In The

Supreme Court of Virginia

RECORD NO. 060392

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

***Appellants*,**

v.

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

Appellee.

BRIEF OF APPELLEE

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ASSIGNMENTS OF ERROR

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

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

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

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

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

QUESTIONS PRESENTED

I. "Did the trial court err in admitting irrelevant statistical evidence of patient falls and previous patient falls at Riverside Hospital?"

II. "Did the trial court err in admitting evidence of a non-party's nursing curriculum and Riverside Hospital's private staff rules?"

III. "Did the trial court err in admitting the privileged communications?"

IV. "Did the trial court err in limiting Nurse Vickers' testimony simply because she had no experience with the activation of bed alarms?"

V. "Did the trial court commit reversible error in submitting Instruction 14 to the Jury?"

STATEMENT OF THE CASE

This is a well-documented case of medical malpractice for a preventable in-patient fall. The case was not "closely contested," as Defendants claim. Brief at 7.

Due to Defendants' negligence, Elaine Johnson suffered a severe hip fracture. Despite extensive surgery, it never healed, always caused pain and rendered her bedridden. She was re-hospitalized and required daily medical attention or assistance. Medical bills approached $115,000.00. Her fall-induced downward spiral precluded her taking necessary chemotherapy. She died on narcotics, awaiting full hip replacement. Plaintiff was awarded $1,000,000.00 general damages. No error is assigned this *quantum*.

Pre-trial, the court found Riverside's routine "incident reports" and its "incident report" Database unprivileged and discoverable. Riverside's medmal insurer, The Virginia Insurance Reciprocal, created its incident report form and Database program, and simply window-dressed them with "quality assurance" headings to avoid discovery. A. 1717-1732. The court made its findings at initial hearing on January 26, 2006, A. 518, 596; but Defendants failed to make any transcript or written statement of the record on appeal, which constituted waiver. The court denied reconsideration at hearing on February 15, 2005, on memorandum, testimony and proffer. A. 266-268, 382-415, 518-532, 549-560, 596-600. No error is assigned to discoverability, so it is a final decision.

Defendants' preferred standard of care ("SOC") expert was excluded *in limine*. He lacked the required active clinical practice. A. 1009, 1039.

At trial, Plaintiff established SOC by properly qualified expert testimony of Wendy I. Jenvey, R.N., B.S.N. Without objection, Plaintiff introduced overwhelming statistical, prior fall and other evidence as "reliable authority." Also without objection, Plaintiff introduced key documents of Defendants consistent with Jenvey and reliable authority.

Riverside's "substantially similar" prior falls, its Orientation refresher of Green and its Nursing School curriculum excerpts were cumulative evidence introduced to show

"notice" for punitive damages. When Plaintiff non-suited his punitive damages claim, Defendants failed to renew objection to this evidence, which constituted waiver. Riverside's Orientation and Nursing School material also could be some SOC evidence.

Plaintiff introduced unique facts recorded contemporaneously on Defendants' incident report for Johnson. These facts were not contained in and materially contradicted Defendants' Nurses Notes in the patient chart and Nurse Green's testimony. Defendants objected to Plaintiff introducing a redacted incident report and introduced "same character" evidence, an alleged incident report Addendum; which constituted waiver.

Nurse Francis Vickers, Defendants' lone witness, was not substantiated by any reliable authority. She lacked experience with "bed alarms," was qualified only for "fall risk assessment," and was not vetted for "fall risk intervention." Defendants abandoned qualifying Vickers on interventions, which constituted waiver. The jury impliedly rejected her predicate opinion that Johnson was not a "high fall risk." Vickers did not offer any SOC opinion in defense of Defendants' "nurse call system," so Plaintiff's *prima facie* SOC case on that issue prevailed as a matter of law.

For Instruction 14 as to Riverside, Plaintiff introduced substantial evidence of "mental and physical condition." Also, Defendants' nurse call system being inoperable was "within the common knowledge and understanding of the jury" for Instruction 14. Further, Instruction 14 is moot because the jury was charged properly as to Green by Instructions 15 and 18 and found her liable, rendering Riverside vicariously liable.

Plaintiff's Closing did not emphasize prior fall and statistical evidence unduly. It twice exhorted the jury to find liability on the risk factors admitted by Defendants, viewing the "case most favorable to the defendants." A. 3164-3166, 3219-3221 (emphasis added).

STATEMENT OF FACTS

Green was a new nurse when Johnson fell on her watch on October 31, 1997. She had graduated nursing school in May, was licensed and oriented as a new Riverside employee around July, and "partnered" into September. A. 1807-1810.

Johnson was admitted to Riverside for hydration and observation because of chemotherapy and diarrhea. Per Plaintiff's SOC expert, all reliable authority and Defendants' own documentation, Johnson was a high fall risk, necessitating certain safety precautions. But Defendants failed to perform the required fall risk assessment properly upon admission and for each nursing shift during October 29-31, 1997. Defendants overlooked Johnson's numerous risk factors and failed to use the required fall risk intervention procedures, *inter alia* pink warnings and, most importantly, the highly efficacious bed alarm. Green admitted known interventions went unused because she did not appreciate Johnson was a high fall risk, even when she was "non-compliant."

The nurse call system Defendants instructed Johnson to use was circuitous, dysfunctional and substandard, leaving her unattended. Communications system construction caused nursing response problems. A. 2730-2731. Johnson's family tried the nurse call button for patient toileting but received poor nursing assistance. A. 2722-2734. Defendants' records show the "nurse call system down," *i.e.,* inoperable, the night in question; and that similarly another elderly patient on the same unit fell just before Johnson, after likewise getting out of bed without assistance. P. Ex. 8. A. 1901.

Most egregiously, Green ignored Johnson's obvious needs. When Green saw Johnson "out of bed without assistance," contrary to instruction and with "unsteady gait" – which "increased tremendously that this patient was an incredibly high risk" – Green

merely told her "to stay in bed" and still did not perform the required fall risk interventions. P. Ex. 3. A. 1896, 2331. Without assistance from Green, Johnson also suffered a large humiliating diarrhea episode in bed. P. Ex. 11. A. 1910, 2000, 2002, 2012-2013. Thereafter, because of Defendants' continuing substandard care, Johnson again was allowed to get out of bed unattended and fell – not "while" getting out of bed, as Defendants twice misrepresent, Brief at 4, 6; but after getting into the hallway unnoticed. P. Ex. 3, 11. D. Ex. 1. A. 1896, 1910-1911, 2035.

Without objection, Plaintiff published and introduced by Jenvey powerful SOC substantive evidence through reliable authority: Henrich, "Hospital Falls: Development of a Predictive Model for Clinical Practice," Applied Nursing Research, Vol. 8, No. 3 at 129-130 (1995)(338 patient incident report sampling, extensive literature review and study of several hundred other cases); Salgado, "Factors Associated with Patients Falling in Elderly Hospital Patients," Gerontology, Vol. 40 at 325-329 (1994)(44 patient study); and Meissner, "Patient Fall Prevention," Nursing Management, Vol. 19, No. 6 at 78 (1988)(35-bed unit program) [collectively "Reliable Authority"]. A. 1523-1532, 2296-2315. Defendants had no reliable authority to support any of their positions.

Jenvey (and Vickers) testified the prevalence and seriousness of in-patient falls were well known to hospitals and nurses before Johnson fell. A. 2392, 2420-2421, 2937. Reliable Authority proved that too. "Patient falls are the most common adverse event reported in acute care facilities, affecting from 2% to 10% of annual hospital admissions. *** Few adverse events that occur in the hospital have as serious consequences for patient outcome, quality of life, and injurious patient falls. *** Falls are one of the most common

reasons that nurses, physicians, and hospitals are sued for medical negligence in the acute area of the hospital." A. 1526, 2305-2306 (emphasis added).

Jenvey also testified many in-patient falls were predictable and preventable by hospitals and nurses based on well known risk factors, and were not simply unavoidable accidents. A. 2219, 2387-2388, 2391, 2394. Reliable Authority proved that too. "Many falls are predictable and should not be considered to be an expected sequela of the aging process." A. 1527 & 2315 (emphasis added). "A review of the fall literature confirms that various researchers have identified risk factors (measurable patient characteristics, medical or nursing diagnoses) that have a potential to predict falls in the elderly population, thus suggesting preventability." A. 1526 & 2305 (emphasis added).

Jenvey opined SOC therefore required nurses to perform fall risk assessment of every patient upon admission and during every nursing shift. A. 2253, 2255-2256, 2262-2263. Vickers admitted fall risk assessment routinely was taught in nursing schools and refreshed in hospitals. A. 2938. Green admitted she was familiar with fall risk assessment from nursing school and Riverside's Orientation. A. 1810, 1924-1925.

Jenvey identified 9 fall risk factors: (1) age, over 65 or 70; (2) mobility, gait instability; (3) confusion, especially intermittent; (4) medications; (5) incontinence; (6) vision; (7) medical condition; (8) weakness; and (9) prior fall history. A. 2220-2228. Reliable Authority proved that too. A. 1524, 1527, 2302, 2310. Also, the "FALL RISK ASSESSMENT" section of Riverside's "ADULT DATA BASE" for Johnson, which was admitted into evidence without objection, identified 7 of the same 9 fall risk factors as Jenvey. P. Ex. 10. A. 1904. Additionally, Riverside's pink "HIGH FALL RISK" sticker, which Johnson had used before, A. 1840, 1843, and was introduced into evidence, also

identified the same 7 of 9 fall risk factors. P. Ex. 6. A. 1898. Further, Vickers admitted 7 of the 9 were fall risk factors: A. 2944-2957, 2970-2972, 2992, 2997-3011. Court Ex. 1. A. 3107. Green admitted she "considered two things in [the] fall risk assessments, gait and mentation," A. 1978; if "gait was unsteady, that was a primary reason to implement that [fall risk] protocol," A. 1925; and Johnson showed both risk factors. A. 1998-1999.

Jenvey opined a patient exhibiting 2 or more of these risk factors rendered the patient a high fall risk. A. 2229, 2244-2245. Reliable Authority proved that too. "Figure 1 shows the proportion of patients [90%] who fell with . . . two plus risk factors." A. 1524-1525, 2301-2302. Riverside's FALL RISK ASSESSMENT section, admitted without objection as P. Ex. 10, and Riverside's pink HIGH FALL RISK sticker, admitted as P. Ex. 6, both also showed the same: "Two or more [check marks] is criteria for Fall Prevention Program." A. 1898, 1904. Green knew this standard too. A. 1995-1996.

Jenvey assessed Johnson exhibited all 9 risk factors, A. 2230; including at least 5 upon admission, A. 2230-2240; and at least 5 on the last shift of Green before falling. A. 2267-2277, 2404-2407. Also, Riverside's FALL RISK ASSESSMENT upon admission showed at least 2 and arguably 3 risk factors checked for Johnson. P. Ex. 10. A. 1904. (Close review of Riverside's ADULT DATA BASE and other admission records shows Plaintiff actually had more risk factors.) Additionally, Vickers admitted Johnson exhibited at least 3 risk factors. Court Ex. 1. A. 2944-2950, 3107. Further, Green admitted Johnson exhibited at least 4 risk factors – including a "mobility problem" and being "intermittently confused" – and possibly 2 more. A. 1998-1999.

Jenvey opined Johnson was a high fall risk and SOC required a "fall prevention care plan" and fall risk interventions such as bed alarms and pink warnings as safety

procedures. A. 2245-2249, 2395. Reliable Authority proved that too. "The intervention strategies were determined from an extensive review of the literature and the circumstances (causation factors) surrounding the fall events in this and several hundred other fall cases reviewed by the investigators from multiple institutions. Fall prevention interventions were aimed at: *** using . . . **bed-exit alarms, which alert the staff when a high-risk patient exits the bed without needing assistance.**" A. 1527 & 2314-2315 (emphasis in original). "[S]everal types of 'bed alert' systems . . . were developed to prevent patient falls by emitting an audible alarm." A. 1523, 2298. [1] "Identify patient with [pink] armband, flag chart for risk." A. 1532, 2310.

Also, the "NURSING INTERVENTIONS" section of Riverside's "FALL PREVENTION CARE PLAN" for Johnson, admitted without objection, proved using a bed alarm and showing pink were SOC intervention procedures for a high fall risk patient like her. It instructed: "Activate bed check alarm" and "Place pink magnetic stickers on the patient's door; pink sticker on the chart, and [pink] armband [on patient]." P. Ex. 9. A. 1902 (emphasis added). Additionally, Plaintiff introduced Riverside's pink HIGH FALL RISK sticker, which Green identified as one she had used. A. 1840, 1843, 1898. Green admitted that by orienting with a nursing "partner" she knew also about using bed alarms, A. 1839, 2567; and she could have implemented the FALL PREVENTION CARE PLAN, including bed alarm and pink warnings. A. 1978-1979. Green just did not use any of those

[1] Portable bed alarms are a "strip positioned under the bottom sheet on the bed [that] functions as a sensor. As the weight of the patient lifts from the sensor, the patient's call light is activated and an alarm sounds simultaneously. Staff respond to the alarm as a 'stat'." A. 1523, 2298. A. 1601-1603. Portable and built-in bed alarms were available on Johnson's unit at Riverside, A. 1598; but most beds had built-ins. A. 1881.

fall risk intervention procedures, because she incorrectly did not consider Johnson a high fall risk. A. 1825, 1837-1838, 1840, 1843-1844.

Jenvey attested to the effectiveness of bed alarms. A. 2278-2283, 2427. Reliable Authority proved that too. "The Patient Fall Prevention Program [including 'bed alert' systems] was implemented in May, 1986, and by November there had been a 100 percent reduction in patient falls with related injuries. These statistics alone support the apparent success of this program." A. 1523, 2299 (emphasis added).

Jenvey also observed most unattended in-patient falls occurred at night, importing heightened nursing vigilance. A. 2221, 2261. Reliable Authority proved that too. "[T]he majority [of in-patient falls] occurred between 9:00 and 11:00 P.M." A. 1523, 2298. (Johnson fell shortly before 11:00 p.m.) Hendrich Figure 4, "Time of Fall," shows peak fall hours. A. 1527, 2309-2310. Also, Hendrich Figure 3, "Place of Fall," shows about 80% of falls occur in "Patient's Room" and only a minimal percentage in "Hall." A. 1527, 2309. Jenvey twice emphasized enfeebled Johnson falling in the hall shows there was time for a "stat" nursing response to a bed alarm (had there been one), but Defendants were oblivious to Johnson. A. 2282-2283, 2427.

Jenvey opined the nurse call system of Defendants was antiquated, circuitous and substandard. Standard systems alert with sound and lights both at the Nurses' Station and outside the patient's room. A. 2286-2287. But Defendants' system routed all patient calls to a remote basement operator, who subsequently sent a beeper text-message to a floor nurse. A. 1694-1697, 2288-2289, 2361-2366, 2730-2731. Further, Plaintiff introduced Riverside's Database Excerpt for October 31, 1997, which showed under another elderly patient who also fell on the same floor the same day just before Johnson: "nurse call

system down," P. Ex. 8; A. 1901, 1744-1748, 1751-1753, 1767-1769, 1779-1780 (emphasis added). Also, the light outside Johnson's room being off was consistent with the system being inoperable, A. 2442-2443; an SOC violation. A. 2291-2292. Johnson's daughter-in-law testified about pre-fall problems getting a nursing response to the nurse "call button" for bathroom assistance, A. 2722-2734; and that a Riverside administrator admitted communication system construction caused nursing response problems. A. 2730-2731.

The incident report for Johnson incriminates Green as follows: "Pt. OOB s assist. Unsteady gait. Instructed to stay in bed. Found in hallway on floor. c/o hip pain on L side after fall." P. Ex. 3. A. 1896 (emphasis added). Despite Green's denials, Jenvey and Vickers testified consistently that means another time before Johnson fell, Green saw she was "out of bed without assistance" (contrary to prior instructions) with "unsteady gait;" but simply instructed Johnson again to "stay in bed," A. 2321-2322, 2340-2341, 3005-3006; instead of using the standard fall risk intervention procedures, such as bed alarm and showing pink. Significantly, Jenvey opined "certainly it increased tremendously that this patient was an incredibly high risk." A. 2331 (emphasis added).

This aggravated fall case really did not present the close "battle of the experts" Defendants conjure. It actually pitted Plaintiff's qualified credible SOC expert, who was backed by all Reliable Authority and all Defendants' records; against Defendants' partially qualified expert, who was evasive, contradictory and impeached much of the time. A. 2945-2949, 2952-2957, 2970-2972, 2997-3011. Jenvey originally had been introduced to medmal consulting by defense counsel's firm; retained as SOC expert by defense counsel and her partners countless times, including for fall cases, and even for Riverside several

times; and qualified as SOC expert numerous times across the Commonwealth for Defendants and Plaintiffs alike, including for fall cases. A. 2191-2207, 2435-2440. On the other hand, Vickers consulted solely for Defendants' counsel and her partners numerous times; never ever opined any nursing conduct was substandard; and never was accepted as an expert at trial before. A. 2933-2935.

ARGUMENT

"[A] party who comes before [this Court] with a jury verdict approved by the trial court 'occupies the most favored position known to the law'." *Ravenwood Towers, Inc. v. Woodyard*, 244 Va. 51, 57 (1992). Plaintiff had no "unfair advantage," as claimed. Brief at 7. The cumulative evidence against Defendants was overwhelming. They raise invited error, harmless error and no error. They got a fair trial and substantial justice.

I. PATIENT FALL EVIDENCE WAS NOT REVERSIBLE ERROR

A. Statistical evidence is relevant and admissible in medmal cases.

Statistical evidence, necessarily based on prior incidents, routinely is central to medmal cases. *E.g., Hadeed v. Medic-24, Ltd.*, 237 Va. 277, 283-287 (1989). "Expert evidence revealed … risk factors in assessing the likelihood that a person has the disease." *Id*. at 283. *Hadeed* also admitted evidence about various probabilities, *id*. at 284; and statistical evidence about "chance of survival." *Id*. at 285.

Fall risk assessment and fall risk intervention were SOC issues at bar. Defendants offered Vickers as their "fall risk assessment [and intervention]" expert. A. 2851, 2880, 2883. "Risk" is "chance of injury, damages or loss" or "chance or degree of probability of loss." Black's Law Dictionary 1328 (7th ed. 1999)(emphasis added). Risk inherently is the

chance, the probability – the statistics. Risk necessarily bespeaks statistical evidence. Otherwise, it devolves to mere guesswork or speculation.

It is anomalous that Defendants call an expert for fall risk assessment (and seek reversal to opine about fall risk intervention also), yet assert that material statistical evidence about falls is inadmissible by Plaintiff. The fact is, Defendants were crushed by the overwhelming weight of material Reliable Authority. They want a new trial confined only to competing unsubstantiated opinions because all the statistics prove them wrong.

Contrary to Defendants' insinuations, this Court did not proscribe statistical evidence or prior incidents in general, or in medmal cases in particular, by *Holley v. Pambianco*, 270 Va. 180 (2005); *McCloud v. Commonwealth*, 269 Va. 242 (2005); or *Sanitary Grocery Co., Inc. v. Steinbrecher*, 183 Va. 495 (1945). They strike at remote equivocal statistics unsupported by the other evidence, which thereby are "misleading."

McCloud actually upheld admission of prior similar incidents, just not dissimilar ones. 269 Va. at 258-259. In *Holley*, "the [closing] argument was based upon a premise unsupported by the evidence . . . . The statistical evidence was so misleading that . . . the jury could infer the direct opposite of defense counsel's argument . . . . We conclude that such raw statistical evidence [1-13 perforations per 10,000 procedures] is not probative of any issue in a medical malpractice case and should not be admitted." 270 Va. at 185 (emphasis added). *Sanitary Grocery* is to the same effect: "evidence of collateral facts, from which no fair inferences can be drawn tending to throw light upon the fact under investigation, is excluded." 183 Va. at 499 (1,000 prior customer store visits accident-free). *Cf., Timblin v. Kent Gen. Hosp.*, 640 A.2d 1021, 1024 (Del. 1994)(cited by Defendants)("A close analysis of the facts of the case refutes . . . the statistical evidence

presented . . . is relevant to causation."). But in the matter *sub judice*, contrary to Defendants' unsubstantiated declaration, Brief at 18; the statistics were not misleading. They were unequivocal, material and supported by other evidence.

B. Other institutional falls were admissible as "reliable authority."

Plaintiff's trial centerpiece was the irrefutable "medical and nursing literature" admitted without objection – much of it statistical, all favoring Plaintiff and none for Defendants. Twelve pages of statements and figures including 6 graphs excerpted from the 3 articles of Reliable Authority were introduced by display and reading through Plaintiff's SOC expert, Jenvey. A. 1523-1532, 2296-2315.[2] They featured prior institutional falls, risk factors, occurrence probabilities and intervention efficacies.

Va. Code Ann. § 8.01-401.1 entitled Plaintiff to introduce his Reliable Authority as "substantive evidence." It is "clear and unambiguous:" "this statute as amended permits the hearsay content of such articles to be read into the record as substantive evidence . . . ." *Weinberg v. Given*, 252 Va. 221, 224 (1996)(emphasis added).

Defendants interrupted during Opening, misrepresenting that "under 8.01-401.1, these articles are not brought into evidence." A. 1440-1443. But Defendants did not object to their admission into evidence when offered. That entitled Plaintiff to discuss the evidence in Opening and Closing and waived any objection on appeal. "The Plaintiff's counsel had the right to discuss [with the jury] the evidence given . . . without objection." *Director Gen. of R.R.s v. Gordon*, 134 Va. 381, 388 (1922). "The defendant did not object

[2] Defendants mischaracterize: "the source of plaintiff's [bar graph] data was not made clear to the jury." Brief at 8 n. 2. In Opening, Plaintiff demonstrated 4 bar graphs "from the nursing literature." A. 1440, 1443-1445, 1525, 1529-1531. Then Plaintiff re-displayed all 4 bar graphs while Jenvey read them as Reliable Authority. A. 2302, 2308-2310.

to this evidence, and cannot now be heard to complain of it." *Id*. Defendants totally ignore § 8.01-401.1 and *Gordon*.[3]

None of Defendants' Virginia or foreign legion cases against statistics or prior incidents involve any evidence admitted as "reliable authority" under § 8.01-401.1 or even any evidence admitted "without objection," like in the matter *sub judice*. *E.g., Holley*; *McCloud*; *Stottlemyer v. Ghramm*, 268 Va. 7 (2004); *Keesee*; *Ligon v. Southside Cardiology Assocs., P.C.*, 258 Va. 306 (1999); *Cherry v. D.S. Nash Constr. Co.*, 252 Va. 241 (1996); *Sanitary Grocery*; *Penalver v. Living Ctrs. of Texas, Inc.*, 2004 Tex. App. LEXIS 5492 (4th Dist., June 23, 2004); *Timblin*; *Dade County Pub. Healthtrust v. Parker*, 551 So. 2d 532 (Fla. Dist. Ct. App. 1989). Thus, the case at bar is distinguishable.

C. Riverside fall evidence was merely cumulative and harmless.

Va. Code Ann. § 8.01-678 "evinces legislative approval of the doctrine of harmless error." *Hope v. Commonwealth*, 8 Va. App. 491, 497 (1989)(cumulative physical evidence). "The harmless error doctrine may be applied when erroneously admitted evidence is merely cumulative of other properly admitted evidence." Friend, The Law of Evidence in Virginia, § 1-7 at 62 (6th ed. 2005 supp.). Defendants cannot appeal on evidence that "was but cumulative and only served to corroborate evidence unobjected to

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[3] *Keesee v. Donigan*, 259 Va. 157 (2000) and *Timblin* are inapposite. First, and most fundamentally, the "reliable authority" statistics in the matter *sub judice* were not admitted erroneously over objection like the statistics in *Keesee*, 259 Va. at 162 ("probative value . . . rested on assumptions . . . that had no factual basis in the record") and *Timblin*, 640 A.2d at 1026. Second, in *Keesee*, the erroneous admission was amplified by the impermissible statistics being introduced through the "only expert witness" on the subject, *id.*; while in the case at bar both sides had an expert. Third, in *Timblin*, Delaware "counsel repeatedly mentioned the [erroneous] statistics during his closing statement," 640 A.2d at 1026; and in *Keesee* counsel similarly "emphasized [the erroneous statistics] in closing argument" too. 259 Va. at 162. But Plaintiff's counsel at bar did not emphasize statistics in general or any erroneously admitted ones in particular.

and already in the record." *Powell v. Young*, 151 Va. 985, 1000 (1928). *Griffett v. Ryan*, 247 Va. 465, 474 (1994).

Defendants allowed Plaintiffs to introduce substantial Reliable Authority about several prior fall studies and statistics. A. 1523-1532, 2296-2315. "Patient falls are the most common adverse event reported in acute care facilities, affecting 2% to 10% of annual hospital admissions." A. 1526, 2305. Vickers testified patient falls were the most commonly reported institutional incident, and "a certain percentage of a certain type of patients" potentially will fall, "often [with] serious consequences." A. 2937. The jury heard Riverside MKP Friend on examination by Defendants testify to substantial statistical information about prior falls. A. 1781-1783. Thus, Plaintiff having Friend verbally acknowledge Riverside had similar prior falls – at the low end of Reliable Authority percentages (and without introducing any documentary exhibits of the same) – merely was cumulative, a discrete narrow corroboration.

D. Riverside fall evidence showed the "nurse call system" was down.

Plaintiff's Ex. 8, Riverside's Database Excerpt, proved another elderly patient on the same unit the same day did not have a bed alarm on, got out of bed without assistance and fell, prior to the same befalling Johnson. Defendants claim it was used "inappropriately to show Riverside Hospital's alleged propensity to allow patients to fall." Brief at 28. In fact, this Database excerpt stated "nurse call system down," *i.e.,* inoperable. A. 1901, 1744-1748, 1751-1753, 1767-1769, 1779-1780 (emphasis added). That Riverside documentation was Plaintiff's key proof of Johnson's "call button" being inoperable. It properly showed discrete negligence "within the common knowledge and experience of a jury," *Beverly Enters.-Virginia, Inc. v. Nichols*, 247 Va. 264, 269 (1994); also an SOC

violation, A. 2291-2292; and, additionally, contradicted Defendant's ostensibly exculpatory position that Johnson failed to use the "call button" as instructed.

E. All fall evidence showed "notice" for the punitive damages claim.

Plaintiff sued for punitive damages. Even in a medmal case, that inherently imports proof of Defendant's prior knowledge and awareness. *See Boyd v. Bulala*, 877 F.2d 1191, 1198 (4th Cir. 1989)(Virginia law). That means Plaintiff can – indeed, must – introduce evidence of Defendant's "notice." *Owens-Corning Fiberglas Corp. v. Watson,* 243 Va. 128, 136-137 (1992)(upholding admission of defendant's 44 prior workers' compensation claims summary). *Cf., New Bayshore Corp. v. Lewis*, 193 Va. 400, 409 (1952)(defendant's prior rules and instructions were "notice"). Defendants' assertion at bar that the nurses' arguable lack of awareness renders prior incidents irrelevant, Brief at 22 n. 6; is itself irrelevant: Riverside's notice alone sufficed for admissibility.

Blevins v. New Holland N. Am. Inc., 128 F. Supp. 2d 952, 961 (W.D. Va. 2001) (Virginia law), cited by Defendants, supports Plaintiff substantially. *Blevins* declared, "It is true that the similarity required is somewhat relaxed when offering prior accidents to prove **notice** . . . rather than negligence. *see Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1386 (4th Cir. 1995)." *Id* (emphasis added). "The incidents need only be sufficiently similar to make the defendant aware of the dangerous situation." *Benedi*, 66 F.3d at 1386.

In *Owens-Corning*, the summary showed defendant "had notice that insulators were at risk of contracting lung diseases from the use of insulation products which contained asbestos." *Id*. at 137. "The 'substantial similarity' test is satisfied because . . . the insulators claimed that they acquired lung diseases caused by exposure to asbestos dust while using insulation products." *Id*. In *Owens-Corning*, the many other dissimilarities of each prior

alleged asbestos victim did not matter. All of the differences in their ages, other physical conditions, jobs, working conditions, etc.; their location, date, degree, duration of exposures, etc.; and their particular diseases, manifestations,
etc., did not destroy their basic substantial similarity.

In the matter *sub judice*, the court permissibly found as fact prior falls by other in-patients getting out of bed without assistance were substantially similar for admission as to notice. A. 854-856. Riverside's Database print-out showed Defendants had notice that in-patients were at risk of falling from getting out of bed without assistance. Like the disparate alleged asbestos victims in *Owens-Corning*, any dissimilarities of those actual Riverside fall victims did not destroy their pertinent substantial similarity.[4] Those "dissimilarities . . . do not affect the admissibility of the evidence, but rather go to the weight that the jury gives to the evidence." *Benedi*, 66 F.3d at 1386. "The probative value of these reports was not outweighed by the danger of unfair prejudice, because the reports were highly probative on the issue of notice." *Id*.

"In making that ['substantial similarity'] determination, a trial court exercises its discretion. Absent an abuse of that discretion, we will not reverse a trial court's decision in admitting . . . evidence of prior occurrences." *A.H. v. Rockingham Publ'g Co.*, 255 Va. 216, 224 (1998). There was no abuse in the matter *sub judice*.

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[4] *Spurlin v. Richardson*, 203 Va. 984, 989 (1962), cited by Defendants, holds prior incidents are admissible if they simply "happened at substantially the same place and under substantially the same circumstances, and had been caused by the same or similar defects and dangers as those in issue, or by acts of the same person". The incidents at bar happened at substantially the same place (the hospital floors), under substantially the same circumstances (in-patients getting out of bed without assistance), and by the acts of the same person (Riverside). *Cf., McCloud*, 269 Va. at 258-259 (admitting similar, but not dissimilar, prior institution infractions); *Jones v. Ford Motor Co.*, 263 Va. 237, 255-257 (2002)(distinguishing *General Motors Corp. v. Lupica*, 237 Va. 516 (1989)).

A whopping 15 times Defendants reiterate that Plaintiff introduced "197" prior fall incidents. Brief at 8-9, 15, 19, 22, 28. Thereby, Defendants mislead and emphasize unduly. Riverside's Database for the preceding 10 months showed 197 fall entries. "In fairness," because Plaintiff did not "want the jury to be misinformed," he repeatedly confirmed that only "the majority of those [197 entries] were patients who had gotten out of bed without assistance and ended up on the floor and were returned to bed." A. 1742-1744 (emphasis added). It sufficed for purposes of brief illustration to have Defendants expediently admit verbally through Riverside's MKP Friend that a "majority" of the 197 in-patient falls were similar, rather than tediously plod through every single actual entry (and probably dispute over some at the margin) to prove the precise number of the overwhelming majority. A. 705-742. Further, Plaintiff did not introduce or even display the Database itself. So the jury did not see any dissimilar incidents or even the similar falls, other than the Database Excerpt (admitted as P. Ex. 8.) for Johnson and the other similar elderly patient who fell just before her on the same unit and day. *See* I(D).

Most Virginia or foreign legion cases cited by Defendants against statistics or prior incidents do not involve any evidence admitted as "notice" or even involve "punitive damages." *E.g., Holley*; *McCloud*; *Stottlemyer*; *Ligon*; *Cherry*; *Sanitary Grocery*; *Timblin*. Further, this Court in *Stottlemyer*, *Ligon* and *Cherry* only held that generally prior acts or habit are irrelevant and inadmissible to prove "negligence" or the lack thereof. 268 Va. at 13; 258 Va. at 312; 252 Va. at 244. *See also, Timblin*, 640 A.2d at 1026. And in *McCloud,* this Court even upheld the admissibility of similar prior institutional infractions for prohibited sexual behavior, as evidence of "propensity" to re-offend sexually. 269 Va. at 258-259 (Plaintiff at bar specifically introduced Riverside's prior falls for notice, A. 854,

1741, not proof of negligence.) Finally, in Defendants' foreign cases where plaintiffs introduced hospital incident reports of prior falls, Texas and Florida courts found as a fact that plaintiffs had failed to show the necessary "substantial similarity." *Penalver*, 2004 Tex. App. LEXIS 5492, * 9-10 ("no effort to show"). *Dade County*, 551 So. 2d at 533 ("no showing"). But the court in the matter *sub judice* properly exercised its discretion, found substantial similarity and admitted prior fall evidence for notice.

F. <u>Inaction waived any objection and bars under Rule 5:25.</u>

First, at Final Pre-Trial Conference, the court properly offered Defendants a "cautionary instruction" on prior falls. A. 855. *Benedi*, 66 F.3d at 1386 ("judge properly gave a limiting instruction to the jury that it could only consider the [reports] as evidence of notice"). But Defendants did not seek one at trial.

"It has been held that the failure to request an instruction at the trial bars any appeal on the point." Friend, § 8-2 at 282. *Rose v. Jaques*, 268 Va. 137, 158 (2004)(citing Va. S. Ct. R. 5:25 bar for not requesting "curative instruction"). "Accordingly, because [Defendant] failed to pursue [the offered limiting instruction on prior falls], we will not address the issue on appeal. Rule 5:25." *Oden v. Salch*, 237 Va. 525, 531 (1989).

Second, Defendants failed to object to substantial prior fall and statistical evidence when offered as Reliable Authority. Thus, even if it was misleading – which is denied – that waives and bars the issue on appeal.

Third, once Plaintiff non-suited all claims for punitive damages, the statistical and prior falls evidence introduced (purely) for notice toward punitive damages became objectionable. Defendants immediately could have and should have objected to the evidence, moved to strike it, moved for mistrial and/or sought cautionary instruction. But

Defendants did none of those things to preserve their position. Instead, Defendants merely consented to the non-suit and co-authored the joint statement for the court to read to the jury, including particularly that "nonsuit [of] his claims for punitive or exemplary damages . . . is . . . without prejudice, to the plaintiff." A. 3123-3124.

It was not sufficient that Defendants initially objected to notice evidence when punitive damages still were under consideration. Because Defendants "failed to renew" their objections and motion, they "acquiesced" and waived under Rule 5:25. *E.g., Green v. Commonwealth*, 266 Va. 81, 95 (2003)(emphasis added), *cert denied*, 540 U.S. 1194 (2004). *Breard v. Commonwealth*, 248 Va. 68, 80 (1994)(emphasis added). "Rule 5:25 thus bars our consideration," since Defendants "failed to ask the trial court for a ruling and did not request a curative instruction or mistrial." *Rose*, 268 Va. at 158.

G. The "same character" rule waives any objection.

The substantive "same character" rule waives a party's objection to admissibility. *Pettus v. Irving S. Gottfried, M.D., P.C.*, 269 Va. 69, 78-79 (2005). "Although the rule is most often applied in cases when the party making the objection later introduces the same evidence, 'it is properly and logically applicable in any case, regardless of the order of introduction, if the party who has brought out the evidence in question, or who has permitted it to be brought out, can be fairly held responsible for its presence in the case'." *Id.* at 79. There are two exceptions: "cross-examination" and true "rebuttal evidence." *Id.* When a party goes "beyond mere rebuttal," waiver arises. *Combs v. Norfolk & W. Ry. Co.*, 256 Va. 490, 299 (1998)(use of exhibits beyond scope of prior examination).

Defendants offered prior fall studies and statistics by Riverside's MKP Friend as rebuttal that covered additional time periods and all falls (not just similar ones), compared

with national averages, etc. A. 1781-1783. Also, Defendants questioned Jenvey about all prior falls at her institution. A. 2392. That exceeded the scope of prior examination and constituted "same character" evidence. Defendants thereby waived any objection to Plaintiff's introduction of Riverside's prior fall evidence.

II. SUPPOSED "PRIVATE RULES" WERE NOT REVERSIBLE ERROR

A. Private rules show "notice" for the punitive damages claim.

Defendants' supposed patient safety rules were admissible to show "notice." *New Bayshore Corp. v. Lewis*, 193 Va. 400, 409 (1952)(defendant's safety rules and instructions "indicate that defendant was aware of the potential dangers involved"). That is so because of Plaintiff's then-pending punitive damages claim. *See* I(E).

B. Inaction waives objection and bars under Rule 5:25.

At trial, Plaintiff repeatedly declared testimony and exhibits of Riverside by MKPs Hicks and Sullivan-Yates were not offered to show "standard of care" and instead proved "knowledge" and foundation. A. 1661, 1663, 1683. "I'm making a record so later she doesn't falsely accuse me on appeal." A. 1683. But Defendants complained about Plaintiff properly limiting his evidentiary introduction ground. "It's inappropriate for him to keep talking to His Honor about what he's trying to do with his evidence." A. 1683. Defendants cannot "approbate and reprobate," so have waived: Defendants then at trial having complained about Plaintiff limiting the basis of introduction, *i.e.,* not showing standard of care, now on appeal cannot complain about introduction supposedly showing standard of care.

Defendants are "bound here by the same representation [they] made to the trial court. Having essentially invited the trial court to [accept Plaintiff's evidence for all

purposes, Defendants] cannot now argue for the application of a different rule on appeal." *Hansen v. Stanley Martin Cos.*, 266 Va. 345, 358 (2003). "No litigant . . . will be permitted to approbate and reprobate – to invite error, as the defense did here, and then to take advantage of the situation created by his own wrong." *Id.*

Second, once Plaintiff non-suited all claims for punitive damages, all private rules for notice became objectionable. However, Defendants merely consented to the nonsuit and co-authored the joint statement for the jury that "nonsuit [of] his claims for punitive or exemplary damages . . . is . . . without prejudice, to the plaintiff." A. 3123-3124. When Defendants "failed to renew" their objection and motion, they "acquiesced" and waived under Rule 5:25. *E.g., Green*, 266 Va. at 95 (emphasis added); *Breard*, 248 Va. at 80 (emphasis added). "Rule 5:25 thus bars our consideration." *Rose*, 268 Va. at 158 (failure to ask for "ruling . . . curative instruction or mistrial").

C. The "same character" rule waives any objection.

Defendants introduced rebuttal that exceeded the scope of Plaintiff's examination on supposed private rules. Riverside MKP Hicks introduced "nursing judgment" (twice), overall condition observations and drawbacks of bed alarms and siderails. A. 1664-1671. Green introduced her Riverside learning about fall risk assessment and using pink and fall risk care plans. A. 1924-1925. Vickers introduced orientation at her hospital. A. 2845-46. Thus, Defendants triggered the preclusive "same character" rule, waiving objections and rendering admission irreversible. *E.g., Pettus*, 269 Va. at 78-79; *Combs*, 256 Va. at 499.

D. Private rules were merely cumulative and harmless.

Riverside MKP Hicks testified an Orientation videotape refreshed all new employees about 4 types of high fall risk patients: post-op, medicated, confused and

toileting.[5] (The videotape was not played, merely marked for identification. A. 1658.) She also testified Orientation refreshed new employees about using bed alarms, side rails and pink stickers as options. A. 1655-1663. Riverside MKP Sullivan-Yates testified its Nursing School taught fall risk assessment and intervention, including with handouts on (im)mobility and a syllabus saying to show pink. A. 1680-1682.

This modest information was cumulative of other unobjected evidence, so at most is harmless error. Friend, § 1-7 at 62; *Griffett*, 247 Va. at 474; *Powell*, 151 Va. at 1000; and *Hope*, 8 Va. App. at 497; Va. Code Ann. § 8.01-678. For example, Vickers admitted fall risk assessment routinely was taught in nursing schools and refreshed in hospitals. A. 2398. Green testified she was familiar with fall risk assessment from nursing school, remembered Riverside's Orientation and used its pink HIGH FALL RISK sticker, A. 1808-1810, 1825, 1843-1845; which was introduced. P. Ex. 6. A. 1845. Also, Plaintiff's Ex. 7, Riverside's FALL PREVENTION CARE PLAN, about showing pink, activating bed check alarm, etc., was introduced. A. 1841-1842. Additionally, Jenvey testified about everything introduced through Riverside MKPs Hicks and Sullivan-Yates and more, A. 2216-2218, 2256-2257; including orientation videotape use. A. 2299. Further, Reliable Authority likewise covered everything introduced through Riverside's MKPs, including high fall risk patients, assessments, interventions (such as bed alarms, rails and colored warnings), in-services and videotapes. A. 1523-1532, 2296-2315.

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[5] Thrice Defendants misrepresent there was "no evidence . . . Green . . . saw the video." Brief at 10, 23, 26 n. 8. Green admitted she attended Orientation in 1997, A. 1808-1809, 1923; and Hicks admitted mandatory Orientation showed the videotape to all such new employees in 1997. A. 1655-1659, 2569-2571, 2821. P. Ex. 23. "[W]e must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the prevailing party," Plaintiff. *Ravenwood*, 244 Va. at 57. Defendants' misstatement is a further misdirection: the videotape is admissible evidence against Riverside anyway.

E. The *Godsey-Pullen* "private rules" rule should not and does not apply.

For three independent reasons, the hospital Orientation and Nursing School materials[6] do not rise to the level of "private rules" under *Pullen v. Nickens*, 226 Va. 342, 351 (1983) and *Virginia Ry. & Power Co. v. Godsey*, 117 Va. 167 (1915).

First, *Godsey-Pullen* holds "private rules are inadmissible in evidence either for or against a litigant who is not a party to such rules." 226 Va. at 351 (emphasis added). But Plaintiff and Defendants qualify as parties to supposed private rules. Johnson was an

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[6] At Plaintiff's post-Petition insistence, Defendants admitted they had claimed incorrectly "Riverside School of Professional Nursing is a completely separate entity from Riverside Hospital." Brief at 2 n.1. But Defendants still lack complete candor: they admit Riverside is "Riverside School of Health Careers," yet claim (unsubstantiated) Riverside School of Professional Nursing ("RSPN") is "operated" by another unspecified entity. *Id*. In fact, Riverside's website currently admits RSPN is part of "Riverside School of Health Careers." *See* http://www.riverside-online.com/rshc/index.cfm. Further, Defendants' concession RSPN "is affiliated with and could be considered an extension of Riverside," Brief at 26; is closer to the truth. Riverside's Assignment of Error 2 about supposed "non-party" RSPN remains uncorrected and fatally flawed.

Further, Defendants asserting Plaintiffs "conceded" RSPN was "not a party" and "not on trial," Brief at 10, 26; is taken out of context and misleading. First, Riverside's MKP then was testifying on "all nursing school teaching of or at Defendant Riverside," A. 1671-1673; hence, it was testifying about its School, *i.e.,* RSPN being part of Riverside. Second, Plaintiff's response was to Defendants' comment the "School of Nursing is not on trial": Plaintiff simply was acknowledging RSPN as such was not named for any alleged malpractice. Third, consistent with first, ensuing references to "Riverside's nursing school" are in the context of "Defendant Riverside". A. 1675-1676. Fourth, RSPN physically was part of Riverside. A. 1678.

In any case, the most significant point is RSPN was state-accredited and training nurses to pass Virginia's nursing boards for licensure, A. 1675-1677. Thus, it is irrelevant whether Green or other Riverside nurses attended RSPN, Brief at 10-11, 26; it is an admission against Riverside and renders its teachings basis for Plaintiff's expert opinion. Despite Riverside's MKP being led into denial on the point upon Defendants' direct, A. 1685; what exactly is a state-accredited nursing school teaching if not state nursing "standard of care"? According to Defendants, a Virginia nursing school professor cannot testify as expert about what she regularly teaches students as SOC evidence.

Finally, Defendants' citation of *Klein v. Boyle*, 1993 U.S. App. LEXIS 27628 (4th Cir. 1993) in the context of the Riverside School, Brief at 26 n.9; is misleading. That unpublished Fourth Circuit decision had nothing to do with "non-party" status as insinuated. Moreover, *Klein* embraces *Bly v. Rhoads*, 216 Va. 645 (1976) in following *Godsey-Pullen*. 1993 U.S. App. LEXIS 27628, *2-3. *See* I(F).

intended third-party beneficiary of the rules. "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, *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, 753 (1984). The rules are those of Riverside and Green as its employee/agent. *See Broaddus v. Standard Drug Co.*, 211 Va. 645, 654-656 (1971)(private manual of contractor detective agency admissible).

Second, Defendants' private rules actually are their nursing policies and procedures. Plaintiff excluded those pre-trial, A. 968-974; Defendants were cautioned against continuing to reference them at trial, A. 3319-3321; and Plaintiff was vigilant against Defendants interjecting them at trial. A. 1656, 2831-2833. The mere refreshers about potential high risk patients and intervention options of Riverside's Orientation introduced, as well as the even more general references to assessment, orientation, (im)mobility and showing pink of Riverside's Nursing School introduced, simply do not rise to the level of a rule. Indeed, Defendants fail to identify a particular rule from the testimony of Riverside's MKPs Hicks and Sullivan-Yates.

Third, the "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 Health Care Organizations (JCAH)." *Estate of Jessie Curtis v. Fairfax Hosp. Sys., Inc.*, 21 Va. Cir. 275, 279 (citing Schockemoehl, 18 U. RICH L. REV. at 730.) "[T]o 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*. (citing *Mackey v. Miller*, 221 Va. 715

(1981)). *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").

F. Expert SOC testimony makes hospital private rules admissible.

Defendants' supposed private rules alone do not make a *prima facie* case. But if relied upon by an expert, they may be admissible on SOC. *See Bly v. Rhoads*, 216 Va. 645, 653 (1976); *Day v. Med. Facilities of Am., Inc.*, 59 Va. Cir. 378, 380 (2002); *Curtis,* 21 Va. Cir. at 278-279; *Johnson v. Roanoke Mem'l Hosps.*, 9 Va. Cir. 196, 202-203 (Roanoke 1987); Schockemoehl, 18 U. RICH. L. REV. at 741-744 & n.81.

In *Bly*, this Court found the issue of admissibility of hospital rules moot because plaintiff had not introduced sufficient SOC expert testimony for a *prima facie* case, but observed anyway that the trial court's exclusion was only "arguably . . . supported by precedent [of] *Godsey*." *Id*. (emphasis added). "*Bly* . . . implies that [hospital rules] may provide some evidence of the standard of care." *Curtis*, 21 Va. Cir. at 278-279.

In the medical arena, supporting hospital rules with SOC expert testimony differentiates *Godsey-Pullen*. *See Johnson*, 9 Va. Cir. at 202.

> Patient care standards . . . do not ultimately define the defendant's duty. * * * The [hospital's] standards, along with learned treatises and expert witnesses, simply represent some concrete evidence of that duty and assist the trier of fact in determining the relevant standard of care. * * * Invariably, a defendant hospital's employees admit under oath that knowledge of relevant standards and substantial compliance with them is a basic part of their orientations training and a required part of their job description.

Schockemoehl, 18 U. RICH. L. REV. at 742-743. "*See also Graves v. Gulmatico*, No. CA 83-0679-R (E.D. Va. Sept 4, 1984)(Judge D. Dorch Warriner ruled that the Hospital and Medical Staff Bylaws were not only admissible exhibits in a case against a physician, but represented some of the best evidence of the applicable standard of care)." *Id*. at 744n.81.

Unlike plaintiff in *Bly*, Plaintiff at bar presented a *prima facie* case by SOC expert testimony. Jenvey testified she reviewed and relied on Riverside's orientation and nursing school materials supposedly constituting private rules, A. 2216-2218; and testified substantially consistent with them. A. 2219-2230, 2245-2249, 2395. That sufficiently supported the rules admissibility as some corroborating evidence of SOC.

G. ***Godsey-Pullen* should be overturned as a minority anachronism.**

Pullen reaffirmed the World War I ruling in *Godsey*. But "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. By the 1980s, "approximately three-fourths of the jurisdictions" already had decided against the old rule. *Id*. at 203. Defendants cite *Gallagher v. Detroit-Macomb Hosp. Ass'n*, 431 N.W.2d 90 (Mich. App. 1988), but Michigan's late hold-out is irrelevant.

Naturally, reversal of *Godsey-Pullen* implicates the doctrine of *stare decisis*. But this Court declines to "perpetuate a mistake" thereon: "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." *Oraee v. Breeding*, 270 Va. 488, 500 (2005)(prior decision "expressly overruled"). The rule that fit in the nostalgic twilight of the horse and buggy a century ago – and long since abandoned as unsuitable by the overwhelming majority of states – now is "flagrant error" in the modern era of big institutional health care.

III. INCIDENT REPORTS, DATABASE AND FACTS WERE ADMISSIBLE

"The present question involves the search for the truth, for the factual, objective development of what took place." *Benedict v. Cmty. Hosp. of Roanoke*, 10 Va. Cir. at 430, 440 (Roanoke 1988). Defendants routinely hide the true key facts in incident reports.

A. Not appealing or preserving "discovery" waives any objection.

Discoverability and admissibility are entirely different things. Defendants only appeal admissibility, not discoverability: "The trial court erred in admitting privileged communications and reports . . . ." Assignment of Error 3 (emphasis added).

Plaintiff Exs. 3 & 8 were admissible as "business records" under the "modern shopbook rule." *E.g.,* Friend, §18-15 at 772-779. Defendants essentially concede the point. Brief at 30. Riverside MKP Torn admitted that incident reports are completed in the routine and ordinary course of business to document contemporaneously all falls and other untoward events, A. 1617-1618; and MKP Friend admitted that the Database simply is incident report data. A. 1732.

Defendants assign admissibility as error solely on § 8.01-581.17. But its plain language only provides "privileged communications . . . may not be disclosed or obtained by legal discovery proceedings." *HCA Health Servs. of Virginia, Inc. v. Levin*, 260 Va. 215, 220 (2000)(emphasis added). *Cf.*, Va. Code Ann. 8.01-397 ("Dead Man Statute" limits admissibility); *Dade County*, 551 So. 2d at 533 (citing § 768.41(4), Fla. Stat. (1981) ("The [hospital] incident reports shall . . . *not be admissible as evidence in court* . . .") (emphasis in original)). Defendants concede this, yet still assert summarily without authority: "But logic dictates that privileged material that is not discoverable cannot be admitted at trial." Brief at 29 & n.11. In fact, § 8.01-581.17 impliedly contemplates

admissibility of undisputedly privileged materials upon the court ordering disclosure anyway "for good cause arising from extraordinary circumstances." More fundamentally, since Defendants failed to assign error to discovery, the court's unappealed decision at the discovery stage that the materials are not privileged is final, so § 8.01-581.17 cannot be invoked now under the rubric of admissibility.

Further, even if *arguendo* discoverability could be considered indirectly through admissibility, Defendants still are not permitted to raise the issue now. They failed to include in the record on appeal pursuant to Va. S. Ct. R. 5:10(a)(7) a transcript or written statement for the hearing on January 26, 2005, at which the court found no privilege and allowed discovery. *Cf., Larchmont Props., Inc. v. Cooperman*, 195 Va. 784, 789-790 (1954)(predecessor Rule 5:1 § d(3))(no transcript). "We are not permitted to give evidential value to exhibits which constitute only a part of the evidence." *Id*. at 789.

B. Not redacting and the "same character" rule waive any objection.

First, Defendants claim Plaintiff used the incident report to insinuate negligence "based on the self-searching descriptions contained in the document." Brief at 28. But Plaintiff gratuitously introduced through Riverside MKP Torn "the hospital does not intend this incident report to be an admission of any kind of liability for anything." A. 1627. Further, Plaintiff merely focused on the facts therein and even tendered a redacted version; but Defendants sought no redaction, criticized Plaintiff for redacting, and insisted on the pink original. P. Exs. 3 & 3A. A. 1607-1610, 1896, 1919, 2034. Defendants cannot "approbate and reprobate," are bound by their trial representations against redacting and cannot avail of any invited error in the unredacted. *Hansen*, 266 Va. at 358. They are barred by Rule 5:25. *Cf., Rose*, 268 Va. at 158; *Oden*, 237 Va. at 531.

Second, through Riverside MKPs Torn and Friend, Plaintiff introduced P. Ex. 3, Incident Report, and P. Ex. 8, Database Excerpt; and questioned MKP Friend. Significantly, as rebuttal (over Plaintiff's objection), Defendants introduced D. Ex. 1, a subsequent Addendum to the incident report. A. 1944-1946. Defendants thereby triggered the "same character" waiver rule by greatly exceeding the scope of initial examination. *E.g., Pettus*, 269 Va. at 78-79; *Combs*, 256 Va. at 499.

C. Such evidence is not privileged under Va. Code Ann. § 8.01-581.17.

Plaintiff Exs. 3 & 8 and Riverside MKP Friends's testimony are unprotected.

1. Privilege is construed strictly, must be proved by the proponent, and does not protect routine accident reports.

"Mere assertion that the matter is confidential and privileged will not suffice. Unless the document discloses such privilege on its face, he [the proponent] must show by the circumstances that it is privileged." *Robertson v. Commonwealth*, 181 Va. 520, 540 (1943). Contrary to Defendants' claim, Brief at 27; self-serving headings do not prove privilege. "You can call a mule 'Man O'War,' but that won't make him a racehorse." *Clark v. Winn-Dixie Raleigh, Inc.*, 40 Va. Cir. 228, 230 (1996).

Further, a document does not become privileged just by subsequent delivery to a person who may enjoy privilege under certain circumstances. *E.g., Robertson*, 181 Va. at 540-541 (negligent employee's oral and written accident-day reports to employer and his supplemental statement to insurance adjustor two days later not privileged despite subsequent delivery to counsel). Otherwise, Defendants could insulate "smoking guns" from discovery simply by routing them through another person after the fact.

"The proponent has the burden to establish that the . . . communications under consideration are privileged and that the privilege was not waived." *Commonwealth v.*

Edwards, 235 Va. 499, 509 (1988). *Eppard v. Kelly*, 62 Va. Cir. at 57, 62 (Charlottesville 2003). "[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." *Edwards*, 235 Va. at 509.

This Court long has held that routine accident reports are not privileged.

> A statement made by an employee to his employer, in the course of his ordinary duty, concerning a recent accident, and before litigation has been brought or threatened, is not privileged either in the hands of the employer or in the hands of the latter's attorney to whom it has been transmitted. We so held in *Virginia-Carolina Chem. Co. v. Knight*, 106 Va. 674, 679, 680, 56 S.E. 725 [1907].

Robertson, 181 Va. at 539 (emphasis added). "The trial court correctly ruled that the [statement] was not a privileged communication." *Id*. at 541. In *Virginia-Carolina*, "the [written accident] report was made by an official of the defendant in the course of his ordinary duty immediately after the accident, before any action had been brought or threatened. A report made under these circumstances . . . is not a privileged communication within the reason of the rule under the authorities." 106 Va. at 680 (emphasis added). Medmal incident reports also are not privileged under common law. *E.g.*, *Brown v. Lab. Corp. of Am.*, 67 Va. Cir. 232, 235 (Rockingham 2005); *McMillan v. Renal Treatment Ctr.*, 45 Va. Cir. 395, 396-397 (Norfolk 1998); *Benedict*, 10 Va. Cir. at 437-439; *Atkinson v. Thomas*, 9 Va. Cir. 21, 23 (Virginia Beach 1986).

2. The plain language of § 8.01-581.17 is "limited narrowly" to protect only peer review committee proceedings, not routine incident reports.

The "statutory language [of Code § 8.01-581.17] is clear, unambiguous, and unqualified." *Levin*, 260 Va. at 220. "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. Courts must give effect to legislative intent, which must be gathered from the words used, unless a literal construction would involve a manifest absurdity." *Id*.

"The obvious legislative intent is to promote open and frank discussion during the peer review process among health care providers in furtherance of the overall goal of improvement of the healthcare system. If peer review information were not confidential, there would be little incentive to participate in the process." *Id*. at 221 ("all documents dealing with any formal or informal complaint . . ., describing any disciplinary action . . . [and] that refer to any decision to grant, revoke, or suspend . . ." are privileged).

Section § 8.01-581.17 "provides a privilege in plain language which is limited narrowly to medical staff *committees*, utilization rule *committees*, and other *committees* specified in § 8.01-581.16." *Klarfeld v. Salsbury*, 233 Va. 277, 284 (1987)(italics in original)(underlining added). "[T]he scope of § 8.01-581.17 is more limited [than § 8.01-581.16]. Stated differently, § 8.01-581.17 does not include an 'other entity' referred to in § 8.01-581.16 which is not a 'committee'." *Id*. Defendants' citation of Michigan's *Gallagher*, Brief at 30; does not trump *Klarfeld* and other Virginia law.

Stevens v. Lemmie, 40 Va. Cir. 499, 508 (Petersburg 1996) essentially parallels *Klarfeld*, anticipates *Levin* and extrapolates to hospital incident reports. Writing as a circuit judge, Justice Lemons in *Stevens* reconciled that the statutes are "only intended to protect peer review committee proceedings and similar internal investigations" and that "the privilege against disclosure must be limited:"[7]

[7] "Ambiguities in the [medmal] statutes should not be extended to enlarge the privilege." *Johnson*, 9 Va. Cir. at 199 (Coulter, J.). "Any ambiguities in [Va. Code Ann. 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

> The provisions of §§ 8.01-581.16 and 8.01-581.17 cause difficulty in interpretation. On the one hand the protection afforded 'all communications' appears to create a universe of coverage without limitation. On the other hand the provision that the statute shall not preclude discovery of evidence 'relating to hospitalization or treatment of any patient in the ordinary course of hospitalization of such patient' appears to reclaim much of what was protected by the former declaration. * * * Applying the interpretive doctrine of *ejusdem generis*, the term 'communications' must be limited in its application to the particulars that proceed it, namely, the 'proceedings, minutes, records, and reports of any medical staff committee, utilization review committee, or other committee as specified in § 8.01-581.16.' Judge Annunziata has observed that §§ 8.01-581.16 and 8.01-581.17 are 'only intended to protect peer review committee proceedings and similar internal investigations of the hospital from public scrutiny.'* * * * This Court is in agreement with the opinions of Judge Coulter [in *Johnson*] and Judge Annunziata [in *Curtis*] that the privilege against disclosure must be limited to accomplish the purpose of the legislation.

Id. "The first sentence [of § 8.01-581.17] could cover [an incident] report . . ., but the second sentence would exempt it. A statute is to be construed as a whole and in a manner to give effect to all of it." *Hurdle v. Oceana Urgent Care*, 49 Va. Cir. 328, 329 (Virginia Beach 1999). "Almost anything could come within such broad and limitless sweep [of the first sentence]. Beyond this analysis, however, the final phrase . . . cannot be ignored and must be met head on. [T]hese words practically eliminate any privilege that the preceding language might grant." *Johnson*, 9 Va. Cir. at 199. "The argument must yield to the more compelling mandate of the statute's last sentence." *Benedict*, 10 Va. Cir. at 437. Contrary to Defendants' assertion, such an interpretation does not eviscerate privilege and "render all attempts at quality improvement useless," Brief at 31; it just limits privilege to genuine peer review committee processes under *Klarfield* and *Levin* as intended.

In *Stevens*, because the Safety Committee operated in a "'peer review' capacity," § 8.01-581.17 protected its internal documents. 40 Va. Cir. at 508-509. They were the Safety

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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 (Annunziata, J.).

Committee minutes and attachments.[8] *Id*. at 514. Significantly, however, Justice Lemons in *Stevens* ruled the hospital had to produce the Security Incident Reports, even though "intended for submission to the Safety Committee for discussion," with "commentary and recommendations for future practices and procedures as a result of the particular incident" redacted. Further, all Security Daily Activity Reports and Operator Logs were not privileged either. *Id*.

3. "Medical records about a patient kept in the ordinary course of business of operating a hospital," such as routine incident reports, and "any facts or information contained in such records" are not privileged under § 8.01-581.17(C).

The concluding sentence of § 8.01-581.17 provides a broad exception that negates any privilege which otherwise may apply to routine incident reports (and any database thereof). "Nothing in this section shall be construed as providing any privilege to the hospital medical records kept with respect to any patient in the ordinary course of business of operating a hospital . . . ." Va. Code Ann. § 8.01-581.17(C) (emphasis added).[9]

Institutions "have tried to classify routine accident or incident reports which are completed by employees on a regular basis as quality assurance documents." *Messerly v. Avante Group, Inc.*, 42 Va. Cir. 26, 27 (Rockingham 1996). But incident reports "do not

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[8] *But see Benedict*, 10 Va. Cir. at 437 (holding incident reports and other documents cannot "become privileged simply by the committee requiring their production, or attaching them to the minutes"). *Cf., Robertson*, 181 Va. at 540-541. *Stevens* and *Benedict* and *Robertson* are reconcilable on this seeming inconsistency: mere attachment does not render the underlying document itself privileged, *Benedict* and *Robertson*; while the particular attachment itself *qua* attachment may enjoy privilege (otherwise, minutes content to some extent is disclosed). *Stevens* holding that Security Incident Reports were not privileged just because earmarked for Safety Committee supports this.

[9] *Boynton v. Kilgore*, 271 Va. 220 (2006) and *Beck v. Shelton*, 267 Va. 482 (2004), cited by Defendants, are inapposite: neither construes § 8.01-581.17(C), is a medmal case, or applies on the facts.

rise to the level as contemplated by the statute of being quality assurance deliberative documents." *E.g., Bradburn v. Rockingham Mem'l Hosp.*, 45 Va. Cir. 356, 360 (Rockingham 1998)(in-patient fall case); *Huffman v. Beverly California Corp.*, 42 Va. Cir. 205, 216 (Rockingham 1997)(incident reports "do not contain any deliberative process of the quality assurance panel"); *Messerly*, 42 Va. Cir. at 27-28.

"The QCRs, QCCRs, or 'Pink Sheets' (. . . 'Incident Reports') are prepared by staff personnel whenever there is an untoward incident which occurs at the hospital." *Bradburn*, 45 Va. Cir. at 358. "They are simply recitations of the accident that occurred, the witnesses who were present, and other objective facts that can be ascertained from the eyewitnesses to the incident." *Id*. at 360. They "will likely have been produced by a person with the background and training to know what questions to ask and what information to collect. The person preparing the report is also likely to have access to those people most knowledgeable about the incident at a time the incident is fresh in mind." *Hurdle*, 49 Va. Cir. at 329. They are standard in all health care institutions. *E.g., Eppard*, 62 Va. Cir. at 63; *Huffman*, 42 Va. Cir. at 216; *Messerly*, 42 Va. Cir. at 26.

Defendants at bar assert incident reports not being kept as "part of the patient's medical records" is conclusively self-proving of their privileged status. Brief at 12. But "the Incident Report in question falls within the purview of the last sentence of Section 8.01-581.17. It is a hospital medical record kept with respect to the patient . . . in the ordinary course of the business of [Defendant] operating its hospital . . . ." *Atkinson*, 9 Va. Cir. at 23. *Bradburn*, 45 Va. Cir. at 360; *Huffman*, 42 Va. Cir. at 216; *Messerly*, 42 Va. Cir. at 28. Defendant in *Hurdle* even conceded the point. 49 Va. Cir. at 329. "Because a hospital may not choose to call a document 'medical record' or may contend that various

reports are not maintained in the ordinary course of a hospital's business . . . does not make it so." *Benedict*, 10 Va. Cir. at 437.[10] "Clearly, injuries to a patient, whether in a hospital or a nursing home, need to be included in the patient's medical chart and cannot be shielded from discovery by the mere expediency of forwarding these 'reports' to a so-called quality control committee." *Messerly*, 42 Va. Cir. at 28; *Eppard*, 62 Va. Cir. at 63; *Bradburn*, 45 Va. Cir. at 361; *Huffman*, 45 Va. Cir. at 216.

Significantly, incident reports (including the one at bar) routinely bear a telltale badge. Like all other patient medical records kept in the chart, they are stamped (in the upper right-hand corner) with the patient's identification plate! P. Ex. 3. A. 1896.

4. "Evidence relating to a patient's hospitalization or treatment in the ordinary course of his hospitalization," such as routine incident reports, is not privileged under § 8.01-581.17(C).

The concluding sentence of § 8.01-581.17 provides another parallel exception that negates any privilege which otherwise may apply to routine incident reports (and any database thereof): "nor shall this section preclude or affect discovery of or production of evidence relating to hospitalization or treatment of any patient in the ordinary course of hospitalization of such patient." Va. Code Ann. 8.01-581.17 (emphasis added). "Any evidence, then, that relates to the treatment of any patient or his hospitalization . . . . is discoverable, notwithstanding whatever privilege the preceding language may have

[10] "What are, or should be, records kept in the ordinary course of treating a patient or operating a hospital with respect to patients, that is the ultimate question. The ordinary course of a hospital's function surely includes the prevention of accident or mishaps to those who have been entrusted to its care. Charting the ordinary course of a patient's treatment would or should require description of events out of the ordinary that relate to a patient's health and well-being." *Benedict*, 10 Va. Cir. at 436 (emphasis added).

granted." *Johnson*, 9 Va. Cir. at 199. "How can these words be given any other meaning than what they clearly say: this section shall *NOT* preclude, it mandates, or affect discovery of evidence that relates to a patient's hospitalization or treatment. And this relation is not quantified; *any* relation to treatment or hospitalization, however infinitesimal, however generalized, is all that is required." *Id*. at 199-200 (emphasis in original). An "Incident Report . . . contains facts and evidence relating to the hospitalization or treatment of said patient in the ordinary course of her hospitalization." *Atkinson*, 9 Va. Cir. at 23. "Because a hospital may . . . contend that various reports and not [evidence of] a patient's treatment does not make it so." *Benedict*, 10 Va. Cir. at 437.

5. "After a hearing and for good cause arising from extraordinary circumstances being shown," a court can order disclosure of otherwise privileged committee communications under § 8.01-581.17(B).

"The protection provided by § 8.01-581.17 is a qualified privilege similar to the privilege afforded by Rules of Court 4:1(b)(3)." *Stevens*, 40 Va. Cir. at 512 (Lemons, J.). The limited statutory privilege for certain "committee" communications pertains only "unless a Circuit Court, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure of such proceedings, minutes, records, reports, or communications." Va. Code Ann. § 8.01-581.17 (emphasis added). For the analogous work-product privilege, determination of "good cause" is "a matter within the trial court's discretion and will be reversed only if the action taken was improvident and affected substantial rights." *Rakes v. Fulcher*, 210 Va. 542, 546 (1970).

Applying Rule 4:1(b)(3) analysis, incident reports should be disclosed under § 8.01-581.17(B), even if *arguendo* they are not discoverable under § 8.01-581.17(C). *See, e.g., McMillan*, 45 Va. Cir. at 397; *McGuin v. Mount Vernon Nursing Ctr. Assocs., L.P.,* 45 Va.

Cir. 386, 386-387 (Fairfax 1998); *Benedict*, 10 Va. Cir. at 438. The court in *McGuin*, another in-patient fall case, found the incident report was not privileged and, alternatively, Plaintiff had substantial need and no substantial equivalent where the patient had died and the nurse had left. 45 Va. Cir. at 397.

The holding of *McMillan* is broader, yet more on point. In *McMillan*, Plaintiff's expert suspected an "undocumented fall," *i.e.*, another fall "prior to the fall documented in the patient's chart." 45 Va. Cir. at 386-387 (emphasis in original). Despite the judge incorrectly not considering an incident report a medical record under § 8.01-581.17(C), *McMillan* correctly recognized routine incident reports as the unique source of contemporaneous corroborating factual information – regardless the availability of the patient and/or the nurse – and ordered discovery:

> Where, as here, the document constitutes a source of information relevant to the inquiry which is not reasonably discoverable from other sources, it may be ordered produced. * * * From other testimony and argument, it is clear that incident reports are prepared whenever there is a fall, and thus they would constitute the only reasonable source of facts to challenge or corroborate the expert's contention.

Id. at 386 (emphasis added). *McMillan* has it right on both counts: (1) routine incident reports are *sui generis* as contemporaneous evidence of the true complete facts; and (2) hospitals routinely launder patient charts of falls and other events by using incident reports they fight producing. *Benedict*, yet another fall case, is to the same effect.[11]

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[11] "The injured patient . . . is at such an unfair [dis]advantage: one single individual, sick and weak, pitted against a colossal corporate giant with staff and resources unlimited and personnel schooled in the techniques of avoiding or minimized losses for claimed negligence. Already incapacitated and perhaps further damaged by the incident and at the complete mercy of the personnel from whom she seeks recovery and relief, she is hardly in a position to undertake critical investigation of what happened. * * * * [T]he Court is satisfied that enough substantial need has been shown to require the production of these documents and that obtaining their substantial equivalent could not only not be obtained 'without undue hardship' but could probably not be obtained at all. * * * * When the input

The matter *sub judice* is similar to *McMillan*. Defendants misrepresent that "the circumstances of Ms. Johnson's fall were fully set forth in the medical records and through the testimony of Nurse Green." Brief at 28. In truth, Defendants' incident report documents key additional, contradictory and otherwise incriminating facts, which go beyond the Nurses Notes of the patient chart and which were denied by Green. *Compare* P. Ex. 3, A. 1896, *with* P. Ex. 11, A. 1910-1911.

Plaintiff at bar suspected an undocumented instance, another event of Johnson being "out of bed without assistance" known to Defendants prior to the fall documented in the patient's chart. Having been tipped off to the same, Plaintiff alleged in his Motion for Judgments: "According to Other Personnel of Defendant, Hospital, prior to the Deceased's fall on October 31, 1997, the Nurse's Station of Defendant, Hospital, was advised that Deceased was standing up alone in her room; but Defendant, Nurse Green, or Other Personnel of Defendant, Hospital, simply threatened Deceased with being put in restraints if she got out of bed again, without undertaking any further fall precaution." A. 5, 110. Obtained subsequently, Defendants' incident report alone corroborates this.

In Box 14, Defendant's incident report briefly describes the following critical facts: "Pt. OOB s assist. Unsteady gait. Instructed to stay in bed. Found in hallway on floor. c/o hip pain on L side after fall." P. Ex. 3. A. 1896. Jenvey and Vickers testified consistently that means another time before Johnson fell, Green saw she was "out of bed without assistance" (contrary to prior instructions) with "unsteady gait;" but simply

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by one party to an issue in dispute has been so handicapped at the outset because of the conditions of health and the location and environment in which the incidents occurred and when measured against the relative investigative strengths of the parties, natural notions of fair play lean heavily toward opening rather than closing doors that might balance the contest. The potential harm to the Claimant in refusing the discovery sought far outweighs the benefit to the Defendant in maintaining their secrecy." *Benedict*, 10 Va. Cir. at 438.

instructed Johnson to "stay in bed," A. 2321-2322, 2340-2341, 3005-3006; instead of using standard fall risk interventions. However, even when confronted with her incident report, troublingly Green still claimed there was no pre-fall instance of Johnson being "out of bed without assistance." A. 1859-1862.

Additionally, "PATIENT STATUS" being shown as "Disoriented @ times" on the incident report, also is missing – laundered – from Johnson's patient chart. *Compare* P. Ex. 3, A. 1896, *with* P. Ex. 11, A. 1910-1911. Hence, the incident report contemporaneously records key facts that differ materially from and contradict the sanitized patient chart and Green testimony to which Defendants want Plaintiff confined for evidence. Thus, the matter *sub judice* evinces "good cause from extraordinary circumstances being shown" to support the incident report disclosure ordered.

6. <u>Fraud or commingling vitiates any privilege.</u>

Claimed "privilege does not permit a litigant to commit a fraud upon a court." *Owens-Corning*, 243 Va. at 141. *Peterson v. Fairfax Hosp. Sys., Inc.*, 32 Va. Cir. 294 (Fairfax 1993)(medmal misrepresentation vitiates privilege). "[W]hen deciding whether a fraud has been committed . . . a controlling factor is 'whether the misconduct tampers with the judicial machinery and subverts the integrity of the court'." 243 Va. at 142.

Riverside labeling routine incident reports "Quality Care Control Report" ("QCCR") and "Quality Management System" ("QMS") was calculated to create knee-jerk privilege "on its face" under Va. Code Ann. §8.01-581.17. It is decades-old fraud on the court and patients with notorious The Virginia Insurance Reciprocal ("TVIR"). TVIR, Riverside's medmal insurer, crafted the QCCR form for incident reports, emblazoned with

its name, initials and logo.[12] Riverside's Risk Management Department ("RMD") under Ms. Friend – different from Riverside's "quality assurance" bodies – collects, data inputs and destroys QCCR incident reports. Riverside's Database, or QMS, is the computer software program named, copyrighted and distributed by TVIR, designed to print on each page "information generated for quality improvement purposes" (even when printed for litigation purposes at bar). A. 1717-1732. Friend's RMD subordinate selectively inputs into the Database, sometimes rewording and omitting incident report entries more favorably to Riverside. A. 1732-1735, 1769-1770, 1778. P. Ex. 13, A. 2167.

At Final Pre-Trial, the court condemned Riverside destroying incident reports after such Database inputting. "Then what you're going to do, you're going to find a judge up there [in the Supreme Court] to say, okay, if you want to play that game then everything is in. That's what you're going to find in reaction to it." A. 896. (emphasis added).

At trial, Riverside MKP Torn was impeached, claiming anew the incident report went to "quality assurance" before RMD. A. 1621-1623. Riverside MKP Friend was impeached about incident reports going to "quality committees" and exposed as knowing "privilege against disclosure" attached to claimed "quality committee" records. A. 1794-1802.

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[12] TVIR's QCCR incident report form at bar is the same TVIR format as Riverside's 1993 one in *Woodcock v. O'Connell*, No. 32067 (Hampton, March 25, 1997), and Sentara's 1998 one in *Garner v. Sentara Norfolk Gen. Hosp*., No. CL00-1107 (Norfolk, February 12, 2001). Riverside used TVIR's forerunner 1983 QCCR incident report form in *Washington v. Riverside Hosp.*, No. 9937-WS (Newport News, December 16, 1985). *See* Addendum at 1-13. QCCR incident reports also were being used in Rockingham by 1994, *e.g., Bradburn*, 45 Va. Cir. at 356-358; and in Roanoke by 1983. *E.g., Benedict*, 10 Va. Cir. at 430-431. Thus, for more than two decades (and probably since § 8.01-581.17 was enacted in 1976), the Commonwealth's leading medmal carrier and its countless insureds floated this scam uniformly.

On Petition and Brief, Defendants cite Michael L. Goodman, Esq. as scholarly authority. Mr. Goodman counsels "if a health care provider seeks to protect incident reports, it must distance them from medical records by shrouding them as risk management materials or quality assurance documents. Clearly the most beneficial route . . . is to emphasize quality assurance in the creation of policies and incident reports. Not only does this approach insulate health care providers . . . ." Michael L. Goodman, *Essay, Discovery Divide: Virginia Code Section 8.01-581's Quality Assurance Privilege and its Protection of Health Care Provider Policies and Incident Reports*, 39 U. RICH. L. REV. 61, 85 (2004)(emphasis added). Mr. Goodman's law firm defending Riverside in medmal cases was not disclosed. The submission of such ostensibly "disinterested expert" article-writing is twice condemned "fraud on the court" in *Owens-Corning,* 243 Va. at 141-142.

Others have been abusing § 8.01-581.17. The similar incident report scheme of University of Virginia's Medical Center ("University Hospital") and its carrier, Piedmont Liability Trust ("PLT"), was exposed in discovery. *Eppard*, 62 Va. Cir. at 59-61.[13]

Eppard found "there may be incentives to immediately commingle the creation of an incident report with healthcare evaluation by using § 8.01-581.17 to avoid discovery of damaging information or documents." *Id*. at 64. Further, "since the University's Risk Management staff as well as the PLT staff assigned to the healthcare committees have

[13] In 1991, University Hospital's "Incident/Occurrence Reports" summarily were retitled "Quality Reports" and claimed "generated to initiate quality review of Health System processes, practices, and procedures for quality assurance purposes." *Id*. at 60. Retitled Reports were routed to various committees ostensibly concerned "primarily with health care improvement activities," but whose membership included and/or was reported to by "risk management and insurance" and "legal" personnel. *Id*. at 60-61. University Hospital and PLT also maintained "patient databases" and "incident report with medical chart review material in a database format," which the Risk Manager could access. *Id*. at 60, 65.

become part of the healthcare improvement process, the system appears to be designed to wrap large segments of the patient treatment review investigation under a blanket of privilege." *Id*. "However, 'peer review' should not be used to shield from disclosure medical records not generated initially for peer review objectives." *Id*. at 63.

Eppard held that "commingling" the claimed "healthcare improvement committee" with legal, risk management and insurance interests did not create privilege under § 8.01-581.17. *Id*. at 64. *Eppard* ordered discovery of the "Case Notes," *i.e.*, "an incident report with medical chart review material in a database format," and the "Database Notes," including "medical discussions [that] list investigative facts unearthed by the various parties involved." *Id*. at 65. *Eppard* declined (as unnecessary to decide) whether any privilege under § 8.01-581.17 "had been waived by the commingling of University Hospital and PLT [insurance and risk management] documents and staff." *Id*. But Plaintiffs at bar assert such waiver and seek such determination by this Court.

IV. DISQUALIFICATION, WAIVER AND MOOTNESS ERASE VICKERS

A. Vickers was not clearly qualified on "bed alarms."

This Court determines "whether a proffered expert witness satisfies the active clinical practice requirement by referring to the 'relevant medical procedure' at issue in a case." *Hinkley v. Koehler*, 269 Va. 82, 89 (2005)(citing §8.01-581.20). "'Actual performance of the procedures at issue' must be read in the context of the actions by which the defendant is alleged to have deviated from the standard of care." *Id.*

Defendants assert "the *initiation* of fall-prevention measures was the true 'procedure' at issue." Brief at 34 (emphasis in original). But generic initiation in the abstract simply is not a procedure. It is a *reductio ad absurdum*. Initiation alone merely

bespeaks the empty generality of beginning or implementing something and begs the real question: initiating what procedures? Thus, contrary to Defendants' misdirection, the "true 'procedure[s]' at issue" are not bare initiation, but rather the (particular) "fall-prevention measures," *e.g.* "fall prevention," *i.e.*, "restraints, bottom bed rails or even a bed check alarm" A. 3, 6, 108, 111 (emphasis added); "a prompt and otherwise reliable system for communicating patient calls," A. 5, 6, 110, 111; and an "appropriate plans of care," A. 3, 6, 108, 111; like Trial Ex. 9. A. 1902.[14]

If a proffered expert has an active clinical practice in most, but not all, of the procedures at issue within one year of the duty breaches, a motion to disqualify as to the unproven procedure should be sustained. *Hartman v. Kleiner*, 69 Va. Cir. 246 (2005). "The question whether a witness is qualified to testify as an expert is 'largely within the sound discretion of the trial court'. * * * A decision to exclude a proffered expert opinion will be reversed on appeal only when it appears clearly that the witness was qualified." *Perdieu v. Blackstone Family Practice Ctr., Inc.*, 264 Va. 408, 418 (2002).

Bed alarms were at the core of Plaintiff's case by his allegations, A. 3, 6, 108, 111; by his SOC expert, A. 2246-2247, 2278-2283, 2292, 2331, 2352, 2401, 2407, 2424-2427; and by his Reliable Authority. A. 1523, 1527, 1532, 2298, 2310, 2314-2315. But through at least 1998, Vickers had not activated a built-in bed alarm. A. 2858. Her "little limited

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[14] Defendants misapply *Wright v. Kaye*, 267 Va. 510 (2004). *Wright* held that the relevant medical procedure was general "female pelvic laproscopic procedures around the bladder," not the precise "urachal cyst surgery" that injured the bladder. *Id.* at 521-524. Under Defendants' formulation, though, the relevant medical procedure in *Wright* would be simply the "initiation" (of the procedures), not the actual procedures themselves. But under *Wright*, the relevant medical procedures at bar are the fall-prevention measures themselves, including particularly use of bed check alarm as alleged by Plaintiff, established as uniquely efficacious SOC intervention by Jenvey and Reliable Authority, and not actually performed by Vickers.

personal experience with bed alarms, was [her] hospital finally getting around to trying [portable] bed alarms;" and that "might have been 1999." A. 2859. Like the proffered expert in *Hartman*, the court properly disqualified Vickers as to bed alarms, since she did not actually perform within one year the relevant procedure by which Defendants deviated from the standard of care, *i.e.,* use of bed alarms.

B. Vickers was unqualified and abandoned on "intervention."

First, Defendants did not qualify Vickers on "intervention" ("prevention") at all. Defendants failed to show Vickers had performed any intervention procedures at the pertinent time. Vickers was vetted for "assessment" only. A. 2847, 2862.

Second, Defendants abandoned Vickers. Defendants offered Vickers on "fall-risk assessment and [intervention]." A. 2851. Plaintiff moved to limit as to "bed alarms." A. 2865-2878. The court agreed: "She can testify as to interventions except for bed alarms, and that will be my order." A. 2878-2880. But Defendants did not want bed alarms carved out of all intervention, so they abandoned Vickers being qualified on any intervention at all: "I will just stick it to fall-risk assessment." A. 2880. The court confirmed, "Are you going to ask anymore concerning interventions?" Defendants replied: "I don't think so." The court observed Vickers would be qualified for "assessment" and "if she mentions intervention, then we are going to – then I may have to interject and say except for bed alarms." A. 2883. Defendants recapitulated their withdrawal: "Ms. Vickers, the Court has ruled that you do not have expertise in the area of bed alarms, and I would, therefore, not ask you any questions about nursing intervention. My questions will be limited to your knowledge of fall-risk assessment . . . And will you please avoid, Ms. Vickers, talking about bed alarms or any other nursing intervention? Let's just focus on the assessment." A.

2884-2885. Defendants re-tendered her on assessment and not intervention: "I would offer Ms. Vickers as an expert on . . . assessing patients . . . .;" with "no testimony relative to any intervention." A. 2886. On Brief at 32, 35-36, Defendants mischaracterize this clear chronology and its impetus.

Defendants are "bound here by the same representation made to the trial court. Having invited the trial court to [qualify Vickers only for 'assessment,' they] cannot now argue for the application of a different rule on appeal." *Hansen*, 266 Va. at 358. "No litigant . . . will be permitted to approbate and reprobate – to invite error, as the defense did here, and then to take advantage of the situation created by his own wrong." *Id.*

C. Vickers being limited is a moot "red herring."

This Assignment of Error boils down to Vickers not being allowed to testify that "patients who are not at high risk for falls do not need fall-prevention measures," that "fall-prevention measures were unwarranted because Ms. Johnson was not a high fall-risk." Brief at 33, 35. That is a moot "red herring" for four reasons. First, the testimony precluded is implicit in Vickers' predicate opinion that Johnson supposedly was not a high fall risk, *i.e.,* a patient who is not assessed a high fall risk does not require the intervention. Second, Plaintiff introduced SOC only required "a high fall risk patient gets certain extra things done for them;" all other patients do not get fall risk interventions, such as bed alarms. A. 2247-2249. Third, in finding for Plaintiff, the jury impliedly credited that Johnson was a high fall risk and rejected Vickers' opinion that she was not, thus rendering that precluded testimony irrelevant. Fourth, Vickers not offering an SOC opinion in defense of Defendants' nurse call system claim results in Plaintiff independently prevailing

as a matter of law on his *prima facie* case under this alternate liability theory, regardless the disposition of this fall risk intervention issue.

V. INSTRUCTION 14 WAS NOT REVERSIBLE ERROR

Despite this assignment of error, "the jury could not properly have been found any other verdict than the one it did find, and when this is the case such rulings are immaterial." *New York, Philadelphia and Norfolk R.R. Co. v. Bundick, Taylor, Corbin-Handy Co.*, 138 Va. 535, 547 (1924). "Furthermore, it is provided by [Va. Code Ann. § 8.01-678] that no judgment shall be reversed 'for any error committed on the trial where it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached'." *Id*.

A. <u>It was fair and correct, not misleading or prejudicial on the evidence.</u>

"Instructions must be read in the light of the evidence presented in the case and if, when so read, they are not misleading, no prejudicial error is committed." *Burnette v. McDonald*, 206 Va. 186, 193 (1965). A disputed instruction passes legal muster if it is "a fair and correct statement of the law as applied to the evidence from the plaintiff's standpoint." *Virginia Ry. & Power Co. v. Smith & Hicks, Inc.*, 129 Va. 269, 278 (1921).

Plaintiff introduced substantial evidence of the patient's debilitated "mental and physical condition." A. 2230-2243. Instruction 14 just covered this evidence. More fundamentally, Instruction 14 was appropriate for Plaintiff's theory of liability and *prima facie* case that Defendants were negligent for having an inoperable "nurse call system"

causing multiple patients to be unassisted and fall.[15] Whether a "reasonably prudent [hospital] would permit its [nurses to care for patients needing assistance by instructing them to use an inoperable 'nurse call system'] is certainly within the common knowledge and experience of a jury." *Beverly*, 247 Va. at 269. Plaintiff alternatively introducing expert testimony that the nurse call system (even when operating) was substandard (as antiquated and circuitous), A. 2208, 2211; does not change this point.

B. <u>Companion instructions ensured the jury was not misled or confused.</u>

Instruction 14 cannot be read in a vacuum with blinders on. "If the jury would otherwise have been confused by the giving of Instruction No. [14] . . . the jury should not have been so confused in view of Instruction [Nos. 15 and 18]." *Burnette v. McDonald*, 206 Va. 186, at 192-193 (1965). "That an error not amounting to a positive misstatement of law can be cured by a clear, definite and correct statement upon the same subject in another instruction is beyond question." *Tri-State Coach Corp. v. Walsh*, 188 Va. 299, 310 (1948).

The jury also was charged with Instructions 15 and 18, A. 3277 & 3280; which Defendants admit is correct. Brief at 39. These Virginia Model Jury Instructions 35.000 and 35.050 embody Va. Ann. Code § 8.01-581.20 and *Perdieu.* Taken together, they

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[15] Plaintiff alleged "Defendants . . . knowingly were utilizing a circuitous call button system that routed calls for assistance . . . down into the basement and then back up to the floor by beeper or pager, and which suffered from interference due to ongoing work with tile, pipe, etc." A. 5, 110. "Defendants . . . are guilty of negligence [for] failing to utilize a prompt and otherwise reliable system for communicating patient calls." A. 6, 111. A Riverside administrator admitted to Johnson's daughter-in-law that "updating the communications system" involved construction and caused some problems in nursing response. A. 2730-2731. Riverside MKP Friend admitted that its Database excerpt showed "nurse call system down" on the night in question, when another patient on the same floor fell before Johnson after getting out of bed without assistance. A. 1744-1748, 1751-1753, 1767-1769, 1779-1780. Jenvey testified that the light outside Johnson's room being off was consistent with the nurse call system being inoperable. A. 2442-2443.

alternatively require the degree of "care" (in Instruction 14) be based on "only the expert testimony," which was introduced amply; and not just "common knowledge and experience," as allowed by *Beverly.* "Under these circumstances it would be unreasonable to say that the jury might have been misled by Instruction [14] into imagining that the plaintiff could recover if [there was no expert testimony Riverside failed to perform the requisite duty of 'care']." *Virginia Ry.,* 129 Va. at 277. Thus, review satisfies "that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." *Lombard v. Rohrbaugh*, 262 Va. 484, 498 (2001).

C. It was harmless because Nurse Green was found liable correctly.

"The doctrine of harmless error is favored by the court, and is applied whenever it seems reasonable and safe to do so." *Poole v. Kelley*, 162 Va. 279, 294 (1934). "Under the harmless error doctrine, the judgment of the court below will be affirmed whenever we can say that the error complained of could not have affected the result." *Blue Stone Land Co. v. Neff*, 259 Va. 273, 279 (2000); *Rhoades v. Painter*, 234 Va. 20, 24 (1987). *White v. Lee*, 144 Va. 523, 531-532 (1926)("formal" instruction error harmless where, according to the "great preponderance of the evidence," defendant "had a fair trial on the merits and substantial justice has been reached").

Instruction 14 does not reference Green. Instructions 15 and 18 alone properly charged the legal standard for her, and the jury found Green liable under it. "A jury is presumed to follow its instructions. Similarly, a jury is presumed to understand a judge's answer to its question." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000)(Virginia). Despite Defendants' double rank speculation about potential "confusion" by the jury's first question of the court, Brief at 13, 39; A. 3254; the jury's second question of the court

resolves its appropriate deliberation on Green. A. 3253. (Defendants reverse the order of the jury's questions in the Appendix, *compare* A. 3253 *with* A. 3254; engendering natural confusion about which jury question came last and thereby potentially misleading about the jury's final impression before reaching verdict.) "Impeachment of a jury verdict is a step taken only in the most extreme circumstances." *Gore v. Viking Jaw, Inc.*, 237 Va. 442, 446-447 (1989)(jury question issue "not reversible error").

By law, Riverside as employer was vicariously liable for Green under the doctrine of *respondeat superior*. Instruction 17 appropriately so charged the jury preemptorily, A. 3279; and properly is the "law of the case." That renders moot argument that the jury improperly found Riverside liable under the ostensibly lesser standard of Instruction 14. Under *Rhoades*, we can "say as a matter of law that the [arguably] erroneous instruction could not have affected the result in this case;" and not that had the jury "been properly instructed, that it might have returned a different verdict." *Id.*

CONCLUSION

Plaintiff prays the Amended Judgment be affirmed and he be awarded all costs.

Respectfully submitted,

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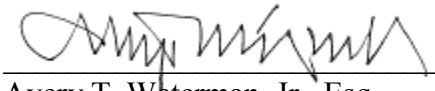
CERTIFICATE

I hereby certify that Va. Sup. Ct. Rule 5:26(d) has been complied with. Pursuant to the Rule, twenty (20) copies of this Brief of Appellee have been hand delivered to the Clerk of the Supreme Court of Virginia and three (3) copies of the same have been mailed, via U.S. first class mail, postage prepaid, to N. Beth Dorsey, Esq./Paul T. Walkinshaw, Esq., Hancock, Daniel, Johnson & Nagle, P.C., 4112 Innslake Drive, Glen Allen, VA 23060, on this 11th of August, 2006.



Avery T. Waterman, Jr., Esq.