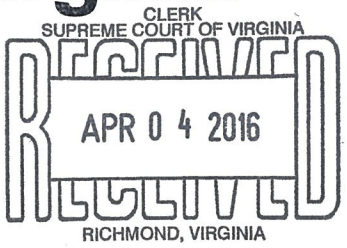
IN THE

Supreme Court of Virginia



RECORD NO. 151758

PATRICK LEE CHERRIE,
Administrator of the Estate of Gerda A. Harvey, Deceased,
and
HUBBARD A. DAVIS,
Executor of the Estate of James Clifton Davis, Deceased,

Appellants,

v.

VIRGINIA HEALTH SERVICES, INC.,

Appellee.

OPENING BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

1. The trial court erred in finding that "only current residents or their designated representative are entitled to review policies of a nursing facility upon request under 12 VAC 5-371-140(G)". [Assignment of Error 1 is preserved in the Trial Transcript ("Tr.") at 10.24-11.3, Joint Appendix ("JA") at 52-53; and in the Final Judgment Order at 2, JA at 35.]

2. The trial court erred in finding that "former residents of a nursing facility, personal representatives of former residents of a nursing facility and/or an administrator or executor of the estate of a former resident of a nursing facility are not entitled to review policies of a nursing facility under 12 VAC 5-371-140(G)". [Assignment of Error 2 is preserved in Tr. at 10.24-11.3, JA at 52-53; and in the Final Judgment Order at 2, JA at 35.]

QUESTIONS PRESENTED

1. Whether the trial court erred in finding that only current residents or their designated representatives are entitled to review policies of a nursing facility upon request under 12 VAC 5-371-140(G)? [Assignment of Error 1]

2. Whether the trial court erred in finding that former residents of a nursing facility, personal representatives of former residents of a nursing facility and/or an administrator or executor of the estate of a former resident of a nursing facility are not entitled to review policies of a nursing facility under 12 VAC 5-371-140(G)? [Assignment of Error 2]

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

Plaintiffs ("Representatives") are the personal representatives of residents of Defendant nursing facility, Virginia Health Services, Inc. ("VHS"). JA at 56, 57. By Certificate/Letter of Qualification, Representatives were designated their respective residents' personal

representatives under *Va. Code* §8.01-25 and §8.01-50, JA at 4, 11; which VHS admitted in its Answers to Complaints at Paragraph 6. JA at 22, 27.

On September 22 and 24, 2014, Representatives made written requests to review VHS' policies, pursuant to 12 VAC 5-371-140(G), JA at 5-7, 12-14. VHS denied those requests. JA at 11, 58.

On November 3, 2014, Representatives filed declaratory judgment actions for their entitlement to review VHS' policies as requested pursuant to 12 VAC 5-371-140(G). JA at 1-14. Representatives filed successively in Circuit Court for the City of Newport News (VHS' principal place of business), instead of filed separately in Circuit Courts for Gloucester County and for Lancaster County (VHS' respective tort locations), *id.*, for economy and consistency*, i.e.*, to avoid needlessly expensive duplicative proceedings and potentially inconsistent judicial interpretations. *Id*.

On November 6, 2014, Representatives moved for consolidation. JA at 16-17, 19-20. On February 13, 2015, they were consolidated for all purposes. JA at 30-33.

In 10 minutes on July 24, 2015, these consolidated actions were tried to a judge with all material facts undisputed, based on VHS' Responses to Requests for Admission ("RRFA") and Davis' Complaint introduced into evidence by Representatives without objection. JA at 45-53. Trial judge

ruled from the Bench in favor of VHS in both actions – moments after Representatives began their presentations, before they had completed them. *Id*.

Trial judge verbalized consideration of three things regarding his decision: [1] *Day v. Med. Facilities of Am., Inc.,* 59 Va. Cir. 378 (Salem Aug. 21, 2002)[1]; [2] 12 VAC 5-371-10, by reference to its definition, not by reference to its citation; and, most significantly, [3] 12 VAC 5-371-150. JA at 48-50 (Tr. at 6.4-8.9). Representatives by counsel objected: "I would simply note my objection to your construction or interpretation and assert that there's a continuing status as resident even when they leave beyond their control and is analogous to patient under 8.01-413." JA at 52-53 (Tr. at 10.24-11.3)(emphasis added).

By Final Judgment Order entered August 19, 2015, the trial judge held "only current residents or their designated representatives are entitled to review policies of a nursing facility under 12 VAC 5-371-140(G)" and "former residents of a nursing facility, personal representatives of former residents of a nursing facility and/or an administrator or an executor of the

[1] In fact, the questions presented at bar were not at issue in that 2002 circuit court case. As trial judge at bar delineated himself, that case was a "discovery" request under Rules of this Court (simply citing 12 VAC 5-371-140(G) as analogous authority for discovery in lieu of claimed privilege), not policies review request under 12 VAC 5-371-140(G). JA at 51 (Tr. at 9.11-14).

estate of a former resident of a nursing facility are not entitled to review policies of a nursing facility under 12 VAC 5-371-140(G)". JA at 34-35 (emphasis added). Representatives objected therein. JA at 35.

Representatives timely filed and served Notice of Appeal on September 17, 2015, JA at 38-39. They timely filed and served Notice of Filing of Transcript on September 23, 2015. JA at 41-42.

STATEMENT OF THE FACTS

The material facts are undisputed, established by VHS' RRFAs introduced as Plaintiffs' Trial Exs. 1 and 2 and by Davis' Complaint introduced as Plaintiffs' Trial Ex. 3. JA at 34, 45-46 (Tr. at 3.18-4.11). They are as follows.

I. VHS nursing facility d/b/a Walter Reed in Gloucester and Lancashire in Lancaster.

At all pertinent times, VHS was a Virginia corporation, JA at 54 (RRFA 1), registered with the State Corporation Commission as its fictitious names "Walter Reed Convalescent and Rehabilitation Center" and "Virginia Health Services (Gloucester Co)" [collectively "Walter Reed"] and "Lancashire Convalescent and Rehabilitation Center" and "Virginia Health Services (Lancaster Co)" [collectively "Lancashire"]. JA at 55 (RRFA 2).[2]

[2] At all pertinent times, Walter Reed and Lancashire were not wholly-owned subsidiaries of VHS and were not otherwise incorporated or formed

Hence VHS was a "nursing facility" doing business under the names of Walter Reed in Gloucester, Virginia, and Lancashire in Lancaster, Virginia. JA at 55 (RRFA 3).

II. Gerda Harvey and her Administrator.

During June 30 – July 23, 2012, Gerda A. Harvey was a VHS resident at its Walter Reed nursing facility. JA at 55 (RRFA 4). While there on July 23, 2012, Gerda was found on its floor and transferred to a hospital. JA at 55 (RRFA 5). She died on July 30, 2012. JA at 56 (RRFA 6).

On August 30, 2012, Patrick Lee Cherrie was designated Administrator of the Estate of Gerda A. Harvey, Deceased; and since then has been such. JA at 56 (RRFA 7). He alleges Gerda's death was a result of VHS' tortious acts and/or omissions related to the VHS fall.[3] JA at 56 (RRFA 8).

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separately from VHS, JA at 61 (RRFA 24); and VHS was not contracted by a third-party to be "operator" of Walter Reed and/or of Lancashire. JA at 62 (RRFA 25).

[3] Significantly, Representatives' policies review entitlement does not turn on this allegation; it is not an element of 12 VAC 5-371-140(G) entitlement. In asserting that each Representative "alleges the death of [resident] was a result of tortious acts and/or omissions of Defendant related to the foregoing floor incident" (emphasis added) – which VHS admitted in RRFA 8 (re Gerda) and in Davis' Complaint, JA at 56, 64-72 – Representatives simply apprised the trial court of historical and future facts and litigation posture. That was a necessary and appropriate threshold disclosure to the trial court by them, since it is hornbook that the trial court choosing whether to enter a declaratory judgment action is discretionary.

While Gerda was at the VHS Walter Reed nursing facility, she did not request review of VHS' policies, JA at 56 (RRFA 9); she had no reason to do so then. After her VHS fall and death, however, by letter on September 22, 2014, and by follow-up email, Administrator requested review of VHS' policies in effect while Gerda was at the VHS Walter Reed nursing facility. JA at 56 (RRFA 10).

VHS denied Administrator's request to review its policies. JA at 56 (RRFA 11). There then was no pending litigation discovery request by Administrator for VHS' policies. JA at 57 (RRFA 12).

III. <u>James Davis and his Executor</u>.

Similarly, during June 9 – July 16, 2013, James Clifton Davis, Jr. was a resident of VHS at its Lancashire nursing facility. JA at 57 (RRFA 13). While there on July 16, 2013, like Gerda at VHS Walter Reed beforehand, James was found on its floor and transferred to a hospital. JA at 57 (RRFA 14). Like Gerda too, he died, on July 31, 2013. JA at 57 (RRFA 15).

On April 1, 2014, Hubbard A. Davis was designated Executor of the Estate of James Clifton Davis, Jr., Deceased; and since then has been such. JA at 57 (RRFA 16). Executor likewise alleges James' death was a

result of VHS' tortious acts and/or omissions related to the VHS fall.[4] JA at 70 (Ex. 3, Complaint).

While James was at the VHS Lancashire nursing facility, he did not request to review VHS' policies, JA at 58 (RRFA 18); like Gerda beforehand, he had no reason to do so then. After James' VHS fall and death, however, by letter on September 22, 2014, and by follow-up email, Executor requested review of VHS' policies in effect while James was at the VHS Lancashire nursing facility. JA at 58 (RRFA 19).

VHS denied Executor's request to review its policies. JA at 58 (RRFA 20). At the time of his request, there was no pending litigation discovery request for VHS' policies or even litigation against VHS by Executor. JA at 58 (RRFA 21).

SUMMARY OF ARGUMENT

The plain meaning of "residents" in 12 VAC 5-371-140(G), as defined in 12 VAC 5-371-10, is not ambiguous whether it includes all residents, former and/or current (as Representatives show), or only current residents (as VHS argues). Even if *arguendo* "residents" were ambiguous, its liberal broad meaning controls over a narrow strained one; otherwise, its results are absurd.

[4] *See* footnote 2, *supra*.

By State Board of Health declaration upon promulgation, nursing facility regulations are remedial in nature for the benefit of injured "vulnerable" residents. So they must be interpreted liberally, per this Court.

Ascertaining the plain meaning of "residents" requires considering and harmonizing its usage in 12 VAC 5-371-140(G) with its usage in companion policies subsections. Recently, this Court has construed related sections in *pari materia* to determine the plain meaning of "court" and that it was not ambiguous.

Companion policies subsection 12 VAC 5-371-150(D) expressly is limited to "residents **currently in residence**" (emphasis added), while 12 VAC 5-371-140(G) is not so limited, *i.e.*, more broadly covers all "residents". Under well-settled construction canons, that means "residents" in 12 VAC 5-371-10 and in 12 VAC 5-371-140(G) include former residents.

Likewise, "Confidentiality of resident information" under policies companion 12 VAC 5-371-140(D)(15)(a) and resident "Clinical records" under companion 12 VAC 5-371-140(D)(11) necessarily include all residents, former and current; otherwise, VHS' narrow strained interpretation creates absurd results impermissibly. Further, salutary persuasive 2015 Kentucky Federal Court interpretation of nursing facility "resident" includes all residents, former and current.

Analogously, "patient" under *Va. Code* §8.01-413(B) indisputably includes all patients, former and current. Again, a narrow interpretation limited to current patients is strained, absurd, against longstanding norms.

Further, 12 VAC 5-371-140(G) explicitly provides for residents to review nursing facility policies on mere request, not by arduous litigation, which is reasonable intent and policy for residents, whom the State Board of Health identified as "vulnerable" when promulgating the nursing facility regulations. Particularly in light of 12 VAC 5-371-120(B)(3) contemplating their revision, nursing facility policies – and thereby pivotal evidence – can be lost to former residents if their entitlement to prompt review is not vindicated.

Technically the standing of Representatives is not before the Court, yet VHS has raised it for the first time on appeal at the Petition stage. So raising and not waiving *Va. S. Ct. Rule* 5:25 bar of the same, out of an abundance of caution, Representatives additionally provide supporting legal authority for their standing on the merits.

VHS admits that Representatives are the Court-designated personal representatives of the VHS residents at bar; and as such under *Va. Code* §1-234 and this Court's jurisprudence, they stand in the shoes of "residents" and also are "designated representatives" under 12 VAC 5-371-

140(G). VHS' implicit narrow strained assertion that only residents themselves can designate their representatives: [1] impermissibly requires adding words of limitation to 12 VAC 5-371-140(G), instead of construing it liberally as required; [2] is contrary to the aforesaid Virginia and Kentucky on-point legal authority; and [3] means that former residents killed and/or current residents incapacitated – even if by VHS negligence – cannot have designated representatives under 12 VAC 5-371-140(G) unless presciently they designated them before death and/or incapacitation, an impermissibly absurd result.

ARGUMENT AND STANDARD OF REVIEW

At the center of this case is the construction of a Virginia Administrative Code regulation and its application to undisputed facts. Such "interpretation is a pure question of law which we review *de novo*," taking "into account any informative views on the legal meaning of [regulatory] terms offered by those authorized by law to provide advisory opinions" and first looking to the "plain meaning" of unambiguous terms. *Fitzgerald v. Loudoun County Sheriff's Office*, 289 Va. 499, 504-05 (2015)(ultimately "pure statutory interpretation is the prerogative of the judiciary").[5]

[5] *Fitzgerald* interpreted a statute, not a regulation; yet regulatory interpretation mirrors statutory interpretation. "We see no reason not to apply the same [statutory] rules to the interpretation of regulations adopted

Significantly, that means this Court determines *de novo* not only what the Code terms mean, but also "how those terms apply to the facts of the case". That is to say, this Court must review *de novo* the legal issue of whether the facts at bar give rise to Virginia Administrative Code entitlement by Representatives to review nursing facility policies upon request. *Bratton v. Selective Ins. Co.*, 290 Va. 314, 322 (2015).

I. 12 VAC 5-371-140(G) entitles all "residents," former and current, to review nursing facility policies upon request.

This case of first impression raises the proper construction and application of "residents" under 12 VAC 5-371-140(G). The trial court erred manifestly in its interpretation.

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by an administrative agency pursuant to statutory authority granted to it by the legislature." *Avalon Assisted Living Facilities v. Zager*, 39 Va. App. 484, 503 (Va. App. 2002)(emphasis added). *Zimmerman v. Zimmerman,* 169 Wis.2d 516, 520, 485 N.W.2d 294 (Wis. Ct. App. 1992)(administrative code regulation interpretation is question of law reviewed *de novo*); *State v. Bucheger,* 149 Wis.2d 502, 507, 440 N.W.2d 366 (Wis. Ct. App. 1989)("plain meaning" construction of regulatory terms); *Terrell County Bd. of Tax Assessors v. Goolsby,* 324 Ga. App. 535, 539, 751 S.E.2d 158 (2013)("We apply the same principles of construction to administrative rules and regulations."); 73 C.J.S. Public Administrative Bodies and Procedure, §105 ("Generally, the rules and regulations of a public administrative agency are subject to the same principles of construction as apply to the construction of statutes."). At bar, the State Board of Health promulgated 12 VAC 5-371-140(G) under its statutory authority to make regulations in general under *Va. Code* §32.1-12 and to make regulations for nursing facilities in particular under *Va. Code* §32.1-127.

"Residents" plainly means all residents, former and current (as Representatives show), not only residents "currently in residence" (as VHS argues). Alternatively, even if "residents" were ambiguous[6] – which again is denied – Representatives' liberal broad construction controls over VHS' narrow strained absurd one.

A. Nursing facility regulations are remedial in nature, so must be interpreted liberally.

Virginia initially promulgated nursing facility regulations in 1980, 12 VAC 5-371-10, *et seq.*; and comprehensively revised them in 1996. 12:8 VA. R. 2903, 2905 July 22, 1996. The State Board of Health then declared such nursing facility regulations to be important "[b]ecause of the **vulnerability** of citizens receiving services by a nursing home". *Id*. at 2902 (emphasis added).

As such, Virginia's nursing facility regulations in general and the ones at bar in particular are remedial in nature. "We construe remedial legislation liberally in favor of the injured party." *Ballagh v. Fauber Enters., Inc.*, 290 Va. 120, 125 (2015)(emphasis added).

B. Companion nursing facility regulations must be considered to determine the plain meaning of "residents".

[6] "Language is ambiguous if it admits of being understood in more than one way, refers to two or more things simultaneously, is difficult to comprehend, is of doubtful important, or lacks clearness and definiteness," *Gillespie v. Commonwealth*, 272 Va. 753, 758 (2006).

This Court interprets companion language to ascertain plain meaning:

> Consideration of the entire statute … to place its terms in the context to ascertain their plain meaning does not offend the ['plain meaning'] rule because it is this Court's duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal. Furthermore, we will not single out a particular term or phrase, but … construe the words and terms at issue in the context of the other language used in the statute.

Office of the Attorney Gen. v. State Corp. Comm'n, 288 Va. 183, 192 (2014)(emphasis added)(internal brackets and citations omitted). "It is our duty to interpret the several parts of a statute as a consistent and harmonious whole." *REVI, LLC v. Chicago Title Ins., Co.*, 290 Va. 203, 208 (2015). "We construe all statutes *in pari materia* in such a manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious." *Id.* at 211 (internal citations omitted).

In *REVI*, this Court similarly compared and harmonized "court" and "court or jury" in two statutes to interpret the plain meaning of "court," given "the relationship between the two related sections in this single enactment". *Id*. at 210-11. Thereby, this Court in *REVI* rejected the argument that "court" was ambiguous. *Id*. at 209-11. Therefore, to ascertain the plain meaning of "resident" at bar, this Court must consider, interpret, and harmonize 12 VAC 5-371-140(G) and other companion policies subsections re "residents" in context.

C. "Residents" under 12 VAC 5-371-10 and 12 VAC 5-371-140(G) is broader than "residents currently in residence" under companion policies subsection 12 VAC 5-371-150(D).

As noted by the trial court, JA at 49 (Tr. at 7.15-20), nursing facility regulations define "resident". "'Resident' means the primary service recipient, admitted to the nursing home, whether that person is referred to as a client, consumer, patient, or other term." 12 VAC 5-371-10 (emphasis added).

The policies regulations' usage of "residents" in two companion subsections shows by comparison what was intended. Regulations' Part II, entitled "ADMINISTRATIVE SERVICES," contains 12 VAC 5-371-140 (which includes the policies subsection at issue), and 12 VAC 5-371-150 (which includes its companion policies subsection); both of which subsections must be read in *pari materia*. *REVI,* 290 Va. at 211.

12 VAC 5-371-140 covers various policies. Subsection 12 VAC 5-371-140(G) thereunder mandates broadly: "Policies shall be made available for review, upon request, to **residents** and their designated representatives." (emphasis added).

Companion 12 VAC 5-371-150 covers other policies. Conversely, subsection 12 VAC 5-371-150(D) thereunder expressly limits "residents" only to "residents **currently in residence**" (emphasis added).[7]

By comparison, unlike companion policies request subsection 12 VAC 5-371-150(D), 12 VAC 5-371-140(G) does not limit its policies entitlement only to "residents **currently in residence**". Obviously, the State Board of Health could have limited 12 VAC 5-371-140(G) to "residents **currently in residence**" just like it did in the companion policies subsection, but it consciously chose not to do so; and that materially different choice of terms evinces conclusively its intention to include also residents not "currently in residence," *i.e.,* former residents too, under 12 VAC 5-371-140(G).

"When construing a statute, 'we are not free . . . to ignore language contained in the statute'." *Virginia Dept. of Health v. Kepa, Inc.*, 289 Va. 131, 145 (2015)(emphasis added). "The Court presumes that the legislature has purposefully chosen the precise statutory language [and when it] has used specific language in one instance, but omits that language or uses different language when addressing a similar subject

[7] At trial, the judge summarily addressed and conclusorily relied upon 12 VAC 5-371-150(D). JA at 50 (Tr. at 8.2-9). Yet comparison of 12 VAC 5-371-150(D) and 12 VAC 5-371-140(G), *infra*, clearly supports Representatives' broad interpretation instead, not VHS' narrow one.

elsewhere . . ., we must presume that the difference in the choice of language was intentional." *David v. David*, 287 Va. 231, 240 (2014).

Further, when it "uses two different terms in the same act, it is presumed to mean two different things." *Klarfeld v. Salsbury*, 233 Va. 277, 284-85 (1987)(emphasis added). At bar, the use of different terms in 12 VAC 5-371-110 and 12 VAC 5-371-140(G), on the one hand, and in 12 VAC 3-571-150(D), on the other hand, was intentional, cannot be ignored, and means that "residents" standing alone is broader and necessarily includes former and current residents.

Otherwise, if "residents" alone narrowly means only "current residents" as VHS argues, then "residents currently in residence" necessarily would be redundant, strained, absurd. But the "plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction, and a statute should never be construed in a way that leads to absurd results". *Ricks v. Commonwealth*, 290 Va. 470, 477 (2015)(construing *in pari materia* and embracing "broad definition" of "bodily injury").

D. All "residents," former and current, plainly are intended by other related nursing facility regulations, including 12 VAC 5-371-140(D)(11) and 12 VAC 5-371-140(D)(15)(a).

Comparison of "residents" in 12 VAC 5-371-140(G) and "residents currently in residence" in companion policies request subsection 12 VAC 5-371-150(D) alone is dispositive in Representatives' favor. Yet certainly VHS cannot argue that "resident" in its required policies for "**Confidentiality of resident information**" under 12 VAC 5-371-140(D)(15)(a) (emphasis added) narrowly means only "current residents". Otherwise, VHS by its resident policies is free to violate resident confidentiality with impugnity as soon as its residents no longer are "currently in residence" – an impermissibly strained absurd result. Ditto re VHS' policies for resident "Clinical records" under 12 VAC 5-371-140(D)(11).

E. 2015 Kentucky Federal Court interpretation of nursing facility "resident' includes all residents, former and current.

Wise v. Pine Tree Villa, LLC, 2015 WL 1611804, *5-7, 2015 U.S. Dist. LEXIS 46838, *14-18 (W.D.Ky. Apr. 9, 2015) is squarely on point and clearly salutary persuasive authority. The interpretation of "resident" identically was at issue under neighboring Kentucky law in *Wise,* another long-term-care facility case involving personal injury.

In *Wise*, "resident" similarly was defined as "any person who is admitted to a long-term-care facility . . . for the purposes of receiving personal care and assistance". 2015 WL 1611804 at *6, 2015 U.S. Dist.

LEXIS 46838 at *16 (quoting KRS §216.510(2))(emphasis added). Like VHS at bar, defendant long-term-care facility in *Wise* argued that "resident" means "a resident of long-term care facility during, but only during, his or her [physical] residence" there, 2015 WL 1611804 at *5, 2015 U.S. Dist. LEXIS 46838 at *14-15; while like Representatives at bar, plaintiff in *Wise* asserted successfully that "discharge of the resident" did not terminate the plaintiff as a "resident," *i.e.*, that former residents are included under "resident" too. 2015 WL 1611804 at *6, 2015 U.S. Dist. LEXIS 46838 at *15.

In *Wise*, "the Court finds that the plain meaning of '**resident**' leads to an interpretation that **includes former residents** as well as current residents." 2015 WL 1611804 at *7, 2015 U.S. Dist. LEXIS 46838 at *18 (emphasis added). Consistent with Virginia law, *Wise inter alia*: (1) would "not insert a restrictive clause into the statute that does not exist," or "lead to an absurd result," 2015 WL 1611804 at *7, 2015 U.S. Dist. LEXIS 46838 at *17; (2) observed that "statutes designed to protect the public should be interpreted liberally," *id.*; and (3) noted the unintended unacceptable inequities that would result from defendant nursing facility's unduly restrictive interpretation of "resident". 2015 WL 1611804 at *7, 2015 U.S. Dist. LEXIS 46838 at *18.

F. Analogously, "patient" under *Va. Code* §8.01-413(B) includes all patients, former and current.

It is hornbook that "patient" under *Va. Code* §8.01-413(B) is not limited only to those who currently are patients of the healthcare provider whose records are sought. Obviously a former patient also is covered by §8.01-413(B).

Otherwise, if "patient" under §8.01-413(B) means only current patients, then patients would be required to request their records prior to discharge – and given §8.01-413(B)'s 15-day period for compliance, arguably remain a current patient until compliance by the healthcare provider – an absurd result by strained narrow interpretation. Indeed, empirically the majority of patients requesting records under §8.01-413(B) are former patients.

Correspondingly, as a practical and legal matter, it should be and is no different with "residents" under 12 VAC 5-371-140(G). Despite rejecting Representatives' apt analogy to §8.01-413(B), neither VHS nor the judge at trial stated why former residents seeking policies under 12 VAC 5-371-140(G) should be analyzed and treated differently than former patients seeking records under §8.01-413(B); and in fact, there is no principled reason to discriminate between the two.

G. 12 VAC 5-371-140(G) entitles review upon mere request, not after arduous litigation, which is reasonable intent and policy for "vulnerable" residents, former and current.

12 VAC 5-371-140(G) explicitly entitles review of nursing facility policies by residents and designated representatives upon mere "**request**" (emphasis added). That plainly intends to insulate vulnerable elderly former residents from suffering the delay, expense, emotion, and uncertainty of litigation just to review the nursing facility policies applicable to them.

Before suffering injury at the nursing facility's hands, residents and their designated representatives (if any) typically have no reason to request policies review. Further, after suffering unexpected injury at the nursing facility's hands, residents and designated representatives (if any) often have insufficient time to request and review policies before the injured resident is removed physically (emergently and/or permanently) from the nursing facility for injury-related medical necessity.

Moreover, nursing facility policies can be lost forever to former residents and their designated representatives if review upon mere request were not mandated by 12 VAC 5-371-140(G), particularly since nursing facility regulations mandate "adoption, implementation and **periodic review** of policies and procedures". 12 VAC 5-371-120(B)(3) (emphasis added). Hence nursing facilities routinely revise and destroy policies in the ensuing

months unto typically years during which residents convalesce and recover from their facility-based injuries and/or their survivors grieve and get designated as their personal representatives; legal counsel are retained, collect patient records, and in turn retain experts; retained experts review materials and certify suit; suit is filed; and discovery requests for nursing facility policies are propounded, objected, compelled, heard, adjudicated, and responded.

Therefore, denial of review upon request can result in permanent loss of nursing facility policies that *inter alia* "may be evidence as to the appropriate standard of care to be provided by defendants [and] offer a factual basis for claims of ordinary and gross negligence". *Stevens v. Hosp. Auth. for the City of Petersburg*, 42 Va. Cir. 321, 329-30 (Richmond May 27, 1997)(Lemons, J.)(medical malpractice)(emphasis added); *Hawkins v. Pinkerton's, Inc.*, 42 Va. Cir. 316, 319 (Petersburg May 27, 1997)(Lemons, J.)(emphasis added). That is particularly so because 12 VAC 5-371-110(B)(3) expressly requires that the "nursing facility must comply with: its own policies and procedures" (emphasis added); making violation of state-mandated nursing facility policies negligence *per se* and the policies indispensable evidence of the same.

Indeed, even if nursing facility policies are not lost by passage of time, former residents and their designated representatives being denied policies review by nursing facilities upon mere request pre-suit pursuant to 12 VAC 5-371-140(G) itself may result in the policies never being discovered because of suit not being filed certified and served by an expert as required or even not being filed by an attorney in the first place. Former residents and their designated representatives being entitled to 12 VAC 5-371-140(G) review upon mere request readily and inexpensively assists them to determine pre-suit whether the nursing facility violated its own state-mandated policies and whether to retain counsel, to retain experts, to file suit, etc. – all at substantial expense of money, time, and emotion.

Consequently, it is sound policy that 12 VAC 5-371-140(G) includes former residents and their designated representatives. Otherwise, inequitably and impractically the requests of vulnerable elderly injured former residents would go unmet – ironically, often due to the nursing facility's predicate fault, and always beyond the control of those vulnerable residents and their legal representatives.

With the American population aging and nursing facilities proliferating, the widespread chronic problem of former residents and their designated representatives being denied VAC review of nursing facility

policies upon mere request will mushroom. The State Board of Health did not intend that.

II. "Personal representatives" of nursing facility residents, former and current, have standing as "residents and their designated representatives" under 12 VAC 5-371-140(G).[8]

Va. Code §1-234 defines an executor and an administrator as the "personal representative" of a decedent. This Court recognizes an executor and an administrator as the "personal representative of a deceased person," including particularly in the context of personal injury and wrongful death. *Wilson v. Whittaker*, 207 Va. 1032, 1035-36 (1967)(medical malpractice).

VHS admits that Representatives are the personal representatives of its former residents, Gerda and James. JA at 56 (RRFA 7), 57 (RRFA 16). Specifically, Representatives expressly were designated personal

[8] At trial, VHS did not contest the standing of Representatives vis-à-vis their capacity as personal representatives of Gerda and James. Hence *Va. S. Ct. Rule* 5:25 bars VHS raising that anew on appeal, though VHS raised the same in its Reply Brief at the Petition stage nonetheless. Likewise, the trial judge's rulings plainly were predicated only on Gerda and James being "former," not "current," residents. Final Judgment Order recites unequivocally that "**former** residents of a nursing facility, personal representatives of **former** residents of a nursing facility and/or an administrator or an executor of the estate of a **former** resident of a nursing facility are not entitled to review policies of a nursing facility under 12 VAC 5-371-140(G)," JA at 34 (emphasis added); not that all personal representatives, administrators and executors are not entitled. Without waiving *Rule* 5:25 bar, however, out of an abundance of caution, Representatives provide legal authority for their standing on the merits.

representatives under *Va. Code* §8.01-25 and §8.01-50 by court Certificate/Letter of the Qualification, JA at 4, 11; which VHS admitted in its Answers to Complaints at Paragraph 6, JA at 22, 27, and in its RRFAs 7 and 16. JA at 56, 57.

Since Gerda and James are "residents" under 12 VAC 5-371-140(G), Representatives as their personal representatives legally are the same. Moreover, Representatives also are "designated representatives" under 12 VAC 5-371-140(G), since they properly have been designated personal representatives of Gerda and James for legal purposes, including particularly for investigating and pursuing wrongful death and survival actions (with requesting review of defendant VHS' nursing facility policies being a preliminary step of that).

Because this nursing facility regulation for the benefit of the injured "vulnerable" deceased residents at bar is remedial in nature, the definition of their "designated representatives" in 12 VAC 5-371-140(G) must be construed "liberally in favor of the injured party" too. *Ballagh, supra*. Otherwise, if VHS' narrow strained interpretation of "designated representatives" were correct, then the court-designated personal representatives of not only deceased former patients, but also of admittedly <u>current</u> incapacitated residents cannot review policies under 12 VAC 5-371-

140(G) – even if the residents' incapacity is caused by VHS' negligence – an impermissibly absurd result.

Although not articulated to date, impliedly VHS contends that the "representatives" can be "designated" only by the residents themselves. But: [1] 12 VAC 5-371-140(G) does not state that, instead must be construed liberally, and cannot have words added to it by VHS, *Kepa, supra*; [2] such narrow strained absurd interpretation cuts against §1-234, *Wilson*, and *Wilcoxson*; and [3] VHS' negligence and/or otherwise may render "vulnerable" residents themselves unable to designate, as at bar.

CONCLUSION

WHEREFORE Appellants pray that on appeal this Court find the trial judge erred manifestly, reverse the trial judge's decision, render judgment in favor of Plaintiffs, remand to the trial court for Defendant to be ordered to provide Plaintiffs its requested policies for review forthwith and for further disposition consistent therewith, and award Plaintiffs/Appellants all costs and such other relief as may be necessary and appropriate under the circumstances.

Respectfully submitted,

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GERDA A. HARVEY, DECEASED

HUBBARD A. DAVIS,
EXECUTOR OF THE ESTATE OF
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CERTIFICATE OF SERVICE

I hereby certify that *Rule* 5:26 of the Supreme Court of Virginia has been complied with, and that pursuant to the *Rule* a PDF version of this Opening Brief has been filed through VACES and ten(10) paper copies hand-delivered to the Clerk's Office. An electronic version has also been delivered to opposing counsel via email on this 4th day of April, 2016, to the following counsel for Appellee:

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