, Johnson introduced evidence that Riverside was aware of the high probability and significant danger of patients falling. App. 1904. Through expert witnesses and Riverside's own nurses and administrators, Johnson introduced evidence of the fall risk assessment factors that Riverside teaches in the Riverside School of Professional Nursing and advocates in its orientation materials for new nurses. App. 1898, 1902, 1904. Johnson's expert witness, Nurse Jenvey, testified to the nursing standard of care and enumerated nine fall risk factors, many of which Ms. Johnson exhibited, and opined that the standard of care required the hospital to perform a fall risk assessment at admission and during each nursing shift. App. 2230–40, 2253–56, 2262–63. Nurse Jenvey also testified about the various fall prevention measures required by the standard of care. App. 2395, 2245–49.

SUMMARY OF THE ARGUMENT

Riverside assigns error to the trial court's admission of two categories of evidence (among others not addressed here): the incident report and the nurse training materials. In neither case did Riverside properly preserve its objection. Moreover, Riverside neglects the fact that the trial court's rulings on these evidentiary matters were discretionary and may be reviewed here only for abuse, which burden Riverside has not carried.

The nurse training materials were presented to the jury as evidence of Riverside's notice of the dangers of patient falls, the need to assess patients for fall risk factors, and the availability of adequate fall prevention measures. Riverside's notice of these matters was a proper consideration for the jury in evaluating Johnson's claim for punitive damages. Although Johnson non-suited the punitive damage claim before the case was submitted to the jury, Riverside failed to renew its objection to this evidence or request a curative instruction and therefore waived its right to assign error to the admission of this evidence. Alternatively, the evidence was admissible under Virginia Code § 8.01-401.1 to help illustrate the applicable standard of care.

The trial court also properly admitted the incident report, which contained unique evidence surrounding Ms. Johnson's fall, evidence that supplemented and contradicted the entries in Ms. Johnson's patient chart. As such, the incident report was beyond the scope of the statutory privilege from discovery set forth in Virginia Code § 8.01-581.17 and was properly received in evidence.

STANDARD OF REVIEW

In reviewing the trial court result in this matter, this Court is guided by the familiar principle that a jury verdict confirmed by the trial court is accorded "the utmost deference." Bussey v. E.S.C. Restaurants, Inc., 270 Va. 531, 534, 620 S.E.2d 764, 766 (2005). The evidence and all fair inferences therefrom shall be reviewed in the light most favorable to Johnson, the party prevailing at trial. Id.; Fairfax Hosp. Sys., Inc. v. Curtis, 249 Va. 531, 532, 457 S.E.2d 66, 67 (1995).

The two assignments of error addressed by the *Amicus Curiae* both pertain to the trial court's admission of evidence. It is well settled that trial courts are afforded substantial discretion in determining the admissibility of evidence at trial, because of the many factors involved in that determination, such as relevance, foundation, prejudice, probative value, and efficiency, among others. See, e.g., Charles E. Friend, The Law of Evidence in Virginia §§ 1-2, 1-5(a) (6th ed. 2003). "A trial court's exercise of its discretion in determining whether to admit or exclude evidence will not be overturned on appeal absent evidence that the trial court abused that discretion." Hinkley v. Koehler, 269 Va. 82, 91, 606 S.E.2d 803, 808 (2005) (internal quotations omitted) (emphasis omitted); accord A.H. v. Rockingham Publishing Co., 255 Va. 216, 224, 495 S.E.2d 482, 487 (1998); Friend, supra, § 1-6 ("Rulings of the trial court regarding the admissibility of evidence will not be disturbed on appeal in the absence of an abuse of discretion."). By failing to recognize or

consider the applicable standard of review, Riverside fatally misdirects its arguments regarding the trial court's admission of evidence.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY ADMITTING INTO EVIDENCE EXCERPTS FROM RIVERSIDE'S TRAINING MATERIALS.

Riverside urges this Court to conclude that its training materials are "private rules," as described in Virginia Railway & Power Co. v. Godsey, 117 Va. 167, 83 S.E. 1072 (1915), and Pullen v. Nickens, 226 Va. 342, 310 S.E.2d 452 (1983), and at least implies that private rules are categorically inadmissible in medical malpractice actions. See Appellants' Brief at 24, 26–27. Even assuming that Riverside properly asserted and preserved an objection, which the *Amicus Curiae* does not concede, Riverside's argument fails on both points because the evidence at issue in the case at bar was beyond the scope of both Godsey/Pullen and Virginia Code § 8.01-581.17 (see infra Parts I.B, C), and was relevant to both notice of risk (see infra Part I.A) and the standard of care (see infra Part I.B).

A. The Trial Court Properly Admitted into Evidence Riverside's "Private Rules" as Relevant to the Defendants' Notice of the Risks of Patient Falls.

At trial, Johnson introduced various evidence in support of his claim for punitive damages, a fundamental element of which is the defendants' notice of dangerous conditions or risks and disregard thereof. To buttress this claim, Johnson established that Riverside was well aware of the importance of

conducting fall risk assessments of its patients and instituting appropriate fall prevention measures. One source of Johnson's proof on this point was Riverside's nurse training material, which demonstrated to the jury that Riverside appreciated the risks of patient falls and educated its nurses about ways to identify and minimize such risks.

Even "private rules" within the scope of the general prohibition of Godsey and Pullen may be admissible for purposes other than the establishment of a duty of care. In New Bay Shore Corp. v. Lewis, 193 Va. 400, 69 S.E.2d 320 (1952), for instance, this Court recognized that such private rules are relevant to a party's notice and admissible for that purpose. Lewis, who was injured while riding a merry-go-round operated by New Bay Shore Corporation, introduced evidence of safety rules that New Bay Shore adopted for its patrons' safety, including that riders must remain seated for the duration of the ride. 193 Va. at 408, 69 S.E.2d at 325. Lewis testified that New Bay Shore's employees failed to enforce this and other safety rules and that small children running around the platform of the merry-go-round while it was in motion knocked her off of the platform and caused her serious injury. Id. at 407–08, 69 S.E.2d at 325. Based in part on the evidence of New Bay Shore's safety rules, this Court concluded that "the jury had a right to find that the defendant was negligent": "The safety rules adopted by defendant, and its instructions to its employees, clearly indicate that defendant was aware of the potential dangers involved." Id. at 408–09, 69 S.E.2d at 325–26. The same conclusion must be drawn from Johnson's evidence of Riverside's

training materials, which are no more than formalized patient safety rules of the type approved in New Bay Shore.

The rationale of New Bay Shore is fair to litigants on either side because, as Clark v. Southern States Cooperative, Inc., 57 Va. Cir. 254 (Albemarle County 2002), illustrates, private rules may be equally admissible *against* a plaintiff on the issue of notice. Clark filed a Motion in Limine to exclude evidence of defendant Southern States's private safety rule, displayed on two placards affixed to its fertilizer truck, that the truck was not to exceed a speed of 30 miles per hour. Invoking the rule of Pullen and Godsey, Clark argued that the "private rule" speed limit was inadmissible against him. 57 Va. Cir. at 254–55. The trial court overruled the Motion, holding that "the placards should be admissible for purposes of the Defendant's assumption of risk defense":

> To make out an assumption of risk defense, a defendant must show that a plaintiff "understood the nature and extent of a known danger and voluntarily exposed himself to it." Necessary to this showing is proof of a plaintiff's knowledge of a risk. . . . [I]n the assumption of risk context, private rules are not introduced to show that the plaintiff's failure to follow them was unreasonable and hence negligent (which would be improper under Pullen); rather they are introduced to establish that a plaintiff understood and assumed the risk in question.

Id. at 256 (quoting Holland v. Shively, 243 Va. 308, 311–12, 415 S.E.2d 222, 224 (1992)) (internal citations omitted); accord Curtis v. Fairfax Hosp. Sys., Inc., 21 Va. Cir. 275, 279 (Fairfax County 1990). In the same way that Southern States's private rule regarding speed in Clark was admissible to

show the plaintiff's notice of a risk, Riverside's training materials were admissible to show the defendant's notice of a risk in the instant case.

It is true that Johnson non-suited his claim for punitive damages and the court did not submit the issue to the jury. App. 3012. Riverside cannot complain in hindsight, however, that all of Johnson's evidence intended to support the punitive damages claim therefore became irrelevant and should have been excluded. The proper remedy for Riverside would have been to object to the evidence and request a curative instruction—or even mistrial—after the non-suit, allowing Johnson to articulate the additional permissible purposes for which the evidence was relevant and admissible. Riverside failed to request any such relief and thereby waived the right to review any alleged error. See Va. S.C.R. Rule 5:25.

B. Apart from the Proper Admission of "Private Rules" Evidence in Support of the Claim for Punitive Damages, the Evidence Also Was Relevant to the Determination and Explanation of the Standard of Care.

Aside from Johnson's then-pending claim for punitive damages, other issues at trial also warranted the introduction of Riverside's training materials. One such issue was the standard of care.

Johnson did not contend at trial, and does not contend on this appeal, that Riverside's training materials set forth the applicable standard of care. There can be no dispute that the standard of care in Virginia medical negligence actions is prescribed by statute, Virginia Code § 8.01-581.20, and expounded in individual cases by the parties' expert witnesses. The statute provides: "[T]he standard of care by which the acts or omissions are to be

judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth." Va. Code § 8.01-581.20(A).

Contrary to Riverside's suggestion, Pullen and Godsey do not mandate the categorical exclusion of all private rules evidence on the duty of care. Notably, both Pullen and Godsey involved ordinary negligence, not medical negligence. As such, Pullen and Godsey are not determinative of the standard of care in medical negligence cases, which is dictated by Virginia Code § 8.01-581.20. Cf. Godsey, 117 Va. at 168, 83 S.E. at 1073 ("A person cannot, by the adoption of private rules, fix the standard of his duty to others. That is fixed by law, either **statutory** or common." (emphasis added)).

Evidence of the standard of care in medical negligence cases is further governed by Virginia Code § 8.01-401.1, which provides in pertinent part:

> [A]ny expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, **need not be admissible** in evidence.
>
> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.
>
> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the

> expert witness in direct examination, such statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay. If admitted, **the statements may be read into evidence** but may not be received as exhibits. . . .

Va. Code § 8.01-401.1 (emphasis added). By virtue of the application of this statute—necessarily relevant to a medical negligence case, where expert testimony is required to establish the standard of care—expert witnesses may rely upon evidence of private rules in their formulation of the standard of care, provided that such rules are "of a type normally relied upon by others in the particular field." Id. Moreover, the trial court may "require[ ]" the expert witness to disclose such foundation during direct examination, in addition to any disclosure that is elicited on cross-examination. Id. The plain meaning of Virginia Code § 8.01-401.1 therefore acknowledges the potential admissibility of private rules to illustrate, if not amplify, the standard of care.

At least one Virginia Circuit Court reached this same conclusion. In Jordan v. Wicks, No. 83-0434, 1984 WL 283889 (Va. Cir. Ct. 1984), the court expressly agreed: "Strong and appealing argument can be made that such rules should be admitted as a help to the jury in determining such a nebulous concept as a standard of care." Id. at *2. The Jordan court, along with several others, recognized that the admissibility of private rules as some evidence, though not dispositive, of the standard of care is the prevailing view in this country. Id.; accord Pullen, 226 Va. at 350–51, 310 S.E.2d at 457 (collecting cases, noting that "the majority of jurisdictions hold that they are

admissible"); Curtis v. Fairfax Hosp. Sys., Inc., 21 Va. Cir. 275, 278 (Fairfax County 1990) (collecting cases, noting "it appears that a majority of other jurisdictions which have addressed the issue have determined the materials to at least be subject to discovery, if not admissible"); Johnson v. Roanoke Mem. Hosp., Inc., 9 Va. Cir. 196, 202–05 (Roanoke City 1987) (collecting cases); 50 A.L.R.2d 16. Particularly given Virginia's statutory directives on the standard of care in medical negligence cases, there is no reason for Virginia to depart from the prevailing view.

The *Amicus Curiae* recognizes that this application of such evidence would be uncommon but should not be categorically foreclosed to litigants. If an expert witness testifies that a party's private rules accurately reflect the applicable standard of care, that expert obviously is vulnerable to cross-examination by the opposing party, who may introduce evidence that the private rules in fact impose greater or lesser duties than the standard of care. Virginia's existing trial procedures, including cross-examination, adequately protect parties against the misuse of private rules evidence, such that a new rule barring the evidence wholesale, in derogation of the plain language of Virginia Code § 8.01-401.1 and premised on the factually distinguishable cases of Pullen and Godsey, would be unwarranted and contrary to the law.

C. Virginia Code § 8.01-581.17 Does Not Confer an Absolute Statutory Privilege on a Health Care Provider's Internal Policies, Procedures, or Training Materials.

While Riverside did not raise and therefore has waived the protection of this potential privilege, it should be noted that the training materials

introduced in this case are beyond the purview of the statutory privilege granted to certain other records of health care providers. Virginia Code § 8.01-581.17 ("the privilege statute") immunizes from discovery certain "proceedings, minutes, records, and reports . . . together with all communications, both oral and written, originating in or provided to" any "(i) medical staff committee, utilization review committee, or other committee, board, group, commission or other entity as specified in § 8.01-581.16; (ii) nonprofit entity that provides a centralized credentialing service; or (iii) quality assurance, quality of care, or peer review committee . . . ." Va. Code § 8.01-581.17(B). In this appeal, Riverside does not seriously contend that the training materials originated in or were provided to any qualified entity enumerated in the statute.

Although Riverside did not invoke the privilege statute in this case, other Virginia trial courts have considered the application of the statute when determining the discoverability or admissibility of private rules. In Day v. Medical Facilities of America, Inc., 59 Va. Cir. 378 (Salem City 2002), for example, the defendants relied on the privilege statute when refusing to produce their "policies, procedures, protocols, guidelines, and training materials relating to the prevention, treatment of documentation of pressure ulcers and infection" in response to the plaintiff's discovery requests. 59 Va. Cir. at 378. The court ordered the defendants to produce the information sought, holding the statutory privilege inapplicable on several grounds.

First, the court applied the doctrine of *ejusdem generis* to conclude that the General Assembly's enumeration of "proceedings, minutes, records, and reports" and "communications" implied that procedural and training manuals were beyond the material the legislature intended to protect. Id. at 379; accord Auer v. Baker, 63 Va. Cir. 596, 599 (Norfolk City 2004) (ordering non-party to comply with subpoena *duces tecum* for production of hospital policies and procedures, concluding that "[t]he Court does not find within the statutory language nor within the legislative intent behind § 8.01-581.17 any privilege for hospital policies and procedures."); Bradburn v. Rockingham Memorial Hosp., 45 Va. Cir. 356, 361, 363 (Rockingham County 1998) (ordering discovery of "fall prevention, vest restraints, nursing rounds, and post-incident care of patients" because "policy and procedure manuals that are intended to be followed by all of the hospital staff and attending physicians are not part of the deliberative process but are the final result thereof and do not share in the privilege conferred by the statute."); Curtis, 21 Va. Cir. at 277 ("Although the material technically might fall within the broad language of the statute, such an interpretation would provide a limitless privilege. Any ambiguities in the statute must be strictly construed . . . .").

Second, the Day court considered and rejected the defendants' argument that disclosure of its internal procedural guidelines could "have a chilling effect" on health care providers' development or adoption of such procedures and guidelines. 59 Va. Cir. at 379; accord Curtis, 21 Va. Cir. at 277–78 ("[D]iscovery of the hospital's guidelines, procedures, and protocols

does not threaten open discussion and debate within the hospital's review committees, and therefore, the privilege should not apply."); Johnson v. Roanoke Memorial Hosp., Inc., 9 Va. Cir. 196, 199 (Roanoke City 1987) ("It is the meetings, minutes and reports of such no-holds-barred investigations—the true peer review—that these statutes are primarily designed to protect. But the ultimate end results of such critiques, which might find their way into depersonalized manuals of procedure and which have been shorn of individual criticisms, does not merit the same concern for protection from public scrutiny. And ambiguities in the statutes should not be extended to enlarge the privilege.").

Because the Day, Curtis, and Johnson courts each addressed the question on a pretrial discovery motion, none reached a conclusion about the ultimate admissibility of the defendants' procedural and training materials. They are instructive, however, because each court recognized that Virginia Code § 8.01-581.17 did not erect an impenetrable shield around a hospital's internal procedural and training materials.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY ADMITTING INTO EVIDENCE THE INCIDENT REPORT DOCUMENTING MS. JOHNSON'S FALL.

Riverside has failed to carry its burden of showing that the incident report was both protected by the privilege statute, Virginia Code § 8.01-581.17, and inadmissible in evidence at trial. The privilege statute provides only a limited privilege from **discovery**. In pertinent part, the statute provides:

> B. The proceedings, minutes, records, and reports of any (i) medical staff committee, utilization review committee, or other committee, board, group, commission or other entity as specified in § 8.01-581.16 ... or (iii) quality assurance or peer review committee ...together with all communications, both oral and written, originating in or provided to such committees or entities, are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless a circuit court, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure or such proceedings, minutes, records, reports or communication....
>
> C. Nothing in this section shall be construed as providing any privilege to health care provider ... medical records kept with respect to any patient in the ordinary course of business of operating a hospital ... nor to any facts or information contained in such records nor shall this section preclude or affect discovery of or production of evidence relating to hospitalization or treatment of any patient in the ordinary course of hospitalization or such patient.

Va. Code § 8.01-581.17.

The party seeking the protection of a privilege bears the burden of proving that the documents at issue fall under the protection of the privilege asserted. Com. v. Edwards, 235 Va. 499, 509, 370 S.E.2d 296, 301 (1988); Robertson v. Com., 181 Va. 520, 540, 25 S.E.2d 352, 360 (1943) (party asserting work product doctrine must produce some evidence that the documents were created to be used with pending or threatened litigation); see also Missouri v. Darnold, 939 S.W.2d 66 (Mo. App. 1997) (holding it was abuse of trial court's discretion to deny plaintiff's discovery requests of hospital on the bare assertion by the hospital that the documents requested were covered by the peer review statutes). This was Riverside's burden and

there is no evidence in the Appendix to show that the privilege was applicable and was not waived.

The trial court held a hearing on January 26, 2005, and ordered discovery of the incident report. App. 596–600. The Appendix does not include the transcript of the hearing, nor is there any evidence of the basis for the trial court's ruling on January 26, 2005.[1] Therefore, there is no evidence that the trial court abused its discretion in finding that the "incident report" was not privileged, was not excluded by section C of the statute that makes medical records discoverable, that the privilege was not waived, or that good cause existed for discovery. Without evidence of the basis for the trial court's decision, this Court lacks the requisite information to assess whether the trial court was in error.

A. Virginia Code Section 8.01-581.17 Only Applies to Discovery, Not the Admissibility of Evidence.

Riverside's failure to assign error to the trial court's order compelling discovery of the incident report is fatal. The privilege statute confers a privilege only from discovery, not a bar to the admissibility of evidence. See Va. Code § 8.01-581.17 (providing only that covered evidence "may not be disclosed or obtained **by legal discovery**" (emphasis added)). The statute does not speak to any bar to the admissibility of evidence. Id. As such,

[1] The transcript of the hearing on defendant's Motion for Rehearing is included in the Appendix. (App. 531–95). At the hearing, the Court addressed the logistics of producing the ordered documents, not the merits of its January 26, 2005 rulings.

Riverside is asking the Court to add language to the privilege statute in order to create a broader privilege than the General Assembly has afforded.

It is well settled that this Court will not add language to, modify, or expand a clear and unambiguous statute. See Klarfeld v. Salsbury, 233 Va. 277, 284–85, 355 S.E.2d 319, 323 (1987) (applying Va. Code § 8.01-581.17); Forst v. Rockingham Poultry Mktg. Cooperative, Inc., 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981). "When statutory language is clear and unambiguous, there is no need for construction by the court, the plain meaning of the enactment will be given it . . . unless a literal construction would involve a manifest absurdity." HCA Health Services of Virginia, Inc. v. Levin, 260 Va. 215, 220, 530 S.E.2d 417, 419 (2000). This is especially true when addressing a privilege from discovery, which is an obstacle to the search for truth. Cf. U.S. v. Nixon, 418 U.S. 683, 709–10 (1974) ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."). This Court has found that the pertinent language in this statute is clear and unambiguous. Levin, 260 Va. at 220, 530 S.E.2d at 420. Therefore, the plain language of the statute must control and its reach must be limited to the discovery, and not the admissibility, of evidence.

When the General Assembly has seen fit to make certain documents both immune from discovery and inadmissible in evidence, it has done so clearly and unambiguously. See, e.g., Va. Code § 32.1-283.4 ("[t]he confidential records and information [of the Medical Examiner] . . . shall not be

subject to subpoena, subpoena duces tecum, or **discovery** when in the possession of the Office of the Chief Medical Examiner, or be **admissible** in any criminal or civil proceeding . . . ." (emphases added)); Id. § 6.1-2.27:1 (explicitly barring discovery and admissibility of certain documents provided by title insurance companies to the State Corporation Commission); Id. § 8.01-418.3 ("No Year 2000 assessment or document shall be discoverable or admissible in evidence"); Id. § 38.2-1315.1 (explicitly barring actuarial reports and data provided to the State Corporation Commission from both discovery and admission into evidence). Conversely, the Dead Man's Statute is not a bar to discovery, but does bar the admissibility of evidence. See Va. Code § 8.01-397. Therefore, there is no basis to conclude that the General Assembly construes a privilege from discovery as synonymous with a bar to the admission of evidence.

Riverside mentions in footnote 11 that logic dictates extending the statute to bar admission into evidence of this otherwise probative incident report. In essence, Riverside assumes that the sole purpose of the statute is to protect health care providers from medical malpractice liability. Appellants' Brief at 29 n.11. Instead, the purpose of the statute is to encourage information to be submitted candidly and "shielded from public disclosure." Levin, 260 Va. at 221, 530 S.E.2d at 420. It is not manifestly absurd for the General Assembly to conclude that once there is public disclosure of the document, the public benefit of barring its use at trial is outweighed by the public interest in the jury considering the otherwise probative facts contained

in the document. While Riverside may believe it is logical to extend the statute to bar the admission of evidence, the General Assembly has chosen not to do so. Accordingly, and because Riverside has not assigned error to the discovery of the incident report, the assignment of error for introducing the reports in evidence should be dismissed.

B. Assuming, *Arguendo*, That Riverside Has Not Waived the Error Alleged, the Documents Were Not Inadmissible Pursuant to Virginia Code Section 8.01-581.17.

This "incident report" is nothing more than a medical record with a self-serving label of "Quality Care Control Report." Section C of the privilege statute serves the critical purpose of preventing a hospital from hiding damaging facts from the patient by labeling them "quality assurance": "Nothing in this section shall be construed as providing any privilege to the hospital medical records kept **with respect to any patient in the ordinary course of business** of operating a hospital . . . ." Va. Code § 8.01-581.17(C) (emphasis added). Construing the facts most favorably to Johnson, as the prevailing party, Riverside's "incident report" contains the exact type of information contained in Ms. Johnson's patient record, except that the incident report corrected the factual omissions and inconsistencies left in Ms. Johnson's patient record. Specifically omitted from the medical records but included in the incident report is Ms. Johnson's medical history of being non-compliant and getting out of bed without assistance. App. 1896. This type of medical history typically is recorded in a patient chart, yet the damaging facts

were specially labeled "quality care control report" and excluded from Ms. Johnson's medical records.[2]

Importantly, the incident report does not contain any self-analysis, criticism, or even comments about liability or improving patient care. App. 1896. While Riverside asserts that Johnson used the report simply to prove Riverside's admitted negligence, Riverside fails to cite to **anything** in the record to support this bold assertion. In fact, Johnson even invited Riverside to redact portions of the incident report before its admission into evidence. App. 1607–10, 1896, 1919, 2034.

Riverside incorrectly argues that, because the report is labeled "Quality Care Control Report" and filed separately from the patient chart, it is, by definition, privileged. Appellants' Brief at 27–28. However, nothing in the privilege statute gives a hospital such broad unilateral authority to usurp discovery and conceal relevant facts by attaching a misleading label to patient records. "Mere assertion that the matter is confidential and privileged will not suffice. Unless the document discloses such privilege on its face, [the proponent] must show by the circumstances that it is privileged." Robertson, 181 Va. at 540, 25 S.E.2d at 360. Permitting Riverside to hide critical patient medical information behind a wall of "privilege" simply by attaching a certain label to the document would elevate form far above substance, which this Court has repeatedly and consistently declined to do. See, e.g., Johnson v.

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[2]Riverside maintains that the incident report is consistent with the medical chart. If Riverside's interpretation is correct, then any alleged error in admitting the incident report was harmless.

Johnson, 183 Va. 892, 904, 33 S.E.2d 784, 788 (1945) (holding that "substance, not form controls" interpretation of mortgage); Scholz v. Standard Accidental Ins. Co., 145 Va. 694, 699, 134 S.E. 728, 729 (1926) (refusing "sacrifice of form to substance").

Permitting a party to create a privilege simply by filing the document separately from the remainder of the medical chart and labeling it privileged is an invitation for unchecked and improper concealment of otherwise discoverable information. In some cases, the parties may have differing views on the scope of the privilege, while in other cases a party may intentionally abuse the privilege to hide unfavorable facts. In either event, it is up to the trial judge to evaluate the substance, not merely the form, of the evidence. The risks of misuse and abuse are tremendous, as plainly illustrated in this case. Had Riverside successfully shielded the patient history contained in the incident report, the jury would not have learned that Ms. Johnson had a prior history of being non-compliant and getting out of bed without assistance, facts that were critical to fall risk assessment and implementation of appropriate fall precautions. Here, the incident report contained no qualitative information regarding admissions of fault or negligence and no tendency toward improving health care. Instead, Riverside's nurse omitted the most revealing facts from the medical chart and placed them in a separate file under the guise of "quality assurance."

Because of the danger of misuse and abuse, the *Amicus Curiae* urges this Court to strictly construe Virginia Code § 8.01-581.17 and to rule that a

trial court must look beyond the form and determine if the substance of the document is medical information more properly placed in the medical chart.

CONCLUSION

Riverside failed to properly assert and preserve its objections to the admission of the nurse training materials and incident report in the trial court and failed to establish any abuse of discretion in the trial court's rulings. The nurse training material was properly admitted as evidence of Riverside's notice of patient risk factors and available fall prevention methods, both of which Riverside effectively ignored in its treatment of Ms. Johnson. Moreover, the nurse training material was admissible as some evidence of the standard of care, under Virginia Code § 8.01-401.1. The trial court also properly admitted the incident report, as Riverside failed to establish the applicability of any privilege under Virginia Code § 8.01-581.17. For these and the other reasons set forth above, the Virginia Trial Lawyers Association respectfully requests that this Court affirm the decision of the trial court.

Respectfully submitted,

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