IN THE

Supreme Court of Virginia

RECORD NO. 131754

JO ANN KNIGHTEN TEMPLE,
Administrator and Personal Representative of the Estate of
ELLIS ETHELBERT TEMPLE, SR., Deceased,

Appellant,

v.

MARY WASHINGTON HOSPITAL, INC.,
FREDERICKSBURG HOSPITALIST GROUP, P.C. and
FREDERICKSBURG EMERGENCY MEDICAL ALLIANCE, INC.,

Appellees.

BRIEF *AMICUS CURIAE* OF VIRGINIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT

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***AMICUS* STATEMENT OF INTEREST**[1]

The Virginia Trial Lawyers Association ("VTLA") is an organization of over 2,000 Virginia attorneys dedicated to promoting professionalism within the trial bar, enhancing the competence of trial lawyers, protecting and preserving individual liberties and access to justice, and supporting efficient constitutionally sound judicial system. VTLA obtained written consent of Appellant, but not Appellees, for filing Brief *Amicus Curiae*; so files Motion for Leave. *Va. Sup. Ct. Rules* 5:4 and 5:30. *See*, Addendum ("Add.") 6.

First impression questions of discoverability of policies and metadata, including "audit trails," cut across all tort litigation and are central to medical malpractice litigation. On behalf of trial lawyers and litigants, VTLA has a substantial interest in this appeal as *amicus curiae*. *See, Whitehead v. H and C Dev. Corp*., 204 Va. 144, 149 (1961).

This appeal presents issues that are important to Virginia law and trial practice in Virginia courts. The appeal concerns not only the rights of the parties to this case, but also the rights of litigants and the nature of trial practice throughout the Commonwealth.

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[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person or entity made a monetary contribution to its preparation or submission.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Amicus adopts Appellant's Statement of the Case.

STATEMENT OF FACTS

Amicus adopts Appellant's Facts. However, additional material facts are stated near the beginning of each Section, *infra*.

ARGUMENT

Hospitals, nursing homes, and other healthcare providers promulgate policies in the routine and ordinary course of their business. Other common equivalents covered are procedures, protocols, guidelines, handbooks, requirements, regulations, bylaws, manuals, etc.

Healthcare providers treat all patients using their policies, but secret their policies from all patients. They jealously guard their policies as if unique formulae kept in a safe, rather than used at all nurses and other computer stations hospital-wide.

In fact, policies customarily are uniform across their healthcare industry, characteristically evincing state and national accreditation dictates, professional society norms, and other standards. That really is a primary reason why healthcare providers fight tooth-and-nail over the use

and even the disclosure of policies in all medical malpractice litigation.[2]

Yet healthcare policies are discoverable because they may "lead to the discovery of admissible evidence" and are not privileged. Indeed, they are admissible into evidence themselves on multiple independent grounds.

But healthcare providers invoke *Va. Code* §8.01-581.17 and archaic "private rules" doctrine toward denying victim litigants policies. Healthcare providers do so while disclosing policies to their own SOC litigation experts surreptitiously and/or introducing them outright at trial surprisingly.

For three decades, policies discoverability unto admissibility has been litigated extensively in Virginia's lower courts, resulting in 100+ published and unpublished decisions. The earliest one appears to be *Washington v. Riverside Hosp*., No. 9937-WS, Judge Memo. (Newport News Dec. 10, 1985), Add.3, in which Judge Stephens presciently found incident reports and hospital policies discoverable despite defense privilege claims.

It is somewhat unusual to cite Virginia Circuit Court opinions to the Virginia Supreme Court. Yet *Amicus* does so for at least four reasons.

First, that unusually large body reflects cogent legal analysis that may

[2] Healthcare defendants also seek to deny plaintiff patients evidence re habit, routine practice, impeachment, control, agency/vicarious liability, awareness/notice, and standard of care ("SOC"). *See,* V, *infra.*

be persuasive, and Judges' own words remain best. Second, a current Justice of this Court authored three of those opinions, which follow two other seminal ones.[3]

Third, given the sea-change in opinion favoring policies discoverability, healthcare interests cannot be surprised by this Court declaring policies discoverability (unto admissibility) the law of Virginia. Fourth, fundamental fairness and sound public policy favor this Court vindicating the majority rule of policies discoverability:[4] like the institutional secrecy of incident reports explicitly rejected by this Court in *Riverside,* policies too should not be a healthcare bastion of secrecy - let alone one that Defendants selectively, strategically, and opportunistically unleash on

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[3] *Stevens v. Hosp. Auth. of the City of Petersburg,* 42 Va. Cir. 321 (Richmond May 27, 1997)(Lemons, J.); *Hawkins v. Pinkerton's, Inc.*, 42 Va. Cir. 316 (Petersburg May 27, 1997)(Lemons, J.); *Stevens v. Lemmie*, 40 Va. Cir. 499 (Petersburg)(Lemons, J.); *Curtis v. Fairfax Hosp. Sys., Inc.*, 21 Va. Cir. 275 (Fairfax Sep. 21, 1990)(Annunziata, J.); *Johnson v. Roanoke Mem'l Hosp*., 9 Va. Cir. 186 (Roanoke Aug. 13, 1987)(Coulter, J.).

[4] Based mostly on pre-2006 cases, Defendant, Mary Washington Hospital ("MWH"), claimed at discovery hearing that the "overwhelming majority of the circuits" oppose policies discoverability. Appendix ("A")1136. In truth, however, the 2006 joint Plaintiff-Defendant legal memorandum presented at the Judicial Conference of Virginia in Williamsburg, Virginia, attests: "Majority view supports discoverability of internal policies." Tate, M.L. and Jessee, J.T., "Discovery Issues in Medical Malpractice Cases," Judicial Conference of Virginia, at 20 (Sep. 25-26, 2006)(emphasis added). Add.5. Moreover, after *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518 (2006), decisions upholding policies discoverability are much more prevalent.

unsuspecting Plaintiff patients inequitably.

I. APPEAL PROPRIETY

By Agreed Order Incorporating Discovery entered September 24, 2012: "All discovery conducted and taken in the previous action that the Plaintiff brought against Defendants, bearing Case No. CL10-47, is hereby incorporated into the instant action." A33-34. That was predicated on "the interest of judicial economy". A33 (emphasis added).

If Judge's discovery hearings and orders were not being incorporated thereby, then there would be no "judicial economy," as discovery would have to be relitigated. Also, the parties did not need an Agreed Order simply to use discovery from nonsuited action in instant action. *See, e.g., Burns v. Gagnon*, 283 Va. 657, 681-682 (2012)(Plaintiff entitled to use deposition from nonsuited action in refiled action).

Additionally, relitigating discovery issues would have been a vain and useless act since the same Judge presided over both actions. *Virginia Passenger & Power Co. v. Fisher*, 104 Va. 121, 129 (1905)("sufficient reason, we think, for not applying…for action to redress the wrongs complained of"). Judge was unchanged re his discovery rulings at Final Pre-Trial Conference ("FPTC"), A863-73; and in denying Motion for New Trial and to Reconsider Evidence. *Compare* A114-45 *with* A1187-89.

Further, defense treated Agreed Order as incorporating rulings from nonsuited action in instant action. At FPTC, MWH relied on nonsuited action ruling that policies is "not discoverable" to exclude Plaintiff's pathology expert opinion re its lack of a Troponin range parameter:

> This Court may or may not remember, many moons ago, being here on this exact same issue. The Plaintiff at the time sought the policies of the laboratory…..
>
> And we argued the same arguments that we always do when it comes to policies and procedures, and the Court ruled that those policies were not discoverable. And I don't believe that it's appropriate to rehash that against today.
>
> ***It really is sort of a circular argument that gets us back to the Court's ruling six or eight months, nine, maybe a year ago.

A863 at 96.21-97.10; A868 at 115.21-116.1 (emphasis added). On appeal, Defendants cannot assume a different position from that in Circuit Court.

In dozens of cases, this Court has pronounced that parties "shall not be allowed to approbate and reprobate" in a "series of suits":

> In Virginia we have…approved the general rule that a party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same facts or set of facts, which are inconsistent with each other, or mutually contradictory. A litigant is estopped from taking a position which is inconsistent with one previously assumed, either in the course of litigation for the same cause of action, or in dealings *in pais*.

Leech v. Beasley, 203 Va. 955, 961-62 (1962). *Leech* is dispositive.

Finally, Judge too treated his nonsuited action rulings as incorporated

in instant action. Excluding Plaintiff's pathology expert opinion, Judge reiterated he already had "found [policies] did not set forth the standard of care," A866 at 106.17-21; "been over this before in other motions," A867 at 112.18-21; "made that [policies] ruling," A868 at 116.2-5; and "dealt with that [policies] issue." A868 at 116.16-17. *See also*, A871 at 129.6-12.

II. TROPONIN DISCOVERY

Plaintiff's third Request for Production ("RP") sought MWH's Troponin range parameters. A805. One-page Troponin kit manufacturer instructions produced by MWH did not include the range parameters sought. A806.

Plaintiff emphasized, "This is a factual inquiry into how the lab defines its values" at MWH. A807. Plaintiff delineated that third RP1 was not simply seeking again the relevant policies sought previously by first RP5, *see,* IV and V, *infra,* and denied by Judge. A807, A827 at 23.5-7.

MWH divulged that its "Critical Tests Reporting Policy" pertained, but reasserted its objection and privilege claim Judge had upheld previously. A818. Judge denied second Motion to Compel. A836-37.

At FPTC, MWH waffled whether MWH lab Troponin range parameters actually existed and simply were not produced:

> Even if that sort of things exists - again, as I've said, maybe we're to semantics now - I don't think something like that exists. Maybe it does and I just didn't dig around enough.

A827 at 130.8-12 (emphasis added). But MWH just dismissed the same as more SOC that enjoyed privilege, A872 at 130.13-15; *i.e.*, as irrelevant.

Assuming MWH genuinely has no lab Troponin range parameters, that underscores the importance of discovering MWH's "Critical Tests Reporting Policy". *See*, IV and V, *infra*. In light of MWH waffling, however, MWH also needs to dig around thoroughly on remand; it's not privileged.

III. POLICIES DICHOTOMY

Temple exposes chronic medical malpractice defense policies dichotomy. Defendants deny Plaintiffs policies, but use them themselves.

A. Defendants concede discoverability by admitting policies.

Defendants opposed Plaintiff's policies discovery, A974-979, A1132-1137, A1140-44, A1147; complaining policies should not be used "as a sword". MWH opposed Plaintiff's expert introducing policies. A863-73.

But in trial Defendants twice used policies "as a sword" against Plaintiff, introducing policies by two physicians' testimony. A79 and A93-Transcript ("T")1299. *See*, V(A)(3)(a), *infra* (detailed accounts of Defendants' policies usage). Yet on appeal, Defendants again oppose policies discovery, claiming inadmissibility.

In the *Leech* personal injury case, *supra*, this Court held the party

"was bound by…his evidence [and] could not retreat from this position". 203 Va. at 962. Likewise, Defendants at bar are bound by their policies evidence: they cannot "approbate" that policies are admissible and "reprobate" that policies supposedly are not discoverable. Defendant cannot, over Plaintiff's objections, convince Judge to preclude policies discovery; then introduce policies at trial; and then on appeal oppose policies discovery. *Cf., Garlock Sealing Techs., LLC v. Little*, 270 Va. 381, 387-388 (2006)(cannot "approbate and reprobate"). *Cf., Pettus v. Irving S. Gottfried, M.D., P.C.*, 269 Va. 69, 78-79 (2005)(substantive "same character" rule waives party's objection).

Medical malpractice Defendants cannot use "privilege as both a shield, preventing the admission of evidence, and as a sword to mislead the finder of fact by allowing evidence that would be impeached by the privilege information if it had not been suppressed." *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 280 Va. 113, 130 (2010). Defendants at bar cannot claim §8.01-581.17 privilege to preclude policies discovery unto admissibility; then selectively override claimed privilege to admit policies without prior discovery to Plaintiff's prejudice. *See*, *Garner v. Sentara Norfolk Gen. Hosp.*, No. L00-1107, Hr'g Tr. at 12.5-12, 27.5-15, and 29.1-5 (Norfolk Feb. 20, 2001)(holding that Defendant's policies were

discoverable, and since Defendant's SOC expert relied on policies for testimony, that policies were admissible for cross-examination). Add.2.

This commonplace defense policies dichotomy is patently inequitable to Plaintiffs. As a matter of sound public policy, this Court should expose and condemn, not condone and foster, chronic defense policies abuse.

B. Court still must reach Plaintiff's "offensive use" of policies.

The inconsistency and prejudice of defense introducing policies at trial after denying Plaintiff policies in discovery is sufficient ground for reversal and remand for retrial. Yet it is insufficient for this Court simply to dispose of this appeal solely on Plaintiff being denied "defensive use" of policies, *i.e.*, solely on Plaintiff being denied use for impeachment only.

Plaintiff sought and is entitled "offensive use" of policies, *see*, IV and V, *infra*; so upon remand still will be pursuing discovery (and admissibility) of policies for her own affirmative use, regardless whether the defense introduces policies again. Moreover, if this Court were to reverse solely for defense using policies to exclusion of Plaintiff, then on remand Defendants presumably just will stipulate not to reference policies at trial again.

Plaintiff's "offensive use" of policies properly is before the Court now, and will be again too if not resolved now. This Court addresses objections that "may arise again on retrial," *Burns*, 283 Va. at 678; so should here.

IV. POLICIES DISCOVERABILITY

At the eleventh hour, when Defendants introduce policies at trial, or even when Plaintiffs stumble across policies in defense expert depositions, the damage is done. It is too late for Plaintiffs to discover and recover.

More fundamentally, Plaintiffs are entitled to use policies affirmatively, not simply to respond defensively if and when Defendants ambush with policies. So Plaintiffs must be free to discover policies from the outset.

Plaintiff's RP5 sought: "All guidelines, manuals, protocols, procedures, checklists, or instructions of any kind [re] management, care and/or treatment of patients presenting with conditions [like Plaintiff's deceased, including re] cardiac monitoring." A904, A924. That's policies.

In support of policies discovery, Plaintiff relied on *Johnson* and *Riverside*. A910-11, A1122, A1138-40, A1156. She rejected MWH's §8.01-581.17 privilege claims, A907; and MWH's Circuit Court cases, which predated *Riverside* and invoked "private rules" doctrine. A1138.

MWH objected and argued §8.01-581.17 privilege and that policies are inadmissible to establish SOC per *Virginia Ry. & Power Co. v. Godsey*, 117 Va. 167 (1915) and *Pullen v. Nicken*, 226 Va. 342 (1983). A924-925, A974-79. Contradictorily, MWH in Opposition Memorandum did not claim policies were irrelevant, just that "mere possibility of the discovery of

admissible evidence is not an 'extraordinary circumstance' as contemplated by the [privilege] statute," A977; while MWH at hearing argued policies are "just not relevant," A1134, and should be found "irrelevant". A1137.

"MWH blurs the concept of discoverability and admissibility," noted Plaintiff. A909. "But we're in discovery. And how can we say that it's not relevant when these issues exist between these [Defendants]?" A1157.

MWH and Judge thwarted Plaintiff identifying all responsive policies withheld. In her Memorandum in Support of Motion to Compel, Plaintiff complained about MWH's failure to provide the requisite privilege log, citing *Va. Sup. Ct. Rule* 4:1(b)(6); yet MWH still did not comply. A979-80.

At discovery hearing, Plaintiff again protested: "we would ask at the very minimum that a privilege log be…produced so we can determine what's available and whether or not it's relevant," A1123; "at this point to not even have a privilege log or understand what policies exist, it's a little difficult to argue why they're relevant when they haven't even been put down in a privilege log." A1140. But Judge denied first Motion to Compel, holding policies privileged, "not relevant…and will not lead to discoverable evidence," A1159; without requiring MWH to provide the requisite *Rule* 4:1(b)(6) privilege log of responsive policies withheld. A1159, A1164-66.

Nonetheless, at a minimum, MWH withheld the following 12 policies

as privileged (which, for lack of the requisite privilege log, it cannot deny):

1. MWH identified at FPTC its “Critical Tests Reporting Policy” re Troponin lab levels of the patient, A818;
2. Nurse Whelan deposed “there were policies regarding patient care and the administration of medications to patient,” A904;
3. R.N. Whelan deposed “there was a ‘2 South Manual’ for the healthcare providers treating patients on the floor on which Mr. Temple was last treated at MWH,” A904;
4. R.N. Perkins deposed “the telemetry department had a policy requiring them to print telemetry heart monitoring strips at certain intervals” and “when anything abnormal appeared,” A904;
5. L.P.N. Roush deposed “MWH provided her with medications guideline book which detailed the scope of her practice in terms of medication,” A905;
6. L.P.N. Roush deposed MWH “provided a ‘CBOT’ book at orientation which outlined her job duties and practice parameters,” A905;
7. Dr. Huesgen deposed “there is an emergency department protocol for patients who present with chest pain called ‘STEMI’,” which has “a specific pathway or protocol that’s followed in those cases” that is “an agreement between the cardiology group, the hospital and the

emergency physician group," A905.

8. Dr. Huesgen deposed there is a MWH "protocol at…that has been in existence for well over ten years that [the patient] cannot go to the floor if they are symptomatic from a cardiac source, meaning they're having chest pain or some cardiac equivalent," A906;
9. Unspecified floor nurses questioned "whether they could properly accept Mr. Temple as a patient if he had an elevated troponin or an elevated cardiac enzyme," implying policies, A906;
10. Nurse deposed "patients aren't supposed to come upstairs [to the floor] until their labs are available," A1123, "referring to policies," A1153;
11. R.N. Neal deposed there was a "policy," a "set of written guidelines," re "when a floor nurse should call for assistance by the Medical Surgical Emergency Team (MSET)," that are "based on factors like heart rate, respiratory rate, blood pressure, etc.," A906; and
12. Nurse Practitioner and ER Nurse both deposed "there's a policy [hospitalists] have to see the patient within an hour". A1154.

By memorandum and at hearing, Plaintiff sought and proffered the relevance for discovery of each policies, A904-907, A1153-1154; to no avail. *See also,* A1122-23, A1124, A1138-40, A1156-57.

Plaintiff being denied those 12 policies, individually and certainly collectively, is reversible error. *See, e.g., Nizan v. Wells Fargo Bank Minnesota Nat'l Ass'n*, 274 Va. 481, 501 (2007)(reversed and remanded)(circuit court preventing party "from conducting discovery that could be relevant" re claim, "abused its discretion"); *O'Brian v. Langley School*, 256 Va. 547, 552 (1998)(reversed and remanded)("circuit court precluded any inquiry…by denying the…motion to compel" and thereby was "improvident and affected substantial rights"). Moreover, because LPN Roush's aforesaid CBOT Book actually was "orientation and training" materials, A905, they clearly were discoverable - and even admissible - under *Riverside*, 272 Va. at 528-531; so it alone being withheld by MWH and denied by Judge is prejudicial error.

A. *Va. Sup. Ct. Rule* 4:1(b)(1) discovery is broad and liberal.

Va. Sup. Ct. Rule 4:1(b)(1) guarantees: "discovery regarding any matter, not privileged, which is relevant to the subject matter". "Evidence is relevant if it has any logical tendency to prove an issue in a case." *John Crane, Inc. v. Jones*, 274 Va. 581, 590 (2007)(emphasis added). "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Rule* 4:1(b)(1).

Judge Coulter observes, "[s]ince full and open discovery is the overwhelming order of the day and since decisions of ultimate admissibility and relevancy are not yet ripe for rule, the fairer judgment at this stage of the proceedings as perceived by the court would be to allow the plaintiff opportunity to explore the full potential of the documents at issue." *Johnson*, 9 Va. Cir. at 202. "Little imagination is required to conclude that the documents sought are quite likely to contain information relevant." *Id*. at 201.

Consistent with Brief of Appellant ("BA") at 10, Judge Annunziata declares policies "will likely permit a more thorough and effective examination of the defendants and their experts," and "also can aid in the discovery of other reports or records…which may be admissible". *Curtis*, 21 Va. Cir. at 280. "Logically, the hospital's rules, regulations and protocols can lead to discovery of admissible evidence on a myriad of issues." *Id*.

Further, although the admissibility of policies themselves is not a prerequisite to the discoverability of policies under *Rule* 4:1(b)(1), the fact that policies are admissible mandates that policies are discoverable. Policies can be admissible re habit, routine practice, impeachment, control, agency/various liability, awareness/notice, and SOC. *See*, V, *infra*.

B. Privilege is construed strictly and proponent's burden.

"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 v. Commonwealth*, 181 Va. 520, 540 (1943). *Fleming v. Mountain States Health Alliance*, 2012 WL 1909343, *6 (W.D.Va. May 25, 2012)(no "evidence" to support defense counsel's bare representations of privilege).

A document is not privileged just because it was possessed by a body which may enjoy privilege under certain circumstances. *Robertson*, 181 Va. at 540-541; *Riverside*, 272 Va. at 530-34. Otherwise, healthcare providers insulate policies just by having them in "protected" Committee temporarily.

MHW as "proponent has the burden to establish that the . . . communication under consideration is privileged, and that the privilege was not waived." *Walton, supra*, 280 Va. at 122-123 (emphasis added). "[P]rivilege is an exception to the general duty to disclose, is an obstacle to the investigation of the truth and should be strictly construed." *Id.* at 122.

C. Policies are not privileged under *Va. Code* §8.01-581.17.

Regarding Defendants' bare claim of privilege under §8.01-581.17, its "statutory language is clear, unambiguous, and unqualified". *HCA Health Servs. of Virginia, Inc. v. Levin*. 260 Va. 215, 220 (2000). "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. *Id*.

§8.01-581.17 is not a facility-wide privilege. It "provides a privilege in plain language which is limited narrowly to…*committees* specified in §8.01-581.16". *Klarfield v. Salsbury*. 233 Va. 277, 284 (1987)(italics original)(underlining added).

Even if there were any ambiguity under §8.01-581.17, it must be resolved against privilege. A statute such as 8.01-581.17 "in derogation of the common law…must be 'strictly construed and not…enlarged in [its] operation by construction beyond [its] express language'." *Univ. of Va. Health Servs. Found. v. Morris*, 275 Va. 319, 332 (2008).

"Any ambiguities in [§8.01-581.17] must be strictly construed for, as the U.S. Supreme Court has noted, 'exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth'. *United States v. Nixon*, 418 U.S. 683, 709-10 (1974)." *Curtis*, 21 Va. Cir. at 277. "Ambiguities…should not be extended to enlarge the privilege." *Johnson,* 9 Va. Cir. at 199.

Notably, Virginia Supreme Court Justice Lemons as Circuit Court Judge agreed with Judge Annunziata and Judge Coulter that "policy manuals were not protected from disclosure under §8.01-581.17" by "the

limited scope of the privilege". *Stevens v. Lemmie*, 40 Va. Cir. at 507-508 (emphasis added). *Stevens v. Hosp. Authority,* 42 Va. Cir. at 329 ("private rules…may be evidence"); *Hawkins,* 42 Va. Cir. at 319 ("private rules…may be evidence"). Justice Lemons applied the doctrine of *ejusdem generis* to interpret "communications" in §8.01-581.17: Presaging *Riverside*, he reasoned the statute's protection of certain committee communications was limited by its exception for "discovery of evidence" related to patient hospitalization, including for example "procedure manuals and hospital protocols". *Stevens v. Lemmie,* 40 Va. Cir. at 508.

Justice Lemons then delineated why final policies are not protected, while actual committee deliberations leading up to them may be privileged.

> [T]he ultimate end results of such critiques, which may find their way into depersonalized manuals of procedure and which have been shorn of individualization criticisms, do not merit the same concern for protection from public scrutiny…. In summary, discovery 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.

Id. (quoting *Curtis*, 21 Va. Cir. at 277-278, quoting *Johnson*, 9 Va. Cir. at 198)(emphasis added). Consistent with *Riverside,* Justice Lemons concluded: "This Court is in agreement with the opinions of Judge Annunziata [in *Curtis*] and Judge Coulter [in *Johnson*] that the privilege

against disclosure must be limited to accomplish the purposes of the legislation." *Id.* (emphasis added). Plaintiff too relied on *Johnson*. A911.

Plaintiff does not seek draft Committee policies, revision debate, etc.; such preliminary internal materials admittedly are privileged "deliberative analysis". Plaintiff simply is entitled to the final policies that MWH routinely disseminated widely, *e.g.*, to governmental and private authorities, at nurses and other computer stations for ordinary use re patients, etc.

Nurse Whelan deposed MWH "policies were stored in the computers and were available on 2 South to [patient's] nurses". A904. Also, Dr. Heusgen deposed STEMI procedure Order was "in the computer". A905. All 12 MWH policies withheld and denied likely are on MWH computers too.

Finally, Judge Greer debunks self-serving defense policies mantra:

> [T]he hospital's argument is without merit, for, if policies, protocols, and procedures are discoverable, it does not follow that health care providers would be any less conscientious in delivering care to patients. In fact, the converse is more plausible. It is more likely that, if policies, protocols, and procedures 'see the light of day,' health care providers will try harder to follow them.

Gravely v. Perren, 2009 Va. Cir. LEXIS 113, *6 (Martinsville Jan. 28, 2009).

D. "Good cause" privilege exception applies to policies.

"Section 8.01-581.17 allows discovery 'for good cause arising from extraordinary circumstances being shown'," wrote Justice Lemons in

Stevens. 40 Va. Cir. at 512. He explained §8.01-581.17 is only "qualified privilege similar to the privilege afforded by Rules of Court 4:1(b)(3)." *Id.*

Like incident reports, policies are *sui generis.* That evinces "good cause", especially coupled with chronic defense policies abuse.

E. Defendants waived any arguable privilege.

Defense twice introduced policies at trial. That waives any privilege, which suffices for reversal and remand, *see*, III (A), *supra*; yet again this Court still needs to adjudicate privilege on the merits since Plaintiff's "offensive use" of policies is before it now and Judge on remand, and Defendants will not waive again by using policies again. *See*, III(B), *supra*.

V. POLICIES ADMISSIBILITY

"All relevant evidence is admissible", unless contrary to Constitution, Court's Rules, or evidentiary principle. *Va. R. Evid. Rule* 2:402. "Every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant." *Virginia Elec. and Power Co. v. Dungee,* 258 Va. 235, 260 (1999)(emphasis added)(fence defect photos "relevant" though not "proximate cause of plaintiff's injuries").

In opposing discoverability by claiming there is no admissibility, Defendants resurrected *Godsey-Pullen* to presume their policies sacrosanct. But *Godsey-Pullen* is archaic, overgeneralized, and

misapplied; healthcare policies are admissible for numerous reasons.

A. ***Godsey-Pullen* does not exclude healthcare policies.**

The anachronistic "private rules" doctrine should not be reaffirmed for the new millennium. Significantly, however, the discoverability and even the admissibility of policies does not depend on this Court overruling *Godsey-Pullen*, as *Godsey-Pullen* readily is distinguishable and limited on the facts. Moreover, policies merely corroborating SOC first established independently by expert testimony does **not** contravene *Godsey-Pullen*.

1. ***Godsey-Pullen* should be overturned.**

Pullen reaffirmed *Godsey*; yet "one of the arguments in support of the *Godsey* decision of 1915 was the expressed observation that the majority rule then in vogue in the nation prohibited the introduction of a company's private rules. Since then, however, the climate has changed substantially." *Johnson*, 9 Va. Cir. at 202 (Coulter, J.).

By early 1980s, three-quarters of the nation had abandoned that 100 year-old rule. *Id*. at 203. *Pullen* acknowledged over 30 years ago the "majority of jurisdictions hold [private rules] are admissible". 226 Va. at 350

Godsey-Pullen's old argument that the doctrine supposedly is necessary to encourage private rules, 117 Va. at 169 and 226 Va. at 351, which was espoused by MWH, A1137; now is dubious analytically and

empirically. That *Godsey-Pullen* thinking is particularly misplaced in the context of the current sophisticated regulated healthcare industry.

Modern healthcare is steeped in rulemaking by government and numerous professional entities, wholly separate and apart from whether and to what extent Virginia continues archaically to subscribe to the minority "private rules" doctrine. Moreover, Virginia healthcare providers would expose themselves to more, not less, liability if they ever recklessly abandoned all private rules and practiced *ad hoc*.

The "private rules" doctrine that fit in the nostalgic twilight of the horse and buggy a century ago – and that long since has been rejected as unsuitable by the overwhelming majority of states – now is flagrant error in the modern era of big institutional healthcare. This Court applying since 2008 a modern "commercial business" realties analysis to limit the doctrine of "charitable immunity" and to deny it to big healthcare, *see, Univ. of Va. Health Servs. Found. v. Morris*, 275 Va. 319, 326-28, 336-39 (2008); is consistent with rejection or at least amelioration of the *Godsey-Pullen* legal anachronism in the context of big institutional healthcare.

Reversal of *Godsey-Pullen* involves *stare decisis*. But *Oraee v. Breeding,* 270 Va. 488-500 (2005)(medical malpractice decision "expressly overruled") declared: "Upon no sound principle do we feel at liberty to

perpetuate an error into which either our predecessors or ourselves may have inadvertently fallen, merely upon the ground of such erroneous decision having been previously rendered." (emphasis added).

2. *Godsey-Pullen* is distinguishable.

Even if the archaic "private rules" doctrine is not abrogated, it does not govern healthcare policies on several independent grounds. First, *Godsey-Pullen* applies only to "litigant who is not a party to such rules," 226 Va. at 351; and patients and healthcare providers are parties to policies.

Patients often have in-house patient advocates representing their interests in the rule-making process. Additionally, patients undeniably are the intended third-party beneficiaries of policies. "Patients are also parties to these [rules] as members of the public represented by government agencies which require and enforce health care standards for 'the public welfare'." SCHOCKEMOEHL, G.M., ADMISSIBILITY OF WRITTEN STANDARDS AS EVIDENCE OF THE STANDARD OF CARE IN MEDICAL AND HOSPITAL NEGLIGENCE ACTIONS IN VIRGINIA, 18 U. RICH. L. REV. 725, 743 (1984).

Healthcare providers obviously are parties to the hospital rules they promulgate, including physicians by their representatives on Committees. Further, physicians "are staff members to the hospital, and they sign and promise to follow hospital policy." A1152-53. SCHOCKEMOEHL at 743.

Second, *Godsey* and *Pullen* are distinguishable on their facts. In *Godsey*, a street car accident victim introduced the company's operation rules to establish the standard of duty to him. 117 Va. at 168-169. Similarly, in *Pullen*, a victim motorist introduced highway department maintenance guidelines to establish the standard of duty. 226 Va. at 345-46, 350-51.

Fatally, however, neither *Godsey* nor *Pullen* involved an expert. Plaintiffs in *Godsey* and *Pullen* attempted to establish the standard for negligence simply by bare introduction of private rules alone, without any expert to establish independently the legal standard as an evidentiary foundation, before introducing the private rules purely as corroboration.

Conversely, under Virginia's Medical Malpractice Act, Plaintiffs presumptively must rely upon expert testimony to establish the legal standard independently. *Va. Code* §8.01-581.20. Indeed, as a medical malpractice suit prerequisite, Plaintiffs must have an expert certify in writing a SOC breach before service of process is requested, *i.e.*, long before there is any discovery of Defendant's policies. *Va. Code* §8.01-20.1 and §8.01-50.1. Thus *Godsey* and *Pullen* are limited narrowly to fact patterns

which inherently are not characteristic of medical malpractice cases.[5]

Third, *Godsey* finding "no evidence of any custom based upon [the particular private rules]," 117 Va. at 168; likewise is distinguishable too. Judge Annunziata observed healthcare policies "materials...may properly be seen as reflecting widely-adopted standards established or required by third-party entities, such as the Joint Commission on Accreditation of Healthcare Organizations ('JCAHO')." *Curtis*, *supra,* 21 Va. Cir. at 279 (citing SCHOCKEMOEHL, 18 U. RICH L. REV. at 730.) Therefore, "to the extent the hospital's policies and protocols are reflective of industry custom and even statewide practices, they may be distinguished from the purely private rules held inadmissible by the Supreme Court in *Pullen*." *Id*. *Cf., X-IT Prods., L.L.C. v. Walter Kidde Portable Equip., Inc.*, 155 F. Supp.2d 577, 629 (E.D. Va. 2001)("guidelines...reflect business or industry practice").

Fourth, this Court in *Riverside* distinguished, rather than embraced, *Godsey-Pullen*; and "more importantly," upheld admission of hospital instructions and training materials that were "corroborative" of SOC set by expert testimony, versus "established" SOC. "In this case, the evidence of

[5] *Amicus* concedes that in medical malpractice (and other) cases, *Godsey-Pullen* prohibits an expert purporting to set the standard of care simply based on and by reference to Defendant's policies alone.

the staff orientation instruction and nursing curriculum…were not hospital policies or procedures of the type involved in *Godsey* and *Pullen*," 272 Va. at 529; and simply were "'corroborative' of the expert's standard of care testimony," not admitted to "establish" SOC. *Id*. at 528-529.

That *Riverside* delineation is consistent with Justice Lemons as Circuit Judge twice citing *Godsey and Pullen* as authority for: "There is no cause of action based on private rules; however, these rules 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. Authority,* 42 Va. at 329 (emphasis added) and *Hawkins*, 42 Va. Cir. at 319 (emphasis added). Also, *Fleming v. Mountain States Health Alliance*, 2012 WL 1909343, *4 (W.D.Va. May 25, 2012) was "unpersuaded by the defendant's argument that its policies, procedures and protocols are not discoverable under the *Godsey* and *Pullen* cases because they [supposedly] are irrelevant and inadmissible."

3. Policies are corroboration re expert standard of care.

As discussed, *see,* I, *supra*, Defendants cannot "approbate and reprobate," *Leech* and *Garlock*, *supra*; cannot introduce "same character" evidence with impugnity, *Pettus, supra;* and cannot use privilege as "shield and sword". *Walton, supra*. Defendants cannot deny and oppose policies

as some evidence of SOC, having used policies toward SOC themselves.

a. Defendants' use of policies.

At trial Defendant introduced policies in its case-in-chief. Specifically, Dr. Huesgen testified about MWH "policy" re transferring patients from its Emergency Room to its cardiac telemetry floor, to buttress the propriety of the patient having been transferred, *i.e.,* to "corroborate" being within SOC:

> Q: And if there had been any change that suggested some sort of cardiac problem that was active at the time, he wouldn't have been permitted to go to the floor, correct?
>
> A: Correct. There's a **policy** on the cardiac telemetry floor at Mary Washington Hospital that they cannot leave the emergency room if they have symptoms suggesting an active ongoing cardiac. So they can't leave with chest pain unless they have an order from the admitting doctor that they can leave.

A79 (emphasis added). Such defense testimony is proper, because policies can "corroborate" SOC "established" independently by expert testimony; so Plaintiff could not and did not object. *See*, V(A)(3)(b), *infra*.

What is improper (erroneous), however, is Plaintiff having been denied that exact policy in discovery, to which Dr. Huesgen had alluded in deposition. *See*, A905; IV at 11-14, *supra*. Although Plaintiff was permitted to cross-examine the doctor about the policy, she should have had in advance the benefit of the actual policy sought itself for independent verification, for exceptions or nuances, and potentially for other information

and/or material to which the policy reasonably may have led by investigation, further discovery and/or testimony preparation; instead of simply having to accept whatever the doctor chose to say, unimpeachably.

Also, Defendant again injected policies in the case-in-chief. Specifically, Dr. Munkaila testified about – indeed, denied – MWH policy re the time within which hospitalists like him had to see new patients on the cardiac telemetry floor, to corroborate him being within SOC:[6]

> Q. Was there any **requirement** at Mary Washington Hospital that you see a new patient face-to-face and start that admission and history process that you re describe for us within some certain period of time after agreeing to admit him to the hospital?
>
> A. No.

A93-T1299 (emphasis added). Such defense testimony is proper – policies can "corroborate" SOC "established" independently by expert testimony – so Plaintiff could not and did not object. *See*, V(A)(3)(b), *infra*.

[6] Despite defense counsel referring to "requirement" in lieu of "policy," it bespeaks the same thing – policies. Substance controls semantics. Moreover, Defendant affirmatively disclaiming the existence of any controlling policy still raises policy – or the absence thereof – re SOC, particularly when in fact there is a policy on point that contradicts and undercuts Defendant. Defendant certainly opens the door to impeachment by contrary policy.

However, it was error that Plaintiff was denied the "hospitalist" policy sought in discovery. *See*, A1154; IV at 11-14, *supra*. First, based on the consistent deposition testimony of Nurse Practitioner and ER Nurse that "there's a policy [hospitalists] have to see the patient within an hour," with that policy in hand Plaintiff would have impeached Defendant doctor's denial – with such a blatant falsehood being a case-breaker on liability.

Second, alternatively, if Plaintiff had such a policy in hand from discovery, Dr. Munkaila certainly would have testified truthfully about its existence, which still would have been a material difference re SOC and liability. Bottom line: Defendants being able to withhold policies from Plaintiffs is license for them to claim anything with impunity, while Defendants having to produce policies to Plaintiffs ensures candor; and sound public policy clearly favors the latter over the former.

b. Plaintiff's use of policies.

Policies admissibility re SOC does not depend on Defendants introducing policies. As Plaintiff asserts on appeal, "<u>these policies would be admissible to **corroborate** the widow's experts' testimony on standard of care</u>". BA9 (emphasis added).

Plaintiff acknowledges policies "can't be used solely as the basis for standard-of-care testimony at trial," A1124, *i.e.*, to "establish" SOC. Yet

Plaintiff delineates policies can be "corroboration for my [SOC] expert's standard of care testimony which is right out of *Riverside*," A1156; "they can be used for corroboration." A1140.

Policies alone do not establish SOC. But they may be some evidence by Plaintiffs if SOC first is established independently by expert testimony. *See, Riverside,* 272 Va. at 528-29; *Bly v. Rhoads*, 216 Va. 645, 653 (1976); *Stevens v. Hosp. Authority,* 42 Va. Cir. at 329-30 (Lemons, J.); *Hawkins,* 42 Va. Cir. at 319 (Lemons, J.); *Curtis,* 21 Va. Cir. at 278-79 (Annunziata, J.); *Johnson,* 9 Va. Cir. at 202-03 (Coulter, J.); and SCHOCKEMOEHL, 18 U. RICH. L. REV. at 741-44 & n.81.

As Circuit Judge, Justice Lemons twice delineated: "There is no cause of action based on private rules; however, these rules 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. Authority,* 42 Va. Cir. at 329-330 (emphasis added) and *Hawkins,* 42 Va. Cir. at 319 (emphasis added). Justice Lemons cited *Godsey* and *Pullen* as authority for his evidentiary pronouncement. *Id*.

If an expert testifies to establish SOC as foundation (based on his education, training, experience, literature, etc.), subsequently policies can be introduced as "corroboration" of that standard. That is analytically sound

and fundamentally fair: the pivotal predicate independent expert testimony of SOC elevates policies beyond mere bare "private rules" and sufficiently delineates them as some concrete corroborative examples of SOC.

Policies were not offered in evidence in *Riverside,* but this Court's reasoning suggests policies being admissible as "corroboration" of SOC, though not to "establish" SOC. "More importantly, it was clear throughout this proceeding that the trial court ruled, and the Estate agreed, that the evidence in question ['staff orientation instruction and nursing curriculum' claimed but found not to be 'private rules'] would not be admitted to establish the standard of care;" 272 Va. at 529, and just was "corroborative of the expert's standard of care testimony". *Id*. at 528 (emphasis added)[7]

Bly also did not reach admissibility of policies, because Plaintiff did not introduce sufficient SOC expert testimony for a *prima facie* case. But *Bly* observed judge's exclusion of hospital rules was only "arguably... supported by precedent [of] *Godsey*". 216 Va. at 653(emphasis added). "*Bly*...implies that [policies] may provide some evidence of the standard of care," reasoned Judge Annunziata. *Curtis*, 21 Va. Cir. at 278-79.

[7] Plaintiff relied on *Riverside* at hearing for policies discovery and for policies admissibility as "corroboration", A1122-24, A1138-40, A1156; and in her objection to the Order denying policies discovery. A1165.

Analogously, use of policies to "corroborate", but not to "establish," SOC is identical to use of agent declarations as evidence of agency in Virginia. The "declarations of an agent cannot be received to prove his agency until the fact of his agency has been otherwise established," *Turner v. Burford Buick Corp.*, 201 Va. 693, 697 (1960)(emphasis added); but once independent "evidence has been introduced tending to prove the alleged agency, or to make out a *prima facie* case thereof, the declarations of the alleged agent become admissible in corroboration". *Bloxom v. Rose*, 151 Va. 590, 599 (1928)(emphasis added). *Turner. Id.*

B. Other *Godsey-Pullen* grounds of policies admissibility.

Even if policies were not used to corroborate SOC first established independently by expert testimony, policies still are admissible for various other purposes. *Cf., Lombard v. Rohrbaugh*, 262 Va. 484, 497 (2001)(evidence of insurance generally inadmissible, but admissible to show bias or prejudice). Under *Godsey-Pullen*, policies still are relevant and admissible for multiple additional distinct grounds other than SOC.

Plaintiff emphasized that she did not "intend to use [policies] **solely** for standard of care". A1122 (emphasis added). "So we contend that just like *Riverside*, there are other reasons why policies can be important and are discoverable in these actions." A1139-40 (emphasis added).

1. Policies are admissible re "habit"/"routine practice".

Healthcare interests passed *Va. Code* 8.01-397.1, making habit and/or routine practice evidence admissible in medical malpractice cases:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eye witnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Evidence of prior conduct may be relevant to rebut evidence of habit or routine practice.

Va. Code 8.01-397.1(A).[8] Policies inherently bespeak "routine practice" and "habit": as Plaintiff argued, "hospital policies give me facts about how the place runs and who they expect [to do what, when, and how]." A1154.

Defendant healthcare providers frequently profess no recollection of malpractice-related conduct in question. Policies stand to refresh things.

Also, claimed memory loss often segues to healthcare providers testifying self-servingly about their supposed personal habit and/or organization's routine practice, *i.e.*, to attesting generally to having done the right thing under the circumstances. Thus, policies also stand as a singular yardstick by which to measure - and impeach - claimed habit

[8] "A 'habit' is a person's regular response to repeated specific situations. A 'routine practice' is a regular course of conduct of a group of persons or an organization in response to repeated specific situations." 8.01-397.1(B).

and/or routine practice under §8.01-397.1, necessarily making them relevant, material, and even crucial evidence. *See also*, V(B)(2), *infra*.

In *Williamson v. Columbia/HCA John Randolph, Inc.,* No. CL 00278, Hr'g Tr. (Chesterfield Jun. 16, 2000), Add.4, Plaintiff emphasized policies were "best evidence" of routine practice. Judge concurred: "As far as a routine practice of an organization, now you can't get that unless you have some record like [policies]." *Id.* at 15.7-16 (emphasis added).

2. Policies are admissible re "impeachment".

Plaintiff argues policies are admissible for impeachment. BA8-10. Again, as Judge Annunziata in *Curtis* observes, policies "will likely permit a more thorough and effective examination of the defendants and their experts," 21 Va. Cir. at 280; which includes impeachment with policies. *Cf., Walton*, *supra,* 280 Va. at 130 (medical malpractice Defendant cannot avoid impeachment by using privilege claim as both a shield and a sword).

When Defendant's nursing expert claimed SOC did not require a bed alarm/alert and that they were not used on her VCU Hospital unit, Judge ordered discovery of VCU Health System's hospital-wide Fall Prevention Protocol proving they were used at VCU Hospital. *Burrell v. Riverside Hosp., Inc.*, No. CL1101633F-15, Order at 1 (Newport News Nov. 19, 2012) Add.1. So under pain of policies impeachment, Defendant's SOC expert

had to be honest that bed alarms/alerts actually were used at VCU.

3. Policies are admissible re "control".

Plaintiff requested policies discovery re "control" among Defendants:

> We intend to use them because we have three defendants in this case, emergency room, hospitalist and the hospital itself.
>
> And one of the issues is to determine who had control of the patient when and why. And so with those policies based on the testimony we've gotten in deposition, we believe we'll be able to more clearly establish once the hospitalist accepted the patient in the emergency room, does he then take control and responsibility for that patient? Is it a joint-control issue? Who instructs the nurses? Who issues the orders?
>
> There's testimony from one nurses that patients aren't supposed to come upstairs until their labs are available. Those are the types of things we would like to discovery.
>
> ****[It] certainly can be used for foundation to establish control between the defendants and for other relevant considerations based on the *Riverside* case.
>
> **** [It] helps us establish the timeline for who's primarily responsible for that patient at any given point.

A1122-23, A1124, A1139. Without policies, Defendants muddled "control".

In *Houchens v. Rector and Visitors of the Univ. of Va.,* 23 Va. Cir. 202, 205 (Charlottesville Jul. 11, 1991)(citations omitted), another medical malpractice case, Judge found policies discoverable re "control" of nurses: "Another element is the extent to which the work of the employee is subject to the control and direction of the employer. It appears to the court that the

extent to which the nurses were or were not obligated to abide by standing orders, protocols, or manuals is relevant to the determination…."

4. Policies are admissible re "agency"/"vicarious liability".

Broaddus v. Standard Drug Co., 211 Va. 645, 654-56 (1971), upheld admission of private written manual and oral instructions re whether tortfeasor was acting within scope of employment for purposes of vicarious liability. Similarly, policies may lead to admissible evidence indicating MWH nurse was "temporary agent" of Defendant physician/practice. *Whitfield v. Whittaker Mem'l Hosp.*, 210 Va. 176, 182 (1969)("evidence from which the jury could determine [hospital's nurse-anesthetist] was temporary agent" of Defendant doctor)(emphasis added).

5. Policies are admissible re "awareness"/"notice".

Plaintiff argues policies are admissible to show "awareness". BA6-8. *New Bay Shore Corp. v. Lewis*, 193 Va. 400, 409 (1952) held Defendant's safety rules and instructions in evidence "indicate that defendant was aware of the potential dangers involved".[9]

[9] Defendant having "specialized safety training warning against the very omissions he made prior to the accident" is "knowledge or notice" shows willful and wanton conduct. *Alfonso v. Robinson*, 257 Va. 540, 546 (1999). Defendant's departure from "instruction and training" evinces gross or willful and wanton negligence. *Green v. Ingram*, 269 Va. 281, 291 (2005).

VI. DATA/METADATA DISCOVERABILITY

Plaintiff's first RP1 sought: "All medical records…and other documents [re patient's] treatment and care." A898, A923. By it, Plaintiff sought "medical records and data electronically maintained on MWH's electronic computer system". A898-899.

Specifically, Plaintiff sought MWH's computer "prompts" or "drop-down menus" of options from which Defendants selected for inclusion in the patient chart. A902, A1114-18. Plaintiff also sought MWH's electronic records that identified by name, time, and content each accessing of the electronic patient chart, A903, BA10; commonly known as "Audit Trails".

Plaintiff relied on 18 VAC §85-20-26,[10] *Va. Code* 8.01-413, and *Va. Sup. Ct. Rule* 4:1. A903. MWH had no authority.

Medical malpractice punitive damage claims inherently import proof of Defendant's prior knowledge and awareness. *Boyd v. Bulala,* 877 F.2d 1191, 1198 (4th Cir. 1989). *Owens Corning Fiberglas v. Watson*, 243 Va. 128, 136-37 (1992)(Defendant's claim summary evinced "notice" for punitive damages). Plaintiff seeking punitive damages must introduce evidence of Defendant's awareness, and policies put on notice.

Defendant's gross, willful or wanton negligence is an exception to Plaintiff's contributory negligence, *Wolfe v. Baube,* 241 Va. 462, 465 (1991); and to Defendant's sovereign immunity. *Burns v. Gagnon*, 283 Va. 657, 677-78 (2012). Policies are evidence of such awareness/notice.

[10] 18 *VAC* §85-20-26 provides: "Practitioners shall maintain a patient record for a minimum of six years following the last treatment." All electronic records Plaintiff sought are covered by that preservation period.

MWH argued only that its electronic record drop-down "choices…are simply not part of the patient's chart," A1129, and thus are "not relevant," A1130-31; MWH did not address Plaintiff's request for Audit Trails. Nonetheless, Judge denied first Motion to Compel. A1157-59, A1164-66.

A. Post-*Riverside* electronic recordkeeping.

Riverside in 2006 re recordkeeping in 1997 had this Court on the cusp of electronic recordkeeping. Patient charts and "hospital records" were handwritten, but incident report and other data from paper records manually was inputted into an electronic database, *id.* at 530-531; which was upheld as discoverable and admissible. *Id.* at 532-534.

Temple in 2014 lands the Court in the thick of electronic data entry, storage, and revision. MWH admittedly is emblematic: "Most charting is done electronically, and any paper documents…are scanned and then discarded contemporaneously." A969. MWH elaborates on point:

> Across the nation health care facilities are largely beginning to store health information electronically. The [2009] American Recovery & Reinvestment Act…includes a provision to encourage health care providers to adopt and effectively use electronic medical records. PUBLIC LAW 111-5. Via the Act, the Federal government is providing funds to encourage health care providers to adopt a paperless system for the storage of medical records. This part of the bill is called the Health Information Technology for Economic and Clinical Health Act [("HITECH")].

A969 (emphasis added). It is imperative this Court declare patient access

to all electronic recordkeeping, including Audit Trails and other metadata.

Nurses, doctors, and others routinely enter data at remote stations, which automatically feeds into central databases. Likewise, staff scanning barcodes on portable carts, apparatuses monitoring vitals/infusions, etc. feed data into the same electronic databases.

Hospitals' highly sophisticated electronic recordkeeping systems:

1. Separate "incident report" data from "patient chart" data;

2. Store data in "patient chart" under chards;

3. Facilitate seemless deletions and additions of "patient chart" data; and

4. Record the identity, time, and content of each "patient chart" access.

Significantly, however, the paper printout of the "patient chart" does not produce any of the aforesaid metadata; rather, it shows just the final sanitized (potentially edited) versions. Only the complete electronic version of the "patient chart," including particularly its Audit Trail, will disclose all of the aforesaid accessing, alterations, and other metadata.

B. *Va. Code* §8.01-413 entitles patient "records and papers".

Va. Code §8.01-413(B) provides: "Copies of hospital, nursing facility, physician's, or other health care provider's records or papers shall be furnished" (emphasis added). That includes copies "from computerized or other electronic storage". *Va. Code* §8.01-413(A)(emphasis added).

In this modern age of electronic recordkeeping (where paper printouts of electronic record indisputably do not reflect the entire electronic record), *see,* VI(A), *supra,* and VI(E), *infra*; "copies" furnished by healthcare providers must include the entire electronic record in its native form, including the Audit Trail, any other metadata, and even computer "prompts" or "drop-down menus" from which data-inputters selected.[11] At minimum, it must be so on specific patient request.

Otherwise, healthcare providers eviscerate the letter and intent of §8.01-413 by systematically maintaining patient records electronically, but providing only a part on incomplete paper printouts, instead of everything on a disk in their native electronic form. Moreover, healthcare providers simply burning a disk obviously is faster, cheaper, and eco-friendlier.

C. ***Riverside*** **entitles "factual information of patient care".**

§8.01-413 entitles Plaintiff to MWH's complete electronic record. However, *Riverside* also independently entitles her the same, ensuring that healthcare providers cannot interpose §8.01-581.17 to trump §8.01-413.

[11] Such "prompts" and "drop-down menus" simply are the modern-day electronic functional equivalent of pre-printed checklists, blanks, etc. on paper-based records, which obviously are provided as part of the print copy, not redacted and withheld. The paper box or blank - the electronic prompt or drop-down - that the healthcare provider did not choose is as or more informative than what it did choose, and in any event adds context, perspective, and contour to what was chosen and completed.

Riverside held all "factual information of patient care" discoverable, regardless how titled and kept, even if facially seeming within the ambit of §8.01-581.17. 272 Va. at 533. That necessarily extends to healthcare providers' electronic data/metadata, including Audit Trails; otherwise, electronic recordkeeping affronts, circumvents, and undercuts *Riverside*.

D. *Va. Sup. Ct. Rules* entitle all "relevant" electronic records.

Va. Sup. Ct. Rule 4:9(b)(iii)(B) makes Requests for Production applicable to "Electronically Stored Information".[12] Even if "a request does not specify the form or forms for producing electronically stored information,…a responding party must produce the information as it is ordinarily maintained". *Rule* 4:9(b)(iii)(B)(2)(emphasis added).

MWH admittedly maintained "charting…electronically". A969. And Plaintiff requested "medical records and data electronically maintained on MWH's electronic computer system," A898-899; but did not get all of it - got only electronic copies of the "charting" - did not get the Audit Trail, any other metadata, "prompts" or "drop-downs".

Even if *arguendo* Audit Trails, other metadata, "prompts" and/or "drop-down menus" are not covered by §8.01-413 and/or *Riverside*, they

[12] MWH did not prove or even claim under *Va. Sup. Ct. Rule* 4:1(b)(7) that the electronically stored medical information Plaintiff requested was "not reasonably accessible because of undue burden or cost".

clearly are covered by the greater breadth of *Rule* 4:1(b)(1). As discussed, IV(A), *supra*, 4:1(b)(1) extends to anything "relevant," anything "reasonably calculated to lead to the discovery of admissible evidence;" regardless whether technically it constitutes the patient's electronic "charting" record.

Defendants cannot argue seriously that Audit Trails chronicling the access date, identity, and content (including alterations) of patient records do not meet the liberal test of *Rule* 4:1(b)(1). Likewise, Defendants cannot argue seriously that (other) metadata - actual "hidden" substantive data about the electronic patient record - is not inherently discoverable too.

Although MWH summarily asserts computer prompts or drop-down menus are "not relevant" because they were "not chosen," that simply is not true. Plaintiff reiterates footnote 11, *supra*.

A decade ago, this Court addressed metadata when it was the subject of extensive discovery and admission in business litigation:

> 'Metadata,' which also is referred to as 'data about data,' is a relational database that contains information about the data located in a data warehouse. The metadata is accessed through certain tables and indexes [sic], which collectively are known as the 'schema'.

MircroStrategy, Inc. v. Li, 268 Va. 249, 253 (2004). Metadata also is relevant to personal injury litigation, particularly patient medical records; and there is no principled reason why metadata discovery should turn on

whether MWH is prosecuting business litigation versus defending medical malpractice litigation, especially re patient medical records.

E. Federal data/metadata, including audit trails.

Although this Court his not addressed metadata since *MicroStrategy*, Federal authorities have been involved regularly, very savvy, and increasingly vigilant over the past decade. This Court needs be now too.

1. *Fed. R. Civ. P.* 34(b)(2)(E) and Jurisprudence.

Va. Sup. Ct. Rule 4:9(b)(iii)(B)(2) is modeled after *Fed. R. Civ. P. Rule* 34(b)(2)(E), which has been applied expansively. As State Judge Thomas D. Horne observed in 2007, "Federal Rules address the emerging role of electronic data in the discovery process by recognizing that 'electronic information must be treated on equal footing with paper documents'." HORNE, T.D., ELECTRONIC DATA: A COMMENTARY ON THE LAW IN VIRGINIA IN 2007, 42 U. RICH. L. REV. 355, 378-79, 380 (2007)(emphasis added)(admiring "beauty of the new federal system" and touting adoption).

A 2010 survey of Federal jurisprudence found virtually all cases held metadata discoverable. One alleged unnecessary surgery and held "the hospital would be compelled to produce all responsive documents in electronic format, along with any metadata." Annotation, *Discoverability of Metadata*, 29 A.L.R. 6th 167 (2010)(citing *Allen v. Woodford*, 2007 WL

309943 E.D. Cal. 2007)(emphasis added)).

Metadata discovery is the integral norm in Federal Courts. The issue is more one of which party will pay for metadata discovery, not whether there will be metadata discovery now. *E.g.*, *Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 2013 WL 1192947 (E.D. Va. Mar. 21, 2013); *Mann v. Heckler & Koch Defense, Inc.*, 2011 WL 1599580 (E.D. Va. Apr. 28, 2011); *Fells v. Virginia Dept. of Transp.*, 605 F.Supp.2d 740 (E.D. Va. 2009).

2. HIPAA, HITECH, and Code of Federal Regulations.

Trenchant "Introduction" to federally-protected Audit Trails follows:

> In the days of the handwritten medical record, it was the job of forensic documents analysts to search for evidence of falsification of records by comparing handwriting, inks, paper stocks, looking for impressions from the writing utensil on pages beneath the subject page, etc. None of this can be done with a record that is newly printed by a computer. At first blush, a printout of [an electronic] medical record will show all of the entries neatly organized in perfect chronological sequence, and there is no way to tell - on the surface - whether the entries are *bona fide* or not.
>
> The audit trail may be the key to discovering whether an electronic medical record has been falsified, amended or back-dated. The audit trail is a log, which institutions are mandated to maintain by federal statute, that shows the identity of the individual accessing the record, and the time and date of record access, the record or records accessed, the portion of the record accessed, and any modifications made.
>
> Valuable information can come to light through a careful scrutiny of the audit trail's contents. Audit trails allowed the authors of this paper to discover vital information, e.g., that attendings who

> denied involvement in the patient's care had actually accessed a patient's diagnostics on multiple occasions, and it revealed names of involved radiologists who became key witnesses and who would otherwise have remained hidden. Audit trails helped us establish that even though the nursing flow sheets appeared to be maintained contemporaneously as events unfolded, that the target period had no contemporaneous entries and that late entries and amendments to data occurred long after the key events unfolded. Scrutinizing the audit trail before a deposition resulted in a line of questioning that exposed that late data entries were actually made with the assistance of the risk manager. Audit trails can allow plaintiff's teams to establish that coincidental-appearing data entries are much more than coincidences.

BOWERS, M.R., JACKSON, N.S. & MEYERS, J.I., FOLLOW THE AUDIT TRAIL, 2 N.Y. LIT. REV. 11 (2010)(emphasis added). *Amicus* commends this Court to the article's ensuing 5-page case expose replete with actual electronic screenshots and informative detailed explanations. *Id*. at 12-16.

The Federal statutory fountainhead is Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), supplemented by 2009 HITECH cited by MWH, *supra* at 39. Although referenced mostly in the context of third-party disclosure, HIPAA also controls electronic recordkeeping and patient access. 45 CFR Part 164 ("Security and Privacy").

Subpart C of Part 164 (45 CFR §§164.302-164:318) is entitled Security Standards for the Protection of Electronic Protected Health Information and features Appendix A, "Security Standards: Matrix," a concise tabular summary of Subpart C's "Administrative Standards". A

covered healthcare provider like MWH must "ensure the confidentiality, integrity, and availability of all electronic protected health information [it] creates, receives, maintains or transmits." 45 CFR §164.306(a)(1).

Notably, several paragraphs in Subpart C's "Technical Safeguards" Section are the specific legal and factual basis for Audit Trails:

> A covered entity or business associate must, in accordance with §164.306:
>
> (a)(1) *Standard: Access Control*. Implement technical policies and procedures for electronic information systems that maintain electronic protected health information to allow access only to [authorized] persons….
>
> (2) *Implementation specifications*:
>
> (i) *Unique user identification (Required)*. Assign a unique name and/or number for identifying and tracking user identity.
>
> ***
>
> (b) *Standard:* ***Audit Controls***. Implement hardware, software and/or procedural mechanisms that record and examine activity in information systems that contain or use electronic protected health information.
>
> (c)(1) *Standard: Integrity*. Implement policies and procedures to protect electronic protected health information from improper alteration or destruction.

45 CFR §164.312 (italics in original)(underlining and bolding added).

MWH's systemic compliance produces the following set of metadata, *i.e.*, Audit Trail, re accessing the electronic patient charting that Plaintiff sought,

A903, BA10: (1) name of each accessing individual; (2) date and time of each access; (3) each part accessed; and (4) each alteration made.

Subpart E of Part 164 (45 CFR §§164.500-164.534) is entitled Privacy of Individually Identifiable Health Information. “[A]n individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set”. 45 CFR §164.524(a)(1). “Designated record set” specifically includes, but is not limited to, patient’s “medical records” and “protected health information,” *i.e.*, includes Audit Trails. 45 CFR §164.501 (Definition. *Designated record set*). “If the protected health information that is the subject of a request for access is maintained in one or more designated record sets electronically and if the individual requests and electronic copy of such information, the covered entity must provide the individual with access to the protected health information in the electronic form and format requested by the individual.” 45 CFR §164.524(c)(2)(ii)(emphasis added).

Hence, Federal law entitles Plaintiff all patient healthcare information, including Audit Trails and all other metadata, in its native electronic form and format maintained by MWH. Plaintiff requested that, and its objection by MWH and denial by Judge contravened Federal law; requiring reversal.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for additional discovery re troponin levels, policies and procedures, metadata (including audit trails), and the fruits thereof and for new trial on all issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2014, fifteen copies of the above Brief *Amicus Curiae* have been hand-delivered to the clerk's office. This same date, three copies of the same have been sent via First Class Mail to the following counsel:

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ADDENDUM

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

SHIRLEY FRAZIER BURRELL,

Plaintiff,

v.

No. CL1101633F-15
JURY TRIAL DEMANDED

RIVERSIDE HOSPITAL, INC.,
AND NURSE M. AMES,

Defendants.

10/18/12 & 11/6/12 HEARINGS ORDER

THIS CAUSE came on for hearing before the Court in person on October 18, 2012, and by telephone on November 6, 2012, on Plaintiff's Motion to Enforce Subpoenas *Duces Tecum*, VCU Health System's Objections and Response to Subpoena Duces Tecum, and Defendants' Motion to Quash Subpoenae Duces Tecum;

WHEREAS Plaintiff re the Subpoena *Duces Tecum* of Nurse Janet Willersdorf voluntarily withdrew entirely Sections I (A, C, D, and E) and Sections II (A-C and D-G) and voluntarily limited Sections I (B) and II (D) to "bed alarms/alerts"; and re the Subpoena *Duces Tecum* to VCU Health Systems voluntarily withdrew entirely Sections A, C, D, and E and voluntarily limited Section B to "bed alarms/alerts"; it is therefore:

ORDERED pursuant to Va. Sup. Ct. R. 4:5(b)(4)(A)(iii) that Defendants' expert, Nurse Janet Willersdorf, shall respond to Sections I (B) and II (D) of her Subpoena Duces Tecum as modified to "bed alarms/alerts," and shall deliver any responsive materials to Plaintiff's counsel by October 25, 2012; and it is:

FURTHER ORDERED pursuant to Va. Sup. Ct. R. 4:9(A) that non-party, VCU Health System, shall respond to Section D of its Subpoena *Duces Tecum* as modified to "bed alarms/alerts," but only with responsive materials applicable to its Orthopaedic units on an individual and/or hospital-wide basis (specifically its 10-page hospital-wide Fall Prevention/Falling Star Protocol and its 6 pages of orientation training text booklets from its Orthopaedic Units employee files); and shall provide all responsive materials to Plaintiff's counsel; and it is:

FURTHER ORDERED that Plaintiff shall pay non-party, VCU Health System, $1,000.00 of its requested $1,475.00 in costs for investigation, search, and production; but is not required to pay VCU Health System its requested attorney's fees for opposing the Subpoena or appearing at hearings; and it is:

FURTHER ORDERED that the Clerk of Court shall forward a copy *teste* order to undersigned counsel upon entry.

12-13-12 A. Waterman, K. Newsome, W. Demarest

ENTERED on this 9th day November, 2012, at Newport News, Virginia.

The Honorable Timothy S. Fisher
Circuit Court Judge

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I certify that the documents to which this authentication is affixed are true copies of a record in the Newport News Circuit Court, that I have custody of the record and that I am the custodian of that record.

Rex A. Davis, Clerk

By Donna P. Burnett D.C.

V I R G I N I A
IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

ELLEN F. GARNER,

Plaintiff,

vs. LAW NO. L00-1107

SENTARA NORFOLK GENERAL HOSPITAL
and
TAMARA J. MORTON,

Defendants.

BEFORE: The Honorable Lydia C. Taylor, Judge
DATE: February 20, 2001

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APPEARANCES:

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The pretrial conference in the above-styled matter commenced at 9:00 a.m.

THE COURT: First, what is your trial date?

MR. WATERMAN: March the 12th

MR. MORELAND: March the 12th.

THE COURT: Do you want the back and forth of the discovery hearing, or do you just want rulings and arguments on specific things? It is entirely up to you what you do, but this is a lot of back and forth on discovery. I leave it to you

MR. MORELAND: I think we ought to take everything down.

THE COURT: Okay. Now, who has a copy of the scheduling order so I can see what the deadlines are on for each, because you mentioned deadlines on a couple of motions.

MR. MORELAND: I will see if I can get one for you.

THE COURT: You mentioned February 8th as a deadline for discovery depositions, and I assume that there was an earlier deadline for the designation of experts.

MR. MORELAND: This is the first discovery order, Your Honor. It was amended by agreement with permission of the --

THE COURT: Well, just as to one person, wasn't it? I have got that consent order.

MR. MORELAND: Actually, it was amended as of today; the dates were changed for the designation of experts.

THE COURT: You will have to tell me how it was changed I thought it was just one deposition that was changed with the consent order.

MR. MORELAND: Here is the second order, which changes the respective dates for designation of experts.

THE COURT: Okay. Well, what is the date that each of you had to designate experts?

MR. MORELAND: January 2 --

THE COURT: We are talking about the change date?

MR. MORELAND: Yes, ma'am. January 2 and February 2.

THE COURT: January 2 for you -- for the plaintiff, I mean. And February 2 for you?

MR. MORELAND: Yes, ma'am.

THE COURT: Okay. Discovery depositions had to be completed by February 8th; you listed that somewhere, Mr. Waterman, is that correct?

MR. WATERMAN: That's correct.

THE COURT: Okay. All discovery depositions.

And you see, every time you change a date by agreement, the two of you, it causes another date to be bumped back, because that only gives six days to depose all defense experts You name experts, and then he has only got six days to depose them.

Realistically, his experts, and you, and yours, are just not going to have dates available for depositions in that timeframe. So, that creates a problem right there.

Let me go through it one piece at a time, though. Settlement conference is today, all discovery completed by January 26, all interrogatories and requests for productions served, so the responses were due before January 26 All depositions upon written questions, oral examinations, including de bene esse, by January 26 I thought you told me February 8th, is that what it was expanded to?

MR. MORELAND: Yes, ma'am

THE COURT: You cut to the chase and gave me the amended dates per. Is there anything else in here of deadline dates?

MR. MORELAND: There is only one other thing I would direct the Court's attention to

THE COURT: Relevant deadline dates and scheduling?

chronic problems with lack of availability of Mr. Moreland.

THE COURT: Okay. Let's state that in the future -- because I really believe in solving problems in the future, not just going back, assessing blame -- please don't ever tell anybody you don't have any available dates when you have got me. I am always happy to do it at 8 o'clock, even if you have got to carry a jury trial. Mr. Moreland, you know you can get a date.

MR. MORELAND: Yes, ma'am.

MR. WATERMAN: It has not simply been getting to you; it has been such fundamental things as getting Judge Jacobson's order entered, which took four or five or six weeks. It has been about getting deposition dates, where I have made myself generally available and Mr. Moreland would say he doesn't have time for weeks on his schedule.

THE COURT: Can we go off the record a moment?

(Off the record discussion.)

THE COURT: Let's go back on the record. Now, what is the first thing we need to deal with?

MR. WATERMAN: I am flexible.

THE COURT: What you are asking is, then, this posture of the matter is that the policies and procedures have not been produced in discovery; Judge Jacobson ruled

tentatively they would not be produced, but with leave for you to file it before me at a later point.

I have read the materials that you have presented in favor of presenting them; I have told you that, as a general rule, they are not going to be brought out in the case, but that they may well be discoverable. Tell me what your argument is, other than the standard that they are not the standard for the standard of care, if you will pardon my redundancy.

MR. MORELAND: Yes, ma'am. First of all, there was a brief filed before the hearing with Judge Jacobson on the issue of the policy and procedures.

THE COURT: Did it say anything much more than what I said, that normally it is the standard of care? The standard of care is set by law. That policy reasons, encouraging you to be safer than is the minimum requirement for a safety net, favor not revealing if you set a higher standard for yourself. The basic rules that I have said; does it say anything more than I have said that I need to read it desperately?

MR. MORELAND: You don't. The two Supreme Court cases that are always cited, Pullen v. Nicken, and the other one escapes me right now, but there is another one; those are cases where the plaintiffs argued to introduce the policies and the Supreme Court said well,

you can't do that, and the defense can't do it, either, and Your Honor -- you have got your finger on the issue there.

The rub in this case is that this is a fall case, and at Sentara, like at every other hospital --

THE COURT: Did the patient fall directly off the bed?

MR. MORELAND: No, ma'am; she fell in the hallway after getting up out of the bed and walking out of her room.

THE COURT: So, the essence of the charge of liability is that they should have, in essence, put her in a position where she could get out of the bed, hence the reference to rails? Second, they should have had people more on call, such that if you had a button somebody would have come, and three, that she shouldn't have been unaccompanied in the hallway? Is that the basics? Don't let her get out, don't let her get out without accompaniment?

MR. WATERMAN: Essentially, these beds on this unit are all sort of the Rolls Royce, and they have built into them an alarm system that is pressure sensitive, such that if a patient leans up, maybe only to sit up, but potentially to get out, the alarm goes off as a warning and the nurses can come running. And all you

have to do is flip a switch on the side of the bed to activate that alarm.

So at the core, we are saying you should have flipped the switch for this high risk patient.

THE COURT: All right First, let's get back to the policies and procedures. I think he is entitled, at this point, to have the policies and procedures However, they are not admissible at trial at this point, unless you produce some showing of unfairness to not be able to use them For you -- and this is what concerns me and I want you to be real aware of this - until your experts start relying on it and referring to it.

MR. MORELAND Let me tell you what has happened thus far.

THE COURT: Let's deal with one issue at a time. Do you have anything other than your generalized objection based on the general reading? I think your reading generally is absolutely correct about the fact they are normally not admitted at trial to producing them at this point. Any other objection you want to state on the record, or are you relying on your brief?

MR. MORELAND: I am relying on the brief, and in addition there are a couple of opinion letters written by judges of this Court, ruling that they are not discoverable, and I certainly have those for Your Honor.

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opinions on policies and procedures, they are going to be admissible on cross examination because I am going to allow him to bring them out. But certainly for the purposes of discovery, the policies and procedures get handed out.

MR. MORELAND: Here they are.

THE COURT: Here they are. Now, let's take a breather, because I can't absorb but so much. You two are much more mentally agile than I am.

MR. MORELAND: During the course of Ms. Cox's deposition, this three page document was sealed in an envelope, and I have it, the exhibit.

THE COURT: I understood from what he wrote that that's what you two agreed to. And for the record, he has now tendered it to Mr. Waterman.

Okay, now, let's go through your filing. Your motion to enforce the order to compel on the hospital nursing education; as soon as those materials arrive here and the original arrives at your office, will be complied with.

You then ask that she be ordered to search. Mr. Moreland has told me that, to the best of his knowledge, he instructed her in front of you to do so; she has informed him that she has done so. Certainly, she will also be -- as I have ordered, a continuation of

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her deposition will be scheduled no earlier than Thursday for you to review those documents.

You may certainly ask her that question again and remind her that she is under oath, under pain of perjury, and ask her has she made the search of the materials to find all the nursing documents on the subject, and if what she has gotten is the materials that are going to be brought to you today, just now by Mr. Moreland's office, from January and August of '98, as well as one of the videos, as well as the video that has been mailed to you, just ask her, "is this everything that you found, did you make the search," and you can ask that at the deposition. With that, I think we have finished with the issue of Mrs. Marshall and the nursing content issues that you raise in your motions; is that correct?

MR. WATERMAN: Agreed.

THE COURT: Okay. Now, the next topic would be Nurse Cox. Let me get some water; I need to take a pill and I'll be right back

(Brief recess taken.)

THE COURT: Back on the record. Nurse Cox was deposed February 7th. She produced a letter from Moreland to Cox, three page letter to Moreland, one page letter Moreland to Cox, three page hospital policy on

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patient. Okay. She produced it; did you look at it and she hand it over physically to you?

MR. WATERMAN: Yes, I had them in my hands; then Robert said "I want to claim privilege, I am not going to fight you for them." I said "fine."

THE COURT: Let me state something that I think occurred. We can call Tom Spahn to give an informal opinion. He has opined, and I think he is as knowledgable and careful in reading of the new ethical rules in Virginia, that if you accidently fax to opposing counsel a privileged document, you may demand its return, and they better by God return it to you when it is done accidently.

MR. MORELAND: I think we agree on it

THE COURT: But, if the nurse hands it over and he reads it and looks at it, and then you decide you want a privilege, I think you waived it by sharing it with counsel for the other side, and therefore I am not going to rule --

MR. MORELAND: That is not what happened, Judge.

THE COURT: Oh, I am sorry.

MR. WATERMAN: The only difference is Robert -- as I was physically having it in my hands and about to read, Robert asserted privilege; so I didn't wrestle with

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him for it, and turned it over. So in fact, I never read it. I never got to read it because I honored his claim of privilege.

MR. MORELAND: May I be heard? There was a request for production of documents filed early on this case asking for C.V.'s of expert witnesses. It was not the subject of an argument before Judge Jacobson. In response to that request for production, when we identify experts, we will give you the C V

That request also asked for all written materials back and forth between experts, and expert opinion letters. In response on that day, back in November of last year, we asserted a privilege that --

THE COURT: I thought this was February the 7th.

MR. MORELAND: This was our initial response to the request for production of documents. We said they are privileged documents.

THE COURT: I got you; you don't have to give me your argument now.

MR. MORELAND: So, at the deposition Ms. Cox brings the medical records that I have provided for her review. In the leaf of the medical binder she has certain correspondence between she and I, and an opinion letter that she prepared.

MEMORANDUM TO FILE

TO FILE: Robert L. Washington, et als v. Riverside Hospital
Law No. 9937-WS

FROM: J. Warren Stephens
Judge

DATE: December 10, 1985

On this day came the parties by counsel on various motions.

After hearing argument, the court:

1. Ordered that policy and procedure manel governing IV pump used on Master Washington be produced by defendant on or before January 3, 1986;

2. Ordered that kind, type and model of IV pump used on Master Washington, including descriptions of options, and, copy of contract of lease between defendant and its supplier covering said pump be produced on or before January 3, 1986;

3. Ordered that various duces tecum filed by plaintiffs against Riverside Hospital and its employees be treated as motions for production, and, defendant is granted until January 3, 1986 to make responses thereto;

4. Ordered that copies of any lesson plans utilized by defendant, its agents or subsidiaries respecting use of IV equipment utilized on Master Washington on date of incident be produced on or before January 3, 1986;

The plaintiffs withdrew their first request for admissions, and, after hearing argument, the court ruled respecting second request for admissions as follows:

1. Request 5. is admitted to the extent that the record so reflects;

2. Defendant need not admit 11., 15., 16., 19., 20., 21., 22., 23., 24., 26., 27., 28., 30., 31., 32. and 33.;

3. Defendant to admit 25. in context discussed in open court.

On motion of plaintiffs, motion of defendant to reduce ad damnum to $500,000.00 was continued to permit counsel to file brief concerning issue of limited liability as concerns non-profit Virginia hospitals.

Neither party requesting further memorialization of the foregoing, the same shall constitute memorandum of order.

J. Warren Stephens
Judge

JWS:lg

cc: Mr. John Ward Bane
Mrs. Kimberlea Rea Cowley

I certify that the document to which this authentication is affixed is a true copy of a record in the Newport News Circuit Court, that I have custody of the record and I am the custodian of that record.

Rick A. Davis, Clerk

By _____ D.C

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

RALPH E. WILLIAMSON	:	
	:	CASE NO.
vs.	:	CL 00-278
COLUMBIA/HCA JOHN RANDOLPH, INC. d/b/a JOHN RANDOLPH MEDICAL CENTER, et al.	:	

Complete transcript of hearing in the above, when heard on June 16, 2000, before the Honorable Ernest P. Gates, Judge.

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APPEARANCES:

MR. WILLIAMSON: Well, Your Honor, coming out here has a salutary purpose. I got the three categories here.

THE COURT: That solved that problem then.

MR. WILLIAMSON: Well, it puts us on the road to solution.

With regard to the incident report, that's exactly what Justice Whiting, then Trial Judge Whiting had before him in 1984, when he ordered an evidentiary hearing, and I have a copy of that for the Court here, Fanning v. White. What --

THE COURT: I will adopt his last paragraph.

MR. WILLIAMSON: Yes, Your Honor. What we would like is the author of the incident report, the name and when it was prepared and who it was sent to. If it was sent to three different bodies, we would like the names of those three bodies, and then if we feel it is necessary after that, we would take the deposition of the author, obviously not trying to get the guts of it.

THE COURT: Would you agree to do that?

MR. OTTEN: I agree, but I would just point out that the facts of this case are a little different with the operating room.

THE COURT: I am not worried about that. Can't you get the answer or get the information he needs?

Go ahead.

MR. WILLIAMSON: Then we can bring in the deposition and anything else that --

THE COURT: That's fine.

Will you do that?

MR. OTTEN: Yes, sir.

THE COURT: Now, what else do you agree?

MR. WILLIAMSON: Your Honor, on the policies and procedures, we think -- I will be the first to concede, there is a big scatter across the Commonwealth about what different circuit courts have done.

It is noteworthy that none of those Circuit Court opinions, though, are post the enactment, as of April, of 8.01-397.1. I don't know whether Your Honor is aware of this new statue.

THE COURT: Is that the log statute?

MR. WILLIAMSON: No, Your Honor. This is a statute about evidence of habit and routine practice.

THE COURT: Okay.

MR. WILLIAMSON: Virginia up until -- Well, actually it was our firm that had a case called Liggon, and it was legislatively overruled when we kept out evidence of a habit in a hospital. They were saying this is what we usually do. We kept that out in the Liggon case, and the health care providers were so upset

that they went to the legislature and not only got this statute enacted, Your Honor, but it was declared an emergency, so it went into effect in April.

THE COURT: All right.

MR. WILLIAMSON: It is in effect now, not even before July 1.

What this means, where the hospital indeed in their brief here says that we are seeking these procedures which are inadmissible under evidence under the private rule law in Virginia, which says that I cannot introduce the private rule of a defendant to prove what the standard of care was for that particular defendant, this is to encourage people to reach for the stars and set a very aspirational standard for its people, saying it would discourage that, but it doesn't say it is inadmissible for all purposes whatsoever, and it certainly doesn't say it is not discoverable.

The reason or primary reason we need these policies and procedures is because it is the best evidence of what the routine practice of that organization is.

We are not talking about some secret document that is produced by one of these quality assurance committees and their internal deliberations.

This is the type of document that necessarily

you would find at every nurses station in the hospital, because every employee -- it is not a secret. Every employee follows that.

That is their road map for how they do it. That is their routine practice, and it says right here that the routine practice of an organization is relevant to prove that the conduct of the organization was in conformity with the habit, and it goes on to describe a routine practice is a regular course of conduct of a group of persons or an organization in response to repeated specific situations.

So we need those protocols and guidelines that pertain to epidurals, so we can see what was ordinarily done with regard to it on that unit, and that way, of course, that has some evidentiary value as to what happened on that particular occasion and, indeed, it would be ironic if the Hospital objected to that, since they wanted this statute, their lobbyists did, and in virtually every case I have, there is a failure of memory on the part of the nurses and others, and they want to just talk about what they regularly and ordinarily do, and the best evidence of that is the protocol.

THE COURT: That is in now, so obviously you are entitled to get that.

MR. WILLIAMSON: Yes, sir.

THE COURT: Do you agree to that?

MR. OTTEN: Absolutely not. I don't think -- This habit statute allows a witness to testify to what they normally do. This in no way addresses the privilege --

THE COURT: How do you determine what a habit is, unless hearing it from the other side? If I want to know what all of your habits are, I have got to discover it, don't I?

MR. OTTEN: Well, you depose the witness whose habits you want to know. If the Hospital committees have enacted policies and procedures --

THE COURT: As far as a routine practice of an organization, now you can't get that unless you have some record like --

MR. OTTEN: Well, I don't think -- What he is looking for is Nurse Blankenship and the other nurses, what they generally do.

Now, if they say they don't know what they generally do, or something like that, the relevant part is what that nurse generally does and whether or not what that nurse did that day met the standard of care, not whether the Hospital has enacted goals that they want their employees to live up to.

What counsel wants to do now is then take these policies and procedures, use them as somehow evidence of the standard of care --

THE COURT: I am going to order that you provide that.

MR. OTTEN: Thank you.

THE COURT: You are welcome.

Does that take care of those three items?

I am going to overrule your general objections, and then you say that the log is just really three things that he wants. You don't have to give him everything, other than that.

Is that correct, Mr. Williamson?

MR. WILLIAMSON: Yes. A simple letter just saying the date of the incident report and who authored it and where it was sent to after it was authored; and then if I think it is necessary, I will take the deposition and bring it on before Your Honor.

MR. OTTEN: There was also the credentialing file of Nurse Blankenship, which we haven't addressed.

THE COURT: Okay.

MR. OTTEN: My brief addresses it as falling directly within the statute of 581.16 and 17 as being documents compiled by an organization who is going to assess the credentials of its employees, and

Discovery Issues
in
Medical Malpractice Cases

Judicial Conference of Virginia
Issues in Medical Malpractice Cases
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Francis, 10 Va. Cir. at 128.

In an unpublished opinion, Judge Sweet of the Charlottesville Circuit Court held that "hospital standards, rules, procedures and protocols . . . are within the provisions of § 8.01-581.17 of the Virginia Code." *Chafin v. Martha Jefferson Hosp.*, Law No. 5285 (Char. Cir. April 23, 1993). The courts in *Riordan* and *Leslie* also discussed privilege under the statutes in denying discovery of these materials.

1. Majority view supports discoverability of internal policies

The arguments advanced by defendants should not apply in the medical negligence context. *Pullen* and *Godsey* do not mandate the categorical exclusion of all evidence of private rules on the duty of care and they "may be evidence as to the appropriate standard of care to be provided by the defendants". *Stevens v. Hospital Auth. of the City of Pet*ersburg, 42 Va. Cir. 321, 329 (1997), J. Lemons.

As recognized in *Pullen*, the admissibility of private rules as some evidence, though not dispositive of the standard of care is the prevailing view in this country. 226 Va. at 350–51, 310 S.E.2d at 457 (collecting cases, noting that "the majority of jurisdictions hold that they are admissible").

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,

Avery Waterman

From: Amy S. Griggs <AGriggs@reganfirm.com>
Sent: Friday, April 4, 2014 12:33 PM
To: 'L. Steven Emmert'; Jeanne Varco
Cc: Avery Waterman; Catherine Bertram
Subject: RE: Temple v. Mary Washington Hospital, et al. - Record No. 131754

Agree, we are very grateful that you are taking the time to work on this issue. If you have any questions about the procedural history or trial, please feel free to call me.

Thanks,
Amy

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Sandy, I'm happy to give you my formal consent, on behalf of the appellant, for this filing. Thank you again for undertaking this effort, and best wishes.

Steve

From: Jeanne Varco [mailto:jeanne@PWHD.com]
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This email was sent to you on behalf of Avery T. Waterman, Jr., Esq.